1

Inducing Intimacy

An Introduction

1.1 Intimacy, Trust and Law

Both sex and intimate relationships are shot through with expectations of trust. We tend to hope that our sexual and romantic partners will be honest, open and reliable, and it matters to us when they are not.[1] At the same time, we tend to think of sex and intimate relationships as distinctively private and personal. With some important exceptions, such as the prosecution of certain kinds of abuse, these forms of intimacy are typically considered no one else's business, least of all that of the state.[2] The idea that law, especially criminal law, might have a role to play in securing these expectations of trust, and offering redress when they are violated, therefore seems doubtful. Nevertheless, in recent decades, academics, legal practitioners and cultural commentators have begun to take this idea seriously and consider whether and when one form of untrustworthy conduct – deceptive sex – merits criminal punishment.

There is now a sizeable body of academic literature aimed at working out what is wrong with sex like this, which archetypically takes place when one person is operating under a false belief that has been caused by their sexual partner's deception,[3] and how law should respond to it. Despite some important disagreements, there is a general consensus that sexual autonomy – the idea that we should have control over with whom we have sex, what kind of sex we have and under what conditions[4] – is important and deserves robust protection. As a result, there is a default assumption that criminalisation is

[1] Dennis J. Fortenberry, 'Trust, Sexual Trust and Sexual Health: An Interrogative Review' (2019) 56(4–5) *The Journal of Sex Research* 425–439; Ken J. Rotenberg and Pamela Qualter, '50 Shades of Trust', *Psychology Today*, 24 February 2014, www.psychologytoday.com/us/blog/matter-trust/201402/50-shades-trust.

[2] Jean L. Cohen, *Regulating Intimacy: A New Legal Paradigm* (Princeton: Princeton University Press, 2002). See Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (London: Routledge, 1996) and Elizabeth Brake, 'Love and the Law' in Christopher Grau and Aaron Smuts (eds.), *The Oxford Handbook of Philosophy of Love* (New York: Oxford University Press, 2017) for some critiques of this view.

[3] Stuart P. Green, *Criminalizing Sex: A Unified Liberal Theory* (New York: Oxford University Press, 2020), p. 101.

[4] On the rise of sexual autonomy, see Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford: Oxford University Press, 2016), ch. 9.

an appropriate response to almost any conduct that interferes with sexual autonomy. Yet because the potential consequences of this, which in the context of this book include the possibility that many instances of deceptive sex might amount to a crime, most likely a sex crime, are undesirable to many, this default assumption has generated ambivalence. While some support expansive criminalisation,[5] others reject this but struggle to find a satisfactory and persuasive basis on which to do so.[6]

A similar situation has arisen within legal practice where prosecutions for deceptive sex across the world have increased and come to encompass a greater number of the deceptions that typically occur within 'ordinary' relationships, such as deceptions about ethnicity, HIV status, gender, relationship intentions and the use of contraception.[7] Since these deceptions threaten sexual autonomy, they appear plausible candidates for punishment. Yet deceptive sex that occurs within these 'ordinary' relationships does not typically involve the abuse of power or trust that characterises deceptive sex in other kinds of relationships, such as between doctors and patients or teachers and pupils,[8] and in circumstances involving adults with mental impairments.[9] The case for a criminal law response is accordingly weaker.[10] On top of this, these prosecutions embody the threat (or promise, depending on your point of view) of expansive criminalisation, which has generated some pushback within the legal profession. In England and Wales, for example, judges have clung to doctrines that limit the range of deceptions that can lead to criminal liability, but, in doing so, they have produced judgments whose consistency and adherence to the relevant legislation are questionable.[11]

Beyond the courtroom and academy, reflections on the ethics and legality of deceptive sex have cropped up in mainstream publications[12] and popular entertainment.[13] Here, too, the focus tends to be the kind of deceptions that arise

[5] For example, Jonathan Herring, 'Mistaken Sex' [2005] *Criminal Law Review* 511–524.

[6] This challenge has led Jed Rubenfeld to argue that sexual autonomy is not the proper foundation for rape laws; see Jed Rubenfeld, 'The Riddle of Rape by Deception and the Myth of Sexual Autonomy' (2013) 122(6) *The Yale Law Journal* 1372–1443.

[7] See Chloë Kennedy, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2021) 41(1) *Legal Studies* 91–110.

[8] Of course, deception can sometimes be used to gain power, and men and women in 'ordinary' relationships do not, even nowadays, meet on exactly equal ground; see bell hooks, *All about Love: New Visions* (New York: William Morrow, 2003), ch. 3.

[9] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* (London: Home Office Communication Directorate, 2000), Paragraphs 2.18.7, 4.10.1–4.10.2.

[10] Cf. deceptive sex in relationships of trust or authority; see Patricia J. Falk, 'Rape by Fraud and Rape by Coercion' (1998) 64(1) *Brooklyn Law Journal* 39–180 at 131.

[11] David Ormerod, 'Rape and Deception (Again)' [2020] 10 *Criminal Law Review* 877–881; see Chapter 7.

[12] For example, Neil McArthur, 'Is Lying to Get Laid a Form of Sexual Assault?', *Vice*, 5 September 2016; Abby Ellin, 'Is Sex by Deception a Form of Rape?', *The New York Times*, 23 April 2019; Roseanna Sommers, 'You Were Duped into Saying Yes. Is It Still Consent?', *The New York Times*, 5 March 2021.

[13] For example, Michaela Coel's HBO-BBC series 'I May Destroy You' (2020).

within 'ordinary' relationships between adults with full capacity, and opinion is divided on how best to respond to, or even describe, this kind of conduct.[14] The widespread interest these questions have generated suggests that the challenge of how to understand and deal with deceptive sex is not merely a case of 'doctrinal theory in search of a problem'.[15] Furthermore, the contention surrounding deceptive sex within 'ordinary' relationships suggests that the questions of whether, when and why a legal response, particularly punishment, is warranted in this context demand independent and sustained treatment.[16]

This book is a response to that demand. It aims to provide an account of how and why 'ordinary' cases of deceptive sex have come to appear as a problem that deserves a serious, punitive response and to develop a new way of thinking about, and answering, the question of whether such a response is justifiable and desirable. I go about pursuing these two aims by constructing a genealogy of legal responses to deceptive sex across the modern period (c. 1750 to the present), which locates these responses within the landscape of civil and criminal law responses to a wider, related set of practices.[17] These practices, which I refer to as 'inducing intimacy', extend beyond deceptive sex to include deceptively induced sexual and/or romantic relationships. Though sex and these relationships do not exhaust the terrain of intimacy – both traditional and queer models of intimacy would include friendships, biological and non-biological family relations and other asexual and aromantic relationships[18] – they are often related to one another in the 'Western' cultural imaginary.[19] As I show in the rest of this book, they are often related in law, too, such that sex is definitionally significant to a number of the legal actions examined. The association between sex and romantic relationships is also one of the reasons why, for better or worse, I do not focus extensively on commercial sex in this book – this is a category of sexual exchange that has traditionally been distinguished from sex with a perceived affective dimension.[20] That said, although sex and intimate relationships

[14] One term in circulation is 'consent theft'; see Katie Tobin, 'What Is 'Consent Theft' and Why Aren't We Talking about It?', *Restless*, 31 March 2021.

[15] Joseph J. Fischel, *Sex and Harm in the Age of Consent* (Minneapolis: University of Minnesota Press, 2016), p. 206, mostly disagreeing with the quotation.

[16] For an exposition of the different treatment of lies in intimate and non-intimate contexts in US law, see Jill Hasday, *Intimate Lies and the Law* (New York: Oxford University Press, 2019).

[17] I draw on Amia Srinivasan's approach to genealogy that focuses on how representational systems sustain certain practices and exclude certain possibilities; see Amia Srinivasan, 'Genealogy, Epistemology and Worldmaking' (2019) 119(2) *Proceedings of the Aristotelian Society* 127–156.

[18] Phillip L. Hammack, David M. Frost and Sam D. Hughes, 'Queer Intimacies: A New Paradigm for the Study of Relationship Diversity' (2019) 56(4–5) *The Journal of Sex Research* 556–592; Luke Brunning and Natasha McKeever, 'Asexuality' (2021) 38(3) *Journal of Applied Philosophy* 497–517.

[19] Lynn Jamieson, 'Personal Relationships, Intimacy and the Self in a Mediated and Global Digital Age' in Kate Orton-Johnson and Nick Prior (eds.), *Digital Sociology: Critical Perspectives* (London: Palgrave Macmillan, 2013), pp. 13–33; Brake, 'Love and the Law'.

