SEXUALLY PROVOKED: RECOGNIZING SEXUAL MISREPRESENTATION AS ADEQUATE PROVOCATION

Bradford Bigler*

Research suggests that a serious sexual misrepresentation can spark an emotional firestorm in the deceived. But, as a matter of law, can this emotional firestorm be considered a reasonable heat of passion? In short, when may a killer assert the provocation defense given a serious sexual misrepresentation? The law currently addresses this question in a haphazard way. Despite the recurrent deception theme found in many provocation cases—such as those involving the concealment of adultery, sexual identity, or sexual health status—the law applies to these cases a patchwork of legal theories that masks the role of the deception in bringing about a reasonable heat of passion. This ad hoc approach leaves the provocation defense both doctrinally disconnected and normatively unappealing. This Comment thus proposes treating sexual misrepresentation as legally adequate provocation when (1) a defendant engages in a sexual act while reasonably deceived, (2) regarding a fact reasonably material to consent, and (3) the discovery of which would cause a reasonable person a severe mental or emotional crisis upon discovery.

* Editor, UCLA Law Review, Volume 53. J.D. Candidate, UCLA School of Law, 2006; B.S., United States Military Academy, 1999. The author is a Captain in the United States Army on active duty, and is studying under the Army's Funded Legal Education Program, pending transfer to the Judge Advocate General's Corps. The opinions expressed in this Comment reflect the views of the author only, and not the views of the Judge Advocate General or the Department of the Army. Thanks to Adam Goldberg, Elizabeth Oh, Pei Pei Tan and the entire editing team for their fantastic support. Special thanks to Sharon Dolovich, Zachary Kramer, and Brent Bigler for their assistance and feedback at critical stages of my research and writing. Finally, I dedicate this Comment to my wife Rebecca, who has endured the entire process with the patience of a saint.

INTRODUCTION

Is a sexual misrepresentation ever so egregious that the criminal law should allow an accused killer to assert a provocation defense? Consider these cases: In the first,[1] defendants Michael Magidson and Jose Merel had consensual sexual relations with Gwen Araujo.[2] When they later discovered that Araujo had a penis and was not the biological female they supposed her to be, they (and at least one other) beat and strangled Araujo to death.[3]

1. This case was retried as *State v. Jose Merel, Jason Cazares, & Michael Magidson*, Nos. H33728A, H33728B, and HH33728C. The first trial ended in a mistrial when jurors deadlocked over murder charges. *See, e.g.*, Kelly St. John, *Teenager Provoked Own Killing, Attorney Says: Defense Argues for Manslaughter—Not Murder—in Closing Arguments of Transgender Trial*, S.F. CHRON., Aug. 30, 2005, at B3. At retrial, Merel and Magidson were convicted of murder. After the jury deadlocked on charges against Cazares, he pleaded no contest to voluntary manslaughter. Merel and Magidson received 15 years to life in prison, and Cazares received six years in prison. Henry K. Lee, *Prison for 3 in Transgender Teen's Slaying*, S.F. CHRON., Jan. 28, 2006, at B1.

2. Vicki Haddock, *"Gay Panic" Defense in Araujo Case*, S.F. CHRON., May 16, 2004, at E1. Another defendant, Jaron Nabors, testified pursuant to a plea bargain, that Magidson and Merel had anal or oral sex with Araujo. *See id.*

3. *See, e.g.*, Chris O'Connell & Eric Malnic, *Man Testifies on His Role in Teen's Death: A Defendant Describes Slaying of 17-Year-Old Who Lived as a Girl. Three Others Are Charged With Murder Under the State's Hate-Crime Statute*, L.A. TIMES, Feb. 25, 2003, at B1.

In *Rowland v. State*,[4] the defendant "and his wife were on good terms, and he was in the habit of visiting her and staying one night with her each week."[5] After close to a week away from home, the unsuspecting defendant returned home to discover his wife, Becky, "in the very act of adultery" with another man.[6] As the two attempted to run out the door, Rowland drew a gun and fired, killing Becky.[7]

In *Commonwealth v. Groome*,[8] defendant Groome and Korpela, his girlfriend, got into a fight regarding their relationship.[9] At some point, she "told him that she had AIDS and herpes, and that he probably did as well."[10] As the argument crescendoed, Groome assaulted Korpela and beat her to death.[11]

In each of these cases, the defendant asserted the provocation defense. To obtain the benefit of the defense, a defendant must show that he acted on legally adequate provocation, which in fact caused a heat of passion, before he in fact had cooled down, and before adequate cooling time had elapsed.[12]

The facts in each of these cases suggest that the discovery of an intimate deception should play a pivotal role in determining whether the defendant acted on legally adequate provocation. In the *Araujo* case, the killers had sex with Araujo while deceived as to her biological sex. In *Rowland*, the defendant was deceived concerning the marital fidelity of Becky, his spouse, and in *Groome*, the defendant was deceived concerning the AIDS status of his lover. Despite the common thread of deception between intimates raised by each of these cases, the criminal law doctrine of provocation handles each without regard to the role of the intimate deception. In the *Araujo* case, the provocation question addressed by the jury was whether the defendants were in a rage provoked by homosexual panic.[13] In *Rowland*, the issue addressed was whether the defendant's anger was provoked by the sudden discovery of

4. Rowland v. State, 35 So. 826 (Miss. 1904).
5. *Id.* at 826–27.
6. *See id.* at 827.
7. *Id.*
8. Commonwealth v. Groome, 755 N.E.2d 1224 (Mass. 2001); *see also Conviction Upheld in Murder Prompted by AIDS Rumor*, AIDS POL'Y & L., May 3, 1996, at 7.
9. *Groome*, 755 N.E.2d at 1232.
10. *Id.*
11. *Id.* at 1232–33.
12. *See, e.g.*, WAYNE R. LAFAVE, CRIMINAL LAW § 15.2(b), at 777 (4th ed. 2003).
13. *See, e.g.*, Haddock, *supra* note 2. A preliminary word about terminology is also appropriate here. This Comment uses the term "homosexual" as an adjective referring to "sexual relations . . . between individuals of the same sex." WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 2 (2d ed. 1997). For simplicity, this Comment also uses the term as a noun referring to those who prefer sexual relations with others of the same sex and gender. For more on sexual identity and the interplay between sex, sexuality, and gender, see discussion *infra* note 66.

adultery.[14] Finally, in *Groome*, the courts sidestepped the provocation issue completely, ruling that it was not a concern because sufficient cooling time had elapsed between the discovery and the killing.[15] In none of these cases did the criminal law contemplate the role of intimate deception in determining whether adequate provocation existed.

This Comment argues that these cases should all be considered under a uniform theory of provocation by *sexual misrepresentation*, which accounts for the role of deception as legally adequate provocation. As we shall see, the discovery of a serious sexual misrepresentation can be infuriating. But rather than acknowledge the role of deception, the current law applies an ad hoc approach to cases involving sexual misrepresentation. This disorganized approach is a major flaw in the provocation doctrine, and is exacerbated by fundamental weaknesses in the existing theories of homosexual panic defense, sudden discovery of adultery, and cases involving sexual health. Instead, the law should apply a uniform approach. Specifically, sexual misrepresentation should be considered legally adequate provocation when: (1) a defendant engaged in a sexual act, while in a reasonably deceived state of mind; (2) concerning a fact reasonably material to consent; and (3) which would likely cause a reasonable person a severe mental or emotional crisis upon discovery. This proposed three-part test for sexual misrepresentation addresses the question of what constitutes legally adequate provocation. This Comment assumes that a defendant can meet the cooling time prongs of the provocation defense, and assumes the provocation in fact caused a heat of passion.

Part I of this Comment outlines the origins and history of the provocation defense, with particular attention paid to how the reasonableness requirement affects the defense, and to two competing rationales for the defense. Part II addresses how current provocation doctrine handles (or more appropriately, mishandles) cases of sexual misrepresentation. Part III develops the argument that uncovering an intimate deception can serve as legally adequate provocation. Part IV draws on themes from each of the previous sections to develop a theory of sexual misrepresentation that locates the framework firmly within existing provocation rationales, while attempting to maintain normative responsibility. Part V applies the theory of sexual misrepresentation to a test suite of adultery, HIV/AIDS, and sexual identity cases.

14. Rowland v. State, 35 So. 826, 827 (Miss. 1904).
15. *Groome*, 755 N.E.2d at 1240.

I. THE PROVOCATION DEFENSE

Stated simply, the provocation defense mitigates to manslaughter a homicide conviction[16] if a defendant establishes that he acted on legally adequate provocation, which in fact caused a heat of passion, before he had cooled down, and before adequate cooling time had elapsed.[17] Although the doctrine is quite old, modern formulations rely on the same basic reasoning as historical doctrine: that she who kills in the heat of passion is less culpable than she who premeditates a killing, because the former acted from passion and not reason.[18]

One who premeditates a killing commits a more heinous crime in part because the actor is in control of her actions at the time of the killing. By contrast, one who kills while under a reasonable heat of passion (that is, one who is adequately provoked) does not possess the same level of control over her own actions. Therefore, one who kills while under adequate provocation is less culpable than one who kills while under no such provocation.[19] The law accounts for this difference in culpability by imposing the lesser manslaughter conviction when one kills under adequate provocation.

Conceptually, one might think of the provocation defense as a theory in which the existence of adequate provocation negates a portion of the defendant's culpability. The remaining culpability of the defendant results in a conviction for manslaughter. For example, suppose a man comes home to discover his wife having sex with his "best friend." Suppose further that as the best friend tries to escape, the slighted husband flies into a rage

16. A conviction of manslaughter still carries a hefty penalty, often resulting in many years in prison. *See, e.g.*, B.R. WHITE, THE CRIMES AND PUNISHMENT PRIMER 123–42 (1986) (listing selected state sentencing guidelines for voluntary manslaughter, with the maximum sentence in some states being up to twenty years in prison). By comparison, the penalty for unpremeditated murder in many states ranges from, on the low end, ten years to life imprisonment. *Id.*

17. *See, e.g.*, LAFAVE, *supra* note 12, § 15.1(a), at 777.

18. For an historical example, see 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 485 (1841) (stating that "[w]henever death ensues from sudden transport of passion . . . it is considered as solely imputable to human infirmity"), and FRANCIS WHARTON, THE LAW OF HOMICIDE 5 & n.4 (3d ed. 1907) (observing that manslaughter is an "act . . . imputed to the infirmity of human nature," and citing seventeen cases for this proposition). For a more modern source, see LAFAVE, *supra* note 12, § 15.1, at 775 ("The principle extenuating circumstance is the fact that the defendant, when he killed the victim, was in a state of passion engendered in him by an adequate provocation (that is, a provocation which would cause a reasonable man to lose his normal self-control.")).

19. See, for example, Peter Arenella, *Legal and Moral Blame*, 39 UCLA L. REV. 1511 (1992), noting that "moral theorists have generally agreed that the necessary attributes of moral agency fall under three categories: knowledge, reason, and control." *Id.* at 1519. Where there is adequate provocation, the defendant's highly emotional state impairs her ability to exercise full reason and control over her actions. Because of this, the law affords her a partial excuse.

which causes him to attack the other man verbally and physically, though not killing him. Many people likely would find the behavior of the husband fully excused by the nature of the provocation. This is likely to be the case even if one believes it was wrong for the husband to attack the other man. Thus, even though the husband was wrong to attack, our excuse of his behavior negates whatever culpability he may have had.

Suppose instead that in the altercation the husband struck a blow that killed his wife's suitor. Here the homicide is clearly not excusable, and yet a portion of the act may be. To the extent that the provocation excuses a portion of the defendant's reaction, the defendant will be held accountable only for the remaining unexcused portion of culpability, resulting in a manslaughter conviction.

The provocation defense emphasizes the notion that one must be in the heat of passion—in essence, under the influence of some uncontrolled and uncontrollable emotion. However, not just any rage can set in motion the machinations of the defense. Even though one might conclude from the foregoing analysis that one in a heat of passion—no matter the cause—might have less control and therefore be less culpable than one who kills while in complete control of his reason, this is not the case. In short, one cannot avail oneself of the provocation defense without showing that one's heat of passion was brought about by legally adequate provocation.[20]

A. The Common Law Influence Over the Modern Provocation Defense

Because the concept of "legally adequate" provocation is fundamental to the provocation defense, its proper definition is central to the doctrine. The law addresses the question of legally adequate provocation in two related but distinct ways: the traditional categorical approach and the modern reasonableness approach. Under the traditional common law, there was a short list of fairly well-entrenched legally adequate provocations: "[E]xtreme assault or battery upon the defendant; mutual combat; defendant's illegal arrest; injury or serious abuse of a close relative of the defendant's; or the

20. I pause for a moment to note that there are some who would point out that the very idea of objectively defining what constitutes legally adequate provocation defeats the culpability analysis that justifies the defense. Instead, one might argue, the law should either allow *any* provocation as adequate, or the law should abolish the defense altogether. While I recognize the strength of this argument, I assert that whatever one thinks of the doctrinal efficacy of the provocation defense, one must also acknowledge its existence, its staying power, and that a serious treatment of the doctrine demands equitable handling of like cases. It is on this assumption that this Comment proceeds.

sudden discovery of a spouse's adultery."[21] Notably, inflammatory words were not considered adequate provocation.[22] These categories served as judicial gatekeepers. A case falling into one of these categories could go to the jury under provocation instructions, while a case not fitting any of the categories would not go to the jury with provocation instructions because the provocation was inadequate as a matter of law.[23]

In contrast with the categorical approach, the modern approach applies a reasonableness standard to the defendant's state of mind at the time of the killing. The Model Penal Code (MPC) offers a good example of this shifted focus. Under the MPC, extreme emotional disturbance (EED) provides mitigation analogous to that achieved by provocation.[24] One can assert an EED defense on showing that a "murder [wa]s committed under the influence of extreme mental or emotional disturbance for which there [wa]s reasonable explanation or excuse[, t]he reasonableness of such explanation or excuse . . . determined from the viewpoint of a person in the actor's situation under the circumstances as he believe[d] them to be."[25]

Despite the increased contemporary focus on the state of mind of the killer, the common law categorical approach retains a powerful influence over the doctrine.[26] This influence may, in part, flow from the large body of law the categorical approach provides by which to gauge whether new situations should likewise constitute adequate provocation. Thus, although modern formulations largely have replaced the categorical approach with the reasonable person standard,[27] the historical categories still heavily influence current formulations of the defense. Since the heavy weight of this precedent counsels strongly against frivolous additions to existing categories of adequate provocation, any new category must be ranked against those already recognized.

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21. Girouard v. State, 583 A.2d 718, 720 (Md. Ct. App. 1991).

22. *Id.* at 723 (holding that words "were not enough to cause a reasonable man to [kill]").

23. *See, e.g.*, CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 18 (2003); *see also* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 4.2, at 244 (Oxford Univ. Press 2000) (1978).

