

## TINDER LIES

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*The rise of Internet dating—in recent years especially through the use of mobile-based apps such as Tinder or Bumble—forces us to reexamine an old problem in the law: how to handle sexual fraud. Many people with romantic aspirations today meet individuals with whom they do not share friends or acquaintances, which allows predators to spin tales as to their true identities and engage in sexual relations through the use of deceit on a greater scale than was previously practicable. Indeed, according to some studies, about eighty percent of individuals lie on at least some part of their online dating profiles, and a subset of those individuals tell lies that undermine their sexual mates' subsequent ability to give consent. Whether and how to criminalize this type of fraudulent behavior has been debated for some time, and the difficulties involved in prosecutions in this context have made criminal law a fairly ineffective tool. Previous proposals for tort recovery have failed to gain many adherents for similar reasons, and courts have been unwilling to extend existing tort doctrines due to a reluctance to legally recognize noneconomic harms. This Article seeks to strike a new path by first proposing that we harness the tools of trademark law to reduce search costs and deception in the dating marketplace, just like we do in the economic marketplace. Second, it argues that we should use a streamlined process through small claims courts to discourage behaviors that may bring significant dignitary,*

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*emotional, and other harms to people's lives and to offer victims a pragmatic path to legal recovery. Third, it proposes the use of statutory damages to alleviate the difficulties in accurately gauging the remedy level for the harm from a given instance of sexual fraud. By providing recovery in cases of material lies, like trademark law does in cases involving deceptive marks, this Article takes an important step towards aligning the legal framework of sexual fraud with those of other types of misrepresentation, incentivizing transparency in the increasingly murky dating world, and protecting individuals' ability to meaningfully consent to sexual relations.*

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#### I. INTRODUCTION

Much has changed in America's dating landscape since the advent of mobile dating apps. Dating websites have been around for some time, with one in three people meeting their spouses through

that route from 2005 to 2013.<sup>1</sup> Tinder and other mobile dating apps have greatly increased the likelihood that people will meet other romantically inclined individuals online. As of 2016, one in six people had used dating apps, and the percentage of those aged eighteen to twenty-four who used online dating services had tripled over the previous three years.<sup>2</sup> Indeed, by 2015 a majority of Americans believed that online dating was a good way to meet prospective mates.<sup>3</sup> Hence, a substantial portion of the U.S. population either has encountered online dating or is likely to have that experience in the future, with one estimate predicting that by 2040 seventy percent of individuals will have met their significant other online.<sup>4</sup> While online dating results in short- or long-term happiness for many individuals,<sup>5</sup> it also empowers those who seek to circumvent sexual consent to varying degrees.<sup>6</sup>

The idea behind Tinder and similar apps is addictively simple: A user indicates his or her interests with a number of parameters and is presented with the pictures and a brief description of a prospective mate.<sup>7</sup> If the user swipes the profile to the right, and the prospective

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1. John T. Cacioppo et al., *Marital Satisfaction and Break-Ups Differ Across On-Line and Off-Line Meeting Venues*, 110 PROC. NAT'L ACAD. SCI. 10135, 10138 (2013).

2. Aaron Smith & Monica Anderson, *5 Facts About Online Dating*, PEW RES. CTR. (Feb. 29, 2016), <http://www.pewresearch.org/fact-tank/2016/02/29/5-facts-about-online-dating/>.

3. *Id.*

4. See Ryan Anderson, *The Ugly Truth About Online Dating*, PSYCHOL. TODAY (Sept. 6, 2016), <https://www.psychologytoday.com/us/blog/the-mating-game/201609/the-ugly-truth-about-online-dating>.

5. Indeed, I myself met my husband on a dating app. See *Irina Manta, Carlos Farini*, N.Y. TIMES (May 6, 2018), <https://www.nytimes.com/2018/05/06/fashion/weddings/irina-manta-carlos-farini.html> (mentioning that we met on Bumble); see also Ashley Fetters, *The 5 Years That Changed Dating*, N.Y. TIMES (Dec. 21, 2018), <https://www.theatlantic.com/family/archive/2018/12/tinder-changed-dating/578698/> (“[I]n 2018, seven of the 53 couples profiled in the Vows column [of the *New York Times*] met on dating apps. And in the *Times*’ more populous Wedding Announcements section, 93 out of some 1,000 couples profiled this year met on dating apps . . .”).

6. Making online dating platforms liable for investigating the specific backgrounds of each individual is theoretically a possibility, but the cost would likely be so prohibitive at this time that this Article does not pursue that option further. Some platforms, however, can and do screen for basic information such as whether an individual is listed on a sex offender registry. See CNN Wire Staff, *Match.com to Begin Checking for Sex Offenders in Wake of Lawsuit*, CNN (Apr. 18, 2011, 4:59 PM), <http://www.cnn.com/2011/TECH/web/04/18/match.rape.lawsuit/index.html>.

7. See TINDER, <https://tinder.com/> (last visited Feb. 9, 2019); see also Marie Black, *How to Use Tinder*, TECH ADVISOR (June 28, 2018), <https://www.techadvisor.co.uk/feature/software/tinder-3515013/>. Other related examples include Bumble and Hinge, among many others. See, e.g., BUMBLE, <https://bumble.com/> (last visited Feb. 9, 2019); HINGE, <https://hinge.co/> (last visited Feb. 9, 2019).

mate does the same with the user's profile, a "match" is created and the two individuals are able to begin communicating.<sup>8</sup> If one or both individuals are not interested, they can swipe to the left and then there is no match.<sup>9</sup>

For all its simplicity and promise, online dating comes with its share of risks and pitfalls. Most problematically, it gives potential wrongdoers access to a large pool of possible victims who do not know each other and thus have limited means of warning their brethren.<sup>10</sup> Unlike when people go out on dates with individuals they met in other social settings such as friends' parties or workplaces, finding mates through apps often presents users with individuals with whom they share few or no mutual acquaintances.<sup>11</sup> Under these circumstances, a liar is less likely to be exposed right away, and the negative consequences to the liar will likely be less drastic. There is a perspective of "Oh well, what is he/she going to do to me?" existing in the online dating environment.<sup>12</sup> Combined with the options available on many dating apps to filter by user attributes, this creates the perfect breeding ground for not just small fibs (such as shaving off a few pounds of weight) but also larger lies such as misstating one's marital status.<sup>13</sup> Indeed, a lot of individuals want as many other users as possible to swipe right or contact them and are willing to

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8. See Black, *supra* note 7.

9. See *id.*

10. See Irina D. Manta, *Gawking Legally*, 41 HARV. J.L. & PUB. POL'Y 117, 123 (2018); see generally MONICA WHITTY & ADAM JOINSON, TRUTH, LIES AND TRUST ON THE INTERNET (2009) (discussing the potential of the internet as a tool of deception due both to the anonymity it provides and the greater speed at which interpersonal rapport is built in that medium).

11. See Richard M. Guo, Note, *Stranger Danger and the Online Social Network*, 23 BERKELEY TECH. L.J. 617, 617 (2008); Michelle McManus & Louise Almond, 'Stranger Danger' in the Online and Real World, CONVERSATION (July 28, 2017, 7:56 AM), <http://theconversation.com/stranger-danger-in-the-online-and-real-world-79517>.

12. Psychologist and relationship expert Esther Perel has decried how the online dating environment has ushered in a decline of "relationship accountability." Esther Perel, *How Technology Has Transformed How We Connect—and Reject—in the Digital Age*, IDEAS.TED.COM (Mar. 23, 2017), <https://ideas.ted.com/how-tech-has-transformed-how-we-connect-and-reject-in-the-digital-age/>.

13. OkCupid has performed research on the lies that users tell, some of which are grounded in increasing users' desirability. See Christian Rudder, *The Big Lies People Tell in Online Dating*, OKCUPID (July 6, 2010), <https://theblog.okcupid.com/the-big-lies-people-tell-in-online-dating-a9e3990d6ae2> (finding, for example, that women may dishonestly report their height because women who are listed as shorter receive more messages). Not everyone lies to increase his or her own desirability—plenty do it simply for fun, while a substantial proportion of women who lie do so to protect themselves from possible cyberthreats. See Alexandra Golovina, *Everybody Lies: What People Are Lying About on Dating Sites*, KASPERSKY LAB (Oct. 10, 2017), <https://www.kaspersky.com/blog/online-dating-lies/19703/>.

misrepresent themselves to obtain a lot of potential matches.<sup>14</sup> While some misrepresentations—such as ones about height or weight—are relatively innocuous or easily uncovered upon meeting, others can remain hidden for weeks, months, or even years.<sup>15</sup> The latter category can cause harm both where the perpetrator hoped that victims would never learn the truth and where he thought that they would find out but perhaps forgive him due to his initial qualities.

Liars defraud users who trust them with their emotions, bodies, and time. Despite the significant harm these kinds of victims suffer both in short- and long-term dating interactions, they have largely been told by courts and society (1) that the deception they have suffered does not “count,” (2) that any resulting harms are their own fault, or (3) that while the harms are real and undeserved, the legal system is not equipped to address them.<sup>16</sup> This lack of legal redress is curious given how criminal and tort law punish and seek to prevent sundry forms of financial fraud and other commercial deceptions, even when the harms are more trivial than the ones present in the sexual fraud context.<sup>17</sup> Many courts have largely thrown up their hands and stated, among other things, that they cannot intervene in such private affairs and that there is no meaningful legal standard that they can apply in evaluating these claims.<sup>18</sup>

This Article will show how modern developments in the dating world both increase the need for legal intervention and provide better evidentiary tools to enable it. Given the courts’ reluctance to apply existing legal tools to sexual fraud, this Article proposes the introduction of state law statutes (potentially through the initial mechanism of a uniform act) that would explicitly penalize lies: (1) that were put in profiles on online dating apps/sites; (2) whose content would materially influence the decision of a reasonable person whether to have sexual intercourse with the profile owner; and (3) that remained uncorrected before sexual intercourse took place.<sup>19</sup> This framework would respond to the problem that most courts have been unwilling to recognize claims of fraud or of emotional distress in these contexts. Partly motivating this legal test are the parallels between branding in the dating marketplace via app profiles and the economic marketplace via trademarks, because individuals seek to minimize search costs and deception in both forums. The materiality

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14. WHITY & JOINSON, *supra* note 10, at 81.

15. *See id.* at 81–83.

16. *See* Deana Pollard Sacks, *Intentional Sex Torts*, 77 *FORDHAM L. REV.* 1051, 1066–67 (2008).

17. *See id.* at 1066.

18. *See id.* at 1052–53, 1052 n.1.

19. The law would need to choose a point at which liability arises, and sexual intercourse provides one logical place to draw that line, but a model including other forms of sexual penetration would be defensible as well.

test through which courts can weed out deceptive trademarks can thus be adapted to reduce deception in the sexual context.

Where criminal law and tort have failed, trademark law may succeed. Prosecutorial resources are in short supply, and criminal statutes are often drawn too narrowly to provide for legal remedies in the context of sexual fraud. Courts have also been timid to extend tort doctrines to protect victims in these situations, in part due to an unwillingness to give legal recognition to the many noneconomic harms involved. At first blush, trademark law may not appear like an obvious candidate to create a redress mechanism. That said, both in the world of brands and that of dating, individuals yearn for transparency because they wish to get what *they* want rather than what the entity on the other end of the transaction happens to be peddling. Those who offer undesired goods are incentivized to disguise the true nature of their products. While the law gives some leeway in the trademark context, meaning that not every misdescriptive mark will raise legal issues, the Lanham Act essentially limits the extent to which a producer can lie to consumers.<sup>20</sup> For example, a producer not only cannot claim that it is a different producer, but it also cannot state that orange juice is “100% Florida” when the juice is no such thing.<sup>21</sup> This Article argues for the first time that as a matter of both efficiency and fairness, the tools from trademark law should be adapted to the online dating world to prevent material misrepresentations in that context as well.

The new online dating statutes would also have other features relative to the existing law: they would use modest statutory damages set at the level of maximum claims allowed in each jurisdiction’s small claims court to bypass a burdensome process when establishing the proper compensation.<sup>22</sup> These types of courts are cost-effective enough to allow victims of even humble economic means to bring their claims without the need for high legal fees and provide a mechanism to disincentivize destructive sexual misconduct, especially in the case of repeat offenders.

Part II will lay out the problems with fraudulently induced sexual relations and the law’s struggle to protect affected individuals, who are often women. Part III will show how trademark law offers a useful lens through which to view this type of deceit and how statutory sanctions implemented via small claims court avoid a lot of the obstacles to legal resolution. It will also address possible objections to the proposal. Part IV will offer a brief conclusion to this Article.

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20. See 15 U.S.C. § 1125(a)(1) (2012).

21. See *Grove Fresh Distribs., Inc. v. New England Apple Prods. Co.*, 969 F.2d 552, 557 (7th Cir. 1992).

22. It is worth emphasizing that the proposal in this Article would supplement rather than supplant other remedies that victims might obtain in any jurisdiction.