[20] Andrew Gilbert, *British Conservatism and the Legal Regulation of Intimate Relationships* (Portland: Hart Publishing, 2018), p. 6. Where sex work is relevant to the development of the legal actions with which I am concerned, I discuss it.

are related, it is important to study them on their own terms, since they are not wholly reducible to one another either culturally or in law.[21]

The first core argument of this book is that examining legal responses to deceptively induced sex and intimate relationships together and mapping how they have changed over time reveals that these responses have reflected prevailing ideas about what makes these two forms of intimacy valuable. More specifically, I argue that they have reflected cultural shifts in the way that selfhood and intimacy are related and in the way that sex and intimate relationships are held in esteem. I set out these shifts later in this chapter, in Sections 1.3 and 1.4, and explore their relationship to legal responses to inducing intimacy in the chapters that follow, but, in a nutshell, my analysis shows that for much of the past couple of hundred years, this cultural framework structured the law and limited its scope. In more recent decades, however, this framework has largely been superseded by a thin conception of autonomy that tends to value choice for choice's sake. This has had important consequences for legal responses to inducing intimacy, including an increased and more punitive reliance on criminal law and the eclipse of legal responses focusing on intimate relationships by legal responses that focus on sex.

Though these developments make sense in light of the historical contexts within which they occurred, they have created certain problems. I introduce these problems in more detail in Section 1.5 before more fully engaging with them in Chapter 8, but, put simply, they boil down to two issues. First, the scope of sexual offence laws has become nebulous and potentially vast. Second, sexual offence laws cannot capture everything that is wrongful and harmful about inducing intimacy, even if we focus only on the wrongs and harms it might be desirable (and feasible) for law to address.

In response to these problems, the second core argument of this book, which I outline briefly in Section 1.5 and expand upon in Chapter 8, is that a culturally embedded account of what makes intimacy valuable has the potential to better structure and constrain legal responses to inducing intimacy under contemporary conditions. This, I argue, would provide a way of responding to deceptive sex, and indeed deceptive intimate relationships, which takes seriously the impetus behind the current dominance of sexual autonomy – that is, a concern for respecting agency and individual choice in intimate contexts – while ameliorating some of its most serious deficiencies.

1.2 Scope and Approach

To help orient the rest of this book, in this section I delineate the scope of the analysis I undertake in Chapters 2–7 and outline the approach I adopt in undertaking it. I begin by introducing the range of legal actions with which

[21] Claire Langhamer, 'Love and Courtship in Mid-Twentieth-Century England' (2007) 50(1) *The Historical Journal* 173–196; Laura A. Rosenbury and Jennifer E. Rothman, 'Sex In and Out of Intimacy' (2010) 59(4) *Emory Law Journal* 809–868.

I am concerned, explaining their significant features and how they align with the book's overarching questions and themes. While doing so, I explain why I chose to focus on particular jurisdictions and time periods, and I indicate the sources on which I relied. Following this, I give a sense of my methodological commitments and how these have shaped my approach, concentrating on my decision to look at both civil and criminal law responses to inducing intimacy and sharing my views on how historically informed research can be relevant and useful to critical and evaluative legal scholarship with a contemporary focus. Here, I gesture towards how the insights generated by my analysis underpin the critically reflective and reform-oriented discussion in the concluding sections of Chapters 2–7 and throughout Chapter 8.

The historical, and to some extent ongoing, special status that marriage has attracted means that a number of the legal actions I examine relate to the constitution of this kind of intimate relationship. So, for example, I consider the law relating to the formation of marriage alongside actions of declarator of marriage, which were brought to try to establish the existence of a contested marriage, and I consider the law of nullity of marriage alongside actions of declarator of nullity, which were brought to try to show that that what appeared to be a valid marriage was in fact not. Where relevant, I also touch upon laws regulating the distribution of assets upon a court finding that a purported marriage is null and the civil wrongs of deceit, fraud and intentional infliction of emotional distress. The other civil wrongs I discuss in more detail are breach of promise of marriage – that is, the unjustifiable termination of an engagement – and seduction, a somewhat amorphous delict (and tort) which included, among other things, persuading a woman to engage in sexual intercourse by falsely promising her marriage. On the criminal law side, the main offences I consider are bigamy, the offence of 'marrying' another despite being part of a subsisting prior marriage; a selection of procuring offences that involved using deception to persuade a woman to engage in unlawful forms of sex; and rape by deception, the crime of engaging in deceptive conduct that, by law, precludes or vitiates sexual consent.

Some of these areas of law have been examined in existing scholarship more than others. For example, the Scottish action of seduction and the more recent history of breach of promise of marriage have been noticeably underexplored.[22] The contribution of this book to the historiography on the discrete actions discussed is therefore considerable, especially in relation to more neglected areas of law. Even where I discuss areas of law that are more familiar, however, I analyse them in a new way by showing how they have constituted legal responses to inducing intimacy. In doing so, I focus on both the structure and substance of legal actions. With respect to structure, I rely on a broad conception of deception that encompasses lies, misrepresentations,

[22] The existing literature is cited, where relevant, in Chapters 3 and 5.

other ways of misleading and failures to disclose information,[23] and I attend to the different ways deception has been held to affect the existence or validity of consent. I take a similarly expansive view when it comes to identifying other relevant features of these actions, remaining alive to the possibility that an intention to deceive and proof of reliance might be unnecessary.[24] I point out these features in each of the chapters that follow, and I draw out some general reflections about them in Chapter 8.

With respect to substance, I am interested in the wrongs and potential harms that have been attributed to inducing intimacy, paying attention to how these can extend beyond the deceived person(s) to incorporate the communicative environment in which intimate relations occur and background levels of trust,[25] as well as specific social and legal institutions. The question of which topics have been singled out as significant is crucial, revealing how these laws have settled the so-called line-drawing problem, that is, how to determine which deceptions merit a legal response. In addition to tracing changes in the range of qualifying deceptions, I draw out the connections between these deceptions and the interests and institutions they were, or are, considered to threaten. In other words, I show how the objects of the law's protection relate to the substance of the deceptions that have elicited a legal response. Again, I offer some general reflections on these points in Chapter 8 as well as commenting on them in each of the chapters that follow.

Even though my focus is deception, broadly construed, some of the actions I consider, such as breach of promise of marriage, the procuring offences and rape by deception, could potentially provide redress for the failure to honour promises, even in the absence of deception. For example, if someone made a good faith promise to marry and disclosed their decision not go ahead with the marriage as soon as possible, they might nevertheless be liable for damages via an action of breach of promise of marriage. In such circumstances, there would have been no deception at the outset because a genuine intention to marry existed, and it could not even be said that deception crept into the relationship via an undisclosed change of heart. With this in mind, the actions I discuss can best be understood as legal responses to untrustworthiness in the context of sex and relationships; beyond cases of clear-cut deception, they are concerned with keeping promises, both explicit and implicit, and abstaining from certain communicative practices.[26] Nevertheless, within this wider category of conduct, the possibility of deception is ubiquitous in part because of the way that failing to honour a promise throws doubt on the

[23] Gregory Klass, 'Meaning, Purpose, and Cause in the Law of Deception' (2012) 100 *Georgetown Law Journal* 449–496 at 450.

[24] Gregory Klass, 'The Law of Deception: A Research Agenda' (2018) 89 *University of Colorado Law Review* 707–740 at 726, 729–730; cf. Larry Alexander and Emily Sherwin, 'Deception in Law and Morality' (2003) 22 *Law and Philosophy* 393–450 at 433.

[25] Klass, 'The Law of Deception' at 709; Klass, 'Meaning, Purpose, and Cause' at 451, 481.

[26] Jan Philipp Reemtsma, *Trust and Violence: An Essay on a Modern Relationship* (Princeton: Princeton University Press, 2012), p. 14.

sincerity of the initial commitment.[27] Furthermore, when deception has been detected it has been treated as significant in law, often aggravating the case.

As should now be clear, the range of laws I analyse is extensive, which is a consequence of my desire to understand how legal responses to a particular kind of conduct have developed, as opposed to examining any discrete area of law.[28] The temporal scope of this book is similarly ambitious, spanning twenty-five decades. Again, the decision of where to set the temporal boundaries of the analysis was driven by my motivating questions. Apart from witnessing fundamental changes in the cultural meanings of intimacy, which I outline in Sections 1.3 and 1.4, the modern era saw big changes in the law relating to inducing intimacy. At least as importantly, and as I explain in a little more detail later in this section, the legal responses that existed during this period are in many ways the correlates, or predecessors, of the laws that now exist. Adopting a wide-ranging perspective in terms of both legal doctrine and time period was therefore necessary to achieve the aims of this book.