24. FLETCHER, *supra* note 23, § 4.2, at 246.

25. MODEL PENAL CODE § 210.3(1)(b) (1962).

26. *See, e.g.*, *Girouard*, 583 A.2d at 721 (implicitly using the common law categories to rule out abusive words as adequate provocation); *see also* LAFAVE, *supra* note 12, § 15.2(b), at 777–78 (noting that while "there may be a future trend away from the usual practice" of categorizing "provocatory conduct," the common law categories "almost as a matter of law . . . influence our legal thinking today"); *cf.* People v. Casassa, 404 N.E.2d 1310, 1317 (N.Y. Ct. App. 1980) (placing limits on the bounds of subjective reasonableness, ruling that the defendant's irrational state of mind was not a defense because there was no objectively "reasonable explanation" for the defendant's actions).

27. *See, e.g.*, LEE, *supra* note 23, at 25.

B. The Provocation Defense as a Cultural Defense

Attempting to arrive at a legal definition of the reasonable response to a given provocation can become problematic when some personal characteristic of the accused would alter the reasonableness of a reaction.[28] At one end of the spectrum, if the defense allows too much particularization, the definition of the reasonable response becomes increasingly subjective and eventually may begin to look exactly like what a given defendant did. On the other end, allowing too little particularization yields a very objective standard, but might result in cases where the jury cannot consider individual characteristics of a defendant that would seem unjust to ignore. Once the law allows a jury to account for some personal characteristics of the accused, it becomes difficult to draw a principled line at which the jury should stop particularizing.[29]

Courts have applied different interpretations of the "reasonableness" standard with varying degrees of success. One potential solution views the standard as strictly objective. Using this standard in considering an impotent man who killed a prostitute for mocking his impotence, for example, one court applied a strict objective standard and did not consider the fact of impotence as relevant in arriving at a verdict.[30] Another method bifurcates the analysis into those attributes that go to the gravity of the provocation and those that go to the self-control of the actor.[31] Thus, the impotent male could benefit from particularization because his impotence contributed to the gravity of the provocation, but an ill-tempered person could not benefit because temper only goes to self-control. This distinction becomes blurry, however, in cases where an attribute might go both to provocation and to self-control. Mutual combat, for instance, traditionally constitutes

28. LaFave notes: "What is really meant by 'reasonable provocation' is provocation which causes a reasonable man to lose his normal self-control; and, although a reasonable man . . . would not kill, yet his homicidal reaction to the provocation is at least understandable." LAFAVE, *supra* note 12, § 15.2(b), at 777.

29. Many scholars have explored this difficulty. *See, e.g.*, Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742, 801 (1995) (noting that "subjectivity must have substance . . . in consensual reality"); Kevin Jon Heller, *Beyond the Reasonable Man? A Sympathetic but Critical Assessment of the Use of Subjective Standards of Reasonableness in Self-Defense and Provocation Cases*, 26 AM. J. CRIM. L. 1, 4 (1998) (noting that "provocation . . . fail[s] to answer a critical question: [of] who, exactly, is the 'reasonable person'"). *See generally* Stephanie M. Wildman, *Ending Male Privilege: Beyond the Reasonable Woman*, 98 MICH. L. REV. 1797 (2000) (reviewing CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN (2000)) (suggesting that the reasonable person should be viewed from a female perspective).

30. Bedder v. DPP, (1954) 1 W.L.R. 1119 (H.L.) (U.K.).

31. *See, e.g.*, DPP v. Camplin, [1978] A.C. 705 (H.L.) (U.K.).

adequate provocation. One might rationalize the mutual combat defense as going to the adequacy of the provocation, but this rationalization does not tell us the degree of restraint one should expect of the reasonable person in the midst of a fight, nor does it suggest whether the provocative content of mutual combat comes from the defendant's abilities (or disability) for self-control. A final option is to admit any characteristic that might bear on the provocation. Like the options above, this one also has drawbacks. If any characteristic is admissible, then juries might be forced to consider such apparent contradictions as the "reasonable" glue-sniffer,[32] or the "reasonable" insane person.

Clearly, none of these approaches is ideal. And unfortunately, the question of particularization is an issue in cases of sexual misrepresentation. Sexual misrepresentation must, by definition, include some form of sexual act; thus, complicated particularization questions involving sex, sexual orientation, and gender necessarily arise. Does a reasonable woman react differently to sexual misrepresentation than a reasonable man? If the issue is one of sexual orientation and not gender, is the reasonable homosexual reaction to a sexual misrepresentation the same as the reasonable heterosexual reaction?[33] Is the reasonable gay response different from the reasonable lesbian response? To the extent that sex, sexual orientation, and gender play a role in both the sexual misrepresentation and the reasonableness of the provoked response, these traits likely do have an impact on the reasonableness of a reaction to provocation. Thus, some level of particularization to account for sexual orientation and gender likely is necessary to the question of whether a given sexual misrepresentation constitutes adequate provocation.

For example, one court ultimately allowed a jury to consider "characteristic[s] of the accused . . . which affected the degree of control which society could reasonably have expected of *him* and which it would be unjust not to take into account."[34] The MPC adopts a similar stance, finding that "[i]n the end, the question is whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[35]

But a full appreciation of the import of the reasonableness standard here cannot come without recognizing the fundamental nature of the

32. R v. Smith (Morgan James), [2001] 1 A.C. 146, 172 (H.L.) (U.K.).

33. *See, e.g.*, LEE, *supra* note 23, at 52–58 (discussing the difficulties inherent in particularizing for gender and sexual orientation).

34. *Smith*, [2001] 1 A.C. at 173–74.

35. MODEL PENAL CODE § 210.3 cmt. 5(a) (Official Draft & Revised Comments 1980).

provocation defense as a cultural defense.[36] A solution to the particularization dilemma lies in allowing the jury to apply a reasonableness standard. If provocation finds proper application through the sympathies of the ordinary citizen, its application is bound to how society feels about the provocation. What constitutes adequate provocation will change as society and mores change.[37]

This Comment will pick up this thread again, arguing that a major flaw with the adultery doctrine (indeed, with any per se category of legally adequate provocation) is that it ignores the fact that changing cultural norms have led to applications of the defense that are out of date. However, instead of arguing that the law should scrap the adultery defense, this Comment attempts to salvage from the ruins of the adultery doctrine those elements which are culturally relevant, ultimately identifying sexual misrepresentation as an important aspect of what makes adultery adequate provocation.

C. The Provocation Defense as a Partial Excuse, Not a Partial Justification

Another theme running throughout provocation doctrine are the competing theories—partial justification and partial excuse—that attempt to provide the moral rationale of the defense.[38] Part of what makes the provocation defense controversial is that it stands on two very different theoretical foundations. A defense based on a justification theory declares that the killer has acted rightly, or at least tolerably, in the eyes of society.[39] An excuse theory, on the other hand, finds the killer not guilty because some defect of human nature has defeated the ability of the killer to control what he did. The law, as excuse, does not condone the actions of the killer

36. *See, e.g.*, James J. Sing, Note, *Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law*, 108 YALE L.J. 1845, 1872–75 (1999) (arguing that the provocation defense is a subset of a larger cultural defense).

37. *See, e.g.*, LAFAVE, *supra* note 12, § 15.2(b), at 777 ("[T]here seems to be a growing realization that what might or might not cause a loss of self-control in a reasonable Englishman of a century ago might not necessarily produce the same reaction in the reasonable Anglo-American of today."); *see also* FLETCHER *supra* note 23, § 4.2, at 248–49 (noting that "a legal doctrine can become totally alienated from the moral sentiments that give rise to it").

38. A third option, the aretaic view, bases moral culpability on the criminal's virtue (or lack of it), rather than the existence of a justification or excuse. *See, e.g.*, Kyron Huigens, *Homicide in Aretaic Terms*, 6 BUFF. CRIM. L. REV. 97, 101 (2002) (arguing that "[t]he inculcation of virtue is the principal justifying purpose of punishment"). However, this view is not widely recognized or adopted. *Id.* at 99.

39. *See, e.g.*, Albin Eser, *Justification and Excuse: A Key Issue in the Concept of Crime*, *in* JUSTIFICATION AND EXCUSE: COMPARATIVE PERSPECTIVES 22–50 (Albin Eser & George P. Fletcher eds., 1987).

but instead "removes the personal blameworthiness of the actor: He is (merely) excused."[40] The defendant killed wrongfully but is not punishable.

The question remains whether the provocation defense is better thought of as a partial justification, or a partial excuse. This Comment sides with most legal scholarship in treating the provocation defense as a partial excuse.[41] One who kills under adequate provocation is assumed to have lost control because of human frailty.[42] This conception of the defense decouples the defendant's actions from anything the victim does, choosing instead to focus on whether the defendant's reaction was excusable given the limits of humans in exercising meaningful control over their own actions.

A central criticism raised against thinking of the defense as a partial excuse is that this reinforces unhealthy cultural norms.[43] In deciding which provocations deserve compassion, the provocation defense inevitably makes cultural judgments about what kinds of things are reasonable to become angry about.[44] Seeing the provocation defense as a partial justification may

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40. *Id.* at 57.

41. *See, e.g.*, FLETCHER, *supra* note 23, § 4.2, at 245–247 (discussing the tension between justification and excuse rationales for the provocation defense); Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 467 (1982) ("The heat of passion defense is an excuse, not a justification."). For a psychologist's viewpoint generally supportive of the excuse rationale, see BRIAN PARKINSON ET AL., EMOTION IN SOCIAL RELATIONS: CULTURAL, GROUP, AND INTERPERSONAL PROCESSES 202–04 (2005). The authors argue that anger is not necessarily an expression of our view on the blameworthiness of others, since "our anger is often directed at nonhuman objects." *Id.* at 203. Because traditional justificationist accounts rely on the victim having engaged in blameworthy behavior, thinking of anger as a noninterpersonal emotion undercuts some of the psychological support for the justification rationale. *Id.*

42. *See, e.g.*, OSCAR LEROY WARREN & BASIL MICHAEL BILAS, WARREN ON HOMICIDE § 90, at 434 (Dennis & Co. perm. ed., 1938) (1914) (noting that "[t]he reason the law reduces such killing from murder to manslaughter is its recognition of the frailty of human nature"). Warren cites the Supreme Court decisions *Andersen v. United States*, 170 U.S. 481, 510 (1898), and *Addington v. United States*, 165 U.S. 184 (1897). WARREN & BILAS, *supra*, at 434–35 n.38.

43. Holders of the justification view argue that thinking of provocation as an excuse has resulted in unreasonably broadening the range of exculpatory behavior, such that it is bounded only by the ability of the jury to understand the relevant provocation. Some worry that this result works injustice, because it gives effect to jury prejudice. *See, e.g.*, Heller, *supra* note 29, at 27 (arguing that a "biased juror . . . cannot determine what kinds of provoked acts are attributable to 'circumstances that overwhelm [the actor's] capacity for choice'" (quoting FLETCHER, *supra* note 23, § 10.3, at 801)). Further, some wonder whether it is possible to partially excuse a provoked killing, arguing that emotions are at least under the partial control of the defendant. *See, e.g.*, Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1391–92 (1997); Huigens, *supra* note 38, at 137–38 (noting the "rational dimension" to emotion). *See generally* Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269 (1996) (discussing the various treatment of emotion in the criminal law as controlling, or as controlled).

44. Although some legal theoreticians criticize the provocation defense on the normative basis that reasonable people never kill, *see, e.g.*, Stephen J. Morse, *Undiminished Confusion in*

allow one to avoid the problem of reinforcing unhealthy cultural norms by limiting the conception of adequate provocation. While this may seem a desirable goal, proscribing certain behaviors as per se provocative or per se nonprovocative removes from the hands of the jury the question of what a reasonable response is. As we shall see when we analyze the adultery defense in Part II, the end result of a per se approach is a defense for which the reasonable response is pegged, even while culture slowly changes—making the provocation seem less and less reasonable.

One who views the provocation defense as a partial excuse may choose to leave the reasonableness decision to the jury, since there are no preordained limitations on what kinds of provocations should (or should not) serve as adequate provocations. This approach binds the defense more tightly to culture at the moment, but also leaves the defense free to change should culture change. Because the provocation defense is properly viewed as cultural, and because the excuse view does not purport to interfere with cultural judgments in the way that a justification view does, the partial excuse rationale for the provocation defense is preferable to a rationale grounded in justification.

Diminished Capacity, 75 J. CRIM. L. & CRIMINOLOGY 1, 33 (1984) ("Reasonable people do not kill no matter how much they are provoked . . . ."), *discussed in* SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 410–11 (7th ed. 2001), some clinical psychologists see anger as both an appropriate and a desirable response in some circumstances. *See, e.g.*, Meira Likierman, *The Function of Anger in Human Conflict*, 14 INT'L REV. PSYCHOANALYSIS 143 (1987). Likierman finds that acceptable positive forms of aggression are characterized by those "aim[ed at] curbing violence, restoring justice and fighting folly, tyranny, etc. . . . . Self assertion and self defence are a healthy response of this kind." *Id.* at 144. A subcategory consists of "aggression [with] . . . constructive potential [that] in the course of its expression becomes unproductive or destructive." *Id.* In discussing anger as an appropriate response to expression of the "death instinct"—manifested in historical atrocities such as the Holocaust, as well as more personal "gross acts of cruelty and crime"—Likierman notes that "[a] mature individual, who is not roused to anger at the sight of injustice and destruction, has an important quality missing in his psychological make-up." *Id.* at 154–55. Less broadly, Likierman notes that anger is an important tool for psychological self-preservation. "[The] urgent explosive nature [of anger] . . . enables us to define anger as our mental 'weapon,' since it sides with the ego and reacts on the ego's behalf to events which persecute the ego with threats of damage or death." *Id.* at 157.

The psychological viewpoint may suggest that anger, even to the point of killing, is appropriate in some contexts, but it still cannot answer the legal question of which contexts merit a legal partial excuse. Indeed, other psychological research and writing laments the culture of anger in America, and the sense of self-expression and false empowerment that many find in anger. *See, e.g.*, Walter Bonime, *Anger as a Basis for a Sense of Self*, 4 J. AM. ACAD. PSYCHOANALYSIS & DYNAMIC PSYCHIATRY 7 (1976). We shall return to this problem *infra* Part IV.C.2, in discussing how the reasonableness requirement of the sexual misrepresentation theory minimizes the negative normative impact of the defense.

II. HOW THE PROVOCATION DEFENSE (MIS)HANDLES CASES OF SEXUAL MISREPRESENTATION

Thus far, this Comment has argued that the provocation defense is properly interpreted as a culturally based partial excuse. In light of this understanding, we now proceed to evaluate how current criminal law handles cases involving sexual misrepresentation. In studying these cases, we shall see that the law often neglects to adhere to a culturally sensitive application of the provocation defense. We will also see that, particularly in cases where the deception involves sexual identity or sexual health status, the basic rationale underlying the law often does not seem to identify fully the provocative nature of the misrepresentation.

A. Sexual Identity Cases

Sexual identity cases involve a misrepresentation that deceives the defendant as to the sexual orientation or gender identity of his or her partner.[45] Two current provocation theories offer promise in handling such cases. The first (and most commonly used) is the "homosexual panic" defense (HPD). The second possibility, where intercourse has occurred, is a rape theory.

1. The Homosexual Panic-based Defense

The first possibility in sexual identity cases is to argue that the defendant killed in a fit of passion brought on by homosexual panic. HPD posits that a same-sex advance can cause a person with suppressed homosexual tendencies to "break," temporarily succumbing in a heat of passion and killing the homosexual solicitor.[46] HPD derives from the work of two psychiatrists in the early to mid-1900s who first diagnosed a medical condition known as the "homosexual panic disorder."[47] Their research suggested that people with

45. The *Araujo* case presents an example of a sexual identity case where the defendants were deceived regarding the sex and gender of the victim.

