
Book review:
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Book Review, Chloë Kennedy, *Inducing Intimacy* (Cambridge UP, 2024)

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In this impressive study, Chloë Kennedy provides a historical and socio-legal account of (mainly) Scottish law responses to inducing marriage and sex by deception. The scope of the exercise is ambitious in several respects.

First, it examines responses to deceptions in the contexts of both marriage and sex, highlighting the relationship between them, the irreducibility (despite the overlap) of one into the other and the opposite trajectory of the responses (demise of responses to marriage and increase in responses to sex) (201).

Secondly, it covers both private and criminal law responses, noting that in general, deceptions in the context of marriage were dealt with more often (and with the exception of bigamy) by private law responses (nullity or voidability of marriage, declarator of marriage, and breach of promise to marry). Meanwhile, sex-inducing deceptions were dealt with mainly as a criminal law issue via procurement offences and rape by deception, with the exception of the seduction civil wrong, which was brought often alongside claims for declarator of marriage and breach of promise. Some of the most interesting discussion revolved around the quasi/punitive nature of civil wrong responses which destabilises any analytical, normative and pragmatic attempt to draw a clear dividing line between private and public responses (203). Also notable is the discussion about the relationship between non-legal, civil and criminal responses (74) and that the unstitching of traditional close-knit ties prevalent in pre-modern societies led (alongside the ascent of the ideal of sexual autonomy) to increased criminalisation of deceptive sex (203).

Thirdly, while the focus is Scottish law, there is a limited comparative angle to the study, with the criminal law chapters (6 and 7) relying much on English cases, and more broadly throughout, references are given to English and some extent US, European jurisdictions and Israel.

Finally, the theoretical framework is diverse and will be of some appeal to scholars from different angles. As principally a legal history account, the study makes important descriptive claims about the law's trajectory and developments in this area. As a socio-legal, or culturally informed account, it provides evaluation of these developments by explaining how law was shaped over time in different directions reflecting prevailing ideas about what makes marriage and sex valuable (4) including the relative weight given to collective interests and the ascent of sexual/autonomy. For feminist and critical scholars, or those otherwise interested in gender, sexuality and the law, the book is of interest by documenting how the relevant interests were (and still are) gendered and how changes in both political economy and public mores led to the demise of legal responses to marriage-based deceptions and increased punitiveness of sex-based deceptions. Jurisprudence scholars (especially those with a legal realist inclination) would delight in discussions about the relationship between interests and rights, collective and individual interests, public, private and non-legal responses and the

relationship between them, as well as the relationship between autonomy, consent, deception, authenticity, identity non-recognition and self-construction. And of course, the work would be of interest for those researching criminal, contract, tort/delict and family law and especially those interested in consent and dishonesty across different areas of the law.[1] Alongside the descriptive-evaluative task, Kennedy also makes some normative contributions, mainly in chapter 8, but also in the concluding sections of chapters 2-7. Methodologically, she stresses how the careful historical analysis she conducted and the insights it brings about are helpful in delineating the appropriate scope of qualifying deceptions. (7, 170, 219). Substantively, her core argument is that authenticity, rather than (sexual) autonomy should be the current guide for such determinations. (13-17, 196, 211-218). In making this claim she notes the following:

(1) Ways used in the past (alternative to the ideal of autonomy) of limiting the scope of qualifying deceptions are no longer acceptable or are under-inclusive: prioritising marriage and focusing on risk to physical harm or unwanted pregnancies. There is no good reason why the range of qualifying identity deceptions should be limited to individuals known personally to the person wronged (212). (2) Relying on the ideal of autonomy is unsatisfactory for several reasons. These include not leaving enough scope to collective interests, focusing attention – in the tradition of victim blaming – on the complainant's (mis)understanding and on consent rather than on the deceiver's action, and ignoring the fact that a subjective approach is impossible as fact finders will fall back on convention and collective interests in determining the beliefs of the person wronged and/or the effect of these beliefs on their decision-making (212). (3) A better approach is to rely on authenticity, self-construction and the interest in avoiding identity nonrecognition (211-218). These would better accommodate collective values via objective tests and focus attention on (a) the culpability of the deceiver's conduct, rather than on the effect of the deception on the deceiver's mind and on (b) the materiality of the deception according to an objective test, rather than on causation between the deception and the consented act. In fact, despite Kennedy not mentioning it explicitly, her suggested test for material facts that need to be disclosed is very similar to the *Montgomery* formula in the context of disclosure duties in the medical informed consent context[2] in that it includes a subjective limb: deception relating to an issue that someone has expressly described as important to them (216). (4) With the exception of deception about marital status (218) and intention to have children (217) (both not qualifying, although it is unclear from Kennedy's discussion whether marital status should qualify for sex), qualifying deceptions are cast broader than the classic tests of nature of act and identity of partner to include, for sex, in addition to deceptions about potential pregnancy or disease also gender identity, and for long term relationships, religious and