Partly to manage the task of analysing such a vast amount of material – which I sourced from legal treatises, law reform reports, reported and unreported cases, newspaper stories, contemporaneous journals and archival holdings – in the majority of Chapters 2–7 I focus primarily on a single legal system – Scotland. I chose the relevant treatises and law reform reports because they are the most prominent of those concerning the areas of law I examine, and I located the majority of the reported cases via searches of major legal databases. I found the unreported cases, which make up the majority of those relating to areas of law with few reported decisions, such as bigamy, seduction and breach of promise of marriage, via searches of newspaper archives and journals from the time. These journals also supplied valuable commentary on legal cases and developments. The archival records I consulted include court papers relating to Sheriff Court, Court of Session and Justiciary Court trials[29] held by National Records Scotland and the Signet Library as well as Session Papers – pleading papers and interlocutors (short records of case outcomes) – held by the Advocates Library.[30]

Despite the emphasis on Scotland, I refer to developments elsewhere, particularly in England and the United States, to highlight important points of confluence and divergence and I cast the net wider again where I discuss contemporary developments so as to identify recent and emerging trends. Furthermore, much of the discussion in Chapter 6 and some of the discussion

[27] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1988), p. 384.

[28] For some reflections on the value and limitations of thinking in terms of areas of law, see Tarunabh Khaitan and Sandy Steel, 'Areas of Law: Three Questions in Special Jurisprudence' (2023) 43(1) *Oxford Journal of Legal Studies* 76–96. I set out the benefits of my approach in greater detail in Chapter 8.

[29] On these courts, see *Stair Memorial Encyclopaedia* (reissue, 2016), Paragraphs 49–88; 89–138; 139–199.

[30] Angus Stewart, 'The Session Papers in the Advocates Library' in Hector L. MacQueen (ed.), *Miscellany Four* (Edinburgh: The Stair Society, 2002), pp. 199–221.

in Chapter 7 relates to laws which applied, or apply, to both Scotland and England and Wales, and much of the litigation I mention in those chapters occurred in England. In these chapters, a different focus was necessary to appreciate the relevant legal developments, that is, those relating to the procuring offences and rape by deception. As the main case study of Chapters 2–5, however, Scotland is particularly appropriate due to its relatively small size and some of its legal idiosyncrasies.

For example, the law of what is called irregular marriage survived for longer in Scotland than it did in other European nations,[31] where abolition occurred much earlier.[32] Unlike regular marriages, which were conducted by authorised celebrants and were similar to marriages as we know them today, irregular marriage did not involve formal solemnisation.[33] Instead, there were three ways irregular marriage could be constituted or proved according to Scots law: expressing mutual consent to marriage; promising marriage then engaging in sexual intercourse; and cohabiting as, and being reputed to be, spouses.[34] Crucially, all three forms of irregular marriage depended, at least in theory, on nothing more than the valid marital consent of the parties.[35] Assuming such

[31] Eleanor Gordon, 'Irregular Marriage and Cohabitation in Scotland, 1855–1939: Official Policy and Popular Practice' (2015) 58(4) *The Historical Journal* 1059–1079 at 1060. For a very general outline of the development of marriage law in Scotland, see Eric Clive, *The Law of Husband and Wife in Scotland*, 4th ed. (Edinburgh: W. Green & Sons, 1997), and for accounts of marriage formation in early modern Scotland, see Leah Leneman, *Promises, Promises: Marriage Litigation in Scotland, 1698–1830* (Edinburgh: National Museums of Scotland, 2003); Katie Barclay, 'Marriage, Sex, and the Church of Scotland: Exploring Non-Conformity amongst the Lower Orders' (2019) 43(2) *Journal of Religious History* 163–179; and Katie Barclay, 'Doing the Paperwork: The Emotional World of Wedding Certificates' (2020) 17(3) *Cultural and Social History* 315–332.

[32] For example, by the Clandestine Marriages Act 1753 in England; see Rebecca Probert, *Marriage Law and Practice in the Long Eighteenth Century: A Reassessment* (Cambridge: Cambridge University Press, 2009).

[33] In addition to regular and irregular marriage, clandestine marriage – marriage that was constituted by a religious ceremony but not otherwise regular – is sometimes referred to as a third mode of contracting marriage; see Brian Dempsey, 'The Marriage (Scotland) Bill 1755' in Hector L. MacQueen (ed.), *Miscellany Six* (Edinburgh: Stair Society, 2009), pp. 77–78.

[34] Rebecca Probert, Maebh Harding and Brian Dempsey, 'A Uniform Law of Marriage? The 1868 Royal Commission Reconsidered' (2018) 30(3) *Child and Family Law Quarterly* 217–237; Clive, *Husband and Wife*, Paragraph 05.001. The first two forms of irregular marriage were formally abolished by the Marriage (Scotland) Act 1939 and the latter survived until 2006; see Family Law (Scotland) Act 2006, s. 3. On the history of irregular marriage in Scotland, see Eleanor Gordon, 'Irregular Marriage: Myth and Reality' (2013) 47(2) *Journal of Social History* 507–525. On marriage registration, see Gordon, 'Myth and Reality' and Anne Cameron, 'The Establishment of Civil Registration in Scotland' (2007) 50(2) *The Historical Journal* 377–395.

[35] James Dalrymple Stair; John S. More (ed.), *Institutions of the Law of Scotland, Deduced from Its Originals, and Collated with the Civil, Canon, and Feudal Laws, and with the Customs of Neighbouring Nations* (Edinburgh: Bell & Bradfute, 1832), p. 32; John Erskine, *An Institute of the Law of Scotland* (Edinburgh: John Bell, 1773), p. 84 and subsequent editions; G. Campbell H. Paton (ed.), *Baron Hume's Lectures, 1786–1822* (Edinburgh: J. Skinner & Co. Ltd., 1939), p. 22; James Fergusson, *A Treatise on the Present State of the Consistorial Law in Scotland, with Reports of Decided Cases* (Edinburgh: Bell & Bradfute, 1829), p. 105; Maurice

marital consent could be proved, according to the rules of evidence, the court could issue a legal declaration of the parties' married status.[36]

Given this relative laxity in the formation of marriage and the primacy of consent, there is a wealth of litigation, much of which concerns the complexities of determining the existence, and legal efficacy, of consent – topics that lie at the heart of this book. Furthermore, the two forms of irregular marriage on which I concentrate most – marriage constituted by present consent and by promise of marriage followed by sex – provided ample opportunities for deceptively induced intimacy. By offering insincere (or, at any rate, unfulfilled) promises of marriage or behaving in a way that implied the existence of marital consent a man (and it was almost always a man) could lure a woman into a false sense of security. To be sure, marriage by habit and repute also created opportunities for duplicitous conduct; it allowed a man to induce a woman to enter an 'illicit, or equivocal' cohabitation in the hope it might 'merge into matrimony'[37] and then, by his circumspect behaviour, leave her marital status uncertain. In practice, however, the number of cases of marriage by habit and repute appears to have been comparatively small.[38] More importantly, in the cases that were litigated the discussion tends to centre on the impression the man's conduct made on the world at large;[39] there are relatively few cases which focus on the impression such a man's conduct made on his would-be spouse.[40] By contrast, and as I explore in Chapter 4, the impression created on the mind of a trusting 'wife' was central to cases of purported marriage by present consent or promise of marriage and sex.

Beyond marriage, the Scottish delict of seduction was, unlike its Anglo-American counterpart, always available to the woman whose sexual consent

Lothian, *The Law, Practice and Styles Peculiar to the Consistorial Actions Transferred to the Court of Session, by Act 1, Gul. IV. c. 69* (Edinburgh: Adam Black, 1830), pp. 25–26; Patrick Fraser, *Treatise on the Law of Scotland as Applicable to the Personal and Domestic Relations* (Edinburgh: T. & T. Clark, 1846), p. 87 and *Treatise on Husband and Wife: According to the Law of Scotland* (Edinburgh: T. & T. Clark, 1876), p. 415; Frederick Parker Walton, *A Handbook of Husband and Wife* (Edinburgh: W. Green & Sons, 1893), p. 2 and subsequent edition (Frederick Parker Walton, *A Handbook of Husband and Wife according to the Law of Scotland* (Edinburgh: W. Green & Sons, 1922)).

[36] Around the middle of the nineteenth century, a semi-formalised system of registering irregular marriages emerged (Gordon, 'Myth and Reality', especially at 515–516), but litigation to establish the existence of irregular marriages continued.

[37] *Report of the Royal Commission on the Laws of Marriage* (London: George E. Eyre & William Spottiswoode, 1868), p. 82.

[38] According to evidence given to the 1868 Royal Commission on the Laws of Marriage, it was 'extremely rare' for marriage to be established on this ground alone; see *Report of the Royal Commission*, p. xxxiii. My own research suggests that the two other modes of constituting irregular marriage were more frequently litigated.

[39] There do not appear to be many cases like this, but see *Dewar* v. *Dewar* 1995 SLT 467 and *Gow* v. *Lord Advocate* 1993 SLT 275, which, unusually, involves a woman defender. This focus on the impression of the world at large is also a feature of cohabitation with habit and repute cases where the defender claimed that neither party intended marriage; see, for example, *Elder* v. *M'Lean* 1829 8 S 56; *Ackerman* v. *Blackburn* 2000 Fam LR 35.