46. Kara S. Suffredini, *Pride and Prejudice: The Homosexual Panic Defense*, 21 B.C. THIRD WORLD L.J. 279, 287 (2001). Despite the relative popularity of the defense, some have questioned it. *See, e.g.*, Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CALIF. L. REV. 133 (1992) (calling for the complete abolition of the defense). Even those generally supportive of the defense have suggested a revision to allow all unwanted sexual advances to serve as adequate provocation. *See, e.g.*, Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L & CRIMINOLOGY 726, 753–54 (1995).

47. Suffredini, *supra* note 46, at 288–90.

suppressed homosexual tendencies were prone to severe depression, and a later study by Henry Adams partially confirmed and expanded the theory.

Adams conducted an experiment in 1996 to determine how self-described straight men would respond to various kinds of sexual stimuli.[48] He began by surveying the participants attitudes toward gays.[49] Based on their responses, he separated those whom he identified as "homophobic" from those whom he identified as "not homophobic,"[50] and attached genital probes to measure sexual response to visual depictions of straight, lesbian, and gay sexual activity. Adams found that only those in the "homophobic" group exhibited an increase in arousal in response to the gay stimuli.[51] Adams's findings suggest that there is a positive correlation between latent homosexuality and negative feelings toward homosexual conduct.

Over the last fifteen years, several high-profile defendants have asserted HPD with varying success. In 1997, the trial of William Palmer for the death of Chanelle Pickett ended in a conviction for assault and battery.[52] Not realizing that Pickett was a male-to-woman transgender,[53] Palmer picked up Pickett at a bar.[54] Despite evidence showing that Palmer choked Pickett for eight minutes, the jury chose not to convict Palmer for murder or manslaughter.[55] By contrast, the 1999 slaying of Billy Jack Gaither resulted in a capital murder conviction for his two killers.[56] The two attracted Gaither with a promise of sex. However, when Gaither began talking about homosexual activities, the men stabbed and beat him to death, before setting his body on fire.[57] In a third case from 1995, a jury found Jonathan Schmitz guilty of second degree murder in the death of Scott Amedure.[58] Amedure proclaimed his love

48. LEE, *supra* note 23, at 70–71.

49. *Id.* at 70.

50. *Id.*

51. *Id.* at 71.

52. *See, e.g.*, Francie Latour, *Sibling Decries Murder Acquittal; Verdict Is Assault in Transsexual's Death*, BOSTON GLOBE, May 3, 1997, at B1.

53. A "male-to-woman" transgender is one who lives the gendered role of a "woman" while in a "male" body. The terminology suggests that the noun (woman) describes who the person is, while the adjective (male) describes a physical aspect of the woman. For more on transgender terminology, see generally GORDENE OLGA MACKENZIE, TRANSGENDER NATION (1994).

54. Latour, *supra* note 52.

55. *Id.*

56. *See, e.g.*, Stan Bailey, *Jury Swiftly Convicts Accomplice in Murder of Gay Man*, NEWHOUSE NEWS SERV., Aug. 5, 1999, at Domestic Section.

57. *Id.*

58. Keith Bradsher, *Talk-Show Guest Is Guilty of Second-Degree Murder*, N.Y. TIMES, Nov. 13, 1996, at A14.

for Schmitz on national television; three days later, the "humiliated" Schmitz shot Amedure twice through the heart at Amedure's home.[59]

Recall the case of Gwen Araujo, in which the defendants killed the victim on discovery that she was a male. Using a variant of HPD, the defendants in Araujo's case argued they were driven into a "gay panic" by the discovery.[60] Ironically, the evidence presented by the defense team at trial and in the press indicates the defendants did not experience a panic based on a homophobic response.[61] An attorney for one of the accused in Araujo's case stated that his client had "no indication[ ] of any bias or attitude[ ] of . . . homophob[ia]."[62] Further, a number of gay acquaintances took the stand to testify that the accused had never exhibited any antihomosexual tendencies.[63] This open admission of the defense seems to undermine the HPD argument for Araujo's killers because the defendants do not fit the profile of those who kill while under a homosexual panic.[64]

But application of HPD is inappropriate even in sexual identity cases when the facts fit the defense more closely, because treating sexual identity cases under HPD is patently underinclusive.[65] To understand why this is so, one first must understand what "sexual identity" is. Sexual identity can be conceived of as operating along three independent axes: sex, gender, and sexual orientation.[66] One's "sex" is a biologically assigned identifier. Generally, sex is

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59. *Id.*

60. *See* Haddock, *supra* note 2.

61. The defense likely was attempting to avoid a hate-crime sentencing enhancement; however, the evidence presented cut against application of the homosexual panic defense (HPD). For a discussion of this phenomenon, see generally Scott D. McCoy, Note, *The Homosexual-Advance Defense and Hate Crimes Statutes: Their Interaction and Conflict*, 22 CARDOZO L. REV. 629 (2001). At least one legislative effort has recognized a tension between hate-crime sentencing enhancements and HPD. *See, e.g.*, Gwen Araujo Justice for Victims Act, Assemb. B. 1160, 2005 Leg., Reg. Sess. (Ca. 2005) (proposing that "it is against public policy for juries to render decisions tainted by bias based upon the victim's . . . gender . . . or sexual orientation"), *available at* http://www.leginfo.ca.gov/pub/bill/asm/ab_1151-1200/ab_1160_bill_20060118_amended_asm.pdf.

62. Tim Reiterman et al., *3 Charged in Beating Death of Boy, 17, Who Lived as a Girl*, L.A. TIMES, Oct. 19, 2002, at B1.

63. Ivan Delventhal, *Psychologist Talks of Panic in Killing*, TRI-VALLEY HERALD (Pleasanton), May 25, 2004 (reporting that five witnesses testified that one of the killers had "never expressed any homophobic views").

64. The jury seemed to find these admissions confusing as well, since they hung in the first trial. *See* St. John, *supra* note 1.

65. Scholars have criticized HPD on grounds that it unfairly discriminates against gays, and implicitly encourages violence against gays. *See, e.g.*, discussion *supra* note 46. Because this Comment treats the provocation defense as a partial excuse based on cultural mores, it passes judgment on the doctrinal efficacy of the HPD only in the more limited context of its application in cases where one's sexual identity was misrepresented.

66. E-mail from Zachary A. Kramer, Teaching Fellow, Charles R. Williams Project on Sexual Orientation Law and Public Policy, to Brad Bigler (Nov. 3, 2005) (on file with author).

described in terms of whether one is male or female. One's "gender" is a socialized construct, and describes the gendered role one plays in society (for example, man or woman).[67] Finally, one's sexual orientation is generally thought of as the kinds of sexual relations one prefers (that is, heterosexual, homosexual, and so on).[68] As noted above, each of these axes may operate independently of the others.

Returning again to the underinclusive nature of HPD with these distinctions in mind, one properly may understand that what the defendants in the *Araujo* case reacted to had nothing to do with Araujo's sexual orientation and everything to do with her sex. The defendants were reacting to the apparent conflict between the gendered role Araujo was playing (woman) and her anatomical sex (male). In short, the shock of their discovery came from the realization that their sex partner—a womanly woman by all accounts[69]—had a penis. Thus, it was the discovery of the deception regarding her sex that sent the defendants over the edge.

Understanding the *Araujo* case this way, one may begin to see why HPD is fundamentally underinclusive. While HPD may address sexual misrepresentation cases where the predicate deception is based on sexual orientation, HPD does little to address cases where the misrepresentation is one of gender or sex. To illustrate the point, consider a slight change in the facts of the *Araujo* case: Defendant, a gay male, kills his sex partner when he discovers the partner he understood to be a man actually is a female but had deceived him regarding that fact. Under current law, the gay man in this position could not put on a provocation defense, even though he experienced the same underlying provocation as was present in the *Araujo* case.[70] Thus, the patent underinclusiveness of HPD suggests that it is not a theory of provocation that suitably addresses cases involving sexual identity.

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67. See, for example, MACKENZIE, *supra* note 53, at 4–7, explaining the difference between gender and sex. *See also* RUBENSTEIN, *supra* note 13, at 7–8 (suggesting that the conception of homosexual men as less masculine is an unsupported stereotype, and noting that one's gendered role is independent of one's sexuality).

68. RUBENSTEIN, *supra* note 13, at 9–10. It may be more accurate to classify both gender and sexuality according to a sliding scale. Compare the Terman-Miles scale, which "determin[es] the degree of masculinity or femininity of an individual," and the Kinsey scale, which classifies one's sexuality according to physical and psychic responses. *Id.* at 8–9.

69. *See, e.g.*, Tim Reiterman et al., *Trying to Understand Eddie's Life—and Death*, L.A. TIMES, Oct. 20, 2002, at A28 (quoting one witness as saying he "never saw anything to indicate that [Araujo] could possibly be a man").

70. One argument to fix the underinclusiveness inherent in the HPD would be to expand it to encompass cases where sexual orientation roles are reversed. However, this would only further confuse the theory, because the defense is based on sexuality specific research: Straight individuals with latent gay feelings sometimes respond violently to same-sex advances because they are attempting to suppress their own homosexual urges. Expanding the HPD to include gays

2. The Rape-based Defense

A second theory of provocation available in sexual identity cases is a rape-based theory. Under the traditional categorical approach, rape can serve as adequate provocation by virtue of its inclusion in the category of serious assault or battery.[71]

Recall the case of Gwen Araujo. If rape qualifies per se as adequate provocation, then one might ask whether Araujo raped his killers.[72] In cases where rape is accomplished by deception, the doctrine of rape by fraud provides an analytical model. Rape by fraud characterizes the relevant deception as either a fraud in fact or a fraud in the inducement. Where consent is vitiated by way of a fraud that conceals the sexual nature of the act (that is, fraud in fact), a rape by fraud has occurred.[73] For example, a doctor is guilty of rape if he has intercourse with a woman who believes she is undergoing a medical procedure and is unaware of the sexual nature of the act.[74] Even though she consented to the "medical procedure," she never consented to sexual intercourse. Her consent was meaningless, therefore, and she was raped.[75] By contrast, where a fraud does not conceal the sexual

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or lesbians would detach the HPD from whatever legitimacy the defense gains from the psychological research done to support it. A more viable solution is to consider the provocation in terms of deception, which this Comment will argue for *infra* Part III.

71. The traditional common law recognized extreme assault or battery; mutual combat; the defendant's illegal arrest; injury or serious abuse of a close relative; and sudden discovery of a spouse's adultery as adequate provocation. *See, e.g.*, Girouard v. State, 583 A.2d 718, 720 (Md. Ct. App. 1991). Since rape is by definition a serious battery, the categorical approach suggests that sexual assault (or at least forcible rape) qualifies as adequate provocation. *See, e.g.*, LAFAVE, *supra* note 12, § 16.1(b), at 815; WHITE, *supra* note 16, at 19–22.

72. The traditional common law defines rape as "the carnal knowledge of a woman forcibly and against her will." WILLIAM BLACKSTONE, 4 COMMENTARIES *209. For purposes of this discussion, we will ignore the gender specificity of this definition, since modern law generally treats rape and sexual assault in the same manner regardless of the gender of the victim. The Model Penal Code retains the gendered definition of rape, but supplements it with a gender-neutral catch-all statute that provides for the same degree of conviction as rape. *Compare* MODEL PENAL CODE § 213.1(1) (1962) (defining rape as a "felony of the second degree") *with* MODEL PENAL CODE § 213.2(1) (defining deviate sexual intercourse by force or its equivalent as a "felony of the second degree"). The force component of rape does not require actual force, but can be met by placing the woman in "fear of death or great bodily harm" or by other constructive force. State v. Hoffman, 280 N.W. 357, 358 (Wis. 1938). *See also* Almon v. State, 109 So. 371, 372–73 (Ala. Ct. App. 1926); State *ex rel.* M.T.S., 609 A.2d 1266, 1279 (N.J. 1992) (defining force as that incidental to intercourse). *But see* State v. Thompson, 792 P.2d 1103, 1106 (Mont. 1990) (finding that a threat leading to psychological impairment did not constitute force).

73. *See, e.g.*, Joshua Dressler, *Where We Have Been, and Where We Might be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 439–42 (1998); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 49 (1998).

74. *See, e.g.*, McNair v. State, 825 P.2d 571, 574–75 (Nev. 1992).

75. *Id.*

nature of the act (that is, fraud in the inducement), no rape has occurred.[76] Thus, if the doctor had not concealed the sexual nature of the act, but instead induced consent by telling her it was necessary to her treatment, there would be no rape.[77] The victim may not have consented had she known the truth about the collateral matter, but no rape occurred, because the victim consented to the actual act of intercourse.

One problem with this distinction is that fraud in fact and fraud in the inducement blur in cases where the fraud fundamentally changes the kind of intimacy the duped partner expected to occur. Consider a case where a man poses as the woman's husband in order to have sex with her.[78] Courts are split over whether such fraud is fraud in fact or fraud in the inducement.[79] Patricia Falk notes the elastic nature of fraud in fact,[80] illustrating the point using *Regina v. Dee*,[81] a case where a man impersonated the victim's husband in order to have sex with her and was convicted of rape because the woman had consented to marital intercourse, not adultery.[82] Even the MPC seems to recognize a difference in seductions where the inducement is fundamental to consent. Though not dealing directly with the fact/inducement distinction required by rape, the MPC appears to co-opt some of the wisdom of the court in *Dee* by criminalizing a seduction where one "is induced to participate [in sex] by a promise of marriage which the actor does not mean to perform."[83]

Sexual identity cases also seem to straddle fraud in the inducement and fraud in fact. On the one hand, sexual identity cases look like fraud in the inducement because both partners are fully aware of the sexual nature of the act. Since they consented to the actual sex act, there was no rape. Even so, it is not perfectly obvious that there is no fraud in fact. In sexual identity cases, the defendant is deceived as to the sex, gender, or sexual orientation (or any combination of the three) of her partner. Because of this deception, the nature of the sex to which the deceived party consents (for example, heterosexual sodomy in the case of Araujo) is fundamentally

76. *See, e.g.*, Dressler, *supra* note 73, at 439–40; Falk, *supra* note 73, at 56.
77. *See, e.g.*, Boro v. Superior Court, 210 Cal. Rptr. 122, 126 (Ct. App. 1985).
78. *See* Falk, *supra* note 73, at 65–70.
79. *Id.* at 65–66.
80. *Id.* at 159–60.
81. R v. Dee, (1884) 15 Cox C.C. 579 (U.K.).
82. *See, e.g.*, State v. Murphy, 6 Ala. 765 (1844); State v. Shepard, 7 Conn. 54 (1828); R v. Clarke, (1854) 169 Eng. Rep. 779 (C.C.); R v. Williams, (1838) 173 Eng. Rep. 497 (N.P.); R v. Saunders, (1838) 173 Eng. Rep. 488 (N.P.). *But see* Lewis v. State, 30 Ala. 54 (1857); State v. Brooks, 76 N.C. 17 (1877).
83. MODEL PENAL CODE § 213.3(1)(d) (1962). The Model Penal Code lists this seduction crime along with other statutory rape crimes. *Id.*

different than the act in which the defendant actually engaged (here, homosexual sodomy).[84] If the difference between marital sex and adulterous sex can serve as a difference significant enough to constitute a fraud in fact, then there seems little reason why a deception as to the homosexual or heterosexual nature of a sexual act should not also constitute a fraud in fact.[85]

Regardless of how one comes out on the question of whether rape occurs in a given sexual identity case, rape doctrine offers a poor analytical framework because the character of the fraud matters little to the issue of adequate provocation. The provocation defense is most interested in whether a defendant was reasonably in a heat of passion, but the fraud in fact/fraud in the inducement distinction does not distinguish usefully between those cases in which heat of passion would be reasonable, and those in which it is not. In either case, the discovery of the deception may be equally angering. For example, in the case of the physician above, the doctor who insisted that the only alternative to intercourse was a painful, expensive medical treatment was not guilty of rape. And yet, for the woman duped, the discovery of the truth must be no less angering than if the doctor had deceived her about the sexual nature of the act. In both cases, the patient must feel doubly violated: The doctor violated the patient's body and concealed it by manipulating the patient's mind.[86]

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84. *See, e.g.*, Haddock, *supra* note 2. The realization that Araujo was biologically male sent one of the defendants wandering around the house crying, "I can't be . . . gay." *Id.* The defendant's distraught confusion about his sexual orientation reveals a deeper inadequacy in the terminology. Part of the defendant's dysphoria may have been due to his inability to put into words what had happened to him. Looking through the prism of genetic sex, the sexual act was clearly homosexual (male with male). However, looking through the prism of gender, the sexual act was heterosexual (man with woman).