## II. THE LEGAL BATTLE OVER SEXUAL FRAUD

A. *The Definition and Origins of Sexual Fraud*

Historically, much of the involvement of the law with sexual offenses did not relate to consent and sexual autonomy, but rather the enforcement of standards of morality rooted in religion or other frameworks.<sup>23</sup> Most sexual activities were illegal, whether due to the gender or racial identity of the parties, such as in cases of homosexual and interracial sex, or due to marital status, such as for all unmarried sex, adultery, and fornication; legal sex, in the form of sex between a man and a woman married to one another, was the exception.<sup>24</sup> Some of the early legal measures seeking to safeguard women from men who made misrepresentations during the act of seduction or falsely promised marriage as part of their ploys did so under rationales such as protecting the victims' fathers' "property" and later the victims themselves against defilement.<sup>25</sup> As historical thinking about equality between genders evolved, neither men nor women generally wanted to maintain these vestiges of the past based on what had become outdated understandings of human sexual relations, and the previous so-called heartbalm statutes and related common-law causes of action were largely abolished.<sup>26</sup>

The key element in most modern sex-related torts and crimes, both in the United States and many other countries, has shifted to focus on the consent of the parties instead of third-party property interests.<sup>27</sup> Statutory rape is prohibited because minors below a certain age are considered incapable of consenting to sexual relations.<sup>28</sup> Rape and other forms of sexual assault are punishable because we believe that no human being should be subjected to

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23. See, e.g., Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1381 (2013).

24. See *id.*

25. See Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," 93 COLUM. L. REV. 374, 382–87 (1993).

26. Jane Larson describes the mixed forces that resulted in the downfall of heartbalm statutes, including the movement led by female lawmakers and spurred along by the misogynistic rhetoric of those who believed that some sexually active women were abusing these laws for their own financial profit. See *id.* at 395–97.

27. See generally Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988).

28. See, e.g., *State v. Thorp*, 2 P.3d 903, 908, 908 n.6 (Or. Ct. App. 2000) (en banc) (noting that "[t]he traditional cornerstones of statutory rape laws have always been that a female, younger than some specified age, cannot give consent to engage in sexual activity, and a mistake of fact by the offender as to the female's age is no defense to the crime," as well as that the vast majority of states have since adopted gender-neutral laws in this respect).

participation in intimate activities without consent.<sup>29</sup> The law continues to grapple, however, with how to fit sexual fraud into current paradigms, even after accepting the idea that force should not be a required factor for an act to qualify as a sexual offense.<sup>30</sup> One scholar has defined “rape by fraud” as a scenario in which “the defendant has accomplished sexual intercourse by any type of fraud, deception, misrepresentation, impersonation, or other stratagem.”<sup>31</sup> This Article adopts a similar understanding while seeking pragmatic ways for the law to address a more significant subset of these situations than it has so far.

### B. *Sexual Fraud in Modern Law*

Sexual fraud cases certainly come in great variety, leading one judge to quip: “There appears to be no limit to the ability of our species to devise new and different bad things to do to each other.”<sup>32</sup> It is useful to review some of the recent scenarios involving criminal punishments. One of the most elaborate such cases of sexual fraud involved a woman in Great Britain sentenced to eight years in prison for pretending to be a cancer-stricken man and, under this false identity, convinced a female friend to have sex with her using a prosthetic penis and other disguise paraphernalia.<sup>33</sup> Part of the ruse involved the use of a blindfold, which the victim eventually ripped off and realized she had been duped, after which she later declared in court that she would have preferred to be raped by a man than have had that experience.<sup>34</sup> During sentencing, the judge noted to the perpetrator: “You pursued this course of conduct over a lengthy period during which you played with her affections, acting entirely for your own sexual satisfaction and choosing to ignore the devastating impact that the eventual discovery of the truth would have on her.”<sup>35</sup> The

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29. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1946–53 (2016) (discussing the evolution of rape law as it relates to the question of consent).

30. While some cases have distinguished between “fraud in the factum” (which qualified as a defense due to the existence of fraud as to the fundamental nature of the act agreed to) and “fraud in the inducement” (which did not qualify as a defense and involved situations in which the victim understood the nature of an act but was perhaps misled as to other attributes of the perpetrator or situation), this distinction has often proved unworkable because many cases could be characterized by either label. See WAYNE R. LAFAVE, 2 SUBST. CRIM. L. § 17.3(c) (3d ed. 2018).

31. Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 48 (1998).

32. *People v. Pham*, 103 Cal. Rptr. 3d 366, 367 (Ct. App. 2009).

33. *Woman Who Posed as Man Jailed for Sex Assaults*, BBC (Nov. 12, 2015) <https://www.bbc.com/news/uk-england-34799692>.

34. LEGAL PERSPECTIVES ON STATE POWER: CONSENT AND CONTROL 172 (Chris Ashford et al. eds., 2016) (internal citation omitted).

35. *Woman Who Posed as Man Jailed for Sex Assaults*, *supra* note 33.



judge also cited the “severe” and “long-lasting” psychological impact of these actions.<sup>36</sup> The case was unusual in a number of respects, but one of them is that the perpetrator was a woman. As can be seen in this Article and by reviewing the case law, however, most of the time the offenders are men, while the victims are frequently women.<sup>37</sup>

One related example in the United States comes from one of the few states that prohibits rape by fraud in its criminal statutes, Tennessee.<sup>38</sup> In *State v. Mitchell*,<sup>39</sup> the defendant called his female victims and introduced himself by the first names of men that were current sexual partners of the women and stated that he wanted to act out a fantasy with them.<sup>40</sup> The fantasy involved, among other things, the women waiting for him naked and blindfolded, which allowed him to have sex with some of them.<sup>41</sup> He was convicted on two counts of rape by fraud and one count of attempted rape by fraud, plus he entered a plea downward from rape by fraud to battery on a severed count; his appeal of his conviction, regarding the constitutionality and factual questions surrounding the rape by fraud charges, failed.<sup>42</sup> Blindfolds also played a role in a case involving multiple underage male victims, who were blindfolded while their male boxing coach performed oral sex on them after telling them that a woman was about to perform said oral sex.<sup>43</sup> In California, a defendant was convicted for rape by fraud after pretending to be the female victim’s husband when penetrating her after breaking into her bedroom at night.<sup>44</sup>

In another Tennessee case also involving charges of statutory rape, a defendant was convicted of fraud where he had induced a fourteen-year-old girl to have sex with him in exchange for magic powers, while claiming that both he and the girl’s mother would die if sexual intercourse did not take place.<sup>45</sup> A different Tennessee

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36. *Id.*

37. See MICHAEL PLANTY ET AL., BUREAU OF JUSTICE STATISTICS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 3, 5 (2016), <https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

38. Tennessee defines rape as having taken place, among other circumstances, when “sexual penetration is accomplished by fraud.” TENN. CODE ANN. § 39-13-503(a)(4) (2018).

39. No. 1996-00008-CCA-R3-CD, 1999 WL 559930 (Tenn. Crim. App. July 30, 1999).

40. *Id.* at \*2.

41. *Id.*

42. *Id.* at \*1, \*17.

43. *State v. Brigman*, No. M2002-00461-CCA-R3-CD, 2003 WL 21391762, at \*1-2 (Tenn. Crim. App. June 17, 2003).

44. *People v. Leal*, 103 Cal. Rptr. 3d 351, 353 (Ct. App. 2009).

45. *State v. Collazo*, No. M2009-02319-CCA-R3-CD, 2011 WL 4529643, at \*2 (Tenn. Crim. App. Feb. 16, 2012). His failed appeal sought to argue that the girl “should not have believed his claims, especially after the first time when she failed to gain the magic powers.” *Id.* at \*16.

defendant that also had sex with an underage (this time male) victim lied to the victim by stating, among other things, that he could have the victim sent to prison for seven years for watching pornography on the defendant's computer, a scheme which the court held was sufficient for a conviction for rape by fraud.<sup>46</sup>

As one can see, these cases frequently involved minors, and the courts recognized rape by fraud where the defendant engaged in deceit about the nature of the act itself, threatened the victim, or literally claimed to be someone else. Looking at the bigger picture beyond the "fraud in the factum," coercion, or statutory rape cases, the vast majority of United States cases in which plaintiffs have successfully pursued sexual fraud claims (whether in tort or criminal law) have involved physical injury, risk thereof, or the abuse of professional relationships.<sup>47</sup> For example, a number of states have passed specific laws making it a criminal offense to fail to disclose a known sexually transmitted disease ("STD") such as HIV, syphilis, or hepatitis B.<sup>48</sup> However, prosecutions are infrequent due to the difficulties inherent in bringing such cases.<sup>49</sup> In the professional context, some states such as California have passed statutes to address situations in which doctors, therapists, or the like took advantage of their credentials to engage in sexual conduct with patients under the guise of treating them.<sup>50</sup> Legislatures seem to

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46. *State v. Madison*, No. M2010-00059-CCA-R3-CD, 2012 WL 1589045, at \*3 (Tenn. Crim. App. May 4, 2012).

47. See Dan Subotnik, "Sue Me, Sue Me, What Can You Do Me? I Love You": *A Disquisition of Law, Sex, and Talk*, 47 FLA. L. REV. 311, 333 (1995) (internal citations omitted); see also *People v. Pham*, 103 Cal. Rptr. 3d 366, 367 (Ct. App. 2009) (involving a chiropractor committing sexual battery by fraud by touching several female victims sexually under the guise of medical treatment). Outside these contexts, recovery has been difficult, including when plaintiffs tried different theories of infliction of emotional distress; Jane Larson believed that "this reluctance to recognize emotional injury from sex is not surprising, given the hostility towards awarding damages for hurt feelings and loss of chastity that fueled the anti-heartbalm movement" even though "this denial of full recovery departs from the ordinary tort rule that compensates all provable and proximately caused injuries, including emotional distress." Larson, *supra* note 25, at 406. She concluded that "much of the judicial skepticism about 'murky' emotional injury claims may be explained as a lack of confidence in courts' ability to ascertain the presence or absence of sexual consent." *Id.* at 410.

48. See Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 570 n.254 (2011) (providing some examples of such laws).

49. See *id.* at 572-77 (citing problems related to the obtaining of the right evidence and to the use of cognitive biases against victims, and pointing out the problematic incentives against STD testing when imposing a standard of actual knowledge of disease status on defendants). See generally TREVOR HOPPE, PUNISHING DISEASE: HIV AND THE CRIMINALIZATION OF SICKNESS (2018).

50. CAL. PENAL CODE § 289(d)(4) (2013) (making it an offense to perform sexual penetration where the victim "[w]as not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's

have considered scenarios of this sort particularly egregious and hence created statutes narrowly tailored to them, but they did not find ways to address sexual fraud at large. As to courts, “the ‘pure emotion’ case is the quintessential instance in which courts fear that recognizing liability for fraudulent sexual misrepresentation will take them far beyond their proper domain. Courts nervously caution that it is not their role to step in whenever a romance might fail.”<sup>51</sup>

### C. *Scholarly Responses to the Problem of Sexual Fraud*

The general problem of sexual fraud is hardly new. Susan Estrich famously advocated to recognize it as rape over thirty years ago, and a decent amount of ink has been spilled on the topic since.<sup>52</sup> A few years ago, the *Yale Law Journal* published Jed Rubenfeld’s critique of classifying sexual fraud as a criminal sexual offense along with four commentaries on his piece, plus his response to the commentary.<sup>53</sup> Jane Larson’s proposal twenty-five years ago to have a comprehensive tort-law framework address sexual fraud and its concomitant problems received a great deal of scholarly attention, but the wheels of state legislatures have turned slowly where at all.<sup>54</sup> Dan Subotnik, an ardent opponent of using the law to pursue most forms of sexual fraud, strongly disagreed with Larson’s view that the legal trend was to recognize sexual fraud as an offense.<sup>55</sup> By the time Patricia Falk provided an overview of the state of the law twenty

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fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose”); see also *People v. Icke*, 214 Cal. Rptr. 3d 755, 760–62 (Ct. App. 2017) (providing a brief discussion of the history of the statutory language).

51. Larson, *supra* note 25, at 404. Larson points out that the introduction of anti-heartbalm statutes has been used as an argument for courts to deny recovery for the nonphysical portion of injuries. See *id.* at 404 n.132.

52. See SUSAN ESTRICH, *REAL RAPE* 102–03 (1987) (advocating that the force requirement for rape include “extortionate threats and misrepresentations of material fact”).

53. See Rubenfeld, *supra* note 23; see also Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on “Rape-by-Deception,”* 123 YALE L.J. ONLINE 321 (2013), <https://www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception>; Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353 (2013), <http://yalelawjournal.org/forum/not-logic-but-experience-drawing-on-lessons-from-the-real-world-in-thinking-about-the-riddle-of-rape-by-fraud>; Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371 (2013), <http://yalelawjournal.org/forum/delineating-the-heinous-rape-sex-and-self-possession>; Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 YALE L.J. ONLINE 389 (2013), <http://yalelawjournal.org/forum/rape-by-deception-a-response>; Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013), <http://yalelawjournal.org/forum/sex-without-consent>.

54. See Larson, *supra* note 25.

55. See Subotnik, *supra* note 47.

years ago, she noted that legislatures were usually introducing laws only to address very narrow issues, which she hoped would eventually change to allow for broader frameworks.<sup>56</sup> By 2011, lamenting the fact that most states continued not to criminalize deception in the sexual context, John Decker and Peter Baroni asked:

Many conversations that precipitate sexual encounters involve exaggerations or overt lies. This conduct becomes unacceptable if it is intended to achieve sex. The fact that deception is commonplace does not justify its tolerance. . . . [P]ocketing an apple at a grocery store is punishable by jail time, but deceiving another to obtain sexual gratification is perfectly legal. Why is deception tolerated in the context of sex? What protection does society provide to a person's sexual integrity? Sexual activity is one of the most intimate encounters people engage in and yet under the law it is treated as less valuable than a piece of fruit if deception is used.<sup>57</sup>

There are a number of possible reasons for this situation, some better than others. Perhaps individuals who shoplift are more dangerous to society on average than sexual fraudsters are, but more likely the law simply encounters fewer line-drawing problems in the context of the former than the latter. Such problems may lead to a fear of overcriminalization and chilling effects—indeed, what if people became too afraid to date because what they themselves perceived as benign puffery could land them in jail? While this likely takes an overly generous view of sexual fraudsters' beliefs, it is true that even potentially legally actionable behavior takes place on a spectrum and that criminal law may be too blunt an instrument to address the problems that arise in related situations.<sup>58</sup> The all-or-nothing nature of many previous scholarly proposals, involving criminal sanctions

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56. See Falk, *supra* note 31.