[40] *Nicol* v. *Bell* 1954 SLT 314 is the clearest example.

was compromised by false promises of marriage. This underexplored action can therefore be seen as a civil law analogue to the laws criminalising deceptive sex that developed thereafter and so it is worth examining in conjunction with these more recent laws. A further feature of the civil law actions I consider, which underscores the value of comparing them to these criminal laws, is what might loosely be described as their quasi-punitive functions. By quasi-punitive functions I mean the meting out of burdensome impositions that aim to give material force to accountability for wrongdoing[41] in the service of vindicatory, deterrent, communicative (sometimes censorious) and/or retributive ends. Punitive damages are the most obvious example, but compensatory damages often fulfil one or more of these functions even if that is not their main purpose.[42] In particular, damages for dignitarian or emotional injuries – the kind of damages frequently awarded via the actions considered in this book – tend to blur the line between compensation and punishment most profoundly. As some authors have argued, punitive damages can be considered compensation for the additional dignitarian and emotional injuries caused by particularly culpable wrongdoing.[43] But even when dignitarian or emotional damages are awarded for the underlying wrong, rather than the malice or other culpable attitude that accompanies it, it can be hard to distinguish these damages functionally from criminal punishment when the latter is conceived as remedying the injury to the victim's honour.[44] It is particularly difficult to draw this distinction when emotional injuries are presumed[45] because this places the emphasis of the action on the wrongdoer's conduct.[46] As I discuss further in Section 1.5, a focus on the wrongdoer's conduct is a hallmark of criminal law.

Perhaps more surprisingly, actions brought to establish the existence of marriage could serve punitive or quasi-punitive functions too. For example, a controversial rule that prevented defenders from relying on their misleading

[41] R. A. Duff, 'Torts, Crimes and Vindication: Whose Wrong Is It?' in Matthew Dyson (ed.), *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014), pp. 146–173, pp. 150–152; Marc Galanter and David Luban, 'Poetic Justice: Punitive Damages and Legal Pluralism' (1993) 42(4) *American University Law Review* 1394–1463 at 1397.

[42] John C. P. Goldberg and Benjamin C. Zipursky, *Recognizing Wrongs* (Cambridge, MA: Harvard University Press, 2020); Galanter and Luban, 'Poetic Justice'; Findlay Stark, 'Tort Law, Expression and Duplicative Wrongs' in Paul B. Miller and John Oberdiek (eds.), *Civil Wrongs and Justice in Private Law* (New York: Oxford University Press, 2020), pp. 441–462.

[43] Marc O. DeGirolami, 'Reconstructing Malice in the Law of Punitive Damages' (2021) 14(1) *The Journal of Tort Law* 193–240 at 231–232.

[44] Galanter and Luban, 'Poetic Justice' at 1432–1433.

[45] Eric Descheemaker, 'Rationalising Recovery for Emotional Harm in Tort Law' (2018) 134 *Law Quarterly Review* 602–626 at 608, 624–625; Niall R. Whitty, 'Overview of Rights of Personality in Scots Law' in Niall R. Whitty and Reinhard Zimmermann (eds.), *Rights of Personality in Scots Law: A Comparative Perspective* (Edinburgh: Edinburgh University Press, 2009), pp. 147–246, pp. 207–208.

[46] For more reflections on all these points, see Chloë Kennedy, 'Comparing Criminal and Civil Responsibility: Contextualising Claims to Distinctiveness' in Thomas Crofts, Louise Kennefick and Arlie Loughnan (eds.), *Routledge International Handbook on Criminal Responsibility* (Routledge, forthcoming 2025).

conduct made it harder for a man to escape the conclusion that he was married to a woman when he had (mis)led her to believe this was the nature of their relationship. Similarly, controversial rules facilitating proof of a defender's marital consent played a comparable role. If a defender's behaviour signalled an intention to wed, a court might find he was married to the pursuer even if he denied that this was his intention.

The first rule, which can be interpreted as a species of personal bar (known elsewhere as estoppel),[47] might plausibly be described as an example of forfeiture by insincere act. As such, it constitutes a forced change in rights and duties based on the defender's culpable wrongdoing.[48] Indeed, the use of personal bar has been described as not only 'preventing' but 'penalising' inconsistent conduct.[49] The second rule is less clearly an example of personal bar[50] but imputing consent where it does not subjectively exist, or at least where it is denied, can also be considered a forced change in rights and duties.[51] The use of these doctrines to effectively force marriage signals an additional layer of punitiveness because, as other studies have shown, coercing marriage – an enduring status that entailed serious economic and behavioural obligations – was punishment in everything but name.[52]

Identifying an element of punitiveness across both civil and criminal law responses to inducing intimacy assists the critical and evaluative ambitions of this book in two ways, both of which are underpinned by my views on the roles historically informed scholarship can perform. In short,[53] I believe that this kind of research can play a generative as well as constraining role in evaluating legal developments and cautiously suggesting ideas for reform. In other words, on top of providing a reality check on ideal theorising, by warning against potential unintended consequences and pointing out the degree of contingency that marks out all human-made laws and institutions, historically informed scholarship might help articulate alternative normative bases for laws and legal systems, predicated on features of human behaviour and institutions observed over time. Since this approach is rooted in empirical studies of 'real world' phenomena yet aspires towards a foundation that is not entirely reducible to any

[47] Elspeth Reid, 'Personal Bar: Case-Law in Search of Principle' (2003) 7(3) *Edinburgh Law Review* 340–366.

[48] Kimberly Kessler Ferzan, 'Losing the Right to Assert You've Been Wronged: A Study in Conceptual Chaos?' in Miller and Oberdiek (eds.), *Civil Wrongs and Justice*, pp. 111–130, pp. 117–118.

[49] Reid, 'Personal Bar' at 344 and 350.

[50] Elspeth Reid, 'Protecting Legitimate Expectations and Estoppel in Scots Law' (2006) *Electronic Journal of Comparative Law*, www.ejcl.org/103/art103-11.pdf at 9.

[51] Ferzan, 'Losing the Right', pp. 113–114, 118.

[52] Melissa Murray, 'Marriage as Punishment' (2012) 112(1) *Columbia Law Review* 1–65.

[53] For more detail, see Chloë Kennedy, 'Immanence and Transcendence: History's Roles in Normative Legal Theory' (2017) 8(3) *Jurisprudence* 557–579 and Chloë Kennedy, 'Sociology of Law and Legal History' in Jiří Přibáň (ed.), *Research Handbook on the Sociology of Law* (Northampton: Edward Elgar, 2020), pp. 31–42. See also Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992).

given moment in time, it rejects the absolutism that is sometimes attributed to the so-called is/ought distinction. Furthermore, since it aims to provide both a deep understanding of contemporary predicaments and new ways to respond to these, this approach can be used as a basis for both critique – an enriched sense of the complexity of the problem – and criticism – potential ways forward.

In light of this, the two ways in which identifying an element of punitiveness across the criminal and civil laws examined is valuable are, first, that a shift towards *increased* punitiveness over time becomes clear and, second, a previously unappreciated foundation for these laws emerges. Starting with the first point, though the range of actions I study has a longstanding association with punishment, broadly construed (which is the crux of what I suggest by identifying instances of civil law quasi-punitiveness), the shift from private to public law responses has certain ramifications which, as I explain further in Section 1.5 and Chapter 8, should be considered when appraising the form and function of existing and prospective legal responses to inducing intimacy. But the fact that the practices of inducing intimacy have attracted a punitive or quasi-punitive response across the modern period shows that there is something enduring about the idea that they are wrongful and warrant censure and deterrence. More importantly, the fact that there is a plausible substantive continuity across these legal responses that is rooted in the relationship between selfhood and intimacy suggests that this link constitutes something like the normatively significant core of these actions.[54] The way this link, and its instantiation in law, has been shaped by different historical dynamics acts as a reminder that it can be underpinned by sensibilities that would not appeal to many contemporary societies. At the same time, the longstanding status of the association suggests this is an important foundation on which an alternative way forward, based on a re-worked version of this association, might be grounded.[55] I explore this possibility in more detail in Chapter 8.

1.3 Selfhood and Intimacy

To begin to substantiate the claim that there is plausible continuity of the kind just described it is necessary to say more about the links between selfhood and intimacy and how these have changed over time. In this section I therefore set out how, broadly speaking, general shifts in conceptions of selfhood have been reflected in changing expectations of intimate relationships before going on, in the next section, to show how these changes can also be detected in the value that is ascribed to sex.[56]

[54] On identifying such a core, despite considerable change, see Maksymilian Del Mar, 'Philosophical Analysis and Historical Inquiry' in Markus D. Dubber and Christopher Tomlins (eds.), *The Oxford Handbook of Legal History* (Oxford: Oxford University Press, 2018), pp. 3–21.