85. The Supreme Court has occasionally considered the differences between homosexual and heterosexual sodomy. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Court seemed to acknowledge a populist and historical viewpoint of same-sex sodomy as morally wrong. The *Bowers* majority found broad historical and legal support for criminalizing same-sex sodomy; thus, there was no substantive due process right to engage in same-sex sodomy. *Bowers*, 478 U.S. at 190–96 & nn. 5–7. The dissent in *Bowers* pointed to sodomy as being a right of "intimate association." *Id.* at 201–02 (Blackmun, J., dissenting). In effect, this view also offers an implicit recognition of the difference between same- and opposite-sex sodomy, since if there were no qualitative difference between the two, then a choice between them would seem meaningless.

In *Lawrence*, the court rebutted much of the underlying rationale in *Bowers*, showing that there was no longstanding *legal* tradition differentiating between same- and opposite-sex sodomy. *Lawrence*, 539 U.S. at 568–78. However, the court pointed out that a substantial minority of states had "singled out same-sex relations for criminal prosecution," *id.* at 570, and conceded "that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral." *Id.* at 571. Thus, although ultimately rejecting the constitutionality of a legal distinction, the Court recognized a *popular* and *moral* distinction between the two.

86. *See* discussion *infra* Part III for a full treatment of the psychological impact of the discovery of a serious sexual deception.

Thus, rape doctrine is an inappropriate theory of adequate provocation in sexual identity cases because rape doctrine asks whether the fraud allowed an opportunity to consent—an inquiry that has nothing to do with the character or strength of the provocation.

B. Sexual Health Cases

Next, we turn to a discussion of how the criminal law treats cases involving a misrepresentation as to the sexual health status of the victim. Courts have left undefined the issue of whether (or under what circumstances) a sexual health misrepresentation can constitute adequate provocation. Examples may be found in *Chattmon v. State*[87] and in the previously mentioned case of *Commonwealth v. Groome*. In *Chattmon*, defendant Chattmon was a drug dealer who gave Pierce, the victim, cocaine in exchange for oral sex.[88] After the exchange, another resident of the house, jealous of Pierce, told Chattmon that Pierce had AIDS. Later that night, Chattmon and several others beat Pierce to death with two-by-fours and a baseball bat, setting fire to the room to cover up the killing.[89] At trial, the court refused to give a manslaughter instruction.[90] On appeal, the court upheld the decision and found no provocation under Texas law because Chattmon was provoked by the other resident and not by Pierce.[91]

In *Commonwealth v. Groome*,[92] defendant Groome and Korpela, his girlfriend, got into a fight regarding their relationship.[93] At some point, Korpela told Groome that she had AIDS and herpes, "and that he probably did as well."[94] When Groome rose to leave, Korpela followed him out to the car, carrying a tool or chisel which she set on top of the car.[95] Korpela then began yelling that the "defendant was 'using her' and that 'all men are the same.'"[96] At this point, Groome picked up the tool and stabbed Korpela approximately fifteen times,[97] before finally throwing a cement cinder block

87. Chattmon v. State, No. 05-93-01605-CR, 1996 Tex. App. LEXIS 1329, at *1 (Apr. 4, 1996).
88. *Id.* at *2.
89. *Id.* at *2–*3.
90. *Id.* at *3.
91. *Id.* at *5–*6. The court never considered the provocation claim on its merits. *Id.*
92. Commonwealth v. Groome, 755 N.E.2d 1224 (Mass. 2001); *see also Conviction Upheld in Murder Prompted by AIDS Rumor*, *supra* note 8, at 7.
93. *Groome*, 755 N.E.2d at 1232.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

on her and backing the car over her to cover up the evidence.[98] At trial, the court refused a manslaughter instruction.[99] On appeal, the Massachusetts Supreme Court found that the refusal was proper because there had been adequate cooling time, and the defendant had in fact cooled down.[100] The court assumed without deciding that Korpela's revelation constituted adequate provocation.[101]

Although the courts in *Chattmon* and *Groome* did not squarely face the question of adequate provocation, sexual health cases probably constitute legally adequate provocation because they involve a serious assault or battery. Many jurisdictions have laws making it a felony for one who knows she is HIV-positive to have sex without her partner's knowledgeable consent.[102] Even in cases involving a less dangerous sexually transmitted disease (STD), such as herpes, there still may be an argument for serious assault or battery.[103]

Despite the strength of an argument based on serious assault or battery, such an argument obscures the role sexual misrepresentation may play in creating a reasonable heat of passion. In sexual health cases, a defendant might feel understandable rage at the thought that his lover intentionally could have harmed him. But more is at work. Consensual sex brings with it an element of reciprocity and trust. As further explored in Part III below, the betrayal of that trust, combined with the sudden realization of the concealment, is grounds for adequate provocation.

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98. *Id.* at 1233.

99. *Id.* at 1239.

100. *Id.* at 1240. Recall that in order to assert the provocation defense, a defendant must have acted on legally adequate provocation, in the heat of passion, before cooling down, and before adequate cooling time had elapsed. *See, e.g.*, LAFAVE, *supra* note 12, § 15.2(a), at 777.

101. *Groome*, 755 N.E.2d at 1240.

102. *See, e.g.*, People v. Jensen, 586 N.W.2d 748 (Mich. Ct. App. 1998) (finding a statute constitutional that made it a felony for an individual to have sex with another while knowing his own HIV-positive status and not obtaining the consent of his partner). See Dean M. Googasian, *Criminal Law*, 46 WAYNE L. REV. 655, 669 (2000), for further discussion of the law and the case. *See also* United States v. Woods, 28 M.J. 318 (1989) (upholding a prosecution for wanton disregard of human life under Article 134 of the Uniform Code of Military Justice where the soldier was alleged to have knowingly engaged in unprotected sex while HIV-positive and without the consent of his partner).

103. The HIV statutes seem based on the reasoning that reckless disregard for another's well-being (that is, having sex with the knowledge that you are putting another's health at risk by doing so) is a punishable offense. This same logic might apply to all sexually transmitted diseases (STDs), but it is less clear whether all STDs are dangerous enough to rise to the level of serious assault or battery.

C. Adultery Cases

In adultery cases, the relevant sexual misrepresentation concerns the marital fidelity of the disloyal partner. These cases currently fall under the well-entrenched common law theory known as the sudden discovery of adultery. Unfortunately, the long usage of this theory has resulted in a defense that is substantially detached from prevailing cultural norms and marital practices.

Under the traditional categorical approach to the provocation doctrine, the sudden discovery of a spouse's adultery constituted adequate provocation,[104] and the modern common law has adopted this standard with few changes.[105] A quick look at the theory of sudden discovery of adultery suggests a puzzle: While the doctrine exists as perhaps the archetypal adequate provocation, the reasons why this is so are not clear. The unique position adultery occupies among the common law's enumerated adequate provocations illustrates the favored nature of the defense: Adultery is the only category under the traditional common law that did not require some form of serious physical harm to constitute adequate provocation.[106] Extreme assault or battery, mutual combat, and illegal arrest all imply (or explicitly require) serious physical harm to the defendant. Injury or serious abuse of a close relative of the defendant does not require a serious assault on the defendant, but it does require immediate physical harm to someone close to the defendant. Contrast these with the sudden discovery of a spouse's adultery. Although adultery may be hurtful in other ways, it does no physical harm. The English common law also reveals favored treatment, again with no apparent justification. In *Holmes v. Director of Public Prosecutions*,[107] the court offered that adultery enjoyed a rationale not due other forms of the provocation defense. Namely, while other forms of the defense required "a sudden and temporary loss of self-control whereby malice . . . is

104. *See, e.g.*, Brunson v. State, 103 So. 664, 665 (Ala. 1925) (quoting Hooks v. State, 13 So. 767, 768 (Ala. 1893)) ("Where one person detects another in the act of adultery with his wife, and immediately slays the adulterer or his wife, as matter of law the provocation is sufficient to reduce the killing to manslaughter."); Scroggs v. State, 93 S.E.2d 583, 585 (Ga. Ct. App. 1956) ("[I]f the killing . . . was actually done by the defendant under a violent and sudden impulse of passion engendered by the circumstances and not to prevent the adultery, the offense is that of manslaughter.").

105. *See, e.g.*, Girouard v. State, 583 A.2d 718, 720 (Md. 1991).

106. *See, e.g.*, Emily L. Miller, Comment, *(Wo)Manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code*, 50 EMORY L.J. 665, 673 (2001); *cf.* Marina Angel, *Susan Glaspell's Trifles and a Jury of Her Peers: Woman Abuse in a Literary and Legal Context*, 45 BUFF. L. REV. 779, 821 (1997) ("The adultery scenario is an emotional self-defense addition to traditional self-defense for physical blows.").

107. Holmes v. DPP, [1946] A.C. 588 (H.L.) (U.K.).

negatived,"[108] discovery of adultery was accorded a "very special exception"[109] when the spouse was caught in the act. The implication is that one could kill with malice and still be afforded the provocation defense where sudden discovery of adultery was involved, even though other forms of adequate provocation were thought to require negation of malice, or mens rea. Special favor for adultery also has flourished in American common law,[110] in some cases expanding beyond English law to include even words conveying the information that adultery has occurred.[111] The favored historical treatment—and the fact that adultery is at odds with other common law categories—leaves sudden discovery of adultery a unique form of the provocation defense. Perhaps the strongest conclusion to be made from this history is that many people regard adultery as an extremely (and reasonably) angering event.

The sudden discovery of adultery remains a strong provocation defense today, despite some data that would suggest a weakening of the underlying cultural rationale. Consider the relatively high incidence of marital infidelity and the relatively low incidence of those who kill on sudden discovery of adultery. For example, the Kinsey reports estimated that close to one-half of married men and over one-quarter of married women have an extramarital affair before the age of forty.[112] Yet while these figures suggest that most people understand the pain adultery causes, spousal murder on discovery of adultery is a rare occurrence. A series of Department of Justice

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108. *Id.*

109. *Id.* at 598.

110. Norman J. Finkel, *Culpability and Commonsense Justice: Lessons Learned Betwixt Murder and Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 47 (1996). Finkel writes:

> *In flagrante delicto* cases are prototypes for most people of what constitutes "crimes of passion." No "rule" of adequate provocation was more firmly entrenched, even by the end of the eighteenth century, than that which proclaimed that a spouse . . . who found his wife in bed with a lover . . . was entitled to a reduction to manslaughter.

Id. (citations omitted).

111. *See, e.g.*, Maher v. People, 10 Mich. 212 (1862). Another interesting development in American common law not paralleled in England was the criminalization of adultery. *See* Carol M. Rose, *Trust in the Mirror of Betrayal*, 75 B.U. L. REV. 531, 543 (1995).

112. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 437 (1953) [hereinafter KINSEY ET AL., HUMAN FEMALE]; ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 585 (1948) [hereinafter KINSEY ET AL., HUMAN MALE]. But reliable figures are hard to come by. *See, e.g.*, Denene Millner & Bill Phelps, *Surviving the Affair*, ESSENCE, Sept. 2004, at 224 ("Though adultery statistics are hotly debated, even the most conservative studies estimate that about 25 percent of men and 15 percent of women have had sex outside their marriage . . . . Throw in the infidelity confessions of men who are in committed relationships . . . and the numbers can go as high as 65 percent.").

studies suggests that less than nine in ten million murder victims are spouses killed after the sudden discovery of an adulterous affair.[113]

Other cultural shifts reveal more weakness in the adultery theory. Even while cohabitation is seeing increased acceptance by society as a legitimate alternative to marriage,[114] courts have not recognized as adequate provocation unfaithfulness in monogamous, cohabiting relationships.[115] If the provocation defense is a cultural one, the failure of the adultery theory to keep pace with culture may be seen as a major flaw in the defense.

Another disturbing aspect of the adultery theory is its usage to protect those who kill their spouse after any relational aspects of the marriage have ceased.[116] In such instances, the spouses do not bother to divorce but instead choose to separate. However, when one partner discovers that his spouse is having an affair with another person and kills, he may claim the sudden discovery of adultery as a defense. This presents a doctrinal problem if the parties separated with the expectation that their relationship was over, since it would seem irrational to allow a spouse to assert a provocation excuse where the split is intended to be as permanent as divorce.[117] A final

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113. A study by the Department of Justice indicated that in 1994 the victimization rate for murder was about nine out 100,000 people (0.009 percent). CRAIG PERKINS & PATSY KLAUS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1994, at 2 (1996), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv94.pdf. Although figures are not available for 1994, a 1988 study of metropolitan areas estimated that only 6.5 percent of murder cases were spousal murder cases. *See* JOHN M. DAWSON & PATRICK A. LANGAN, U.S. DEP'T OF JUSTICE, MURDER IN FAMILIES 1994, at 1, *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/mf.pdf. Of this number, approximately 37 percent were convicted at trial. *Id.* at 7 tbl.11. Of those convicted, only 42.6 percent were convicted of voluntary manslaughter. *Id.* at 7 tbl.12. Even if all such voluntary manslaughter convictions were spurred by the sudden discovery of adultery, such killings would occur in only nine of ten million marriages.

114. *See, e.g.*, Linda Lyons, *How Many Teens Are Cool With Cohabitation?*, GALLUP POLL TUESDAY BRIEFING, Apr. 13, 2004, at 117 (stating that nearly seven out of ten teens support the idea of couples living together before marriage); *cf.* Stanley A. Renshon, *The Polls: The Public's Response to the Clinton Scandals, Part 1: Inconsistent Theories, Contradictory Evidence*, 32 PRESIDENTIAL STUD. Q. 169 (2002) (detailing polling results indicating "the public would forgive the president if he had committed adultery," and implying a more general relaxation in sexual mores, even for those holding public office).