57. John F. Decker & Peter G. Baroni, "No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1167–68 (2012). Richard Posner has argued that if a woman is willing to have sex with a man who had told her any number of lies, there is no "invasion of bodily integrity," unlike in a case in which a man is impersonating the woman's husband; indeed, Posner believes that in the latter case, "were the true facts known to the woman, [they] would be disgusting as well as humiliating, rather than merely humiliating as in the case of the common representations of dating and courtship." RICHARD A. POSNER, SEX AND REASON 392–93 (1992). This reasoning appears rather tenuous and makes a number of assumptions about human nature whose foundation is unclear. Decker & Baroni, *supra* note 57.

58. See Stuart P. Green, *Lies, Rape, and Statutory Rape*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 253 (Austin Sarat ed., 2015) (explaining that offenses operate on a spectrum and that in the sexual context, consent can be violated in ways that differ in wrongfulness while each problematic in its own way).

and expensive tort lawsuits, may have represented too great a break from current law and too massive an investment of judicial resources to be adopted.

That said, as a number of scholars have argued, we recognize claims of fraud taking place in all kinds of commercial settings—claims which could raise some similar overcriminalization and chilling concerns—and even involving only small amounts of monetary harm.<sup>59</sup> As Jane Larson cogently put it: “Fraud is harmful because it subverts the capacity of individuals to choose relationships and pursue experiences that further their best interests. The problem under either approach is the involuntariness of fraudulent exchanges, not the visceral feelings they may generate.”<sup>60</sup> She states further that from a “dignitary perspective, it seems arbitrary and discriminatory to protect the voluntariness of economic but not sexual interactions.”<sup>61</sup> When (1) autonomy and dignitary interests have been violated either way, (2) the harm in question is often significantly larger or at the very least equivalent in the sexual fraud context, and (3) it is quite difficult to find justifications for the behavior of the perpetrators, why has the law struggled so much to respond in the situations that arise in this context?<sup>62</sup>

The Massachusetts case of *Conley v. Romeri*,<sup>63</sup> in which a woman brought suit against her former boyfriend for fraud, intentional and negligent infliction of emotional distress, and other claims, proves illustrative.<sup>64</sup> There, the plaintiff alleged that, because her time to become pregnant was running out, she would not have engaged in a romantic relationship and had sex with the defendant if she knew that he had had a vasectomy.<sup>65</sup> The defendant made several statements that led the plaintiff to believe that he was fertile, until he admitted about eight months into their relationship the fact of his vasectomy; this disclosure brought about emotional devastation and a major depressive disorder for the plaintiff, which she claimed also

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59. See, e.g., Pamela H. Bucy, *Crimes by Health Care Providers*, 1996 U. ILL. L. REV. 589, 634 (1996) (describing the “minimal amount of money” involved in some types of health care fraud).

60. Larson, *supra* note 25, at 422.

61. *Id.* at 416; see also Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 4 (2014) (advocating for “embracing human dignity as rape law’s touchstone”).

62. See *infra* Subpart II.D.1.

63. 806 N.E.2d 933 (Mass. App. Ct. 2004).

64. *Id.* at 935; see generally *C.A.M. v. R.A.W.*, 568 A.2d 556 (N.J. Super. Ct. 1990) (rejecting the claim of a plaintiff who became a mother against her will after the defendant allegedly falsely claimed to have had a vasectomy); *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980) (refusing tort recovery to a plaintiff who became a father against his will after the defendant allegedly lied to him about taking birth control pills); *Wallis v. Smith*, 22 P.3d 682 (N.M. Ct. App. 2001) (same).

65. See *Conley*, 806 N.E.2d at 935.

resulted in medical costs and reduced work performance.<sup>66</sup> The court rejected her claim of negligent infliction of emotional distress because there could be no negligence without a corresponding duty and stated that the plaintiff “does not identify any legally cognizable duty between parties in a dating relationship, nor [is the court] aware of any legally defined duty applicable in these circumstances.”<sup>67</sup> Responding to the plaintiff’s fraud claim, the court discussed the following test from the *Restatement (Second) of Torts*:

(1) Reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material.

(2) The matter is material if

....

(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it.<sup>68</sup>

The court quite summarily dismissed the claim, concluding that to address “the plaintiff’s allegation that the defendant’s failure to disclose his vasectomy was the material factor in determining his liability would require us to assess the emotions, expectations, and commitments inherent in a developing romantic relationship. *We are aware of no jurisprudential standards that can be applied in such circumstances.*”<sup>69</sup> The plaintiff’s claim for intentional infliction of emotional distress fared no better because the test set the high bar of requiring the defendant’s conduct to be “extreme and outrageous,” which the court stated was not the case here.<sup>70</sup> Lastly, the court

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66. *See id.* at 935–36.

67. *Id.* at 936 (explaining that the claim thus failed the first element of the test for negligent infliction of emotional distress, which consists of: “(1) [N]egligence; (2) emotional distress; (3) causation; (4) physical harm manifested by objective symptomatology; and (5) that a reasonable person would have suffered emotional distress under the circumstances of the case” (citation omitted)).

68. *Id.* at 936 n.3, citing RESTATEMENT (SECOND) OF TORTS § 538 (1977).

69. *Id.* at 936–37 (emphasis added) (relying in part on the case of *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618, 643 (Ct. App. 1980), in which the court stated in a case involving a defendant lying about taking birth control pills and having a child against the will of the plaintiff that the claims “arise from conduct so intensely private that the courts should not be asked to nor attempt to resolve such claims”).

70. *Id.* at 937–38 (imposing a test for intentional infliction of emotional distress that states that “[A] plaintiff must establish (1) that the defendant intended to inflict emotional distress, or knew or should have known that emotional distress was the likely result of his conduct . . . (2) that the defendant’s

dismissed the plaintiff's claim that her consent was vitiated by the defendant's lies about his vasectomy in such a way as to transform their sexual relations into a battery.<sup>71</sup>

Deana Pollard Sacks has summarized courts' attitudes in cases like *Conley* as displaying "an inappropriate 'boys will be boys' mentality."<sup>72</sup> The result of this consists of a legal landscape in which even though there is usually broad "self-determination protection afforded by intentional tort theory, plaintiffs in these cases have had little success in the absence of physical injury in accordance with anti-heartbalm sentiment. Courts are usurping the jury's fact-finding role in sexual deceit cases and dismissing them based on anti-heartbalm sentiment as a matter of law."<sup>73</sup> It is safe to say at this stage that without legal reform, courts will generally refuse to vindicate the legal claims of victims of most types of sexual fraud, even when said victims have suffered both dignitary and emotional harms. The next Subpart shows why many of the legal solutions proposed so far have been rejected for opening up their own cans of worms, respectively.

#### D. *The Rubik's Cube of Sexual Fraud*

Sexual fraud, like some other types of legal dilemmas, presents a legal Rubik's Cube in some ways, in that while trying to accomplish one goal—for example, turning a side of the cube blue—one often departs from a different goal such that the green side of the cube gets messed up.<sup>74</sup> Objections to legal intervention for sexual fraud have been based on a number of different arguments or combinations thereof. This Subpart focuses on six of the main objections and critiques them.

##### 1. *Questioning the Harm*

The harms from sexual fraud vary and may be physical, financial, emotional, or any combination of the three. The law is much more likely to recognize the first two than the last one, consistent with Jed Rubinfeld's position that "deceptive sex, however bad it may be, isn't that bad."<sup>75</sup> Adopting Stuart Green's view of the spectrum of harms,

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conduct was extreme and outrageous, beyond all possible bounds of decency, and utterly intolerable in a civilized community, (3) that the actions of the defendant were the cause of the plaintiff's distress, and (4) that the emotional distress suffered by the plaintiff was severe and of such a nature that no reasonable person could be expected to endure it.") (internal quotation marks and citations omitted).

71. *Id.* at 939.

72. Sacks, *supra* note 16, at 1066.

73. *Id.*

74. See RUBIK'S, <https://www.rubiks.com> (last visited Feb. 9, 2019).

75. Rubinfeld, *supra* note 23, at 1416.

that statement could be correct in the sense that some forms of sexual offenses are indeed worse than others and should therefore be punished more harshly; that does not mean, however, that what scholars like Larson and Sacks have correctly identified as behaviors that result in serious dignitary harms should not be legally actionable.<sup>76</sup>

At the current time, knowingly passing along a severe STD is criminalized in a number of jurisdictions.<sup>77</sup> Frauds involving a financial element, such as those present in various “romance scams” can sometimes be pursued as well.<sup>78</sup> Recently, Oklahoma passed the Catfishing Liability Act of 2016 that protects individuals against impersonation, but that law appears mainly focused on protecting an individual whose identity is being taken rather than third parties defrauded in the process.<sup>79</sup> As Patricia Falk noted, legislatures have generally introduced laws on a piecemeal basis when sexual fraud is involved and have limited them to the narrowest of situations, such as misuse of professional status or impersonation of a specific individual, like a husband.<sup>80</sup>

On some level, the law needs to define at what point an individual should be able to say and enforce “I do not want to have sex with someone like you.” To the extent that some scholars and lawmakers have been reluctant to create a framework in which some lies would be punished while others would not be, the reality is this: we are already there. Lying about one’s HIV status is lying about part of one’s identity, and yet a number of states have no trouble punishing it. Certainly, lying about one’s HIV status would be considered by

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76. See *supra* Subpart II.C.

77. See, e.g., Kim Shayo Buchanan, *When Is HIV a Crime? Sexuality, Gender and Consent*, 99 MINN. L. REV. 1231, 1232 (2015) (“In nearly every state, people with HIV have been prosecuted for failing to disclose their serostatus before having sex.”).

78. See, e.g., *United States v. Ezeah*, 738 F. App’x 591 (10th Cir. 2018) (dismissing the appeal of a romance scammer who pleaded guilty to conspiring to commit wire fraud after he was indicted for scheming to obtain money from wealthy widows).

79. The law states:

Any person who knowingly uses another’s name, voice, signature, photograph or likeness through social media to create a false identity without such person’s consent, or in the case of a minor the consent of his or her parent or legal guardian, for the purpose of harming, intimidating, threatening or defrauding such person, shall be liable for online impersonation and liable for any damages sustained by the person or persons injured as a result thereof . . . .

Catfishing Liability Act of 2016, OKLA. STAT. ANN. tit. 12, § 1450 (2018). Other states are said to be considering similar laws. See, e.g., Sara Morrison, *New Anti-Catfishing Law Is the Toughest in the US*, VOCATIV (May 17, 2016, 2:43 PM), <http://www.vocativ.com/319357/new-anti-catfishing-law-is-the-toughest-in-the-us/index.html> (mentioning California, Pennsylvania, and Texas).

80. Falk, *supra* note 31, at 170.



many people to cause more harm than many other types of lies.<sup>81</sup> That alone does not explain, however, why the contours of what is legally actionable at all should be drawn there. Why should lies about marital status, for example, remain exempt?

Let us examine the harms that an individual lying in that context actually inflicts. Assume that a man bamboozles a woman for several months about his true identity and marital status. In today's dating culture where people often only see each other once or twice a week for some time, it is hardly unimaginable.<sup>82</sup> Exacerbating this state of affairs (pun intended) is the fact that narcissists both are more likely to cheat in their marriages<sup>83</sup> than nonnarcissists and often appear charming at first sight<sup>84</sup>—hence, they seem to have the motivation and ability to attract others in sexual contexts. When the unwitting affair partner discovers the betrayal, she may endure a great degree of suffering, anxiety, depression, and religiously or morally induced feelings of guilt.<sup>85</sup> The emotional, and at times financial,<sup>86</sup>

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81. It appears that a (presumably relatively small) group of individuals do wish to “receive” HIV. See Hugh Klein, *Generationing, Stealthing, and Gift Giving: The Intentional Transmission of HIV by HIV-Positive Men to their HIV-Negative Sex Partners*, 2 HEALTH PSYCHOL. RES. 1582, 1582 (2014).

82. Indeed, this is the type of pace that some self-appointed experts actively recommend. See, e.g., SCOTT CARROLL, *DON'T SETTLE: HOW TO MARRY THE MAN YOU WERE MEANT FOR* (2016) (advising not seeing a new mate more than twice a week for the first month).

83. See, e.g., Joshua D. Foster et al., *Theoretical Models of Narcissism, Sexuality, and Relationship Commitment*, 23 J. SOC. & PERS. RELATIONSHIPS 367 (2006); James K. McNulty & Laura Widman, *Sexual Narcissism and Infidelity in Early Marriage*, 43 ARCHIVES SEXUAL BEHAV. 1315 (2014).

84. See generally Mitja D. Back et al., *Why Are Narcissists So Charming at First Sight? Decoding the Narcissism-Popularity Link at Zero Acquaintance*, 98 J. PERSONALITY & SOC. PSYCHOL. 132 (2010).

