

## Erotic Entitlements Part I: A Reply to *Sex Therapy in the Age of Viagra: "Money Can't Buy Me Love"*

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### I.

This is the first of three inquiries into what might be thought of as erotic entitlement. It explores the role of the erotic in regulatory and distributive regimes.<sup>1</sup> Conceived as a reply to Susan Stiritz and Susan

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1. My usage may recall for some readers Ratna Kapur's term "erotic justice." In her 2006 collection of essays, Kapur uses postcolonial feminist methodologies to launch a critique of how Western feminism collaborates with law and liberalism. She focuses on "sexual subaltern subjects"—sex workers, homosexuals, and transnational migrant workers—each of whom threatens the hegemonic operation of law and the nation state. By erotic justice, Kapur then means to describe both the *impossibility* of justice for sexual subaltern subjects under the conventional liberal rights regime and also to reject the regime's underlying norms and imperatives in favor of a discursive space "that would bring erotically stigmatized communities . . . into an inclusive conversation." RATNA KAPUR, *EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM* (2005); see also Ryan Charles Gaglio, Book Note, *Ratna Kapur's Erotic Justice: Law and the New Politics of Postcolonialism*, 17 *YALE J.L. & FEMINISM* 517, 524 (2005) (praising Kapur's "focus[] on the law as a discursive site of conflict," but criticizing her failure "to offer any sustainable alternative theoretical or political way to understand the problems affecting subaltern third-world women and impeding the realization of greater justice" and suggesting her book would have benefited had she "remain[ed] in the realm of politics and law for long[er]"); Alpina Roy, *Erotic Justice: Law and the New Politics of Postcolonialism* by Ratna Kapur, 27 *SYDNEY L. REV.* 589 (2005) (book review) (praising Kapur's use of postmodern and postcolonial methodologies to conceptualize the "sexual subaltern subject" and counter the "liberal positivist position").

Another use of erotic justice comes from Marvin Ellison's 1996 monograph on crafting an ethics of sexual-wellbeing. MARVIN M. ELLISON, *EROTIC JUSTICE: A LIBERATING ETHIC OF SEXUALITY* (1996). Ellison criticizes conservative ideology for its punitive and repressive stance towards sexuality, or what he calls "erotophobia," which it uses to "mobilize and also distract people from criticizing the capitalist economic system." *Id.* at 6. While liberalism

Appleton's provocative and rich essay *Sex Therapy in the Age of Viagra*, it starts by summarizing the innovations of their argument.<sup>2</sup> It next uses their paper to pose some questions. First, in this time of contentious feminist, constitutional, and human rights sexual discourse, how is the erotic defined? How is the erotic related to and distinct from desire, the sexual, and even the pornographic? Second, are men's and women's erotic interests aligned? And relatedly, does erotic interest differ according to orientation? Finally, is there a "right" to an erotic life? If so, how is such an entitlement best construed—as right, justice, or capability? This short Essay is the first step toward answering these questions, which will be subsequently taken up in two forthcoming essays.<sup>3</sup>

## II.

In *Sex Therapy in the Age of Viagra*, Susan Stiritz and Susan Appleton set out to document the complex set of forces that transformed 1960s sex therapy into "the little blue pill."<sup>4</sup> Their paper offers a sweeping narrative of sexuality that includes critiques of medical uses of vibrators in the early twentieth century, comparisons between the space race and sexology, and psychoanalysis of the

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would seem to be more promising, Ellison faults its juridical vision of power and its underlying dichotomies of the public/private and rationality/emotion as inadequate to yielding the robust vision of sexual justice he seeks. Like Kapur, Marvin Ellison's inquiry into erotic justice is, at bottom, a critique of liberalism. However, unlike Kapur, who turns to literary and cultural studies to find a discursive erotic justice, Ellison theorizes it from the philosophical perspective of sexual well-being.

Both of these uses of erotic justice are rich and each, in its own way, substantially advances the discourse on erotics and justice. My use of erotic entitlement, however, is quite different. As described in Section III, by erotic entitlement I mean to suggest how sexuality might be conceived within distributive regimes of justice.

2. Susan Ekberg Stiritz & Susan Frelich Appleton, *Sex Therapy in the Age of Viagra: "Money Can't Buy Me Love,"* 35 WASH. U. J.L. & POL'Y 363 (2011).

3. Adrienne D. Davis, *Erotic Entitlements II: The Limits of Market Metaphors: A Review Essay of Siobhan Brooks' Unequal Desires: Race and Erotic Capital in the Stripping Industry*, 31 PACE L. REV. (forthcoming 2011) [hereinafter Davis, *Erotic Entitlements II*] (contending genealogy, innovations, and unintended consequences of term "erotic capital"); Adrienne D. Davis, *Erotic Entitlements III: A Reply to Libby Adler's Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, 46 HARV. C.R.-C.L. L. REV. (forthcoming 2011) [hereinafter Davis, *Erotic Entitlements III*] (showing how black queer theory is consonant with legal distributive analyses).

4. Stiritz & Appleton, *supra* note 2, at 417.

American imaginary. But at bottom lies the story of how the sex therapy developed by William Masters and Virginia Johnson was eclipsed by pharmacological approaches to sexual dysfunction. Part review essay, part biography, part cultural survey, their article uses a recent book on Masters and Johnson as a launching pad to contrast the “cultural moments” that gave rise to Masters and Johnson’s sex therapy innovations and, thirty years later, to the rise of Viagra.<sup>5</sup> In the process, Stiritz and Appleton document a fascinating story of one “struggle over gendered meanings of sex, intimacy, and power.”<sup>6</sup>

For those for whom Masters and Johnson recall only a vague association with sexology, indistinguishable perhaps from Kinsey or Hite, *Sex Therapy in the Age of Viagra* is a wonderful review essay of a recent extensive biography of the therapists.<sup>7</sup> The essay recounts how Masters and Johnson’s behavioral approaches to sexual dysfunction displaced the psychoanalytic frameworks that had dominated the first half of the twentieth century, which produced a much higher cure rate for sexual dysfunction, 80 percent versus 20 percent. As part of this, Stiritz and Appleton emphasize Masters and Johnson’s rejection of the vaginal orgasm and the therapists’ identification of the clitoris and its role in women’s “sexual prowess,”<sup>8</sup> which the authors have also explored in other work.<sup>9</sup> At the same time, Stiritz and Appleton emphasize the parallel story of Virginia Johnson herself, lauding the biographer Thomas Maier for “detail[ing] for the first time the major role [she] played in the founding of contemporary sex therapy.”<sup>10</sup> In this sense, biography parallels biology in that women, and their pleasure, frequently become invisible.

However, Stiritz and Appleton mainly use Maier’s biography to sketch how Masters and Johnson’s therapeutic approaches

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5. *Id.* at 374–89.

6. *Id.* at 366.

7. See THOMAS MAIER, MASTERS OF SEX: THE LIFE AND TIMES OF WILLIAM MASTERS AND VIRGINIA JOHNSON, THE COUPLE WHO TAUGHT AMERICA HOW TO LOVE (2009).

8. Stiritz & Appleton, *supra* note 2, at 377.

9. See, e.g., Susan Ekberg Stiritz, *Cultural Cliteracy: Exposing the Contexts of Women’s Not Coming*, 23 BERKELEY J. GENDER L. & JUST. 243 (2008); Susan F. Appleton, *Toward a “Culturally Cliterate” Family Law?*, 23 BERKELEY J. GENDER L. & JUST. 267 (2008).