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[1] See eg., Sotirios Santatzoglou, Martin Wasik, Anthony Wrigley (eds.,), *Dishonesty, Liability and the Law: Exploring the Moral Importance of Context* (Routledge, 2025); Louise Austin and Jose Miola (eds.,) *Research Handbook on medical Consent* (Edward Elgar, forthcoming 2025).

[2] *Montgomery v Lanarkshire* Health Board [2015] UKSC 11 [87].

political views and sexual orientation.[3] However, deceptions regarding relationships should give rise only to private law responses since they might become less significant over time (218). Whether private, criminal, or no response at all is ultimately due for sex deceptions is not entirely clear from the discussion (205, 216-17) but my own reading is that given equality concerns and the unequal burden that disclosure rules have on the marginalised, deception about gender identity could justify at best a civil response (217, including n74), and that public health and privacy concerns might make any legal response, but especially criminal, inappropriate (217). I found this recommendation section a bit confusing in terms of separating sex from long-term relationships and the appropriateness of criminal/civil/no response.

Kennedy's analysis tackles many important issues and angles for analysis and makes fascinating claims and observations, some of them controversial. I can address here only a handful of points. First, the tension between objective and subjective tests in the context of consent and its impairment, including in terms of determining counterfactual causation, is a well-known issue in law. Indeed, notwithstanding the ascent of autonomy as an organising value across commercial, medical and criminal/amatory contexts, the tests for determining consent, materiality and causation are often objective or hybrid. As previously mentioned, Kennedy's two prong test for material facts which is based on authenticity and is ingrained in a critique of autonomy, is very similar to *Montgomery*'s test which is founded on commitment to autonomy.[4] Moreover, my own work, which calls for greater protection of autonomy as a stand-alone head of damages in negligence, both stresses the need for a meaningful choice as one constitutive condition for the claim—so echoes Kennedy's concern about the need to constrain the actionability of a claim that one's autonomy was undermined—and supports a move similar to what Kennedy offers (210, 213) that undermining one's autonomy might justify a remedy even without proving causation between the breach and the induced act (what I call type 1 injury to autonomy).[5] So both points suggest that a resort to authenticity in lieu of autonomy does less of the normative and analytical heavy lifting than Kennedy believes.

Second, while exposing the relationship between civil and criminal responses to intimacy-inducing deceptions and the quasi/punitive nature of the former are important insights, I was not entirely convinced by the explanations why only civil responses were historically deemed (or are supported by Kennedy as) appropriate in some areas. For

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[3] This view was rejected by the Israeli Supreme Court in 5827/19 *Ploni v Plonit* (SC, 16/8/2021). I survey the decision in 'Medical Consent and Broader Consent Paradigm' in Miola & Austin (n1) ch10.

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[4] As an aside, it is unclear how a qualification of the subjective limb suggested by Kennedy (216)—no liability if the deceptive party had good reason to think that the matter would not be important to their partner—could ever exist or that it is normatively attractive, given Kennedy's insistence that the conditionality be explicit.

