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47 Fla. L. Rev. 311 (1995)

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Florida Law Review

VOLUME 47

JULY 1995

NUMBER 3

"SUE ME, SUE ME, WHAT CAN YOU DO ME? I LOVE YOU" * A DISQUISITION ON LAW, SEX, AND TALK

Dan Subotnik**

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* Nathan Detroit to Adelaide in Frank Loesser's song, *Sue Me*, after she has complained about his endless unfulfilled commitments, especially to marry: "You promise me this, you promise me that, you promise me anything under the sun." FRANK LOESSER, GUYS AND DOLLS (Frank Music Corp. 1949).

** Professor of Law, Touro Law School. Special thanks to Ray Belliotti, Bill Carmel, Ruth Ann Crowley, Louise Harmon, Richard Klein, The Hon. Richard Posner, Rochelle Silfen, Rena Sepowitz, and especially to my wife and helpmeet of twenty-six years, Rose R. Subotnik. Thanks also to Marianne Artusio, Valerie Baugh, Jeena Belil, Nancy Fox, Marsha Freeman, Salome Geronimo, Perry Halkitis, Cecil Hunt, Eileen Kaufman, Ed Lukashok, Jeffrey Morris, Dan Polsby, Henry Ramer, Tom Schweitzer, Terry Scheiner, Jill Selden, Robyne Weinstein, Amelia Wilson and Peter Zablotsky. Thanks, finally, to my Dean, Howard Glickstein, for his support.

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He lied about everything He said his father was Cuban, that he lived in Miami . . . that he had attended American University [that] he was twenty-two when he was only seventeen, and that the girl at his place who was slamming everything around was his cousin when she was only his girlfriend.

—Anonymous medical records technician¹

The words "I'll love you till the day I die,"
The self-deception that believes the lie. . . .

1. Quoted in DORY HOLLANDER, 101 LIES MEN TELL WOMEN AND WHY WOMEN BELIEVE THEM 3 (1995).

The faint aroma of performing seals
 The double crossing of a pair of heels.
 I wish I were in love again!

—Lorenz Hart²

I. INTRODUCTION

Woman to man or man to woman: "Are you married?" Answer: "No." Q: "How many women (men) have you been with?" A: "You would be the second." Q: "Tell me about yourself." A: "I am Catholic; I graduated from Cal Tech; I make into the six figures; I don't do drugs; I have never had an abortion." "Of course we are going to get married." Q: "Where were you all day? I tried to reach you." A: "I was at a meeting."

Let us suppose that all of these assertions are outright lies, that in fact the liar in the last example had been intimately involved with a lover. Later, the truth comes out. As a result the relationship collapses and the innocent party is badly hurt. Is there—should there be—a cause of action?³

A great deal is surely at stake here. A serious jolt to a sexual partnership, psychologists say, can lead to restlessness, panic attacks, sleeplessness, loss of appetite, and deep depression.⁴ "A Song of Love Is a Sad Song" indeed.⁵ If we accept the proposition that being duped in or into a sexual relationship magnifies these effects, and if reports of the ex-governor of Arkansas' infidelities are true, it is easy to see why no measure of damages could fully recompense Hillary for her pain; why a woman presumably without Hillary's extraordinary survival skills, say, Adrienne Rich, might be driven crazy;⁶ why for Susan Estrich sexual fraud can be rape.⁷

2. LORENZ HART, *I Wish I Were in Love Again*, THE COMPLETE LYRICS OF LORENZ HART 228 (Dorothy Hart & Robert Kimball eds., 1995).

3. A growing number of commentators believe there is, or at least should be. See *infra* note 63.

4. See CARL G. HINDY ET AL., IF THIS IS LOVE WHY DO I FEEL SO INSECURE? 200-03 (1989).

5. *Lili* (MGM 1953).

6. ADRIENNE RICH, ON LIES, SECRETS, AND SILENCE 186 (1979) ("To discover that one has been lied to in a personal relationship . . . leads one to feel a little crazy.").

7. SUSAN ESTRICH, REAL RAPE 102-03 (1987) ("The 'force' or 'coercion' that negates consent ought to be defined to include extortionate threats and misrepresentations of material fact.").

It is difficult to even imagine the other side of this story. And yet, picture Cyrano standing behind the trees under Roxane's balcony, not far from the man she has her eyes on and who has eyes for her, Christian.⁸ Christian is somewhat anxious as he starts wooing Roxane because she has made clear her principal requirement in a man, that he possess a poet's sensibility, and this is precisely the quality that he lacks. Things do not go well for Christian. The harder he tries, it seems, the worse it gets and, as he sees his chances slipping away, he panics. In the face of the impending disaster—and because of his own love for Roxane which leads him to seek her happiness even at the cost of his own—Cyrano comes to the rescue. He summons the words to express his feelings for Roxane giving them to Christian for his use; then, in frustration, takes control of the courtship, addressing Roxanne directly while mimicking Christian's voice. So exquisite are Cyrano's words, so moving his passion, that at the end of the latest film version of this scene, when we (men and women alike) see him slinking home after Christian has gained welcome to Roxane's bedroom, our hearts simply break.

Does or should Roxane now have a cause of action against Cyrano and Christian for fraud? Going by the pain and number of Roxane-like figures and other victims of sexual fraud, yes, absolutely. Who among us has not suffered for inviting a poet to bed only to discover a clod? On the other hand, who among us has not also, like our love-crazed heroes, misrepresented himself in love?⁹ "Do you think," asks columnist Art Hoppe, "Prince Charming would have been swept off his feet for one minute by a cleaning lady?"¹⁰ "Don't . . . feminists know," asks Camille Paglia, "that everything in romance is lying and delusion and that judgment goes out the window in sexual matters?"¹¹ "SEX FRAUD! What's Professor Larson trying to do—" sums up Hoppe, "wipe out the human race"?¹²

This Article evaluates the desirability of a tort action for misrepresentations designed to secure sexual benefits (often called a sex fraud

8. EDMOND ROSTAND, *CYRANO DE BERGERAC* (Anthony Burgess trans., 1971) (1897).

9. See, e.g., *Picket Fences* (CBS television broadcast, Feb. 4, 1994) (involving a Cyrano-type fraud in which Judge Bones dismisses charges of rape, explaining that everybody lies a little in courtship).

10. Arthur Hoppe, *Free Sex*, SAN FRANCISCO CHRON., June 20, 1993, Sunday Punch section, at 1. Cinderella may not have lied in the ordinary sense of the word, but by going to the ball dressed as the most beautiful princess of all, she can be charged with trying to mislead. The deception seems to have worked, as the prince certainly treated her as a princess. For a general discussion of the relationship between lying and deception, see *infra* Part II.G.

11. Quoted in Shulamith Gold, *Don Juan in Court*, CHI. TRIB., Jan. 5, 1993, at N1.

12. Hoppe, *supra* note 10.

action herein).¹³ The Article consists of ten parts. Part II provides a legal, historical, and philosophical framework for assessing the sex fraud action. In so doing it focuses special attention on a new article by sex fraud tort proponent Professor Jane E. Larson.¹⁴ Part III, *The World of Lies*, examines the place of lying generally in our dealings with others and in our private, mental lives. Part IV, *Sex, Lies, and Audiotape*, extends the discussion of lying to the sexual setting. Part V, *Men vs. Women as Victims*, compares the damage suffered by men and women in sexual relationships. No explanation is necessary for the Part VI, *Women vs. Men as Liars*. Part VII, *The Mind Game*, briefly lays out some communication theory and then highlights the implications for sexual partners. Part VIII, *Is a Sexual Fraud Regime Workable?*, examines the administrative problems that a sex fraud regime would bring. In part IX, *The People Speak*, two recent opinion surveys are presented and evaluated. The Article ends with a brief summary and some conclusions.¹⁵

13. For a more complete definition of the tort, see *infra* text accompanying notes 70-80.

14. Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit' ": *A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374 (1993).

15. A few words about the Article's method and style. Where the subject matter of an essay elicits strong reactions, as it does here, thoughtful writers will want to tightly control their own sentiments so as to preserve their fair-mindedness. This is precisely what Stendhal's narrator intended in an analogous context: "I am making every possible effort to be matter-of-fact. I want to impose silence on my heart, which wants to say too much. I am always afraid of only having put down a sigh, when I imagine myself to have recorded a truth." STENDHAL, *ON LOVE* 27 (H.B.V. trans., 1927).

At the same time, wise writers will understand the limitations of intellectual work that does not get under their skin. Cornel West has complained about this "bourgeois" model of scholarship in one of his own fields, black studies. CORNEL WEST, *KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA* 82 (1992). To shake loose from the grip of stultifying and disembodied scholarship, West urges black scholars to reject this model in favor of "a new 'regime of truth' . . . permeated by . . . kinetic orality and emotional physicality . . . rhythmic syncopation . . . protean improvisation [and] rhetorical and antiphonal repetition." *Id.*

Neither the Stendhalian nor the Westian approach can exclusively provide the kind of perspective that is needed here. Both, therefore, will be used. If one approach undermines the other, readers should at least be able to distinguish between them and adjust their thinking accordingly.

As for style, readers should note that I have allowed most of the authors cited herein to speak in their own voices. This is because the subject of sexual conversation has attracted so much attention from the very best thinkers and writers that many times, when I began to paraphrase their ideas and manner of expression, I was left with a sense of dread.

II. THE LEGAL, HISTORICAL, PHILOSOPHICAL, AND CULTURAL BACKGROUND

Any man who, by means of temptation, deception, arts, flattery, or a promise of marriage, seduces any unmarried woman in this state, shall, on conviction, be imprisoned in the penitentiary for not less than one nor more than ten years. . . .

—Code of Alabama (1940)¹⁶

[A] male [may] make promises that will not be kept, . . . indulge in exaggeration and hyperbole, or . . . assure any trusting female that . . . the ugly frog is really the handsome prince. Every man is free, under the law, to be a gentleman or a cad.

—*People v. Evans*¹⁷

A. *The Law of the Lie*

For most of American history the law has allowed an action against a man who misrepresented himself for purposes of seducing a woman.¹⁸ Early on, such an action could be brought by a parent of the deceived woman on grounds of loss of the daughter's services.¹⁹

16. ALA. CODE § 419 (1940) (repealed 1977).

17. 379 N.Y.S.2d 912, 922 (1975) (holding that since penal sanctions for seduction are no longer enforced, the defendant's conduct could not be characterized as criminal).

18. See M.B.W. Sinclair, *Seduction and the Myth of the Ideal Woman*, 5 LAW & INEQ. J. 41-64 (1990); see also Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817 (1996) (highlighting the obstacles for plaintiffs).

19. See, e.g., *Franklin v. Hill*, 444 S.E.2d 778, 781 (Ga. 1994) (stating that the rationale behind Georgia's seduction statute was to hold men accountable for corrupting young women); *Kendrick v. McCrary*, 11 Ga. 603, 606 (Ga. 1852) (stating that the statute protected fathers from being disgraced by their daughters). Only the slightest loss of services needed to be shown by parent plaintiffs, as courts explicitly based the seduction action on emotional and social harm to the parent. See, e.g., *id.* at 605-06.

In upholding a verdict for the father, which included \$49 in actual damages and \$1000 in punitive damages, the court pointed out that the action exists "for the wisest and most benevolent of purposes, to preserve his domestic peace, by guarding from the spoiler the purity and innocence of his child." *Id.* at 603-04. The court went on to explain:

Never, so help me God, while I have the honor to occupy a seat upon this bench, will I consent to control the jury, in the amount of compensation which they may

Because the victim had no property rights in herself, she had no claim on her own behalf.²⁰ However, beginning in the second half of the nineteenth century, in a climate that allowed passage of the married women's property acts,²¹ parents' claims slowly became disfavored,²² with the right of action passing to the victim.²³ Two actions were available to plaintiffs: seduction,²⁴ our primary focus here, and breach of promise to marry.²⁵ The tort of seduction imposed a chastity requirement which often meant that a married woman could not recover.²⁶ A woman might recover in seduction for her damages

see fit to render a father for the dishonor and disgrace thus cast upon his family; for this atrocious invasion of his household peace. There is nothing like it, since the entrance of Sin and Death into this lower world. Money cannot redress a parent who is wronged beyond the possibility of redress; it cannot minister to a mind thus diseased. Give to such a plaintiff, all that figures can number, it is as the small dust of the balance. Say to the father, there is \$1049, embrace your innocent daughter, for the last time, and let her henceforth become an object for the hand of scorn to point its finger at! What mockery! And yet this is the identical case we are considering.

Id. at 606.

The court may have been influenced by the *Bible* which holds that "[I]f a man entice a maid that is not betrothed, and lie with her, he shall surely endow her to be his wife. If her father utterly refuse to give her unto him, he [the seducer] shall pay money according to the dowry of virgins." *Exodus* 22:16-17 (King James).

20. See Larson, *supra* note 14, at 382-84.

21. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 184-85 (1973).

22. Larson, *supra* note 14, at 384-87. Just a few years ago, a woman brought an action under a statute (Georgia Code 51-1-16) which allowed parents to sue the seducer of their unwed daughters. *Franklin*, 444 S.E.2d at 781. The Georgia Supreme Court denied relief, holding the statute unconstitutional. *Id.*

23. Larson, *supra* note 14, at 384-87; Sinclair, *supra* note 18, at 48-50, 60-64.

24. 70 AM. JUR. 2D *Seduction* § 1 (1987).

Seduction is the act of persuading or inducing a woman of previously chaste character to depart from the path of virtue and submit to sexual intercourse with the seducer [by] the use of any species of arts, persuasions, or wiles calculated to result in illicit sexual intercourse between the woman and the seducer and in fact having that result.

Id.

25. Two other torts paralleled these. The tort of "Alienation of Affections" arose where there was "willful and malicious interference with marriage relation by third party, without justification or excuse"—more specifically, where a defendant's actions led to a plaintiff's "loss of affection or consortium of spouse." BLACK'S LAW DICTIONARY 72 (6th ed. 1990). The tort of "Criminal Conversation" is defined as "[s]exual intercourse of an outsider with husband or wife, or a breaking down of the covenant of fidelity." *Id.* at 373. It is a "[t]ort action based on adultery, . . . a civil injury to the husband or wife entitling him or her to damages." *Id.*

26. See *Weinlich v. Coffee*, 176 P. 210, 211 (Colo. 1918) (cited with approval in

"where the act or acts of seduction are induced by false or fraudulent representations."²⁷

Yet even without fraudulent representation, a suitor could be at risk.²⁸ "[U]rgent importunity" as well as "professions of attachment" are included within the purview of the meaning of enticement or persuasion.²⁹ While pregnancy was not a formal element of the seduction action,³⁰ in most of the cases the union produced a child.³¹ If the woman was productive, of course, this circumstance would have most immediately produced a "loss of services" either to the parent or the daughter, or perhaps both.³²

As might be expected in settings where breathtaking ingenuity has been displayed, courts have been unable or unwilling to define prohibited artifice.³³ One important message, however, regularly came through: "What might be seduction in one case might, with an older woman, more mature mentally, of greater intelligence, education, and experience, and under different circumstances, not constitute seduction. The disparity of the ages of the parties is always proper to be considered."³⁴ Once seduction was established, damages could be awarded for

Destefano v. Grabrian, 763 P.2d 275, 282 (Colo. 1988)). *But see* Fulgham v. Gatfield, 241 P.2d 824 (Idaho 1952) and Haeissig v. Decker, 166 N.W. 1085 (Minn. 1918) (stating that "seduction presupposes chastity, but it would not do to hold that chastity once lost can never be regained").

27. Slawek v. Stroh, 215 N.W.2d 9, 19 (Wis. 1974).

28. *See, e.g.,* Seamons v. Spackman, 341 P.2d 442 (Idaho 1959) (upholding the defendant's conviction based on his persuading a woman of previously chaste character to engage in sexual intercourse).

29. *Id.* at 444.

30. *Id.* at 443.

31. *See* Sinclair, *supra* note 18, at 37, 47 (discussing seductions resulting in pregnancy).

32. *See* Piggott v. Miller, 557 S.W.2d 692, 695 (Mo. Ct. App. 1977) (holding that while a seduced woman could not recover from a married defendant for breach of promise to marry, she nevertheless stated a viable cause of action in damages for seduction based on her reliance on his fraudulent promise to marry).

33. *See, e.g.,* Angie M. v. Superior Ct., 37 Cal. App. 4th 1217 (Cal. Ct. App. 1995) (reversing lower court's determination that minor plaintiff's cause of action for seduction was not defined under California's civil law). Although the *Angie M.* court recognized the minor plaintiff's seduction action, it declined to define seduction itself, but instead implicitly recognized seduction as a related claim where the defendant also was criminally charged with rape of a minor and child sexual abuse. *Id.* at 1224-25.

34. Kralick v. Shuttleworth, 289 P. 74, 81 (Idaho 1930) (upholding verdict for plaintiff where, among other things, she was 21 years old while defendant was 61). This guideline was cited with approval in *Seamons*, 341 P.2d at 446 (upholding verdict for plaintiff; plaintiff was 19 and defendant 35 when they began a sexual relationship). *See also* Opitz v. Hayden, 135 P.2d 819 (Wash. 1943) (discussing whether in a breach of contract case, a purported settlement of a seduction case could be based on consideration). Holding for the plaintiff, in *Opitz* the court noted that at the point of meeting defendant, the plaintiff was a girl of 19 years, "of unblemished virtue" from a Christian family, who attended Sunday School. *Id.* at 821. She had no contact

pain and suffering experienced in pregnancy and childbirth,³⁵ for the mental anguish produced by the seduction,³⁶ and for loss of social standing.³⁷

The breach of promise action was born of contract—and paradox.³⁸ “What is strangest of all,” Plato notes in his *Symposium*, “is the popular conviction that a lover, and none but a lover can forswear himself with impunity—a lover’s vow, they say, is no vow at all.”³⁹ Recognizing this legal inconsistency and the serious harm done, the common law came to provide a remedy.⁴⁰ The action did not require fraud; that is, a remedy was available even if the promise was intended to be kept at the time it was made.⁴¹ Damages caused by the breach might include loss of the pecuniary and social advantages of the promised marriage,

with boys and did not go to parties. *Id.* The seducer, by contrast, was 40 years old, tall, slender, and genial. *Id.* He was also her employer and, though married, maintained a relationship with still another woman. *Id.*

Anderson started writing love notes and addressing Opitz affectionately. *Id.* Then came dinner invitations, shows, and automobile rides. *Id.* In 1920 they began a sexual relationship that lasted 13 years. *Id.* In 1921 Opitz became pregnant and, at defendant’s insistence, had an abortion. *Id.* During the long “courtship,” Anderson told plaintiff he wanted children with her and wanted to marry her as soon as he settled affairs with his wife. *Id.* at 822. Thereafter plaintiff on two occasions moved away, but was persuaded to come home by defendant who continually professed his deepest affection for her. *Id.* Three days after finally obtaining a divorce from his wife, defendant married another who was completely unknown to plaintiff. *Id.* at 824.

35. *Gemill v. Brown*, 56 N.E. 691, 695 (Ind. 1900).

36. *Id.*

37. *Hawn v. Banghart*, 39 N.W. 251, 253 (Iowa 1888); *Piggot*, 557 S.W.2d at 694.

38. See 12 AM. JUR. 2D *Breach of Promise* §§ 26-27 (1964). While the focus of this Article is fraudulent misrepresentation, breach of promise will be given some attention because in its classic form it also allows recovery for emotional damages. *Id.* In doing so, of course, breach of promise imports the same problems as fraudulent misrepresentation with regard to proof and measurement of damages. Compare *id.* with 37 AM. JUR. 2D *Fraud & Deceit* §§ 47-48 (1964).

39. Quoted in SHOSHANA FELMAN, *THE LITERARY SPEECH ACT* 23 (Catherine Porter trans., 1980).

40. See *supra* note 38 and accompanying text.

41. See, e.g., *Piggot*, 557 S.W.2d at 695 (upholding plaintiff’s seduction cause of action even though married defendant’s promise to marry plaintiff was legally void). But fraud on a woman plaintiff’s part could defeat her claim. Thus, when a defendant could prove that his affianced was not the innocent he could rightfully have expected, the defendant could get the plaintiff’s claim dismissed. See, e.g., *Leckey v. Bloser*, 24 Pa. 401 (1854). Though early in the nineteenth century, the breach of promise action was gender-neutral, thereafter recovery was virtually always limited to women. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 32-49 (1985) (providing a comprehensive account of breach of promise in the last century).

mental anguish, humiliation, and injury to health and psyche.⁴² Expenditures made in preparation of marriage also were recoverable.⁴³

Seduction, i.e., the use of artifice to gain sexual favor, also was a crime⁴⁴ (as was breach of promise). The legal test for both civil and criminal liability was the same, at least in principle,⁴⁵ though a number of states made a promise of marriage a necessary element of the crime.⁴⁶ Where the victim was deceived as to the nature of the act being performed (fraud in the factum), a charge of rape might arise.⁴⁷ Doctors, for example, were not infrequently convicted of rape where, under the guise of conducting a physical examination, they had intercourse with their patients.⁴⁸ Rape was rarely chargeable, however, in the much more common case where the victim consented to the act of intercourse, though the consent was obtained through artifice (fraud in the inducement).⁴⁹

Beginning in the 1930s, in the wake of the first, and now almost forgotten, sexual revolution of the twentieth century, a "heartbalm" (also paradoxically called "anti-heartbalm") movement was launched to abolish the torts of seduction and breach of promise (as well as alienation of affections and criminal conversation).⁵⁰ Among its

42. *Bradley v. Somers*, 332 S.E.2d 665, 666-67 (S.C. 1984).

43. See 12 AM. JUR. 2D *Breach of Promise* §§ 26-27 (1964), cited with approval in *Bradley*, 332 S.E.2d at 667. But see *Bruno v. Guerra*, 549 N.Y.S.2d 925, 926 (1990) (upholding state statute prohibiting recovery of prepaid wedding expenses).

44. See *Mitchell v. State*, 151 So. 2d 752, 754 (Ala. 1962).

45. See *supra* note 18 and accompanying text and *Mitchell*, 151 So. 2d at 754 (finding defendant guilty under ALA. CODE tit. 14, § 419 (1940), which criminalized seduction as "tempting a chaste woman through deception, arts, flattery or a promise of marriage").

46. See, e.g., *Mitchell*, 151 So. 2d at 754.

47. See ROLLIN M. PERKINS, CRIMINAL LAW 964-66 (2d ed. 1969).

48. See, e.g., *Eberhart v. State*, 34 N.E. 637, 638 (Ind. 1893) (affirming phony, itinerant doctor's rape conviction for sex act with 13-year-old girl under pretense of treatment despite no evidence of resistance); *Pomeroy v. State*, 94 Ind. 96, 102 (1883) (holding that defendant physician's sex act with mentally deficient patient under the guise of a medical examination constituted rape); *State v. Atkins*, 292 S.W. 422, 426 (Mo. 1926) (holding that non-consensual vaginal penetration of plaintiff by defendant doctor's penis during physical examination was rape notwithstanding her consent to the examination); *State v. Ely*, 194 P. 988, 991 (Wash. 1921) (affirming physician's conviction for rape perpetrated during physical examination of female patient).

49. See, e.g., *Evans*, 379 N.Y.S.2d at 916-19. Under the guise of conducting a sociological experiment, the accused induced the complainant to accompany him to his apartment, and where after additional artifice on his part, the two had sex. *Id.* at 916-17. In finding the defendant not guilty, the court cited the "prevailing view in this country is that there can be no rape which is achieved by fraud, or trick or stratagem." *Id.* at 919.

50. See Mary Coombs, *Agency and Partnership: A Study of Breach of Promise Plaintiffs*, 2 YALE J.L. & FEMINISM 1 (1989); Larson, *supra* note 14, at 398 (discussing the historical background of feminist reforms).

founders and leaders were early feminists who took the position that the heartbalm torts were infantilizing them by implying that women could not manage their own social and emotional lives.⁵¹ Whatever influence such women had, however, it was men who guaranteed the movement's success by insisting that, far from protecting innocent women, the actions were all too frequently used by experienced and unscrupulous women to extort money from their less sophisticated male admirers.⁵²

The movement continued for over forty years, with the result that today seduction actions are precluded by statute in all but seventeen states.⁵³ Approximately twenty-one states have extended these anti-heartbalm statutes to prohibit breach of promise.⁵⁴ Thus, the seduction

51. See Larson, *supra* note 14, at 393-401. Of special importance in this movement was Roberta West Nicholson, the Indiana legislator who introduced the first heartbalm bill. See Coombs, *supra* note 50, at 12 n.71.

52. See, e.g., *O'Brien v. Manning*, 166 N.Y.S. 760 (1917) (breach of promise). Here plaintiff was 29 years old. *Id.* at 761. Defendant was 84, partially palsied, and worth well over \$10 million. *Id.* The engagement was extremely short-lived, lasting only a few days. *Id.* Though plaintiff admitted that she did not love defendant (thus there were no wounded affections), the court held that she was entitled to damages for "mortification and wounded pride and the loss of benefits she would have had," awarding her \$125,000. *Id.* at 761-62.

Former § 61-a of the New York Civil Practice Act articulated the rationale for the State's heartbalm statute:

The remedies heretofore provided by law for the enforcement of actions based upon allege[d] . . . seduction . . . having been subjected to grave abuses, causing extreme annoyance, embarrassment, humiliation and pecuniary damage to many persons wholly innocent and free of any wrongdoing, who were merely the victims of circumstances, and such remedies having been exercised by unscrupulous persons for their unjust enrichment, and such remedies having furnished vehicles for the commission or attempted commission of crime and in many cases having resulted in the perpetration of frauds, it is hereby declared as the public policy of the state that the best interests of the people of the state will be served by the abolition of such remedies. Consequently, in the public interest, the necessity for the enactment of this article is hereby declared as a matter of legislative determination.

1935 N.Y. LAWS 732-33 (repealed 1963). New York's original statute abolishing seduction and breach of promise was enacted in 1935. *Id.* While omitting the New York legislature's rationale, the current statute continues to prohibit these causes of action. N.Y. CIV. RIGHTS LAW § 80-A (McKinney 1994). Now we can fully understand that Nathan Detroit's mock protest of powerlessness to control himself as expressed in the primary title to this Article, which is how the line is simply understood today, also serves to taunt Adelaide for her real powerlessness (short of dumping him) to find a remedy. See *supra* note 1 and accompanying text. This aspect would not have been lost upon *Guys and Dolls*' Broadway audiences 40 years ago, when the play was first performed.

53. See Larson, *supra* note 14, at 401 n.118.

54. See Coombs, *supra* note 50, at 5 & n.25.

action still theoretically exists in about one-third, and breach of promise in more than half, of our state jurisdictions. Nevertheless, almost no "pure" seduction cases⁵⁵ and very few breach of promise cases are brought today.⁵⁶ Also as a result of the heartbalm movement, criminal

55. By "pure" I refer to kinds of cases referred to on pp. 316-20, *supra*. See also *supra* note 51 and accompanying text (discussing seduction in abuse of patient and other unusual cases).

56. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 834 (1988). Professor Martha Chamallas makes a compelling case for the suspended animation, if not death, of breach of promise. *Id.* "One good reason for refusing to afford a cause of action for a breach of promise," she writes, "is that, regardless of any emotional harm caused, it is desirable to permit everyone the opportunity to extricate themselves [sic] from unwanted intimate relationships." *Id.* Professor Chamallas goes on:

[P]erhaps the most common risk in any sexual relationship is the risk that one party will end the relationship unilaterally, against the wishes of the other party. Given this pervasive risk, the judgment may be that people (especially women) should assume the risk that the other party might some day break off the relationship. If this is the implicit moral judgment, then the only damages properly cognizable . . . would be those for insult or indignity traceable to the deception, omitting any damages flowing from the relational loss. When so pared down, the claim for a breach of promise to marry . . . loses much of its apparent monetary value.

Id. at 834-35.

Potential breach-of-promise plaintiffs should take note of *Willey v. Springs*, 840 F. Supp. 1259 (N.D. Ill. 1994), *rev'd*, 47 F.3d 1475 (7th Cir. 1995), a case discussed in some detail by Gretchen Reynolds in *A Breach of Promise*, CHI. MAG., Apr. 1994, at 63. In April 1992, at the end of a short, but intense courtship period of nine weeks, Richard Springs and Sharon Willey became engaged to be married. *Willey*, 840 F. Supp. at 1262. Both parties were in their fifties; Sharon was an attorney, while Richard was a wealthy cattle rancher. *Id.* Shortly thereafter, Sharon wanted to renegotiate a retainer arrangement with her sole cash-paying client and Richard agreed to help with cash flow if problems arose with the client. Reynolds, *supra*, at 65. In fact, the client balked and Sharon lost the account. *Id.* At about this time Richard decided things were not working out to his satisfaction and broke off the engagement. *Id.*

In October 1992, Sharon brought an action for breach of promise claiming recompense for medical costs (she was seeing a psychiatrist for \$125 per hour), pain and suffering, as well as profits lost in her law practice. *Willey*, 840 F. Supp. at 1263. A jury found in her favor for \$178,000, which amount was subsequently reduced by \$60,000, representing the lost profits which the court held were not recoverable given her claim for breach of promise to marry (as opposed to a claim for breach of financial promise). *Id.* at 1263, 1268. *Willey* was subsequently overturned on the grounds that the complaint was insufficiently specific. *Willey*, 47 F.3d at 1486; see also *Jilted Woman Keeps Ring, Not Jury Award*, N.Y. TIMES, Jan. 23, 1995, at B6.

This brings us to the heart of the case and why the trial court opinion in *Willey* is not likely to have much application outside Illinois. Under the Illinois Breach of Promise Act, damages are "limited to the actual damages sustained as a result of the injury complained of." ILL. ANN. STAT. ch. 740, para. 15/2 (Smith-Hurd 1993). Thus, there is no provision for recovery of lost profits. The Act continues: "[n]o punitive, exemplary, vindictive or aggravated damages shall be allowed. . . ." *Id.* para. 15/3. In short, then, unlike the great majority of jurisdictions with

seduction statutes have been either swept away or ignored.⁵⁷ The last

heartbalm statutes, Illinois law contemplates that some recoveries will be allowed as a result of breach of promise, and the principal issue is whether pain and suffering is within the category of "actual damages." *Id.* para. 15/2.

One of the defenses raised in *Wildey* was that the defendant was excused from performing the contract because the plaintiff was suffering from an "obsessive compulsive personality disorder." *Wildey*, 840 F. Supp. at 1266. Defendant argued that this was a sufficient basis for allowing him to break the engagement. *Id.* In rejecting this claim, the court held that "only if [a] disease is fairly permanent and would truly interfere with the physical relations between the parties" might the defendant be excused from performance. *Id.* (citing *Shackelford v. Hamilton*, 19 S.W. 5, 7-8 (Ky. 1892)). Finding that the disorder in question was probably curable through therapy, the court stated that in any event the putative disorder would not render the plaintiff unable to " 'discharge the duties of the marital relation' " and that Springs could not have realistically overlooked this characteristic in the four months of courtship. *Id.* at 1266. Ultimately, the trial court held for plaintiff. *Id.* at 1266-67.

Barry Schatz, a prominent Chicago practitioner in a family-practice law firm, commented on the decision: "You once had to have a lawyer handle your divorce; then you started to need one to draw up your prenuptial agreement. Will you need one now to handle the terms of your engagement? I don't believe that is progress." Reynolds, *supra*, at 63.

57. *People v. Hough*, 607 N.Y.S.2d 884 (N.Y. Dist. Ct. 1994) (highlighting the extent of the criminal law's distaste for sex fraud actions). In this case the accused was charged under a New York statute which defines sexual misconduct as "engag[ing] in sexual intercourse with a female without her consent." *Id.* The complaint alleged that the accused, impersonating his twin brother, Lenny, slipped into Lenny's girlfriend's bed very late one night and had sex with her while she was not fully conscious. *Id.* at 885. Holding that the victim had consented under the statute, both because she had the capacity to consent and because no forcible compulsion had been applied, the court dismissed the information. *Id.* at 886-87. In so doing the court granted the People leave to bring other charges against the accused. *Id.* at 887. Thereafter, the People charged the accused with criminal impersonation, but in the second action the jury found the accused not guilty. See Maureen Fan, *Twin Cleared in Sex with Brother's Girl*, *NEWSDAY*, Oct. 28, 1994, at A24.