85. See, e.g., Julie Fitness, *Betrayal, Rejection, Revenge, and Forgiveness: An Interpersonal Script Approach*, in INTERPERSONAL REJECTION 73 (Mark R. Leary ed., 2001) (discussing the many harmful effects of betrayal in romantic relationships); Warren H. Jones et al., *Interpersonal Transgressions and Betrayals*, in BEHAVING BADLY: AVERSIVE BEHAVIORS IN INTERPERSONAL RELATIONSHIPS 233, 234 (Robin M. Kowalski ed., 2001) (indicating that betrayals can persist as painful memories for as long as thirty or forty years). An Australian study of victims of financially-motivated online fraud found that “the overwhelming majority of participants in this study reported profound emotional impacts following their victimisation. Participants described the fraud as ‘devastating’, ‘soul-destroying’, or as an event that ‘changed [their] attitude to life’. . . . The most common [emotional responses] were shame or embarrassment, distress, sadness and anger.” Cassandra Cross et al., *The Reporting Experiences and Support Needs of Victims of Online Fraud*, 518 TRENDS & ISSUES CRIME & CRIM. JUST. 1, 4 (2016).

86. The financial investments could include the cost of dates, gifts, and so on. The average cost of one date—to include dinner for two, a bottle of wine, and two movie tickets—has recently been estimated at \$102.32, with great geographical variance to that figure across the United States. Brooke DiPalma, *Map: A Look How Expensive Dating Is Across U.S. States*, YAHOO! FIN. (Aug. 20,

investments made into the relationship are generally ineligible for reparation. The woman in this case also potentially suffered a significant opportunity cost.<sup>87</sup> She could have met a different man during that time and, depending on her age, what occurred could also reduce or in some cases eliminate her chance of procreating.<sup>88</sup> While relationships can go wrong for any number of reasons, and far be it from this Article to suggest that we should make all or even most such situations actionable, here there was intentional and concrete deceit that raised the woman's search costs and created dignitary harms by violating her autonomy, regardless of the specific level of other types of harms she endured. The law's failure to provide recovery for the kind of deception that victims in these kinds of scenarios experience may play a direct role in the creation of unreasonable search costs and of preventable harms.

The victim may also suffer reputational losses if others find out that she was a participant in an affair as they may not believe that she did not know the man's marital status. This could have personal, social, and professional repercussions. In several states, the woman could potentially even be accused of alienation of affection or criminal conversation under some circumstances.<sup>89</sup> Last, this woman could become exposed to violence or other forms of vindication by the wronged spouse, who may not believe in the woman's innocence or may not care about the woman's state of mind altogether.<sup>90</sup> This may

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2018), <https://finance.yahoo.com/news/gave-look-expensive-dating-across-u-s-states-200617454.html>.

87. For a tongue-in-cheek approach to the use of economic concepts in romantic love, see generally WILLIAM NICOLSON, *THE ROMANTIC ECONOMIST: A STORY OF LOVE AND MARKET FORCES* (2014).

88. Social commentator Mark Radcliffe refers to men who waste women's time as "Time Bandits" and explains:

While it's unethical for either partner (regardless of gender) in any relationship to waste the other's time by not being fully committed, or honest about their intentions, it seems a particularly worse crime when perpetrated against women (if she wants to have kids and be married some day), since time is a resource they simply have less of than men.

Mark Radcliffe, *When Men Waste Women's Time*, GOOD MEN PROJECT (Sept. 13, 2012), <https://goodmenproject.com/ethics-values/the-good-life-when-men-waste-womens-time>.

89. See H. Hunter Bruton, Note, *The Questionable Constitutionality of Curtailing Cuckolding: Alienation-of-Affection and Criminal-Conversation Torts*, 65 DUKE L.J. 755, 756, 782 (2016). A North Carolina trial court recently awarded a male plaintiff in this context \$8.8 million against a male defendant who had been dating the plaintiff's wife; \$6.6 million of that sum was in the form of punitive damages. See Ayana Archie & Sal Sendik, *A Man Cheated with Someone Else's Wife and Is Now Paying for It... with \$8.8 Million*, CNN (Aug. 2, 2018, 10:51 AM), <https://www.cnn.com/2018/07/31/us/north-carolina-adultery-law-trnd/index.html>.

90. See, e.g., Rachel Gribble, *Woman's Revenge on Husband's Mistress Lands Her Behind Bars*, NBC4 (Dec. 4, 2016, 6:59 AM), <https://www.nbc4i.com/news/u-s-world/womans-revenge-on-husbands-mistress-lands-her-behind->

particularly be true of female victims of sexual fraud in heterosexual settings because studies suggest that women are more likely to blame female rivals than cheating male partners for infidelity.<sup>91</sup>

What many critics of legal intervention for sexual fraud often also neglect to discuss is that it is unlikely that most perpetrators of such fraud stop at one victim. Rather, they impose cumulative harm on society. So even if one were to think that the emotional harm to any one victim is not large enough to justify legal intervention, the calculus could change with more offenses. As discussed below, that kind of large volume of potential victims is exactly what the dating apps provide. This Article takes the position that the dignitary harm to each victim is inherently sufficient to justify recovery of a statutorily fixed amount. The potential emotional harms to that victim as well as the dignitary and emotional harms to future possible victims are, moreover, additional reasons for intervention.

## 2. *Blaming the Victim*

One view of victims of sexual fraud is that they must not be particularly intelligent or prudent if they have been bamboozled through some of the mechanisms described in this Article. As Joel Feinberg has pointed out, however, “people do not forfeit their rights simply by being ignorant or naively trusting, and even stupid people—especially stupid people—can be taken advantage of and harmed.”<sup>92</sup> And the argument about prudence underestimates the sophistication of some of the perpetrators of sexual fraud.

On a more abstract level, we need to decide how many precautions we want individuals to have to take in the dating arena.<sup>93</sup>

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bars/1065195185 (explaining the arrest of a woman who allegedly intruded into her husband’s mistress’ apartment, beat her, and threw a trash can at her); Michelle Pekarsky & Melissa Stern, *Woman Who Drove from Texas to Mo. to Kill Husband’s Lover Sentenced to 20 Years*, FOX 4 NEWS (Feb. 20, 2015, 10:48 PM), <https://fox4kc.com/2015/02/20/woman-who-drove-from-texas-to-mo-to-kill-husbands-lover-sentenced-to-20-years/> (discussing a wife’s commission of murder by shooting of her husband’s lover); Emily Shapiro & Morgan Winsor, *Woman Kills Husband’s Mistress Then Turns Gun on Herself in ‘Calculated, Planned Attack’: Police*, ABC NEWS (Apr. 25, 2018, 4:20 PM), <https://abcnews.go.com/US/woman-kills-husbands-mistress-turns-gun-calculated-planned/story?id=54717280> (describing a related murder-suicide in Pennsylvania).

91. See, e.g., DAVID M. BUSS, *THE DANGEROUS PASSION: WHY JEALOUSY IS AS NECESSARY AS LOVE AND SEX* (2000); Michael J. Dunn & Gemma Billett, *Jealousy Levels in Response to Infidelity-Revealing Facebook Messages Depend on Sex, Type of Message and Message Composer: Support for the Evolutionary Psychological Perspective*, 4 *EVOLUTIONARY PSYCHOL. SCI.* 17 (2018).

92. Joel Feinberg, *Victims’ Excuses: The Case of Fraudulently Procured Consent*, 96 *ETHICS* 330, 337 (1986).

93. Richard Posner thinks that individuals should engage in self-protection against the possibility of sexual fraud rather than have the government punish the perpetrators. POSNER, *supra* note 57, at 393.

Certainly, things could be made a lot safer if people hired private investigators to do deep research on every individual with whom they interact in such a setting. This type of expenditure of resources would likely be highly inefficient for society, though. Simply put, the sheer fact that sexual fraud occurred does not by itself tell us whether the victim acted imprudently based on the ex-ante knowledge she had and assuming a societally optimal level of precautions.<sup>94</sup>

Criminal and tort cases are filled with victims that “could have” prevented what took place had they had total ex-ante knowledge. The individual that had said knowledge and complete power to prevent such incidents, however, is the perpetrator. Hindsight bias and just-world bias (combined with other cognitive biases) have frequently been used to condemn victims rather than pursue perpetrators, with particularly unfortunate results in the context of rape and other sexual offenses.<sup>95</sup> Even outside the courtroom or the psychology laboratory, arguments about blame in such cases rage on.

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94. For a general discussion on determining optimal levels of precaution, see Steven Shavell, *On Optimal Legal Change, Past Behavior, and Grandfathering*, 37 J. LEGAL STUD. 37, 44–48 (2008).

95. See, e.g., Steffen Bieneck & Barbara Krahé, *Blaming the Victim and Exonerating the Perpetrator in Cases of Rape and Robbery: Is There a Double Standard?*, 26 J. INTERPERSONAL VIOLENCE 1785, 1794 (2011) (showing a greater degree of victim blaming and lesser degree of perpetrator blaming in the case of rape than robbery); Amy Grubb & Julie Harrower, *Attribution of Blame in Cases of Rape: An Analysis of Participant Gender, Type of Rape and Perceived Similarity to the Victim*, 13 AGGRESSION & VIOLENT BEHAV. 396, 402–03 (2008) (showing that men engage in more victim blaming than women, that victims who knew their attackers receive more blame, and that subjects who view themselves as similar to the victim place greater blame on the perpetrator than those who do not); Amy Grubb & Emily Turner, *Attribution of Blame in Rape Cases: A Review of the Impact of Rape Myth Acceptance, Gender Role Conformity and Substance Use on Victim Blaming*, 17 AGGRESSION & VIOLENT BEHAV. 443, 443 (2012) (finding, inter alia, that men blame women more than women do, that women who violate traditional gender roles are attributed more blame than women who do not, and that women who consume alcohol before being attacked are blamed more than those who do not); Yael Idisis et al., *Attribution of Blame to Rape Victims Among Therapists and Non-Therapists*, 25 BEHAV. SCI. & L. 103, 114, 115 (2007) (reporting that both therapists and nontherapists had a slight tendency to blame the victim, that female victims received more blame than male ones, and that therapists of each gender blamed victims of the same gender as themselves less than victims of the other); Ronnie Janoff-Bulman et al., *Cognitive Biases in Blaming the Victim*, 21 J. EXPERIMENTAL SOC. PSYCHOL. 161, 174 (1985) (demonstrating that when presented with scenarios, subjects believed rape to be a more likely outcome ex ante when told it had actually occurred); Mark A. Whatley, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis*, 1 AGGRESSION & VIOLENT BEHAV. 81, 81 (1996) (concluding that the victim’s clothing revealingness and character greatly affect the likelihood that the victim will be blamed). But see Richard B. Felson & Christopher Palmore, *Biases in Blaming Victims of Rape and Other Crime*, 8 PSYCHOL. VIOLENCE 390, 390 (2018) (finding that rape victims were not assigned more blame than other victims).

One study focusing on social media found that in the aftermath of some high-profile rape cases, Twitter users who engaged in victim blaming both had more followers than those who tweeted content supporting victims and were more likely to be retweeted.<sup>96</sup> The Internet exploded with commentary when a woman described the sexual experience that she had had with the entertainer Aziz Ansari, after which many questioned whether the woman gave the requisite level of consent for sexual intimacy, and others defended Ansari and said that she should have been more vocal about her discomfort with his actions.<sup>97</sup> Whichever side one chooses in the Ansari debate, it undeniably crystallizes that the #MeToo movement now subjects behaviors in the dating arena to greater questioning and that we live in a time in which legal boundaries in this context are intensely up for discussion.<sup>98</sup> The legal treatment of sexual fraud should be a part of that terrain.

There is no doubt that in most cases of sexual fraud, the victim could have prevented the fraud by refusing to engage with the individual in question or taking any number of other steps between when they met and when sexual intercourse occurred. The equivalent is true in the case of commercial fraud, and yet we discount that fact when deciding to punish perpetrators in those scenarios.<sup>99</sup> As explained above, the real question is what level of precaution we should expect from prospective victims of sexual fraud.<sup>100</sup> This can be examined either using an objective or subjective standard.

Let us take a scenario in which a man claimed to be single when he was in fact married, and he engaged in sexual intercourse with a woman who believed his lie. Had they met at a bar, we might expect

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96. Megan Stubbs-Richardson et al., *Tweeting Rape Culture: Examining Portrayals of Victim Blaming in Discussions of Sexual Assault Cases on Twitter*, 28 FEMINISM & PSYCHOL. 90, 102–03 (2018).

97. See Katie Way, *I Went on a Date with Aziz Ansari. It Turned into the Worst Night of My Life*, BABE (Jan. 13, 2018), <https://babe.net/2018/01/13/aziz-ansari-28355>. For some examples of commentary on the story, see Samantha Cooney, *The Aziz Ansari Allegation Has People Talking About 'Affirmative Consent.' What's That?*, TIME (Jan. 17, 2018), <http://time.com/5104010/aziz-ansari-affirmative-consent/>; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/>; Megan Garber, *Aziz Ansari and the Paradox of 'No.'* ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/aziz-ansari-and-the-paradox-of-no/550556/>; Bari Weiss, Opinion, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader.*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>.

98. For one debate on the aftermath of the Aziz Ansari and other incidents, see Anne Perkins et al., *How Should Young Women React as #MeToo Moves into Dating? Female Writers Discuss*, GUARDIAN (Jan. 17, 2018, 7:48 AM), <https://www.theguardian.com/commentisfree/2018/jan/17/young-women-react-metoo-dating-female-writers-discuss-panel-aziz-ansari-cat-person>.