[5] See eg., Tsachi Keren-Paz, 'Compensating Injury to Autonomy: A Conceptual and Normative Analysis' in Kit Barker, Karen Fairweather, and Ross Grantham (edn) *Private Law in the 21st Century* (Oxford: Hart Publishing 2017) 411.

example, seduction was not criminalised also due to privacy concerns: 'the action was considered to be personal on account of the facts that it put the woman's character in issue and involved publicising issues she might wish to remain private' (142). But this concern applies equally, or with greater force, to allegations of rape and other sexual offences which have long been the purview of criminal prosecution. Moreover, the more weight given to the quasi/punitive character of a civil wrong claim, the less easy it might be to explain the choice to use a civil but not a criminal response. Indeed, on a deterrence understanding of the law, associated with economic analysis of law, all damages resemble fines, and not only, as argued convincingly by Kennedy (68), dignitary, or non-pecuniary damages. Some would also dispute the claim that the need for certainty can justify precluding criminal responsibility but allow a civil response (198) notwithstanding that at other places (201, 203) Kennedy acknowledges the importance of certainty in private law.

Third, from a private law perspective, three issues could have been developed further, despite the fact that most of them did receive some treatment: (1) from a remedies law perspective, it would have been good to know more which interest – reliance or expectation – was protected by breach of promise to marry ('*breach*'). Ancillary questions include what was given by declarator of marriage (so how much less attractive was a *breach* claim compared to a declarator claim), what was the size of damages for *breach* compared with seduction and how was the split between pecuniary damages, reflecting, mainly, reduced chances to marry and dignitary damages (solatium) for hurt feelings and humiliation. (2) Kennedy correctly mentions (69) that *breach* is a hybrid claim between contracts and tort. While she mentions personal bar and its connection with estoppel, private lawyers would have liked to see more about promissory estoppel, especially in its US version (Restatement Second of Contracts §90) and its applicability to *breach*, seduction and declarator of marriage based on promise followed by sex. (3) Historically, the female pursuer's immorality in engaging in extra-marital sex was an issue to be reckoned with by courts. In several places, Kennedy indicates how this concern—which in contemporary economic lingo would be referred to as moral hazard—influenced the scope of liability (92, 133); Kennedy also helpfully observed that illegality defence was relevant (57-58, 184). And yet, the distinction between the following four propositions was not sufficiently examined and evaluated: (a) that a promise was not made based on an objective test, (b) that reliance was not reasonable, (c) that no deception was made or that, alternatively, (d) all the elements of a claim were made but it is nonetheless disallowed due to public policy. Given Kennedy's emphasis on how contemporary values influenced the interpretation of doctrinal elements (4, 199-200) this is a forgone line of analysis. (4) An important contribution of the study is the finding that subjective tests are subject to hegemonic interpretation of collective contemporary values and social conventions (198, 219). This insight could have informed even to a greater extent chapter 3's analysis of promises as (a) subjectively genuine, (b) objectively interpreted to exist or (c) punitively imposed and could draw

support from Zamir's claim that contract interpretation—contrary to judicial rhetoric giving precedence to the parties' subjective will—in fact prioritises objective values.[6]

Fourth, from the criminal side of things Kennedy's analysis invites further reflections: (1) building on the observation that seduction operated 'as a kind of "defence" for the seduced' from the charge of the woman voluntarily engaging in immoral extra-marital sex (125) the analysis in other chapters, especially of rape by deception, could have benefited from Coughlin's analysis of rape law as made intelligible in its historical development as a defence claim by the woman against a criminal charge of engaging voluntarily in extra-marital sex.[7] (2) An important theme touched upon in the study is whether the sex is wrong since consent is impaired or despite its existence, for example in the contexts of statutory rape (123) and abuse of trust and authority (178-83). This relates to the question whether the focus of a legal intervention is ingrained in absence of claimant's consent or in the defendant's wrongdoing, with Kennedy clearly opting for the latter (eg. 209-10) and revealing ambivalence about structuring the law around consent (205). Indeed, such questions are relevant also in other areas of law such as unconscionability and undue influence in contract and unjust enrichment law[8] and featured in decisions of the Supreme Courts of Canada and Israel in the context of sexual consent.[9] An interesting question which was not explored much in the book is how the fact that historically, marital rape was not criminalised could have affected—but might have not—the causes of action explored (including impersonation (156) but especially concealment of disease by the husband and the relationship with offences against the person) (184). If unlawful sex is the actus reus and consent to marital sex is not needed, deceptions about disease might not be prosecuted as rape and the overlap with and effects on prosecuting offences against the person in that context might need to be examined further. (3) In evaluating the cogency of the ontological distinction between different types of acts (as appropriate basis to distinguish between non/qualifying deceptions) Kamir's argument that rape law should distinguish at the actus reus level between un/desired sex[10] could seemingly bolster Kennedy's argument that the focus should shift on the defendant's (or accused) behaviour, rather than on the pursuer (or complainant's) consent. However, in fact, given the documented observation (which I read as endorsed by Kennedy, but she might not have intended this) that impairing consent by deception is less wrongful and harmful than undermining it by force or its