[55] See also Alan Norrie, 'Criminal Law and Ethics: Beyond Normative Assertion and Its Critique' (2017) 80(5) *Modern Law Review* 955–973.

[56] These sections support the assertion that 'intimacy is important in the construction of the self, and ideas of selfhood shape our intimate interactions'; see George Morris, 'Intimacy in Modern British History' (2021) 64(3) *The Historical Journal* 796–811 at 806.

One typical characteristic of modern conceptions of selfhood is that they are predicated on the belief that individuals necessarily participate actively in their own self-construction. As Christine Korsgaard has put it, '[c]arving out a personal identity for which we are responsible is one of the inescapable tasks of human life'.[57] This is in contrast to earlier conceptions of selfhood, according to which the self was conceived of as largely given, having mostly been fixed by powerful, often hierarchical, societal or cosmic orders.[58]

In late modernity, however, this process of self-construction has become reflexive in new and increasingly demanding ways. Under late modern conditions, self-construction has come to involve continually constructing and maintaining a biographical narrative that is composed via myriad choices, filtered through abstract systems.[59] As might be expected given the importance of generating and sustaining this life narrative, the late modern self is to a large extent considered to be inwardly generated.[60] External referents, such as social and cultural institutions, figure as significant but they tend to appear as such because of the way they support or hinder the inward, reflexive process of self-construction.[61]

Before moving on from this point I first want to foreground a distinction that I come back to towards the end of this chapter and in Chapter 8, that is, between different ways of construing this relationship between internal and external. The distinction is exemplified by two similar, but importantly different, ways of thinking about modern selfhood: autonomy and authenticity. These two ideals are similar in the way they prioritise generating and acting on one's own reasons; they are both agent-centred in that regard. But whereas autonomy emphasises the importance of deliberation and choice that is free from external referents, such as social institutions, cultural norms and even other people, authenticity tends to present external referents in a more positive light. Put differently, while autonomy valorises an ideal of freedom that is maximally self-determining, authenticity emphasises the importance of deciding in accordance with one's values but recognises the significance of external horizons of meaning, including for the ability to hold these values at all.[62] Though

[57] Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Oxford: Oxford University Press, 2009), p. 24.

[58] Jerrold Seigel, *The Idea of the Self: Thought and Experience in Western Europe Since the Seventeenth Century* (Cambridge: Cambridge University Press, 2005), p. 43. See also Charles Taylor, *Sources of the Self: The Making of Modern Identity* (Cambridge, MA: Harvard University Press, 1989).

[59] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Cambridge: Polity Press, 1991). The idea of narrative self-construction is much older; see Thomas Ahnert and Susan Manning, 'Introduction' in Thomas Ahnert and Susan Manning (eds.), *Character, Self, and Sociability in the Scottish Enlightenment* (New York: Palgrave Macmillan, 2011), pp. 1–30.

[60] See also Dror Wahrman, *The Making of the Modern Self: Identity and Culture in Eighteenth-Century England* (New Haven: Yale University Press, 2004).

[61] Giddens, *Modernity and Self-Identity*, p. 75.

[62] Somogy Varga and Charles Guignon, 'Authenticity', *The Stanford Encyclopedia of Philosophy*, Spring 2020 Edition, Edward N. Zalta (ed.), https://plato.stanford.edu/archives/

these ideals tend to shade into one another, they have different implications for how concepts that aim to protect freedom, such as consent, are fleshed out,[63] as I show more fully in Chapter 8.

Returning to modern conceptions of selfhood and their link with intimate relationships, historically speaking marital status was the key to this association. For centuries, marriage bestowed prestige and respectability on its participants, particularly women, at the same time as it imposed obligations. Anyone who 'failed' to marry would be held in correspondingly low esteem, but women, especially mothers, had most to lose in reputational (and material) terms through remaining unmarried.[64] Though these positively and negatively inflected relationships between selfhood and marital status endured for much of the modern period, several important changes across this time have oriented marriage, and intimate relationships more generally, towards the kind of concern for individual choice and self-fulfilment that is characteristic of late modern selfhood. These changes are clustered around waves of liberalisation that took place in the late eighteenth century, the late nineteenth century, and across the twentieth century (in the 1920s, 1970s and during the last couple of decades) that have, essentially, three dimensions.

First, each wave has increased the extent to which love is considered an appropriate motive for entering and staying in marriage, sometimes to the exclusion of other considerations,[65] with the result that marriage has lost much of its hegemonic status. Almost as soon as the core aspirations of marriage were reconfigured from political and economic advantage to love and companionship, conservatives warned that these new ambitions would undermine the institution they were meant to protect. The fear, which proved well-founded, was that marriage would be rendered optional. With love as the bedrock of marriage, a dearth of love could 'excuse' those who remained unmarried or left their spouse and the presence of love could elevate non-marital intimate relationships, making it harder to disparage them as inferior or deficient.[66] Though it would take post-war social security innovations and the growth in paid work for women for marriage rates to decline, since then single person and single

spr2020/entries/authenticity; Charles Taylor, *The Ethics of Authenticity* (Cambridge, MA: Harvard University Press, 1991), pp. 28, 36–39; Selznick, *The Moral Commonwealth*, pp. 12, 65, 71.

[63] Maiken Umbach and Mathew Humphrey, 'Introduction' in Maiken Umbach and Mathew Humphrey (eds.), *Authenticity: The Cultural History of a Political Concept* (Cham: Springer International Publishing, 2018), pp. 1–12, p. 3; Fred M. Frohock, 'Liberal Maps of Consent' (1989) 22(2) *Polity* 231–252.

[64] Katherine Holden, Amy Froide and June Hannam, 'Introduction' (2008) 17(3) *Women's History Review* 313–326.

[65] Stephanie Coontz, *Marriage, a History: How Love Conquered Marriage* (New York: Penguin Books, 2006); Katie Barclay, *Love, Intimacy and Power: Marriage and Patriarchy in Scotland, 1650–1850* (Manchester: Manchester University Press, 2011), pp. 60, 88, 94; Claire Langhamer, 'Love, Selfhood and Authenticity in Post-War Britain' (2012) 9(2) *Cultural and Social History* 277–297.

[66] Coontz, *Marriage, A History*, p. 175; Langhamer, 'Love, Selfhood and Authenticity'.

parent households have proliferated[67] and sophisticated calls for the abolition of state-recognised marriage have appeared.[68]

Second, parties to intimate relationships now expect to have greater choice over their partner and more control over the terms of their relationship. Again, almost as soon as the transition towards love-based marriage began it started to appear inappropriate for anyone but the potential spouses to decide on the suitability of the match.[69] Importantly, this also changed ideas about what criteria should be used in making that decision, with a greater range of personal, and more personalised, characteristics supplementing (and sometimes supplanting) general attributes like rank or wealth.[70] The notion that people should be able, or even required, to set the terms of their relationships developed later but it has gained traction in recent decades.[71] Reflecting the increased reflexivity of late modernity, some of these terms are reviewed and renegotiated throughout the course of the relationship[72] and in keeping with the way relationships continue to play a role in self-construction, the phrase 'relational orientation' has emerged to refer to the kind(s) of intimate relationship in which one participates.[73]

Third, it is now expected that marriages, and intimate relationships more generally, should be easy to end when they are no longer satisfying[74] – that liberty both to enter and exit relationships should be maximised – and that they should do more to satisfy us. Over the course of the last few centuries the expectations placed on intimate relationships have multiplied to include emotional and, later, sexual satisfaction, as well as affection, fidelity, honesty, respect, temperamental and intellectual compatibility, and intimacy,[75] which

[67] www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2018.

[68] For example, Clare Chambers, *Against Marriage: An Egalitarian Defence of the Marriage-Free State* (Oxford: Oxford University Press, 2017).

[69] Note, however, that social conformity remained important in some communities, such as working-class ones, even as expectations of marriage changed; see Andrea Thomson, '"The Best of Both Worlds"? Young Women, Family and Marriage in 1970s Scotland' in Katie Barclay, Jeffrey Meek and Andrea Thomson (eds.), *Courtship, Marriage and Marriage Breakdown: Approaches from the History of Emotion* (New York: Routledge, 2019), pp. 127–143.

[70] Barclay, *Love, Intimacy and Power*, p. 110; Coontz, *Marriage, A History*, p. 243; Lawrence Stone, *Uncertain Unions: Marriage in England, 1660–1753* (Oxford: Oxford University Press, 1992), p. 8.

[71] Pamela Haag, *Marriage Confidential: Love in the Post-Romantic Age* (New York: Harper Perennial, 2011).

[72] Coontz, *Marriage, A History*, p. 282; Giddens, *Modernity and Self-Identity*, p. 90.