99. POSNER, *supra* note 57, at 392.

100. *Id.* at 393.

the woman (who does not wish to become a partner in an affair) to check if he is wearing a wedding band and to inquire into his status. If they subsequently have sex, is society willing to say that it was her fault for having sex with him on the first date at all? What about on the second or third date? Should the woman insist on having sex with him only at his home to investigate better the possibility of a spouse, even if her own home may be safer in many other respects? With the exception of very narrow statutes, the law today is essentially giving people two choices: only engage in sexual relations after significant research into and time spent with an individual—that is engage in what most would consider an unreasonably high level of precaution—or there can be no reparation for virtually any nonfinancial fraud that said individual commits along the way.

In the online dating context, how in-depth an Internet investigation should a prospective victim be expected to conduct? Performing a simple Google search on an individual often does not reveal data such as marital status. If the individual has a small digital footprint, much other information may remain obscure as well. Some particularly savvy perpetrators of sexual fraud in fact construct multiple fake social media profiles that pop up when victims conduct searches.<sup>101</sup> At what point can we hold such individuals responsible rather than blaming the victim?<sup>102</sup>

While some of the stories involving sexual fraud are rather exotic, many people could be duped in some of the more mundane scenarios. Even if it turned out that only a small percentage of people are likely to turn into victims of sexual fraud, it is unclear why these people do not matter. The problem also becomes self-fulfilling: if blaming victims becomes the reason for not punishing perpetrators, perpetrators are encouraged to continue or even expand their behaviors, which if met with further victim blaming perpetuates itself endlessly. Only an evaluation of the costs and benefits of a possible legal intervention, including whether it would make prospective victims less prudent than would indeed be optimal, can tell us whether it should be implemented—the fact that victims “could”

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101. As a related matter, commenting on romance scammers with financial motives, “Phil Tully, a senior data scientist for the social media and digital security group ZeroFox, said it’s impossible for a social media site to detect every scammer because both the tactics and scammers change so frequently.” Ann Brenoff, *How a Billion-Dollar Internet Scam Is Breaking Hearts and Bank Accounts*, HUFFINGTON POST (July 20, 2017, 1:10 PM), [https://www.huffingtonpost.com/entry/romance-scams-online-fbi-facebook\\_us\\_59414c67e4b0d318548666f9](https://www.huffingtonpost.com/entry/romance-scams-online-fbi-facebook_us_59414c67e4b0d318548666f9) (last updated July 27, 2017).

102. For further discussion about how sexual fraudsters have the potential to cause harm on a greater scale than their bar counterparts, and how the written evidence in the online context ensures greater judicial ability to determine the existence of lies, see *infra* Subpart II.E.

prevent sexual fraud themselves (apparently regardless of costs) does not tell us anything of the sort.

### 3. *Insulting Women by Introducing Legal Protections*

As mentioned above<sup>103</sup> and as several scholars have described, early laws related to seduction relied on beliefs about women's chastity or status as family property that have generally become discarded by now.<sup>104</sup> As also described, many women favored the elimination of antiseduction statutes due to feminist rationales.<sup>105</sup> Would it be an act of misogyny to enact new, gender-neutral laws that penalize more lies in the sexual context given that a higher percentage of victims are likely women?<sup>106</sup> This appears rather doubtful. For one, the women who would feel belittled by bringing such a claim in a tort framework are in no way forced to do so. For another, to some extent this line of thinking goes back to the idea of blaming the victim—it is saying, e.g., that someone *should* feel embarrassed to have been bamboozled by a sexual con artist. That is arguably a much more misogynistic message and parallels the accusations against female victims in cases of sexual assault or sexual harassment.

Many individuals today are struggling to find romantic partners. Lopsided gender ratios in some geographical areas have also skewed the behavior of individuals in pursuit of mates, at times encouraging arguably predatory tendencies.<sup>107</sup> While the “three-date rule” is no absolute, according to one study undertaken by the company Groupon, thirty percent of men and eight percent of women believe that sex should take place in the first three dates.<sup>108</sup> While there is undoubtedly great variation depending on geography and subculture, it is fair to say that a significant percentage of the population, and especially of men, expects sex to take place fairly early. Indeed, most people appear to wait an average of eight dates before having sexual intercourse.<sup>109</sup> Given these social trends, opportunities for lies in the

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103. See Subpart II.A.

104. See, e.g., Larson, *supra* note 25, at 380–85.

105. See *id.* at 391.

106. Note that this may not hold true in some settings. For example, I have spoken to a male victim that interacted with a female perpetrator who lied about being single when her husband was actually on military deployment. This occurred near a military base, where this scenario may arise with some frequency.

107. See generally JON BIRGER, DATE-ONOMICS: HOW DATING BECAME A LOPSIDED NUMBERS GAME (2015).

108. *Three-Date Rule? Groupon Dating Trends Survey Finds Most People Wait an Average of Eight Dates Before Hopping into Bed*, BUS. WIRE (Sept. 14, 2017), <https://www.businesswire.com/news/home/20170914006090/en/Three-date-Rule-Groupon-Dating-Trends-Survey-Finds>.

109. See *id.*

sexual context abound because today's rapid pace offers fewer chances for individuals to find out in advance untruths about their sexual partners.

Furthermore, the argument that a legal protection is insulting could be dangerously (mis)applied in a number of other contexts even outside those involving physical harm, such as sexual harassment. At the end of the day, individuals who do not wish to avail themselves of new legal tools in this context are not obligated to, and it appears doubtful that society as a whole would become more misogynistic if more such laws were introduced.

#### 4. *Everybody Lies When It Comes to Love and Sex*

Dan Subotnik argues in an extensive treatment of the subject that lying is ubiquitous in romantic matters.<sup>110</sup> Lies, however, come in all different shapes—and the law already recognizes that. Lying about STD status to obtain sex is one behavior that many people have no trouble criminalizing, for one.<sup>111</sup> As Stuart Green has stated, “[s]ome deception- or coercion-induced sex might be more or less blameworthy than other deception- or coercion-induced sex.”<sup>112</sup> Many people (some say as many as about eighty percent)<sup>113</sup> lie on dating apps, but those lies are not created equal, and it is unclear why society would want to encourage the most problematic ones. Let us imagine a woman who lies in one of the most common ways: claiming on her profile that she is skinnier than she is and posting misleading pictures of herself. When she shows up to a first date, her lie is easily unmasked, and hence the other person can choose not to continue dating her and not to have sex with her if she does not match his preferences. Even assuming that he somehow finds out after sex that she weighs more numerically than she claimed in her dating profile, is he likely to experience significant emotional trauma as a result?<sup>114</sup> And indeed, some empirical data suggests that when it comes to lying on online profiles, people are more likely to deviate in small ways than to misrepresent their relationship information.<sup>115</sup>

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110. See Subotnik, *supra* note 47, at 362.

111. Green, *supra* note 58, at 235–36.

112. *Id.* at 220.

113. Stephanie Rosenbloom, *Love, Lies and What They Learned*, N.Y. TIMES (Nov. 12, 2011), <https://www.nytimes.com/2011/11/13/fashion/online-dating-as-scientific-research.html>.

114. Even for the possibility of dignitary harm, we would have to believe that the man in this scenario would actually have turned down the woman for sex had he found out the true numerical value right before intercourse; this appears doubtful in most cases.

115. See Catalina L. Toma et al., *Separating Fact from Fiction: An Examination of Deceptive Self-Presentation in Online Dating Profiles*, 34 PERSONALITY & SOC. PSYCHOL. BULL. 1023, 1032 (2008).



While Subotnik may be right that line-drawing problems make many shy away from having the law intervene more strongly in sexual fraud cases, we must be wary not to commit the nirvana fallacy in this context.<sup>116</sup> Just because a legal system may not strike a perfect balance does not mean that we cannot do better. Some types of lies carry much greater risks of harm than others, and it is generally the case that people can engage in sexual relations without telling those lies. To take the example of secretly married individuals seeking out affairs, even for those whose spouses cannot or choose not to engage in sex with them, other solutions such as ethically polyamorous or divorce-based solutions usually exist. In any case, a lack of solutions would still not create a responsibility on the part of victims to provide company or sex to someone.

“But I won’t be able to get laid as easily” is a poor argument for the need for lies in the sexual context. It reflects an often-misogynistic attitude of entitlement to sexual access that in its more extreme forms has been used to justify rape and that has been embodied in recent times by the involuntary celibacy, or incel, movement.<sup>117</sup> Most people understand, however, that there is no right to have sex with a particular person or with anyone at all if nobody is willing.

By way of a telling anecdote, here is the story that occurred to someone we will call Janet.<sup>118</sup> Janet was in her mid-thirties and went on a date with a man named Fred. Upon meeting Fred, she soon realized that rather than being in his mid-forties, as he had claimed on a dating app, Fred was actually a good bit older. She eventually got him to confess that he was in his mid-fifties. When she made it clear that she was unwilling to pursue things further with him because he lied, he exclaimed: “But you don’t understand! You wouldn’t have been willing to go out with me if I had told you my real age!” to which Janet replied along the lines of: “Exactly. And that’s my choice to make.” Fred was trying to get women like Janet to do something he knew that they were unwilling to do, which is to date a man about twenty years their senior. Perhaps he hoped that if they only gave him a chance rather than filtering him out from the start, they would change their minds and actually go out (and have sex) with him after all. Which categories of lies the law should pursue is

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116. See Subotnik, *supra* note 47, at 388–93 (arguing that a sexual fraud legal regime is not workable).

117. See Dorothy E. Roberts, *Rape, Violence, and Women’s Autonomy*, 69 CHI.-KENT L. REV. 359, 364 n.27 (1993) (“Rapists explain their actions in terms of their entitlement to sexual access.”); see also Zoe Williams, *Raw Hatred: Why the ‘Incel’ Movement Targets and Terrorises Women*, GUARDIAN (Apr. 25, 2018), <https://www.theguardian.com/world/2018/apr/25/raw-hatred-why-incel-movement-targets-terrorises-women>.

118. The source of this anecdote is known to the author but wishes to remain anonymous.

addressed below in the Article,<sup>119</sup> but this anecdote speaks volumes: Fred got around informed consent from Janet to go on the date, and he was hoping to do the same regarding sexual intercourse. He was willing to impose dignitary and possibly other harms on her. To claim that, say, disguising the truth in the form of hiding blemishes with makeup is of similar moral substance as this type of behavior defies the internal compass of most members of society.<sup>120</sup>

5. “*He Said, She Said*”—*Evidentiary Problems in Establishing Sexual Fraud*

One of the long-standing concerns about lies in the sexual fraud scenario is that it is difficult to ascertain the content and context of these lies. Of course, that same argument was long made about a number of other sexual offenses such as rape, sexual assault, or sexual harassment, and is still frequently used to diminish victims’ accounts in those circumstances.<sup>121</sup> In the tort setting, what it means is that the alleged victim in causes of action of a sexual nature may have a high threshold to overcome practically, even though the “preponderance of the evidence” standard of most civil cases is lower than the “beyond a reasonable doubt” one of criminal cases.<sup>122</sup> The cost of errors for granting recovery in such situations certainly cannot be ignored. Innocent defendants risk bearing large financial and reputational costs in the case of such accusations, even if the court finds them groundless in the end.

This argument ties back to the harm argument because many individuals tolerate the “he said, she said” problem if they perceive the harm as significant enough. As will be discussed below, while online dating increases the opportunities for the perpetration of sexual fraud, it also reduces the evidentiary problems associated with this potential offense and creates less stigma than a high-stakes criminal case.

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119. See *infra* Part III.

120. Sherry F. Colb, *Rape by Deception, Rape by Impersonation, and a New California Bill*, JUSTIA (May 1, 2013), <https://verdict.justia.com/2013/05/01/rape-by-deception-rape-by-impersonation-and-a-new-california-bill> (mentioning makeup and other enhancements on a list of devices that could technically be perceived as helping to bring about “consent under false pretenses”).

121. See, e.g., Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 220–21 (2017) (illustrating the dangers of the “he said, she said” template in the rape context); see also Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1, 20 & n.105 (2017) (discussing the much lower incidence of false sexual assault allegations than those commonly reported by law enforcement officers and presenting sources critiquing the “he said, she said” framework).

122. Michael S. Pardo, *Group Agency and Legal Proof; Or Why the Jury Is an “It”*, 56 WM. & MARY L. REV. 1793, 1825 (2015) (discussing burdens of proof).

### 6. *Using Sexual Fraud Law for Vengeful Purposes*

Some worry that sexual fraud laws could be abused by individuals such as disenchanted former lovers. For example, a woman could have sex with a married man knowing fully well that he is married, and when he refuses to leave his wife like he promised he would, his lover accuses him of sexual fraud. In a subset of cases, at least some reputational harm to him may be accomplished even without the existence of relevant sexual fraud laws (e.g., she could go tell his wife about the affair). A law that only provides a low amount of recovery for any individual situation, such as the one proposed in this Article, would not be likely to change the opportunities for revenge as significantly as laws involving higher amounts. Any plaintiff who chooses to lie to a court also faces possible repercussions that could deter abuse in conjunction, again, with a low potential amount of recovery. That said, it is certainly the case that virtually any new law has some potential for abuse, and that an individual who materially misrepresents himself on a dating app runs risks if he does not correct that misrepresentation in writing before sexual intercourse takes place.