10. Stiritz & Appleton, *supra* note 2, at 367.

established a new sexual “frontier,” one that they contrast with our subsequent “age of Viagra.”<sup>11</sup> Stiritz and Appleton explore the regulatory and cultural contexts that gave rise to these different protocols for treating sexual dysfunction. They speculate that Masters and Johnson’s therapeutic innovations, initiated at Washington University’s School of Medicine, might not have occurred in the contemporary regulatory context. Unlike Masters and Johnson’s era, today’s regulatory climate boasts dramatic restrictions on scholarly freedom, ever more complex academic hierarchies, intellectual property regimes that are less favorable to individual researchers, and increased expectations that faculty seek grants and for-profit partnerships, particularly in the sciences and medicine, Masters’s home discipline. Our regulatory context today, though, is a perfect breeding ground for pharmacological protocols, such as Viagra, to take root and thrive, eclipsing behavioral sex therapy. The cultural context, too, has shifted. Against the accessibility of and institutional support for Viagra, which is widely prescribed by general practitioners and therapists alike and enjoys insurance and Medicaid coverage, Stiritz and Appleton contrast the increasing fragility of reproductive rights, which allow women to disaggregate reproduction from sexual pleasure. They also draw intriguing links to the uneven constitutional protection for sex toys, which “facilitate the clitoral stimulation that Masters and Johnson identified as so important for women’s sexual pleasure.”<sup>12</sup>

Most intriguingly, though, *Sex Therapy in the Age of Viagra* finds the seeds of Viagra’s success in Masters and Johnson’s own discoveries. Masters and Johnson’s research, Stiritz and Appleton contend, spawned two contradictory findings. On the one hand, the therapists showed that “female sexual response was significantly more robust and abundant than male sexual capacity,” a finding that could have created new “sexual scripts,” in which clitoral stimulation not only understudied but shared center stage with penetration by the fragile and unreliable penis.<sup>13</sup> But Stiritz and Appleton document

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11. *Id.* at 363.

12. *Id.* at 387.

13. As a reader, I wish Stiritz and Appleton had said more about these new “scripts” and how they might challenge gender roles, and perhaps more broadly, the heteronormativity of

how the therapists fled from their own findings. Masters and Johnson instead organized their therapy around the idea of a universal “human sexual response cycle,” which continued to privilege penis penetration and mandated simultaneous coital orgasm for both parties.<sup>14</sup> Divergences from this cycle were “not diversity but pathology.”<sup>15</sup> Ironically then, Masters and Johnson’s findings about women’s capacity for protracted sexual pleasure and multiple orgasms *combined with their insistence on the universal sexual response cycle* actually fueled the coital imperative, generating new norms that penises should match clitorises point for point and remain the organ in charge. Stiritz and Appleton note that, by labeling other sexual responses as inadequate, the therapists actually further normalized heterodyadic, penetrative sex, which in turn, ironically, increased men’s “performance anxiety.”<sup>16</sup> Enter Viagra, which “promised to re-establish the penis as the reliably powerful hegemonic sexual organ it had previously been.”<sup>17</sup> Hence, one of the contributions of Stiritz and Appleton’s paper is to reveal how Masters and Johnson’s therapeutic innovations had an internal split, which gave rise to a “clash of standpoints” and “contradictory sex therapies” based on different gender scripts and sexual politics.<sup>18</sup>

This then leads to the fascinating concluding section of their paper. Sex therapies, they believe, “reflect[] a normative vision of sex,” which they explore through three fantasies.<sup>19</sup> Fantasy, as conventionally understood, “represents a bridge between reality and

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much sex therapy. They explain that despite the emerging understanding of the sexual potential of the clitoris, which could have led to all kinds of new “sexual practices,” when sexual dysfunction entered the *Diagnostic and Statistical Manual* in 1980, clitorises were ignored. Instead, the penis “remained at the center of approved sexual scripts.” *Id.* at 412–13.

14. *Id.* at 410–12.

15. *Id.* at 412.

16. *Id.* at 407. I use the term heterodyadic to describe the current marital regime, in which most states, and the federal government, recognize only marriages among heterosexual couples, deeming same-sex and contemporaneous polygamous unions illegitimate. Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (contending that, while the analogy between gay marriage and polygamy is inapt, polygamy could be effectively regulated, and adapting commercial partnership norms to do so).

17. Stiritz & Appleton, *supra* note 2, at 413.

18. *Id.* at 366.

19. *Id.* at 418.

something either desired or feared.”<sup>20</sup> Stiritz and Appleton invoke collective American fantasies about sex, which they argue “inspire[] . . . public priorities” about policies ranging from sex toys to insurance coverage to reproductive rights.<sup>21</sup> Their paper identifies three fantasies that shape how we think about sexuality. First, there was the sexual fantasy ascendant when Masters and Johnson were working.<sup>22</sup> Stiritz and Appleton refer to this as the “fusional” fantasy of sex, which emphasizes how the “quality of the couple’s relationship play[s] out in their sexual interactions.”<sup>23</sup> In the fusional fantasy, couples “strive for emotional intimacy” and “eternally egalitarian love and partnership.”<sup>24</sup> (In fact, the so-called fusional fantasy might have been called “egalitarian” or “mutual.” It certainly has what they characterize as a fusional component, that is “hyper-secure attachment” and “dissolving of personal boundaries,” but seems to emphasize even more the reciprocal, mutual, relational aspects of sex.<sup>25</sup>)

The other two fantasies, clitoral and phallic, are both about power. However they manifest power in opposite ways. The clitoral fantasy empowers women in some part as non-reproductive sex that “does not conflict with women’s autonomy.”<sup>26</sup> But beyond that, the clitoral fantasy encourages both, or all, parties, regardless of gender, to express themselves and negotiate with others for mutual pleasure and joy. With its emphasis on non-procreative sex and individual, but non-dominating pleasure, the clitoral fantasy is “all about self, empowerment, acceptance of limitations, and perhaps the joy of being recognized by another and having one’s sexual desires validated as legitimate.”<sup>27</sup> In contrast, the phallic fantasy is about dominating power, envisioning a hierarchy within sexual coupling in which men dominate women. Unlike the clitoral fantasy, the phallic

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20. *Id.* at 389.

21. *Id.* at 365.

22. *Id.* at 394.

23. *Id.*

24. *Id.* at 394–95.

25. *Id.* at 394. In fact, they refer to Carol Gilligan’s work on how gender shapes visions of care, interactions, and relationships. *See id.* at 377.

26. *Id.* at 400.

27. *Id.* at 407.

fantasy links sex to power, but in the process arranges not only sex, but relationships, hierarchically. It idealizes not just dominance, but “exploitation.”<sup>28</sup> It is this fantasy Stiritz and Appleton describe as culturally hegemonic. As they noted earlier, Viagra “triumphs” over other forms of therapy for sexual dysfunction, including conjoint sex therapy.<sup>29</sup> Similarly, “[w]hen we connect each type of fantasy to a different sex therapy and thus to a different vision of sexual pleasure, the triumph of Viagra over conjoint and feminist therapies emerges as the triumph of phallic over fusional and clitoral fantasies.”<sup>30</sup>

Although their paper presents these three fantasies descriptively, Stiritz and Appleton clearly have a preference. They characterize the clitoral fantasy as superior to the other two, describing it as psychoanalytically “mature” because of its emphasis on both self-recognition and negotiation with others.<sup>31</sup> In contrast, both the fusional and phallic fantasies remain developmentally “immature.”<sup>32</sup> The fusional fantasy is lacking because of its aspirations for “perfect mutuality uninterrupted by conflict” and “its inability to let go of the all-good ideal.”<sup>33</sup> While fusional fantasy may resonate with elements of Second-Wave feminism, to Stiritz and Appleton it remains an inferior vision of sexual pleasure.