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[6] Eyal Zamir, 'The Inverted Hierarchy of Contract Interpretation and Supplementation' (1997) 97 Columbia Law Review 1710. Another relevant debate in contract theory is whether penalty default rules exist. See eg., Eric Posner, 'There Are No Penalty Default Rules in Contract Law', (2006) 33 *Fla. St. U. L. Rev.* 563 challenging Ayers and Gertner's famous claim to the contrary.

[7] Anne Coughlin, 'Sex and Guilt' (1998) 84 *Virginia L Rev.* 1.

[8] See eg., Larry DeMateo & Bruce Rich, 'A Consent Theory of Unconscionability: An Empirical Study of Law in Action' (2006) 33 *Florida State ULR.* 1067, 1110-115; Rick Bigwood, Undue Influence: 'Impaired Consent' or 'Wicked Exploitation'? (1996) 16 *OJLS* 503.

[9] *Norberg v Wynrib* [1992] 2 SCR 226; CivApp 360/64 *Abutbul v Kliger,* PD19(1) 429 (SCI, 1965).

[10] Orit Kamir, '"There is another sex – bring it here!" Rape Law as a battleground between honor and dignity paradigms and a dignity-inspired legal reform proposal' (2005) 7 *Haifa UL Rev* 669, 747-53.

threat (162) it would have been interesting to think how consent secured through deception sits with Kamir's new actus reus reconceptualization, as in cases of rape by deception the deceived person participated in desired sex at the time intercourse took place. This suggests that some focus on consent might still be needed, for criminalising sex by deception, contrary to the intuitions of both Kennedy and Kamir to move away from a focus on complainant's consent. (4) In important rape by deception cases—both in England and elsewhere— the context involved unproven allegations of coercive sex.[11] The normative implications of convicting in rape for deception as a fallback on unproven coercive sex are briefly discussed by Kennedy (166) but could merit a more expansive analysis, and possibly a different conclusion.

The previous discussion leads nicely to final my point about consent as potentially scalar (rather than binary) concept. This is an important theme in the book (123, 204, 206) but some avenues for further exploration remain. The difference between void and voidable transactions is most intelligible in contract law, given the options to ratify the original agreement or to set it aside. Here too, there are issues about temporality, quantum of damages and the effects on third parties which Kennedy briefly discusses, but could be explored further (eg., ratification of marriage 38). What is less clear is the meaning of scalar consent and how it works in criminal and in civil wrongs contexts. Is the appreciation that some vitiations of consent are more serious than others is really an indication that consent is scalar, or does it just go to the lesser harms caused by (or the wrongfulness of) the activity? If it is better to prosecute rape by deception as an offence separate to rape, or if damages awarded are lower in deception-based cases does this mean that consent is scalar? Would not the concept of scale require a continuum from 0-1 (like how contributory negligence as comparative fault works) rather than three points switch (void/voidable/valid)? More work is needed to answer these questions.

All of the above queries are in fact to Kennedy's credit. Rather than viewing them as indicating gaps in her argument, I see them as an invitation to a continuous and better informed scholarly and intellectual dialogue. Kennedy impressively delivers on her ambitious research agenda. Her discussion is informative, erudite and enticing. In the tradition of excellent scholarship, *Inducing Intimacy* invites readers to re-examine the building blocks of legal doctrine, and of socio-legal and legal history research, to reveal and illuminate hitherto concealed patterns in law and to further readers' own research agenda and ideas.

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[11] See Keren-Paz (n3).