The result might be different under a Tennessee statute which provides, in part, as follows: "Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances: . . . (3) The sexual penetration is accompanied by fraud." TENN. CODE ANN. § 39-13-503 (1991).

Also notable is a story reported recently by the Associated Press:

NASHVILLE, Tenn.—The phone rings late at night. In a sexy whisper, a man persuades a woman to unlock her door, undress, put on a blindfold and wait for him in bed.

At least three women did so, thinking he was their boyfriend, and had sex with the so-called Fantasy Man—one woman twice a week for two months.

Blindfolded Women Seek Rape Charges Against Fantasy Man, TAMPA TRIB., Feb. 3, 1995, Nation/World, at 2. Raymond Mitchell III, the Fantasy Man, was recently sentenced to a prison term of 15 years for his crime. *News: Blindfolded Sex*, USA TODAY, June 20, 1996, at 3A.

One English court has extended criminal responsibility for sex fraud to conduct with prostitutes. In *R v. Linekar*, 2 W.L.R. 237 (C.A. 1994), the defendant had negotiated a contract with a prostitute for £25. *Id.* The latter performed her part of the bargain but the defendant left

seduction conviction seems to have been recorded in 1967.⁵⁸ However, rape statutes have some continuing effect in this area.⁵⁹

The heartbalm movement, then, has left us powerless against sex fraud by our partners.⁶⁰ How have we managed? Largely by inhaling the nicotine-inspired wisdom of Bizet's cigarette girls passed down by generations of mothers: "Words of love, how oft they prove Nought but smoke. Warmest sighs, fondest ties, All end in—smoke."⁶¹ And it is not only, as some might think, daughters who have been the objects of their mothers' concern. "My mama done tol' me, when I was in knee-pants," notes Louis Armstrong, "a woman'll sweet talk, and give ya the big eye, but when the sweet talkin's done, a woman's a two-face, a worrisome thing who'll leave you to sing the blues in the night."⁶²

Appalled by what they perceive as the coarsening of the spirit that our courtship games have come to exhibit, and the continuing, if not

without paying. *Id.* While the Court of Appeal, Criminal Division, overturned a conviction for rape, a recent commentator noted that had the charge had been brought under England's Sexual Offences Act of 1956, the Queen would have prevailed since, under the statute, "it is an offence for a person to procure a woman, by false pretences or false representations to have unlawful sexual intercourse in any part of the world." Alan Reed, *Contra Bonos Mores: Fraud Affecting Consent in Rape*, 145 NEW L.J. 174, 176 (1995) (quoting the Sexual Offences Act 1956, 4 & 5 Eliz.2 ch. 69, § 3(1) (Eng.)).

No analogous case seems to have been brought in this country for many years. Thankfully so, according to one commentator, because "the notion that rape, one of the gravest possible infringements of human integrity, should be expanded to include situations where the woman attempts to sell her body and fails to receive the bargained-for price simply makes a mockery of women's long efforts to achieve autonomy, respect, and equality." Vivian Berger, Review Essay, *Not So Simple Rape*, CRIM. JUST. ETHICS, Winter/Spring 1982, at 76.

58. See *Amburgey v. Commonwealth*, 415 S.W.2d 103 (Ky. 1967) (victim was under the age of 21).

59. See, e.g., *McNair v. State*, 825 P.2d 571, 574 (Nev. 1992) (holding that defendant physician's penile penetration of female patients during physical examinations constituted rape).

60. In all my research I have found no society that allows victims of sex fraud to sue.

61. Georges Bizet (librettists Henri Meilhac & Ludovic Halevy) *CARMEN*, act I, sc. 4 (1875).

62. LOUIS ARMSTRONG, *BLUES IN THE NIGHT*, on LOUIS ARMSTRONG MEETS OSCAR PETERSON (Venue Records 1957). The success of this song may attest to its psychological acuity. *Blues in the Night* has parallel lyrics which warn daughters of the untrustworthiness of men. *Id.*; see also SMOKEY ROBINSON, *SHOP AROUND* (Motown Records 1960) (recounting a son's recollection of his mother's advice on relationships with women).

For many, of course, cynicism is learned not through parents or culture, but through the crucible of experience, as when Madame Bovary cries to her lover, Rodolphe, "'You're my king, my idol,'" seeking to reverse the course of his fading interest. GUSTAVE FLAUBERT, *MADAME BOVARY* 215 (Francis Steegmuller trans., 1957). "'You're beautiful! You're wise! You're strong!'" *Id.* Rodolphe is stone-hearted. *Id.* "Since he had heard those same words uttered by loose women or prostitutes, he had little belief in their sincerity when he heard them now: the more flowery a person's speech, he thought, the more suspect the feelings, or lack of feelings, it concealed." *Id.*

increasing, pain of the players, a number of writers in the last few years have complained that the heartbalm actions went too far.⁶³ To protect women by ensuring that sexual activity is preceded by true consent, reformers have proposed punishing sexual fraud.⁶⁴

B. *A Remedy for an Injury*

"There is a slowly growing recognition that the law should play a role in sexual relations between adults," says Northwestern University law professor Jane E. Larson.⁶⁵ "For many years, we had this attitude that sex was either a uniformly positive experience, or that it didn't matter much anyway so was outside the interest of the law. Neither, I think, is true. Sex can hurt. And it does matter to people, a lot."⁶⁶ Larson argues that "the law should be available to those who are damaged because of their sexual relations with someone else."⁶⁷ Driving her point home, Larson adds that "[i]t's only when a person feels he or she has no other option that you have something like the Lorena Bobbitt case."⁶⁸

To ensure fair dealings between sexual partners, Professor Larson wants the sex-motivated lie to be considered not only a sin,⁶⁹ but also a tort.⁷⁰ She spells out her position in an elaborate article entitled,

63. See ESTRICH, *supra* note 7, at 102-03 (postulating that sex fraud can be rape). Cardiff Law School Professor Peter Alldridge regards consent "as vitiated by mistake [if] the mistake is one without which the consent would not have been given; and . . . the person to whom the consent is given knows this." Peter Alldridge, *Sex, Lies and the Criminal Law*, 44 N. IR. LEGAL Q. 250, 267 (1993). Professor Stephen J. Schulhofer would punish "[m]isrepresentations about pecuniary advantages" and other statements "intended to create feelings of isolation, physical jeopardy, or economic insecurity." Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 93 (1992). Since criminal liability ordinarily implies civil liability, it is reasonable to suppose that these authors would support the tort in question. Martha Chamallas, while apparently not supporting criminalization, welcomes civil liability for sex fraud. See Chamallas, *supra* note 56.

64. See *supra* note 63.

65. Quoted in Reynolds, *supra* note 56, at 114.

66. *Id.*

67. *Id.*

68. *Id.* Lorena Bobbitt, it will be recalled, achieved notoriety when she severed her husband's penis as he slept.

69. This is a good place to start thinking about the moral obligation to tell the truth in the sexual setting. Consider a recent letter in *Dear Abby*. Abigail Van Buren, *Dear Abby*, ST. PETERSBURG TIMES, Aug. 10, 1995, at 2D. A woman whose husband of 18 years had left her for a "silicone princess" decided to remedy her perceived faults. *Id.* Soon thereafter she met and married a man who admitted that he was first attracted by her bosom. *Id.* Now ten years married, she wonders whether she should tell him. *Id.* Announces Abby: "If he asks, tell him the truth." *Id.* Is the moral issue so clear?

70. See Larson, *supra* note 14, at 379-81.

*Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction.*⁷¹ The title is borrowed from a line uttered by Don Giovanni, the notorious lecher and eponymous character in Mozart's opera.⁷² For Larson, Don Giovanni—Don Juan in the Spanish tradition—is the Everyman who uses romantic dialogue for the purpose of overcoming the natural diffidence of women and who is utterly without scruple about what he says or promises in order to secure his objectives.⁷³

To put a damper on these Great Deceivers, Larson proposes adding the following language to the *Restatement (Second) of Torts*: "One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation."⁷⁴ Under this definition of sex fraud, which is adopted here, the misrepresentations hypothesized at the outset of this Article might well be actionable.⁷⁵

Building a system which discourages sex fraud is only one benefit—and maybe a minor one at that—held out by Larson who writes, "My argument in this Article is not simply that sexual fraud would advance feminist ends, but also that creating and supporting expectations

71. See Larson, *supra* note 14.

72. See *id.* at 375 & n.1. Leporello, Don Giovanni's servant, boasts that his master has seduced no less than 1003 women in Spain alone. WOLFGANG AMADEUS MOZART, DON GIOVANNI act 1, sc. 2 (Libretto by Lorenzo Da Ponte, Ellen H. Bleiler trans., 1964) [hereinafter DON GIOVANNI].

73. See Larson, *supra* note 14, at 376 n.3. Donna Elvira, his most piteous victim in the opera, claims that Don Giovanni called her "[his] wife." DON GIOVANNI, *supra* note 72, act 1, sc. 2.

74. See Larson, *supra* note 14, at 453. Note that while Larson's article focuses primarily on seduction games of the unmarried, misrepresentations by spouses also would be covered by the tort. Note also that the sexual payoff sought need not be immediate for a false statement to be actionable. See *id.* at 465 (discussing *Perry v. Atkinson*, 195 Cal. App. 3d 14 (Cal. Dist. Ct. App. 1987)).

75. See *Perry*, 195 Cal. App. 3d at 14. Perry met Atkinson, a married man, in 1976 and the two began an affair which lasted for more than a year. *Id.* at 17. In August 1977, Perry discovered that she was pregnant. *Id.* Unhappy with the news, Atkinson persuaded her to have an abortion. *Id.* According to Perry, he did so by assuring her that he wanted a child with her, though not at that point, and by promising that he would conceive a child with her the following year, either directly, or if the relationship did not last that long, through artificial insemination. *Id.* (To fit the case comfortably within the definition of sexual fraud, we need to assume that Atkinson's motivation was to keep the sexual relationship going, a goal he thought would be jeopardized by pregnancy and childbirth.) Larson argues that if the court had adopted her sex fraud theory it would not have granted summary judgment to Atkinson, but would have let the case go to the jury. See Larson, *supra* note 14, at 465.

of fairness and honesty between sexual partners would increase the quality (and perhaps even the quantity) of sexual interaction.”⁷⁶

Larson’s legal argument can be stated simply: Recognizing that lying can be harmful in business settings, the law has long provided victims with a cause of action.⁷⁷ Through the establishment of the (relatively) new tort of intentional infliction of emotional harm, society now recognizes that psychic injury is both real and serious.⁷⁸ Since it is clear that, say, a false representation about marital status, can be even more harmful than, say, the promise of a green car by a seller who actually intends to, and does, deliver a red one, a fortiori sexual fraud should also be actionable.⁷⁹ That sex fraud is usually not actionable is the puzzle of what Larson calls the “sex exception to fraud.”⁸⁰

For Larson the tort emerges organically from “A Feminist Rethinking of Seduction” (the subtitle of her article); her sources are largely feminist and her illustrations exclusively depict innocent female victims and male predators.⁸¹ “As ‘emotional workers,’ ” she emphasizes, “traditionally held responsible for nurturing the personal qualities conducive to emotional intimacy and relational trust, women are more likely to be *exposed to* (and hence suffer) emotional injury than

76. See Larson, *supra* note 14, at 438.

77. *Id.* at 412.

78. See, e.g., *id.* at 406-10. The tort of intentional infliction of emotional distress has been widely adopted in the United States. See *Atchison, Topeka & Santa Fe R.R. v. Buell*, 480 U.S. 557, 568 (1987).

79. “[W]e [should] prohibit fraud to secure sex,” writes Susan Estrich, “to the same extent we prohibit fraud to secure money. . . .” See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1120 (1986). However, the sex-as-contract argument turns at least one feminist argument on its head. Consider, for example, the issue of the enforceability of an agreement between a man and a woman under which the latter will carry a fetus to term or, alternatively, under which the man will be released from obligations to support resulting offspring. Peter D. Feaver and others have argued in favor of giving effect to such agreements. See Peter D. Feaver et al., *Sex as Contract: Abortion and Expanded Choice*, STAN. L. & POL’Y REV., Winter 1992-93, at 213. Martha Fineman denounces this view, arguing generally that it has led to the oppression of women and, in particular, that it would lead to a transfer back to men of the reproductive decisionmaking power hard-won by women. See Martha A. Fineman, *A Legal (and Otherwise) Realist Response to ‘Sex as Contract,’* 4 COLUM. J. GENDER & L. 128 (1994). For more on Fineman’s view, see *infra* note 488 and accompanying text.

80. Larson, *supra* note 14, at 412. Larson’s logic would surely have been lost on the great French novelist, Stendhal. Writing about Americans 175 years ago, he noted, “I can see no trace of the passions which make for deeper joy. . . . It is as if the sources of sensibility have dried up among these people. They are just, they are rational, and they are not happy at all.” Quoted in Kay S. Hymowitz, *The L Word: Love as Taboo*, CITY JOURNAL, Spring 1995, at 30. The cost of eliminating sex-based pain in relationships is explored further below. See *infra* notes 124-26 and accompanying text.

81. See Larson, *supra* note 14, at 381-412.

men.”⁸² Accordingly, it does not seem unfair to conclude that Larson makes her tort gender neutral only to help sell it to males.⁸³

The economic/commercial model (the sale of the car) is an interesting one, and we shall come back to it. However, it exposes a serious weakness in Larson’s case, since no matter how much legal systems circumscribe commercial fraud, they recognize that commerce requires selling—the conscious shaping of self-serving messages. For Larson, by contrast, the function of communication is only to serve the listener’s interests.⁸⁴ Under Larson’s model, any benefit to the speaker is thus highly suspect.⁸⁵ This being the case, Larson cannot and does not address such arguments as: we crave to tell and hear lies; the lie can be a force for good, as well as evil; indeed, it is a *sine qua non* to understanding social life at all times and in all societies; women manipulate men through lies to offset the latter’s economic and social powers;⁸⁶ one person’s lie is another’s truth; and, perhaps most telling, as a result of the foregoing factors, a sex fraud regime is both unworkable and largely unwelcome.⁸⁷ These are some of the themes that will be explored herein.

Setting the tone for her argument and putting aside questions of what exactly was said to whom and what it meant, Larson surveys nineteenth-century European and American literature describing

82. *Id.* at 448-49 (emphasis in original). Larson continues: “Conversely, men, who . . . own and manage property, are more likely to incur . . . economic injury. Shaped by this gendered division . . . , formal legal rules and informal biases disfavoring emotional injury recovery tend to marginalize women and their injuries.” *Id.* at 444.

While these views will have an allure to some, a certain cynicism quickly sets in, for one has to wonder about the degree to which Larson believes them herself. That is, if these views were offered in testimony before the Equal Employment Opportunity Commission on the subject of employment discrimination, would she let them go unanswered? Or would she not likely argue, like most of the rest of us, that having the same interests, talents, and goals as men, women are interchangeable with men in the marketplace? For a discussion of the relative vulnerability of the sexes to sex-based emotional harm, see *infra* notes 273-74 and accompanying text.

83. Susan Estrich holds that men are victimized by fraud as well as women. See ESTRICH, *supra* note 7, at 81.

84. See Larson, *supra* note 14, at 456. “The meaning to be given to particular words or conduct is determined by their effect on an ordinary person.” *Id.*

85. See *id.*

86. This claim actually is being promoted by women. See RICH, *supra* note 6, at 186.

87. The analysis of language, from analytic philosophy through structuralism and deconstruction, can perhaps be considered the main preoccupation of twentieth-century philosophy. In particular, J.L. Austin’s Speech Act Theory has had substantial influence in broadening our conception of the function of language. See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 148-64 (J.O. Urinson & Marina Sbisa eds., 2d ed. 1975). Obviously only a corner of this realm can be discussed here.

conditions for women, that from our perspective, are appalling. From *Tess of the d'Urbervilles* to *The Scarlet Letter*, from George Eliot to Leo Tolstoy, she writes, "[s]eduction leads to public exposure of the liaison (often because of a pregnancy), and quickly thereafter to the lover's abandonment of the woman he has seduced. This betrayal," Larson continues, "seals her fate. The seduced woman is exiled from respectable society," she concludes, "left alone to face the often devastating consequences of sexual relations."⁸⁸ For Larson, this state of affairs was and is only part of a pattern of relentless male patriarchy.⁸⁹

Few, if any, would want to recreate these conditions today. But if there is a feminist case to be made for regulating seduction, Larson does not do it justice. Of course the story of Don Giovanni's seduction spree reflects—and stimulates—men's fantasies (and, we can imagine, produces a kind of smugness in the women who know how to resist his blandishments). But also it is true that in the end Don Giovanni is, to his own disgrace and to the other characters' satisfaction, if not delight, dragged down to hell in a sulfurous abduction.⁹⁰ Don Giovanni, then, is more fiend than personal hero.⁹¹ As for nineteenth-century social conditions, is it not also true that women's economic situation has vastly improved, that virginity is no longer a valued attribute, that birth control and abortion are widely available and thus women are in a stronger position than ever to protect themselves in the case of sexual relationships gone bad? Finally, are we so sure that the story of the nineteenth century centers on women's powerlessness? The story of women's influence on social life, notwithstanding their exclusion from the smoke-filled rooms, has only begun to be told.⁹²

88. Larson, *supra* note 14, at 377.

89. *See id.*

90. DON GIOVANNI, *supra* note 72, act 2, sc. 2.

91. The fate of the Don Juan character is no better in the contemporary setting, such as in the 1971 morality movie, *Carnal Knowledge*, where the Don Juan character (played by Jack Nicholson) receives a punishment exquisitely fitting his crimes. CARNAL KNOWLEDGE (Embassy Pictures & Icarus Productions, 1971). For other screen portrayals of the emptiness of the Don Juan lifestyle, see SATURDAY NIGHT FEVER (Paramount Pictures, 1977), DANGEROUS LIAISONS (Warner Bros. Inc., 1988), and ALFIE (Paramount Pictures, 1966).

In a short but insightful (and as yet unpublished) paper, Professor Paul Heald argues that in the nineteenth century Byron and others transformed the Don Juan character into a superhero who seeks not sex but general transcendence. *See* Paul Heald, *Don Juan, Feminism and the Tort of Seduction* (unpublished, on file with author). But how useful is this for our purpose? The only Don Juan we know is Mozart's.

92. For evidence of women's social and political power before the modern era, see NANCY ARMSTRONG, *DESIRE AND DOMESTIC FICTION: A POLITICAL HISTORY OF THE NOVEL* (1987) and ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN CULTURE* (1977). For a stunning account of

C. *An Unreconstructed Male Speaks*

If Larson's account of women's history did not color her entire argument, we could simply continue with her sex fraud proposal here. Accepting Larson's premises even tentatively, however, would temper any inclination we might have to demur. Accordingly, the other side of women's history must now be told before we return to the presentation and evaluation of Larson's work.

For better and for worse no one has told that story as crisply and starkly as Jean Baudrillard, contemporary French philosopher, social theorist, and surely the best-known writer on the psychology of seduction.⁹³ Reconstructing the historical record construed by Larson and so many others, he would consider Larson's position at best naive.⁹⁴ Baudrillard, whom Larson seems to completely ignore, writes:

The "traditional" woman's sexuality was neither repressed nor forbidden. Within her role she was entirely herself; she was in no way defeated, nor passive, nor did she dream of her future "liberation." It is the beautiful souls who, retrospectively, see women as alienated from time immemorial, and then liberated. . . .

It is easy to paint a picture of woman alienated through the ages. . . . It is all so simple, so obscene in its simplicity—worse, it implies the very essence of sexism and racism: commiseration.

Fortunately, the female has never fit this image. She has always had her own strategy. . . . There is no need to lament the wrongs she suffered, nor to want to rectify them. No need to play the lover of justice for the weaker sex. . . .

women's power at work, see RUTH HARRIS, *MURDER AND MADNESS: MEDICINE, LAW, AND SOCIETY IN THE FIN DE SIECLE* 208-42 (1989), in which she catalogs and analyzes the wholesale acquittals of women in turn-of-the-century France crime-of-passion cases. It is hard to imagine an "all-powerful" judicial establishment composed of Don Juans declaring open season on itself.

We could ask another question here. If nineteenth-century men played a major role in imposing nineteenth-century conditions, something we surely can all agree on, is it not possible that women were complicit in the oppression of their own kind? It does not seem farfetched to hypothesize that, despairing over their husbands' tendency to stray, married women (who surely had the most power within the female population) sought to limit illicit relationships by placing a heavy burden on the other woman. We do not have to assume a giant conspiracy of the majority of women against the minority to underscore this point. If a great divide exists among women today—if each of two large groups of women today believes that the other is undermining the very foundations of women's well-being—can we not imagine an equally divided female population one hundred years ago?

93. See, e.g., JEAN BAUDRILLARD, *SEDUCTION* (Arthur Kroker & Marilouise Kroker eds., Brian Singer trans., 1990) (describing the history and mythology of seduction).

94. Compare *id.* at 19 with Larson, *supra* note 14, at 378-79.

At each moment of the story the game was played with a full deck, with all the cards, including the trumps. And men did not win, not at all.⁹⁵

Baudrillard indeed wonders whether there has ever been a true phallic power:

This entire history of patriarchal domination, of phallocracy, the immemorial male privilege, is perhaps only a story. . . . The opposite hypothesis is just as plausible and, from a certain perspective, more interesting—that is, that the feminine sex has never been dominated, but has always been dominant. . . .

In this sense, the masculine has always been but a residual, secondary and fragile formation, one that must be defended by retrenchments, institutions, and artifices.⁹⁶

What precisely, according to Baudrillard, is it that has functioned as the counterweight to the routine, humdrum exercise of male power? The strength of the feminine is the “artificial bluffing,” the “systematic simulation” of seduction.⁹⁷ “The sovereignty of seduction,” Baudrillard concludes, “is incommensurable with [dwarfs] the possession of political or sexual power.”⁹⁸

Baudrillard’s account falls far short of being fully persuasive. Still, for all his excesses,⁹⁹ in his analysis of seduction, Baudrillard poses a challenge to the all-and-nothing feminist enterprise largely assumed by Larson, and it is through his writing that the one-dimensional nature of her article comes clearly into perspective. But as will be seen throughout this Article, there are many theoretical and practical conundrums, contradictions, and stumbling blocks in the area of sex fraud. Most of the remainder of this Article will be devoted to examining them.

D. *Setting the Record Straight*

In assessing prospects for her proposed tort, Larson finds encouragement in the legal precedents. She begins by citing cases from the 1960s

95. BAUDRILLARD, *supra* note 93, at 19.

96. *Id.* at 15-16. For more on this point, see *infra* note 338 and accompanying text.

97. BAUDRILLARD, *supra* note 93, at 7, 91. While Baudrillard does not define “‘systematic simulation’ ” it seems fair to suppose that he is equating seduction and misrepresentation.

98. *Id.* at 8.

99. These excesses have been noted by a number of commentators. See, e.g., Andrew Ross, *Baudrillard's Bad Attitude*, in *SEDUCTION AND THEORY: READINGS OF GENDER, REPRESENTATION AND THEORY* 214-15 (1989).

and 1970s for the proposition that, notwithstanding the heartbalm movement, the seduction action continued to be viable.¹⁰⁰ Her citations, however, do not support her conclusion.¹⁰¹ Larson next looks over cases from the 1980s and early 1990s and finds an "emerging theory of sexual fraud."¹⁰² But here as well, to the extent that Larson is suggesting that the law currently provides redress for the misrepresentations hypothesized at the outset of this Article, she sacrifices good judgment to hope.

As Larson shows, plaintiffs have sustained viable cases, sounding in fraud where defendants knowingly suffered from a sexually transmitted disease and, without disclosure of its nature, passed the disease to plaintiffs.¹⁰³ In one case she cites, a woman successfully sued to recover medical expenses for an ectopic pregnancy where the defendant had falsely claimed sterility.¹⁰⁴ Larson also usefully points out a

100. Larson, *supra* note 14, at 401 n.117.

101. *See id.* Skousen v. Nidy, 367 P.2d 248, 250 (Ariz. 1962), was held not to be a seduction case at all. Robinson v. Moore, 408 S.W.2d 582, 583 (Tex. Civ. App. 1966), allowed a minor to sue for seduction while making it clear the action was not available to adult plaintiffs absent a promise to marry. In Hutchins v. Day, 153 S.E. 132 (N.C. 1967), the court rejected a claim of seduction because no artifice was employed prior to the first sexual act. That the court did not dismiss the claim for failure to state a cause of action, which for Larson is of great import, may have been entirely without significance. The same can be said of McCraney v. Flanagan, 267 S.E.2d 404, 405 (N.C. Ct. App. 1980), which also denied recovery for lack of proof of artifice. To be sure, the courts in Slawek v. Stroh, 215 N.W.2d 9, 18 (Wis. 1974), Breece v. Jett, 556 S.W.2d 696, 708 (Mo. Ct. App. 1977) and Piggott, 557 S.W.2d at 695 held that the cause of action for seduction existed. But such judgments in only two jurisdictions hardly make that action viable.

102. *See* Larson, *supra* note 14, at 402. Writing five years earlier, Chamallas, *supra* note 56, at 810-13, also discerned a trend.

103. *See, e.g.,* Kathleen K. v. Robert B., 198 Cal. Rptr. 273, 274 (Cal. Ct. App. 2d Dist. 1984) (upholding minor plaintiffs cause of action for fraud against minor defendant, who misrepresented his herpes-infected status prior to intercourse); Mussivand v. David, 544 N.E.2d 265 (Ohio 1989) (citing many venereal disease misrepresentation cases and providing historical perspective); *see also* Larson, *supra* note 14, at 405 n.136 (citing numerous cases involving claims for misrepresentation of herpes and HIV status). In the case of AIDS, plaintiffs may even be able to prevail based on fear of infection. *See, e.g.,* Castro v. New York Life Ins. Co., 588 N.Y.S.2d 695 (Sup. Ct. N.Y. County 1991); Harris J. Zakarin, Comment, *Scared to Death: A Cause of Action for AIDS Phobia*, 10 *TOURO L. REV.* 263 (1993) (citing *Castro*) (discussing how a plaintiff's claim for emotional distress was upheld where the plaintiff is pricked by HIV-infected hypodermic needle improperly disposed of by defendant). *But see* Kaufman v. Physical Measurements, Inc., 615 N.Y.S.2d 508, 509 (1994) (holding that "[i]n the absence of proof of a likelihood of contracting AIDS, recovery for emotional distress will be denied as overly speculative and remote").

104. Larson, *supra* note 14, at 406 n.137 (citing *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 425 (Cal. Ct. App. 2d Dist. 1983) (upholding pregnant plaintiff's fraud action against defendant who misrepresented to plaintiff that he was sterile)); *see also* *Alice D. v. William M.*, 450 N.Y.S.2d 350 (Small Claims Ct. 1982) (allowing recovery of a minimum sum to a victim of

number of recent fraud cases involving abuse of a professional relationship—legal, psychiatric, pastoral, educational—where plaintiffs have recovered.¹⁰⁵

The physical injury and abuse of professional relationship cases aside, however, defendants in sex fraud cases have overwhelmingly prevailed.¹⁰⁶ Indeed, the only recent case Larson adduces in support of

sexual fraud who underwent an abortion).

105. See Larson, *supra* note 14, at 154-64; Richard H. v. Larry D., 243 Cal. Rptr. 807, 810 (Cal. Ct. App. 1st Dist. 1988). But see Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988) (holding that minister engaged in marital counseling who began affair with parishioner was "not liable for breach of fiduciary duty, fraud, misrepresentation or nondisclosure"); Weisbeck v. Hess, 524 N.W.2d 363, 366-68 (1994) (dismissing plaintiff's professional negligence suit against defendant marriage counselor for affair with plaintiff's wife during the course of therapy on grounds that wife's communications with defendant were privileged).

106. A frequent fact pattern in sex fraud cases is where one sexual partner falsely claims to be infertile or to be using birth control. If a child is subsequently born, does the defrauded party have a cause of action? I have found no cases holding for plaintiffs in these circumstances. See, e.g., C.A.M. v. R.A.W., 568 A.2d 556, 563 (N.J. Super. Ct. App. Div. 1990) (holding that public policy precludes tort actions involving alleged misrepresentations about contraception); L. Pamela P. v. Frank S., 449 N.E.2d 713, 716 (N.Y. 1983) (holding that the defendant father's constitutional right to decide whether or not to father a child does not entitle defendant to avoid child support even if the mother misrepresented that she was using contraception); Douglas R. v. Suzanne M., 487 N.Y.S.2d 244, 246 (Sup. Ct. 1985) (dismissing plaintiff's claim that defendant's failure to inform plaintiff that she removed IUD constituted misrepresentation which would vitiate her child support claim); Linda D. v. Fritz C., 687 P.2d 223, 225 (Wash. Ct. App. 1984) (holding that "the [child support] statute . . . does not contemplate whether one of the parents may or may not have breached a contract to use contraceptive measures . . . [but] only those facts relating to the needs of the child"). To be sure, the stated basis for denying liability in some of these cases is troubling: the protection of the privacy of sexual partners. See, e.g., Douglas R., 487 N.Y.S.2d at 245 (stating that "[c]ourts which have considered the question [of sexual misrepresentation] have found it to be intertwined with an individual's right to privacy and have declined to interject the state into an area as personal as the practice of birth control"). Why the law ought to protect privacy when one party is willing to waive it is never explained. In some of these cases courts confuse a privacy notion in tort with constitutional privacy. See, e.g., L. Pamela P., 449 N.E.2d at 715-16 (holding that absent state action, father's constitutionally protected right not to beget a child falls short of a cognizable defense to a child support claim). Other opinions have offered a more persuasive rationale for denying recovery to a defrauded parent. In Barbara A. v. John G., 193 Cal. Rptr. 422, 429 (Ct. App. 1983), for example, the court explained that "it is not sound social policy to allow one parent to sue the other over the wrongful birth of their child. Using the child as the damage element . . . could seldom, if ever, result in benefit to a child." Presumably the court was concerned that a lawsuit would create or aggravate adversarial relationships between the parties which would carry over to relationships with their children.

Characterizing an action as intentional infliction of emotional harm does not seem to help plaintiffs. See Sanders v. Rosen, 605 N.Y.S.2d 805, 811 (Sup. Ct. 1993) (holding that "[t]he public policy of this State now looks with disfavor on actions for seduction. . . ."); Snider v. Keenan, No. 92-J-39, 1994 WL 45308, at *1 (Ohio Ct. App. 1994) (holding that there is no recognized cause of action for breach of promise to marry); Jose F. v. Pat M., 586 N.Y.S.2d

734, 736 (Sup. Ct. 1992) ("It is inappropriate for the court to intrude into an intimate relationship in an attempt to substantiate what is tantamount to an action for seduction."); *see also Strock*, 527 N.E.2d at 1242 (finding that intentional infliction of emotional distress is not a proper cause of action when asserted within a marital context).

Singh v. Singh, 611 N.E.2d 347 (Ohio Ct. App. 1992), a case alleging fraud and intentional infliction of emotional distress, responds most directly to Larson's complaint about the "sex exception to fraud." *See Larson, supra* note 14, at 412. Dr. Kuldeep Singh advertised the availability for marriage of his sister-in-law, Satinder. *Singh*, 611 N.E.2d at 348. Harbhajan Singh (no relation then) responded and subsequently married Satinder. *Id.* The marriage failed. *Id.* Harbhajan sued Dr. Kuldeep for failing to disclose that he had "performed surgery on [Satinder] for 'an incurable disease which adversely impairs her ability to have normal sexual relations.'" *Id.* (quoting plaintiff). In upholding dismissal of the complaint, the court held that "as a [matter of] public policy . . . this state cannot recognize a cause of action which treats female persons as goods and subjects others to suits if the women themselves are found unacceptable." *Id.* at 350. It would be easy to distinguish this case from one where, say, Satinder had advertised herself as available for marriage, however, the *Singh* court's market metaphor could be read to mean that in this court, at least, the result would have been the same.