Particularly in their crosshairs is the phallic fantasy. They maintain that “Viagra has trumped a feminist program that could have expanded gender equality by inviting people to engage in mutual, communicative, and reciprocal interactions or to accord more attention and legitimacy to the clitoris.”<sup>34</sup> Their paper refers to the “insidious power of Viagra” and indicts the drug for “[f]ortifying phallic power rather than creating equality-producing interpersonal

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28. *Id.* at 408.

29. *Id.* at 373, 414.

30. *Id.* at 391–92.

31. “Clitoral fantasy eschews the idealization of wordless fusion in favor of a more realistic understanding that, when two (or more) individuals engage in a sexual interaction, they must negotiate to maximize their pleasure, and they must also accept imperfection.” *Id.* at 400–01.

32. Of the fusional they say, “[I]ts inability to let go of the all-good ideal marks this fantasy as immature.” *Id.* at 400. Similarly, the phallic fantasy “reflects immaturity under Klein’s approach.” *Id.* at 408.

33. *Id.* at 400.

34. *Id.* at 419.

mutuality or celebrating clitoral pleasure.”<sup>35</sup> Squarely in their crosshairs is the pharmaceutical industry, which “*opportunistically* decided to launch the drug as a pharmaceutical sex therapy.”<sup>36</sup> As noted above, Stiritz and Appleton join others who have commented on how insurance coverage of Viagra but exclusion of birth control and sex therapy comprise discrimination. However, beyond that, Viagra then “naturalizes the hierarchy embodied in phallic fantasy.”<sup>37</sup> Indeed, for Stiritz and Appleton, not only does Viagra trump the other fantasies, but it also is emblematic of neoliberalism, with its emphasis on the individual and corporate profits.<sup>38</sup> Finally, Stiritz and Appleton contend that Viagra manifests Foucault’s notion of bio-power, in which pleasure replaces fear, desire replaces violence, and consumption reigns supreme.<sup>39</sup>

### III.

*Sex Therapy in the Age of Viagra* is an enticing read. As noted at the beginning of this paper, it draws sweeping connections between legal regimes and other institutions that regulate seemingly disparate areas of our lives. Connecting all of these through the lens of sexuality, Stiritz and Appleton make some fascinating and pointed observations about collective national fantasies and the gender scripts and sexual politics they support and challenge. In the process, their article also raises some fascinating questions, which Stiritz and Appleton may not have intended or anticipated. It is to these to which I will now turn my attention.

Their paper raises a question that has emerged as central to feminism: what is erotic? Stiritz and Appleton reference Audre Lorde, whose essay *The Uses of the Erotic* has emerged as foundational in feminist theorizing about sex.<sup>40</sup> Her phrase, “The

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35. *Id.* at 414, 417.

36. *Id.* at 372–73 (emphasis added).

37. *Id.* at 419.

38. *Id.* at 365 (“Our analysis of the triumph of Viagra and its implications for sexual relationships turns out to have much in common with critiques of today’s prevailing neoliberal ideology and its implications for increasingly oppressive national and global politics.”).

39. *Id.* at 417–18.

40. AUDRE LORDE, *The Uses of the Erotic: The Erotic as Power*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 53 (1981).



erotic is a resource within each of us that lies in a deeply female and spiritual plane, firmly rooted in the power of our unexpressed or unrecognized feeling,”<sup>41</sup> is widely quoted, including in *Sex Therapy in the Age of Viagra*.<sup>42</sup> In their own invocation, Stiritz and Appleton use Lorde’s quotation to suggest that her view of the erotic resonates with their first fantasy, the fusional view of sex.<sup>43</sup> Famously, Lorde’s essay bifurcates the erotic from the pornographic, contending that “pornography is a direct denial of the power of the erotic, for it represents the suppression of true feeling” and concluding “[p]ornography emphasizes sensation without feeling.”<sup>44</sup> Although Lorde’s essay is recuperative of the erotic, seeking to reclaim and redeem it for women as a source of power and knowledge, it remains intriguingly abstract.<sup>45</sup> The erotic is a “measure between the beginnings of our sense self and the chaos of our strongest feelings,” an “internal sense of satisfaction,” an antidote to “resignation, despair, self-effacement, depression, self-denial.”<sup>46</sup> Yet it has very little to say about actual bodies and their (corporeal) pleasures.

Although *The Uses of the Erotic* has become a canonical text in feminist thought, its foundational role is currently under revision by some contemporary black feminist theorists.<sup>47</sup> In her project using the

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41. *Id.* at 53.

42. Stiritz & Appleton, *supra* note 2, at 394–95 (quoting Lorde, *supra* note 40).

43. *Id.*

The “deeply female and spiritual plane” is the caregiver’s holding of the infant and reflecting back to the child unreserved love and affirmation. While masculinity prematurely splits off or limits access to this realm, femininity makes it the source and measure of all relational orientation and practices, in turn giving rise to the all-good fantasy of eternally egalitarian love and partnership.

*Id.* at 395.

44. LORDE, *supra* note 40, at 54. Elsewhere in the essay, Lorde says, “There are frequent attempts to equate pornography and eroticism, two diametrically opposed uses of the sexual.” *Id.* at 55.

45. In her words, the erotic can be a source of “power,” “knowledge,” and “information,” offering “a well of replenishing and provocative force to the woman who does not fear its revelation, nor succumb to the belief that sensation is enough.” *Id.* at 54.

46. *Id.* at 54, 58.

47. LaMonda Horton-Stallings, Funky Erotixx 13 (unpublished manuscript on file with author) (“[I]t is an introductory document that paralyzes with the enormity of its expectations and goals and awes with its discursive touch to symbolize the very thing that it speaks about: the erotic.”). Sharon Holland refers to *The Uses of the Erotic* as “the most thoroughgoing

musical genre funk to recuperate the black erotic, literary scholar LaMonda Horton-Stallings says of Lorde's essay: "I have to simultaneously accept its very cogent critique of capitalism, its awe of joy and reverence for creativity but refuse the typical ways that many feminist critics use the essay as an anti-sex document and critique of pornography alone."<sup>48</sup> She connects Lorde's essay to the writer's later *Cancer Journals*: "I believe that reevaluating *Uses of the Erotic* as part of the *Cancer Journal* conversation enables us all to connect the essay to a broader, more introspective use of sexual desire, erotica, sexual health and well-being that needs the body as much as the spirit."<sup>49</sup> But Horton-Stallings has a different vision of what she calls "black feminist eroticism."<sup>50</sup> Claiming that "black erotica is the textual embodiment of funk" leads her to question black feminist disengagement with the erotic, including Lorde's germinal essay.<sup>51</sup>

From its very inception, with the construct of the slave narrative genre, African American literary tradition has made an effort of writing itself [a]way from the body and eros. In proving the humanity of enslaved black people, the slave narrative, with few exceptions, came to represent the spiritual and intellectual value and worth of Black human beings and the sexual and moral depravity of white slave owners. Writers spoke of spiritual literacy, intellectual literacy, but never erotic literacy. But even the slave narrative contains potential moments of erotic literacy that are overwritten with the history of racialized sexuality . . . .<sup>52</sup>

Horton-Stallings tries to recuperate this "erotic literacy" as part of black sexuality and the black erotic through the lens of funk, which

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(black) feminist engagement with the erotic." SHARON HOLLAND, *THE EROTIC LIFE OF RACISM* (forthcoming 2012).