115. *See, e.g.*, Turner v. State, 708 So. 2d 232 (Ala. Crim. App. 1997) (holding that legal marriage was required to claim provocation, despite the fact that the defendant and the victim had lived together for many years); *see also* KADISH & SCHULHOFER, *supra* note 44, at 412 (discussing *Turner v. State* and noting the restrictive interpretation of the courts).

116. *Cf.* State v. Little, 462 A.2d 117, 118 (N.H. 1983) (affirming the manslaughter instructions given in an extreme emotional disturbance (EED) case where the husband killed his estranged wife after she refused to reconcile).

117. This seems especially illogical, in light of the fact that the law denies the provocation defense to those who kill a cheating partner in a monogamous but unmarried relationship. *See, e.g.*, Dressler, *supra* note 41, at 440. Dressler writes: "Only a highly unrealistic belief about passion can explain [the adultery] rule in terms of excusing conduct. It is implausible to believe that

criticism of the defense is that it protects men whose abusive behavior drives their wives into the arms of other men.[118] These criticisms have led some commentators to conclude that the defense is one concocted for males, by males,[119] and that it ought to be scrapped.[120]

In sum, the criminal law addresses cases involving sexual misrepresentation in a disjointed and sometimes illogical fashion. Sexual identity cases are often addressed as HPD cases, even when applying the theory is inappropriate given the facts of the case. Further, courts thus far have failed to engage the sexual health cases meaningfully. Finally, the theory of the sudden discovery of adultery, while strongly entrenched, seems to have lost touch with modern realities.

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when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor's spouse." *Id.*

118. *Id.*; *see also* Angel, *supra* note 106, at 821, arguing that "the traditional common law reasonable man reacting to the purported provocation of adultery is the prototypical abusive male who exhibits sexual jealousy and possessiveness, anger and a short temper."

119. *See, e.g.*, Angel, *supra* note 106, at 821 ("Common law doctrines of provocation and self-defense were based on men's emotions, men's realities, and men's stories."). There are several reasons why this may be the case. Some have argued that biological differences between men and women have resulted in men having a greater need for surety regarding their biological offspring, and allowing sudden discovery of adultery to serve as adequate provocation was a way for men to gain some assurances regarding their offspring. *See, e.g.*, LEE, *supra* note 23, at 29 (citing ELEANOR EMMONS MACCOBY & CAROL NAGY JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 352 (1974)). *See generally* STEVEN GOLDBERG, THE INEVITABILITY OF PATRIARCHY 104 (1973); Aaron Kipnis, *Men, Movies, and Monsters: Heroic Masculinity as a Crucible of Male Violence*, 29 PSYCHOL. PERSP. 38, 49 (1994). Another argument is that men and women have been acculturated differently, so that men expect women to behave chastely, with no concomitant expectation of themselves. LEE, *supra* note 23, at 30–31.

This critique also explains why men seem to be the ones who most often benefit from asserting the defense. *See* DAWSON & LANGAN, *supra* note 113, at 1–2 (finding that "in spouse murders, women represented [only] 41% of killers"). *But see* LEE, *supra* note 23, at 27 (noting that female spouse murder defendants tend to be acquitted more often than male defendants, and more often receive shorter prison terms).

120. *See, e.g.*, JEREMY HORDER, PROVOCATION AND RESPONSIBILITY 193–94 (1992), *quoted in* KADISH & SCHULHOFER, *supra* note 44, at 412. Horder argues:

> [T]he existence of such mitigation simply reinforces in the law that which public institutions ought in fact to be seeking to eradicate, namely, the acceptance that there is something natural, inevitable, and hence in some (legal) sense . . . forgivable about men's violence against women, and their violence in general.

Id. This Comment remains agnostic as to the adultery doctrine's continued validity for the following reasons. First, a thorough critique of adultery doctrine goes beyond the scope of this Comment. However, because I treat the provocation defense as a culturally based partial excuse, it would make little sense to scrap the defense so long as a culturally articulable basis remains. Finally, and perhaps most important, the adultery doctrine is useful in that it touches upon sexual deception as a root cause of an adequate heat of passion.

III. SEXUAL MISREPRESENTATION AS ADEQUATE PROVOCATION

A. The Discovery of Sexual Misrepresentation Creates a Complex Interplay of Emotions

So far, this Comment has critiqued the law's handling of sexual identity, sexual health, and adultery cases, arguing that the provocation defense is incoherent and increasingly detached from its cultural base, particularly when applied to cases of sexual misrepresentation. But this discussion is not meant to suggest that there is nothing to the claim of adequate provocation in cases involving a serious sexual misrepresentation. Thus far, the discussion has only hinted at the true basis for finding adequate provocation in each of these cases—the discovery of a serious sexual deception. Now we turn our focus to the task of elucidating the role that the discovery of a sexual misrepresentation plays in bringing about a reasonable heat of passion. In order to substantiate the assertion that sexual misrepresentation may serve as adequate provocation, we first consider the well-documented psychological responses of those deceived by a spouse's adultery.[121]

We begin with one woman's narration of the mental anguish wrought by the slow realization that she was being deceived about an adulterous relationship:

> I felt totally out of control of the situation. . . . Fear was there all the time, and anger and hurt. . . . I felt as if I was being experimented on, as part of the apparatus. I felt so used to achieve his ends. I was a means to his ends . . . . [B]ecause it was so degrading and so hard on my self-esteem I felt I wasn't in any position to do anything about it.[122]

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121. There is a paucity of research on the psychological impact of nonadulterous deception on the deceived. *See, e.g.*, CHARLES V. FORD, LIES! LIES!! LIES!!!: THE PSYCHOLOGY OF DECEIT 266 (1996) ("The empirical scientific evidence for the effects of deception on relationships is remarkably scanty, perhaps because it is such a difficult area to research."); *see also* J.A. BARNES, A PACK OF LIES: TOWARDS A SOCIOLOGY OF LYING 10 (1994) (dealing with the sociological aspects of lying, not the broader topic of deception); SISSELA BOK, LYING, at xix (1978). Bok notes:

> [T]hough no moral choices are more common or more troubling than those which have to do with deception in its many guises, they have received extraordinarily little contemporary analysis . . . . Even if one looks back over the last few centuries, the little discussion which is to be found is brief and peremptory.

Id.; WARREN SHIBLES, LYING: A CRITICAL ANALYSIS 24 (1985) ("There are very few books about the lie."). Although these last resources are concerned more with the sociological and moral aspects of lying than the psychological impact of deception, they nevertheless underscore the shortage of research in the area of deception as a whole.

122. BARNES, *supra* note 121, at 100 (citing a study by Lucy Fontaine Werth & Jenny Flaherty, *A Phenomenological Approach to Human Deception*, *in* DECEPTION: PERSPECTIVES ON HUMAN AND NONHUMAN DECEIT 293, 296 (Robert W. Mitchell & Nicholas S. Thompson eds., 1986)).

If the reaction of this woman is atypical, it is only because many people react even more strongly.[123] One woman says, "It was as if something snapped . . . I never believed that such sounds could come out of my mouth. I was screaming and cursing. I hit him. I hit him so hard he cowered."[124] Another woman expressed her rage at discovering an infidelity in verse: "Shattered by this spectacle/I found it hard to breathe/Deceived by those I trusted/I vowed to make them bleed."[125] A man expresses it this way: "[Adultery] is like having a horrible nightmare from which you cannot escape. The thought 'this can't be happening to me' replays itself over and over again in your mind. The only interruption is the anger and hatred that must be battled to maintain one's sanity."[126]

Psychologists and counselors recognize these kinds of responses as normal, and note that both sexes experience these kinds of emotions.[127] As one psychologist notes:

> Few people can answer *yes* to the question: "Would I be level-headed and do the right thing about it, if my married partner were unfaithful?" When it does happen, those involved are too close to it, too blinded by emotion to act reasonably. Men and women both become hysterical. Crimes of passion are a frequent result of infidelity. Suicides occur when people have not been given any perspective on the problem. They feel they are suffering the worst thing that could ever happen to them, and their lives are ruined. Murder of the "other man" is a common occurrence. Sometimes both suicide and murder result when a triangle situation has reached the explosive point.[128]

The examples above illustrate the highly emotional response of those who discover they have been deceived about a marital infidelity. This highly emotional response offers much of the basic rationale for maintaining sudden discovery of adultery as adequate provocation. While one may not condone violence against an adulterer, society understands an angry response and so partially excuses a defendant when his emotions result in a

123. *See, e.g.*, FRANK S. CAPRIO, MARITAL INFIDELITY 4 (1953) ("Crimes of passion are a frequent result of infidelity.").

124. DON-DAVID LUSTERMAN, INFIDELITY: A SURVIVAL GUIDE 106 (1998) (quoting a victim of infidelity).

125. Laura Mae Oldham-Brownell, *The Maddening* (2004), http://www.everypoet.net~everycom/ppop/showthread.php?+=30382 (lyricizing the emotion and murderous rage of observing an adulterous liaison).

126. Alan Cole, *The Pain of Adultery*, S. GREEN STREET BIBLICAL STUD. (South Green Street Church of Christ, Glasgow, Ky.), Mar. 2002, at 2, *available at* http://www.glasgow-coc.org/Biblical%20Studies/bs-mar02.pdf.

127. CAPRIO, *supra* note 123, at 10.

128. *Id.* at 3–4.

killing. But a close look at the responses of those deceived about adultery suggests they have much in common with the reactions of those deceived by other serious sexual misrepresentations. As the following sections will attempt to make clear, any serious sexual misrepresentation evokes the same volatile mix of emotions in the deceived. These emotions include feelings of violent victimization, self-hatred, betrayal, rejection, moral outrage, reality shock, and the need for vengeance. We shall handle each in turn.

1. Violent Assault

Deception results in the deprivation of autonomy, as does violence, and many have noted this link between the two. Deception strips the deceived of her autonomy in a critical decision, resulting in an alteration in the normal power dynamic of a relationship.[129] "Deceit and violence—these are the two forms of deliberate assault on human beings," one scholar has noted.[130] "Both can coerce people into acting against their will . . . [b]ut deceit works more subtly, for it works on belief as well as action."[131] Another scholar notes that "the lie is often perceived by the recipient as an aggressive assault."[132] The comparison of deceit to violence is useful in understanding the role of deception in adequate provocation. In the context of a romantic relationship, one's decisionmaking process and one's emotions are very closely intertwined. When deceit subdues the mind, it also controls the deceived party's emotions. Uncovering the deceit may result in an immediate liberation of the mind, but one's emotions often are not resolved so readily. Because the truth often throws one's emotions into a state of turbulent confusion, it is easier to understand how the uncovering of deceit would result in an extreme emotional reaction, accompanied by physically lashing out at the deceiver in an effort to regain emotional autonomy.

129. *See, e.g.*, BOK, *supra* note 121, at xvii. For the deceived, "to be given false information about important choices in their lives is to be rendered powerless. For them, their very autonomy may be at stake." *Id.* *But see id.* at 29 ("[B]oth violence and deception are means not only to unjust coercion, but also to self-defense and survival."). We later will explore the idea that society may view some kinds of deceit as more understandable than others.

130. *Id.* at 18.

131. *Id.*

132. BARNES, *supra* note 121, at 139 (quoting Charles V. Ford & Marc H. Hollender, *Drs. Ford and Hollender Reply*, 145 AM. J. PSYCHIATRY 1611 (1988)).

2. Self-Hatred

Self-hatred compounds the deceived's impression of violent assault, because many victims of deceit feel they are partially to blame for being duped. One scholar thus explains many crimes of passion in response to adultery as "killing [one]self, not [one's spouse]. [One] hates [one]self for having been [deceived]."[133] Whether the deception is uncovered in the context of an adulterous affair, or in the context of some other serious sexual misrepresentation, the deceit still raises the same feelings of self-hatred. Moreover, feelings of self-hatred may be amplified where the deceit is a passive concealment instead of an active lie. "The target may feel more outraged [about] a concealment than a falsification lie [because] 'they can't complain that they were lied to, and thus feel rather as if their opponent has slid [through] a legal loophole.'"[134] This presents a problem for the deceived because it inhibits the ability to cast moral blame on the deceiver.[135]

3. Betrayed Trust

Sexual deception also may be portrayed as a transgression of behaviors that a deceived expects of the one he trusts. A deceived often enters a relationship with the expectation that his partner will not betray his trust. Put another way, the deceived believes his partner's character (as a "first-party constraint") will maintain the partner's emotional and physical fidelity to the relationship.[136] "Second-party constraints" exist in the form of positive (or negative) externalities provided by the other partner to encourage fidelity and discourage cheating.[137] Finally, "third-party constraints" are those that

133. *See* CAPRIO, *supra* note 123, at 13.

134. PAUL EKMAN, TELLING LIES: CLUES TO DECEIT IN THE MARKETPLACE, POLITICS, AND MARRIAGE 29 (1985) (quoting Eve Sweetser, *The Definition of Lie*, *in* CULTURAL MODELS IN LANGUAGE AND THOUGHT 59 (Naomi Quinn & Dorothy Holland eds., 1987)).

135. *See, e.g.*, Kent Greenawalt, *Punishment*, *in* ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1287 (Sanford H. Kadish ed., 1983) (discussing the utility of recognizing that "victims, their families and friends, and some members of the public will feel frustrated if no . . . response [from society] is forthcoming"). *See generally* PIETRO MARONGIU & GRAEME NEWMAN, VENGEANCE: THE FIGHT AGAINST INJUSTICE (1987).

136. Rose, *supra* note 111, at 542. "Truth bias" provides another way to think about first-party constraints: Because "the vast majority of our everyday communication is truthful," people generally assume that any specific communication is also truthful. GERALD R. MILLER & JAMES B. STIFF, DECEPTIVE COMMUNICATION 35 (1993). The truth bias becomes even more pronounced in the context of ongoing relationships, because people employ a cognitive heuristic that states: "My partner has been truthful in the past, therefore he or she is being truthful now." *Id.* at 98–99 (citation omitted).

137. MILLER & STIFF, *supra* note 136, at 98–99.

society imposes.[138] But the most important aspects of marital trust (and therefore the most upsetting if breached) rest on the first-party constraint of character: I trust you because I know the kind of person you are.[139]

When a serious sexual misrepresentation is uncovered, the realization of the deception throws the duped party's understanding of the deceiver's character into disarray, resulting in feelings of betrayal. "[I]nfidelity involves far more than extramarital sex. Infidelity involves disloyalty. It is betrayal of a trust, of someone's confidence."[140] Although framed here in the context of marriage, the same feelings of betrayal extend to the other forms of serious sexual misrepresentation. In all cases, trust places a potential victim in a position of vulnerability, a trust based primarily on the belief that first-party constraints—character—will keep the other party from betraying that trust. However, when a serious sexual misrepresentation is discovered, the shockwaves of betrayal poison both the relationship and the innocent party's feelings for the deceiver.

