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FUTURE SEX

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INTRODUCTION

The point of creating futures is to get people to imagine what they want and don't want down the road, and maybe do something about it.

—Marge Piercy¹

Even now, during the great pandemic, as experts have been urging people to keep six feet apart, people not already partnered have been wondering about sex. How they will have it. They have been wondering too about after the pandemic, and whether sex will ever be the same.

Meanwhile, reformers, already decades into efforts to reduce “unwanted sex,”² have been thinking the same thing, wondering about the

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¹ MARGE PIERCY, *Introduction to the 2016 Edition*, in *WOMAN ON THE EDGE OF TIME* 3 (1976, 2016).

² STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* ix (1998, 2016)

future.³ In a way, *our* work—I count myself among them—has become more urgent, not less.

To be sure, there were a rash of reforms in the 1970s, and the hope then of real change. But when 1 in 5 women continue to be victims of rape,⁴ when male victim rape is routinely ignored;⁵ when the country can be divided over the nomination of Brett Kavanaugh to the Supreme Court over allegations of sexual assault;⁶ when we rightly ask, in the case of Bill Cosby and Harvey Weinstein and Jeffrey Epstein and so many others, how could this have gone on so long;⁷ when “whisper” channels still seem necessary even after the seeming gains of the #MeToo movement;⁸ when #BelieveWomen becomes a rallying cry, and yet seems at odds with our presumption of innocence; when race and class and sexuality matter, and yet are constantly sidestepped;⁹ when our ranks are divided by disagreements

³ One such reform effort is the one taken on by the American Law Institute’s to revise the Model Penal Code’s Sexual Assault provisions. The ALI approved the project in 2012, and the Advisers and Members Consultative Group continue to meet. An overview of the status of the project and publicly available drafts can be found on the American Law Institute’s website. See *Status Details, ALI Sexual Assault and Related Offense*, ALI.org, <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/>. For an inside view from one of the project’s two Reporters, see Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 335 (2017).

⁴ MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011); see also RAINN, VICTIMS OF SEXUAL VIOLENCE STATISTICS, <https://www.rainn.org/statistics/victims-sexual-violence> (reporting that 1 in 6 “American women has been the victim of an attempted or completed rape in her lifetime”).

⁵ As I have written previously, male victim rape has too long been confined to the margins and footnotes. Put simply, “male-victim rape is real rape, too.” I. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1264 (2011).

⁶ See David Smith, *Kavanaugh Confirmation Fight Exposes America’s Bitter Fault Lines*, THEGUARDIAN.COM, Oct. 5, 2018, <https://www.theguardian.com/us-news/2018/oct/05/brett-kavanaugh-confirmation-america>.

⁷ Jelani Cobb, *Harvey Weinstein, Bill Cosby, and the Cloak of Charity*, NEW YORKER, October 14, 2017, <https://www.newyorker.com/news/daily-comment/harvey-weinstein-bill-cosby-and-the-cloak-of-charity>

⁸ Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1167-72 (2019).

⁹ For example, though rarely discussed, and certainly outside the public imagination about rape victims, Black women face greater rape victimization than white women. See Black Women and Sexual Violence, NOW.ORG, <https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf>. The numbers are even worse for Native women. Maren Machless et al., *Native American*

over of *mens rea* and *actus reus*, and by those who point out that increasing the range of behavior that should be criminalized is, well, increasing criminalization, playing into the hands of the carceral state and governance feminism and against the goal of decarceration,¹⁰ to say nothing of the goal of abolition or the goal of racial reckoning—well, it makes sense to press pause and reassess and take stock.¹¹ During this time when people are being more intentional about “dating” and “hookups,”¹² and when the reporting of rapes and sexual assaults has decreased,¹³ during this interregnum of sorts, it makes sense to ask, “Where have we been, and where are we going?” And it makes sense to ask, “Where do we want to be.”

Women, Sexual Assault: A Justice Issue on Tribal Lands, USATODAY.COM, Oct. 18, 2019, <https://www.usatoday.com/story/news/nation/2019/10/18/native-american-women-sexual-assault-justice-issue-tribe-lands/3996873002/> (reporting that 1 in 3 Native American women and Alaskan Native Women experience rape). The LGBT community is also at greater risk of sexual victimization. See *Sexual Assault and the LGBT Community*, HRC.ORG., <https://www.hrc.org/resources/sexual-assault-and-the-lgbt-community>. This is to say nothing of how race is entangled in the history of rape laws in this country. See generally JANE DAILEY, *WHITE FRIGHT: THE SEXUAL PANIC AT THE HEART OF AMERICAN RACIST HISTORY* (2020); see also I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1351-71 (2010) (discussing the racialization of rape).

¹⁰ For a critique of the alliance between feminists and the carceral state, see generally AYA GRUBER, *THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION ON MASS INCARCERATION* (2020); see also Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340-42 (2006).

¹¹ See, e.g., CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* (1992); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 12 (1998) (observing that despite decades of reforms “designed to free rape law from ... misogynistic antecedents, contemporary courts remain hostage to the traditional definitions, which require rape victims to surmount special legal obstacles that the victims of other crimes are spared.”).