One could imagine that the combination of economic and emotional harm might combine into a potent plaintiff's brew when he claims that his wife misrepresented his paternity of children and there was no basis for suspecting otherwise at the time. There are many cases of this nature where plaintiffs seek to free themselves from support obligations. *See, e.g., Pinter v. Pinter*, 641 N.E.2d 101, 105 (Ind. Ct. App. 1994) (holding that father was released from future obligations but not arrearages). *But see Campbell v. Campbell*, 540 N.Y.S.2d 556, 557 (App. Div. 1989) (quoting *Matter of Ettore I. v. Antela D.*, 513 N.Y.S.2d 733, 738 (Sup. Ct. 1987) (ruling against plaintiff because "his" children, ages 16 and 10, grew up believing the plaintiff was their natural father and stating, "[T]he unequivocal trend and evident purpose of these decisions has been to zealously safeguard the welfare, stability and best interests of the child by rejecting untimely challenges affecting his or her legitimacy.")). In *Nagy v. Nagy*, 258 Cal. Rptr. 787 (Ct. App. 1989), a plaintiff sued his ex-wife for damages alleging that she had misrepresented his paternity of her child: "In our opinion, allowing a non-biological parent to recover damages for developing a close relationship with a child misrepresented to be his and performing parental acts is not a damage which should be compensable under the law. *Id.* at 791. But in a sex fraud world, Mr. Nagy would presumably prevail, and maybe even recover for prior support as well as for emotional harm. *See Reynolds, supra* note 56, at 114. To the best of my knowledge, however, no plaintiff has yet succeeded in such a case.

Where defendant goes through a bigamous marriage, courts occasionally have provided relief. *See Friedman v. Libin*, 157 N.Y.S.2d 474, 485 (Sup. Ct. 1956) (quoting *Snyder v. Snyder*, 14 N.Y. Supp. 2d 815 (1939): "[A]n action to recover damages because of a consummated bigamous marriage is not one which is subject to abuse or manipulation by unscrupulous persons. It is neither within the letter or the intentment [sic] of the [heartbalm] law"), *aff'd*, 161 N.Y.S.2d 826 (1957). *Friedman* also held that the right to sue is not waived by continued cohabitation after the prior marriage is revealed, although such action may mitigate damages. *Id.* at 483. *But see Buckley v. Buckley*, 184 Cal. Rptr. 290, 294 (Cal. Ct. App. 1982) (holding that the plaintiff husband's breach of promise claim against defendant wife, who was already legally married at the time of plaintiff and defendant's wedding, was barred by California's "heart balm" statute, notwithstanding the fact that the marriage constituted bigamy).

Plaintiffs' lack of success in seduction cases is largely matched by their experience in breach of promise cases. *See Zaragoza v. Capriola*, 492 A.2d 698 (N.J. 1985) (holding that to recognize plaintiff's action for breach of promise to marry as a basis for exacting child support payments

her proposed new tort is *Parker v. Bruner*,¹⁰⁷ a case which produced a vigorous dissent at both the appellate and Supreme Court level. Here the court upheld a verdict for the plaintiff where the defendant, a prosperous, 34-year-old dentist, coaxed a 23-year-old naïf into a lengthy sexual relationship that resulted in two unwanted pregnancies and one abortion.¹⁰⁸ The court pointed out that there was evidence that the defendant had misrepresented his affection for her and had promised marriage, which obligation he had no intention of keeping.¹⁰⁹ That this case cannot fairly be understood as the basis for an "emerging theory of sexual fraud" is obvious when we recall that it arose in Missouri, the only state which had regularly held for plaintiffs in sex fraud cases.¹¹⁰

If there is only one plaintiff victory in a pure seduction case¹¹¹ since 1980, what shall we make of it? It could be argued that the absence of reported cases suggests that defendants are settling. But in

from a defendant not related to plaintiff's children would "make a mockery of the institution of marriage and personal relationships"); *Snider*, 1994 WL 45308, at *1 (holding that there is no cause of action in Ohio for breach of promise to marry); *Vrabel v. Vrabel*, 459 N.E.2d 1298 (Ohio 1983) (holding that the plaintiff's claim for breach of promise to marry is statutorily barred). *But see* *Bradley v. Somers*, 322 S.E.2d 665, 666 (S.C. 1984) (holding defendant liable for waiting until the moment of signing of the marriage license to inform his intended that he would not go through with the wedding). *See also* *Wildey*, 840 F. Supp. at 1266, *rev'd*, 47 F.3d at 1486 (overturning plaintiff's favorable trial court ruling on her breach of marriage promise claim due to lack of specificity of the complaint).

Larson has welcomed the trial court's decision in this latter case, which came down after her article was published. While suggesting that she does not want individuals to be forced to marry where promises have been made, she goes on to say, "But if you make promises to someone, gain your objective, especially if it's sexual, and then don't follow through on those promises, that should be actionable. I hope and expect," Larson adds, "that the *Wildey* verdict will serve to inspire many other people, men and women, to consider a similar course of action." *Id.* Larson's expectations appear ill-founded, however, in light of the reversal of the *Wildey* verdict on appeal. *Wildey*, 47 F.3d at 1486.

Recovery for financial harm still may be within reach. In the context of breach of promise cases, see *Wilson v. Dabo*, 461 N.E.2d 8, 10 (Ohio Ct. App. 1983) (holding that plaintiff may recover property transferred in reliance upon promise of marriage because of equitable principle of unjust enrichment) and *In re Marriage of Heinzman*, 596 P.2d 61, 62 (Colo. 1979) (holding that a man may recover real property conveyed to common-law wife when such conveyance was in reliance upon her failed promise to wed in actual ceremony). *But see* *Vrabel*, 459 N.E.2d at 1299, 1303 (holding that ex-husband's breach of promise to remarry plaintiff was not actionable under the state heart balm statute even though the defendant ex-husband induced plaintiff to give up her job and move back to Cleveland where he resided).

107. 686 S.W.2d 483 (Mo. Ct. App. 1984), *aff'd*, 683 S.W.2d 265 (en banc), *cert. denied*, 474 U.S. 827 (1985).

108. *Parker*, 686 S.W.2d at 485.

109. *Id.* at 485-86.

110. *See supra* notes 101-02 and accompanying text.

111. *See supra* notes 107-09 and accompanying text.

this tell-it-all era of ours, is it likely that the prospect of a public record would shame a shameless generation of defendants into capitulation? Or is it not more likely that plaintiffs, having read the older cases in the light of contemporary social conditions, have simply given up?

The sexual fraud issue comes up in two other settings: alimony/equitable distribution and annulment. In the former, one spouse is asking for damages from the other on account of some egregious behavior by the other spouse. Here again, however, the courts have put up strong resistance.¹¹² Plaintiffs have fared better where they have

112. The Supreme Court of North Carolina has held that marital misconduct that does not reduce the value of marital assets is not grounds for departing from general equitable distribution rules (although the court suggested that for alimony purposes such fault might be taken into account). *Smith v. Smith*, 331 S.E.2d 682, 687 (N.C. 1985). In New York, the Domestic Relation Law requires that consideration for both alimony and equitable distribution purposes be given to "any other factor which the court shall expressly find to be just and proper." N.Y. DOM. REL. LAW § 236(B)(5)(d)(13) & 236(B)(6)(a)(11) (McKinney 1986). *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 113-14 (Sup. Ct. 1984) gives meaning to this commonly used language.

[W]e conclude that, as a general rule, the marital fault of a party is not a relevant consideration under the equitable distribution law in distributing marital property upon the dissolution of a marriage. This is not to deny, however, that there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare and will require proof of marital fault substantially greater than that required to establish a bare prima facie case for matrimonial relief. They will involve situations where the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that shocks the conscience of the court thereby compelling it to invoke its equitable power to do justice between the parties.

Id. at 113-14.

New York courts have found such extraordinary circumstances where a defendant raped his minor stepdaughter, *Vazquez v. Vazquez*, N.Y. L.J., Apr. 23, 1987, at 16 (reciting an unpublished opinion), and where defendant attempted to engage a person to murder his wife and dispose of the body, *Brancovenu v. Brancovenu*, 535 N.Y.S.2d 86, 90 (Sup. Ct. 1988). Adultery is not such a circumstance. *See LeStrange v. LeStrange*, 539 N.Y.S.2d 53, 54 (1989) (finding that wife's adultery was not conduct so egregious or uncivilized as to warrant deprivation of her share of the marital property); *Nolan v. Nolan*, 486 N.Y.S.2d 415, 418 (1985) (holding that wife's adultery was insufficiently egregious to justify divestiture of her marital property interest); *Pacifico v. Pacifico*, 475 N.Y.S.2d 952, 955 (1984) (holding that defendant husband's alleged illicit relationship had no bearing on the issue of property distribution). *But see Givens v. Givens*, 599 S.W.2d 204 (Mo. Ct. App. 1980) (affirming a Missouri trial court's determination that wife should get marital residence because of adultery of husband which, the court concluded, had led to marital breakdown).

Two cases highlight the current state of the law in this area. In *McCann v. McCann*, 593 N.Y.S.2d 917 (Sup. Ct. 1993) in the context of an in limine motion, plaintiff alleged that defendant had misled her into thinking he would undertake medical procedures to make him

limited their objectives to seeking an annulment.¹¹³ Thus, an annulment was granted to a sick and old man because defendant represented herself as a virtuous woman whereas, in fact, she had run a house of prostitution for years¹¹⁴ and to another man where his wife represented that she was a widow when, in fact, she was a divorcee.¹¹⁵ In more modern times, annulments have been granted where a defendant could not engage in normal sex¹¹⁶ and where a defendant misrepresented a desire to have children.¹¹⁷ The test in annulment cases is whether the fraud goes "to the very essence of the marital relation."¹¹⁸ Notwithstanding

fertile after she had expressly made that a condition of her marriage to him. *Id.* at 919. The court held that the *Blickstein* standard, under which the issue of marital fault is irrelevant in determining marital property distribution, had not been satisfied. *Id.* at 923. In *Askew v. Askew*, 28 Cal. Rptr. 284, 299 (Cal. App. 4th Dist. 1994), a trial court award for plaintiff on the ground of misrepresentation of affection was reversed on appeal.

In a distinguishable fact pattern, a Michigan plaintiff met with somewhat more success. *Gubin v. Hodisev*, 494 N.W.2d 782 (Mich. Ct. App. 1992). Here, where a nonresident alien went through a marriage ceremony with plaintiff, but showed he was interested only in entering the country, the court held that the fault clause in the Michigan equitable distribution statute could be used to allow plaintiff to recover for her time and out-of-pocket medical expenses. *Id.* at 785-86. In another case which might also be considered a sham marriage, the wife was entitled to recover under the fault clause of an alimony statute where three weeks into the marriage, the husband, who had had another relationship prior to the marriage, announced that he had made a mistake despite the fact that the wife had given up alimony from a former husband and had left her home and job for him. *Bridgeman v. Bridgeman*, 391 S.E.2d 367, 370 (W. Va. 1990).

113. See *infra* notes 114-17 and accompanying text. With the proliferation of no-fault divorce statutes, fewer marriages are undone through annulment in our times. Nevertheless, because an annulment may produce financial consequences that are different from those brought on by divorce, annulment cases are still numerous.

114. *Etsminger v. Etsminger*, 161 P. 607, 609 (Kan. 1916). For an out-of-date, but full annotation on this subject, see H.D. Warren, Annotation, *Concealed Premarital Unchastity or Parenthood as Ground of Divorce or Annulment*, 64 A.L.R. 742 (1959).

115. *Minner v. Minner*, 144 N.E. 781, 783 (N.Y. 1924).

116. See, e.g., *Kshaiboon v. Kshaiboon*, 652 S.W.2d 219 (Mo. Ct. App. 1983) (affirming wife's annulment of marriage on grounds that prior to marriage, husband concealed his physical and mental incapacity to engage in normal sexual relations).

117. See, e.g., *Wolfe v. Wolfe*, 389 N.E.2d 1143, 1145 (Ill. 1979) (granting an annulment based on fraudulent misrepresentation prior to marriage that former husband was still alive when disclosure of this information would have precluded marriage on religious grounds); *Jordan v. Jordan*, 35 A.2d 168, 169 (N.H. 1975) (holding annulment was proper based on nondisclosure of prior marriage to one for whom such revelation would have precluded marriage and where health would have been endangered by continuation of the marriage); *V.J.S. v. M.J.B.*, 592 A.2d 328 (N.J. Super. Ct. Ch. Div. 1991) (holding that husband's concealment of intent to have children was fraud warranting annulment where husband expressed contrary intent in pre-nuptial agreement); *Kober v. Kober*, 16 N.Y.2d 364, 369 (1965) (holding that concealment of prior membership in the Nazi party was grounds for annulment); *Potter v. Potter*, 275 N.Y.S.2d 499, 500 (App. Div. 1966) (affirming annulment based on concealment of affliction of voyeurism).

118. *In re Marriage of Johnston*, 22 Cal. Rptr. 2d 253, 255 (Cal. Ct. App. 1994) (emphasis in original). As can be imagined, this standard cannot be defined except by illustration.

the above holdings, it seems fair to conclude that most plaintiffs have failed the test.¹¹⁹

F. *Different Voices*

Since it should now be clear that the law does not ordinarily compensate victims of sexual fraud, we can return to the question of whether it should. While no academic response to Larson yet has been attempted, a number of commentators have raised relevant and serious questions. Speaking of misrepresentation as a basis for a criminal prosecution, for example, Vivian Berger questions the desirability of a rape charge where a man represents that he is rich and famous when he is not.¹²⁰ Also speaking of a possible criminal statute for sexual fraud, Donald Dripps writes that "the theft-of-services statutes only punish representations made in bad faith when the representation is a necessary

119. "The concealment of 'incontinence, temper, idleness, extravagance, coldness, or fortune inadequate to representations' " cannot be the basis for an annulment." *Marshall v. Marshall*, 300 P. 816, 818 (Cal. 1931) (quoting 16 CALIF. JUR. 967). For example, a shoe salesman's false representation that he owned his shoe store is not sufficient grounds for annulment. *Mayer v. Mayer*, 279 P. 783, 787 (Cal. 1929). Similarly, a court has held that, even if it were to believe plaintiff wife that she did not know of husband's drunkenness, laziness, and slovenliness prior to marriage, an annulment could not be granted. *Johnston*, 22 Cal. Rptr. 2d at 355. In the same vein, neither premarital false declarations of love and affection nor the fact that one party married for money is sufficient for an annulment. *See Woronzoff-Daschkoff v. Woronzoff-Daschkoff*, 104 N.E.2d 877, 880 (N.Y. 1952) (citing *Schaeffer v. Schaeffer*, 144 N.Y.S. 744 (N.Y. 1913) and *Feig v. Feig*, 249 N.Y.S. 695, 700 (N.Y. 1931)). Likewise, misrepresentations regarding age were held not to be actionable. *Pankiw v. Pankiw*, 256 N.Y.S.2d 448, 450 (N.Y. App. 1965).

In the recent case of *Woy v. Woy*, 737 S.W.2d 769 (Mo. Ct. App. 1987), the wife had not informed her future husband prior to marriage that she used drugs and had engaged in homosexual activities. *Id.* at 771. In an action for annulment by the husband, the court held that in view of the fact that for the ten-year period of cohabitation—including five years before marriage—their sexual relations were "fine" and that wife was not addicted to drugs, there was no affirmative duty to disclose. *Id.* at 773-74. Denying the husband's petition, the court noted that had the subject of the nondisclosure been more serious, for example a venereal disease, a different decision might have resulted. *Id.* at 774. The court also noted that under the circumstances of this case, the decree of annulment would have left the wife with nothing. *Id.*

In another recent case, plaintiff sought an annulment of his marriage to defendant when he found out that the latter's mother was having an illicit intercaste relationship. *Patel v. Navital*, 627 A.2d 683, 686 (N.J. Super. Ct. App. Div. 1992). Plaintiff argued that because he was a practicing Hindu, the actions of his mother-in-law brought shame upon him. *Id.* at 685-86. Rejecting plaintiff's petition, the court held that while "[p]ublic policy encourages full disclosure of pertinent facts especially in contemplation of entering a bond as significant as marriage . . . [it] imposes a duty to investigate in matters affecting character," which obligation was not satisfied by plaintiff in this case. *Id.* at 688.

120. *See Berger, supra* note 57, at 76-77. This issue will be taken up at some length in Part VIII.

and sufficient condition for obtaining the service.”¹²¹ Holding that it is difficult to know the effect of specific misrepresentations in the context of sexual fraud, Dripps is dubious about imposing criminal sanctions.¹²²

Focusing on sexual harassment in the workplace, George Mason University law professor Lloyd Cohen points to difficulties in sexual/romantic communication, which he ascribes to differences in speaking styles based on gender, class, ethnicity and the like.¹²³ The law, he

121. Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1803 (1992) (emphasis omitted).

122. See *id.* This argument would, of course, carry over into the civil field. Dripps also points out that criminalizing sex fraud would recriminalize adultery. *Id.* Since it seems reasonable to suppose that most adultery is committed in secret, Dripps is surely right here. The sexual fraud would inhere in the future sexual benefits sought from the victim of the lie. See Larson, *supra* note 14, at 466-67.

Richard Posner has attempted an explanation of why victims of sex fraud have not received the protection accorded to rape victims:

The thinking may be that if [a] woman is not averse to having sex with a particular man, the wrong if any is in the lies (and we usually do not think of lying in social [as opposed to economic] settings as a crime) rather than in an invasion of her bodily integrity. It is otherwise if the man is impersonating the woman's husband . . . [in which case] the act itself, were the true facts known to the woman, would be disgusting as well as humiliating, rather than merely humiliating as in the case of the common misrepresentations of dating and courtship.

RICHARD A. POSNER, SEX AND REASON 392-93 (1992).

The first distinction Posner draws—between economic and social lies—is not helpful. For example, if a man lies to get money, claiming that you have already won \$10 million, and now need to reserve payment with a \$5000 deposit, he surely has committed larceny, if not criminal fraud, when he keeps the \$5000 without turning over the advertised winnings. See 32 AM. JUR. 2D. *False Pretenses* § 78 (1995). While not actionable by itself, the lie is essential in establishing the case. *Id.* To say that this conclusion does not extend to sex fraud because the lie is social rather than commercial in character is merely to state a money-isn't-sex conclusion. See Larson, *supra* note 14, at 412 n.168. The disgusting versus humiliating distinction is more useful in explaining current law, but it too, however, has limitations. See *id.* at 420-21. A woman who links up with a man who misrepresents his past is likely to be sickened by the revelation that her partner is a convicted pederast. See *id.* On the other hand, a woman who has willingly had sex with a particular male can reasonably be thought to have consented in some sense to the action. See *id.* It is perhaps for this reason that Posner argues that the adult “who has acted the fool is likely to feel slightly less offended at having been fleeced” than other victims of sexual abuse. POSNER, *supra*, at 393. Larson, however, would almost surely reject this view on the grounds that the breach of trust implicit in the former would make it even more painful. See Larson, *supra* note 14, at 420 n.203 and accompanying text.

123. See, e.g., Orlando Patterson, *Gender and Liberal Fallacies*, N.Y. TIMES, Oct. 20, 1991, at E15 (recounting how Clarence Thomas' background might have led him to make the remarks

suggests, could come down hard on communicators who gave offense. But in doing so, he cautions, lawmakers would be making a common mistake. “[S]ince the transaction costs of law are generally not explicitly modeled, discussion of legal reform is often carried on with the implicit assumption that costs are negligible and may be ignored.”¹²⁴ What is that cost? Romantic communication, a social preliminary to romantic union, might never take place in a legally charged atmosphere.¹²⁵

This would especially be the case if the problem of accurate communication were compounded by a drive to deliberately miscommunicate, i.e., to lie. Indeed, if this drive is as powerful as the evidence herein will suggest, Larson’s proposed tort would lead to nothing short of a revolution in mating customs.¹²⁶

G. Deception

Again, we will deal with these matters in greater detail below. For now, recall Don Giovanni’s complaint in Larson’s title phrase: “*They Call My Good Nature, ‘Deceit.’*”¹²⁷ Deceit is the general classification of behavior that encompasses lies.¹²⁸ We can determine its importance in daily life by focusing on our manners.¹²⁹ We feign interest in others’ thoughts and problems; we still ourselves when we ought to speak; we flirt; i.e., we “behave amorously without serious intent.”¹³⁰ We do all this to create, or at least emphasize, good qualities and hide bad ones.¹³¹

“The practical value of appearances, albeit hypocritical or deceptive, is too great to ignore,” Ludwig writes. “The disguise which appearance affords allows us to . . . communicate to others that we are one of them,” he continues, “that we are not enemies or strangers to their ways of thinking or behavior. . . . Appearance becomes our passport to travel

alleged by Anita Hill).

124. Lloyd R. Cohen, *Sexual Harassment and the Law*, SOCIETY, May/June 1991, at 8, 11.

125. That working in a “safe” environment—an environment free from all sexual pressure from those in power—is not the highest goal for either men or women was made clear to me through responses to a brief questionnaire I distributed to one of my classes several years ago. I had asked whether students would approve of a blanket rule prohibiting romantic relationships between supervisors and supervisees and had pointed out that this would mean in the best of cases that if there was any interest in courtship one of the parties would have to seek a transfer to another department. Ninety percent of both men and women said no.

126. See *infra* Part III.

127. Larson, *supra* note 14, at 374-75.

128. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 329 (1988).

129. See generally ARNOLD M. LUDWIG, THE IMPORTANCE OF LYING 27-90 (1965).

130. WEBSTER’S, *supra* note 128, at 473.

131. LUDWIG, *supra* note 129, at 27-90.

in circles we choose, and it grants us diplomatic license to travel about without fear of harm.”¹³²

Hardly anyone complains about this behavior today. But how far should we be able to travel on a hot passport? Is misrepresentation beyond the realm of the foregoing social graces also part of the bedrock of our culture? One thing is sure. If from an early age we start off our relationships as deceivers, and we become adept at the practice, only a clear and convincing argument will induce us to legislate against the lie.

III. THE WORLD OF LIES

Now it is evident that speech was given to man, not that men might therewith deceive one another, but that one man might make known his thoughts to another. To use speech, then, for the purpose of deception, and not for its appointed end, is a sin.

—St. Augustine¹³³

It is questionable whether the language of humanity lends itself perfectly to the expression of truth; it derives from the cries of animals and has kept some of their characteristics. It expresses emotion, passions, needs, joy and sorrow, hate and love. It was not meant to tell the truth. There is no truth in [our] souls and . . . the metaphysicians who have described it are lunatics.

—Anatole France¹³⁴

To evaluate a new cause of action for sexual misrepresentation we must contextualize truth-telling. Is lying morally defensible? Is truth-telling? Is lying so widespread that any attempt at regulation is doomed? Larson lets us down by providing none of these perspectives. What, then, are the normative and the descriptive dimensions of truth-telling?

132. *Id.* at 64-65.

133. SAINT AUGUSTINE, FAITH, HOPE AND CHARITY 29 (Louis A. Aravel trans., 1947).

134. Anatole France, *La Vie en Fleur*, DIAL, Dec. 1921, at 692.

A. *To Lie or Not to Lie*

As suggested by the above epigraphs, the question of whether we ought to tell the truth has evoked the strongest and most eloquent sentiments. A review of a veritable feast of works on the subject is obviously not possible here; we shall have to be content with but a few choice morsels. "The lie in its mere form is man's crime against his own nature," announces Kant, "and is a vice which must make a man disreputable in his own eyes."¹³⁵ "It would be impossible to declare more fully what a vile, detestable and outrageous thing [a lie] is," writes Montaigne.¹³⁶ How can we understand these teachings? Augustine spells out the consequences of their rejection: "When regard for truth has been broken down or even slightly weakened, all things will remain doubtful."¹³⁷

But must we mean what we say? Is truth-telling all it is cracked up to be? Truth leads to facts and "[f]acts," laments Oscar Wilde through one of his characters, "have invaded the kingdom of Romance. Their chilling touch is over everything. They are vulgarizing mankind."¹³⁸ Presumably reacting to the wild success of the scientific ethos in his age, Wilde urges the author to look forward to the time when "[f]acts will be regarded as discreditable, Truth will be found mourning over her fetters, and Romance, with her temper of wonder, will return to the land."¹³⁹ Francis Bacon brought the message down to earth while demonstrating its historical roots. "Doth any man doubt," he asked, "that if there were taken out of men's minds vain opinions, flattering hopes, false valuations, imaginings as one would, and the like, but it would leave the minds of a number of men poor shrunken things, full of melancholy and indisposition, and unpleasing to themselves?"¹⁴⁰ More

135. See LUDWIG, *supra* note 129, at 3. No reference to the original is provided. Consistent with this thought and his epigraphic comment above, Augustine believed that lying was wrong even to protect chastity. See R.J. DeFerrari ed., *Lying*, in TREATISES ON VARIOUS SUBJECTS 68-70, 105-07 (1952).

136. See LUDWIG, *supra* note 129, at 3.

137. Quoted in SISSELA BOK, LYING at xv (1989). Bok herself turns an elegant phrase. "As lies spread . . . trust is damaged. Yet," she goes on, "trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged the whole community suffers; and when it is destroyed, societies falter and collapse." *Id.* at 26-27.

138. Oscar Wilde, *The Decay of Lying*, in THE PENGUIN BOOK OF LIES 261 (Philip Kerr ed., 1991).

139. *Id.* at 264.

140. Francis Bacon, *Of Truth*, in ESSAYS, CIVIL AND MORAL 1-2 (1910). Wilde might be excited by some tentative progress along the lines he suggests. A well-regarded member of the Narrative School acknowledges that: "Although I have a preference for storytelling in my scholarship, I like to have 'facts' at my disposal to prove my points." Deborah W. Post, *Critical Thoughts About Race, Exclusion, Oppression, and Tenure*, 15 PACE L. REV. 69, 74 n.14 (1994).

contemporarily—and, like Bacon, focusing on the humdrum lives most of us lead rather than on the Life of the Artist—philosopher David Nyberg holds that “a healthy, livable human lifetime of relationships with others is . . . inconceivable without deception.”¹⁴¹

With all these conflicting views, how shall we lead our lives? The issue is, of course, complicated by the myriad of settings that present themselves in which we are tempted to lie. Feminist poet and MacArthur Fellow Adrienne Rich tries to help here. “[T]o have an honorable relationship with you,” she writes, “means that most of the time I am eager, longing for the possibility of telling you . . . [t]hat we . . . are trying, all the time, to extend the possibilities of truth between us.”¹⁴² Surely this graceful conception is one that almost all of us can subscribe to. But how useful is it really? “Most of the time” may leave a lot of time unaccounted for and Rich does not tell us when either the general rule or the exception applies. There being no solution at hand to our first question, i.e., the extent to which the lie is morally defensible, we turn to the pattern our lying actually takes. Who knows? Maybe some moral and even legal conclusions will emerge.

B. *Why People Lie*

From a sizable literature on the subject, we can construct a short but useful taxonomy of the reasons people lie. These categories can overlap under some conditions, but for analytical purposes we will keep them separate. For one thing, we lie to protect ourselves from harm.¹⁴³ Second, we lie “to satisfy selfish motives for manipulation, . . . to attract attention [to ourselves], even love, or to impress others with exaggerated abilities or accomplishments. . . .”¹⁴⁴ Third, we lie for the sake of

141. DAVID NYBERG, *THE VARNISHED TRUTH* 2 (1993). Nyberg does not want to be misunderstood: “I repudiate all harmfully exploitative deceptions such as consumer fraud, insider trading, the misuse of public office, . . . husbands and wives cheating on each other, . . . cigarette advertising, and so on.” *Id.* at 10-11.

142. RICH, *supra* note 6, at 194.

143. See NYBERG, *supra* note 141, at 57-59.

144. See *id.* at 48. The descent into falsehood is beautifully captured by Tolstoy’s epic, *War and Peace*, in which the character Rostov, when asked about a wound he received in battle, responds by embellishing the facts:

He began with the intention of telling everything precisely as it had happened, but imperceptibly, unconsciously, and inevitably he passed into falsehood. . . . He could not tell them simply that they had been charging full gallop, that he had fallen off his horse, sprained his arm, and run with all his might from the French into the copse. And besides, to tell everything exactly as it had happened, he would have had to exercise considerable self-control in order to tell nothing beyond what had happened. To tell the truth is a very difficult thing and young people are rarely

preserving privacy.¹⁴⁵ Last, we lie in the interests of civility and altruism to protect others from our true sentiments and ourselves from the consequences of expressing them.¹⁴⁶

These categories are, for the most part, self-evident; the last two, however, probably require some elaboration. Perhaps nothing more succinctly captures the fierce drive for privacy, the third category of lies, than this familiar colloquy: "Where did you go?"—"Out"—"What did you do?"—"Nothing."¹⁴⁷ Nyberg expounds on our shrewd use of mumbling, miswording, foreshortening, misplaced emphasis, nonchalant nodding and the like:

The magnitude of [our] effort to mislead others cannot be understood or explained if we assume that the primary purpose of language is to discover and share the truth. Our actual use of language [shows a] vital purpose of equal if not greater importance [i.e., to protect our separateness]. . . . While it is clear that language serves a universal desire to achieve and protect intimacy with a small number, . . . it is less obvious that in order to achieve closeness with a few "insiders," a wary distance must be kept from the majority. Language can be understood as one of the arts of privacy.¹⁴⁸

The last category of lies—lies to avoid giving offense—is well illustrated by Philip Roth in an account of his last meeting with his friend, the venerable author, Bernard Malamud, a frail old man at the time.¹⁴⁹ Malamud had asked Roth to look over a manuscript and tell

capable of it. His listeners expected to hear how he had been on fire with excitement, had forgotten himself, had flown like a tempest on the enemy's square, had cut his way into it, hewing men down right and left: how a saber had been thrust into his flesh, how he had fallen unconscious, and so on. And he described all that.

LEO TOLSTOY, *WAR AND PEACE* 219 (Constance Garnett trans., 1931).

Rostov, to be sure, was not seeking career advancement through the story; yet if his superior could have been deceived in these matters, Rostov surely would have accommodated him. *See id.* Rostov lives on today as a job-seeker. *See* Julie A. Lopez, *The Big Lie: Job Applicants Rarely Tell the Truth About Their Current Salaries; and the Deception Usually Pays Off*, *WALL ST. J.*, Apr. 21, 1993, at R6.

145. *See* NYBERG, *supra* note 141, at 128-34.

146. *Id.* at 134-36.

147. *Id.* at 128-34.

148. *Id.* at 113.

149. Philip Roth, *Pictures of Malamud*, *N.Y. TIMES*, Apr. 20, 1986, § 7 (Book Review), at 1.

him what he thought.¹⁵⁰ Roth read the work and was disappointed.¹⁵¹ But what to say? Roth could only bring himself to give a tepid review.¹⁵² Malamud, Roth sensed, “wanted to be told that what he had painfully composed while enduring all his burdens was something more than he himself must have known it to be in his heart.”¹⁵³ He was suffering so,” continues Roth, “I wished I could have said that it *was* something more, and that if I’d said it, he could have believed me.”¹⁵⁴

Asks Nyberg: “Was Malamud really asking for Roth’s candid critical opinion of his draft or was he asking for some kind of assurance to help him endure a crumbly end to his life?”¹⁵⁵ Answering the question, Nyberg writes:

We can never know for sure what is in other people’s minds, and it is presumptuous to assume to know what other people “really” need. Nevertheless, it’s a fair guess that Roth did do the right thing when he varnished the truth he had to tell, and that what passed between the two friends was an understanding more valuable and constructive than the unequivocal truth would have been.¹⁵⁶

How can anyone possibly arrive at even a “fair guess” of what someone else is thinking? “No normal human being wants to hear the truth,” remarked Mencken, “[i]t is the passion of a small and aberrant minority of men, most of them pathological.”¹⁵⁷ A story told by Roy Mottahedeh nicely illustrates the point:

Every Iranian knows the story of the mullah, who on the way to mosque for morning prayers, was splashed by a dog shaking itself in a drainage ditch. The mullah, who knew he did not have time to change his clothes before prayers, refused to look squarely at the animal that had sprayed water on him and rushed on, muttering, “God willing, it’s a goat.” (Water from dogs is polluting while water from goats is not.) “God willing, it’s a goat” is shorthand in

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. NYBERG, *supra* note 141, at 139.