4. Personal and Relationship Rejection

Rejection is yet another dangerous emotion added to the mix that confirms both the feelings of self-hatred and betrayal. The sexual misrepresentation is a rejection on two levels. At a personal level, the lie represents a rejection of the individual as unworthy: "To tell a harmful lie to someone may be to say we do not care about them."[141] At another level, the relationship is being rejected.[142] Both these forms of rejection result in feelings of inadequacy in the victim. This happens because "[l]ying requires a *reason*, while truthtelling does not."[143] In other words, the implication of the lie is that neither the victim nor the relationship could stand on truth alone; instead, both were propped up by the deception.

138. Rose, *supra* note 111, at 542.

139. *Id.*

140. CAPRIO, *supra* note 123, at 5; *see also* WILLARD F. HARLEY, JR. & JENNIFER HARLEY CHALMERS, SURVIVING AN AFFAIR 138–51 (1998) (listing honesty as the most crucial of four different relationship elements violated by an affair, and discussing five aspects of honesty required to restore trust).

141. SHIBLES, *supra* note 121, at 98; *see also* CAPRIO, *supra* note 123, at 10 ("A woman who is sensitive and loves her husband deeply suffers damaging trauma when she suddenly learns he is unfaithful to her.").

142. SHIBLES, *supra* note 121, at 98 ("Love relationships . . . may be broken by lies.").

143. BOK, *supra* note 121, at 22.

5. Moral Outrage

A fifth emotion produced by deception is moral outrage. Most people can appreciate feeling morally indignant on the discovery of a lie told to them. Some moral philosophers have seized on this universal feeling in attempting to explain the moral issues with deceit: "If you want to know the foulness of lying for yourself, consider the lying of someone else and how you shun it and despise the man who lies and regard his communication as foul."[144] While an ordinary lie may conjure ordinary displeasure, serious sexual misrepresentations seem to combine all the most negative aspects of a deception. First, the deception is by one sexually, and often emotionally, close to the victim, and by one from whom the deceived expected the truth.[145] The moral outrage at being deceived plays off both the feelings of betrayal and the feelings of rejection, each in turn heightening the victim's awareness of the wrong that has been done. Secondly, the deception is about an important matter—an intimate sexual exchange—and is often in the context of an emotional relationship. The more significant the deception, the greater the sense of violation, and the greater the moral outrage of the victim.[146] Finally, and perhaps most angering, is the realization that the deception was maintained for the benefit of the deceiver.[147] The feelings of assault, deprivation of autonomy, and helplessness that resulted from the deception intensify the victim's realization that the deceiver was untrustworthy and manipulative on his or her own behalf. Each of these factors heightens the sense of moral assault. Finally, prevailing mores concerning both the deception and the underlying concealed behavior contribute to the sense that moral outrage is justified.[148]

144. *Id.* at 29 (quoting W. MONTGOMERY WATT, THE FAITH AND PRACTICE OF AL-GHAZALI 133 (1953)).

145. "Lies told to a friend [a]re considered to be more reprehensible than those told to strangers and associates." BARNES, *supra* note 121, at 79 (citing Richard A. Maier & Paul J. Lovrakas, *Lying Behaviour and Evaluation of Lies*, 42 PERCEPTUAL & MOTOR SKILLS 577 (1976)).

146. BOK, *supra* note 121, at 20 ("Those who learn that they have been lied to in an important matter . . . are resentful, disappointed, and suspicious.").

147. "[L]ies told to benefit the liar met with greater disapproval from . . . respondents than did lies told to benefit the dupe." BARNES, *supra* note 121, at 79 (citing Svenn Lindskold & Pamela S. Walters, *Categories for Acceptability of Lies*, 120 J. SOC. PSYCHOL. 129, 130–31 (1983)).

148. This is particularly true in adultery cases. *See, e.g.*, DONAL E.J. MACNAMARA & EDWARD SAGARIN, SEX, CRIME, AND THE LAW 191–92 (1977) (discussing the disapproval of most people for adultery and the stigmatic origins of the term "cuckold"); BERTRAND RUSSELL, *Our Sexual Ethics* (1936), *reprinted in* WHY I AM NOT A CHRISTIAN AND OTHER ESSAYS ON RELIGION AND RELATED SUBJECTS 168, 168–69 (Paul Edwards ed., 1957) (noting that monogamy is encouraged by "public opinion"); Don-David Lusterman, *Repetitive Infidelity, Womanizing, and Don Juanism*, *in* MEN AND SEX: NEW PSYCHOLOGICAL PERSPECTIVES 84–99 (Ronald F. Levant &

6. Reality Shock

Another aspect of deception's emotional firestorm is the reality shock that occurs when one realizes the chasm that exists between one's expectations and reality. This reality shock can be dangerous because it produces a volatile state of emotions in the deceived that is detached both from the new (truthful) reality, and from the old (deceptive) reality.

How does this happen? The deceiving party often deploys elaborate measures to keep the deceived party from discovering the truth.[149] Moreover, the romantic relationship is particularly susceptible to such deceptions because both parties are complicit in the fantasy: "[T]he initial exaggerations and lies of the courtship become magnified and embellished to unrealistic proportions . . . as a result of the distortion of reality by the lovers. . . . Lovers create a subjective world of their own in which they idealize each other with little attention paid to reality."[150]

The effect of the deception is that the deceived exists in an altered reality, where the deception is the truth. However, the problem is that the deception often does not last long. When it finally crumbles, the deceived must choose which reality is the "true" reality, often resulting in an unstable

Gary R. Brooks eds. 1997) (discussing the psychological deficiencies of men who engage in adulterous behavior); Wendy McElroy, *Adultery: The Intimate Fraud*, Feb. 4, 2003, *at* http://www.ifeminists.net/introduction/editorials/2003/0204.html (last visited Dec. 15, 2005) (discussing the immorality and destructivity of adultery). Even when people do not feel that adultery itself is morally outrageous, many people feel that hiding the adultery with deceit is wrong. *See, e.g.*, Renshon, *supra* note 114, at 176 (detailing polling results indicating "the public would forgive the president if he had committed adultery but not if he had lied and encouraged Ms. Lewinsky to lie").

The underlying behavior in sexual identity cases may also hold stigmatic moral force for the defendant, although the research is a little less clear. One 2003 study found that a small majority of Americans believed that "homosexual behavior is a sin," while approximately one-third of those surveys disagreed. News Release, Pew Research Center, Religious Beliefs Underpin Opposition to Homosexuality 6 (Nov. 18, 2003), *at* http://people-press.org/reports/pdf/197.pdf. Interestingly, a majority of those who believed homosexual behavior was sinful said that adultery and homosexuality were equally sinful. *Id.* This finding may be less true among the secular, as only 18 percent of those with no religious affiliation reported that "homosexual conduct" was a sin. *Id.* In sexual health misrepresentation cases, the victims may find reinforcement for her moral outrage in the knowledge that many states have made it illegal for one knowingly and without gaining the consent of the other party to have sex while infected with HIV. *See* discussion *supra* note 102.

149. *See, e.g.*, THE BRANDON TEENA STORY (New Video Group 1998) (describing the elaborate measures Brandon Teena used to conceal the fact that he was a biological female, even while having sex). Adultery also often inspires detailed deceptions because many adulterous spouses "rationalize that if they are 'perfect' at home their spouse could not possibly believe they [are] involved with anyone else." Allen Cowling, *Marital Crisis and Coping With Adultery*, http://www.allencowling.com/adultery.html (last visited Oct. 8, 2005); *see also* HARLEY & CHALMERS, *supra* note 140, at 139 ("[A]lmost all affairs *require* dishonesty.").

150. GEORGE SERBAN, LYING: MAN'S SECOND NATURE 198 (2001).

mental state and, at times, an explosive situation.[151] When deceived people uncover the truth, they often "suffer . . . a conflict . . . of *two minds*: they struggle against the intrusion of a reality that is too painful to accept on the one hand, and [continue to] harbor a phantasy that is incapable of being realized on the other."[152]

7. The Need for Vengeance

The feelings of violent victimization, self-hatred, betrayal, rejection, moral outrage, and reality shock also may result in an overwhelming need for vengeance. Marongiu and Newman argue that "[v]engeance has the power of an instinct. The 'lust for vengeance,' the 'thirst for revenge,' are so powerful that they rival all other human needs."[153] The instinct toward vengeance becomes particularly strong when the victim of deceit feels that a lover has wronged him,[154] as in the case of one duped by a serious sexual misrepresentation. Vengeance is often directed creatively at the heart of the perceived wrong,[155] and is often the result of cool reflection and planning. However, the need for vengeance does not always take a measured gait. Indeed, some forms of vengeance may look more like "a passionate, violent reaction"[156] than a cool, calculated act.

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151. A form of this can be seen in the *Araujo* case, discussed *supra* note 1, where the realization that Araujo was a biological male sent one of the defendants wandering around the house crying, "I can't be . . . gay." *See, e.g.*, Haddock, *supra* note 2; *see also* KINSEY ET AL., HUMAN FEMALE, *supra* note 112, at 433 ("Extra-marital relationships had . . . most often caused difficulty at the time that the spouse first discovered them."); KINSEY ET AL., HUMAN MALE, *supra* note 112 (same); Burton Farbman, *Afterword*, *in* SUZY FARBMAN, BACK FROM BETRAYAL: SAVING A MARRIAGE, A FAMILY, A LIFE 255 (2004) (admitting that telling the truth after years of lying "hurt her more than I ever thought I could"); *supra* notes 121–128, and accompanying text (regarding the highly negative emotional response elicited from the discovery of adultery).

152. M. Guy Thompson, *Deception, Mystification, Trauma: Laing and Freud*, 83 PSYCHOANALYTIC REV. 827, 828–30 (1996) (discussing the common clinical roots of neurotic and psychotic behavior). Thompson notes that "deception can be devastating. When one finally discovers the truth about something that was concealed for many years, the victim of this deception may be so discombobulated that he feels his reality has been forcibly taken from his grasp." *Id.* at 844.

153. MARONGIU & NEWMAN, *supra* note 135, at 1.

154. REGINA BARRECA, SWEET REVENGE: THE WICKED DELIGHTS OF GETTING EVEN 72 (1995). Barreca writes:

> [T]he instinct to hurt the lover who leaves is perhaps the least gender-specific of any instinct apart from breathing. . . . [A]nyone who has discovered a partner's affair, who has been left waiting by a telephone for a promised call that didn't come, or who has been on the receiving end of unfair humiliations in an otherwise reasonable relationship has entertained thoughts of revenge, however fleetingly.

Id.

155. *See, e.g.*, *id.* at 76–100. Barreca devotes an entire chapter to "real-life scenes [of revenge] directed by those who have been burnt in a relationship." *Id.* at 76.

156. MARONGIU & NEWMAN, *supra* note 135, at 3.

The discovery of a serious sexual misrepresentation may produce a heated response for several reasons. First, in the case of a serious sexual misrepresentation, the heart of the perceived wrong is deception—a wrong the victim may not be able to avenge directly because discovery of the deception may terminate the relationship. Moreover, note that mere termination of the relationship likely is not satisfactory as vengeance because the deceiver has already made the victim feel as though the relationship was a sham, and not worthy of the deceiver's commitment.[157] Finally, the weight of moral outrage combined with feelings of rejection, reality shock, self-hatred, betrayal, and defenselessness may so stir up the victim that a reasonable heat of passion is the inevitable result.

B. Allocating the Burden of Avoiding Deception

Now we turn to the question of how the provocation defense should allocate the risk of deception between the deceiver and the deceived. This question has great import, for if the law allocates the burden of risk on the deceived, then it might well hold the deceived liable for the deception and find that his anger—though real, understandable, and reasonable (as argued above)—is nonetheless unreasonable for the purposes of the provocation defense. On the other hand, if the law allocates the burden of risk exclusively on the deceiver, then a defendant might escape a murder conviction by raising even a ludicrous claim that some action or aspect of the victim brought about a reasonable heat of passion. Running cross-grain is the concept that deception, self-deception, fantasy, and their ilk are characteristic of the adult human love relationship. Because the correct allocation of the burden of risk is a threshold inquiry for the provocation defense, and because some level of deception is integral to the love interaction, the law must be careful to apportion risk correctly. Thus, this Comment suggests that the law should allocate the risk of deception according to a "reasonableness" standard. Under the facts of a case, if an attempted sexual deception reasonably could deceive, then the deceiver must bear the burden of risk that a deception will occur.

Some level of deception is present in almost all intimate relationships.[158] Moreover, most people expect some level of deceit in their romantic relationships.

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157. *See* discussion *supra* Part III.A.4 (explaining the feelings of personal and relationship rejection resulting from an uncovered serious sexual misrepresentation).

158. William Shakespeare expressed it this way:

> When my love swears that she is made of truth
> I do believe her though I know she lies,

In fact, lying is so common in romantic relationships that one researcher found that some spouses tolerate it as a normal part of being married.[159]

If deceit in romantic relationships is common, why not place the burden of avoiding deception on the potential deceived? Indeed, it may make sense to require people to manage their own risk because everyone knows that "the same people capable of devotion and loyalty to one . . . person could . . . turn against the person previously held in high esteem."[160] Therefore, the most prudent course of action seems to require avoiding the risk of deception by relying on one's "best judgment, free of any biases, untested assumptions, or emotional needs incompatible with [one's] goals."[161]

To this end, some scholars have argued that people should take steps to protect themselves from being duped. George Serban, for example, suggests that people should verify the truth to the extent possible.[162] Second, they should "stay cool in order to be able to separate fact from fiction."[163] Third, they must "remain emotionally detached. . . . [because their] emotions will interfere if not control [their] reasoning, which will make [them] unable to see the [deception, because the deception is] in line with [their] wishes."[164]

Unfortunately, none of the above steps advanced to protect against deception are practical in the context of a romantic courtship or relationship. First, a person pursuing a romantic relationship may find it nearly impossible to verify the truth. If nothing seems amiss, the deceived will likely accept

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That she might think me some untutored youth
Unlearned in the world's false subtleties.
Thus vainly thinking that she thinks me young,
Although she knows my days are past the best,
Simply I credit her false-speaking tongue;
On both sides thus is simple truth suppressed.
But wherefore says she not she is unjust,
And wherefore say not I that I am old?
O, love's best habit is in seeming trust,
And age in love loves not to have years told.
Therefore I lie with her, and she with me,
And in our faults by lies we flattered be.

William Shakespeare, *Sonnet 138*, *in* THE NORTON SHAKESPEARE 1970 (Stephen Greenblatt et al. eds., W.W. Norton & Co. 1997) (1609). For a more modern, if less colorful, source, *see* FORD, *supra* note 121, at 263 ("Deception is . . . common in sexual behavior on the part of both sexes.").

159. "Most husbands and wives . . . lied to one another and realized that they were being lied to." BARNES, *supra* note 121, at 80 (citing RICHARD H. BLUM, DECEIVERS AND DECEIVED 222–30 (1972)). However, expectations of the particular nature of the deceit depended on the sex of the spouse. Men more often expected lies concerning matters of fidelity. *Id.*

160. SERBAN, *supra* note 150, at 203.

161. *Id.* at 204.

162. *Id.* at 218.