48. Horton-Stallings, *supra* note 47, at 13.

49. *Id.* at 14.

50. *Id.* at 25.

51. *Id.* at 5.

52. *Id.* at 9.

she argues resonates with queer efforts to engage subversive and non-normative sexualities.<sup>53</sup>

Literary and cultural theorist Sharon Holland expresses similar concerns. In her forthcoming book, *The Erotic Life of Racism*, Holland worries that, as “one of the most important feminist statements in the latter part of the 20th century,” Lorde’s essay “places the most visible branch of black feminist thought in direct opposition to an emerging sexuality studies.”<sup>54</sup> Connecting Lorde’s essay, first delivered in 1978, to Simone de Beauvoir’s work thirty years earlier, Holland finds that *The Uses of the Erotic* “expresses a commitment not only to the erotic but also to a *gendered* erotic; one harnessed by and for women.”<sup>55</sup> This is curious, Holland contends, because although Lorde might have taken the opportunity to forge intellectual and political allegiances between two emerging bodies of thought focused on the body, sexuality, and justice—black feminism and queer studies—“Lorde’s piece does the work of moving black feminist inquiry away from an understanding of *all* sexual minorities (perverts, prostitutes, pederasts and sex workers) as having a *collective* stake in dismantling the regulatory regime of sex law.”<sup>56</sup> In this sense, Lorde and other “*significant and visible* black feminists

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53. *Id.* at 7.

Once we understand the importance and workings of funk, it would be easy to comprehend that the sexual revolution never bypassed blacks and because we continue to live with institutional racism, white supremacy, and patriarchy, sexual revolution and sexual decolonization of the mind continue even today. Funk was already offering what queer studies still struggles to do.

*Id.* Funk also shares with queer theory an embrace of the deviant: “[B]ecause funk can be affect, mood, agency, subjectivity, adjective and action, the subjects it produces, freaks and aliens, are attempts to create a discourse of human rights, replace the nation and citizen in black liberation discourses with a more globally-oriented subject.” *Id.* at 8.

54. HOLLAND, *supra* note 47.

55. *Id.*

Beauvoir’s and Lorde’s work on the erotic is punctuated by what feminists have come to think of as essentialist claims about the “nature” of the feminine and female experience, although the new renaissance in Beauvoir studies has tried to provide a more nuanced understanding of her contributions to feminist inquiry by interrogating the charge of essentialism against her.

*Id.*

56. *Id.*

... absented themselves from a somewhat fruitful, if problematic debate about how we take our pleasure.”<sup>57</sup>

These emerging black feminist critiques suggest that “feminist erotics” remains under construction and revision. While both laud her work, Horton-Stallings and Holland still find Lorde’s essay “provides one of the first black feminist injunctions against the messy contemplation of pleasure/desire that queer theory would undertake in the next two decades.”<sup>58</sup> Similarly, Mireille Miller-Young questions the intellectual merit in “setting up the pornographic outside of productive politics for black women.”<sup>59</sup> Both Horton-Stallings and Holland call for deeper interlocution between black feminist and black queer thought, which also focused on the production and regulation of the body and produced an alternative theory of the erotic.<sup>60</sup> Leaving the erotic undefined and vague enables a vacuum to emerge, one that can easily be filled by “erotophobic” investments.<sup>61</sup>

Contemplating this question—what is erotic—raises a few questions about Stiritz and Appleton’s own erotic investments. For instance, while they clearly intend to be sex positive, endorsing sexual pleasure and encouraging the development of “new sexual scripts,” this reader detected an undertone of judgment about appropriate and inappropriate sources and stimulations for the erotic.<sup>62</sup> At times their paper seems to revert to a dominance analysis that is skeptical of heterosexual intercourse.<sup>63</sup> For instance, they refer

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57. *Id.*

58. *Id.*

59. E-mail from Mireille Miller-Young, Assistant Professor of Feminist Studies and Affiliate Assistant Professor of Black Studies, Univ. of Cal., Santa Barbara, to Adrienne D. Davis, Professor of Law, Washington Univ. Sch. of Law (Jan. 6, 2011, 09:50 CST) (on file with author); see also Mireille Miller-Young, *A Taste for Brown Sugar: Black Women, Sex Work, and Pornography* (unpublished manuscript) (on file with author) (destabilizing common understandings regarding black women who work in pornography).

60. I will be elaborating this connection in a subsequent essay. Davis, *Erotic Entitlements III*, *supra* note 3.

61. Horton-Stallings, *supra* note 47, at 26.

62. In other work, both Stiritz and Appleton have demonstrated their commitment to sex positivity. See, e.g., sources cited *supra* note 9.

63. Dominance analysis was first articulated by legal feminist Catharine MacKinnon. She summarized and rejected both of the primary extant approaches to sex equality:

approvingly to an older wife (fifty-one!) who complained that Viagra had disrupted the decreasing frequency of sex in her marriage, which she had cited as a positive trend.<sup>64</sup> Similarly, an erection, in their language, comprises “repackaged male dominance” and “male supremacy.”<sup>65</sup> References to the “insidious power of Viagra” suggest that medically enabled erections, “without benefit of counseling,” are

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The philosophy underlying the difference approach is that sex *is* a difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine is to make normative rules conform to this empirical reality by granting women access to what men have access to: to the extent that women are no different from men, we deserve what they have. The differences branch, which is generally seen as patronizing but necessary to avoid absurdity, exists to value or compensate women for what we are or have become distinctively as women (by which is meant, unlike men) under existing conditions.

CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 33 (1987) [hereinafter MACKINNON: *FEMINISM UNMODIFIED*]. In contrast, she contended that:

Gender is also a question of power, specifically of male supremacy and female subordination. The question of equality, from the standpoint of what it is going to take to get it, is at root a question of hierarchy, which—as power succeeds in constructing social perception and social reality—derivatively becomes a categorical distinction, a difference.

*Id.* at 40; *see also* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 178 (1979) (“[D]ominance and aggressiveness are found to characterize the ideal of ‘masculinity’ in general and in sexual relations. . . . A major substantive element in the social meaning of masculinity, what men learn makes them ‘a man,’ is sexual conquest of women; in turn, women’s femininity is defined in terms of acquiescence to male sexual advances.”); MACKINNON, *FEMINISM UNMODIFIED*, *supra*, at 3 (“The social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual—in fact, is sex.”); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (contrasting feminism’s account of male power through sex with Marxism’s account of class power through labor); Catharine A. MacKinnon, *Feminism, Marxism, Method and the State: An Agenda for Theory*, 8 *SIGNS* 532 (1982) (“[W]omen notice that sexual harassment looks a great deal like ordinary heterosexual initiation under conditions of gender inequality. Few women are in a position to refuse unwanted sexual initiatives. That consent rather than nonmutuality is the line between rape and intercourse further exposes the inequality in normal social expectations.”).