156. *Id.*

157. LUDWIG, *supra* note 129, at 18.

Persian conversation for "Let's let things pass and not look too closely."¹⁵⁸

Nyberg highlights the depths of our deliberate self-delusion—our need to hear lies—for skeptics: "Your two closest friends offer to tell you, with unchecked candor and without regard to your feelings, everything they think about you. Would you want them to do it?"¹⁵⁹ "A society in which all truths were bluntly exposed," he responds, quoting Marcel Eck, "would be more of a hell than a paradise."¹⁶⁰

But now we relax our assumptions; our friends are allowed to package the truth in an appropriate manner. Even so, how often would we ask our friends what they think of us? Here is the point. We cannot allow ourselves to be defined by even our wisest and most discreet friends, for even the most delicately revealed truth can be destructive. "Once he finds out who he is, what can [c]onsole him," writes Spanish poet, Calderon, "for on earth [e]veryone who lives, lives in a dream."¹⁶¹ Can we help but conclude with Nyberg that "[h]uman self-deception is one of the most impressive software programs ever devised?"¹⁶²

This fact of mental life leads to a serious question for those trying to understand the human condition. Can we at least rely on our thinkers and writers to overcome their natural biases through education and self-consciousness and describe the world as it really is? Ernest Becker writes of the problem of acquiring knowledge:

One of the ironies of the creative process is that . . . usually, in order to turn out a piece of work the author has to exaggerate the emphasis of it, to oppose it in a forcefully competitive way to other versions of truth; and he gets

158. ROY P. MOTTAHEDEH, *THE MANTLE OF THE PROPHET: RELIGION AND POLITICS IN IRAN* 181 (1985).

The reader may have noted that all the liars in the stories thus far have been men. Are men bigger liars than women? (I do not speak here of lying between sexual partners, the subject of a later part.) Not according to the latest, albeit still very sketchy, research on the subject, though women may lie more to protect others' egos while men may be more inclined to embellish in their story-telling. See Bella M. DePaulo et al., *Sex Differences in Lying: How Women and Men Deal with the Dilemma of Deceit*, in *LYING AND DECEPTION IN EVERYDAY LIFE* 126-47 (Michael Lewis & Carolyn Saarni eds., 1993).

159. See NYBERG, *supra* note 141, at 8.

160. See ROBERT L. WOLK & ARTHUR HENLEY, *THE RIGHT TO LIE* 4 (1970). Thus, two of my colleagues will not read their student evaluations directly, but rather screen them for each other.

161. Quoted in NYBERG, *supra* note 141, at 81.

162. *Id.*

carried away by his own exaggeration, as his distinctive image is built on it.¹⁶³

If Becker is right up to this point—and experience tells us that he is—far from offering balanced and disinterested viewpoints, even the best of our writers are models of unreliability.¹⁶⁴ Thus, when after deluding themselves, they go on to delude us with endless footnotes, baroque ornamentations, and other devices to trump up claims to omniscience, we have excellent reason to dismiss their works as just highfalutin jive.¹⁶⁵ Becker, however, does not let readers off the hook so easily. “[E]ach honest thinker who is basically an empiricist has to have some truth in his position, no matter how extremely he has formulated it. The [readers’] problem is to find the truth. . . .”¹⁶⁶ So, for example, when we read Larson, we are first obliged to understand her in her own terms. But when Larson interjects into the discourse an Edenic vision of not only more but also better sex—and when she grounds that vision on the ability of people to be ruthlessly honest with themselves—must we not incline towards incredulity?

We turn now to the psychological dimensions of lying: How did humankind come to lie? At the heart of the matter, suggests Nyberg, is the need of people “to think well of themselves. . . . Our common ground is a need to appear to be better than we think we really are. . . . It is the craving to be appreciated that motivates much deception of others and deception of self.”¹⁶⁷

If one takes this drive as a given, then far from being maladaptive and dangerous, self-delusion is efficient.¹⁶⁸ In the extreme, of course, self-deception takes us on the low road whose eventual destination is self-destruction.¹⁶⁹ But if, on the other hand, we were to dwell on our anxieties, guilt, embarrassments, failures, lusts, and aggressions, would not paralysis ensue? How would we attend to what had to be done? Self-delusion allows life to go on.¹⁷⁰

163. ERNEST BECKER, *THE DENIAL OF DEATH* at xi (1973).

164. *See id.*

165. *See id.*

166. *Id.*

167. *See* NYBERG, *supra* note 141, at 86. The fact that self-deception and deception of others are related in origin does not, of course, mean that they are moral equivalents. *See infra* note 170 and accompanying text.

168. *See infra* note 174 and accompanying text.

169. *See supra* note 91 and accompanying text.

170. Self-deception and deception of others are “in our nature, and [they are] there for some reason,” writes Nyberg, “the mind does not evolve in ways harmful to itself.” *See* NYBERG, *supra* note 141, at 2.

But are we ready to publicly concede an honorable place for lying? Hardly. We hold that only Truth is Beauty.¹⁷¹ Mind you, that Truth is Beauty is O.K.—as far as it goes. But when we go on to posture that it is also “all [we] know” and, even worse, “all [we] need to know,” no, not by a long shot.¹⁷² “Truth is beautiful, without doubt;” reports Emerson, “but so are lies.”¹⁷³

If lying is pervasive and (socially) purposive, indeed, if George Steiner is right that “[t]he human capacity to utter falsehood, to lie, to negate what is the case, stands at the heart of speech and [culture],”¹⁷⁴ does it make any sense for the law to even try to abolish the lie?¹⁷⁵ But in asking this question, we are getting ahead of ourselves. For in focusing on the lie as a generally useful survival skill, we have ignored the one area of interpersonal relations that needs to be addressed here. And so the question arises: Do we also lie for sex and love?

IV. SEX, LIES, AND AUDIOTAPE

Sex is a way of creating closer emotional ties to one another. There is nothing about it that ordinarily requires lying and manipulation.

—Jane Larson¹⁷⁶

It is frightening to think that social science is in the hands of professionals who are so deaf to human nuance that they believe that people . . . have no interest in manipulating the

171. John Keats, *Ode on a Grecian Urn*, in *ENGLISH ROMANTIC WRITERS* 1186 (David Perkins ed., 1967) (1820).

172. *Id.* Bill Carmel, an English literature scholar, suggests that in addressing his poem to the urn, rather than to the reader, Keats is acknowledging a difference between the needs of art and those of “life.”

173. *Quoted in* NYBERG, *supra* note 141, at 111.

174. GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 214 (1975).

175. Asks a colleague: “Why do we not ask this question in relation to perjury, slander, commercial fraud etc.?” This entire Article, of course, serves as a response. In short, we have determined, presumably like George Steiner, that social life (whether with members of one’s family or otherwise) and mental health would be seriously impaired without room to maneuver in the domain of speech. *See supra* note 170 and accompanying text. There being no comparable generalized and deep-seated need to misrepresent in the other cases hypothesized, society can demand truth-telling. *See, e.g.,* Larson, *supra* note 14, at 412 (comparing the societal demand for truth-telling in commercial versus sexual contexts).

176. *See* Gold, *supra* note 11, at N1.

impression that [others] have of them . . . about the most freighted aspects of their lives.

—R.C. Lewontin¹⁷⁷

A. *All Roads Lead to Rome*

Look in your local bookstore and you will find a swath of books on how to make and keep a sexual/romantic connection. Look in your local library and all these books will be checked out or missing. You should not be surprised. Acquiring the right partner is rarely easy and we need all the help we can get. Indeed, the subject has received considerable attention for the last two thousand years in western tradition, dating all the way back to the Roman poet Ovid.

Ovid produced three satirical yet serious-minded works dealing with the subject: *The Art of Love*, *The Cure for Love* and *The Amores*. Those who wish to find mates, Ovid suggests, should go to the circus and sit close to their targets.¹⁷⁸ Then, in advice that can hardly be improved upon today, he tells his readers to make their moves: “[F]ind occasion to begin discourse; Enquire whose chariot this, and whose that horse; To whatsoever side she is inclin’d suit all your inclinations to her mind; Like what she likes; from thence your court begin; And whom she favors, wish that he may win.”¹⁷⁹

No advocate for fair play—except in the sense that a free-for-all is fair—Ovid was interested only in the score.¹⁸⁰ He urges his fellow men who meet resistance:

Make promises. What harm in promising/In promises a pauper can be rich./Hope has staying power once instilled;/she’s a tricky goddess, but she fits./Once you’ve made a gift, she can drop you with good reason:/she’ll carry off past profits and leave without a loss./The trick is not to give, but to dangle hoped for gains/like a barren field that often fools its owner./She’ll be like a gambler losing on to cut his losses,/the dice keep beckoning his greedy palms./“This the task, this the toil”: to bed her with no prior

177. R.C. Lewontin, *Sex, Lies and Social Science*, N.Y. REV. OF BOOKS, Apr. 20, 1995, at 24, 28 (Review of *Sex in America* and *The Social Organization of Sexuality*, see *infra* notes 280 & 497).

178. Ovid, *The Art of Love*, in *A LITERARY GUIDE TO SEDUCTION* 26 (Robert Meister ed., 1963).

179. *Id.*

180. *See id.*

outlay;/she'll keep giving so as not to lose what she already gave.¹⁸¹

Is Ovid to be dismissed as just another male chauvinist? Hardly.¹⁸² Among other things, he does not save his best counsel for men. How should a woman act who wants her partner to come back for more?

Whisper seduction and whimper for joy/ and giggle and say naughty words./ Even you who feel nothing, whom nature's denied/ fake it and murmur sweet lies./ . . . But when you pretend, make sure you're not caught: move like you mean it, look like you ought./ Show him you like it with panting and sighs; Ah! But "that place" has its own secret signs/. . . . Don't open the window to let in full light:/ Most of your body looks better by night.¹⁸³

A thousand years later, the medieval world was still debating the morality of Ovid's advice.¹⁸⁴ Finally, at the end of the twelfth century, a monk named Andreas Capellanus produced what could be called the first systematic and more or less well-received self-help book, *The Art of Courtly Love (The Art)*.¹⁸⁵ This serious yet humorous work, which is based on the idea of love as an art, served for hundreds of years as an authority on meeting and keeping sexual partners and then in various ways as a prototype for most of the works on the subject that followed.¹⁸⁶

181. MOLLY MYEROWITZ, *OVID'S GAMES OF LOVE* 121 (1985). A pro bono publico dimension of Ovid's work begins to show here. Elsewhere it is starkly evident. "I'm not here to teach the art of loving. Big spenders have no need of my technique. . . . A poet for the poor am I, who loved, a pauper in my time. When I couldn't give gifts, I gave her a line." *Id.* at 181.

182. In his writings, Ovid "develops the unheard-of concept of equality between the partners in a love affair." *PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS* 440 (Alex Presniger ed., 1974) [hereinafter *PRINCETON POETRY ENCYCLOPEDIA*].

183. See MYEROWITZ, *supra* note 184, at 183-84. What to do when the flush of excitement fades? "When a new lover falls captive into your trap,/ let him hope that he's alone./ Later, let him know that a rival shares your bed;/ omit these ploys and love grows old./ A bold steed races well from the starting gate/ when he has horses to trail and to pass." *Id.* at 85. Whether they choose to heed his advice or not, modern readers should be able to appreciate the wisdom in Ovid's work.

Notwithstanding Ovid's insistence that being full of lies, his love columns were not meant to be taken seriously, it is quite possible that these writings led to his banishment from Rome by Emperor Augustus. *Id.* at 18-19.

184. See, e.g., *PRINCETON POETRY ENCYCLOPEDIA*, *supra* note 185, at 156-57 (discussing the development of romantic poetry from Ovid's time up to the medieval period when Capellanus wrote).

185. ANDREAS CAPELLANUS, *THE ART OF COURTLY LOVE* 37 (John Jay Perry trans., 1941).

186. *PRINCETON POETRY ENCYCLOPEDIA*, *supra* note 185, at 157. "The fact that

B. *Wild Words*

Capellanus perceived a profound inertia blocking development of romantic relationships. What to do to get things going? Capellanus urges a man of the middle class who is interested in a woman of the same class to start in a low-key manner then let a little time pass in case the woman wishes to speak.¹⁸⁷ He should then attempt to make her laugh at something or praise her home or family. The time has come for business. Holding, as J.M. Keynes did three-quarters of a millennium later that "[w]ords ought to be a little wild for they are the assault on the thoughts of the unthinking,"¹⁸⁸ Capellanus recommends the following gambit:

When the Divine Being made you there was nothing that He left undone. I know that there is no defect in your beauty, none in your good sense, none in you at all except, it seems to me, that you have enriched no one by your love. . . . Oh if you should take service with Love, blessed above all others will that man be whom you shall crown with your love! Now if I, by my merits might be worthy of such an honor, no lover in the world could really be compared with me.¹⁸⁹

[Capellanus] obviously wrote with tongue in cheek . . . does not reduce the value of his treatise for the modern reader." *Id.*

187. Different dialogues are recommended in *The Art* for members of the nobility or for those addressing them.

188. Quoted in Geoffrey D. Klinger, *Painting by Numbers: Critically Exploring the Economic Rhetoric of Alan Greenspan*, SOC'Y OF CRITICAL EXCHANGE 1 (1994). No citation to the original is provided.

189. CAPELLANUS, *supra* note 185, at 37. If the opening gambit seems extremely arch, if you have trouble seeing its connection to contemporary discourse, consider the kind of billet-doux which Larson's disclosure policy—also taken to extreme—might produce:

Dear John,

Although I aspire to self-sufficiency, experience has confirmed what I have long suspected: the presence of sexual drives whose nature requires the participation of another for their satisfaction. We have known each other for a time sufficient for me to extend you the following offer.

Pursuant to my need to satisfy erotic urges, I hereby request your participation in an act of sexual intercourse on Friday, July 26, in my bedroom. As consideration for your participation, I promise to satisfy your similar urges.

I hope that you will accept the terms enunciated herein. Please respond no later than Wednesday, July 24, after which time my offer expires.

Yours in lust,
Mary

But if plain speaking was not the best policy, if artistry and artifice effected the transition from lovelessness to love, why should their use be limited? After the first bloom of love, lovers would want to test the affection of their partners. He who would do so, advised *The Art*, should "with the greatest care and subtlety, pretend . . . that he desires the embraces of some other woman, and he should be seen near this woman more often than he has been."¹⁹⁰ He will then know the truth from her jealousy and the "inner suffering of her soul."¹⁹¹

Alternatively, perhaps for those less hard-hearted, lovers should pretend "from time to time to be angry with one another . . . for a true lover is always in fear and trembling lest the anger of his beloved last forever. . . ."¹⁹² "You must not think that by quarrels of this kind the bonds of love and affection are weakened," *The Art* consoles the squeamish, "it is only the clearing away of the rust."¹⁹³

Hewing close to *The Art*'s guidelines kept one out of social trouble. For those concerned with their good standing, *The Art* suggested recourse to what might be called the Court of Courtly Love. Should a woman prefer an older suitor to a younger one?; Should a woman deceived by a lover take him back when he returns penitent?; Should a lady who "through no fault of her own" marries an "honorable man" be thereafter permitted to deny her long-standing love his "usual solaces"?¹⁹⁴ (Marriage in *The Art* existed primarily for preserving the social position of the family.) The Court would render a decision.¹⁹⁵ Thus, Professor Larson has learned her history lessons well, because in seeking to flatten amatory discourse, Larson would build up a new Love Court and invest it with full civil powers.¹⁹⁶

See RAYMOND A. BELLIOU, GOOD SEX: PERSPECTIVES ON SEXUAL ETHICS 105-06 (1993). Which of the two proposals would you want to receive?

190. See CAPELLANUS, *supra* note 185, at 158.

191. *Id.* The degree of freedom of action allowed lovers should not be exaggerated. A number of provisions were quite restrictive. See Peter Goodrich, *Law in the Courts of Love: Andreas Capellanus and the Judgments of Love*, 48 STAN. L. REV. 633, 667-68 (1996).

192. CAPELLANUS, *supra* note 185, at 158-59.

193. *Id.* at 159.

194. *Id.* at 171.

195. The ruling: "The later contracting of a marital union does not properly exclude an early love except in cases where the woman gives up love entirely and is determined by no means to love any more." Decision by Lady Ermengarde of Narbonne, later Viscountess of Narbonne. *Id.*

196. See generally Larson, *supra* note 14 (advocating the courthouse as an appropriate destination for women harmed by sexual fraud). And the court could pay for itself and probably make a profit. Indeed, with all the power of a soap opera, an Ann Landers column and People's Court, the new court's proceedings would probably be a media sensation.

But on what moral basis would Larson's court operate? Raymond Belliotti, in his exciting and comprehensive new study, *Good Sex*, attempts a definition of moral sex.¹⁹⁷ A liberal in these matters, he writes: "[s]ex is morally impermissible if and only if it involves deception, promise breaking, illicit force, or exploitation."¹⁹⁸ But developing and maintaining relationships—as real estate brokers, investment bankers, psychologists, clergymen, social workers, well know—does not often come naturally or easily; relationships have to be developed with art and artifice.¹⁹⁹ Perhaps this is because even before it is applied, any advice they proffer must make us feel good. It should not surprise anyone that this holds true for mating relationships as well.²⁰⁰ If loneliness is the worst curse, "[i]t simply does not make good sense for people interested in acquiring a mate to blatantly advertise their bad as well as their good qualities."²⁰¹ And if "a woman's finery is . . . a strategic, a calculated display," asks Baudrillard, "is not the seducer's strategy a display of calculation with which to defend himself from some opposing force? A strategy of finery vs. the finery of strategy."²⁰²

Consider just a few stories featured over the last few years in the American media, the best mirror we have of American life. To try to get

197. See BELLIOTTI, *supra* note 189, at 104.

198. *Id.*

199. See *supra* notes 130-31 and accompanying text.

200. See Milton Fisher, *Mergers of the Heart*, WALL ST. J., Feb. 14, 1994 (Valentine's Day), at A18 (describing an investment banker's matchmaking skills, which consist primarily of misleading individuals into thinking that another is specially interested in meeting them). According to an old Jewish proverb, a person who can't lie can't be a marriage broker.

201. *Id.* "And here I'm lying through my teeth," writes Woody Allen. "I mean I can't tell Louise that I was in jail and that I rob and steal and never did an honest day's work 'cause, you know, some people hold these things against you." THE ILLUSTRATED WOODY ALLEN READER 86 (Linda Sunshine ed., 1993).

As reported by Professor David L. Chambers, the AIDS organizations seem to have seized on the idea of the defensibility of lying. A Gay Men's Health Crisis publication pamphlet eases the guilt for HIV infectees: "If you follow these safe sex guidelines [primarily use of condoms] you don't need to worry about whether your partners know you're positive. You've already protected them from infection and yourself from reinfection." Similarly, Positive News, a newsletter put out by the San Francisco AIDS Foundation, urges that whether or not to inform is up to the individual. What should a person with HIV say when asked directly about his status by a sexual partner? The San Francisco AIDS Foundation says that this is one of the many questions that are difficult to answer. See *Gay Men, AIDS and the Code of the Condom*, 29 HARV. C.R.-C.L. L. REV. 353-85 (1994). The last point has been confirmed to me in a private communication by Professor Chambers. While Professor Chambers endorses the foregoing views, *id.* at 379, and while I generally understand those who choose to conceal information in sexual relationships (and am reluctant to criticize those who live a lifestyle different from my own), given the effects of AIDS, I cannot go along with him.

202. See BAUDRILLARD, *supra* note 93, at 98.

a relationship going, Arnie of L.A. Law tries to mislead his fundamentalist colleague, Jane, into thinking that he is interested in Bible studies.²⁰³ In the same episode one of the characters pretends to be a cop because the woman he desires feels most secure when in their company.²⁰⁴ Anais Nin, it was recently reported, does not tell the man she purports to wed that she is already married.²⁰⁵ Similarly Katherine Ann Porter lies to her husband (or husband-to-be) about a hysterectomy she had had.²⁰⁶

203. *L.A. Law* (NBC television broadcast, Feb. 3, 1994).

204. *Id.*

205. Miranda Seymour, *Truth Wasn't Sexy Enough*, N.Y. TIMES BOOK REV., Oct. 17, 1993, at 18.

206. See Marty Gordon, *The Angel of Malignity: The Cold Beauty of Katherine Ann Porter*, N.Y. TIMES, Apr. 16, 1995 (Book Review section), at 17.

Nothing captures the routine deception practiced in the earliest stages of courtship better than this fictional commentary by Art Hoppe, who imagines himself as a eavesdropper and generously offers commentary:

[At the gym,] "What's a svelte creature like you doing here?" he asks. "You don't need to lose an ounce." (But what he thinks is: More like about eight pounds.)

"Thanks, I just come to listen to the music," she says. (And case all these guys' buns of steel.)

"How about a platonic dinner together?" He says. "Nothing more. It's only that I hate to eat alone." (Or go to bed that way, either.)

"Let me check my Memo Minder to see if I have a date tonight," she says demurely. (Heck, I'm free in 1993.)

So they have a bite. "I just love pineapple pizza," she tells him, (if I don't throw up).

"How about another Harvey Wallbanger Double Daiquiri?" he suggests. "There's hardly anything in it" (that won't lower your will to resist).

They chat about movies: "Yes, I, too, really want to see 'Les Champignons Fous,' " she says, (when I'm short on sleep). And he hints of the future when he says, "I love children," (preferably boiled).

When they reach her place, he puts his arms around her and says, "Believe me, this won't be a one-night stand," (not if I can catch a bus home by midnight).

As she succumbs, she flutters her eyelashes demurely. "Honestly, I'm not the kind of woman who does this often," . . . (enough).

Lastly, he delivers the ultimate misrepresentation. "I'll always respect you"

C. *Stories to Make You Cry*

Wait a minute, you might say, these are either peccadilloes or you cannot resonate to them because of a lack of context. Fine, let us test your response with a fully fleshed out whopper. How should the love court resolve the following clinical case? Bryan and Joan were in love and had engaged in some sexual play. Joan wanted to go further and suggested as much to Bryan. Bryan wanted to wait until marriage so "you can come to me a virgin." "Is that what you are going to be?" asked Joan. "Heh, heh, me?" Brian laughs, "I'm afraid not. But I'll tell you this . . . those other girls weren't anything like you." Joan then confesses to Bryan that she is not the virgin he thinks, which acknowledgment Bryan scoffs at. "I don't believe it and I am not going to take advantage of you until our wedding night. Believe me, sweetheart, I promise you a night you'll never forget."²⁰⁷

And so it was; for the wedding night, as your insides are probably telling you by now, was a disaster. In fact, Bryan was the virgin in the family who, as subsequently diagnosed, was lying about the fact to boost his flaccid self-image and to induce Joan to suppress any doubts about marrying him.²⁰⁸ His insistence on waiting until marriage stemmed from his fear of sexual intimacy. His refusal to believe that Joan had other lovers was a necessary piece of self-deception to hide his fear of being compared to other men. Eventually in this case the marriage was annulled.²⁰⁹ Should a just and merciful legal system (would Larson) allow Bryan's pain and humiliation to be compounded by a tort action against him? Or does the very question suggest patriarchal thinking that ignores the possibly devastating consequences to Joan of allowing the relationship to develop, especially to the point of marriage?²¹⁰

Hoppe, *supra* note 10, at 1.

"Sex," suggests Larson, "is a way of creating closer emotional ties to one another. There is nothing about it that ordinarily requires lying and manipulation." See *supra* note 176 and accompanying text.

207. This case was written up by Wolk and Henley. See WOLK & HENLEY, *supra* note 160, at 162-64. I have made some modifications.

208. The future sexual benefits that such a union could be expected to produce makes the case one of sex fraud.

209. Someone decided that sexual intercourse went "to the very essence of the marital relation." See *supra* note 118 and accompanying text.

210. A critic wonders how Joan might be injured through Bryan's not being, as he claims, a man of the world. She probably cannot be. But she most certainly can be hurt by Bryan's withholding of information about his sexual problem.

A frequent variant of the Joan-Brian problem arises when a sexual partner does not tell a companion of the opposite sex that he has gay tendencies. For a brief discussion of the pain and

How might we understand this deception? Speaking of the need for privacy, Ruth Gavison writes that “[p]rivacy enables individuals to establish a plurality of roles and presentations to the world. The control over ‘editing’ one’s self, is crucial, for it is through the images of others that human relations are conducted and maintained.”²¹¹ Bryan, we could say, could not live with himself as a model for failed masculinity; he needed a role as a success as well. Maybe if he thought only positive thoughts, such as that he was sexually experienced while Joan knew nothing, maybe if he waited until after marriage when on account of the formalization of the union some of the pressure would have abated, maybe because Joan, unlike all those ballbusters he used to hang around with, was so special . . . this time, Lord willing, it would be different.

To hold Bryan accountable for his lies also would be to trap him, perhaps forever, in his past. With every new relationship he would await with terror the almost inevitable question: “How many people have you been with?” or “How many serious relationships have you had?” How would he respond? In this society at least “None of your business,” even in its euphemistic form, “I don’t care to talk about it,” far from being responsive under the circumstances, is wholly unacceptable. So the question arises: Do human beings need room in the sexual domain to reinvent themselves—to start with a clean slate—or, if they prefer, as the king and queen of Sheba? Do we want a world in which, because he must disclose his background as a petty thief, Aladdin can never win the hand of the princess?²¹²

Now consider the case of Eliot S., a successful attorney who has been married for over twenty years.²¹³ He has been faithful to his wife throughout, or so he says.²¹⁴ Eliot’s wife develops Parkinson’s disease and loses much of her strength.²¹⁵ Eliot is now caught between the pressure of his work and of taking care of his wife who is declining on a daily basis before his very eyes.²¹⁶ Laboring under this strain, he occasionally finds an outlet with a call girl.²¹⁷ On these nights, in order

disruptiveness caused by the withholding of such information, see Trip Gabriel, *How Marriages Unravel When One Spouse Is Gay*, N.Y. TIMES, Apr. 23, 1995, at A1.

211. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 450 (1980).

212. According to Disney, at least, an apology by Aladdin was sufficient to redress the lie. Disney unfortunately does not tell us whether a sexual encounter has taken place.

213. This case also was written up by Wolk and Henley. See WOLK & HENLEY, *supra* note 160, at 173. Minor modifications have been made. See *supra* note 74 regarding applicability of sex fraud tort to marrieds.

214. See WOLK & HANLEY, *supra* note 160, at 173.

215. *Id.*

216. *Id.*

217. *Id.*

to be able to exit gracefully, he tells his wife he is going out to play cards with the boys.²¹⁸ His wife finds out and, primarily because of her fragile condition, becomes distraught.²¹⁹ Does she have a cause of action?²²⁰

The foregoing discussion presupposes an ethical obligation on the part of partners to tell the truth; for if that were not the case, on what basis could the legal system attach significance to the lie? But is there such a duty? One could argue, quite to the contrary, that far from being based on truth-telling, romantic relationships are, at heart, mutual feelgood societies. Shakespeare illustrates the point by writing of the lover, fearful that his "days are past the best," who asks his partner and is falsely told in response that he is still young.²²¹ In return for this service the lover does not call the partner on what the former suspects is a lie, happily concluding: "Therefore I lie with her, and she with me/ And in our faults by lies we flatter'ed be."²²² Should the Big Lie—the lie about infidelity—produce a different result? Nyberg is dubious;²²³ Penny Vincenzi says no.²²⁴ And, of course, "fessing up" to such an

218. *Id.* Once again in this illustration the liar is not lying to gain immediate sexual advantage. He does, however, want to preserve the marriage—we can imagine—not only because he does not want to hurt his spouse after they have been together for 30 years, but also because intercourse is still an occasional feature of the marriage.

219. Here is how one presumably healthy wife described her life following discovery of her husband's affair. "During the past ten years I have been through mental and physical hell. . . . I am still unable to come to terms with the fact that for eighteen years of our thirty-year marriage my husband lived a lie to me, that is, a fifteen-year affair . . ." See ANNETTE LAWSON, *ADULTERY* 222 (1988). Is it not easily imaginable that a sick spouse—one who has nothing else going for her—will take the news even harder?

220. Even if she does, Ovid suggests that exercising such rights is both childish and churlish:

Oh, if only I could press charges in such a way that I could not win! Damn it, why is my case so good? Fortunate is he who bravely dares defend the object of his love—he to whom his girlfriend can say "I am not guilty!" Iron-hearted and over-keen to indulge his own indignation, is the [person] who insists on his pound of flesh when the defendant is beaten.

OVID, *THE SECOND BOOK OF AMORES* 37 (Joan Booth trans., 1991).

221. WILLIAM SHAKESPEARE, *Sonnet 138*, in *THE RIVERSIDE SHAKESPEARE* 1174 (G. Blakemore Evans ed., 1974).

222. *Id.*

223. See NYBERG, *supra* note 141, at 8.

224. See Penny Vincenzi, *The Lie in Adultery*, in *THE PENGUIN BOOK OF LIES*, *supra* note 138, at 468-71. Writes Ovid: "If you are ever caught, no matter how well you've concealed it, Though it is clear as day, swear up and down it's a lie." *Quoted in* DIANE ACKERMAN, *A NATURAL HISTORY OF LOVE* 40 (1994).

action defies every piece of street advice ever given to man and woman. Where did we get this crazy notion that the truth will set us free?

Here we come to the nub and the rub of Larson's proposal. If sexual partners have an obligation to speak the truth to one another in the early stages of the relationship, is not the debt at least as great as the relationship develops into marriage or long-term nonmarital commitment?²²⁵ And, correlatively, how much greater is the pain of sexual disloyalty that comes with the deeper emotional engagement of the parties? Yet if we are not ready for a tort action in these settings, can we justify an action when the parties come to one another as virtual strangers?

D. *Intimate Enemies*

Of course, as the previous hypotheticals reveal, the relationship between sexual partners involves far more than the sharing of intimacies; it is a complex dynamic that a crude ideology of male exploitation does not come close to addressing.²²⁶ Perhaps we can begin to usefully think of male-female communication this way: Just as after sexual connection lovers may not wish to be touched in certain places, so too lovers will need relevant distance after other intense interactions.²²⁷ Indeed, it seems fair to say, the more closeness they have at any given time, the more space they will later need.²²⁸

But even this analogy is inadequate in describing the need for private space. For it suggests a roseate and symbiotic equilibrium between

Ovid seems to have derived this principle through exegesis of the story of Io, a mortal whom Zeus had taken a liking to. One day, when they were together, Zeus sensed his wife Hera approaching. He quickly wrapped the earth in a dark cloud so she would not see them. Hera, however, became suspicious and dispelled the cloud whereupon Zeus instantly changed Io into a heifer. When confronted by his still mistrustful wife, he swore up and down that he had never laid eyes on that creature before. This, says Ovid, shows that the lies lovers tell do not anger the gods. See EDITH HAMILTON, *MYTHOLOGY* 76-77 (New American Library 1969) (1942).

225. Beverly Balos & Marie L. Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991). The two authors raised this precise question, arguing among other things, that the law inverts elemental logic when it presumes that the longer a confidential relationship has been in existence, the less the likelihood that a defendant raped the complainant. *Id.* at 605. These authors suggest that the law should impose a greater obligation of parties to one another once the relationship is confidential. *Id.* at 606. Specifically, they urge that "[s]ilence or other passive behavior by the victim [should] not constitute sufficient evidence of consent between nonstrangers." *Id.* at 607.

226. See CAMILLE PAGLIA, *SEXUAL PERSONAE: ACT AND DECADENCE FROM NEFERTITI TO EMILY DICKINSON* 13 (1991) (characterizing sexuality as "a murky realm of contradiction and ambivalence").

227. *Id.*

228. *Id.*

lovers, individuals who are at the same point in their emotional cycles with respect to intimacy and space, concealment and disclosure. If so, wonderful—assuming that is what they want. Yet surely that will not always, or even usually, be the case; difference, often to the point of opposition, will exist.