[73] Amber K. Stephens and Tara M. Emmers-Sommer, 'Adults' Identities, Attitudes, and Orientations Concerning Consensual Non-Monogamy' (2020) 17 *Sexuality Research and Social Policy* 469–485; Margaret Robinson, 'Polyamory and Monogamy as Strategic Identities' (2013) 13(1) *Journal of Bisexuality* 21–38.

[74] Giddens, *Modernity and Self-Identity*, p. 90; Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Newark: Polity Press, 1992), p. 137. See also Benedict Douglas, 'Love and Human Rights' (2023) 43(2) *Oxford Journal of Legal Studies* 273–297 and Brian L. Frye and Maybell Romero, 'The Right to Unmarry: A Proposal' (2020) 69(1) *Cleveland State Law Journal* 89–104.

[75] Coontz, *Marriage, A History*, pp. 8, 20, 23, 177, 259, 271; Tanya Cheadle, *Sexual Progressives: Reimagining Intimacy in Scotland, 1880–1914* (Manchester: Manchester University Press, 2020), pp. 2, 17; Langhamer, 'Love, Selfhood and Authenticity' at 280, 293.

has come to mean providing access to one's private self, feelings and dissatisfactions.[76] In some respects, these contemporary ideals have increased the overlap between intimate relationships and friendships, with both characterised by an emphasis on choice and self-individualisation,[77] but there remain important distinctions, such as general expectations of exclusivity within intimate relationships and the conventional and legal priority that is still afforded intimate relationships.[78] In this context, the additional expectations placed on intimate relationships have charged them with the burden of meeting a remarkable number of complex and sometimes competing needs,[79] and it is now more likely that one or more of these will not be met.

Pausing on the expectations of honesty and intimacy, both of which are obviously relevant to the subject of this book, these have been transformed by changes in the way people meet and communicate. For example, dating apps and digitally mediated communications present new opportunities for deception in intimate contexts but they also provide new ways of potentially regulating such deceptions.[80] At a more profound level, however, the move to love-based relationships has complicated what it might mean to be honest with an intimate partner on account of changes in the way love has been understood. Across the nineteenth century, the idea that love could develop from, or even be created out of, feelings of respect and appreciation of good character came under threat from the belief that love could not be willed or reasoned into existence. As love came to be seen as a spontaneous and uncontrollable force lying beyond the grasp of reason[81] it became harder to identify feelings of true love in other people and oneself.[82] Yet because the ideal marital relationship was supposed to be grounded in true love, the tasks of conveying and detecting genuine emotions could not be easily dismissed.

[76] Barclay, *Love, Intimacy and Power*, p. 135; Coontz, *Marriage, A History*, pp. 20–21.

[77] On friendship, see Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (Cambridge: Cambridge University Press, 2020), p. 219.

[78] Rhaina Cohen, 'What If Friendship, Not Marriage, Was at the Center of Life?', *The Atlantic*, 20 October 2020.

[79] As Barbara Rosenwein points out, the modern idea of 'obligation free' love is arguably a source of more onerous obligations – stemming from the obligation to meet these needs out of love – than earlier ideals about love; see *Love: A History in Five Fantasies* (Cambridge: Polity Press, 2022), p. 65.

[80] Robert Sparrow and Lauren Karas, 'Teledildonics and Rape by Deception' (2020) 12(1) *Law, Innovation and Technology* 175–204; Stefanie Duguay, 'Dressing Up Tinderella: Interrogating Authenticity Claims on the Mobile Dating App Tinder' (2017) 20(3) *Information, Communication & Society* 351–367; Gayle Brewer, 'Deceiving for and during Sex'; Catalina L. Toma, James Alex Bonus and Lyn M. Van Swol, 'Lying Online: Examining the Production, Detection, and Popular Beliefs Surrounding Interpersonal Deception in Technologically-Mediated Environments' in Tony Docan-Morgan (ed.), *The Palgrave Handbook of Deceptive Communication* (Cham: Springer International Publishing, 2019), pp. 551–556 and pp. 583–602.

[81] Coontz, *Marriage, A History*, pp. 178, 184; Barclay, *Love, Intimacy and Power*, pp. 109, 111.

[82] Barclay, *Love, Intimacy and Power*, p. 111; Claire Langhamer, 'Trust, Authenticity and Bigamy in Twentieth-Century England' in Barclay, Meek and Thomson (eds.), *Courtship, Marriage and Marriage Breakdown*, pp. 160–174.

Indeed, the expectation that marriage should be grounded in true love meant it could be considered immoral to marry for any other reason[83] and immoral to marry without it.[84]

If there is a neat, one-word way of summarising these transformations in intimate relationships and selfhood across the modern period it might be this: tension. Intimate relationships matter as much as they ever have, perhaps more, because they are a potentially stable source and site of self-construction in a world where other external referents are neither given nor standardly perceived as welcome. At the same time, they are harder to secure and sustain. The desire for transparency in intimate relationships has reached new heights, as has the range of information over which we want control, but this desire is easily frustrated, not least because one of the central planks of the intimate relationship – its emotional connection – is not verifiable in a straightforward way. Finally, intimate relationships are still expected to be secure but they are also expected to be dispensable. This desire for easy egress effectively rules out, or at least makes less appealing, any effort to protect against untrustworthy conduct that would simultaneously make it harder to leave the relationship. Furthermore, if Katherine Hawley is correct in suggesting that trust in intimate relationships, unlike trust more generally, is motive sensitive,[85] then an intimate relationship where *either* party feels compelled to stay is likely to be unattractive to *both* parties. Thinking about the still-popular views that intimate relationships should be based on love and that true love is spontaneous[86] it becomes clear why a relationship that lacks this quality, irrespective of whose love is untrue in this sense, is likely to be undesirable.

In Part I, I argue that each of the changes outlined in this section, and the tensions to which they give rise, is evident in the laws and legal actions examined there. As I argue in Chapters 2 and 3, the range of deceptions that might render marital consent invalid and promises of marriage non-binding has in many ways mirrored anxieties about, and expectations of, marriage and spouses. Furthermore, the various attempts to extend this range and efforts to make emotional authenticity matter to the law of breach of promise of marriage largely coincided with the periods of liberalisation outlined above. In terms of the perceived harms and wrongs of these two areas of law, they were very clearly rooted in the gendered significance of marital status. This is a feature they shared with the rules governing the formation of marriage I discuss in Chapter 4, which provided redress for women who had been misled about their marital status alongside the crime of bigamy, which for much of the modern period was conceived as a crime against the deceived spouse.

[83] Coontz, *Marriage, A History*, pp. 178–179. [84] Barclay, *Love, Intimacy and Power*, p. 61.
[85] Katherine Hawley, *How to Be Trustworthy* (Oxford: Oxford University Press, 2019), p. 24.
[86] Work by Mikko Salmela confirms that, according to mainstream thinking, spontaneity is considered the hallmark of authentic emotions; see 'What Is Emotional Authenticity?' (2005) 35(3) *The Journal for the Theory of Social Behaviour* 209–230.

The shift away from this understanding of bigamy towards its reconfiguration as one of several crimes that damaged the state's ability to monitor the existence of valid marriage and the legal benefits this bestows was ironically facilitated by a greater concern with individual choice and happiness. As the deceived spouse's decision-making powers and happiness came to matter more, the possibility that they might wish to forgive and remain with their partner, despite the deception, also came to matter more. A relatively similar narrative helps explain the formalisation of the process of constituting marriage and the difficulty in using marriage as a form of punishment for deceptive conduct aimed at the would-be spouse. As the state's interest in effectively managing this relationship for its own benefit – that is, to avoid the 'misuse' of marriage by couples looking to 'cheat' the state – grew, the capacity of this area of law to function as a form of individual redress declined. Finally, the decline and eventual demise of the action of breach of promise of marriage owes much to the liberalisation of marriage and the sense that compelled marriage is not only an affront to the institution but also to the individuals who enter it.

Overall, in addition to strengthening the overarching argument that cultural conceptions of selfhood and intimacy are reflected in, and shore up, legal responses to deceptively induced intimacy, these changes mean that various instances of inducing intimacy that were formerly censured, either directly or indirectly, are no longer recognised as wrongful via law. Yet developments regarding the law of nullity elsewhere in the world and the innovative use of other civil wrongs suggest that there is still a desire for legal responses to this kind of conduct. These developments therefore indicate that there remains a sense in which trying to obtain formal censure for this kind of untrustworthy conduct is tantalising; they also underscore the reality that liberalisation does not necessarily go hand in hand with a reduced role for law, a point that is especially clear in legal developments concerning sex.

1.4 Sex and Marriage

As this section highlights, the value now generally ascribed to sex reflects the emphasis on individual choice and control that characterises contemporary conceptions of selfhood. In other words, as I suggested at the start of the previous section, ideas and experiences of selfhood seem to have shaped the way this form of intimacy is understood. This suggestion appears even more plausible when the changing relationship between sex and marriage is considered. While these two forms of intimacy have historically been intertwined, across the modern period they have come to acquire independent (though overlapping) significance and, eventually, value. Crucially, just as the changes outlined in Section 1.3 have shaped legal responses to inducing intimacy, the changes outlined in this section have, I argue, been similarly consequential for law.