64. Stirtz & Appleton, *supra* note 2, at 415. The quotation is:

So here we are at that stage of our life and . . . as things are quieting down in your life and you’re . . . becoming friends and yes, there’s a closeness and a friendship and yes sex did happen occasionally but quite rarely as you’re getting older, and to me that wasn’t a major problem . . . and *all* of a sudden Viagra . . . became a main focus in the house . . . .

*Id.* (quoting Annie Potts et al., *The Downside of Viagra: Women’s Experiences and Concerns*, 25 *SOC. HEALTH & ILLNESS* 697, 708 (2003)).

65. *Id.* at 417.

illegitimate.<sup>66</sup> Legitimate (sincere?) erections, it seems, must be earned, ideally in the context of sex therapy that also instructs in non-penetration alternatives.

Relatedly, in one intriguing part of the paper, Stiritz and Appleton juxtapose the increasing fragility of women's reproductive rights against what they characterize as the "ascendancy of respect for male sexual pleasure—most notably a Supreme Court opinion [*Lawrence v. Texas*] idealizing gay male anal sex and its role in fostering intimacy."<sup>67</sup> While I tend to disagree with their characterization of *Lawrence* as "idealizing" gay male anal sex, their underlying argument troubles me even more. It leads me to question whether Stiritz and Appleton *themselves* respect male sexual pleasure as a legitimate regulatory goal. In fact, claims such as Viagra is "inimical to women's interests" beg the question: what *are* women's, or anyone's, erotic interests?<sup>68</sup> Are women's erotic interests conceptually and analytically distinct from men's? If so, how do men's erotic interests figure in Stiritz and Appleton's analysis? Their indictment of Viagra and their characterization of male sexuality in *Lawrence* lead me to wonder about the scope of their claims and commitments. In addition, while calling for new sexual scripts, Stiritz and Appleton seem critical of some non-normative enactments. Consider their criticism of the phallic fantasy, which they say "embodies the thrill of power, but here it is power *either masochistically or sadistically* experienced."<sup>69</sup> They continue, "[t]his is a sexual fantasy found in *hierarchically arranged* relationships."<sup>70</sup> They thus associate the sexual *practice* of sadomasochism with inequitable *relationships*. Of course, Stiritz and Appleton's characterization and critique of sadomasochism will be perplexing to many, practitioners of S/M and scholars of sexuality alike. While it

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66. *Id.* at 413, 417; *see also id.* at 414 ("While sex therapists who use evidence-based practices integrate sex therapy (often for couples) with the use of Viagra, when indicated, to treat interpersonal and sexual difficulties holistically, general practitioners, who are a much larger group and who treat many more patients, usually dispense Viagra to treat the penis alone.").

67. *Id.* at 387.

68. *Id.* at 364.

69. *Id.* at 408 (emphasis added).

70. *Id.* (emphasis added).

may be true that, as in the phallic fantasy, “[d]ominance, privilege, and power-over constitute the appeal of” S/M,<sup>71</sup> it does not follow that those who practice it engage in the exploitative and hierarchical *relationships* Stiritz and Appleton identify with the phallic fantasy. Nor is it clear that practitioners of S/M experience the personal disempowerment in work and other aspects of their lives that Stiritz and Appleton cite as correlated with inegalitarian/hierarchical sex.<sup>72</sup> (To the contrary, many S/M submissives often enjoy immense social power, including in their jobs.<sup>73</sup>) Many also would reject the claim that S/M, a consensual practice that brings pleasure to both dominants and submissives, constitutes “exploitation.”<sup>74</sup> Finally, I resist the association of S/M with all of the negatives Stiritz and Appleton attribute to the phallic fantasy: developmental immaturity, homophobia, and the perpetuation of “male sexual dominance,” “conventional gender hierarchies,” and “harmful myths and practices.”<sup>75</sup>

In sum, their perhaps unintended association of S/M with the much criticized phallic fantasy suggests Stiritz and Appleton may have a circumscribed vision of erotics, albeit one that remains undefined. While *Sex Therapy in the Age of Viagra* and their other papers suggest that their vision of the erotic is deeply and sincerely rooted in realizing mutually negotiated sexual pleasure, I am curious

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71. *Id.*

72. Stiritz & Appleton, *supra* note 2, at 401–02.

So entwined is sexual pleasure with power in other realms, one report suggests that women who do not feel entitled to demand equal sexual pleasure from their male partners also do not feel entitled to ask for raises at work, while sexually self-confident women are much more likely to pursue entitlement on the job, as well as in the bedroom.

*Id.*

73. Relatedly, contrary to Stiritz and Appleton’s unspoken assumption that the *sexual* submissive is also the less powerful person in the relationship, some theorists contend it is the submissive who has the power, at least in the sexual interaction.

74. According to Stiritz and Appleton, “Phallic fantasy idealizes success resulting from quest, dominance, and exploitation.” Stiritz & Appleton, *supra* note 2, at 408.

75. See Stiritz & Appleton, *supra* note 2, at 413 (why phallic fantasy is immature); *id.* at 409 (“Phallic fantasy is homophobia.”); *id.* at 413 (“What props up male sexual dominance is phallic fantasy . . . . When these ideals become reality, phallic fantasy consolidates, justifying the conventional gender hierarchy it reproduces. Yearning for the gratification that phallic fantasy offers makes us fall for products that promise we can attain it and perpetuates harmful myths and practices.”).

to know what, exactly, is the relationship between the erotic and the egalitarian? Is there room for inegalitarian erotics in their vision?

There also is a lack of serious consideration of gay male sexuality in Stiritz and Appleton's otherwise broad-ranging discussion of Viagra. This is curious given their call for new sexual scripts. Viagra has engendered some intriguing new sexual practices among gay men. For instance, some studies suggest that Viagra may encourage safer sex practices. A 2009 study of sexually active gay men, none of whom experienced medical erectile dysfunction, revealed that a number "described using Viagra to *maintain condom use*."<sup>76</sup> Thus, this non-medical use of Viagra to assist and maintain erections, the use that Stiritz and Appleton criticize, "reduce[d] performance anxiety and assist[ed] their efforts to engage in sex."<sup>77</sup> One Viagra user even proclaimed it, "a godsend to the gay community."<sup>78</sup>

A second and quite different Viagra script involves the expanded industry of "gay for pay" pornography, in which straight-identified men become a part of the gay pornography industry in an explicit and celebrated way.<sup>79</sup> After 1985, the growing gay pornography industry "began to attract performers who did not identify as gay or homosexual" and "[b]y the mid 1980s, there was active recruiting of performers by scouts, photographers and others who work in the gay

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76. Nat'l Ctr. in HIV Soc. Research, *The Use of Viagra by Gay Men: Findings from the QUICKIE Project for HIV Educators and Other Health Professionals*, UNIV. OF N.S.W., 1 (2009), [http://nchr.arts.unsw.edu.au/media/File/1\\_The\\_use\\_of\\_Viagra\\_by\\_gay\\_men.pdf](http://nchr.arts.unsw.edu.au/media/File/1_The_use_of_Viagra_by_gay_men.pdf).