Much of the clashing will come when, perceiving threats to their sense of self, which for some is always, the parties seek power for themselves.²²⁹ And we should not imagine, as Larson's argument might suggest, that it is only men who aspire to power in relationships.²³⁰ *The Wife of Bath* tells the other side of the story.²³¹ A young knight whose rape of a woman threatens him with banishment from the court is rescued at the last moment by some highly placed ladies.²³² He can only be restored to the court if he sets out on a journey to discover what it is that women most want.²³³ At great sacrifice to himself he discovers the "right" answer (as determined by his saviors): Women seek mastery over their husbands.²³⁴

Our drive to power manifests itself most clearly perhaps through sex. "Feminists, seeking to drive power relations out of sex," writes Camille Paglia, (who devotes an entire book to this subject), "have set themselves against nature. Sex is power."²³⁵ Baudrillard heartily agrees.²³⁶ But, ironically, if we seek power through sex, power is not ultimately what seduces. "To seduce is to appear weak," writes Baudrillard. "We seduce with our weakness, never with strong signs or powers. . . . [T]his is what gives seduction its strength."²³⁷ Why, we might ask, is weakness so seductive? Might it not be because in showing weakness, we play into the other's need for power?²³⁸

229. See Larson, *supra* note 14, at 379.

230. See *id.*

231. GEOFFREY CHAUCER, *The Wife of Bath's Tale*, in *THE RIVERSIDE CHAUCER* 116-17 (Larry D. Benson ed., 3d ed. 1987).

232. *Id.* at 117.

233. *Id.*

234. *Id.* at 121-22.

235. See PAGLIA, *supra* note 226, at 2 (emphasis in original). The relationship between sex and power is surely best understood through Henry Kissinger's famous dictum: "Power is the ultimate aphrodisiac." Henry A. Kissinger, *quoted in* *THE QUOTABLE QUOTATIONS BOOK* 207 (Alec Lewis ed., 1980).

236. See *supra* notes 95-99 and accompanying text.

237. BAUDRILLARD, *supra* note 93, at 83.

238. The expression of weakness is merely a seduction device. If my sources are representative, most of us revel in abandoning the struggle for control, in laying down our burdens, in being on the bottom. If sex is ultimately the pursuit of power alone, how can we understand Flaubert's Rodolphe? See *supra* note 62 and accompanying text. Emma has yielded herself completely to him, yet, far from being attracted to her, he is repelled. See FLAUBERT,

But even this discussion does not capture the fast shifting, even contradictory nature of the human personality which is responsible for so much intra-couple conflict. Bonnie Raitt expresses this aspect of sexual/romantic life when describing the tortured message so many partners have for one another: "One part be my lover; one part go away."²³⁹ Consider, moreover, some of the conflicting emotions associated with sexual behavior that have been recorded by experts in this area. Simon and Gagnon describe the "not uncommon experience [of parties] wanting to express [sentiments] that were consistent with stereotyped gender-role postures, while simultaneously experiencing feelings intensely incongruous with those very gender-role postures, e.g. simultaneously to take possession of the object of desire (the male role) and to be the object of desire (the female role): to seduce and to be seductive, to conquer and to surrender, to desire and to be desirable."²⁴⁰ When these oppositions are combined with all others between sexual partners, what are the chances of lovers finding something beyond a symbiotic moment? Must we not very often be tempted to agree with the great French epigramist, La Rochefoucauld, that "[i]f love is judged by most of its effects, it resembles hate more than friendship."²⁴¹

supra note 61, at 162-64. If power leads to sex, it seems fair to conclude, it also leads to contempt.

239. BONNIE RAITT, *One Part Be My Lover, on LUCK OF THE DRAW* (Capitol Records 1991).

240. William Simon & John H. Gagnon, *Sexual Scripts: Permanence and Change*, 15 ARCHIVES SEXUAL BEHAV. 97, 109 (1986). Are the drives of homosexuals any less oppositional? "Our bodies are tired of all the stereotyped cultural barriers, all the physiological segregation. . . ." BAUDRILLARD, *supra* note 93, at 24 (quoting Judith Belladonna Barbara Penton). "We are male and female, adults and children, fairies, dykes, and gays, fuckers and fucked, buggers and bugged. . . . We refuse to limit ourselves to what society demands of us, that we be either hetero, lesbian, gay, the whole gamut of promotional products." *Id.* at 224.

241. LUDWIG, *supra* note 129, at 99 (quoting La Rochefoucauld). Will Durant offers a simple and particularly cogent image for the interaction between sexual partners: "Love, which has always been a combat and a chase," he writes, "becomes a war in which the night's embrace is but a passing armistice." *Id.* (quoting Will Durant). And you do not, like Durant, have to be a historian or married to the same individual for 68 years to arrive at this conclusion. "Every creature on earth," writes (fortyish) biologist Matt Ridley, "is in a [dynamic] struggle with its parasites (or hosts), its predators (or prey), and above all, with its mate. . . ." MATTHEW RIDLEY, *THE RED QUEEN: SEX AND THE EVOLUTION OF HUMAN NATURE* 19 (1994).

Is this a message of despair? Would life be fuller and richer without the continuous conflict? Or is conflict a prerequisite for the good life? W.B. Yeats has supplied an answer:

"Fair and foul are near of kin
And fair needs foul," I [vent] . . .
"For nothing can be sole or whole
That has not been rent."

If this is the case, is it any wonder that the dialogue between even the most intimate of sexual partners cannot always be relied on to be sincere?²⁴² To hold that a mortal enemy (albeit of the moment) has the same claim to truth as the friend is mere cant.²⁴³ Indeed, though some may wish to limit the principle, no one proposes to repeal the notion that exceptional stratagems, presumably including lying, are fair game in war.

But if, with her idealized view of human relationships, Larson hardly deals with this reality, even less does she consider the perverseness that characterizes human sexual beings at play. "Love is a child of Egypt; he has never, never recognized any law," sings the leading lady in one of the best known arias in all of western opera, "If you don't love me, I love you, and if I love you, watch out for yourself."²⁴⁴ An American movie drives the point home: A guy follows a street-walker, prudently, in the appropriate manner. The woman swings around, responding aggressively: "What do you want? Do you want to jump me? Then change your approach! Say, 'I want to jump you!'" The guy, troubled, repeats, "'yes, I want to jump you.'" "Then go fuck yourself."²⁴⁵

E. Games People Play

Love, sex, seduction—and, by extension, writing about such phenomena—offer the joy of playacting, challenge, intrigue, and

William B. Yeats, *Crazy Jane Talks with the Bishop*, in THE NORTON ANTHOLOGY OF MODERN POETRY 178-79 (Richard Ellman & Robert O'Clair eds., 2d ed. 1988).

242. D.H. Lawrence warned of the dangers of trusting both love and trust. "The greater the love, the greater the trust," he writes "the greater the peril, the greater the disaster . . . since each human being is a ship that must sail its own course . . . Two ships may sail together to the world's end. But lock them together in mid-ocean and try to steer both with one rudder," he continues, "and they will smash one another to bits. So it is," he concludes, "when one individual seeks absolutely to love, or trust another. Absolute lovers always smash one another, absolute trusters the same." Simon Leys, *Lawrence of Australia*, N.Y. REV. BOOKS, Apr. 21, 1994, at 29, 34 (quoting D.H. Lawrence). Adding the forces of culture to those of nature, as Larson's proposal would do, would only seem to sink any survivors.

243. For a good discussion of the issue of lying to enemies, see BOK, *supra* note 137, at 131-45. Bok believes that lying to enemies is overrated as a strategy because it tends to perpetuate rather than eliminate the hostilities. Maybe so. But if La Rochefoucauld, Durant, Ridley, and Lawrence are right about marriage, the parties will and must battle it out to preserve their sense of self; and this will at least involve hiding the truth that otherwise would be revealed. Even Bok recognizes the Allies' need to mask the time and place of the D-Day invasion. See *id.* at 131-45.

244. GEORGES BIZET, *CARMEN* act 1, sc. 4.

245. BAUDRILLARD, *supra* note 93, at 42, provides this illustration though without identifying the movie. Perhaps feeling in control of the situation or sorry for the guy, the street-walker later tells him "I'll make coffee, and then you can jump me." *Id.*

reversal.²⁴⁶ And we should not infer from any aspect of Larson's work that this play therapy is important only for men, since, notes D.H. Lawrence: "[T]he greatest triumph an American woman can have is the triumph of seducing a man, especially if he is pure. . . ."²⁴⁷ We may not wish to join in all the revelry, but the seduction drive, because it draws its power from an elemental source, ordinarily will come to the fore.²⁴⁸

What is this source? "It is not from some libidinal investment, some energy of desire, that this passion [i.e. to seduce] acquires its intensity," Baudrillard persuasively argues, "but from gaming as pure form and from purely formal bluffing."²⁴⁹ Seduction "is what remains of [an earlier] magical, fateful world," he explains, "a risky, vertiginous, and predestined world; it is what is . . . effective in a visibly efficient and stolid world."²⁵⁰ How do we know we are alive? "Nothing exists naturally," Baudrillard writes, "*things exist because challenged, and because summoned to respond to that challenge.*"²⁵¹ We are conditioned to think (especially in academia?) that "those who can no longer produce are dead. In reality," Baudrillard concludes, "only those who do not wish to seduce or be seduced are dead."²⁵²

In sum, our examination of sexual relationships has revealed that lying is a pervasive, and perhaps even desirable, element whose origin lies in the never-ending conflict between the need of *Homo Liber* to decide for himself or herself what to do and say, and that of *Homo Ludens*, to play with others. But surely our inquiry cannot end here,

246. See *id.* at 82; see also ACKERMAN, *supra* note 224, at 86-87 (describing love games).

247. Quoted in ELIZABETH HARDWICK, *SEDUCTION AND BETRAYAL: WOMEN AND LITERATURE* 181 (1974) (without reference to the original source). The attentive reader will note that the picture of women drawn thus far is a composite of pieces largely produced by (notable) men. I have tried to remedy this shortcoming in the remaining sections of this Article.

248. See *id.* at 181.

249. BAUDRILLARD, *supra* note 93, at 82. "Oh, the pleasures of intrigue," writes Susanna Centlivre, the seventeenth-century English playwright (through her character Belair), "it finds employment for every sen[s]e, [s]harpens the wit, and gives a Life to all our Faculties." *Love at a Venture*, in 1 THE DRAMATIC WORKS OF THE CELEBRATED MRS. CENTLIVRE 267 (John Pearson ed., 1872).

250. See BAUDRILLARD, *supra* note 93, at 180.

251. *Id.* at 82 (emphasis in original).

252. *Id.* at 84. Blanche Dubois understood the connection between sex and death—perhaps too well for her own good. Asked by admirer Mitch about reports of her promiscuity, she wants to defend herself. Invoking images of the long period of decline and ultimate death of her mother, whom she was caring for, and of the local army base full as it was of lusty young men, she explains: "Death—I used to sit here and she used to sit over there and death was as close as you are. . . . We didn't even admit that we had heard of it! . . . The opposite is desire How could you possibly wonder!" TENNESSEE WILLIAMS, *A Streetcar Named Desire*, BEST AMERICAN PLAYS 86 (3d ed. 1945-51).

since, after all, most sex-based lying probably falls into that most objectionable class of falsehoods—those which benefit the perpetrator while harming the victim.²⁵³ Lying for personal gain in this conception is more objectionable than what Roth might have done to shelter Malamud's pride.²⁵⁴ And among this class of lies, perhaps sex fraud is the most pernicious.²⁵⁵ To illustrate, if Andrea Dworkin is right that sexual relations for a woman represent an annihilation of the self,²⁵⁶ or if Jane Larson is right that when based on fraud, they can represent a gross violation of a woman's autonomy and "dignity interests,"²⁵⁷ something would have to be done. So the question arises: Should we think of sexual fraud as a kind of ritual symbolic murder of a class of people who, because of a lopsided distribution of power, are in no position to protect themselves? Or should the law ignore sexual fraud as behavior not so different from masturbation; full of delusion but of no great moment?

V. MEN VS. WOMEN AS VICTIMS

Your desire shall be for your husband, and he shall rule over you.

—*Genesis* 3:16

How fortunate we are that women defend themselves so badly. Otherwise we would be only their timid slaves.

—Pierre Choderlos de Laclos²⁵⁸

A. *The Pain of Love*

Do sexual relationships gone bad hurt so much that, at least in the context of sex fraud, the law ought to intervene? The question is an

253. See BOK, *supra* note 137, at 79-80. This distinction was perhaps originally drawn by Augustine. See AUGUSTINE, *supra* note 133, at 21.

254. See *supra* note 154 and accompanying text.

255. See Larson, *supra* note 14, at 417-19.

256. See ANDREA DWORKIN, *INTERCOURSE* 138 (1987); see also *infra* notes 273-75 and accompanying text (discussing negative aspects and consequences of seduction from the female's viewpoint).

257. See Larson, *supra* note 14, at 460 n.374.

258. PIERRE CHODERLOS DE LACLOS, *LES LIAISONS DANGEREUSES* 15 (1782) (Lowell Bair trans., New Classic ed., 1992).

important one.²⁵⁹ For at the heart of the case for actionability is a serious problem. The technical measure of damages in fraud actions is the amount of money that would have accrued to the innocent party if the fraud had not taken place.²⁶⁰ There being (usually) little or no monetary loss in sex fraud cases, advocates of tort for sexual fraud must stress, as Larson does, the uniqueness of the damage in these cases.²⁶¹

Consistent with this position is Carole Pateman's assertion that "[s]exual services, that is to say, sex and sexuality, are constitutive of the body. . . . Sexuality and the body[,] she adds, "are . . . integrally connected to conceptions of femininity and masculinity, and all [of] these are constitutive of our individuality, our sense of self-identity."²⁶² Autonomy, i.e. basic personal dignity, for Jane Larson requires, among other things, "bodily integrity" and "sexual self-possession."²⁶³ This latter category "includes a person's interest in sexual self-expression through acts and with partners that satisfy her present desires and purposes. Nonconsensual sex is an act of bodily and sexual *dispossession*. . . ."²⁶⁴

Implicit in these notions would appear to be the idea that sex is "closer to personhood," or "considered more priceless," than, say, ordinary wage contracts, to go back to the economic model on which Larson premises her case,²⁶⁵ and thus sexual expectations should receive even more protection under the law than the latter. But, as Raymond Belliotti has argued, to say these things is only to repeat in conclusory form what must be proved.²⁶⁶ Furthermore, he suggests, "If what we do affects directly who we are, it is certainly arguable that the more enduring character of wage labor is more central and crucial to personal identity than temporary sexual activity."²⁶⁷ Recent studies on the effects of joblessness would seem to assign at least an equally central psychological importance to employment.²⁶⁸

259. See Larson, *supra* note 14, at 416-19.

260. See RESTATEMENT (SECOND) OF TORTS § 525 (1977) ("One who fraudulently makes a misrepresentation of fact . . . for the purpose of inducing another to act . . . is subject to liability . . . for the pecuniary loss caused to [the other] by his justifiable reliance upon the misrepresentation.").

261. See Larson, *supra* note 14, at 461.

262. Carol Pateman, *Defending Prostitution: Charges Against Ericsson*, 93 ETHICS 561, 562 (1983).

263. Larson, *supra* note 14, at 425.

264. *Id.* (emphasis in original).

265. *Id.* at 436, 438.

266. BELLIOTTI, *supra* note 189, at 123.

267. *Id.*

268. See JOSEPH T. HOWELL, *HARD LIVING ON CLAY STREET* (1973); MELVIN KOHN & CARMI SCHOOLER, *WORK AND PERSONALITY: AN INQUIRY INTO THE IMPACT OF SOCIAL*

But perhaps combining the sexual experience of men and women and comparing such experience with that of other activities, as we have done, does not do justice to the actual experience of sex for women. Perhaps differences in wealth and social power, in physical strength, and in the nature of the sexual organs and mechanics of sex lead to greater vulnerability of women. Surely the most fully developed, if extreme, case for the destructive power of sex on women is made by Andrea Dworkin, for whom all intercourse seems to be, in an important sense, nonconsensual.²⁶⁹ According to Dworkin sex means social inferiority, sexual subordination, obedience to man, and surrender to male force or violence.²⁷⁰ "What is taken from [a woman] in that act is not recoverable, and she spends her life—wanting, after all to have something—pretending that pleasure is in being reduced through intercourse to insignificance. . . . She learns to eroticize powerlessness and self-annihilation."²⁷¹ While few feminists will go as far as Dworkin, many, including Larson, would seem to agree with her that even outside the context of classical rape, where force is applied or threatened, women are exposed to far greater sex-based emotional harm than are men.²⁷²

Do we have to accept the notion?²⁷³ Would Sol Wachtler? When considering writing about sex fraud some years back, this author asked a then intimate friend whether she thought she needed more protection

STRATIFICATION (1983); MICHAEL L. SCHWALBE, *THE PSYCHOLOGICAL CONSEQUENCES OF NATURAL AND ALIENATED LABOR* (1986).

269. DWORKIN, *supra* note 256.

270. *Id.* at 137-38.

271. *Id.*

272. See *supra* note 82 and accompanying text. Linda LeMoncheck offers a reason for why women might be more vulnerable to sex-based harm than men. "Sex," she writes, "is a less effective vehicle for dehumanizing men than it is for women. Men typically have no rape mentality. . . ." DEHUMANIZING WOMEN 92-93 (Rowman & Allanheld 1985). (We can recognize but must put aside fear of homosexual rape here.) The view that women are the primary victims of sexual relationships is not confined to women. Irving Kristol argues for a new male sexual code. See Irving Kristol, *Men, Women and Sex*, WALL ST. J., May 12, 1992, at A24.

273. Kant apparently did not. "If then a man wishes to satisfy his desire, and a woman hers, they stimulate each other's desire," he writes anticipating Dworkin: "their inclinations meet, but their object is not human nature but sex, and each of them dishonors the other." IMMANUEL KANT, *LECTURES ON ETHICS* 164 (Louis Infield trans., 1963).

Compare also the findings of a study on suicide 15 years ago. "[I]nterestingly," writes the author, "divorce or separation was mentioned as a cause of suicide attempts only for male suicide completions and younger female nonfatal attempts." RONALD MARIS (with Bernard Lazzerowitz), *PATHWAYS TO SUICIDE* 272 (1981). But see Shelley Levitt, *What Women Don't Know About Today's Men*, *READER'S DIGEST*, Oct. 1995, at 57 (Myth #4: Men Cope with Breakups More Easily than Do Women).

against sex fraud than the men she knew. Her proud, almost contemptuous response: "Can't I hurt you as much as you can hurt me?"²⁷⁴

Let us now shift our focus from the pain produced by our more or less conscious interactions with one another to that produced by the sexual act itself, which is rarely faced directly. If we are successful at doing so, must we conclude that the experience of sex strikes closer to the woman's sense of self-worth than the man's, that she is at greater risk of emotional harm? To be sure, as Dworkin emphasizes, the woman can feel invaded (and befouled),²⁷⁵ but does the man emerge unscathed?

Bristling at the notion that women are the victims of sexual intercourse, Camille Paglia highlights the emotional high-wire experience that sex is for the male. Will he be able to perform? (Does he have the requisite will?) If he can, will he measure up or is his fate to be ridiculed? (Does he have the requisite forces?) If he enters her, will he get out intact? (Is she lying in ambush?) In our earlier hypothetical, Bryan failed the first of these tests and we can only imagine what happened to him.²⁷⁶ But even when the man passes, Paglia suggests, he fails (his victory is pyrrhic and exceedingly shortlived).²⁷⁷ His vital force is taken from him, she notes (mocks?); "[m]en enter in triumph but withdraw in decrepitude."²⁷⁸

Surely it is this vulnerability that is a major source of man's enduring hostility to woman. But man's vulnerability—and thus his hostility—also stems from deeper sources than the physicality of the sexual process, and it is here that the reductive empowered/disempowered, patriarch/victim, hegemonic/subordinated dualities that characterize Larson's work are most distressing. For if men have the edge over women in some areas, in another, as we shall now see, men are regularly and roundly humiliated.

274. Indeed.

275. "By definition, she [has] a lesser privacy, a lesser integrity of the body, a lesser sense of self since her body can be physically occupied and in the occupation taken over. [T]his lesser privacy . . . this lesser self, establishes her lesser significance. She is defined by how she is made, that hole which is synonymous with entry . . . [with] consequences to her that may be intrinsic." See DWORKIN, *supra* note 256, at 122-23.

276. See *supra* notes 207-11 and accompanying text.

277. PAGLIA, *supra* note 235, at 20.

278. *Id.* Are these images of loss and potential dismemberment any less powerful in explaining sexual behavior than ones of colonization and defilement? Who is to say?

B. *Beggars and the Beggees*

"I only beg for sex," says the Woody Allen character in trying to save a nubbin of dignity before or after some new self-debasement.²⁷⁹ Why, since the beginning of human memory, have even his most fortunate fellow males dissipated their energies in wheedling, cajoling, propitiating, and otherwise prostituting themselves for sex? In *Sex and Reason*, Richard Posner provides a simple answer: the male sex drive is stronger than that of the female.²⁸⁰ Posner's argument, however, has been heavily criticized and, because there are other ways in arriving at his conclusion, will not be pursued further here.²⁸¹

Of more help in evaluating the relative sexual power—and thus vulnerability—of men and women may be Donald Symons' classic, *The*

279. The author asks to be taken on faith on this one; memory fails.

280. See POSNER, *supra* note 122, at 91-92. This position would seem to be confirmed by recent findings that three times as many men as women—54% vs. 19%—think about sex at least once a day. See ROBERT T. MICHAEL ET AL., *SEX IN AMERICA* 156 (1994). But see Nussbaum, *infra* note 281 and accompanying text. At a conference I attended not long ago at Brown University, Posner highlighted his conclusion. When Catherine MacKinnon's turn to speak came, a roar of approval erupted from the audience as she countered: "Yes, but we come and we come and we come." The observation, of course, as Posner points out in his book *Sex and Reason*, is simply not responsive. POSNER, *supra* note 122, at 92.

281. Posner relies for his conclusion principally on reports of heterosexual and homosexual activity, specifically, that male homosexuals are most sexually active, heterosexuals are next, while female homosexuals are least active. See POSNER, *supra* note 124, at 91. The criticism is that he has failed to consider the nature and environment of homosexual interactions. See Ruthann Robson, *Posner's Lesbians: Neither Sexy nor Reasonable*, 25 CONN. L. REV. 491, 497 (1993).

Martha Nussbaum has attempted a fuller critique of Posner and a defense of womanhood. See, e.g., Martha Nussbaum, *Only Grey Matter: Richard Posner's Cost-Benefit Analysis of Sex*, 59 U. CHI. L. REV. 1689, 1715-16 (1992) (criticizing Posner's conclusion that men have stronger sex drives than women). To understand Nussbaum's view, we need to think of Posner as likening the male sex drive to an unopened bottle of soda that is constantly being jostled. *Id.* at 1715. There is increasing disequilibrium within the bottle until the the cap is twisted open or blows off. *Id.* (For a stunning and heart-wrenching account of the slow journey into hell of a male deprived of sexual and emotional intimacy, see DENNIS POTTER, *PENNIES FROM HEAVEN* (Faber & Faber 1996) (1981)).

Nussbaum contrasts this "push" aspect of sexuality with that experienced by women: "It is simply not true," she writes, "that the state of arousal and desire in a human being is a function only of biology. . . ." *Id.* at 1716. For women, a "pull" factor operates under which arousal takes place when there is a perception of special value in the object. *Id.* And when that object—Mr. Right—is discovered, she suggests, women can be just as sexually driven as men. *Id.*

Coming back to our analogy, what Nussbaum is saying is that while men are content with soda, women are interested only in Chateau Lafite, but when they get it they need to drink at least as much as men do soda. *Id.* But how useful is this observation? If a woman rejects all offers of soda, and drinks only vintage wine, given that the latter is not always available, how meaningful is it to say that the woman is just as thirsty as the man?

Evolution of Human Sexuality.²⁸² In his chapter entitled, "Copulation as a Female Service"²⁸³ Symons begins by asking the more limited question of why it is that

[a]mong all peoples it is primarily men who court, woo, proposition, seduce . . . [and] *give gifts* in exchange for sex. . . . Everywhere sex is understood to be something that females have that males want; it constitutes a service or favor that females in general can bestow or withhold from males in general, although "favorless" intercourse also occurs, and the exchange may be reversed in certain circumstances.²⁸⁴

What a blow to the male ego, that in the scales of romance his affection is found so wanting that female affection has to be bought! Symons does not arrive at his painful conclusion lightly, but only after careful review of the anthropological literature.²⁸⁵ It might be suggested that only men give gifts because only they have property to give, but this seems too farfetched, since it requires that the women literally never owned anything of value.

If in the economics of sexual behavior gifts flow from males to females, Symons wants to know why.²⁸⁶ It is not that sex pleasures men more than women, he argues; indeed, he points out, the Judgment of Tiresias suggests otherwise.²⁸⁷ The view that copulation is a female,

282. See DONALD A. SYMONS, *THE EVOLUTION OF HUMAN SEXUALITY* (1979).

283. *Id.* at 253-85.

284. *Id.* at 253 (emphasis added). This pattern is not unique to humans. In species after species, Darwin noted, the female is "less eager than the male." *Quoted in* Robert Wright, *Our Cheating Hearts*, *TIME*, Aug. 15, 1994, at 47.

285. SYMONS, *supra* note 282, at 257-58. In a review of the Human Relations Area Files, Symons finds that in 15 of the societies only the men give gifts; in one both the men and women give gifts but the men's gifts are more valuable; and in three men and women exchange gifts but the indeterminate values of the gifts prevents analysis of possible disequilibrium. Symons informs us that he used the "extramarital sex" heading in his search, but that his conclusion was based on all the evidence of sexual gift giving he found in that section. *Id.*

286. *Id.*

287. See *id.* (quoting OXFORD CLASSICAL DICTIONARY 1078 (2d ed. 1970)). Tiresias "saw two snakes coupling and [repelled at the breach of public etiquette?] struck them with his stick, whereat he became a woman; later the same thing happened again and he turned into a man. Being asked by Zeus and Hera to settle a dispute as to which sex had more pleasure of love, he decided for the female; Hera was angry and blinded him, but Zeus recompensed him by giving him long life and power of prophecy." *Id.* at 261-62 (quoting OXFORD CLASSICAL DICTIONARY 1078 (2d ed. 1970)).

Why did Hera feel compelled to punish Tiresias? According to Symons, not for learning the truth, but for revealing it. He elaborates:

rather than a male service, or an even exchange, he suggests, rests on other grounds, a few of which are offered here.²⁸⁸ First, males are more aroused by visual stimuli, which tends to give females more leverage.²⁸⁹ Second, males display greater “sexually appetitive behavior” than do females.²⁹⁰ Third, females are better able to deal with abstinence than are males.²⁹¹ Fourth, males have need for greater sexual variety.²⁹²

Symons’ conclusions seem persuasive. Moreover, for men, even where sex does not have to be bought, it has to be earned.²⁹³ In our romantic traditions it is men who slay dragons or swim the Hellespont to win the hearts of their ladies.²⁹⁴ It is the men who stand on the street side of the sidewalk to protect their ladies from the slop produced by passing vehicles. And it is the women who bestow or withhold their “favors.”²⁹⁵ But perhaps most persuasive of all in establishing Symons’ point, more than the science, the literature, and the linguistic usage, is our personal experience as it informs our imagination. In Aristophanes’ *Lysistrata*, the women, distraught over continuing call-ups to the front by political leaders, resolve to stop sleeping with their husbands and

In an interaction between two people, the relative value of the interaction to each participant determines which, if either, is providing the service; but value and pleasure are nonobservable states of mind, and goods and services are worth whatever one can get for them, hence Hera’s anger and Zeus’s satisfaction: were Tiresias’ decision to become generally known, it would give males added leverage in sexual transactions with women and very likely in nonsexual transactions with women as well.

Id. at 262.

288. *See id.* at 253-85 (discussing copulation as a female service to males).

289. *See id.* at 264.

290. *See id.*; *see also* Carrie Gottlieb, *Diminished Desire*, *NEWSDAY*, Sept. 12, 1994, at B15 (discussing factors influencing diminished sex drives in women). One would think that thousands of years of experience with prostitution would have settled the issue of whose sex drive is greater as would increasing evidence that men masturbate much more frequently than do women. *See* MICHAEL ET AL., *supra* note 280, at 158-59. The authors themselves, however, urge some caution in evaluating this latter data because in their minds masturbation is more of a social construct than an expression of physical need. *See id.* at 159.

291. *See* SYMONS, *supra* note 282, at 265.

292. *Id.* at 266. You do not need the training of a Donald Symons or a Jane Larson to understand these matters: “La chocha tiene mas fuerza que una junta de bueyes,” goes an old South American folk saying. (The *female genitalia* are more powerful than a yoke of oxen.) To this author’s knowledge, male counterparts have never received such recognition for their drawing power.

293. *See supra* notes 284-85 and accompanying text.

294. *See* ACKERMAN, *supra* note 224, at 54.

295. *See supra* notes 284-85 and accompanying text.

lovers until they refuse to fight.²⁹⁶ If women were the warriors, would even the most resolutely pacifist community of males be able to pull this off?²⁹⁷ “[W]hile without a minimum of food (or water, or shelter) people die,” taunts a feminist author, “to my knowledge no one has ever died for want of an outlet for their sexual appetites.”²⁹⁸ Could a man have written that?

In short, in the face of claims of powerlessness, women hold a (the?) key card, one that after being played, moreover, is magically restored to the holder to be played again and again.²⁹⁹ Does this continuing source of power help offset political, economic, and social advantages now decreasingly held by men? Physical advantages? Perhaps this source of power explains why feminist philosopher Virginia Held writes that “in their dealings with one another, man and woman discover . . . that man can overpower woman . . . and woman can overpower man—that is, at the level of *sexual* power, as opposed to muscular and other power,”—as if the sexual power can be separated from political and social powers—“they really *are* equal.”³⁰⁰

At any rate, we lack a compelling rationale for generalizing about women’s powerlessness and for deeming them emotionally more vulnerable than men to sexual relationships, and thus, to sex fraud.³⁰¹

296. See ACKERMAN, *supra* note 224, at 22.

297. If science has demonstrated that men indeed have greater sexually appetitive behavior, we must not suppose that women are passive players in all aspects of the courtship process. Indeed, a recent cross-cultural study of techniques used by women to show interest concludes that notwithstanding general assumptions, “in practice women around the world actively begin sexual liaisons.” See HELEN FISHER, ANATOMY OF LOVE 1-36 (1994).

298. CAROLE PATEMAN, THE SEXUAL CONTRACT 198 (1988).

299. See *supra* notes 293-96 and accompanying text. If women in fact hold the key card, Larson’s proposal faces an interesting obstacle, because her argument is that sex fraud should be treated just like economic fraud. But the law does not necessarily punish fraud in economic contexts. Consider the case of employees who lie about their credentials to get a job. See Lopez, *supra* note 144, at R6. Do employers have a cause of action against them for loss of expected productivity and training expenses? In an extensive review of the literature on this subject, this author has found no case in which the employee has been sued, let alone successfully sued. How can we understand this peculiar state of affairs? To be sure, employees are often judgment proof. But there are many employees, especially today, who earn enormous salaries and presumably have the wherewithal to pay. A better explanation, it is suggested here, is a sense by employers that the law is stacked against them because of a perception that they control the marketplace and that lying would be seen as merely righting the (im)balance of power. See *id.* But if, because of perceived powerlessness in the marketplace, employees are effectively authorized to manipulate their employers at will, on what basis could our Love Courts discipline men, who, under our hypothesis, also come as supplicants?

300. Virginia Held, *Marx, Sex, and the Transformation of Society*, 5 PHILOSOPHICAL F. 168, 175 (1973).

301. See *id.*

But then, in what sense might a sex fraud tort be imagined as emerging from "A Feminist Rethinking of Seduction?"³⁰²

VI. WOMEN VS. MEN AS LIARS

Sigh no more, ladies, sigh no more,
Men were deceivers ever,
One foot in sea and one on shore,
To one thing constant never.

—Wm. Shakespeare³⁰³

Never was it given to mortal man to lie so boldly as we
women can.

—Alexander Pope³⁰⁴

If men's sexual needs are more importunate than those of women, and if lying is a means for people to get what they want, then men will be more likely to lie to get sex. Is this, finally, the feminist basis of Larson's proposal?³⁰⁵

302. See Larson, *supra* note 14, at 379-80. Once again the subtitle of Larson's article. The question of whether a sex fraud tort has a fundamentally feminist nature, a question that continues as the subject of the next part, is of considerable importance. As we have seen throughout, Larson wraps her tort in symbols that are female-oriented as opposed to gender-neutral. See *supra* notes 81-82 and accompanying text. Her plaintiffs are virtually always sympathetic women victims; her defendants male predators. See *id.* In addition, her intellectual sources are drawn almost entirely from the realm of feminist scholarship. See, e.g., Larson, *supra* note 14, at 390-91 nn.67-69. Larson's purpose in all this seems absolutely clear—to draw on the prestige and the power of the feminist movement. *Id.* at 380. My purpose here is to try to disentangle the tort from the needs of women so that the tort can be evaluated on grounds that are less ideologically charged. Deciding whether or not the tort is feminist, of course, does not resolve the question of whether it is desirable. This issue will be the subject of Parts VI, VII, and VIII.