163. *Id.*

164. *Id.*

the deception as reality. Without a tip-off to the existence of the deception, the only way to verify the truth would require a level of suspicion unacceptable to both parties and destructive for the relationship: The suspicious party would risk losing his or her partner, while the other party would be put off by the untrusting personality of his or her pursuer.[165] Further, an effective deception is unlikely to elicit suspicion on its own because part of what makes it effective is that it has "a logical content similar to [a] regular exchange or transaction."[166] This "logical content" is simply that the deception makes sense to the deceived. However, even where the content of the deception is not perfectly logical, the conventional wisdom that "love is blind" suggests that the deceived lover still may not realize the truth.[167]

Further complicating the allocation of risk is the fact that allocation to either party creates problems. If we place the risk of deception on the deceived, then he cannot claim adequate provocation if he is deceived by *any* intimate misrepresentation. Query whether this is the right solution. The provocation defense is concerned with how a reasonable person might respond to a given provocation,[168] and as already argued, a serious sexual misrepresentation can lead to a reasonable heat of passion. Therefore, a per se approach eliminating any provocation defense based on sexual misrepresentation would not be ideal. On the other hand, one might adopt a rule that the deceiver must bear the risk of causing the sexual misrepresentation. This per se approach would seem to have even worse consequences, since, as established above, much in love consists of slight of hand.

Clearly, either per se approach would reintroduce culturally insensitive standards that provocation law should shun. However, if the law is to avoid a per se approach, then it must strike a balance that both reflects the normalcy of some deception in relationships and recognizes the provocative nature of a serious sexual misrepresentation.

Balancing behavioral incentives is nothing new to the criminal law. Carol Rose, in an interesting comparison of the criminal law's treatment of adultery and nonconsensual, nonserial bigamy, argues that bigamy receives a stronger legal penalty in part because the deception is of a different character than

165. Rose, *supra* note 111, at 545.

166. SERBAN, *supra* note 150, at 212.

167. *Id.* at 226 ("The reality is that people are ready to make allowances for disparities . . . or for inconsistencies . . . as long as the [deceiver] offers them the hope of getting what they want."); *see also* EKMAN, *supra* note 134, at 20 (writing that lovers often "overlook[discrepancies], giving ambiguous behavior the best reading, collusively helping to maintain the lie").

168. *See supra* Part I.

adultery. Victims in bigamy are particularly vulnerable because bigamists "seem[ ] primarily to manipulate the victim's trust in those reassurances that are most difficult to monitor, namely the purported first-party constraints of the bigamist's love, loyalty, and fidelity."[169] According to Rose, these reassurances are particularly deceptive because closer inquiry into the bigamist's past (or present) relationships would likely invite a breakup,[170] a result the deceived party wants to avoid. Because first-party constraints seem to make the risk of being deceived by a bigamist low, and because attempting to uncover a bigamy deceit would probably undo the relationship, most people will choose not to investigate whether their partner is a bigamist.[171] Rose points out that the law's response to this has been a more forceful recognition of bigamy as a serious crime,[172] noting that "[t]he law lets people go ahead and get married without engaging in some of the monitoring and double-checking that rationality might demand."[173] Rose goes on to address the possibility that legal enforcement of trust might "encourage some sloth,"[174] but ultimately concludes

> that some sloth is a good thing [in the law generally], because too many questions and too much suspicion may mean that the wedding bells never ring, the deal never gets cut, the office morale suffers, and the file cabinets overflow with monitoring evaluations. Just as the law's clumsiness puts the brakes on the up-stroke of excessive trusting, so the law's efficacy halts the down-stroke of excessive suspicion—the suspicion that itself undermines trust.[175]

The law can encourage an analogous sort of healthy sloth by allocating the burden of risk according to a reasonableness standard in cases of sexual misrepresentation. A reasonableness standard recognizes (and encourages) trust in keeping with normal, culturally dictated expectations, just as it discourages excessive, idiosyncratic trust. To put it differently, there seem to be important considerations that line up on both sides of the equation. On the one hand, the deception may be so subtle, and the consequences so devastating, and that it would be a manifest injustice to require the defendant to manage all the risk of deception. On the other hand, deception seems to be so integral to the human love interaction that the law ought to require of the defendant a degree

169. Rose, *supra* note 111, at 545.
170. *Id.*
171. *Id.* at 544–45.
172. *Id.* at 543–44.
173. *Id.* at 546.
174. *Id.* at 556.
175. *Id.*

of awareness and considered action. The law can provide the appropriate level of motivation by requiring that the defendant be reasonably deceived.[176]

IV. AN INTEGRATED APPROACH TO SEXUAL MISREPRESENTATION CASES

Thus far, we have learned that the provocation defense is a partial excuse predicated on a culturally based interpretation of the reasonable response to a given provocation. Further, we have learned that a serious sexual misrepresentation can bring about a firestorm of powerful emotions that collectively can create a reasonable heat of passion. But missing from this discussion has been a definition for a sexual misrepresentation defense that would improve on the criminal law's handling of sexual misrepresentation claims while remaining responsive to the cultural rationale that motivates the provocation defense. To this end, we now turn to the task of elucidating such a definition.

This Comment offers a three-part test, proposing that a sexual misrepresentation constitutes legally adequate provocation when:

(1) the defendant engaged in a sexual act, while in a reasonably deceived state of mind;
(2) concerning a fact reasonably material to consent; and
(3) which would be likely to cause a reasonable person a severe mental or emotional crisis upon discovery.

From this definition, the following discussion will draw on the lessons we have learned thus far to develop an integrated approach to sexual misrepresentation cases. Specifically, we begin by laying out the contours of the proposed defense, defining what sexual misrepresentation is. The proposed framework will rely on rape and adultery doctrine as a guide to formulating the defense. Finally, it will draw on our understanding of the provocation defense as a culturally based partial excuse to provide the basic reasonableness rationale that will apply to each of the three elements of the proposed test.

A. Defining Sexual Misrepresentation

The first element of the proposed sexual misrepresentation test requires the defendant to have engaged in a sexual act, while in a reasonably deceived state of mind. This element requires that a sexual misrepresentation reasonably deceive the defendant, while placing the important limitation that adequate provocation requires a sexual act.

176. *See* discussion *supra* Part III.B.

The first requirement—that of reasonable deceit—is fairly straightforward. The requirement of a deceived state of mind reflects the research, discussed above, supporting the proposition that the discovery of a serious deception can create an emotional maelstrom.[177] The reasonableness requirement explicitly mirrors the modern law's understanding of the provocation defense as driven by the responses of the reasonable person. Further, as discussed above, the reasonableness approach balances the competing interests of both parties to the sexual relationship so as to protect people from the worst kinds of deceptions while requiring of the defendant a degree of awareness and considered action that is in keeping with the inherently deceptive nature of sexual behavior.[178]

Requiring a reasonable deception is also in keeping with the sudden discovery of adultery as an existing provocation rationale. The requirement of suddenness requires a temporal urgency to the adultery defense. But suddenness also implies that a defendant must not have had some lurking sense that adultery was ongoing. If the defendant was aware of the high probability of adultery but had not actually confirmed it, then her "sudden discovery" of adultery by walking in on her spouse with his lover would be neither sudden nor a discovery, because she reasonably had known the true facts all along. The reasonableness requirement plays the same role in the sexual misrepresentation context. Claiming to be deceived concerning the true facts is unreasonable if a defendant reasonably knew the true facts before discovery of the deception.

The first element of the proposed sexual misrepresentation framework also insists on a sexual act. This means that one cannot claim sexual misrepresentation unless there has been some kind of sexual contact between the deceiver and the deceived. Of course, there is a tendency toward definitional blurring at the boundaries of what may be considered a sexual act. For example, kissing may be a sexual act but it may be much less intimate than a sexual penetration. Further, while kissing can be nonsexual, it also can be highly sexualized. Because of the ambiguous, fact dependent nature of what one may deem a sexual act, this Comment leaves without further definition what may be considered a sexual act.

This is not to say that the proposed sexual misrepresentation test considers the definition of sexual acts as boundless in nature. Although this definition does not foreclose the possibility of arguing by analogy in cases without sexual contact, stretching the theory of sexual misrepresentation to

177. *See* discussion *supra* Part III.A.
178. *See* discussion *supra* Part III.B.

include nonsexual conduct would result in a tenuous link between the application of the theory and its justifications. The Teena Brandon case presents an example. Teena Brandon was a female who lived as a man. After discovering Brandon was biologically female, and "[a]ngry that they had been deceived," several of her male acquaintances "drove her to a rural area and raped her." Approximately one week later, they killed Brandon.[179] In the Teena Brandon case, the defendants might have argued by analogy to a sexual misrepresentation theory that they were enraged at discovering that Brandon Teena was a female because, if they had known Teena was a female, they never would have befriended her. Such an analogy should fail because a deception in the context of a nonsexual friendship does not raise the issues of assault, self-hatred, and personal rejection to the same degree as a sexual misrepresentation. Further, to the extent that the defendants could argue that their trust was betrayed, they were morally outraged, and they were shocked by the revelation, these arguments are far weaker than in the case of a serious sexual misrepresentation because few would classify a casual, nonsexual friendship as meriting such a serious level of emotional involvement. Ultimately, because many of the most angering aspects of deception may best be understood by the jury in the context of an intimate relationship involving sexual intercourse, the jury will define and offer balance to what may constitute a sexual act.

Thus far, we have defined a sexual misrepresentation as a sexual act accompanied by a reasonable deceit. But this definition does not mark out the critical linkage between the reasonable deceit and the sexual act. The second element of the proposed test creates this link by requiring that the deception concern a fact reasonably material to sexual consent.

Not all forms of sexual misrepresentation can serve as adequate provocation. If this were the case, then, for example, a man could claim adequate provocation merely because he went to bed with a woman who wore make-up and a push-up bra. Similarly, he could claim the same thing if his lover lied about her yearly income, profession, or age. These misrepresentations all bear on the way one might feel about a sexual act, but they are not (nor should they be) adequate provocation.

But before making the rather mundane conclusion that some sexual misrepresentations are not adequate provocation, one must address the foundational consideration of how to separate the misrepresentations that are important for the provocation defense from those

179. *See* State v. Lotter, 586 N.W.2d 591, 603–04 (Neb. 1998) (per curiam), *aff'd*, 664 N.W.2d 892 (2003).

that are not. Drawing on the provocation defense's handling of rape reveals that materiality to consent is the proper place to draw the line.

The common law definition of rape is "the carnal knowledge of a woman *forcibly* and *against her will*."[180] Although the connection between force and adequate provocation is almost intuitive, it turns out that force is not itself dispositive of the provocation question. The degree of force by itself tells us nothing of the degree of provocation involved, since it does not reveal the state of mind of the victim or of the victim's receptivity to the force. Indeed, force may or may not be desirable in the context of any given sexual act.[181] What makes force undesirable is the lack of consent,[182] and it is the failure of consent that sets the rape victim (and hence the adequately provoked killer) in the frame of mind that leads to a reasonable heat of passion.

Unfortunately, an inquiry into consent in cases of sexual misrepresentation is problematic because the presence of deception prevents one from knowing whether consent would have occurred in its absence. Thus, the relevant question is: If the victim/killer had known the facts, would the victim/killer have consented? In other words, the issue becomes whether the deception concealed a fact reasonably material to consent.[183]

The role of materiality to consent also may be seen (though to a lesser extent) in adultery theory. The importance of this materiality has less to do

180. WILLIAM BLACKSTONE, 4 COMMENTARIES *210 (emphasis added).

181. *See, e.g.*, Thomas Stuttaford & Suzi Godson, *In Spanking Form*, THE TIMES (London), Mar. 13, 2004, at 22.

182. This has led many to argue that nonconsensuality is the essence of rape. *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX 99 (1998). Schulhofer notes that "the central value to be protected is . . . the freedom of every person to decide whether and when to engage in sexual relations." *Id.* at 99. *See generally* DAVID ARCHARD, SEXUAL CONSENT (1998); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS (2003); Lois Pineau, *Date Rape: A Feminist Analysis*, *in* DATE RAPE 1 (Leslie Francis ed., 1996). Note, however, that we are interested not in what constitutes rape, but in what about rape constitutes an adequate provocation.

There are additional reasons why the presence of force does not necessarily imply adequate provocation. First, it is an equivocation to suggest that actual force is a rape requirement. Rape doctrine allows *constructive* force to replace *actual* force. Rape by fraud and rape by coercion are two examples of this. *See supra* Part II.A. Therefore, if force is not an absolute requirement for rape, neither should it be an absolute requirement for adequate provocation. Second, to the extent that force is an important element of rape, force is primarily an evidentiary element. *See, e.g.*, MACNAMARA & SAGARIN, *supra* note 148, at 35–38 (noting the evidentiary usefulness of the force/resistance requirement). This evidentiary need is not present with respect to adequate provocation.

183. Some scholars have suggested that materiality to consent is a way for the law to delineate between rape and consensual sex in cases of rape by fraud and rape by coercion. *See, e.g.*, Falk, *supra* note 73, at 166–68. Others have suggested that a reason rape doctrine does not use materiality to consent is the "desire to avoid the difficult task of choosing which lies will be treated as material and which will be dismissed as insignificant." *Id.* at 167 (quoting Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 833 (1988)).

with the formal contractual arrangement we know as marriage; rather, it has to do with marital fidelity as a fundamental expectation between the spouses, that when violated, can produce a reasonable heat of passion. In other words, fidelity matters quite a lot to the marital relationship, and a breach of fidelity can result in adequate provocation. Materiality to consent serves a similar function in the sexual misrepresentation context, since it separates mundane deceptions from those more likely to cause a reasonable heat of passion.

The final prong of the proposed sexual misrepresentation test provides an essential nexus between the sexual misrepresentation and the role it plays in bringing about a reasonable heat of passion, requiring that the deceit be likely to cause a reasonable person a severe mental or emotional crisis upon discovery. This prong reflects the MPC formulation of EED, a defense analogous to the common law provocation defense.[184] EED cannot be asserted without showing an "extreme mental or emotional disturbance,"[185] nor can sexual misrepresentation be asserted without a deceit likely to cause a reasonable person a severe mental or emotional crisis.

B. Sexual Misrepresentation as Doctrinally Sound, Culturally Responsive, and Normatively Responsible

Having proposed a definition of sexual misrepresentation, we now pause to note the role of the reasonableness requirement in the sexual misrepresentation defense. The reasonableness requirement runs through all three prongs of the sexual misrepresentation theory. Recall that, on the theory being advanced, a sexual misrepresentation is adequate provocation when (1) the defendant engaged in an act, sexual in nature, while in a *reasonably* deceived state of mind; (2) concerning a fact *reasonably* material to consent; and (3) which would be likely to cause a *reasonable* person a severe mental or emotional crisis upon discovery. Requiring an objectively reasonable showing on each of these prongs satisfies the underlying rationales for the provocation defense as a cultural defense based on reasonableness notions. Notably, the reasonableness limitation favors responsiveness to cultural norms while keeping in mind the necessity of normative responsibility.

The reasonableness limitation ensures cultural responsiveness. What culture views as an acceptable precipitate for anger changes over time.[186]

184. See discussion *supra* note 27.
185. MODEL PENAL CODE § 210.3(1)(b) (1962).
186. *See, e.g.*, LAFAVE, *supra* note 12, § 15.2(b), at 777.