¹² Sara Konrath, *What the Pandemic Has Done for Dating*, TheAtlantic.com, Dec. 31, 2020, https://www.theatlantic.com/ideas/archive/2020/12/what-pandemic-has-done-dating/617502/?utm_source=pocket-newtab (reporting a 20% decline in users seeking hookups on the dating site OkCupid, and a survey showing singles being more “intentional” about dating).

¹³ See *Research Brief: Violence Against Women*, 3 UNODC.org, Nov. 24, 2020, https://www.unodc.org/documents/data-and-analysis/covid/Violence_against_women_24Nov.pdf. (finding a reduction in the reporting of rape and sexual assault).

As is no doubt obvious by now, this is not a traditional law essay. At the end, it offers no tight solution all wrapped in a tight bow. It does not argue that if we “just made x reform” our problems would go away, or would at least be less problematic. Though I have written my share of law review articles and essays in that vein, the goal of this essay is decidedly different. I think of this essay as *an invitation*. Its goal is begin a dialogue, not a monologue. It is to start a conversation. And it is to listen.

In a way, the conversation I want to start, at least in Part One, is simple. It’s about sex. If we truly want to craft reforms that protect individuals “from sexual overreaching and abuse,”¹⁴ in short, from *unwanted* sex, then doesn’t it behoove us to begin by having an open, honest discussion about *wanted* sex? To set the stage for that conversation, Part One begins with a thumbnail sketch of where we are now with respect to rape law, including the reform efforts of the ALI, and the sea change that the #MeToo movement does, and does not, herald. It then turns to how we have sex now, and suggests that wanted sex must inform how we think about, and craft reforms to deter, unwanted sex.

Ultimately, of course, this is just the beginning of the conversation. The more ambitious part is to imagine a future perfect, free from unwanted sex. This is the topic I turn to in Part Two. Here too the suggestion I want to make is straightforward, and begins with a question. If the goal is to craft real reforms that make a real difference, doesn’t it behoove us too to imagine what a future with only wanted sex would look like? That we imagine a future perfect, so to speak?¹⁵ After all, it is this future that should be our end point, that will help us keep our eyes on the prize and reduce the likelihood of our being sidetracked or losing track and ending up someplace else. It will reduce too the likelihood of us passing “non-reformist reforms,” if I may repurpose a term coined by the French socialist Andre Gorz and embraced by abolitionists¹⁶—in other words, reforms that inadvertently contribute to mass

¹⁴ SCHULHOFER, *supra* note __, at ix.

¹⁵ This essay thus falls into the category of legal futurist scholarship, which imagines the distant future, and the law’s role in that future. For an early bibliography of legal futurist writing, see David A Funk, *Legal Futurology: The Field and Its Literature*, 73 LAW LIBRARY J. 625 (1980). For a recent example, see Bennett Capers, *Afrofuturism, Critical Race Theory, and Policing in the Year 2044*, 94 N.Y.U. L. REV. 1 (2019).

¹⁶ Gorz first used the term with reference to radical labor organizing. ANDRE GORZ, *STRATEGY FOR LABOR: A RADICAL PROPOSAL* 6 (1968). Since then, several prison abolitionist have adopted it. See, e.g., Dorothy Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 114 (2019) (“By engaging in nonreformist

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incarceration, over-criminalization, and the racialized and gendered policing that seem to accompany them. While I have the floor—trust me, I want everyone who has a seat at the table to speak—but while I have the floor, allow me to go a step further and suggest that we look to feminist futurists to help us imagine this future perfect. And let me suggest that imagining a future perfect—or at least one free from unwanted sex—be our first step in mapping a way there.

There is one more thing to say before beginning this essay proper, and that is this. I said earlier that my goal is to initiate a conversation. But let me be clear here. My goal is not merely a conversation with scholars and advocates, but a conversation with everyone, from prosecutors to defense lawyers, from sex workers and queers and college students to club kids and prison inmates and abstainers, from those who identify as victims and/or survivors and to those who have been identified as rapists. Yes, even them. The goal is to give everyone a seat at the table, and to have all of us think about where have been we been and where are we going and where do we want to be. In short, the goal is to encourage all of us now to think about future sex.

I. WANTED SEX

Allow me this opening statement: Before turning to what a society with only wanted sex might look like, it makes sense to first begin by taking stock of where we have been, and where we are now. If nothing else, this starting point will give us a sense of how much ground there is to cover. This part accordingly describes the black letter law of rape that predominated up until the 1970s, the reforms that followed feminist agitation for change, and the ongoing efforts to reform rape law. After setting forth where we are now, this part then invites an honest discussion about wanted sex, and how we have sex now, so that we can better understand the parameters of unwanted sex.

A. *Past Imperfect*

reforms, abolitionists strive to make transformative changes in carceral systems with the objective of demolishing those systems rather than fixing them.”); RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (2007) (describing “nonreformist reform” as “changes that, at the end of the day, unravel rather than widen the net of social control through criminalization.”); *see also* Amna A. Akbar, *An Abolitionist Horizon for Police (Reform)*, 108 CALIF. L. REV. 1781, 1837-41 (2019).