303. WILLIAM SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act 2, sc. 2.

304. Quoted in H.L. MENCKEN, *A NEW DICTIONARY OF QUOTATIONS* 730 (1942). This sounds suspiciously like Chaucer's Wife of Bath. See CHAUCER, *supra* note 230. But why quibble?

305. See Larson, *supra* note 14, at 379-80 (proposing a new cause of action for sexual fraud).

A. *The Problem with Men*

Leslie Farber offers some support for this idea.³⁰⁶ The author wonders why it is that, as evidenced by women's persistent complaints over the years, when the man comes home at the end of the day, man/woman talk fails.³⁰⁷ The woman overflows with descriptions and analysis of the day's happenings, but when she turns around and asks the man about his day, he shuts down.

If we wish to understand the man's reticence, Farber suggests we should think back to the man's adolescence when he was in the throes of what Midge Decter apparently coined, "undifferentiated lust," a drive to unite with the entire population of the opposite sex, a sentiment not shared by his potential women partners.³⁰⁸ The only drive they have that "corresponds to some degree to [his] is an undifferentiated desire to be *desired* by anyone and everyone."³⁰⁹

Given this difference, asks Farber, "how can there be frank talk?" "To admit that he is driven by a sexual hunger for anyone or everyone would, he believes, deprive him of release with a woman who does not share this extreme hunger."³¹⁰ He may, by using the egalitarian notions of the day, try to convince his partner to consider him a sexual object, as he does her, but common experience tells us this does not work.

The man's partner often will understand the differences between them and taunt him: "All you want is my body." He quickly learns the art of disavowal, that the lust that overpowers him must "be concealed or dissembled in his dealings with women." And as with any success mechanism, the disavowal spreads throughout his life's dealings "almost by contagion, to include all manner of experience, both pleasurable and painful, that has little to do with his undifferentiated lust. At this point there may be said to be a 'habit of disavowal,'"—a proclivity to lie—to

306. See LESLIE FARBER, *LYING, DESPAIR, JEALOUSY, ENVY, SEX, SUICIDE, DRUGS, AND THE GOOD LIFE* (1976).

307. *Id.* at 167-68. That this is an enduring problem for women is manifested by the fact that Deborah Tannen devotes an entire chapter to it in her recent book. See DEBORAH TANNEN, *Put Down that Paper and Talk to Me!: Rapport-Talk and Report Talk, in YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION* 74-95 (1990).

308. See FARBER, *supra* note 306, at 170.

309. *Id.* at 175 (emphasis added).

310. *Id.* at 171.

women generally.³¹¹ In time, fearing exposure as a liar, but seeing little gain and much risk in straight talk, the man simply clams up.

Sociobiologically-based evolutionary theory would seem to confirm the tendency of males to lie. Under the classical version of this theory, since men can never know that they are the fathers of any given baby, they gain evolutionary advantage when they impregnate the largest number of women. With fewer potential offspring, by contrast, women gain more when they induce the fathers of their children to stick around and provide nurture for the young so that they will survive.³¹²

311. *Id.*; cf. RICH, *supra* note 6, at 186. "Men have been expected to tell the truth about facts, not about feelings. They have not been expected to talk about feelings at all. Yet even about facts they have continually lied." *Id.* Farber's and Rich's observations are even more compelling if we accept the proposition that copulation is a female service, not the culmination of any process where two similarly situated persons get together. In this context men would be motivated to avoid any disclosure that might upset the delicate mood.

312. These notions, longstanding in biology, and accepted for the most part by Posner, have come under attack in recent years. *See, e.g.,* PHILIP KITCHER, *VAULTING AMBITION: SOCIOBIOLOGY AND THE QUEST FOR HUMAN NATURE* (1985); Sarah Blaffer Hrdy, Letter, N.Y. REV. OF BOOKS, July 14, 1994, at 54.

I was the first to propose that female primates may mate with multiple males so as to confuse information available to males about paternity and thereby enhance the survival of subsequent offspring, since former consorts might be more disposed to help, or at least not to harm, possibly related offspring.

Hrdy, *supra*, at 54. Feminist legal academics, responding to Posner's book, *Sex and Reason*, have been especially critical. *See, e.g.,* Jane Larson, *The New Home Economics*, 10 CONST. COMMENTARY 443-63 (1993); Robin West, *Sex, Reason and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993) (review); Gillian Hadfield, *Flirting with Science: Richard Posner on the Bioeconomics of Sexual Man*, 106 HARV. L. REV. 479 (1992) (review).

That feminists should respond so harshly to Posner should not be surprising. Sociobiology with its essentialist emphasis on female nurturing and sexual passivity can be read to counteract the central feminist message that it is exciting to be a woman. It is perhaps for this reason that Larson writes wishfully that "[i]n the past decade scientists have disproved this prediction of passive females and promiscuous males as having been based on evidence gathered using distorted observation methods." Larson, *supra*, at 456. West longs for the day when sociobiology will go the way of phrenology." West, *supra*, at 2438.

This is not to deny the real contribution of critics to the discussion of such matters. Larson, like Posner before her, forces our attention to changes in the direction of a freer and more active sex life among Swedish women in response to a social welfare system (broadly defined) that makes women less dependent on men. *See* Larson, *supra*, at 4. Hadfield suggests that if classical sociobiology were on target, women would spend time only with monogamous males. Hadfield, *supra*, at 489. Thus, even allowing for mistakes in evaluating specific males, the monogamous males could not dominate the population. Hadfield, *supra*, at 489. In this view, since the Don Giovannis are successful as a class, it must be because a purely sexual drive, i.e., one independent of concern for protection of the young, must be asserting itself. Happily, the validity of the classical sociobiological position on this issue does not need to be resolved here.

Matt Ridley draws out the implications. "In courtship, as in the world of advertising," he writes, "there is a discrepancy of interests between the buyer and the seller. The female wants to know the truth about the male [the seller for Ridley as well as for Symons]—his health, wealth and genes. The male wants to exaggerate the information. The female," Ridley adds, "wants the truth: the male wants to lie. The very word seduction implies trickery and manipulation."³¹³

That a major function of human speech is to advertise one's self, including one's sexual self—as opposed to passing along name, rank, and serial number—should not be surprising. Indeed as Ridley notes, manipulating the listener may be at the heart of all animal communication. Citing a major study, Ridley writes that "a nightingale does not sing to inform potential mates about himself; he sings to seduce them. If that means lying about his true prowess, so be it."³¹⁴

But what about the female nightingale and by extension the human female? If she "wants the truth," is she prepared to give it?³¹⁵

B. *What's Sauce for the Gander*

At the turn of the seventeenth century it was women, not men, who were performing Elizabethan bed tricks.³¹⁶ In the culture of late eighteenth-century France it was Madame de Merteuil who was orchestrating the greatest assault on sincerity in romantic discourse since Ovid.³¹⁷ In the nineteenth century women were known to deliberately

313. See RIDLEY, *supra* note 241, at 154.

314. *Id.* at 158 (citing Dawkins & Krebs, *Animal Signals: Information and Manipulation*, in BEHAVIOURAL ECOLOGY 282-309 (1978)). Compare this observation with that of Anatole France, *supra* note 133.

315. "Natural selection," writes Sarah Blaffer Hrdy, "has produced women who are assertive, sexually active, or highly competitive, who adroitly manipulated male consorts. . . ." Hrdy, *supra* note 312, at 54.

316. Lionel Trilling explains this phenomenon best. "'I am not what I am [or say]' could have been said not alone by Iago but by a multitude of Shakespeare's virtuous characters at some point in their careers. . . . Helena is not Diana, Mariana is not Isabella—the credence the Elizabethan audience gave to the ancient bed-trick in which a woman passes herself off as another during a night of love, suggests the extent of its commitment to the idea of impersonation [or misrepresentation]." LIONEL TRILLING, *SINCERITY AND AUTHENTICITY* 13-14 (1971).

We should not, however, make too much out of Elizabethan women's manipulations, Marliiss Desens tells us. See MARLISS C. DESENS, *THE BED TRICK IN ENGLISH RENAISSANCE DRAMA* 140 (1994). In the mostly male-written dramas she examined, fully 60% of the bed-tricks were orchestrated by men, while in the remaining cases the device usually was used by women only to regain wayward husbands. *Id.* For more on the bed trick, see *infra* notes 402-13 and accompanying text.

317. See LACLOS, *supra* note 258.

misinterpret a squeeze of the hand as a proposal of marriage.³¹⁸ And it is of twentieth-century America that, as we have seen, D.H. Lawrence writes that the “greatest triumph an American woman can have is the triumph of seducing a man, especially if he is pure.”³¹⁹

It is easy to imagine Lawrence creating a paradigmatic seductress for the ages. But if he even tried, he failed, and the model we are left with is not an American at all, but the central character in the eponymous opera, Carmen.³²⁰ Because of Carmen’s importance—she is probably the best-known female opera character—close attention will be given to her here and later in this Article. In the first act Carmen is entertaining the crowd while Corporal-of-the-guard Don Jose is cleaning his gun, the only person paying her no mind whatever.³²¹ Piqued, she throws a flower at him, which he, intrigued, picks up.³²² Later Carmen instigates a fight with her co-workers.³²³ When she is locked up and put into Don Jose’s custody, she pleads for her freedom, offering a relationship with him when they next meet.³²⁴ Don Jose is an innocent, the only one in town, it seems, who does not know of Carmen’s devil-may-care sexuality, and his guilelessness is perhaps best evidenced by his relationship with his hometown sweetheart, the virginal Micaela.³²⁵ Don Jose, however, is savvy enough to know that letting Carmen go free will have serious professional consequences for him, but Carmen, sensing Don Jose’s weakness for her, taunts him.³²⁶ In response he asks her: “If I surrender, if I give in, will you keep your promise? And if I love, Carmen, Carmen, will you love me?” “Yes,” she says.³²⁷ He

318. See William Safire, *Jimmy Clinton*, N.Y. TIMES, June 27, 1994, at A17. One could argue that squeezes of the hand could come to be understood through custom as proposals of marriage. Safire, however, speaks of women “deliberately misinterpreting” the act. *Id.* I take this to mean that no claim is being made based on social convention.

319. HARDWICK, *supra* note 247, at 181. Recall here the connection made by Baudrillard between seduction and “systematic simulation.” BAUDRILLARD, *supra* note 93, at 19.

320. See GEORGES BIZET, *CARMEN* (Ellen H. Bleiler trans., 1983).

321. *Id.* at act I, sc.2.

322. *Id.* We might conclude from her behavior that Carmen has an “undifferentiated” need to be loved. See *supra* notes 306-09 and accompanying text.

323. BIZET, *supra* note 320, at act I, sc.2.

324. *Id.* at act I, sc.2. The Carmen case involves a reversal of sorts. In most of the cases examined here a promise or statement is made to induce romance or sexual services. Carmen, by contrast, is offering romance and sexual services in order to induce other action. But from Larson’s standpoint the reversal should be irrelevant, since any damage to Don Jose as a result of misrepresentation will—if we accept the proposition that sexual fraud is equally damaging to both sexes—be no different from that suffered by, say, Don Giovanni’s victims. See Larson, *supra* note 14, at 378-79.

325. BIZET, *supra* note 320, at act I, sc.2.

326. *Id.* at act I, sc.2.

327. *Id.* at act I, sc.2.

frees her and is temporarily imprisoned himself for neglect of duty.³²⁸ Later, after Carmen threatens to withdraw her affections, Don Jose deserts his regiment to begin a life of crime as a smuggler with her.³²⁹

Not long thereafter Carmen tires of Don Jose's dependence on her. Don Jose is devastated, for he has given up not only an honorable career, but an honorable and long-standing relationship as well. Feeling the sting of loss and humiliation, he longs to make sense of the shambles of his life and begs Carmen for a word of encouragement.³³⁰ With self-righteous, proud, and arguably justified indignation, she says no, adding, "Carmen has never lied,"³³¹ a statement which, because it leaves him fully responsible for his own downfall, costs Carmen her life, probably Don Jose his, and Micaela perhaps effectively hers.

C. *Women Speak*

If there are elements of Don Giovanni in every man, is it not conceivable that every woman is part Carmen? As it turns out, we need not look to long deceased male authors, composers, and librettists' conceptions of women to extend to them the indictment for lying.³³² "Naturally good until now, I had never lied, for nothing tempted me," writes Diana Cooper.³³³ "But now with the advent of the young men—benign serpents—came the apple. . . . Childhood was over."³³⁴ Scarlett O'Hara tells Frank Kennedy that her sister is no longer available for marriage because Scarlett, anxious to get money to maintain Tara,

328. *Id.* at act I, sc.2. & act II, sc.1.

329. *Id.* at act II, sc.4.

330. *Id.* at act IV, sc.2.

331. *Id.* at act IV, sc.2. The argument that Carmen is blameless in this matter is grounded in the notion that sexual relationships—especially new ones—are inherently unstable so that promises to continue relationships are meaningless.

Would Larson allow a cause of action against Carmen's estate? Since she cheered Sharon Wildey on for bringing her breach-of-promise case, *see Wildey v. Springs*, 840 F. Supp. 1259 (N.D. Ill. 1994) and *supra* note 106, one wonders whether she would support Don Jose here. To be sure, Carmen did not promise to marry Don Jose, but she did coax him with her favors into leaving his military position, knowing that for him there was no going back and that the chance of any but the shortest relationships between them was nil. *BIZET*, *supra* note 320, at act I, sc.2 & act II, sc.1. It is this knowledge on her part that leads to the conclusion that Carmen is a seductress and not merely a sexually free woman.

332. Interestingly, there is evidence to suggest that Carmen was modeled on a real courtesan who became a writer. *See SUSAN MCCLARY, GEORGES BIZET: CARMEN IN CAMBRIDGE OPERA HANDBOOK* 39 (1992).

333. DIANA COOPER, *THE RAINBOW COMES AND GOES* (1958), *quoted in THE NEW QUOTABLE WOMAN* 301 (1993).

334. *Id.*

wants Frank for herself.³³⁵ “[W]omen,” admits Larson in a recent interview, “are just as inclined, it seems to me, to be deceitful and to be sexually exploitive of partners as men are.”³³⁶

Even more instructive is the Table Talk of a leading poetess of contemporary feminism, Adrienne Rich.³³⁷

We have been expected to lie with our bodies: to bleach, redden, unkink or curl our hair, pluck eyebrows, shave armpits. . . . We have been required to tell different lies at different times depending on what men of the time needed to hear. The Victorian wife or the white southern lady who were expected to have no sensuality, to “lie still”; the twentieth-century “free” woman who is expected to fake orgasms.³³⁸

“In the struggle for survival we tell lies,” Rich continues, “[t]o . . . men who have power over us, who legally own us and our children, lovers who need us as proof of their manhood.”³³⁹

The devil made me do it. Is this what today’s feminism is, at bottom, all about: avoiding responsibility for women’s actions?³⁴⁰ Is it so

335. MARGARET MITCHELL, *GONE WITH THE WIND* (MGM 1939).

336. Jane Larson, *All Things Considered* (National Public Radio Broadcast, Aug. 1, 1993), available in LEXIS, News library, APR file.

337. RICH, *supra* note 6.

338. *Id.* at 188. “Who knows,” Baudrillard asks, challenging the prevailing wisdom, “if women, far from being ‘despoiled,’ have not from time immemorial been playing a game of their own by triumphantly asserting a right to sexual reticence? If they have not, from the depths of their sexual impassibility, been throwing down a challenge, challenging men’s pleasure to be but the pleasure of men alone?” See BAUDRILLARD, *supra* note 93, at 18.

Is this so farfetched? Worried that after they deny their lovers sexual comforts they would be beaten into submission, the community of women ask Lysistrata for her counsel. LYSISTRATA, IN ARISTOPHANES: *THE ELEVEN COMEDIES* 237 (1943). “Then yield to their wishes,” she urges, “but with a bad grace; there is no pleasure for them where they do it by force. Besides, there are a thousand ways of tormenting them.” *Id.*

339. “I want to reiterate,” emphasizes Rich, “that when we talk about women and honor or women and lying, we speak within the context of male lying, the lies of the powerful. . . .” RICH, *supra* note 6, at 189.

Rich is not the only one who, noting women’s flight from truth, nevertheless proclaims their innocence. Harriet G. Lerner compiles a list of women’s complaints: “I pretended I was in love with him because I was desperate to get married”; “I pretended to want sex”; “I pretended to enjoy motherhood”; “I pretended to be happy in my marriage.” “Patriarchy,” concludes Lerner, “schools women to pretend as a virtual way of life. . . .” HARRIET G. LERNER, *THE DANCE OF DECEPTION* 121 (1993).

340. Alas, there is evidence to support such a view. See, e.g., Deirdre English, *Raising the “New Daughter,”* N.Y. TIMES BOOK REV. 11 (Oct. 10, 1993). The authors want to know why mothers and daughters are so often at odds with one another. “Their thesis,” writes English, “is

difficult to acknowledge, "I am human, therefore I lie"—and then to speak of special burdens on women?³⁴¹ Is Rich articulating the core of women's future defense to sex fraud?³⁴²

D. *The Contemporary Scene*

Whatever the case, women's lies and their legal effects have been at issue in two recent civil actions. How shall we evaluate them? In 1988 Anita Singh placed an ad in the *India West* and *India Abroad* magazines, advertising her availability for marriage and describing herself as a third-year student at the University of California in electrical

that traditional mothers betray daughters by their subservience to male patriarchal authority. In male-dominated families, mothers are generally in charge of keeping girls from rebelling, and daughters are so indebted to mother love that they . . . submit," she adds, "but not without lasting, half-repressed resentment." *Id.*

341. Compare one of the confessionals in the Jewish liturgy: "We abuse, We betray, We are cruel. . . . We falsify. . . . We lie. . . . We pervert. We quarrel." MAHZOR FOR ROSH HASHANAH AND YOM KIPPUR 715 (2d ed. 1981).

342. Rich, to her credit, is at least embarrassed by women's manipulations; there would be no point otherwise in seeking to deflect responsibility to others. The same cannot be said of the latest school of feminist critics of Bizet's opera. *See, e.g.,* SUSAN MCCLARY, *FEMININE ENDINGS: MUSIC, GENDER, AND SEXUALITY* 59-60 (1991) (noting Carmen's disdainful treatment of Don Jose: "She continually resists his attempts at possessing her, manipulates him pitilessly . . . talks back, makes sexual demands, takes other lovers . . . and even persuades him to desert the army, to become an outlaw for her sake."); Nelly Furman, *The Languages of Love in Carmen*, in *READING OPERA* 175 (Arthur Groos & Roger Parker eds., 1988) (characterizing Carmen as a shameless manipulator); Michael Rabaud, *A Tragedy of Love, Sun and Death*, in *13 ENGLISH NATIONAL OPERA GUIDE* (1982) (same). In their eyes, a suit against Carmen would be absurd since she was not even owed an apology. It appears that for these critics, as Jennie Cavilleri put it, "[l]ove means not ever having to say you're sorry." ERICH SEGAL, *LOVE STORY* 91 (1970).

If anyone is indebted to anyone in this context, these scholars go on, it is Don Jose who owes a profound measure of gratitude to Carmen. Sure, Carmen manipulates her lover's desire. But Don Jose is actually better off with the infusion of vitality he receives from her. "The Jose who is in love with Carmen . . . is infinitely preferable to the pasteboard soldier Micaela encounters at the beginning." *See* MCCLARY, *supra*, at 66; *see also* Rabaud, *supra*. (Is Dona Elvira similarly better off for letting Don Giovanni into her life?) Jose is also better off without his "black-and-white" values, MCCLARY, *supra*, at 66, and his "ideology of possession," Furman, *supra*, at 175. Unlike Don Jose, we are to understand, Carmen is "in love with love itself." Her love is based on feminine "jouissance" for it is "not necessarily mutually shared or even reciprocated," but is rather "an energy in constant motion." *Id.* Carmen, in short, has achieved an "assured place in the pantheon of feminist idols." *See id.* at 172.

That Don Jose may not find happiness, indeed may suffer immeasurably in this brave new world, is of little concern. Here is the point. The very qualities Larson reviles in Don Giovanni, the new critics revere in Carmen. *See, e.g.,* MCCLARY, *supra*, at 66. Unlike Larson, this school of thought does not dream of a world without Don Giovannis, but rather of a world full of them—as long as they are women. *See id.* Larson's imaginable denial notwithstanding, the manipulative woman has become a hero.

engineering and a believer in traditional Indian values.³⁴³ Raghvendra responded to the ad, and after a courtship of several months, the two got married.³⁴⁴ Some time later a child was born to the couple.³⁴⁵ By 1991, however, the marriage was in serious trouble and Anita filed for divorce.³⁴⁶

After the divorce was granted and Anita won custody of the child, Raghvendra sued for damages in fraud on the grounds that she had lied about her schooling and her values, that is, that she had been only a first-year student at a community college and that by virtue of her petition for divorce had proved her indifference to traditional Indian norms of behavior.³⁴⁷ His marriage to his wife under these circumstances, Raghvendra alleged, had the effect of damaging his reputation in the Indian community.³⁴⁸ Are we ready to see someone like Anita wiped out for her transgression?³⁴⁹

Or consider *Askew v. Askew*.³⁵⁰ In an effort to mediate serious marital difficulties, Ronald and Bonnette see a marriage counselor.³⁵¹ After thirteen years of marriage and two children—and with presumably little, if any, sense of foreboding—Bonnette makes a stunning revelation.³⁵² Here is Ronald's testimony about the session:

Bonnie stated to me that she had been living a lie through her marriage with—to me. And that she had deceived me, and that she had at the time of our marriage, and at the time that she entered into the marriage, that she had never had any desire or any passion for me. That she had never loved me, never loved me in the way—way that she knew I wanted to be loved. That she—she—was wrong, and she knew if—that if she had told me the truth, I would not have married her. . . .³⁵³

343. *Raoul v. Mowatt, Man Sues Ex-Wife for Allegedly Filing Phony Personal Ad*, HOUS. CHRON., Nov. 4, 1992, at A9.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. No opinion of this case has been reported officially. The Supreme Court of California, however, recently denied Raghvendra's petition for review of an adverse divorce ruling by the Sixth Appellate District. *In re Marriage of Anita & Raghvendra Singh*, 1996 Cal. LEXIS 494.

350. 28 Cal. Rptr. 2d 284 (Cal. Ct. App. 1994).

351. *Id.* at 287.

352. *Id.* at 286.

353. Brief for Appellant at 8-9, *Askew*, 28 Cal. Rptr. 2d 284 (Cal. Ct. App. 1994) (Nos. G014021, G014610, G014892).

While Bonnette's version of the session was different, her deposition demonstrates the truth of the underlying statement.³⁵⁴ Some time after the counseling session, Ronald Askew brought his action in sexual fraud seeking monetary damages and the restitution of property taken in joint tenancy with Bonnette.³⁵⁵ Bonnette countered that giving Ronald relief would undermine the community property law.³⁵⁶ The appellate court, reversing the trial court, found for Bonnette on the grounds that the heartbalm statute precluded relief.³⁵⁷ Are we really ready now to reverse that decision and grant Ronald relief for what he at least considered the lie of his whole marriage and what surely is the wreckage of his life?

VII. THE MIND GAME

Honesty is such a lonely word
Everyone's so untrue
Honesty is hardly ever heard
But mostly what I need from you

—Billy Joel³⁵⁸

354. Brief for Respondent at 3-4, *Askew*, 28 Cal. Rptr. 284 (Cal. Ct. App. 1994) (Nos. G014021, G014610, G014892), as follows:

Q. Is it fair to say that you lost sexual desire for Mr. Askew *prior* to your marriage to him?

A. Yes.

Q. Is it your opinion that had you told Mr. Askew of your lack of sexual desire for him *before* the marriage, that he still would have married you?

A. I can't be certain of that.

Q. Do you recall Ron asking you *before* your marriage if there was anything that he should know about before the two of you were married?

A. I believe so.

Q. Were you of the opinion that your lack of sexual desire for Ron was something you did not need to tell him?

A. Yes.

Id. (emphasis in original).

355. *Askew*, 28 Cal. Rptr. 2d at 285.

356. *Id.* at 286.

357. *Id.*

358. Billy Joel Ballads, *Honesty* 32 (Hal Leonard Publishing 1993).

We could make believe I love you/ Only make believe that
 you love me/ Others find peace of mind in pretending/
 Couldn't you?/ Couldn't I? Couldn't we?

—Jerome Kern and Oscar Hammerstein II³⁵⁹

That women are full members in the community of liars and thus equally vulnerable as men to charges of sex fraud, does not, of course, require rejection of Larson's proposal.³⁶⁰ For even if sex fraud is practiced equally and regularly by men and women, a sex fraud tort still might be desirable.³⁶¹ Two sets of questions arise at this point: To what extent do speakers understand what they are saying and listeners what they are hearing? And, to what extent are our answers to these questions dependent on the gender of the speaker, listener, and evaluator? In other words, can we understand the language of romantic/sexual partners? Can we even "Be sure it's true when [we] say 'I love you?'"³⁶²

Daniel is telling his friend about his date the previous evening and how, after the most satisfying experience ever with her, he had told her that he loved her—again a potentially actionable event for Larson.³⁶³ Yet, the morning after, Daniel has his regrets.³⁶⁴ No, not the usual ones; but did he lie?

A. *From Head to Tongue*

"I felt the love," Daniel reports, "I even felt myself wanting to love her, and I was thinking about my future with her in it."³⁶⁵ According to Nyberg, Daniel wanted Nora to believe that "which he thought he believed (though perhaps not completely) but which, as it turns out, he does not now think he believes."³⁶⁶ The key question for Nyberg, then, is, did Daniel believe "I love you, Nora" at the time he spoke.³⁶⁷ The

359. MAKE BELIEVE, *on* SHOWBOAT (Columbia Records 1962).

360. See Larson, *supra* note 14, at 379-81.

361. See *id.* Tax evasion is, in this author's opinion, at least as pervasive and no serious-minded individual advocates a laissez-faire policy as a response to that problem.

362. BILLY MAYHEW, *IT'S A SIN TO TELL A LIE* (1936). According to a recent study, this is the second most common lie told to women. The first? "I'll call you." See HOLLANDER, *supra* note 1, at 345.

363. NYBERG, *supra* note 141, at 51; see also Larson, *supra* note 14, at 466-67 (discussing the elements of Larson's proposed sex fraud tort).

364. NYBERG, *supra* note 141, at 51.

365. *Id.*

366. *Id.*

367. *Id.* In terms of the definition of sex fraud, the question here is whether there has been

problem, Nyberg points out, is our inability “to know exactly and completely what we believe at any given time, especially at times of heightened emotion, speculation, optimism.”³⁶⁸ Asks Nyberg, who provides no answer: “Does believing ‘I love Nora’ feel enough like believing ‘I want to love Nora; I hope I can’ so that you might honestly confuse the two states of mind?”³⁶⁹

Might a speaker be similarly confused about a misrepresentation of fact, when he tells a potential romantic partner, for example, that he does not have an ongoing relationship? Might he not want to believe that he is physically and emotionally separated? And if such thoughts are swirling around his head about his own relationships, might they not with respect to other matters?

The problem is not only one of knowing, but also of communicating that knowledge. “There is a treacherous transition from believing something, thinking it through in one’s own mind, to saying it out loud to someone else,” writes Nyberg.³⁷⁰ “Even though we may not always experience fully the complexity of this transition, to speak a simple truth is an impressive mental accomplishment.”³⁷¹ Karl Scheibe puts the problem in a somewhat different way. “Speech is a misrepresentation of psychological reality,” he writes, “not because everyone is a malicious liar but because that inner reality is fugitive and only poorly fits the devices of expression it finds.”³⁷² Which brings us to the heart of the poststructural message—that we do not create language, that grammar, vocabulary, and syntax are but imperfect tools language offers us for our

a “fraudulent . . . misrepresentation of fact, opinion or intention” and by extension whether there can be justifiable reliance on it. Larson, *supra* note 14, at 453. “Fraudulent,” of course, implies knowledge of falsehood, scienter. Whether such scienter can be found in the Daniel/Nora case will be dealt with (briefly) below. See *infra* note 383 and accompanying text.

368. NYBERG, *supra* note 141, at 51.

369. *Id.* Cheryl Merser expands on the difficulty of translating love talk. “Saying ‘I love you’ can mean ‘I like you,’ ‘I am having a good time, aren’t you?,’ ‘Yes, we’re lovers.’ Or it can mean the real thing, whatever that is. Early on in a relationship what it most often means is that we’re not in love, but ‘in hope.’ ” CHERYL MERSER, *HONORABLE INTENTIONS* 26 (1983). Similarly, my friend Ruth Ann Crowley points out, “we have only the foggiest working definition of ‘love’ as in loving broccoli, music, dancing, your horse, etc.”

The problem of knowing what we believe is aggravated by the limitations on our powers of perception. “I start with the fact,” writes the well-known scholar, Erving Goffman, “that from an individual’s particular point of view, while one thing may momentarily appear to be what is really going on, in fact what is actually happening is plainly a joke, or a dream, or an accident, or a mistake, or a misunderstanding, or a deception, or a theatrical performance.” *Quoted in* Jack Rosenthal, *On Language: Frame of Mind*, N.Y. TIMES MAG., Aug. 21, 1994, at 16.

370. NYBERG, *supra* note 141, at 50.

371. *Id.*

372. Karl Scheibe, *In Defense of Lying: On the Moral Neutrality of Misrepresentation*, 15 BERKSHIRE REV. 16 (1980).

use. This being the case, we cannot be held responsible for it in the same way as if we were making it up as we went along. This does not make a sex tort regime impossible, only that much more difficult to implement.

B. *Speaking and Listening*

These problems of knowing and communicating are compounded by mistakes and biases on the part of the listener. For much of the time we do not take in what is said to us, but only what we have programmed ourselves to hear. According to Marcel Proust, "We pack the physical outline of the creature we see with all the ideas we already formed about him, . . . [and] [i]n the end they come to fill out so completely the curve of his cheeks . . . the line of his nose . . . that each time we see the face or hear the voice it is our own ideas of him which we recognize and to which we listen."³⁷³ If human beings did not come gendered, if there were no biological divide between us, we might be able to manage fairly easily. But, alas, this is not the case and we are left with a serious sex-based communication problem. Deborah Tannen, speaks to this point in her recent bestseller when, following on the work of Carol Gilligan,³⁷⁴ she claims that women's purpose in conversation is to create connections while that of men is to establish dominance.³⁷⁵

There also may be epistemological differences. In expecting to find meaning that is firm enough to be the basis for actionability, Larson may be acting like a male. Evaluating an article by Richard Posner and Andrew Rosenfield,³⁷⁶ for example, Mary Joe Frug wrote: "their response exhibits the weaknesses stereotypically associated with masculinity: they are arbitrary, rigid and authoritarian. They are unable to claim [presumably like women can] what Keats called 'Negative Capability'—the capacity 'of being in uncertainties, Mysteries, doubts, without any irritable reaching after fact & reason.' "³⁷⁷

Not reaching after fact and reason, enjoying wrestling with language without expecting to pin it down, Frug takes us far from Larson territory

373. Marcel Proust, *quoted in* IRVING YALOM, *LOVE'S EXECUTIONER AND OTHER TALES OF PSYCHOTHERAPY* 182 (1989). No citation to the original is provided.

374. *See, e.g.,* CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

375. DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: MEN AND WOMEN IN CONVERSATION* 24-25 (1990).

376. *See generally* Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

377. Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1039-40 (1992).

and places us squarely in Wilde's.³⁷⁸ Larson wants to take sex talk, refine it down to its core, and hold the speaker accountable therefore.³⁷⁹ Language for her is, in technical terms, "cognitive" or "constative," an instrument of knowledge.³⁸⁰ For Don Giovanni, Wilde, Cyrano, and so many of the rest of us, by contrast, language is "performative," a field of play.³⁸¹ After Christian expresses concern about the propriety of having Cyrano supply the lines for him, Cyrano settles him down. "Call it a sort of lie/ If you like, but a lie is a sort of myth/ And a Myth is a sort of truth. No reason why Roxan[e] should be disillusioned."³⁸²

There is yet another difficulty in this domain. Let us go back to Nora. It is not only that Daniel was confused himself and lacked expedient means for sharing his confused state of mind with Nora, but that he willed himself into a higher level of romantic attachment than he "naturally" felt: "I even felt myself wanting to love her. . . ."³⁸³ Consider why we so often intoxicate ourselves with drink or drugs before our sexual encounters. To be sure, it is in part to relax to get through what is a tense³⁸⁴ and dirty business.³⁸⁵ But might there not be more?