The idea that sex and marriage might be related but unevenly valued is part of a distinctively 'Western tradition' that bears the imprint of Christian thinking and reform. In other cultural settings, the notion that sexual desire and romantic love are in tension, with the latter acting to tame the former, did not take root; instead, sex was celebrated in and of itself and thought capable of creating powerful, even spiritual, connections between humans.[87] According to beliefs that dominated in the 'West', however, marriage – ideally marriage based on love – for a long time constituted the sole context within which sex was considered permissible or even civilised. It also provided the institutional setting through which sex could purportedly be rendered benign.[88]

Since any effort to contain sexual desire within the confines of marriage necessarily acknowledges the existence (and threat) of sex outside marriage there is an important sense in which sex and marriage have always had independent significance, even according to the peculiarly Christian ethic that has prioritised marriage. What is significant about the modern period is the way sex has become associated with a potentially freestanding cultural artefact, that is, sexuality, and accordingly valued more positively both within and outside marriage. Temporally speaking, sexuality – the idea that sexual desire and pleasure is rooted in a constitutive feature of human personality – and the closely related concept of sexual identity, which refers to the way we define ourselves by reference to sexuality, are generally considered to have gained prominence throughout the nineteenth century and come most fully to the fore during the early twentieth century.[89] At this time, this new aspect of personhood could at least in principle be decoupled from phenomena like eroticism, intimacy and love, with which sex was traditionally associated,[90] and valued discretely on independent grounds.[91]

That said, the emergence of the concept of sexuality did not, at least in the early stages, coincide neatly with any significant move towards what might now be called sex positivism.[92] Instead, the late Victorian era is notable for

[87] William M. Reddy, *The Making of Romantic Love: Longing and Sexuality in Europe, South Asia and Japan, 900–1200 CE* (Chicago: University of Chicago Press, 2012), ch. 1, discussing sexual practices in South Asian and Japanese regions, and Joseph E. David, *Kinship, Law and Politics: An Anatomy of Belonging* (Cambridge: Cambridge University Press, 2020), p. 28, discussing sacramental and trans-substantive interpretations of corporeal union.

[88] Coontz, *Marriage, A History*, p. 9; Cheadle, *Sexual Progressives*, pp. 15, 22; Pat Moloney, 'Savages in the Scottish Enlightenment's History of Desire' (2005) 14(3) *Journal of the History of Sexuality* 237–265; Barclay, 'Marriage, Sex and the Church of Scotland'.

[89] David M. Halperin, 'Is There a History of Sexuality?' (1989) 28(3) *History and Theory* 257–274; Farmer, *Making the Modern Criminal Law*, p. 282.

[90] Halperin, 'History of Sexuality?', especially at 259.

[91] Timothy Willem Jones and Alana Harris, 'Introduction: Historicizing "Modern" Love and Romance' in Alana Harris and Timothy Jones (eds.), *Love and Romance in Britain, 1918–1970* (London: Palgrave Macmillan, 2015), pp. 1–19.

[92] Leigh Ann Wheeler, 'Inventing Sexuality: Ideologies, Identities and Practices in the Gilded Age and Progressive Era' in Christopher McKnight Nichols and Nancy C. Unger (eds.), *A Companion to the Gilded Age and Progressive Era* (Chichester: Wiley-Blackwell, 2017), pp. 102–115.

the social purity movements which, among other things, were directed at more tightly regulating sex so as to protect women and girls from exploitation.[93] Furthermore, despite changes in marriage expectations, marital sex essentially remained the only culturally valued form of sex until well into the twentieth century. Even in the face of growing egalitarian relationship ideals, increased sex education and greater availability of contraceptives, any new, more positive attitudes to sex were confined to its role within marriage until the 1970s when non-marital heterosexual sex (of some kinds) started to enjoy some mainstream esteem.[94] Since this time, although there have been many important changes in attitudes towards sex it would be fair to say that by and large the value now ascribed to sex is in many ways a function of the value that is ascribed to ideals of autonomy and individual liberty more generally.[95] The desire to discipline certain forms of sex has therefore certainly not abated.[96] Instead, in line with changing expectations of intimate relationships, marriage no longer exerts the same disciplinary force it once did[97] and it cannot provide a normatively compelling framework for other areas of law, either.

In Part II, I argue that for much of the last three centuries civil and criminal law responses to deceptively induced sex, from seduction to procurement offences and eventually rape, have been given form and substance by the way marriage was prioritised, and exerted power over, sex. The widespread disapproval of extra-marital sex, and the potential damage caused by engaging in sex of this kind, provided one basis on which to limit the range of deceptions that would be held by law to compromise sexual consent. It also shaped interpretations of what made deceptive sex wrongful and injurious. Though the relevant legal responses migrated from the civil into the criminal law sphere, the only substantive innovation in this framework was that the law expanded to take account of certain deceptions that occurred within relations of trust or authority. But rather than reflecting the importance of sexual choice per se, I would suggest that these expansions are better understood as part of the late nineteenth-century protectionist impulse and worries about the reputations of the established professions. It is only since the last couple of decades of the twentieth century, when sex (of certain kinds) has become valued in and of

[93] Lesley A. Hall, *Sex, Gender and Social Change in Britain since 1800*, 2nd ed. (Basingstoke: Palgrave Macmillan, 2012), ch. 2; Cheadle, *Sexual Progressives*, p. 99.

[94] Langhamer, 'Love, Selfhood and Authenticity'; Hall, *Sex, Gender and Social Change*, chs. 6–8, 10; Cheadle, *Sexual Progressives*, pp. 178–204; Roger Davidson, *Illicit and Unnatural Practices: The Law, Sex and Society in Scotland since 1900* (Edinburgh: Edinburgh University Press, 2018), p. 165.

[95] Pamela Haag, *Consent: Sexual Rights and the Transformation of American Liberalism* (Ithaca, NY: Cornell University Press, 1999); Cohen, *Regulating Intimacy*.

[96] For a critique, see Chloë Taylor, *Foucault, Feminism, and Sex Crimes: An Anti-Carceral Analysis* (New York: Routledge, 2019). More generally, there is a large and growing literature engaging critically with carceral and governance feminism.

[97] Though, as Murray has argued, marriage's disciplinary power has been widely internalised (Murray, 'Marriage as Punishment', sections IV and V).

itself, that the range of deceptions that might invalidate consent to sex has grown and the scope of the law has become potentially vast.

There are two facets of these developments I want to draw out before moving on to Section 1.5. The first is that, in their differing ways, both sets of legal responses to inducing intimacy – those that focus on sex and those that focus on intimate relationships – now largely embody what I described earlier as the ideal of autonomy. Both aim to protect a conception of freedom that is maximally self-determining, and thus protect unconstrained choice, but while this has mostly worked to curb legal responses in the context of intimate relationships, it has had the opposite effect in the context of sex. This makes sense in light of the account I've offered here; while in the context of intimate relationships, the ideal of autonomy provides some reasons to resist efforts to use law to protect against untrustworthy conduct, especially where this makes the easy dissolution of these relationships more difficult, in the context of sex there are fewer, if any, such concomitant reasons.

But just as we should think critically about the expansion of legal responses to deceptively inducing sex, we should think critically about the retraction of responses to deceptively inducing intimate relationships. The historical disentanglement of sex from marriage is a significant and, in my opinion, mostly welcome development, but there is a risk that it has led us to, as Rachel Fraser puts it, 'confuse[] sex with intimacy, and project[] anxieties proper to the latter onto the former'.[98] Certainly, while calls to impose liability for lying or catfishing (creating and adopting an entirely false persona) on dating apps often focus on the sexual 'gains' secured by these deceptions, they are also interpolated with references to the damage the relationship itself can cause.[99] This might suggest a reduced emphasis on legal responses that focus on sex, but it might also suggest a modest expansion in legal responses that focus on intimate relationships. In concluding this chapter, I want to introduce the final set of overarching concerns which, drawing on the genealogy offered in this book, should be factored in when considering these suggestions. These concerns stem from three senses of public and private.

1.5 Public(s) and Private(s)

Like the other concepts introduced in this chapter, and the cultural trajectories I have outlined, the three senses of public and private I set out in this section underpin the expository and evaluative aims of this book. They do this by providing a lens through which to analyse the historical developments I consider and

[98] Rachel Elizabeth Fraser, 'The Erotics of ASMR', *The Oxonian Review*, 8 May 2020.