Let us now imagine that a lover initially did not know that a man was married, found out during the progression of their relationship, and at first simply did not report him despite any suffering that this discovery may have caused her. Previous sexual offenses do not cease to be such offenses just because the victim later engages in consensual intercourse with the perpetrator.<sup>123</sup> Hence, no injustice takes place if a victim decides legally to pursue the perpetrator on the basis of subsequent behavior. This is no different from other tort contexts, in which the victim has some time to decide whether to litigate against a tortfeasor and makes that decision in light of the full circumstances. Perpetrators of sexual fraud and other tortfeasors chose to engage in risky behavior, and a combination of their later actions and the luck of the draw (such as who the plaintiff happened to be—even an “eggshell” one) contribute to whether they actually end up getting sued or not.<sup>124</sup>

Like any Rubik’s Cube, the law of sexual fraud can be fashioned such that all sides align optimally—it just takes a bit of work. The next Subpart will show how modern technological and social trends have both increased the need for legal intervention and created greater opportunities for designing a fair legal framework.

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123. See, e.g., *George v. Commonwealth*, 2003 WL 22227195, at \*2 (K.Y.) (“[E]vidence [of consensual sex after an allegation of rape] is not conclusive on the issue of consent and is only a circumstance for the trier of fact to consider.”).

124. For a discussion of “eggshell” plaintiffs, see Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375, 375 (2013).

*E. How Modern Dating Makes Things Both Worse and Better*

Dating in the age of Tinder and other dating apps has become more fast-paced than ever before, and some individuals are meeting prospective mates of all sorts in large volumes at dizzying speeds. The Rhode Island Department of Health recently blamed dating apps for the significant rise in the local and national STD rate, with an increase especially observed in young people.<sup>125</sup> “Just as ride-hailing apps like Uber and Lyft have disrupted transportation—and required new regulations and cultural adaptations—dating sites have disrupted the way people have sex.”<sup>126</sup> While it is difficult to disentangle correlation and causation, empirical studies have suggested that otherwise similarly situated individuals who use dating apps have more frequent sexual encounters and contract more STDs.<sup>127</sup> As discussed below, while many people benefit from the existence of dating apps,<sup>128</sup> the nature of such apps has increased the opportunities for wrongdoers who use substantive lies to obtain sexual and other benefits. Modern dating, however, with its reliance on apps and texting also enables courts to overcome some of the evidentiary problems previously sometimes considered an argument against legal intervention.

*1. Increased Opportunities for Lies and Harm in Sexual Contexts*

Not only do dating apps increase the number of interactions with potential mates, but these individuals are drawn from a much broader pool than had been the case before the advent of the apps. Research from the Netherlands has shown that while individuals use dating apps such as Tinder for many different reasons, men are more likely than women to seek short-term sexual relationships through that medium.<sup>129</sup> If this is accurate, it may provide a greater incentive

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125. See David Goldman, *Tinder and Hookup Apps Blamed for Rise in STDs*, CNN (May 26, 2015, 8:34 AM), <http://money.cnn.com/2015/05/26/technology/rhode-island-tinder-stds/index.html>.

126. Julia Belluz, *Tinder and Grindr Don't Want To Talk About Their Role in Rising STDs*, VOX (Nov. 13, 2017, 11:00 AM), <https://www.vox.com/science-and-health/2017/11/13/16620286/online-dating-stds-tinder-grindr>.

127. See, e.g., Justin J. Lehmler & Michael Ioerger, *Social Networking Smartphone Applications and Sexual Health Outcomes Among Men Who Have Sex with Men*, 9 PLOS ONE 1, 5 (2014).

128. Andrew Gilden has noted the ability of the internet to allow people to explore their sexual fantasies and has warned against legal interventions that would chill this possibility, but the kinds of situations that his work describes envision consensual encounters rather than the type of sexual fraud on which this Article focuses. See Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 419–20 (2016).

129. Sindy R. Sumter et al., *Love Me Tinder: Untangling Emerging Adults' Motivations for Using the Dating Application Tinder*, 34 TELEMATICS & INFORMATICS 67, 74 (2017).

for men to lie if their lies produce the desired outcome of casual sex and either remain undiscovered or are often of no great consequence to the perpetrators, especially in the case of short-term interactions.

Perpetrators of sexual fraud can attract victims in much greater volumes than before. So even if one believes that the harm to any one victim is moderate, that harm must now be multiplied manifold compared to earlier times. It is possible for an individual on dating apps to meet up and have sex with several people every week, potentially accumulating dozens or hundreds of partners in a single year. “Real-time dating apps like Tinder intensify the interpersonal dating situation by rewarding impulsive behaviors, given the expectation of immediate gratification (delivering casual sex quickly and geographically conveniently) . . . .”<sup>130</sup>

Both the criminal and tort law frequently punish offenses that are individually of minor import but cause collective harm. Shoplifting a baseball cap violates theft law even though one could hardly argue that it usually imposes a greater harm on a store than the perpetrator of sexual fraud imposes on an individual victim.<sup>131</sup> We recognize as a society that a serial shoplifter may cause much harm in the aggregate (to a single or multiple retailers), and that shoplifters as a group bring about significant collective harm.<sup>132</sup> Of course, stores could do more—invest in more cameras, hire more security personnel, and so forth. Society has deemed it both unjust and inefficient, however, to expect potential victims in that context to take on all the costs of protecting against predatory behaviors. That reasoning fundamentally applies in the sexual context as well.

Additionally, society punishes shoplifting despite the possible chilling effects; after all, people may be slightly more nervous to go to stores or to touch merchandise that they are considering buying because the risk exists of being accused of an offense wrongfully. Relatedly, there is a chance of convicting the innocent of sexual fraud, for example, if someone is found to have lied who actually told the truth, but introducing a system that requires a significant level of evidence lowers that chance and hence the potential chilling effects.<sup>133</sup>

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130. Grant Hilary Brenner, *Casual Sex on Tinder*, PSYCHOL. TODAY (May 8, 2017), <https://www.psychologytoday.com/us/blog/experimentations/201705/casual-sex-tinder>.

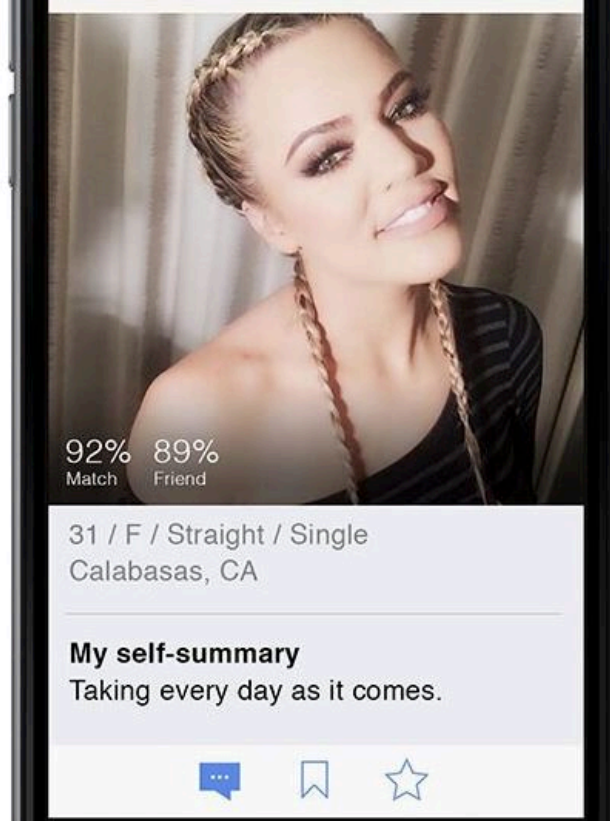
131. *See, e.g.*, N.Y. PENAL LAW § 155.25 (McKinney 2018) (defining petit larceny as involving the theft of any goods below one thousand dollars in value).

132. *See, e.g.*, Katie Reilly, *Shoplifting and Other Fraud Cost Retailers Nearly \$50 Billion Last Year*, TIME (June 22, 2017), <http://time.com/money/4829684/shoplifting-fraud-retail-survey/>.

133. A legal framework that only sets low sanctions, such as the one proposed in this Article, further mitigates the risk of such chilling effects.

2. “He Wrote, She Wrote”—Better Evidence of Sexual Fraud

Dating apps at times provide a wealth of information in writing that was previously exchanged in less transparent mediums. Statements including lies about one’s status, such as on being single, can be found both in the actual dating app profiles and in subsequent texting exchanges. Here is an example of how a dating app profile may display—this one being Khloe Kardashian’s OKCupid profile:<sup>134</sup>



She lists herself as “Single”, which gives information about her personal brand as a dater. Let us assume that she was actually married when she wrote this profile and that she was secretly looking for affairs on the OKCupid app. While we cannot say definitively that a sexual partner whom she met on OKCupid remained ignorant of the fact that she was married before engaging in intercourse (in her case,

134. For the accompanying article, see Meera Jagannathan, *Khloe Kardashian Creates OKCupid Dating Profile, Parties with Ex French Montana Following James Harden Split*, N.Y. DAILY NEWS (Feb. 9, 2016, 10:51 AM), <http://www.nydailynews.com/entertainment/gossip/khloe-kardashian-creates-okcupid-dating-profile-article-1.2525361>.

it may have obviously been mentioned in the media—but even for a regular person, the person may have admitted to it before sex took place), it at least creates a solid *prima facie* case.

People who match up via a dating app or website also usually text—either on the app itself or through a different phone-based mechanism—for a bit before meeting in person.<sup>135</sup> This leaves a trail of evidence much different from the one of, say, two people meeting at a bar who may not even have any witnesses as to what they discussed.<sup>136</sup> As described below, an individual’s written statement that: (1) turns out to be a falsehood; and (2) materially influences a victim’s decision to engage in sexual intercourse should shift the burden to the defendant to show that he or she corrected the record in time for meaningful consent to be established.

### III. FASHIONING A LEGAL RESPONSE TO SEXUAL FRAUD IN THE AGE OF TINDER

Most attempts in the late twentieth and early twenty-first century to target sexual fraud, whether in the criminal or tort arena, have found little acceptance in legislatures. As described, however, the magnitude of the problem has significantly increased due to the rapidly accelerating use of dating apps, and the evidentiary problems that stood in the way previously have been greatly diminished. This Part of the Article proposes a legal standard modeled after its proven counterpart in trademark law, provides new tools to address the problem of harm measurement for the courts, and seeks to reduce litigation costs for the victims. Thus, the Article offers a model that will hopefully prove pragmatic enough to meet with the legislative and judicial welcomes that have eluded more traditional frameworks. This type of approach could be first either implemented by states on their own or undergo further study by the Uniform Law Commission and result in a uniform act that individual states would subsequently adopt.<sup>137</sup>

If one is willing to recognize that the often widespread dignitary and at times emotional harms caused by perpetrators of sexual fraud should be of some legal significance when we offer recovery for even

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135. Holly O’Mahony, *Three Signs Your Online Dating Match Likes You*, GUARDIAN: SOULMATES BLOG, <https://soulmates.theguardian.com/blog/advice/three-signs-your-online-dating-match-likes-you> (last visited Feb. 9, 2019).

136. *See id.*

137. For some examples of previous uniform acts, see Uniform Law Commission, National Law Group Wraps Up 127th Annual Meeting – Seven New Acts Approved (Oct. 19, 2018, 12:07 PM), <https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=3b18adea-1517-4547-930b-b2cd36167cbe&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer#bm3b18adea-1517-4547-930b-b2cd36167cbe> (listing examples).

minor financial harm in other contexts,<sup>138</sup> it is helpful to examine how some of the legal remedies that exist in intellectual property law—combined with the procedural mechanisms that small claims court provides—can offer a helpful solution to a thorny problem.

A. *Search Costs and Deception in Trademark Law*

The notion that the dating world functions as a marketplace, both as a matter of scholarly study and self-perception, has become broadly accepted.<sup>139</sup> Within that, branding—usually conceptualized in the realm of trademarks—also occurs in the world of dating.<sup>140</sup> In that sense, creating an online dating profile is akin to creating an ad for oneself, replete with pictures and textual information.<sup>141</sup> We place limits in the commercial world on how misleading an ad can be—puffery is allowed (“This is the greatest gum in the world”) but false advertising is not.<sup>142</sup> And similarly, trademarks can be misdescriptive in only limited ways; they must, however, not be outright deceptive. Indeed, trademark law will not permit the registration of deceptive terms, which are defined as ones that would elicit affirmative answers to the following three questions: “(1) whether the term is misdescriptive as applied to the goods, (2) if so, whether anyone would be likely to believe the misrepresentation, and (3) whether the misrepresentation would materially affect a potential purchaser’s decision to buy the goods.”<sup>143</sup> This standard was applied to synthetic car seat covers with the mark “Lovee Lamb,” which was held to be deceptively misdescriptive because: (1) the products did not consist of real lamb; (2) consumers may have believed that the

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138. Another way to consider the parallel is the following: most people would much rather have five dollars (and frequently much larger amounts) taken from them through fraud than be lied to by the person with whom they end up having sexual intercourse. As this Article has discussed throughout, we allow punishment and recovery for the former, even through the criminal law, and generally give no recourse for the latter.

139. See, e.g., Rebecca D. Heino et al., *Relationshipshopping: Investigating the Market Metaphor in Online Dating*, 27 J. SOC. & PERS. RELATIONSHIPS 427, 427 (2010); Soohyung Lee & Muriel Niederle, *Propose with a Rose? Signaling in Internet Dating Markets*, 18 EXPERIMENTAL ECON. 731, 731 (2015); Colette Nataf & Thomas S. Wallsten, *Love the One You’re with: The Endowment Effect in the Dating Market*, 35 J. ECON. PSYCHOL. 58, 58 (2013).