378. See WILDE, *supra* note 138, at 261. I do not want to suggest that Frug, whom I knew, would actually have rejected Larson's proposed tort. Indeed, I am reluctant to even speculate on this matter. All I wish to do is to highlight the implications of Frug's and others' generalized writings about the difficulties of squeezing meaning from language without having it slip through their fingers.

379. See Larson, *supra* note 14, at 456-71 (delineating the elements of Larson's proposed tort of sexual fraud).

380. See *id.* at 456-57.

381. These distinctions, based on the work of J.L. Austin, are nicely drawn in FELMAN, *supra* note 39, at 26-27.

382. ROSTAND, *supra* note 8, at 76-77.

383. NYBERG, *supra* note 141, at 51.

384. See *supra* notes 269-71 & 275-78 and accompanying text.

385. "Have you not yet noticed that while pleasure is indeed the sole motive for the union between the sexes," writes Choderlos de Laclos (through the Marquise de Merteuil), "it is not sufficient to form a bond between them, and if it is preceded by desire, which attracts, it is none the less followed by disgust, which repels. It is a law of nature," adds Laclos, "which can be changed only by love. . . ." See LACLOS, *supra* note 258, at 275. If Laclos is right, we would be depriving ourselves if we did not exaggerate, even manufacture, good qualities in our mates.

It is not my purpose to suggest that the griminess of sex functions only as a depressant of sexual activity. See, e.g., DAN SABBATH & MANDEL HALL, *END PRODUCT* 147-65 (1977) (discussing the sex act in various scatological contexts).

C. *Smoke Gets in Your Eyes*³⁸⁶

The culture teaches that smoke gets in our eyes only after our heart fires up. But, it is suggested here, the smoke often comes first. Before she gives herself to Christian, Roxane informs Cyrano, "I'll tell [Christian] to overwhelm me with excess, to rhapsodize, be brilliant."³⁸⁷ And this willful self-delusion continues in the fullness of love. The character Nancy says in a Thirty-Something episode (explaining why she is taking back her husband, Elliot, after he had brought her such pain): "When we're in love we invest the other person with more glamour . . . than they actually have; otherwise we'd kill ourselves."³⁸⁸

This kind of self-deception would appear to be universal.³⁸⁹ "Bésame, bésame mucho" begins one of the best known Spanish language songs, "kiss me, just keep kissing me."³⁹⁰ The quantity of kisses the singer seeks is clear. But what about the quality? Does s/he want a sincere kiss, a kiss from the heart? Hardly. Rather, a kiss "como si fuera . . . la última vez;" "as if . . . for the last time."³⁹¹ Under the circumstances can we rationally make lies actionable? Daniel, then, may well have told Nora that he loved her not to move her nor to deceive her, but rather to move and deceive himself.³⁹²

Diane Ackerman elaborates on the need for these tricks. While "[s]ex may seem spontaneous, raw, true, and of the moment, because the sensations are so hotly felt that the body screams out its own version of *Eureka!*"³⁹³ She continues, "[e]very sex act, no matter how casual, is a tangled drama, a piece of pure 'theater.'" ³⁹⁴ It is the result, she

386. JEROME KERN, ROBERTA (1933) (book by Otto Harbach adapted from Alice D. Miller, *Gowns by Roberta* or, alternatively, *Roberta*).

387. ROSTAND, *supra* note 8, at 99. One could argue that Roxane gets what she deserves—deception.

388. Once again I ask the reader's indulgence. I cannot provide a citation.

389. A word has even been coined for it. "What I have called crystallization is a mental process which draws from everything that happens new proofs of the perfection of the loved one," writes Stendhal (author of *The Red and the Black*), "[for it] evolves from the feeling that the degree of pleasure is related to the perfections of the loved one. . . ." STENDHAL, *supra* note 15, at 45-46. Who knows? Maybe crystallization is rooted in nature as a means of assuring survival of the species.

390. CONSUELO VELAZQUEZ, *BÉSAME MUCHO* (1943) (1941).

391. *Id.* "Oh what lies there are in kisses," wrote the poet, Heine. *Quoted in* NYBERG, *supra* note 141, at 51.

392. *Id.*; see *supra* notes 363-69 and accompanying text. No wonder that in the dictionary, before being explicated as "a passionate love affair," the noun "romance" is defined as "something that lacks basis or foundation in fact." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1969 (1971).

393. Robert Stoller, *quoted in* ACKERMAN, *supra* note 224, at 246.

394. ACKERMAN, *supra* note 224, at 246.

continues, quoting Stoller, "of years of working over the scripts in order to make them function efficiently—that is, to produce excitement . . . rather than anxiety, depression, guilt or boredom."³⁹⁵ Stoller adds, "the whole business is a fraud, an act, a masquerade, a disguise—no matter how much the author . . . proclaims about truth. Yet for all that falsity," Stoller continues (because of it?), "tissues swell. Fantasy converts to physiology."³⁹⁶ A story making the rounds bears this out. A longstanding groupie of Mick Jagger's is finally, after much hoping and praying, invited to bed. When she emerges, her envious friends descend on her to ask how it all went. "O.K.," she responds, "but he is no Mick Jagger." Anyone enjoying the story understands that it is, in fact, the fantasy of union with Mick Jagger that, uh, makes possible (and is the measure for) actual connection with him. Thus, when a prominent authority on sex law writes that "I do not suggest that this aspect of sexuality [i.e., fantasy] is necessarily a 'good' thing," one wants to comfort him.³⁹⁷

What is the best strategy for heightening sexual response? Take risks; let go of suspicions, even those that are rationally grounded. According to Stoller, excitement is possible only when we are navigating between certain dualities, such as alive/dead, love/hate, strong/weak, control/out-of-control, succeed/fail.³⁹⁸ "Excitement is uncertainty; certainty brings pleasure, pain or no response," writes Stoller, "but not excitement."³⁹⁹ In the same vein, Martha Nussbaum writes that "only a risk so terrible that it can annihilate makes true joy possible."⁴⁰⁰

D. *Taking Leave of Our Senses*

We now know that self-deception is pervasive in matters of the heart,⁴⁰¹ however, we do not yet have a full measure of its depth. So

395. Robert Stoller, *quoted in* ACKERMAN, *supra* note 224, at 246. Ackerman, alas, does not provide citations to Stoller's work. Her bibliography does, however, list titles of some of his works from which presumably the quoted material derives.

396. Robert Stoller, *quoted in* ACKERMAN, *supra* note 224, at 246.

397. *See* Schulhofer, *supra* note 63, at 92.

398. *See* ACKERMAN, *supra* note 224, at 246.

399. *See id.*

400. Nussbaum, *supra* note 281, at 1725. Professor Nussbaum is inspired to this conclusion by the character Enid in Joyce Carol Oates, *You Must Remember This*. Enid, Nussbaum asserts, "knows that deep sexual joy is linked with the extinguishing of the reasoning power, of language, almost of consciousness—and therefore with the constant risk of death." *Id.* at 1724-25. Demanding truth in courtship may be to seek a kind of control that Nussbaum suggests is lost.

401. And in related matters of the flesh. A man writes in his diary on his birthday, recalls Gershon Legman: "Today I am twenty years old and I can't bend my penis with both hands."

we turn to the story of Shi Pei Pu and Bernard Bouriscot, Chinese spy and French foreign service officer, respectively, probably the greatest sexual deceiver and self-deceiver of all time.⁴⁰² Shi Pei's offense: Representing to Bouriscot that their twenty-year relationship was based on love, that he was a woman and that a child had been born of the union.⁴⁰³ When the truth came out about the former's sexual identity, his partner was inconsolable.⁴⁰⁴ Playwright David Henry Hwang was so intrigued by the story that after interviews with Boursicot, he went on to write *M. Butterfly* to try to get at its heart.⁴⁰⁵ In the play the judge at the subsequent trial for espionage asks Song Liling, the male/female character, in disbelief, how he could possibly have sustained the astonishing hoax on Gallimard, the victim.⁴⁰⁶ Song responds by giving credit to his mother, an experienced prostitute, who explained how easy it is to start the chain of dependency.⁴⁰⁷ "Rule one is: Men always believe what they want to hear. So a girl can tell the most obnoxious lies and the guys will believe them every time—'This is my first time'—'That's the biggest I've ever seen'—or *both*. . . ."⁴⁰⁸

But this is Song Liling speaking and he is in a difficult legal—and ethical—position; not only has he engaged in espionage himself, but he also has deceived an intimate into collaborating with him. And he has done what to Gallimard, at least, is even more unforgivable. "You showed me your true self. When all I loved was the lie. A perfect lie, which you let fall to the ground—and now it's old and soiled."⁴⁰⁹ By referring to Gallimard's need to believe, therefore, Song Liling seeks to deflect the blame from himself. So is Gallimard really to blame for the fix he is in? Is the woman who discovers that her husband has had a lover for fifteen years of a thirty-year marriage responsible, at least in part, for her own fate?⁴¹⁰ Did she, like Gallimard, fail to see what was plainly in front of her? The playwright helps us answer the question. Near the end of the play Song Liling asks Gallimard whether he could really accept that Song was a man.⁴¹¹ Gallimard says he can, then goes

"Today I am twenty-five years old and I can't bend my penis with both hands." This goes on and on: thirty, thirty-five, forty, forty-five, fifty, fifty-five. Finally, at sixty 'I bent it. I must be getting stronger.' " G. LEGMAN, *RATIONALE OF THE DIRTY JOKE* 303-04 (1968).

402. DAVID H. HWANG, *M. BUTTERFLY*, *Playwright's Notes* (1989).

403. *Id.*

404. *Id.*

405. *See id.* at 94.

406. *Id.* at 81-82.

407. *Id.* at 82.

408. *Id.* Song Liling goes on to point out how these two messages are contradictory.

409. *Id.* at 89.

410. *See* LAWSON, *supra* note 219, at 222.

411. HWANG, *supra* note 402, at 87.

further. "I knew all the time somewhere that my happiness was temporary, my love a deception. But my mind kept the knowledge at bay."⁴¹² "Happiness," concludes Gallimard, "is so rare that our mind can turn somersaults to protect it."⁴¹³

If because of our limited cognitive capacities we cannot know ourselves or others well, and if compounding this problem are differences in speaking style⁴¹⁴ and self-deception,⁴¹⁵ is administration of a sex fraud system feasible? This is the subject of the next part. For the moment must we not agree with an observation by Baudelaire? "The world functions only through misunderstanding," he writes. "It is through universal misunderstanding that everyone agrees. For if by misfortune people understood one another," he adds, "they could never agree."⁴¹⁶

VIII. IS A SEXUAL FRAUD REGIME WORKABLE?

The factual determinations to be made in a sexual fraud litigation will require nuanced human judgments. But juries exist for such purposes.

—Jane Larson⁴¹⁷

412. *Id.* at 88. But here once again we have a male author speaking—and through a male character at that. Would a woman engage in such self-delusion? "Little by little things were happening that didn't make sense," writes a woman in describing her reaction to evidence that her husband was having an affair, "but I can remember making excuses for them myself . . . I didn't want to believe there was anything to find out. . . . You know, I, I, as I said, I made up a lot of excuses, and really believed them. . . . I didn't confide in anyone, too, because I was afraid of what they would tell me. . . . I was afraid more of the truth than living in the lie kind of." ROBERT W. MITCHELL & NICHOLAS S. THOMPSON, *DECEPTION* 296 (1986). Recall in this connection the Fantasy Man. *See supra* note 57.

It will not be suggested here that such self-deception is in the same moral category as deception of others. That would be silly. My purpose is only to highlight that recognition of the drive to self-deception is important in evaluating the sex fraud tort.

413. HWANG, *supra* note 402, at 60. Deceivers often need to delude themselves as well. A woman talks about deceiving her lesbian lover into thinking she was attracted to her: "Part of the time I pretended to myself that I really wasn't deceiving anybody but that wasn't very possible really. It was pretty hard because in my heart I knew what the truth was . . . I was fooling myself. I wanted it, I wanted something to be different than the way it was and so I was fooling myself. I was saying, 'Well, it will change. I'll come around,' even though I think way deep inside I knew that wasn't going to happen. . . ." MITCHELL & THOMPSON, *supra* note 412, at 299.

414. *See supra* notes 307-08 and accompanying text.

415. *See supra* notes 412-13 and accompanying text.

416. MY HEART LAID BARE, *quoted in* FELMAN, *supra* note 39, at 29. Every contracts casebook, I think, should have these words etched into its cover along with the title.

417. Larson, *supra* note 14, at 467.

[The Thomas-Hill quarrel] embroiled the United States Senate in the impossible task of adjudicating alleged offenses that had occurred in private, of which there were no witnesses and no evidence. . . . It was not a hearing, much less a trial; it was a story-telling contest that was not winnable by either participant. . . . Its only result was damage to all participants and to the nation.

—Wendell Berry⁴¹⁸

A. *Proving the Elements*

In a sex fraud regime, if Don Jose does not kill Carmen he will almost surely sue her.⁴¹⁹ Why? He cannot live with the idea—of which she is a constant reminder—that he is responsible for his own downfall.⁴²⁰ But how will he prove that Carmen made a misrepresentation of fact that was relied upon?⁴²¹ Except sometimes in the movies, the important declarations are made in private; indeed, in our society it is a greater breach of etiquette to speak of affection in public than to show it. If a (false) statement is about something easily refutable, say, marital status, it is even less likely to be made in public. The result: he said/she said contests that devastate the parties and perhaps the legal system as well.

The problems of proving others' declarations in sex fraud settings are compounded by those relating to materiality.⁴²² Which misrepresentations will be actionable? Larson offers only two safe harbors for those seeking to embellish themselves in the mating competition. You can say with impunity, "I am a great and undiscovered poet."⁴²³ But the lie here is obvious. To make such a statement is to disprove it; what poet would utter such a cliché? The other proves even less useful: "No, I don't think you're too fat."⁴²⁴ But the question that precedes this answer is clearly rhetorical. Both the speaker and the listener know that in an intimate situation the question allows only one answer, regardless of its truth content. If these are Larson's only examples, then unlike the

418. WENDELL BERRY, *SEX, ECONOMY, FREEDOM AND COMMUNITY* 118 (1992).

419. See *supra* notes 322-31 and accompanying text.

420. See *supra* note 331 and accompanying text.

421. See *id.*

422. The word "materiality" actually does not appear in Larson's proposed definition. Larson, *supra* note 14, at 453. In importing the term into her analysis, Larson seems to conflate it with "justifiable reliance." See *id.* at 462-68.

423. See *id.* at 462.

424. *Id.*

commercial model on which Larson bases her case,⁴²⁵ a sex fraud regime offers no room for simple puffery; every misrepresentation can be material.

Whether or not a representation is held to be material,⁴²⁶ according to Larson, will depend on the individual circumstances of the case. "To a person seeking a spouse, for example, a false claim to be unmarried may be highly material to sexual consent; in a more casual relationship, a potential partner's marital status may not play a part in the decision to have sex."⁴²⁷ But, as Larson herself points out, "several layers of motivation may co-exist."⁴²⁸ Her solution to the problem of determining materiality is to follow the lead of the *Restatement*:⁴²⁹ "[M]isrepresentation," she writes, "need only be a 'substantial factor' influencing reliance to be material."⁴³⁰

But what does this mean in the setting before us? If a woman claims, writes Larson, "that she was ready for a serious relationship and was not, in fact, going to sleep with anyone outside that, and can prove that, then there's no reason she's not going to be believ[ed]."⁴³¹ But is it possible to prove such things? Is the sex drive not powerful enough to drive us to distraction? Is Larson describing human beings or robots?

Proving justifiable reliance, another element of sex fraud, is equally problematic.⁴³² Let us consider whether Don Jose can win a case against Carmen's estate based on his reasonable reliance on her promise of loyalty.⁴³³ He is, as we have seen, naive. But should this failing undermine his claim? After all, is the whole point of Larson's tort not to protect the innocent?⁴³⁴ Who else needs protection? On the other hand, Carmen's estate would surely argue that the promise was made *in extremis*, while she was in prison; that even an ignorant soldier knows the power of freedom; that not being tied down for her was the

425. *Id.* at 413.

426. *Id.* at 462-63.

427. *Id.* at 462.

428. *Id.* at 463.

429. RESTATEMENT (SECOND) OF TORTS § 546 cmt. b (1977).

430. Larson, *supra* note 14, at 463.

431. Gold, *supra* note 11, at N1, N2.

432. For guidance on justifiable reliance, Larson draws on the RESTATEMENT (SECOND) OF TORTS § 537 (1977). See Larson, *supra* note 14, at 464 n.387.

433. See Larson, *supra* note 14, at 464. She promised to be true when she had no intention do so and knew that he would be harmed as a result. See *id.*; see also *supra* notes 322-31 and accompanying text.

434. One of the cases on which Larson relies most heavily in this regard is *Parker v. Bruner*, 686 S.W.2d 483 (Mo. Ct. App. 1984), *aff'd*, 683 S.W.2d 265 (en banc), *cert. denied*, 474 U.S. 827 (1985), involving a young woman who was every bit the innocent that Don Jose is—and more. Larson, *supra* note 14, at 407 nn.142-47 and accompanying text.

paramount value and that he knew this or should have known it, if only because he was with her when she sang of the flightiness of love,⁴³⁵ and thus he should not have relied on her declarations; and that if Don Jose is allowed to successfully counter that he closed his mind to the truth because of his passion for Carmen, the whole notion of justifiable reliance goes out the window. Are these issues that our juries should be debating?⁴³⁶

A jury also would have to measure "serious harm."⁴³⁷ For Larson this would mean economic and physical harm, including, no doubt, psychiatric costs, and emotional harm.⁴³⁸ "Compensation for emotional injury—that most disfavored category of tort damages—should be treated as an ordinary element of consequential damages," writes Larson, "subject to no special proof requirements."⁴³⁹

435. BIZET, *supra* note 320, at Act I.

436. Recall Larson's paradigm case of *Perry v. Atkinson*, 195 Cal. App. 3d 14 (1987), which involved involving a promise by a married man to impregnate his paramour at some future time even if the couple was no longer together. *Id.* at 15. Larson acknowledges that Atkinson's marriage to another should have raised doubts on Perry's part as to the former's sincerity. Larson, *supra* note 14, at 459. But, she adds, this doubt is offset by the specificity of his promise. *Id.* It seems, however, that Larson is ignoring a central feature in love affairs. Most of the time, when a relationship ends it is precisely because at least one of the parties wants to cut, or at least loosen, ties, not preserve them. Was it therefore reasonable on Perry's part to rely on Atkinson's promise to father a child after the love relationship ended when such action was likely to enmesh the two lives legally and otherwise for an indefinite future?

437. Larson, *supra* note 14, at 459 n.368. "Although the loss of sexual integrity is in and of itself an insult to human dignity," writes Larson, "nominal damages like those available in an assault action cannot be recovered in an action for misrepresentation." *Id.*

438. *Id.* at 459.

439. *Id.* Larson claims that contemporary jurisprudence no longer disfavors emotional damages relative to other damages. *Id.* at 459 n.370. Given the historical reluctance of courts to compensate for emotional damages, the few cases Larson cites are not sufficient to support her claim. *See id.* at 459.

As to how serious "serious" harm must be, Larson says little in her article. Perhaps in response to readers' questions, she has since elaborated on her position. "We're talking about people who experience very crippling kinds of emotional and mental distress. It can be sexual dysfunction, humiliation, rage, loss of an ability to trust other people. These are very much like the kinds of injuries that are suffered by people who are raped by a date or by incest victims. . . ." Sonya Live (CNN television broadcast, May 11, 1993 (transcript at 42). Elsewhere, Larson has written,

Almost any sexually mature person has suffered from some kind of sexual fraud, but most of us just eat a lot of ice cream, bitch to our friends, nurse our wounds and go on with our lives. We don't, . . . suffer the kind of serious harm that would be a prerequisite for this kind of lawsuit.

GLAMOUR, Apr. 1994, at 174, reproduced *infra* text accompanying note 449.

B. *The Burden on the Courts*

But, as Alan Dershowitz points out using a fraudulent breach of promise as a model, how a court would measure the amount of damage a plaintiff suffered from the false promise is questionable:

Would it depend on whether she enjoyed the sex or merely tolerated it? Would a gold digger be entitled to more damages than a woman who wanted to marry for true love? Would the damages be less if the man were a real sleazebag, since marriage to a loser is worth considerably less than marriage to a winner? Would the judge have to hear experts discuss the likelihood of the marriage being successful? And just how much is a successful marriage worth?⁴⁴⁰

Judges and juries would surely have their hands full with all the issues they had to decide. Would they be up to the job? Larson is convinced that they would. "The factual determinations to be made in a sexual fraud litigation," she writes, "will require nuanced human judgments, but juries exist for such purposes."⁴⁴¹ Sheila Kuehl, Director of the California Women's Law Center, and new Assemblywoman in California, concurs with Larson's conclusion while offering another rationale. "Unlike business litigation," she says, "this is the one time when you might actually get a jury of your peers."⁴⁴²

But can decisionmakers—as opposed to scholars—afford to deal so perfunctorily with the practical sides of sex fraud? Are not the real issues whether a jury, judge, general arbitration panel or body of communications specialists and sexologists can render a satisfactory and just determination in any given case, and whether our justice system, already burdened, should be subject to the additional strain of resolving sex fraud disputes when such cases are so problematic?⁴⁴³ To be sure, the statutes abolishing the heartbalm actions speak of the need of

It is hard to know what to make of this. There was no claim in *Perry v. Atkinson* of rape-like or incest-like damages. See *supra* note 436. On the other hand, it is harder yet to imagine Larson wanting to compensate Ronald Askew who almost surely is out of commission for years. *Askew*, 28 Cal. Rptr. 2d at 286; see also *supra* notes 350-57 and accompanying text (discussing the *Askew* case).

440. Alan M.I. Dershowitz, *View from the Top*, PENTHOUSE, Nov. 1993, at 28.

441. See Larson, *supra* note 14, at 467.

442. See Gold, *supra* note 11, at N2.

443. See Jane Larson, *Sex, Lies and the Right to Sue*, CHI. TRIB., Oct. 5, 1993, § 1, at 19; see also WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (1991) (addressing the major increase in American litigation since 1970).

avoiding fraud by those claiming to be its victims;⁴⁴⁴ but is it not equally likely that the legislatures were anxious to ease the burden on the courts of handling these troubling issues?

We cannot not resolve this last issue now, fifty years later. But we can find practical guidance through the problem at hand from the folks who have not yet been heard from, those who do not make their livings from law review articles, the folks out there in the real world. And so we ask them: Is it time for a sex fraud tort?

IX. THE PEOPLE SPEAK

Should an action be available against a sexual partner who has lied about (denied) a serious attempt at suicide?

—Dan Subotnik⁴⁴⁵

If sexual fraud lawsuits had been possible in the past, would you have brought one against a partner?

—Glamour⁴⁴⁶

Jane Larson has written a tightly argued and emotionally powerful article that might be expected to appeal to large numbers of women. But if women are both the Powerful Sex in terms of the sexual act itself⁴⁴⁷ and the Empathetic Sex in their preference for conciliation over confrontation,⁴⁴⁸ will they want to impose Larson's brand of gynocentrism on those suffering from serious genital and congenital disabilities?

In the April issue of *Glamour*, the readership was asked for its reaction to various questions under the general heading, "Should the Law Punish Lovers Who Lie?" The one-page summary of results is reproduced on the following page.⁴⁴⁹

444. See, e.g., *supra* note 52.

445. Dan Subotnik, *Sex Fraud Tort Questionnaire*, THE RESTATEMENT, Nov.-Dec. 1993, at 6.

446. *Should the Law Punish Lovers Who Lie?*, GLAMOUR, Apr. 1994, at 174.

447. See Larson, *supra* note 14, at 392-93.

448. See GILLIGAN, *supra* note 374.

449. *Should the Law Punish Lovers Who Lie?, 84% Say Yes*, GLAMOUR, June 1994, at 133 [hereinafter GLAMOUR SURVEY RESULTS].

[this is what you thought]

Should the law punish lovers
who lie? 84 percent say yes

JANE LARSON, A Professor at Northwestern University School of Law, has proposed creating a new legal category of fraud — sexual fraud. Eighty-four percent of the respondents to our April survey agree with Larson that people should be able to sue for physical damages resulting from a sexual partner's lies. However, respondents were split fifty-fifty as to whether or not emotional damage should be grounds for a lawsuit. Sixty-four percent say someone has successfully lied to them to get them to have sex. For more results of the survey, read on.

- 1. SHOULD PEOPLE BE ABLE TO SUE FOR PHYSICAL DAMAGES DUE TO A SEXUAL PARTNER'S LIES (E.G., AIDS, ANOTHER STD OR A PREGNANCY THAT DEVELOPS MEDICAL COMPLICATIONS)?

84% say yes.

"Three years ago, I sued the man who gave me genital warts — and won. The settlement reimbursed me for my medical expenses and emotional distress. I suffered for years because of his lies. Winning the case was very liberating."

16% say no.

"We should teach young women to rely on their own instincts for protection, not the law. Whatever happened to responsibility and good judgment?"

- 2. SHOULD PEOPLE BE ABLE TO SUE FOR EMOTIONAL DAMAGES DUE TO A SEXUAL PARTNER'S LIES?

50% say yes.

"Men have to understand that they can't take it upon themselves to ruin a woman's life simply to get her into bed. It's a form of abuse that they've been getting away with for too long."

50% say no.

"Dating and intimate relationships have always involved some degree of persuasion and misrepresentation. Learning who we can and can't trust is something most of us have to learn the

hard way."

"A law like this implies that women are too naive for their own good, and I for one don't want to perpetuate that stereotype."

- 3. HAS SOMEONE EVER SUCCESSFULLY LIED TO PERSUADE YOU TO SLEEP WITH HIM/HER?

64% say yes.

"I never thought I'd fall for a line, but some guys act so sincere you don't realize they're feeding you a line."

"When someone you're crazy about says he loves you, it's easy to get caught up in the moment and say yes to sex. How are you supposed to know about the other two girlfriends who think he loves them?"

36% say no.

"I've had guys say all kinds of things to me to get me into bed. No matter what, it's ultimately my decision whether or not I have sex with someone. Women must stop allowing ourselves to be labeled as victims and start taking responsibility for our own choices."

- 4. IF YES, WHAT WAS THE LIE?

88% say "I love you."

"On New Year's Eve, my boyfriend of three months told me he loved me. We spent the night in a hotel room making love and talking about the future. Afterward, he stopped calling, and I learned from a mutual friend that he just wanted to have sex on New Year's Eve—after that, I was history."

58% say "I'm not seeing anyone else."

"One guy told me he and his girlfriend broke up because she wanted to get married and he didn't. I found out two weeks later that they got engaged the day after I slept with him."

39% say other.

"A man I was dating told me he'd had a vasectomy and discouraged me from using birth control. When I got pregnant, he denied the baby was his."

28% say "I'm disease-free."

"I asked my boyfriend what the sore on his penis was and he told me he'd caught his penis in his zipper. Two

weeks later, I was diagnosed with herpes. I never saw him again, and I've been living with this disease for ten years."

20% say "I'm going to marry you."

5% say "I'm heterosexual/homosexual."

- 5. IF YOU ANSWERED YES TO NUMBER 3, WHAT WAS YOUR REACTION AFTER THE FACT?

56% say they were hurt, but got over it.

"I was embarrassed that I had been so gullible. Now I'm a lot stronger and I no longer count on a man to make certain promises before deciding whether or not I'll sleep with him. I make that decision based on my own desires."

42% say they suffered long-term damage.

"I'm still not over a boyfriend who lied about wanting to marry me three years ago. I was totally committed to him, and he was just in it for the sex. I feel demoralized and haven't been able to trust a man enough to have another relationship."

2% say they were indifferent.

- 6. IF SEXUAL-FRAUD LAWSUITS HAD BEEN POSSIBLE IN THE PAST, WOULD YOU HAVE BROUGHT ONE AGAINST A PARTNER?

67% say no.

"People have to learn that the world isn't a nice-nice place and you can't legislate it into one."

"Who needs a lawsuit? Personal revenge can be much sweeter."

33% say yes.

"As far as I'm concerned, someone who knowingly exposes a partner to an STD should be held as accountable as someone who willfully assaults another person."

Please turn to the next page and give us your responses to this month's survey, "Are 'Three Strikes' Laws the Answer to Violent Crime?"

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What sense can be made of these reactions?⁴⁵⁰ On the face of things Larson's tort has widespread support; eighty-four percent of *Glamour*'s respondents want a remedy for those who suffer physical damages as a result of fraud.⁴⁵¹ But, as we have seen, such damages are already actionable.⁴⁵² As for the fifty percent who wish to compensate emotional harm as well,⁴⁵³ consider what they identify as most common and, we might presume, ultimately most hurtful: the "I love you" lie.⁴⁵⁴ But the case of Daniel and Nora has demonstrated the difficulties of making such statements actionable.⁴⁵⁵ And Stephen Schulhofer has suggested that devoting itself to such matters may not be worth the judicial effort.⁴⁵⁶

"I am not seeing anyone else": should this be the basis for a cause of action? The problem here is that sex offers an excellent way for individuals to test out their sentiments; the body knows. Consider *A* who is choosing between *B* and *C*, both of whom she has feelings for. Should the tort system be forcing a disclosure that might precipitate a premature and thus potentially bad decision for *A*? Or consider Eliot *S.* who, after his wife becomes seriously ill, gets involved with a "call girl" in order to cope.⁴⁵⁷ Should the law induce him to abandon his wife? Or, in this latter case, should the law create a new defense of "justifiable misrepresentation"? Similarly, if *A* chooses *B* and the relationship later begins to sour, should *A* have to give up *B* entirely before experimenting with *D*? In an ideal world perhaps yes, but this seems not to be the way many—particularly the young—currently lead their lives.

But who cares, you might think, about *A* or Eliot's needs? How can we live in a world where liars go unpunished for the damage they have done? In his much celebrated work, *Singled Out: A Civilized Guide to Sex and Sensibility for the Suddenly Single Man—or Woman*,⁴⁵⁸

450. Author's telephone conversation with an editor of *Glamour*.

451. The overwhelming number of responses to *Glamour* questionnaires come from women, an editor informed me.

452. See *supra* note 103 and accompanying text.

453. GLAMOUR SURVEY RESULTS, *supra* note 449, at 133.

454. *Id.*

455. See *supra* notes 363-64 and accompanying text.

456. Schulhofer, *supra* note 63, at 93.

[T]here does not appear to be a clear social consensus about the circumstances in which misrepresentation in matters of sexual intimacy is improper. Particularly where statements about feelings and commitments are concerned, there are few pervasively shared intuitions about what is material and what is "misrepresentation," as opposed to puffing or "story-telling."

Id. at 92. Schulhofer goes on: "Statements about emotions and commitment seem the most material, but their significance can be elusive." *Id.* at 93.

457. See *supra* note 213 and accompanying text.

458. RICHARD SCHICKEL, *SINGLED OUT: A CIVILIZED GUIDE TO SEX AND SENSIBILITY FOR*

Richard Schickel discusses the problems of the newly single (NS) who, because they are still grieving the loss of the prior relationship, become blocked up emotionally.⁴⁵⁹ He suggests that at some point they break the logjam by forcing themselves to look for a new relationship.⁴⁶⁰ Because of their disequilibrium, Schickel writes, and because they may be out of practice in finding suitable partners, the NS male will likely gravitate towards a "Transitional Woman," someone whom he likes and who likes him, but who he knows does not offer possibilities for an enduring relationship.⁴⁶¹ The NS male recognizes at the same time, however, that the transitional woman may well be contemplating an open-ended relationship. Is this a time for guilt? Should the NS male terminate the relationship before it really begins? "[D]on't worry," comforts Schickel, "you'll get your chance to redeem your debt, because, just as sure as you're born, some lady is going to make you into her 'Transitional Man' and break your heart at the end of the process."⁴⁶² Under this new, enlarged, karmic definition, justice is done.