The reasonableness limitation ensures that the sexual misrepresentation theory remains culturally responsive by leaving in the hands of the jury the judgment as to the reasonableness of being deceived, the reasonableness of the materiality of consent, and the reasonableness of the resulting heat of passion.[187]

On the dangers of detaching a provocation theory from its culturally based rationale, consider the sudden discovery of adultery. Adultery serves as per se adequate provocation.[188] Thus, it nicely illustrates a defense that is both deeply ingrained in the law and fiercely criticized for being out of step with the normatively desirable social goal of protecting women from abusive husbands.[189] Further, as cultural norms continue to shift away from condemnation of adultery,[190] it arguably will become less and less reasonable to fly into a rage on discovery of adultery. The problem with adultery theory is that it fails to allow discretion for the jury to consider explicitly whether times have changed, making a heat of passion less reasonable under the given circumstances.

One might also inquire what affect the reasonableness requirement might have on sexual identity cases, where many of the underlying issues are hotly debated in political, religious, and social circles.[191] As with any intense debate, how the future might resolve the debate is difficult, if not impossible, to foretell. But the strength of the reasonableness requirement is that it does not require the law to forecast the result of the debate.

One of the strengths of the reasonableness requirement, however, may also contribute to a perceived weakness. Tying adequate provocation so closely to the reasonable person arguably forgoes an opportunity for the law to make a normative statement about what kinds of behaviors are acceptable, particularly with respect to the sexual identity cases. In the case of sexual identity misrepresentation, one might argue a sexual misrepresentation defense leaves transgenders (and perhaps even homosexuals) in a double bind. Society seems to encourage transgenders to assume a place in the

187. *See supra* Part I.B.

188. *See* Girouard v. State, 583 A.2d 718, 721 (Md. Ct. App. 1991).

189. *Compare* discussion *supra* notes 110–119 and accompanying text.

190. *See, e.g.*, Renshon, *supra* note 114. Public attitudes may not only shift away from disapproval of adultery, but also towards a less inclusive view of what adultery is, suggesting that some forms of extramarital sexual behavior are less objectionable. *Cf. In re* Blanchflower, 834 A.2d 1010, 1111 (N.H. 2003) (holding that the same-sex relationship of the wife did not constitute adultery, because adultery requires sexual intercourse between persons of the opposite gender, *discussed in* Posting of Eugene Volokh to The Volokh Conspiracy Blog, *at* http://volokh.com/2003_11_02_volokh_archive.html (Nov. 7, 2003)).

191. *Cf.* Pew Research Center, *supra* note 148, at 5, relating that the subject receives significant attention "from the pulpit," and noting that the public opinion of gays and lesbians is fractured on regional, gender, age, ethnicity, education, and geographic lines.

generally accepted binary gender/sex role universe.[192] To meet this requirement, there is pressure to conform that sometimes results in sexual identity misrepresentation in the first place. On the other hand, the provocation defense is based on culturally acceptable standards of behavior. After implicitly encouraging the initial sexual identity deception, it seems that society turns around and condemns the deception by allowing the provocation defense. Thus, it seems unjust to allow sexual identity cases to serve as adequate provocation.

This criticism is particularly difficult to dispose of, not because of its specific application against the sexual misrepresentation theory, but rather because it questions the rationale underlying the provocation defense more generally. The provocation defense takes compassion on the human frailties that cause some to kill in anger, but in so doing, the defense inevitably makes cultural judgments about what may elicit a reasonable heat of passion.

Because of the broader reach of the normative critique, and because this Comment accepts the provocation defense as a legitimate creation of the criminal law, the resolution of this criticism goes somewhat beyond the scope of this Comment. Nevertheless, a serious treatment of the provocation doctrine requires equitable handling of like cases. Ultimately, maintaining a reasonableness standard seems the only way for the provocation defense to be both internally coherent and consistent with its rationale as a culturally driven partial excuse. For the law to engage in a selective normative assessment would deny a partial defense to one whose culpability is the same as another who killed on adequate, but different, provocation.

Finally, leaving the assessment of reasonableness to the jury ensures that, as the normative debate carries on, verdicts will reflect the progress of the debate.[193] Thus, even if changes in how people view deception "contribute[ ]

192. The most overt pressures to conform to binary expectations operate against transitioning transgenders. *See, e.g.*, Brett Genny Beemyn, *Transgender Issues in Education*, GLBTQ: AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER AND QUEER CULTURE, http://www.glbtq.com/social-sciences/transgender_issues_education.html (last visited Jan. 9, 2006) (detailing, among other things, violence against transgendered students, and the lacking institutional response to transgender issues like transitioning).

193. Some evidence suggests that the public may grow less likely to accept some kinds of sexual identity deceptions as adequate provocation. Evidence shows that young people under the age of twenty-five "have more favorable views of homosexuals than do older people," suggesting a trend toward more acceptance. Pew Research Center, *supra* note 148, at 4. Moreover, between 1985 and 2003, the number of people believing that sexual orientation is an innate characteristic that cannot be changed increased from 20 percent to 30 percent. *Id.* at 7. This suggests that it may become less reasonable to argue that a sexual identity misrepresentation caused a crisis concerning one's own sexual identity, since more and more people seem to believe that sexual orientation cannot be changed.

to the public's wavering in opinion about the wrongs of lying,"[194] the sexual misrepresentation theory will be able to adjust and account for those changes, and will allow society to decide whether a defendant's actions can be understood in "terms that arouse sympathy in the ordinary citizen."[195]

V. APPLYING THE INTEGRATED APPROACH TO THE CASES

With the proper sexual misrepresentation test laid out, we now will apply the sexual misrepresentation defense to a set of test cases. Thus, we evaluate the *Araujo* case, two sexual health cases, and two adultery cases to determine the considerations that sexual misrepresentation can raise.

A. Sexual Identity Cases

Recall the case of Gwen Araujo, the transgender teen found beaten and strangled to death after her sexual partners discovered that she had a penis. The Araujo case is interesting because the facts raise an issue regarding whether the defendants were reasonably deceived concerning Araujo's male-to-woman transgender status. The facts suggest that Araujo's killers were reasonably deceived,[196] but they are not conclusive. One of the defendants testified under a plea bargain that the defendants had been suspicious of Araujo because of his high cheek bones, "scratchy" voice, and willingness to engage only in certain kinds of sexual behavior.[197] If Araujo's high cheek bones and scratchy voice were enough to trigger a reasonable conclusion that Araujo was a male, then the killers probably were not reasonably deceived. However, if these attributes were insufficient, then Araujo's killers probably were not reasonably deceived. Either way, Araujo's unwillingness to engage in certain sexual behaviors merely would be a factor that contributed to discovery of the deception and not to the reasonableness of the deception, because Araujo's unwillingness was only noted after having engaged in the sexual act.

194. SERBAN, *supra* note 150, at 3.

195. MODEL PENAL CODE § 210.3 cmt. (Official Draft and Revised Comments 1980).

196. *See, e.g.*, Reiterman et al., *supra* note 69 (quoting Paul Merel as saying that he "never saw anything to indicate that [Araujo] could possibly be a man").

197. *See, e.g.*, Ivan Delventhal, *Jury Deadlocks in Deliberations*, TRI-VALLEY HERALD (Pleasanton), June 23, 2004 ("[The] men's suspicions were fueled by Araujo's prominent cheekbones and scratchy voice, and the fact that the teen had engaged only in anal and oral sex with the men."); *see also* Haddock, *supra* note 2 (reporting that Araujo did not let the men touch her genitalia during sex).

A second issue raised by the *Araujo* case is whether discovery of her deception was likely to cause a reasonable person a severe mental or emotional crisis. Note some factors a jury might consider: For example, a jury could consider whether it is reasonable to believe that one's own sexual identity can be harmed by homosexual sex when one actually prefers heterosexual sex. At a higher level of abstraction, a jury also could consider the overall level of intimacy between the partners (trust, love, and so on), and the degree to which that intimacy would be affected by discovery of the misrepresentation. Whatever the answers currently might be, they are likely to change over time. However, because the inquiry is decoupled from an explicit recognition of sexual identity as adequate provocation, sexual misrepresentation doctrine is free to change with social mores.

B. Sexual Health Cases

We now return to *Chattmon v. State*, and *Commonwealth v. Groome*. In *Chattmon*, the defendant beat the victim to death after hearing that she had AIDS. In *Groome*, on hearing that the victim had HIV and herpes, the defendant stabbed her approximately fifteen times. An important issue raised by these cases is materiality to consent. In sexual health cases, consent is not merely a yes or no proposition, since many STDs can be prevented by using protection or engaging in limited sexual activity. Thus, the main issue presented by sexual health cases is whether a reasonable person with knowledge of the facts would have consented to another form of the sexual activity, or whether a reasonable person would have withdrawn consent outright. In *Chattmon*, the facts suggest that the deception was reasonably material to consent. The sexual relationship seemed casual—Chattmon gave Pierce drugs in exchange for sex.[198] Further, the potential STD—HIV—is a very serious one, even though it cannot be contracted easily through oral sex. Given the high risk and the low emotional payoff of the sexual activity, it seems likely that Chattmon would reasonably have foregone the oral sex if he had known the victim was HIV-positive before the act.

Groome presents a more difficult case. The defendant appeared to have an ongoing relationship with Korpela. For the sake of discussion, let us assume the relationship was relatively long and healthy. On disclosure in the context of such a relationship, one might conclude it more reasonable to alter rather than halt sexual activity. If the two were having protected sex, then the risk factor would be greatly diminished and the revelation of

198. Chattmon v. State, No. 05-93-01605-CR, 1996 Tex. App. LEXIS 1329, at *2 (Apr. 4, 1996).

HIV-positive status might not be reasonably material to consent to the sexual act. On the other hand, one might argue that even if protected sex were a foolproof solution, the discovery of a partner's HIV-positive status might imply infidelity in the relationship. In this case, a potential infidelity likely would be material to sexual consent.

The double meaning inherent in the revelation of a sexual health misrepresentation also has an impact on whether the discovery of the deception likely would cause a reasonable person a severe mental or emotional crisis. In *Groome*, under a theory of sexual misrepresentation, the defendant could rely on a history of intimacy to fortify his position that the STD revelation betrayed both his trust in the victim's faithfulness to the relationship and his trust in her regard for his health and safety. The *Chattmon* case raises these issues less strongly, because the level of intimacy was low. Therefore, it presents a less reasonable expectation of absolute truthfulness in the relationship. Even though *Chattmon* might reasonably be angry at Pierce's disregard for his safety, he would not be able to claim that he was upset because of her unfaithfulness.

C. Adultery Cases

The adultery cases raise two important issues for the sexual misrepresentation framework. First, they bring up the connection between the timing of the sexual act and the beginning of the adultery. Recall *Rowland v. State*, where the defendant and his wife, Becky, lived separately for unknown reasons. They "were on good terms, and he was in the habit of visiting her and staying one night with her each week, or every two weeks."[199] Although he was not often home, the two appeared to be intimate regularly.

The problem in *Rowland* comes in determining whether the defendant engaged in a sexual act while deceived about his wife's fidelity. Depending on how long the two were apart, Becky may have begun her affair after the last time the two were intimate. If this were the case, Rowland would lose his adequate provocation claim because he never had sex with her while deceived regarding her fidelity. In the context of mutual separation or abandonment, this might seem the right result. But what about any instance when the two were apart for business, financial, or other reasons? It would seem perverse, for example, to hold that one has no right to expect loyalty from one's spouse if away on business for a long time. The answer in such cases is to accord a presumption of uninterrupted intimacy in committed

199. Rowland v. State, 35 So. 826, 826–27 (Miss. 1904).

sexual relationships. Thus, in *Rowland*, that the two were in a committed sexual relationship (marriage) would accord the killer a presumption that the sexual nature of the relationship was uninterrupted. However, this presumption could be overcome by showing that the sexual relationship was in fact severed at a point prior to the discovery of adultery.

A second important point is how the sexual misrepresentation framework dovetails with existing adultery doctrine. In *People v. Gingell*,[200] the defendant and his wife, Ramsey, married and moved to Los Angeles.[201] Because they were low on money, Ramsey went ahead to Los Angeles first, with Gingell following a few months later.[202] When Gingell arrived, "[h]e had heard rumors that his wife was attending parties and going out with other men."[203] Because he only had enough money for an apartment for himself, however, Ramsey continued to live with a friend.[204] Being suspicious, Gingell began spying on Ramsey and on one occasion observed a man, Sigurd Bjorneby, leaving the apartment.[205] Some time later, Gingell let himself into the apartment and discovered Ramsey in bed with Bjorneby.[206] Gingell shot and killed them both.[207] At trial, he was convicted of first degree murder.[208]

Gingell and *Rowland* offer a nice juxtaposition because they illustrate how the "reasonably deceived state of mind" standard in sexual misrepresentation would apply to the discovery of adultery. In *Gingell*, the evidence suggests that it would be unreasonable to be deceived, since it was clear that Ramsey was "going out with other men" and Gingell personally observed a man leaving her apartment. While a reasonable person might not conclude from this evidence that one's spouse was committing adultery, the evidence certainly suggests that something was amiss. Note that the result reached by the sexual misrepresentation test is in keeping with the actual result reached under an adultery theory. Under the adultery test, the jury in *Gingell* determined that the discovery of adultery was not sudden and therefore was not adequate provocation. Under a sexual misrepresentation test, the jury also would not find adequate provocation because Gingell was not reasonably deceived regarding his wife's fidelity.

200. People v. Gingell, 296 P. 70 (Cal. 1931).
201. *Id.*
202. *Id.*
203. *Id.* at 70–71.
204. *Id.* at 70.
205. *Id.* at 71.
206. *Id.*
207. *Id.*
208. *Id.* at 70 (upholding the murder conviction).

CONCLUSION

The criminal law lacks a unified analytical approach to provocation cases involving sexual misrepresentation. Currently, the provocation defense applies a patchwork solution to cases involving sexual misrepresentation. What is more, in cases involving the same basic provocation—sexual misrepresentation—the law fails even to acknowledge the role of deception in bringing about a reasonable heat of passion. Instead, the law continues to recognize adultery as an adequate provocation per se, even as changing times and mores erode some of the basic rationales for the defense. Additionally, sexual health cases languish almost completely unaddressed by the criminal law, while HPD provides a one-dimensional, underinclusive effort in cases involving sexual identity. Unfortunately, this ad hoc approach leaves much to be desired, both doctrinally and normatively.

Applying sexual misrepresentation doctrine to cases of sexual orientation, sexual health, and adultery deception presents a way for the criminal law to unify and improve upon its treatment of provocations involving sexual misrepresentations. As we have seen, a serious sexual misrepresentation can result in complex, interdependent negative emotions that culminate in a reasonable heat of passion. Sexual misrepresentation is a theory that incorporates existing theories of provocation law while updating the rationale behind them to reflect more clearly existing cultural norms concerning deception in intimate relationship. Further, sexual misrepresentation provides a way to restore balance to adultery cases by using reasonable deception as a requirement to distinguish between those cases that constitute adequate provocation, and those that do not. Finally, since sexual misrepresentation relies on a cultural interpretation of what is likely to cause a reasonable person a severe mental or emotional crisis upon discovery, sexual misrepresentation provides a framework for analysis that will remain relevant even as society changes. This flexibility allows the provocation defense to remain relevant, keeping the provocation question focused where it should be: on "whether the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen."[209]

209. MODEL PENAL CODE § 210.3 cmt. (Official Draft and Revised Comments 1980).

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