[99] For example, Adam Lusher, 'MPs Urged to Pass Law against Online "Catfish" Imposters Tricking Women into Sex', *The Independent*, 17 July 2017; Irina D. Manta, 'Tinder Lies' (2019) 54(1) *Wake Forest Law Review* 207–249. This is also clear in the testimony of women who were tricked into sexual and romantic relationships with undercover police officers (https://policespiesoutoflives.org.uk/our-stories).

to engage critically with the contemporary developments I discuss. Two of the senses of public and private are nested within the first, which refers to public (that is, state) and private (that is, non-state) responses to inducing intimacy.[100] The second sense of public and private refers to kinds of interest protected by the state, distinguishing between public (that is, collective) and private (that is, individual) interests. The final sense of public and private refers to kinds of state response and distinguishes between public law (that is, criminal or regulatory law) and private law (that is, civil law) responses.

Since the focus of this book is legal responses to inducing intimacy, it might not be obvious how the first sense of public and private is relevant. One answer is that some of the legal actions featured in this book came into existence and/or disappeared across the modern period, and it is important to try to understand why. As the early development of breach of promise of marriage illustrates, the existence (actual or potential) of extra-legal norms might at certain points in time suggest that legal intervention is unnecessary because these other forms of pressure could be equal, or superior, deterrents.[101] By contrast, legal intervention might seem inappropriate in light of the feeling that collective censure of any kind of would be inappropriate, as was the case when breach of promise of marriage actions were abolished. Though both periods of scepticism reflected worries about encroachment of the public into the private (and vice versa), these worries had quite distinct bases.

The second form of anxiety over encroachment – that legal or perhaps any form of collective censure is inappropriate – points to the other way this first sense of public and private is relevant to this book. As I mentioned at the start of this chapter, a key question in current debates about deceptive sex is whether it is appropriate for legal responses to extend into the potentially wide array of deceptions that occur within 'ordinary' relationships. If, as I have suggested, there is normative force to the longstanding practice of using law to secure certain expectations of trust, which reflect the link between selfhood and intimacy, in this context then it is hard to resist the conclusion that some expansion of this kind is not only predictable but also potentially legitimate. In fact, as I have suggested it might be that some expansion in the realm of intimate relationships is also predictable and potentially legitimate. This does not mean that any legal response must, or should, be as wide ranging as possible, however.

To see why a narrower approach might be desirable, it is helpful to consider the second and third senses of public and private. Thinking about the type of interests protected by law, it is clear that legal responses to inducing intimacy have historically aimed to protect both private (individual) and public (collective) interests. A number of these responses have bolstered the legal and social institution of

[100] On the public/private distinction as a communicative phenomenon that establishes fractal distinctions, see Susan Gal, 'A Semiotics of the Private/Public Distinction' (2002) 13(1) *Differences: A Journal of Feminist Cultural Studies* 77–95.

[101] For a discussion of the relationship between individual pressure and social and legal norms, see Dan Threet, 'Mill's Social Pressure Puzzle' (2018) 44(4) *Social Theory and Practice* 539–565.

marriage at the same time as they protected individuals' reputational and emotional interests, as shaped by this institution. On one level, this is not surprising; though it is now common to think of institutions as facilitating independently conceived ends, they also condition the way we act and make decisions.[102] Recent legal developments in the realm of inducing intimacy tend not to reflect this point, though. If these moves indicate a concern with any collective interest, it is something like the aggregate of each person's individual interest in unconstrained choice.[103] As such, this collective interest has no substantive content that can structure, and constrain, any legal response that serves to protect it.[104]

This development gives rise to particular problems when the legal response in question is some form of public law, such as criminal law. Historically, criminal punishment was usually considered appropriate when the conduct in question was perceived to threaten society or some shared, as opposed to aggregated, interest. This attitude is clearly present in nineteenth-century attempts to criminalise seduction, which I discuss in Chapters 5 and 6. When making their case, advocates of criminalisation couched their pleas in concerns about unmarried mothers, whose abandonment gave rise to social and moral problems, and prostitution, the existence of which posed a perceived threat to both health and morals. And while it is now more commonly accepted that individual interests might legitimately be protected by the criminal law,[105] I would suggest that the situation is different when that interest is effectively untethered from any substantive shared interest, or at least a substantive shared value or social form, that might help give it shape.[106]

There are three difficulties that flow from this situation I want to introduce here, which arise even if a criminal law response is otherwise considered justifiable. The first relates to the fairly uncontroversial desire for prospective clarity regarding the scope of the criminal law. If the range of deceptions that might ground a criminal conviction turns on nothing more than the beliefs of each particular complainant and how, according that complainant, those beliefs were relevant to their decision-making then this prospective clarity is difficult to achieve.[107] The second difficulty relates to the fact that public laws, including

[102] Barbara Herman, 'Could It Be Worth Thinking about Kant on Sex and Marriage?' in Louise M. Antony and Charlotte Witt (eds.), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Oxford: Westview Press, 1993), p. 59.

[103] On rights individualism and the collapse of a public realm standing above self-interest, see Morton J. Horwitz, 'The History of the Public/Private Distinction' (1982) 130(6) *University of Pennsylvania Law Review* 1423–1428. On liberal conceptions of freedom and the scope of criminal punishment, see Henrique Carvalho, *The Preventive Turn in Criminal Law* (Oxford: Oxford University Press, 2017).

[104] I discuss these points further in Chapter 8.

[105] Farmer, *Making the Modern Criminal Law*, ch. 1, critically analysing this perspective.

[106] On valuing choice with reference to collective values and social forms, see Raz, *The Morality of Freedom*, chs. 14 and 15.

[107] For a critique of some laws that punish the infliction of emotional distress along these lines, see Avlana K. Eisenberg, 'Criminal Infliction of Emotional Distress' (2015) 113 (5) *Michigan Law Review* 607–662.

criminal law, typically focus on the conduct of the defendant and, in contrast to private law, do not always require injury (even if injuries are sometimes presumed in private law).[108] Finally, though complainants' reactions to having experienced a crime are important they are not usually considered determinative; hence, criminal prosecutions are at least purportedly carried out in the public interest and often undertaken by public prosecutors.[109] These points suggest that if it were possible to identify deceptions that could plausibly be described as wrongful and likely to cause harm, there might be at least prima facie good reasons to endorse their criminalisation, and perhaps prosecution, irrespective of particular complainants' experience of being subject to them.[110] Focusing solely on individual, unconstrained choice cannot facilitate the process of identifying such deceptions.

In Chapter 8, I pick up each of these points and suggest that one way they might be addressed is by developing a new framework through which these deceptions might be identified. Building on the insight that sex and intimate relationships both tend to matter in self-constructing terms, I argue that such a framework could and should rest on a contemporary, constructivist account of the links between these forms of intimacy and selfhood. This would provide what Sarah Buss describes as 'a story about why being manipulated and/or deceived is … incompatible with something it makes sense to call "treating autonomous agency with respect"'.[111] As Buss points out, this story is not provided by the concept of bare autonomy. The ideal of autonomy – that unconstrained choice is valuable – cannot in and of itself account for why deciding for oneself is important or make sense of how and why the intuition that it *is* important might need to be cashed out differently in disparate contexts. As I have gestured towards in this section, when this ideal is encoded in law it has the added downside of creating practical problems, too.

In rejecting the ideal of autonomy, the framework I develop embodies something closer to the ideal of authenticity outlined earlier in this chapter. Putting this framework to use in identifying which deceptions should qualify as legally salient therefore involves exploring which sorts of external referents, including social institutions and interpersonal relationships, tend to matter

[108] Goldberg and Zipursky, *Recognizing Wrongs*, ch. 6.

[109] Of course, the criminal justice process could be amended (see Duff, 'Torts, Crimes and Vindication'), but this would require taking these points into account. For a critical assessment of restorative justice in practice, see William R. Wood and Masahiro Suzuki, 'Are Conflicts Property? Re-Examining the Ownership of Conflict in Restorative Justice' (2020) 29(6) *Social & Legal Studies* 903–924.

[110] This is similar to the way the Domestic Abuse (Scotland) Act 2018 does not require that the complainer actually experience any of the negative effects outlined in the legislation. See also Gardner and Shute's influential argument that rape should be punished even when it is not harmful in particular cases; see John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed.), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford: Oxford University Press, 2000), pp. 193–218.

[111] Sarah Buss, 'Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints' (2005) 115(2) *Ethics* 195–235 at 207.

in self-constructing terms and when and how they feature in the practices of inducing intimacy. While this provides a general (contestable and revisable) list of deceptions, the framework leaves space for more idiosyncratic deceptions to qualify when their significance has been expressly communicated by one party to the other in advance. This dual approach draws on contemporary accounts and experiences of selfhood by centring the importance of deciding in accordance with one's own values while at the same time recognising the crucial role that culturally sensitive social institutions play in shaping these values. In doing so, it provides a richer account of how selfhood and intimacy are connected and shows how this account can help set the parameters of potentially punitive state responses to the practices of inducing intimacy.