The misrepresentation of fertility or birth control use can produce among the most distressing consequences to the innocent party when a child is subsequently born. Should a cause of action be available to the deceived? Larson says yes.⁴⁶³ There is a problem with compensating for such lies. A lawsuit may in a costly fashion draw resources from the misrepresenter that could be used to support the child. It is to encourage both parents to invest in their child and thus bond with it that the courts, as we have seen, seem never to hold for the victim.⁴⁶⁴ In any event, since allowing such suits to proceed might well create many more male plaintiffs than female ones, one would be hard pressed to label the cause of action as "feminist."⁴⁶⁵

"I'm disease-free," after which the speaker infects his partner, has already been dealt with; passing a serious sexually transmitted disease is already actionable.⁴⁶⁶ What about "I'm going to marry you"? For all of Larson's efforts, there is almost no support for actionability.⁴⁶⁷ In

THE SUDDENLY SINGLE MAN—OR WOMAN (1980).

459. *Id.* at 16-17.

460. *Id.*

461. *Id.*

462. *Id.* at 17-18.

463. See Larson, *supra* note 14, at 462.

464. See *supra* note 106 and accompanying text.

465. If we can believe one recent study, "women who cheat on mates tend to do so around ovulation, when they are most likely to get pregnant." Wright, *supra* note 284, at 48. (No citation to the original study is provided.)

466. See *supra* note 103 and accompanying text.

467. See *supra* note 53; Schulhofer, *supra* note 63, at 91. But see Note, *Heartbalm Statutes and Deceit Actions*, 83 MICH. L. REV. 1770, 1773 (1985) (suggesting that causes of action based on fraudulent promises to marry should not be abrogated by heartbalm statutes).

any event, here, as in the case of misrepresentation of fertility and birth control use,⁴⁶⁸ allowing an action for breach of promise might also produce an abundance of female defendants.

Lying about sexual orientation will be dealt with below.⁴⁶⁹ For the moment consider what is perhaps the bottom-line of the Glamour survey: two-thirds of respondents say that they would not make use of a sexual fraud tort if it were available.⁴⁷⁰ As for the other third, if sexually transmitted disease is representative of their concerns, and it is supposed to be, there is no need for a new cause of action. Why do women evince such lack of interest in a tool Larson is so anxious to give them? One of the respondents spells it out. "Dating and intimate relationships have always involved some degree of persuasion and misrepresentation. Learning who we can and can't trust is something most of us have to learn the hard way. A law like this implies that women are too naive for their own good, and I for one don't want to perpetuate that stereotype."⁴⁷¹ In fact, abstract principles of this nature are always suspect when applied to questions directed at the heart. Perhaps Sherren Leigh, publisher of *Today's Chicago Woman*, is even closer to the mark when she writes: " 'I'd be embarrassed to let people know that I've dated some of the [jerks] I've gone out with, let alone taken them to court.' "⁴⁷²

As useful as the Glamour questionnaire is in helping to evaluate the need for a sex fraud tort, it does not begin to capture the wide range of sexual/romantic deception and responses thereto. To accomplish this purpose, the author prepared and distributed a questionnaire to Touro Law School students. The questionnaire and a tabular summary of results are reproduced on the following pages.

468. See *supra* note 106.

469. See *infra* note 474 and accompanying text.

470. GLAMOUR SURVEY RESULTS, *supra* note 449, at 133.

471. *Id.*

472. See Gold, *supra* note 11, at N1. Larson expands on this point when she writes that many women will not want their sexual biographies written in court, something that might be inevitable in the absence of "shield" laws analogous to the ones available in the rape area. See Larson, *supra* note 14, at 440-42 (discussing the tension between accountability and privacy interests).

Does this reticence undercut any "floodgates" argument? Perhaps. And yet, is there any way to know what might happen under a sex fraud regime when a few brave souls have shown the way? The great surge in sexual harrasment cases in recent years may help provide a glimpse into the future.

Sex Fraud Tort Questionnaire

Memo to: Touro Students
Re: Sex Fraud Tort

In an article appearing in a recent issue of the Columbia Law Review (93 C.L.R. 374-472), a law professor advocates establishing an action for sex fraud. Premised on the notion that fraud in commerce is actionable, as is intentional infliction of emotional harm, this tort would allow recovery for the primarily psychic injuries arising from sex-based misrepresentation. By providing a remedy in these cases, the professor argues, the law would help ensure that sexual relationships are based on true consent. (Under current law sex-based misrepresentation is only rarely actionable.)

I am in the process of writing a law review article on the subject of sex fraud and would much appreciate your

help in this regard. What I ask of you is *first* to *carefully* read the questionnaire in its *entirety* and then to fill it out indicating *which, if any, of the lies specified below should give rise to a cause of action*. Please feel free to discuss these matters with anyone (or as many people as) you choose to help clarify and develop your position. (You might want to bear in mind that whether or not sex-based lying becomes actionable, but especially if it does, parts or all of this questionnaire may come into general use.)

Explanatory comments for both yea and nay responses are especially appreciated; please write these neatly in the space provided or on separate sheets of paper. (For those who lose their Restatement copies I will be replicating the form on regular 8 1/2

by 11 paper and leaving it in the receptionist's office.)

Preliminary instructions: You are to assume in the questions below that the innocent party relies on the misrepresentation and begins or continues a sexual relationship. Also, in responding to the questions you are to consider the point in that relationship when the statement would most like be made. Finally you are to assume that one way or another the underlying request for information has been made directly.

In return for your help, I promise to present the results and evaluate them for you as soon as I possibly can.

Please note: I have deliberately not provided hypotheticals based on HIV and herpes infection.

Thanks very much for your help,
Professor Dan Subotnik

✂

(Please tear this page out and I leave it with the receptionist.)

✂

<p>Please indicate your level of agreement (or disagreement) with the following statements by circling the appropriate number where: 5 = strongly agree; 4 = somewhat agree; 3 = neither agree nor disagree; 2 = somewhat disagree; and 1 = strongly disagree.</p> <p>AN ACTION SHOULD BE AVAILABLE AGAINST A SEXUAL PARTNER WHO:</p> <p>A) lies about (denies) drug use: misrepresentation by males (m) 1 2 3 4 5; by females (f) 1 2 3 4 5</p> <p>B) appreciably misrepresents income or educational achievement: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>C) Lies about marital status (claims to be single): m 1 2 3 4 5; f 1 2 3 4 5</p> <p>D) Appreciably overstates level of affection (I love you): m 1 2 3 4 5; f 1 2 3 4 5</p> <p>E) Appreciably understates number of previous sex partners: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>F) Appreciably understates age: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>G) Lies about religious persuasion: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>H) Lies about (denies) undergoing an abortion: f 1 2 3 4 5</p>	<p>I) Lies about (denies) conviction for tax evasion: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>J) Lies about (affirms) current sexual faithfulness: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>K) Lies about (denies) a serious attempt at suicide: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>L) Lies about (denies) participation in armed robbery: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>M) Appreciably understates debts: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>N) Lies about (denies) same sex inclinations. (This question is designed for those attempting to lead heterosexual lives. I cannot come up with an analogous question for gay individuals.) m 1 2 3 4 5; f 1 2 3 4 5</p> <p>O) lies about (denies) interest in whips and chains: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>P) Lies about true paternity of children (Of course you are the father of the children, in later suit for reimbursement for support payments made.) w 1 2 3 4 5</p> <p>Q) Lies about (denies) medical condition, say, incipient multiple sclerosis: m 1 2 3 4 5; f 1 2 3 4 5</p> <p>R) lies about (denies) smoking cigarettes. m 1 2 3 4 5; f 1 2 3 4 5</p>	<p>Please provide the following information. (Bear in mind that all data will be kept confidential [except by those few who will be evaluating them] and that you are not being asked to identify yourselves by name.)</p> <p>Age _____</p> <p>Gender (circle) M or F</p> <p>Marital status (circle): Single/never married; divorced/separated; Domestic partner</p> <p>If separated or divorced indicate number of years since divorce or separation _____</p> <p>Ethnicity (circle): African-American; Asian American; hispanic/latino; White (European-American); Other _____</p> <p>Religious Affiliation (circle): Catholic; Jewish; Protestant; Other Christian; Muslim; None; Other _____</p> <p>Comments: _____</p>
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**MEAN RESPONSES BY MALES AND BY FEMALES
TO QUESTIONNAIRE ITEMS***

	<i>Males</i>	<i>Females</i>	<i>Unweighted Means</i>
1.	2.9	2.9	2.9
2.	1.8	1.8	1.8
3.	3.4	3.3	3.35
4.	1.6	1.6	1.6
5.	2.6	2.6	2.6
6.	2.4	2.6	2.5
7.	1.9	1.9	1.9
8.	-	-	-
9.	1.9	1.9	1.9
10.	2.9	2.9	2.9
11.	2.0	2.0	2.0
12.	2.3	2.3	2.3
13.	2.2	2.1	2.15
14.	3.0	2.9	2.95
15.	2.0	2.0	2.0
16.	-	-	-
17.	3.0	3.0	3.0
18.	1.7	1.8	1.75

* Responses to items 8 and 16 are omitted. The sample size of 54 consists of 29 women, 24 men and one person of unspecified sex. Fifty-nine percent of respondents were single, 83% were white, and 43% identified themselves as Catholic.

A number of interrelated conclusions emerge from the study. First, for all the examples of misrepresentation provided, it is with respect to one class only—lies regarding marital status—that a sex fraud tort finds some support.⁴⁷³ Even here, however, respondents come down closer to neither agreeing nor disagreeing with the proposed cause of action than agreeing with it. One might suppose that an honest answer to item 14—lies regarding homosexual inclinations—might be enormously important to sexual players. After all, same sex inclinations on the part of one's heterosexual partner would diminish the likelihood of a long-term relationship with him/her and perhaps increases a woman's fear of contracting AIDS from a male partner who is gay.⁴⁷⁴ Here again, however, the results do not support a call for action.

Second, men and women essentially evaluate particular misrepresentations the same way.⁴⁷⁵ In an ironic historical twist, due perhaps to fear of sexually transmitted diseases, women were readier to punish understatements of sexual experience.⁴⁷⁶ Third, there was virtually no difference in the culpability respondents attached to any given lie based on the gender of the liar.⁴⁷⁷ That is, where men and women believed that a specific lie should be actionable, they were no more willing to accept such misrepresentation among their own than among others.⁴⁷⁸ Last, while in general, racial and religious differences of respondents were not important factors, Catholics were least likely to be tolerant of lies about marital status and smoking.

Under a sex fraud regime, questionnaires directed to potential partners might well become the rage, for at some level we want to know everything about our romantic/sexual partners. But even if they do not, we can anticipate that at some point during our sex/romance talk a voice will well up within us, shattering the perfection of the moment: "Watch out now, you are in contract mode." Or perhaps that jolt will be provided by our partners, who simply declare a state of contract to be in effect. That such sudden shifts can change the essential character of a relationship by throwing everything into question should be apparent. In Jerry Sterner's *Other People's Money*, the President of New England Wire and Cable is talking to investment banker Larry Garfinkle.⁴⁷⁹ Out of the blue, he asks, "Can we speak frankly?"⁴⁸⁰ "I don't like people

473. See *supra* pp. 398-99 (Subotnik's sex fraud questionnaire).

474. See generally Gabriel, *supra* note 210 (discussing how marriages are destroyed by a revelation that one spouse is a homosexual).

475. See *supra* pp. 398-99 (Subotnik's sex fraud questionnaire).

476. *Id.*

477. *Id.*

478. *Id.*

479. JERRY STERNER, *OTHER PEOPLE'S MONEY* 14 (1989).

480. *Id.*

who say, 'Can we speak frankly?' " responds Garfinkle. "Means they're bullshitting me the rest of the time."⁴⁸¹

Will sex fraud bring other losses as well? Will fear keep the Cinderellas and Aladdins with their own kind, thereby locking the princes and princesses into their stale preconceptions of life and love? One thing will almost surely be lost: that sensuous striptease in which we slowly and deliriously reveal our indissolubly entangled real and imagined selves to our partners—and then hope for the best.⁴⁸²

X. CONCLUSION

Love is the world's infinite mutability; lies, hatred, murder even, are all knit up in it; it is the inevitable blossoming of its opposites, a magnificent rose smelling faintly of blood. A dream which makes the world seem . . . an illusion. The art of illusion is the art of love, and the art of love is the blood-red heart of the world.

—Pierre Corneille (and Tony Kushner)⁴⁸³

Man's brain, like the rest of him, may be looked upon as a bundle of adaptations. . . . We are anything but a mechanism set to . . . the truth Rather we have evolved a nervous system that acts in the interests of our gonads

—Michael Ghiselin⁴⁸⁴

Where does this leave us? On the one hand, we have heard the pain of sexual deception, recognition of which has led both men and women to propose social control.⁴⁸⁵ We also have heard the arguments rejecting the notion that lying is an inevitable part of the sexual order.⁴⁸⁶ And, finally, we have listened to the claim that regulation of sex fraud would not only prevent unwanted relationships from beginning, but also would

481. *Id.*

482. *See supra* notes 181-200 and accompanying text.

483. PIERRE CORNEILLE, *THE ILLUSION* 158 (Tony Kushner trans., 1994). Corneille (and Kushner) should not be read here as advocating murder. Rather, what we hear in this passage, which comes at the end of a gripping play, is Corneille's unflinching insistence through his character, Alcandre, that the noble qualities of love are never fully extricable from those we deplore, if not despise.

484. MICHAEL T. GHISELIN, *THE ECONOMY OF NATURE AND THE EVOLUTION OF SEX* 263 (1974). Gonads, it should be recalled, are not unique to males.

485. *See supra* note 63.

486. *See supra* note 176 and accompanying text.

lead to better relationships because of the atmosphere of trust that would result.⁴⁸⁷

On the other hand, there are questions. Speaking of the sex-is-contract view (in the context of arrangements regarding pregnancy), Martha Fineman elegantly spells them out:

Are whispered, passionate nuances of the language of love to be given legal content and consequences when individual expectations are frustrated? What would it mean for society . . . ? Would there be a state contract that governs such interactions unless explicitly altered by the parties? How many of us would be comfortable with the "scripts" legislators and judges write for the circumstances in which promises are not explicit, but only to be implied from the surrounding circumstances?⁴⁸⁸

"To state some of the questions which flow from the initial premise that sex is an occasion for contract," Fineman concludes, "is to reveal the underlying absurdity and inherent danger of that concept."⁴⁸⁹

Having over fifty years of experience with antiheartbalm regimes, moreover, we have come to understand that since the law offers few effective remedies, we must shoulder responsibility for protecting ourselves. We should now also understand the immense obstacles in the way of establishing a sex fraud regime: our deep need to trump up our accomplishments;⁴⁹⁰ our need for privacy;⁴⁹¹ the interplay in our mental lives between fact and fancy;⁴⁹² the difficulties of interpreting language, particularly in high-tension contexts;⁴⁹³ the burden that the

487. See *supra* note 76 and accompanying text.

488. Fineman, *supra* note 79, at 135 (footnote omitted).

489. *Id.* at 13. Once sex-is-contract is established regarding consequences of the sexual act, Fineman goes on to ask "will state and federal legislatures be free to define and confine . . . the sexual act itself?" *Id.*

490. See *supra* note 144 and accompanying text.

491. See NYBERG, *supra* note 141, at 128-34.

492. See *supra* note 170 and accompanying text. For Drucilla Cornell, this aspect of the sexuate personality should not be tampered with by a system as crude as the law. Changing the environment which produces such suffering

is under my definition a project that demands the space for the renewal of the imagination and the concomitant re-imagining of who one is and who one seeks to become. Hence, my insistence on the imaginary domain as crucial to the very possibility of freedom . . . to transform itself. . . .

Quoted in Goodrich, *supra* note 191, at 666-67.

493. See *supra* Part VII.A. & B.

determination of sex fraud would impose on our judicial or quasi-judicial systems;⁴⁹⁴ the positive obligation to lie in some circumstances.⁴⁹⁵

Some, to be sure, will dismiss these “problems”—along with this entire Article—for being grounded on anecdote and other minor cultural artifacts. Drawing their moral creeds from the secular and religious teachings of Montaigne, Kant, Bok, and Augustine,⁴⁹⁶ these skeptics will only scoff at Cyrano and Christian’s travails. They will meet the assertion that lying is closely bound up with the sexual experience, or that it is morally neutral, with a demand for the scientific or religious authority to back it up.

Four distinguished individuals in their fields have—however inadvertently—provided the science. In the most comprehensive study of sexual behavior ever conducted in this country,⁴⁹⁷ and under the titles *Sex in America*⁴⁹⁸ (the popular version) and *The Social Organization of Sexuality*⁴⁹⁹ (for the elite), these authors have probed our deepest sentiments about sex. As a result of interviews with over three thousand respondents, we now have answers to such questions as: Did sex with a partner make you feel satisfied, sad, loved, anxious, worried, wanted, scared, thrilled, guilty or otherwise?⁵⁰⁰ More important for our purposes is an entire class of findings, of which the following is but one example: Men report that they received fellatio at a far greater rate than women report providing it.⁵⁰¹ Is there anyone who will not be surprised by this paradox? Does it suggest a fundamental design flaw? Were questions misunderstood? Were there mistakes in compilation?

494. See *supra* note 443 and accompanying text.

495. See *supra* notes 148-56 and accompanying text. Some of these factors suggest that contrary to Larson’s dualities, those who suffer harm, may, in other circumstances, end up causing it. That there is no necessary virtue produced through suffering is demonstrated in the findings of a recent study of the secondary schools: The large majority of students who have been harassed also have harassed someone else at some point during their school life, and over half of all students (boys as much as girls) have experienced harassment as victims as well as perpetrators. V.E. Lee et al., *The Culture of Harassment in the Secondary Schools*, AM. EDUC. RES. J. (forthcoming 1995-96). These same factors may also suggest why, notwithstanding its insistence that there be full consent for every stage of sexual play, Antioch College has not sought to regulate sexual fraud as we have used the term.

496. See *supra* notes 135-37 and accompanying text.

497. See Anthony Lane, *Lay People*, THE NEW YORKER, Dec. 19, 1994, at 110 (reviewing EDWARD G. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* (1994) and ROBERT T. MICHAEL ET AL., *SEX IN AMERICA* (1994)).

498. See MICHAEL ET AL., *supra* note 280.

499. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* (1994).

500. See *id.* app. C, at 4, 15.

501. See MICHAEL ET AL., *supra* note 280, at 140.

Perhaps, though none of these possibilities seems to have even been considered. In a recent review, Anthony Lane has supplied what is probably the best explanation:

[T]hese books are not about sex [at all]. They are about lying. They are constructed with admirable clarity, but they [display] the unalterable fuzz of our duplicity, the need to hide the truth from other people in the hope that we will cease to recognize it in ourselves. . . . This is not a question of inefficient research, or of culpable hypocrisy, or even of that much loved villain of the piece, the male boast; it is simply what T.S. Eliot called *bovarysme*, "the human will to see things as they are not. . . ." ⁵⁰²

If Lane's analysis is correct—and Ockham's Razor suggests that it is—the authors of the sex books (and we might add Larson to this group) have failed to distill a critical message of their own work—that it is absurd to take as gospel what people say about their sexual experiences, hopes, and fears. And indeed, *The Social Organization of Sexuality* offers so much contradiction, so much inappropriate scientism, that the work, according to Lane, stands as "one of the comic masterpieces of our age." ⁵⁰³

The books in question have demonstrated that we lie to researchers. But no one is suggesting (yet) that such lying be the basis for tort. So back to our primary focus: should lying to a sexual partner be actionable? An old story is instructive. "Wait a minute," you say. "There you go again promoting anecdote as truth." The charge will not hold. First of all, in the moral realm anecdote can be truth or at least it can bring us as close to truth as we can possibly come; ⁵⁰⁴ what we can suppose is the very best science, as we have seen, has its limits. More important, far from being anecdotal, this particular story is Biblical gospel, for many the very definition of truth and the basis for truth-telling in the courtroom.

The Patriarch Jacob was traveling in the East when he encountered his cousin Rachel, whom he had apparently never seen before. ⁵⁰⁵ He fell in love with her and asked Laban, Rachel's father, for her hand in marriage. ⁵⁰⁶ Laban readily agreed on condition that Jacob serve him

502. Lane, *supra* note 497, at 113.

503. *Id.* at 111.

504. "[C]ertain truths about human life can only be fittingly and accurately stated in the language and forms and characteristic of the narrative artist." MARTHA NUSSBAUM, *LOVE'S KNOWLEDGE* 5 (1990).

505. *Genesis* 29.

506. *Id.*

for seven years, which Jacob did.⁵⁰⁷ On the wedding night, however, Jacob was duped.⁵⁰⁸ Laban induced his elder daughter, Leah, to substitute for her sister in the marriage bed.⁵⁰⁹ When Jacob realized what had happened, it was too late.⁵¹⁰ To earn Rachel, Jacob was forced to serve Laban for an additional seven-year period. No penalty, it should be emphasized, was imposed on Leah, the Foremother (or on Laban) for the sexual fraud. This being the case, can we justifiably impose sanctions on Leah's successors in these matters?

One could argue that the moral dimension is more obscure than it has been made out to be, that the events described took place at a time when families were dominated by fathers. In this view, having been given no choice in the matter, Leah is not morally culpable. Because we cannot be sure one way or the other, we turn to another story. Tamar was a widow, her husband having been killed by God for his evil ways.⁵¹¹ Pursuant to custom, i.e., levirate marriage, she was entitled to be taken in by either her brother-in-law, or under some circumstances, her father-in-law.⁵¹² The latter, Judah (son of the Patriarch Jacob, and his wife, Leah) fearing a similar fate for his surviving son, was reluctant to authorize a marriage between him and Tamar.⁵¹³ So Tamar took the initiative by removing her mourning outfit, dressing up as a harlot and waiting for Judah on the side of the road.⁵¹⁴ Not recognizing her, Judah asked her for sex, offering gifts in return.⁵¹⁵ Later, having been informed that his daughter-in-law was pregnant through harlotry, he was horrified.⁵¹⁶ But when Tamar advised him that he was the father and that her purpose was only to remarry, his anger abated and he acknowledged fault for not allowing the marriage with his son.⁵¹⁷

If sexual fraud is a violation of "dignity interests," should Tamar have been allowed to go unpunished? Did this incident, which is the only information we have about her, at least taint her or her line in

507. *Id.*

508. *Id.*

509. *Id.*

510. *Id.* It should be mentioned that Rachel herself may have participated in the fraud. See "Rashi" commentary on *Genesis* 29:25 in *THE SONCINO CHUMASH* 171 n.25 (The Reverend Dr. A. Cohen ed., 1983). Pitting the language of the parties against custom, and the custom of one party against that of the other, the foregoing story makes for a wonderful contracts hypothetical. *Id.*

511. *Genesis* 38.

512. *Id.*

513. *Id.*

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

some way? It seems not. For, as it turned out, through this one union with Judah, Tamar came to be an ancestor to King David and through Joseph, to Jesus as well.⁵¹⁸

Read narrowly, the story of Tamar permits a woman to lie for the sake of finding a husband. Because of the complication introduced by levirate marriage, however, and because sex-based liars often have other objectives, we cannot close our enquiry here. Pursuing a different path towards resolution of the sex fraud issue, this author wrote to Harriet Lerner, Staff Psychologist at the Menninger Clinic, strong feminist and author of the principal and best-selling treatise on sexual/romantic lying and the psychology of women. Asked to comment on the possibility of a sex fraud tort, Dr. Lerner, who in general rejects claims of justifiable deception, responded:

The idea of creating a tort for sex fraud doesn't strike me as a terrific idea . . . [D]eception, in its countless manifestations, is woven into the fabric of everyday life, so it seems wildly absurd to try to regulate lies, secrets, silence, faking, exaggerating, minimizing, pretending and the whole gamut of ways we show the false and hide the real. . . . More to the point, a tort for sexual fraud would narrow, not widen, the likelihood of truth-telling between two people. If men and women could sue each other for misrepresenting facts and feelings, the resulting emotional climate would be so anxious that it would be increasingly difficult for people to spontaneously be themselves or take risks in uncovering old lies and coming clean. . . . What a subject. What a world.⁵¹⁹

In highlighting the ironic consequences that would follow adoption of a sex fraud tort, Lerner is clearly on target. If we are looking for legal and maybe even moral guidance through the sexual thicket, then, does it make any sense to stop our search at Larson? If Martha Nussbaum is right that "only a risk so terrible that it can annihilate makes true joy possible,"⁵²⁰ shall we follow Larson into her effete new world? There is an alternative vision. It is provided for us by another woman, Susanna Centlivre, the highly regarded English playwright. Writing almost three hundred years ago, Centlivre invented the vibrant character, Belair, who

518. *Matthew* 1:3-16.

519. Letter from Harriet Lerner, staff psychologist, Menninger Clinic, to Daniel Subotnik, Professor of Law, Touro Law School (June 20, 1994).

520. See Nussbaum, *supra* note 400, at 1725 (describing a common theme in *Wuthering Heights*, *You Must Remember This*, and *Maurice*).

like many of Shakespeare's creations, takes on a disguise to win love.⁵²¹ Belair rationalizes his deception by citing a principle which Centlivre formulates, if not originates; which she seems to accept as necessary, if not ideal; which she offers the Don Giovannis to save their miserable lives, if not their souls (and which in its contemporary form has become one of the most widely known maxims of justice in the English language): "All Policy's allow'd in War and Love."⁵²²

But even this principle, however helpful, cannot ultimately provide the solution to the question of the desirability of the sex fraud tort. Because we need something of a law of war and a law of love,⁵²³ it should be taken only metaphorically to mean that the law ought to allow wide discretion in these areas. How much discretion? Another old story is instructive. It concerns a powerful man who had a secret, and a woman "friend" who, unbeknownst to him, was out to do him harm.⁵²⁴ She was certain that uncovering the secret would achieve her purpose. She first asked him directly.⁵²⁵ Rather than refusing to answer and risk losing the relationship, and fervently hoping she would not test his response, he lied to her not once, but twice and then a third time.⁵²⁶ When this pattern became clear to her she stepped up the pressure, reproaching him, " 'How canst thou say I love thee, when thy heart is not with me' [S]he pressed him daily with her words, and urged him [by withdrawing immediately before his climax] so that his soul was vexed unto death."⁵²⁷

Though he had his suspicions, he wanted to tell her everything as it really was, to give her the sense of intimacy she seemed to crave and to enjoy the peace and the exhilaration that come when two people are as one.⁵²⁸ We might even say today that he aspired to become a New Man unafraid of showing vulnerability, to create the kind of sincere and forthright relationship that Larson holds out for all of us as ideal. Finally, his warrior pride giving him confidence, he capitulated.⁵²⁹ But

521. See CENTLIVRE, *supra* note 249.

522. *Id.* at 273.

523. Only a few would argue, for example, that the law should not intervene when an individual, knowing he has a serious STD, does not inform his sexual partner of such, and, as a result, the disease is passed to the partner. See *supra* note 103 and accompanying text.

524. *Judges* 16.

525. *Id.*

526. *Id.*

527. *Id.*; BABYLONIAN TALMUD, Tractate Sotah 9b (Soncino 1985).

528. See *Judges* 16.

529. See *id.*

there were no blessings to be had from this act of faith, for what ensued was catastrophe.⁵³⁰

In retrospect, of course, we know Delilah's purpose.⁵³¹ Samson, however, did not.⁵³² If we ignore her actual purpose, and assume that she was as Samson hoped, does she have a cause of action against him for the lies he told?⁵³³ If not, what lesson should we draw? Might it not be that we are all Samsons with hidden weaknesses, and that a rule precluding the cover-up of our faults, as we perceive them, is simply inhuman?⁵³⁴

Giving out too much information about one's self—of which the paradigm might be telling someone you love them before the time is ripe—can thus be destructive. But what will dissuade information seekers—say, those who ask whether you love them at the wrong time—from confusing intimacy with full disclosure? Delilah's fate is no deterrent because it is unknown. Don Giovanni cannot help us here.

530. *Id.*

531. *See id.* Believing that there is a big difference between keeping secrets and lying, a colleague has asked whether I have inappropriately conflated the two here and elsewhere in this Article. I think not, for I do not find the distinction particularly useful. If the secret is important, it is likely to affect the behavior of the secreteholder, and the partner will, more often than not, sense this. He or she will then start asking questions and these questions, if the secret is to be kept, will have to be met with a lie.

Now let us suppose that the the partner does not sense the existence of a secret, that the secret is Samson's special power (not its source), and that we are in a sex fraud regime. Would Samson have an affirmative obligation to reveal it? Presumably even Larson would say no because, not knowing the secret, Delilah cannot have relied on it. *See Larson, supra* note 14, at 453-54. On the other hand, Larson would presumably want to impose such a burden on a man whose female friend believes him to be unmarried (although he has never said anything about his marital status) and he is aware of her belief. In sum, the sex fraud regime proposed by Larson would require an entire set of rules for when affirmative disclosure is required, a burden that she does not even begin to undertake in her article.

532. *Judges* 16.

533. Larson might argue that information of this potentially destructive nature does not constitute a basis for justifiable reliance. The problem with this assertion is that Samson was not merely volunteering information to Delilah. *Judges* 16. He was responding to a specific question after she had made it clear that she was not interested in pleasuring him until he demonstrated his trust in her. *Id.* If Delilah is not entitled to a honest answer under these circumstances—that is, if she is not entitled to choose her own criteria, reasonable or unreasonable, for sexual consent—can Larson fairly claim that a woman is entitled to sexual autonomy?

Biblical law, in any event, would seem to deny recovery to both partes under the foregoing assumption. *See Exodus* 22:16-17 (requiring compensation to minor virgin's family for seducing her). For if seduction were generally actionable, there would be no reason to explicitly provide a cause of action in the narrow case of the under-age and virginal victim. *See id.*

534. While agreeing that a sex fraud tort is highly problematic, Professor Paul Heald wants boundaries. He proposes that sex fraud be actionable where it is unconscionable. *See Heald, supra* note 91, at 26-27. Not believing that a community standard will, without more (in fact, much more), produce results that are reasonably consistent or cost-effective, I must disagree.

Happily, another operatic leading man can.⁵³⁵ Lohengrin comes into town on a boat drawn by a magic swan.⁵³⁶ His purpose is to protect the princess Elsa from the false charge that she had her brother, the Duke, murdered so that she could take control of the Duchy.⁵³⁷ Lohengrin proves her innocence through trial by combat with the accuser.⁵³⁸ He asks Elsa for her hand in marriage, which she readily agrees to, but he warns her that "You never once shall ask me/ Nor even care to wonder/ From whence I journeyed here/ Nor what my name and race."⁵³⁹ Elsa again agrees.⁵⁴⁰

Though happy in her marriage, in time, worried that the mysterious origins of her stranger/husband might put her at risk, and maddened by the thought that Lohengrin might not love her enough to trust her, she breaks trust with him by asking the unaskable.⁵⁴¹ Not being the kind of man to delude or even put off his wife—and, unlike Samson, having no reason for concern about his personal safety—he readily provides the answer.⁵⁴² In so doing, the longstanding traditions of the Knights of the Grail, the secret society of benefactors from which he came, force him to leave.⁵⁴³ As he sails away, Elsa collapses and dies.⁵⁴⁴ Is the message not clear by now that sexual players need space from one another, and that if they do not get it, they and all around them should watch out for falling pillars?

535. See generally RICHARD WAGNER, *LOHENGRIN* (Stewart Robb trans., 1963).

536. *Id.* at 4.

537. *Id.* at 5.

538. *Id.* at 6.

539. *Id.* at 5.

540. *Id.*

541. *Id.* at 17.

542. *Id.* at 20.

543. *Id.* at 21.

544. *Id.* The archetypal story in this area is surely that of Cupid, the god of love, and Psyche. See HAMILTON, *supra* note 224, at 92-100. It should not be supposed, however, that not only women who in the world's great stories cross the forbidden line in seeking information about their partners. See 15 *ENCYCLOPEDIA BRITANNICA* 134 (1959) (defining the mythological character Melusine).