77. *Id.*

78. *Id.* At the same time, this and other studies have found that Viagra offsets the erectile problems caused by some illicit drugs and excessive alcohol, thereby "complicat[ing] the decisions gay men have to make about sexual safety." *Id.*; see also Andrea A. Kim et al., *Increased Risk of HIV and Sexually Transmitted Disease Transmission Among Gay or Bisexual Men Who Use Viagra, San Francisco 2000–2001*, 16 AIDS 1425 (2002) (study of high-risk population found "a significant relationship between Viagra use and sexual risk behaviors," especially when combined with other, illegal drug use); Press Briefing, 2004 National STD Prevention Conference, Crystal Methamphetamine Use, Internet and Other Factors Likely Fueling Increases In STDs, Risk Behavior Among Gay and Bisexual Men (Mar. 10, 2004), available at <http://www.cdc.gov/stdconference/2004/MediaRelease/Pdf/CrystalMethMSM.pdf> ("Researchers at the San Francisco Department of Public Health (SFDPH) found that MSM [men who sleep with men] who used crystal and Viagra together were 6.1 times more likely to be diagnosed with syphilis than those who did not use either drug.").

79. Jeffrey Escoffier, *Gay-for-Pay: Straight Men and the Making of Gay Pornography*, 26 QUALITATIVE SOC. 531 (2003).



segment of the industry.”<sup>80</sup> Jeffrey Escoffier has noted some of the effects of straight-identified men performing in gay pornography. For instance, these straight-identified performers often experiment with alternative “sexual personas” that may challenge existing heteronormative masculinity.<sup>81</sup> In addition, because “gay pornography contributes to the education of desire,” i.e., it helps sexual minorities envision sexual possibility and affirms their sexual reality, “the widespread employment of straight performers in gay pornography . . . confer[s] legitimacy on homosexual *behavior* independent of gay identity.”<sup>82</sup> The widespread availability of Viagra has made it easier for straight-identified men to participate in gay

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80. *Id.* at 535. Escoffier cites one director who “estimates the number of straight men in gay pornographic videos to be sixty percent,” although Escoffier himself “suspect[s] that this is on the high side.” *Id.* Straight-identified men are drawn to gay pornography for a variety of reasons, including economic ones. *See, e.g., id.* (“One contributing factor is that male performers were better paid in the gay pornography industry than in the straight side of the business.”).

81. *Id.* at 545–46.

The straight actor’s development of a porn persona is a means by which heterosexual men can organize elements of their biographies, fantasized sexual scripts, and gender roles to perform homosexual sex acts and perhaps to achieve a minor sort of “celebrity” before an audience that is deeply engaged in the sexual significance and dramas of masculinity. The persona is, in part, a piece of bravado. Through the porn persona, the actor grants himself permission and elaborates the conditions under which he agrees to participate in the business. In addition, the persona can be easily parlayed into sex work—escorting and dancing—that is often an offshoot of performance in gay pornography.

*Id.*

82. *Id.* Escoffier elaborates:

[W]hile every pornographic movie made for a gay male market manifestly performs at least two tasks—to sexually stimulate its viewers and, in some way, to affirm their sexual identity—it may also perform a third and more contradictory task: to provide evidence of *homosexuality without identity*. It may do so either narratively, through the inclusion of scenes portraying straight men having credible sex with gay men, or by employing “known” heterosexual (gay-for-pay) performers to credibly represent gay male sexuality.

*Id.* at 538 (citation omitted). Escoffier notes that

gay male porn also has a somewhat paradoxical “hetero/masculinist effect,” in which the generic conventions that consolidate and reinforce gay male identity coexist with frequent representations of “straight” men engaging in homosexual acts. In this way gay porn reinforces the incongruity between male homosexual desire—stigmatized, abject—and the heterosexual dominance of the masculine regime of desire.

*Id.* at 537.

porn.<sup>83</sup> While maintaining an erection is necessary for any male performing in mainstream pornography, Escoffier explains their particular significance in gay male pornography.<sup>84</sup> The erection, of the top *and the bottom*, certifies the “authenticity” of the performance to an audience that consumes pornography for both stimulation and affirmation.<sup>85</sup> Hence, Viagra allows some straight-identified men to participate in gay porn and reliably display the “authentic” signs of sexual arousal.

The role of Viagra in the gay male community seems to be an important omission in *Sex Therapy in the Age of Viagra*. I suspect these two examples merely scratch the surface of how Viagra is sponsoring sexual innovation in gay male communities. If the idea of sexual scripts means “redefin[ing] sexuality from being the combined product of biological drives and social repression into an arena of creative social initiative and symbolic action,” Viagra’s complex role in both condom use and gay for pay pornography suggests its potential to assist in reorganizing sexual behavior.<sup>86</sup>

The lack of more than passing references to gay sexuality makes me curious about the scope of some of Stiritz and Appleton’s claims.<sup>87</sup> They criticize Viagra for reinforcing the phallic fantasy and eclipsing other sexual possibilities in heterosexual intercourse. One

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83. By the same token, Viagra calls into question the “authenticity” of erections in gay, and indeed all, pornography. However, Escoffier observes that this authenticity long has been a fallacy in pornography, as directors and actors use a variety of aids to sponsor and maintain erections, including actors’ own viewing of pornography, fluffers, and creative editing. *Id.* at 547, 550.

84. Escoffier rejects the exceptionality of gay for pay pornography, observing that all sexual conduct in the video porn industry is to one degree or another an example of situational sexuality inasmuch as the performers are often required to engage in sexual acts for monetary compensation that they would not otherwise choose to perform and with partners for whom they feel no desire. *Id.* at 534.

85. “Without any erections or effective engagement a straight bottom cannot give a credible performance.” *Id.* at 547. Gay men, too, performing as bottoms may have difficulty maintaining erections. *Id.*

86. *Id.* at 538 (citing JOHN H. GAGNON & WILLIAM SIMON, *SEXUAL CONDUCT: THE SOCIAL SOURCES OF HUMAN SEXUALITY* (1973)). Of sexual scripts, Escoffier observes, “Both the norms that regulate sexual behavior and the enabling social conditions that elicit and permit homosexual conduct from heterosexually-oriented participants can be activated using sexual scripts that circulate throughout the culture.” *Id.* at 533.

87. See, e.g., Stiritz & Appleton, *supra* note 2, at 413–14.

wonders, though, what the phallic fantasy means in the context of gay relationships. Does penetration reinforce gendered iterations of power? I could imagine Stiritz and Appleton being of one of two minds. On the one hand, they might be concerned that gay men, too, valorize penetration to the exclusion of other sexual practices. If so, they might prescribe the clitoral fantasy as the antidote in gay sex, as well.<sup>88</sup> Yet, they would quickly run into the problem that, unlike the clitoris, stimulating the prostate *requires* some sort of penetration. On the other hand, Stiritz and Appleton might be limiting their critique of penetration to penis-in-vagina sex and its role in heterosexual dynamics. If so, it would be fascinating to learn how they would differentiate the meanings of penetration in different contexts. While they acknowledge homophobia, indeed contending that “[p]hallic fantasy *is* homophobia,” there is little discussion of gay men (or lesbians) as a positive matter.<sup>89</sup> Without some reference to gay male sexuality, it is difficult to ascertain the limits of the commitments and prescriptions of *Sex Therapy in the Age of Viagra*.