140. See, e.g., Michael Karson, *Dating as Marketing*, PSYCHOL. TODAY (Sept. 26, 2014), <https://www.psychologytoday.com/us/blog/feeling-our-way/201409/dating-marketing>.

141. See, e.g., Janelle Ward, *What Are You Doing on Tinder? Impression Management on a Matchmaking Mobile App*, 20 INFO., COMM’N & SOC’Y 1644 (2016) (discussing Dutch Tinder users’ experience of creating their online dating profile brands).

142. See generally Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U. PA. L. REV. 1305 (2011).

143. *In re Budge Mfg. Co.*, 857 F.2d 773, 775 (Fed. Cir. 1988) (citation omitted).



products were made of real lamb; and (3) whether the products consisted of real lamb would make a material difference to the purchasing decision.<sup>144</sup> A similar test can be applied in the context of sexual fraud to determine if a lie that was told on a dating profile and preceded sexual intercourse should result in legal redress. At the very least, such a material lie would provide the basis for a prima facie case that would shift the burden to the defendant to show that he dispelled the false belief before intercourse took place.

To return to basics, in the economic marketplace that uses trademarks, scenarios generally begin with a search for the right product; this led William Landes and Richard Posner famously to theorize about a search-cost model for trademark law that found many adherents over the years.<sup>145</sup> The efficiency concerns that misleading trademarks raise have parallels in the dating world.<sup>146</sup> Daters incur increased search costs when other individuals misrepresent themselves.<sup>147</sup> While a small misrepresentation (e.g., lying about height) may generally not have dramatic negative effects and may in fact sometimes have positive effects (for example, someone compatible could have been filtered out had he listed his height accurately and the searcher was willing to accept that small fudge upon discovery), this is likely often not the case with material misrepresentations.

A prototypical hypothetical case is a man whom we shall call Marvin Simmons who claims to be single but is actually married and in what his wife believes is a monogamous arrangement with her. A woman named Leila is using dating apps to find someone single who is open to the possibility of a serious monogamous relationship. She is thirty-nine years old and would ideally like to have biological children if she finds the right partner. Marvin and Leila both swipe right and a match is created. By lying about his status, Marvin increases Leila's search costs from the start. He is most definitely not what she is looking for, but his lie misleads her into thinking that he is in the pool of people worth exploring. They spend some time chatting and decide to meet for drinks. A few dates later, they begin having sex.

Marvin is a busy business executive, so he can only meet once or twice a week. Furthermore, he tells Leila that it has been a rough year for him—he got divorced a year ago and his mother died recently, so he wants to get to know someone slowly and feels the need to spend much of his rare free time alone or with friends. Leila wants to give

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144. *See id.* at 775, 777.

145. *See* William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J.L. & ECON. 265, 275 (1987).

146. This Article takes a utilitarian perspective and, to maximize societal utility, seeks both to reduce harm to victims and increase search efficiency.

147. *See generally* PAUL OYER, EVERYTHING I EVER NEEDED TO KNOW ABOUT ECONOMICS I LEARNED FROM ONLINE DATING (2014) (discussing the idea of search costs in the online dating context).

him the space that he needs to heal. She has googled Marvin, and while he does not really use social media (he told her that “Facebook is such a waste of time!”), she finds a LinkedIn page with the name that he gave her and the information checks out. Leila has no reason to assume that Marvin Simmons is a fake name.

Leila’s feelings for Marvin grow over time, and she stops dating other men. However, after a few months, she becomes increasingly concerned because not only has he not introduced her to any of his friends, but they have still not been to his apartment. His explanation made sense at first—his apartment was under renovation and her apartment was close to his work, so it seemed logical to hang out there during intimate times. When Leila demands to see Marvin’s apartment, regardless of the state of the renovations, he finally confesses that he is actually married, and his wife does not know about his extracurricular activities.

Feeling violated (i.e., recognizing the dignitary harm she suffered) and heartbroken (i.e., experiencing emotional harm), Leila is left without meaningful recourse. She could tell Marvin’s wife what happened, if Leila even figures out his true identity, but violence could erupt and the wife may not believe that Leila was in the dark about his marital status that whole time. Leila may have little way to leverage social sanctions. She has wasted months on him, and several more months pass before she is able to trust again and recover from the depression into which this incident plunged her. Meanwhile, Leila turns forty, and the passage of time has diminished her odds of being able to conceive a child. Marvin’s deceit was directly responsible for her inability to pursue her best interest.<sup>148</sup>

There may well be a good match for Leila out there, but in addition to bringing about dignitary and emotional harm, individuals like Marvin greatly increase Leila’s search costs. There is never a guarantee that a dating relationship will work out, but the relationship with Marvin was essentially doomed to failure from the start. Similar to the scenarios that arise in trademarks, Leila could not get the “product” she wanted due to its misleading branding. Marvin was using the romance equivalent of a deceptive trademark or of false advertising, which are actions prohibited by the Lanham Act and other laws in the commercial context.

When trademark law seeks to minimize search costs, one of the main things it protects is the value of our time.<sup>149</sup> The law does the

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148. See *supra* notes 56–58 and accompanying text.

149. Mark McKenna summarizes the search-cost theory of trademarks as follows:

[T]rademark law operates to enable consumers to rely on trademarks as repositories of information about the source and quality of products, thereby reducing the costs of searching for goods that satisfy their preferences. Trademark protection enables consumers who are

same in a number of other contexts, sometimes assigning a monetary value that takes into account an individual's hourly wages.<sup>150</sup> If the injured party has died, we even allow family members to recover for the value of the time that the deceased statistically would have had left in his life—and would presumably have spent with his relatives—had it ended naturally.<sup>151</sup> In the dating context, time wasted as a result of fraud takes on several meanings. A victim could have done many things with her time, whether earned additional wages, improved her health through a variety of measures, or engaged in any number of other activities. This is leaving aside the actual financial costs of the dating process, such as money spent on transit or food, or to cover for other obligations that she may have had during that time. While one could argue that the victim obtained some hedonic pleasure from these expenses, the long-term value thereof is questionable once the fraud comes to light. Most importantly, the victim would often not have opted for that value had she known the truth.

The reduction of fertility, as mentioned above, cannot be underestimated, either, which could become cumulative if a victim encounters multiple individuals who commit sexual fraud against her. The gender effects do not stop here. While and, in part because, women lose their fertility in a much more dramatic way than men, their appeal to the male dating pool drops over time as well; women in their early- to mid-twenties are highly prized, after which there is

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shopping for shoes, for example, to rely on the presence of the NIKE mark as an indicator of the quality of the shoes to which that mark is affixed. Consumers who previously have had good experiences with Nike shoes can simply look for the NIKE mark the next time they go shoe shopping because they can assume that new pairs of Nike shoes come from the same company that produced their last pair of Nike shoes and that they will be similarly satisfied with the new Nike shoes (since, the theory further assumes, stability of source designation is a good proxy for consistent quality). First-time customers benefit from protection too, since they can rely on the NIKE mark as shorthand for information they have learned from advertising or by word of mouth.

Mark P. McKenna, *A Consumer Decision-Making Theory of Trademark Law*, 98 VA. L. REV. 67, 73 (2012). He further explains that, under search-cost theory, trademark law lowers “the cost of acquiring information about goods or services . . . by preventing parties from using marks that are likely to confuse consumers about the source of goods or services, as this kind of confusion undermines the informational efficiencies gained by using trademarks in the first place.” *Id.* at 74–75.

150. See, e.g., *Johnson v. Dir., Office of Workers Comp. Programs*, 911 F.2d 247, 249 (9th Cir. 1990) (utilizing value of individual's weekly wages to determine disability compensation).

151. See, e.g., *Romero v. Byers*, 872 P.2d 840, 842 (N.M. 1994) (recognizing loss of consortium claims); Robert Cooter & David DePianto, *Community Versus Market Values of Life*, 57 WM. & MARY L. REV. 713, 725–26 (2016) (discussing the calculation of economic and noneconomic damages in the context of wrongful death lawsuits).

a steady decline.<sup>152</sup> Spending time with the wrong person may thus, in some respects, come with higher opportunity costs for women than for men, even though the reduction of the dating pool size generally as more people pair up can have negative effects for both genders.<sup>153</sup> While sexual intercourse provides a logical and legally helpful trigger for liability, offering legal recourse would also serve the purpose of compensating victims for lost time.

In addition to seeking to minimize search costs, trademark law further considers and tries to prevent other costs that deception creates. This could be something as extreme as a product that is physically harmful and as minor as a soda whose taste a customer simply does not enjoy quite as much. Why should the law protect a person who was deceived about a material fact regarding his or her shampoo brand more than one who was deceived about a material fact regarding a sexual partner? The analogy holds up even if we consider the theories of trademark law that protect other producers rather than the consumers—a prospective partner for whom that material attribute would have been different has been hurt as well. One of the things that changes between the two contexts of trademarks and dating is the plaintiff. In trademarks, the competitor sues because he is best situated to do so.<sup>154</sup> In dating, the party who can most easily bring suit is the victim. That victim, however, generally does not have the same kinds of financial resources as a trademark plaintiff. And that is one of the advantages of taking the recovery process to small claims court.

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152. See, e.g., Caitlin Dewey, *Tinder's Age Tax Is Just One Small Piece of Online Dating's Massive Age Problem*, WASH. POST (Mar. 5, 2015), <https://www.washingtonpost.com/news/the-intersect/wp/2015/03/05/tinders-age-tax-is-just-one-small-piece-of-online-datings-massive-age-problem/>. This is not to say that this excuses women lying about their age on the apps, a category that could potentially fall into the purview of a corrective statute. For a discussion of a concern for heterosexual women who feel pressured to lie about their age in the context of this proposal, see Robin J. Effron, *Lies, Dating Lies, and Small Claims Court*, JOTWELL (Sept. 25, 2018), <https://courtslaw.jotwell.com/lies-dating-lies-and-small-claims-court/>. It is possible, however, that more legal pressure on heterosexual men to reduce their own lies about age would ultimately result in a greater likelihood of men moving their age search range upward, thus increasing disincentives for age lies for both genders.

153. See Michael J. Rosenfeld & Reuben J. Thomas, *Searching for a Mate: The Rise of the Internet as a Social Intermediary*, 77 AM. SOC. REV. 523, 538 (2012) (“For heterosexuals in their late 30s, the partnership rate is over 80 percent, meaning that fewer than 20 percent of individuals are single.”).

154. See generally Mark P. McKenna, *The Normative Foundations of Trademark Law*, 82 NOTRE DAME L. REV. 1839 (2007) (discussing that although trademark law can protect consumers, the law is focused on providing a right of recovery to competitors who find their trademarks misused).

*B. Statutory Sanctions and Small Claims Courts*

There have been numerous obstacles to the proposals that scholars have made over the years to address the problem of sexual fraud. One of these barriers is that opponents emphasize the difficulty of evaluating the level of harm that a victim suffered,<sup>155</sup> a perennial problem whenever emotional distress is involved in a lawsuit. It is unclear, however, why the standard answer in such line-drawing cases appears to be not to bother compensating the victim at all. A victim may be satisfied, or at least more satisfied, with a small recovered amount rather than nothing. The symbolism of the victory may overcome the sense of helplessness and injustice that she faces otherwise. And the expressive value of even the smallest judgment cannot be underestimated.<sup>156</sup> More importantly, however, the law needs to show recognition of the fact that regardless of how much or little emotional distress a victim experienced, she suffered a dignitary harm when her ability to give consent was violated.

One way to provide recovery for that dignitary harm, as well as overcome the problem of calculating the exact level of emotional harm and deter future wrongful behavior, is through the mechanism of statutory sanctions. By setting a specific amount of recovery, neither the victims nor the courts have to expend resources resolving just how upset someone is or needs to be after having experienced sexual fraud. This Article proposes using the relevant amount that will keep the suit in small claims court. In New York City, for example, which is one of the largest markets for online dating in the United States, this could mean setting the damages at five thousand dollars.<sup>157</sup> This is a sum significant enough potentially to deter sexual fraudsters, but also one that will allow the culprit to recover from his mistake and mend his ways. Unlike in scenarios in which concerns of slippery slopes run high, the caps on damages that can be obtained in small claims court provide a limit that would require much greater legislative effort to overcome than the types of statutory or other damages that one sees in different parts of the court system.<sup>158</sup>

This amount will also hopefully prove especially effective to deter serial fraudsters because having ten or twenty individuals recover that kind of sum from just one person would start adding up. Given

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155. See generally Danielle Keats Citron, *Law's Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373 (2009) (recognizing that opponents to remedies for sexual harassment often refuse to recognize the true harms and damages associated with sexual harassment).