I do not think that Stiritz and Appleton intend this omission. Both have expressed their commitments to broad-ranging sexual pleasure and proliferating, fluid sexuality.<sup>90</sup> Yet *Sex Therapy in the Age of Viagra* seems locked in a dominance framework and a heterosexual one at that.<sup>91</sup> I suspect this is a decidedly unintended effect of their

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88. *See, e.g., id.* at 400 (“Nor is it even necessarily depicted as partnered sex or heterosexual.”).

89. For instance, they note:

While Masters and Johnson never shed their heterosexist assumptions, continuing to see penis-in-vagina intercourse as the holy grail of sexual activity, the rise of sex toys intended for clitoral stimulation and the celebration of women’s masturbation have not been similarly confined. Often these orgasm-promoting techniques serve as an aid in heterosexual relationships, but these techniques also facilitate same-sex and solitary pleasures.

*Id.* at 406 (footnotes omitted).

90. *See supra* note 9. They also co-teach a course, *Regulating Sexuality*, that encourages this approach. *See* Syllabus, Susan Ekberg Stiritz & Susan Frelich Appleton, Washington Univ. Sch. of Law, Syllabus: *Regulating Sex* (Jan. 2011) (on file with author); Susan Ekberg Stiritz & Susan Frelich Appleton, *Sex Ed for Tomorrow’s Lawyers: Regulation and Revision* (unpublished manuscript) (on file with author).

91. Catharine MacKinnon, the most brilliant and penetrating progenitor of dominance analysis, has made explicit that it is not limited to heterosexual interactions. *See, e.g.,* Catharine A. MacKinnon, Brief for the Nat’l Org. on Male Sexual Victimization, Inc. as Amici Curiae Supporting Petitioner, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998),

deep engagement with Masters and Johnson's therapy innovation. Stiritz and Appleton make explicit that Masters and Johnson's "work was legitimated by its promise to stabilize marriage and curtail divorce. The therapy project, situated in its own cultural context, was consciously heterosexual and marital."<sup>92</sup> Yet, while they are cognizant of Masters and Johnson's own heterodyadic reality, they do not fully gain a critical purchase on it.<sup>93</sup> Their own paper is fundamentally about how the phallic fantasy functions in conventional heterosexuality—how its valorization of penetration as power subordinates women and denies their sexual pleasure. This framework causes them to miss Viagra's proliferation in non-heterosexual communities. It also leads them to be skeptical, in my reading, of erections outside of negotiated "equality-producing interpersonal mutuality."<sup>94</sup> In contrast, their antidote, the clitoral fantasy, syncs well with "a firm principle of Masters and Johnson's original method of sex therapy, [that] the relationship is the context for negotiating pleasurable interaction," and they insist "this principle holds whether the relationship is long-term or fleeting, same-sex or different-sex, dyadic or larger."<sup>95</sup>

This then leads to a final question raised by Stiritz and Appleton's provocative article: is there an entitlement to non-auto-erotic sex, and if so, how would we conceptualize it? What would such an entitlement look like in jurisprudential and doctrinal or policy terms? Stiritz and Appleton laud Masters and Johnson's conjoint model that "would eschew treating a body part in isolation and excluding consideration of partners' experiences and wishes, as most Viagra

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*reprinted in 8 UCLA WOMEN'S L.J.* 9 (1997) (using a dominance lens to demonstrate how same-sex harassment manifests sexual inequality); *see also* Catharine A. MacKinnon, *The Road Not Taken: Sex Equality in Lawrence v. Texas*, 65 OHIO ST. L.J. 1081, 1089 (2004) ("Because heterosexuality's inequalities have so largely defined what sex is, sex is routinely gendered unequal. Male dominant norms can and do sexualize hierarchy in same-sex as well as non-same-sex settings, if not always in the same ways.")

92. Stiritz & Appleton, *supra* note 2, at 396; *see also id.* at 395 ("Arising in the era of marital/couples therapy and second-wave feminism, Masters and Johnson's approach inherited and passed on the fantasy of heterosexual complementarity and mutuality, conceptualized by one school of feminism and adopted by couples therapy, yet never publically regarded as a specifically feminist contribution to therapeutic thought.")

93. *See supra* note 16 (explaining my use of the term heterodyadic).

94. Stiritz & Appleton, *supra* note 2, at 414.

95. *Id.* at 415–16 (footnotes omitted).

prescribing physicians do today.”<sup>96</sup> They similarly quote uncritically phrases such as “you cannot treat the penis separate . . . from the relationship.”<sup>97</sup> They criticize Viagra for “[f]ortifying phallic power rather than creating equality-producing interpersonal mutuality or celebrating clitoral pleasure seems to be the sex therapy of preference in America today.”<sup>98</sup> They likewise indict the drug’s maker, Pfizer, as emblematic of a “pharmaceutical industry [that] has co-opted sexual dysfunction as a medical problem unconnected to interpersonal issues and so requiring no more than a prescription.”<sup>99</sup> *Sex Therapy in the Age of Viagra* thus raises the important question: is sexuality a meaningful *individual* capability?

The disabled community was the first to frame and theorize this question.<sup>100</sup> Rejecting dominant frameworks for theorizing the erotic,

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96. *Id.* at 414.

97. *Id.* at 415.

98. *Id.* at 414.

99. *Id.* at 370; *see also id.* at 413–14 (“The 1998 introduction of Viagra has led to over thirty-five million men taking some form of an erection-enhancing drug today, most without benefit of counseling about other aspects of sexual interactions, including pleasurable alternatives to penis-in-vagina intercourse.”).

100. *See, e.g.,* TOM SHAKESPEARE, KATH GILLESPIE-SELLS & DOMINIC DAVIES, *THE SEXUAL POLITICS OF DISABILITY: UNTOLD DESIRES* (1996) (rejecting mainstream institutions’ accounts of disability and sexuality to “explore the emotional and sexual experiences of disabled people . . . relying predominantly on the verbatim accounts of disabled people themselves”); *Disability Sexuality Information on Sex and Sexual Issues with Disabilities*, DISABLED WORLD, <http://www.disabled-world.com/disability/sexuality/#ixzz1VAEKozz3%20> (last visited Aug. 19, 2011) (“People with physical or intellectual disabilities in today’s society are often regarded as non-sexual adults. Sex is very much associated with youth and physical attractiveness, and when it is not, is often seen as ‘unseemly.’ If sex and disability are discussed, it is very much in terms of capacity, technique, and fertility—in particular, male capacity and technique and female fertility—with no reference to sexual feelings by ignoring aspects of sexuality, such as touching, affection, and emotions.”). I explore the legal implications for incorporating disability into erotic justice elsewhere. *See* Davis, *Erotic Entitlements II*, *supra* note 3; *see also* Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307 (2009) (identifying the key norms that structure intimate discrimination and contrasting how they operate along lines of race, homogeneity; sex, heterogeneity; and disability, desexualization); Michael L. Perlin, *Hospitalized Patients and the Right to Sexual Interaction: Beyond the Last Frontier?*, 20 N.Y.U. REV. L. & SOC. CHANGE 517, 520 (1993–94) (“Simply put, the sexuality of persons with mental disabilities is one of the most threatening issues confronting clinicians, line workers, administrators, advocates, and attorneys who are involved in mental health care related work, as well as the families of individuals with mental disabilities. It is ‘a public policy question as controversial as they get,’ since the taboos and stigmas ordinarily associated with sexual behavior are inevitably enhanced when juxtaposed with stereotypes about mental disability.”).

they called for different conceptions of what might be thought of as erotic justice and sexual self-determination. Following their activism in other areas of their lives, they called for recognition of their sexual rights.<sup>101</sup> Some activists fought to legitimize and normalize access to sex markets and other non-normative sexual experiences. In a recent suit in Denmark, a disabled man won a suit “forcing officials to pay his expenses for the services of a call girl.”<sup>102</sup> As Katherine Franke, Janet Halley, and other recent legal updates from the *Pleasure and*

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101. Rejecting both the “medical tragedy” and “care and compassion” models, disability rights activists approached the question of sexuality through the “social oppression” lens, framing it as a question of rights and justice, not pity or disgust:

Slogans such as “Rights not charity” and the empowerment evidenced in collective action and self-organization enable individuals to move from a negative self-image to a positive self-image, to change from self-blame and self-pity to anger and self-confidence. Given that self-love, confidence and assertiveness are critical elements in a successful emotional, sexual and romantic life, then these developments will also increasingly impact on disabled people’s experience of love and relationships.