156. See, e.g., *id.* at 413.

157. See N.Y. CITY CIV. CT. ACT § 1801 (McKinney 2018).

158. See, e.g., Irina D. Manta, *The High Cost of Low Sanctions*, 66 FLA. L. REV. 157, 161 (2014) (arguing that laws with lower penalties will receive less publicity and attention, making them easier to pass than laws with harsher penalties).

that the dating apps allow some people to defraud dozens or even hundreds of individuals a year,<sup>159</sup> providing this type of deterrence could have a significant effect on reducing the sum total of harm that sexual fraud causes. One can also surmise that the victims of the most egregious behavior will be some of the most likely actually to pursue legal avenues. Of course, a percentage of defendants may be judgment-proof or find ways to escape judgments against them, but victims will overall have a much better chance at recovery than they do currently.<sup>160</sup>

In addition to the problem of measuring the proper recovery amount for sexual fraud, one of the factors that has thwarted many previous proposals is the cost of lawsuits in the regular court system.<sup>161</sup> This is one of the greatest general strengths of the small claims system and one of the reasons that it was adopted in the first place. Many people cannot afford to engage in regular civil lawsuits even when they have experienced serious harm. While some rejoice in the fact that this reduces the total number of lawsuits, others view it as a significant problem of access to justice.<sup>162</sup> Small claims court does not require a plaintiff to have an attorney or specialized legal knowledge, and the filing fees are low.<sup>163</sup> As described above, many

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159. See, e.g., Kim Stephens, 'As Many Sexual Partners as They Can Get': Dating Apps Fuelling Rise in Casual Sex, NEWS.COM.AU (Jan. 16, 2017), <https://www.news.com.au/lifestyle/relationships/dating/as-many-sexual-partners-as-they-can-get-dating-apps-fuelling-rise-in-casual-sex/news-story/7bb94ffb5ddec69fd5a114aabd54db> (quoting an Australian sexual health doctor who says he often "treats patients who have sex with up to 10 people a day").

160. It is understood that in other types of fraud cases, corporate entities may be less likely to escape liability than private parties.

161. Charles Silver, *Does Civil Justice Cost Too Much?*, 80 TEX. L. REV. 2073, 2113 (2002).

162. Recognizing this issue in the intellectual property context, the United Kingdom created a small claims court to deal with some types of copyright infringement cases. See Christian Helmers et al., *Who Needs a Copyright Small Claims Court? Evidence from the U.K.'s IP Enterprise Court*, BERKELEY TECH. L.J. 1, 2 (Jan. 10, 2018), <http://btlj.org/2018/01/who-needs-a-copyright-small-claims-court-evidence-from-the-u-k-s-i-p-enterprise-court>. For a discussion of introducing a patent small claims court, see, for example, Dmitry Karshtedt, *The Completeness Requirement in Patent Law*, 56 B.C. L. REV. 949, 1022–28 (2015).

163. See, e.g., *Filing Fees*, N.Y. CTS., <https://www.nycourts.gov/forms/filingfees.shtml> (last visited Feb. 9, 2019) (listing current small claims court filing fees in New York at fifteen to twenty dollars). In some jurisdictions, the small claims court process is even moving online, which could streamline future dispute resolution and would allow sexual fraud claims originating in online dating apps to come full circle—indeed, many victims may find it a more comfortable process than that in physical courts. See, e.g., Elle Thomas, *From the Courtroom to Your Room, Utah Court System Pilot Program Brings Small Claims Cases Online*, FOX13 (Oct. 25, 2018), <https://fox13now.com/2018/10/25/from-the-courtroom-to-your-room-utah-court-system-pilot-program-brings-small-claims-cases-online/>; (describing a recent

sexual fraudsters rely on the fact that their victims will be unable to fight back in any meaningful way, even if they uncover the nature of the fraud. The availability of a small claims court procedure could greatly shift the perspective of potential perpetrators in that regard.

A statute regarding sexual fraud could provide for a fixed amount of recovery for lying in writing about a material fact such as to induce someone to engage in sexual intercourse. This standard may ask a small claims court judge to determine what would have deterred a reasonable, or average person, from having sex with someone.<sup>164</sup> This could be limited to facts that were not easily ascertainable upon meeting the alleged perpetrator in question.<sup>165</sup> So it would not be enough to say that a victim of sexual fraud would not have wished to *meet* the liar had she known the fact—it has to be a fact that led to sex specifically. Hence, someone who did not wish to meet prospective mates that are above or below a certain height or weight, fairly common but generally more innocuous lies, would not have a claim. A cause of action would potentially exist, however, against someone who lied about marital status or other determinative attributes. Blatant lies about religious background, profession, and the like could qualify under proper circumstances as well if the remainder of the test can be met.<sup>166</sup>

Stuart Green suggested, in the criminal law context, that a helpful tool to define legal contours would be to collect “empirical data

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initiative to move online some small claims in West Valley City Justice Courts in Utah); Online Dispute Resolution: Franklin County Municipal Court, <https://sc.courtinnovations.com/OHFCCMC/home> (last visited Feb. 21, 2019) (creating the same type of opportunity for cases in Franklin County Municipal Court in Ohio).

164. There are arguments in favor of using a subjective rather than objective standard, but as Stuart Green has indicated, a subjective determination would hinge “on the basis of the victim’s testimony, which in some cases will be tinged with regret and the distorting lens of hindsight.” Green, *supra* note 58, at 219. Using an objective standard also avoids debates about whether a specific victim, based on his or her history, would be likely to engage in sexual intercourse with, say, a married individual whose spouse did not agree to this (even if the answer is yes, that would not mean that the victim wishes to do so unknowingly). For a broader discussion of the reasons why and ways in which public policy should put a premium on individual choice, see Irina D. Manta, *Choosing Privacy*, 20 N.Y.U. J. LEGIS. & PUB. POL’Y 649, 664–71 (2017).

165. Deana Pollard Sacks has argued that in cases of this sort, “[t]he defendant’s intentional misrepresentations or omission of facts regarding marital status, extramarital affairs, relationship status, family background, or other objective, material, factual aspects of her life should vitiate consent in order to protect the plaintiff’s sexual autonomy, provided causation is established.” Sacks, *supra* note 16, at 1084 (footnotes omitted).

166. Patricia Falk’s suggestion, in the context of Tennessee’s related criminal law, that the legislature provide “a nonexclusive list of the types of misrepresentations that fall inside or outside . . . the statute’s purview” could be adopted here as well. Falk, *supra* note 31, at 170.

about how people ‘in the street’ view the wrongfulness of various kinds of deception-induced sex”<sup>167</sup> because while not determinative, such data “can provide a useful reference point.”<sup>168</sup> Studies of this sort can gauge both what individuals believe should be legally punishable and what level of punishment they think is appropriate.<sup>169</sup> This type of work could also be helpful to lawmakers and judges to determine the content of a civil (rather than criminal) legal test based on reasonable expectations and materiality, which would be used in small claims court.

Of course, some individuals would have had sex with the imposter even knowing that, say, the person is married, but the proposed framework would shift the burden to the alleged perpetrator to demonstrate that this is the case here. With written evidence displaying the lie, including dating app statements and text messages, the alleged perpetrator would need to provide, for example, text messages in which he explained his situation truthfully before intercourse took place.<sup>170</sup> The same is true of qualifying lies other than those about marital status.

Policymakers would need to make decisions as to what happens in the case of silence about a legally-protected category. For example, what about a Tinder profile that does not state the individual’s marital status at all? A good case can be made that the default assumption about an individual on a dating app is that he is unmarried, so silence on the app and in texts could validly be treated the same way as a lie. A more cautious approach that requires explicit lies certainly has its justifications as well, however, and one could argue that the burden on potential victims is not overly large to ask questions clarifying the other person’s status.

### C. Addressing Possible Obstacles

Like any new proposal, this one faces possible objections. First is the one that the law should not intervene in the private affairs of citizens to this degree. This argument, however, goes nowhere. The law already intervenes frequently in sexual matters, including rape, sexual assault, sexual harassment, and many other forms of abuse. It delves into people’s private lives when it comes to family law, examining under the microscope text message exchanges between

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167. Green, *supra* note 58, at 223.

168. *Id.*

169. For an extended analysis of such studies in the context of theft, intellectual property infringement, and related subjects, see generally STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE (2012) (comparing the moral differences and culpability between different criminal acts which are all described as theft).

170. For a discussion of the use of text messages as evidence in litigation, see generally Jeffrey Bellin, *eHearsay*, 98 MINN. L. REV. 7 (2013).



spouses or between parents and children.<sup>171</sup> The argument that the law should not be involved in the case of sexual fraud related to online dating usually boils down to the claim that the harm in this context is not significant enough to warrant invasions into private matters. As this Article has demonstrated, however, the harm is large both as an individual and collective matter.

A second objection relates to the cost of mistakes. What if the law at times punishes individuals who did not lie in a material way, or who corrected lies before sexual intercourse took place? While mistakes could happen, the use of small claims court is likely to mitigate their financial import. Individuals who lie on the apps would have to internalize the risks that they were previously imposing on others, and the burden shifting would force them to show that they corrected misperceptions. While there is a financial, reputational, and time-expenditure cost involved in innocent parties being pursued or wrongfully punished, it is unclear why that cost outweighs the cost currently paid by all the parties who suffer from the effects of lies told in the dating app context.

A third argument against the framework proposed in this Article is that individuals could bring frivolous claims for various reasons. There are multiple responses to this claim that culminate in the fact that it is not clear that the small claims model changes the arsenal much of a person who has no true claim and is simply seeking to harm a current or former sexual partner. Someone willing to bring a frivolous claim under this statute could have already done so under any number of other laws—such as by asserting that the sexual partner committed property theft. An individual in that category could have also availed herself of websites that permit the reporting of general unsavory behavior by former partners (and are more likely to pop up in third parties' Google searches than small claims court cases). It is not clear why or how a statute allowing claims for sexual fraud in this context greatly changes preexisting dynamics.

A fourth argument against the proposal is that the procedural protections in small claims court are not strong enough to safeguard the rights of alleged perpetrators. This is where one needs to balance the needs of the accused with the ability of victims to obtain access to justice. As discussed, previous proposals have failed while online dating has allowed the extent and effects of sexual fraud to spiral out

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171. See, e.g., *A.B.A. v. T.A.*, 2018 WL 564396 (Sup. Ct. N.J. App. Div.) (granting a restraining order to the plaintiff against his ex-wife based in part on the threatening content of her text messages to him); *Shaw v. Young*, 199 So.3d 1180 (Ct. App. La. 2016) (justifying a permanent protective order in part on the basis of repeat text messages by the defendant against his plaintiff ex-wife). See also *Commonwealth v. Simpson*, 2013 WL 11258826 (Sup. Ct. Pa.) (discussing, in a criminal action, the defendant's text message to his daughter in which he explained that his wife was not allowed to eat any food found in the family home).

of control. The need to defend oneself in small claims court, while unpleasant and damaging to the innocent, may be a cost that we have to be willing to bear to correct the long-term and increasing injustices perpetrated against victims—many of them women—whose ability to give consent freely has been violated.

A fifth objection could raise First Amendment concerns regarding this attempt to compensate for the lies of some individuals if they lead to sexual fraud.<sup>172</sup> Traditionally, fraudulent speech was usually thought to fall outside the protections of the First Amendment.<sup>173</sup> The major exception is the recent case of *United States v. Alvarez*,<sup>174</sup> in which the Court struck down the Stolen Valor Act, which criminalized false statements about having earned a military medal.<sup>175</sup> But *Alvarez* is likely to impose only very modest limits on any sexual fraud statutes. The criminal law at bar in *Alvarez* was broad and prohibited false statements regardless of intent and consequences, and the Court generally recognized that false statements could still be prohibited upon a showing of material gain or harm.<sup>176</sup> Indeed, Congress passed a new version of the Stolen Valor Act in 2013, which now includes a provision that the individual committing fraud need to have intended to gain a benefit or something of value.<sup>177</sup> The civil statute here would only punish statements that proved material in procuring sexual intercourse to the fraudster, and would therefore be consistent with *Alvarez*.

A sixth objection could involve that the proposal does not go far enough. It may not reach enough behaviors, liability only kicks in after intercourse has taken place, and recovery is limited by the ceiling that each respective small claims court sets. If implemented, however, the proposal would likely have positive effects on reducing the amount of lying on dating apps more generally. For once, the speech-chilling effects from a law are likely to be largely positive. It is also important not to let the perfect be the enemy of the good. This proposal will not eliminate all deceit from the sexual context, but it will present an improvement over the current legal situation—which is ultimately the proper test for whether we should adopt any new statute.

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172. I would like to thank Will Baude for our conversation on this topic.

173. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

174. 567 U.S. 709 (2012).

175. *Id.* at 709, 730. See generally Catherine J. Ross, *Incredible Lies*, 89 U. COLO. L. REV. 377 (2018) (considering the effect of First Amendment protection for lies in the wake of *Alvarez*).

176. See *Alvarez*, 567 U.S. at 722–23.

177. Stolen Valor Act of 2013, 18 U.S.C. § 704 (2017). Interestingly, the defendant in *Alvarez* himself went to jail for fraud (involving health insurance benefits) in the end. See Wes Woods II, *Water Board Director Xavier Alvarez Sentenced to Five Years' Prison*, THREE CORNERS POL. (Oct. 1, 2009, 11:43:57 AM), <http://threecornerspolitics.blogspot.com/2009/10/water-board-director-xavier-alvarez.html>.

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*TINDER LIES*

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## IV. CONCLUSION

This Article shows that addressing sexual fraud is not an all-or-nothing proposition. Using a combination of trademark law, statutory sanctions, and small claims court reduces the problems associated with other models that have proven largely unsuccessful so far in attracting the attention of lawmakers. This proposal should be viewed as part of the larger agenda of making Internet dating a safer process in a world that increasingly relies on this technology to satisfy basic human needs. One of the greatest strengths of Internet dating is also one of its deepest flaws: that it enables individuals to meet prospective mates that they may have never encountered otherwise. When material lies negate the ability to give consent meaningfully, victims are currently left with little recourse, and perpetrators of sexual fraud have few incentives to cease their behavior. This is why when considering the legal framework of sexual fraud, legislators should swipe right on this proposal.