SHAKESPEARE ET AL., *supra* note 100 at 3. For discussion of how others use the term “erotic justice,” see *supra* note 1. For further discussion of how sexuality and disability intersect, see Russell P. Shuttleworth, *Disability and Sexuality: Toward a Constructionist Focus on Access and the Inclusion of Disabled People in the Sexual Rights Movement*, in *SEXUAL INEQUALITIES AND SOCIAL JUSTICE* 174, 174 (Niels Teunis & Gilbert H. Herdt eds., 2007) (arguing for constructionist frameworks that focus on “the construction of access/obstruction to the sociocultural contexts in which desire is evoked and sexual negotiations become possible”); Symposium, *Focus on Sexual Access for Disabled People*, 22 *DISABLED STUD. Q.* 2 (2002); Symposium, *Special Issue: Critical Research and Policy Debates in Disability and Sexuality Studies*, *SEXUALITY RES. & SOC. POL’Y*, Mar. 2007, at 1.

102. Lars Gravesen, *Taxpayers Foot Bill for Disabled Danes’ Visits to Prostitutes*, *TELEGRAPH* (London), Oct. 2, 2005, <http://www.telegraph.co.uk/news/worldnews/europe/denmark/1499735/Taxpayers-foot-bill-for-disabled-Danes-visits-to-prostitutes.html>. Subsequently, the Danish government “launched an information campaign advising the disabled how best to go about obtaining erotic services,” and the country’s Ministry of Social Affairs even publishes an informative pamphlet “to inform the disabled of their sexual rights, and encourages their carers to contact providers of erotic services.” *Id.* Complicating the matter, *The Sexual Politics of Disability* describes the controversy over disabled people’s use of sex markets. The authors use as an example paid sexual surrogacy, often presented as a sort of sex therapy requiring special skills, which may provide “something of an answer in the short term” but also may “reinforce[] the medical model of disability and ignores institutional oppression and societal barriers, which are the root causes of imposed celibacy.” SHAKESPEARE ET AL., *supra* note 100, at 132–33. *Scarlet Road*, a documentary screened at this year’s Sydney Film Festival, follows an Australian sex worker’s campaign to both protect the rights of sex workers and advocate for disabled people’s access to sexual interactions and intimacy. See *SCARLET ROAD* (Paradigm Pictures 2011); *SCARLET ROAD*, <http://www.scarletroad.com.au/about/> (last visited June 15, 2011); see also *Documentary news*, SBS DOCUMENTARY, <http://www.sbs.com.au/documentary/blogs/latest> (last visited June 15, 2011).

*Danger* era have contended, so often sex is seen as subordinating women, and hence the accompanying “right” is construed as the ability to withhold consent.<sup>103</sup> What about the other side, the right to sex?

I am intrigued by the possibility of construing a right to sex as an individual capability. By capability I mean to capture Amartya Sen and Martha Nussbaum’s usage as the distribution of abilities that occurs prior to the market’s distribution of goods.<sup>104</sup> The capabilities rubric emphasizes not only the *absence* of formal barriers to acquiring goods, but also the *presence* of the capacity to make use of them. It also focuses attention on how *a priori* social conditions shape desires and expectations, thereby influencing reported preferences. Sen is famous for reframing famines as a distributive failure.<sup>105</sup> What would it look like to think about sexuality through a distributive regime?<sup>106</sup> What would it mean to envision sexuality as an individuality capability that everyone is deserving of?<sup>107</sup> Would

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103. See, e.g., PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 1984); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001); Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y 7, 25, 29 (2004).

104. AMARTYA SEN, *COMMODITIES AND CAPABILITIES* (1999) (examining the foundations of welfare economics and calling to replace wealth and utility metrics of human wellbeing with a capabilities measure); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) (arguing that ethics and justice should underpin international economic and development policy and that feminism must address the condition of women in the Third World); *THE QUALITY OF LIFE* (Martha C. Nussbaum & Amartya Sen, eds., 1993) (collection of essays by economists and philosophers integrating concept of quality of life into economic and public policy analyses). Stiritz and Appleton make tantalizing gestures in this direction. See, e.g., Stiritz & Appleton, *supra* note 2, at 388.

105. See, e.g., AMARTYA SEN, *POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION* (1981).

106. I take up this question in Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J.L. & FEMINISM 1, 54 (2011) (urging sex should enjoy “same distributive inquiry that we make with respect to other central capabilities, i.e., literacy, food, health care, shelter”).

107. For instance, according to the World Health Organization, “[s]exuality is an integral part of the personality of everyone: man, woman and child. It is a basic need and an aspect of being human that cannot be separated from other aspects of life.” PAN AM. HEALTH ORG. & WORLD HEALTH ORG., *PROMOTION OF SEXUAL HEALTH: RECOMMENDATIONS FOR ACTION* 50 n.15 (quoting T. LANGFELDT & M. PORTER, WORLD HEALTH ORG., *SEXUALITY AND FAMILY PLANNING: REPORT OF A CONSULTATION AND RESEARCH FINDINGS* (1986)), available at <http://www.paho.org/english/hcp/hca/promotionsexualhealth.pdf>.

such an approach provide the requisite jurisprudential grounding for “erotic entitlement”?<sup>108</sup>

#### IV.

In the end, my deep-seated appreciation for *Sex Therapy in the Age of Viagra* is two-fold. First, as described in Section II, I am grateful to Stiritz and Appleton for introducing Masters and Johnson’s therapy innovations into legal scholarly discourse. Likewise, I find their questioning of Viagra’s effects and their contrast between the drug and other forms of sex therapy provocative and illuminating. Their invitation to contemplate different sexual scripts and how to enable them also has prompted me to think differently about the distributive effects of sexual regulation. Second, their article raises a fascinating series of questions about erotic investments and entitlements. These range from asking what *is* the erotic, to whether men’s and women’s erotic interests differ, to whether feminists have an interest in *men’s* erotic pleasure, to whether inegalitarian eroticism has any role in feminist theory. Their article similarly reminds us how conventional psychoanalysis, and sex therapy, may grab hold of our sexual imaginations and constrain them such that we miss the enactment of new and subversive sexual scripts in non-normative sexual communities. Finally, and perhaps most provocatively, their article challenges us to question whether our jurisprudence and policy could support an entitlement to an erotic life, and whether there would be any merit in doing so.

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108. This is the subject of the next essay in this series. See Davis, *Erotic Entitlements II*, *supra* note 3.