As any student of rape law knows, the black letter law of rape has always been deceptively simple. At English common law, rape was defined as “carnal knowledge of a woman forcibly and against her will,”¹⁷ and American jurisdictions for the most part adopted this definition.¹⁸ The elements of the offense were also simple: To be guilty of rape, the prosecution had to establish beyond a reasonable doubt that there had been vaginal intercourse, that the intercourse was obtained by force, and that the intercourse occurred despite nonconsent.¹⁹

As any student of the history of rape law also knows, the definition of rape favored men, not women.²⁰ For example, courts interpreted the force element as requiring not only that the defendant used force to obtain sex, but that the complainant resisted with force of her own. In fact, her own use of responsive force was essential to establish two elements: that the “defendant’s force was really force and to prove that the victim’s nonconsent, no matter how many times expressed verbally, was really nonconsent.”²¹ Nor would just any quantum of response force do. At common law, women were required to resist to the utmost before a defendant could be found guilty. As one court put it, “not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person, that this must be shown to persist until the offense is consummated.”²² Absent such defensive force, a claim of rape would not stand. As Anne Coughlin wryly put it, early rape law permitted men something akin to a “woman’s failure of actus reus defense.”²³

¹⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 201 (Chicago Press ed. 1979) (1765-1769).

¹⁸ Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 36-37 (1992).

¹⁹ SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES 359-56 (10th ed. 2017)

²⁰ See, e.g., Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1780-81 (1992) (observing that rape laws have always have the effect of “reinforce[ing] the interest of males in controlling sexual access to females.”); SUSAN ESTRICH, REAL RAPE 62-63 (1987); arguing that rape law protected “male access to women where guns and beatings are not needed to secure it.”

²¹ Capers, *Real Women, Real Rape*, *supra* note __, at 834.

²² *Brown v. State*, 106 N.W. 536, 538 (Wis. 1906).

²³ Coughlin, *supra* note __, at 38.

Evidentiary rules tipped the scales in favor of defendants as well. Rape was one of the few crimes where a complainant's word was insufficient. Before a defendant could be found guilty, there had to be some independent corroboration of the complainant's account, as well as evidence that the complainant complained promptly.²⁴ These evidentiary rules were considered so essential to protect defendants that Model Penal Code's drafters, who at the time were considered progressive thinkers,²⁵ included them in the sexual assault provisions of the Code.²⁶ In addition, evidentiary rules allowed defendants to cross-examine complainants about their sexual history, and in some cases even introduce extrinsic evidence of a complainant's prior sexual history, to contest the lack of consent and to undermine the complainant's credibility.²⁷ In effect, evidentiary rules allowed the defendant to put the complainant on trial "to determine whether she was the type of woman who consents, the type of woman to lie about it, and hence the type of woman who should not be protected by the law, at least not at the expense of the presumptively good man."²⁸ As I have written before, "All of this served to frame rape trials as pitting bad women against good men. All of this served to tip the scales in a way that benefited these men to the detriment of women."²⁹

But even the observation that rape law favored men becomes more complicated, and even false, when race is added to the analysis. Before the Reconstruction Amendments, black letter law often dictated harsher punishments for black men convicted of raping white women; the whiteness of the victim essentially triggered a sentencing enhancement, even capital punishment.³⁰ But even after explicit distinctions were invalidated under the Equal Protection Clause, a type of unwritten law remained.³¹ This unwritten

²⁴ See generally SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & RACHEL E. BARKOW, *CRIMINAL LAW AND ITS PROCESSES* 436-37 (10th ed. 2001); Capers, *Real Women, Real Rape*, *supra* note __, at 835; Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 948, 953-64 (2004).

²⁵ MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* 6-22 (2002); see also Luis E. Chiesa, *The Model Penal Code and Mass Incarceration*, 25 GEO. MASON L. REV. 605, 609 (2018) (describing the drafters as "well-meaning progressive scholars").

²⁶ MODEL PENAL CODE § 213.6(4) and (5).

²⁷ Capers, *Real Women, Real Rape*, *supra* note __, at 835.

²⁸ *Id.*

²⁹ *Id.* at 839.

³⁰ Capers, *The Unintentional Rapist*, *supra* note __, at 1355-56.

³¹ *Id.* at 1357.

law, which I have elsewhere described as a type of “white letter law”³²—think of white ink on white paper—continued to disfavor black men accused of sexually assaulting white women.³³ And this is when law had a role to play at all, other than turning a blind eye. The history of rape and race in this country is also a history of lynching black men based solely on accusations from white women.³⁴

The common narrative was also different for black female victims. During the long period of slavery, enslaved black women were denied any sexual autonomy, with the law granting owners license and sexual access to enslaved blacks, both for sexual gratification and for forced breeding with other slaves.³⁵ Though less common, it is also worth noting that black women were subjected to sexual medical experimentation, often without anesthesia, in the name of science.³⁶ To justify this denial of sexual autonomy, black women were cast as naturally libidinous, and indeed as “unrapeable.”³⁷

³² I first introduced the concept “white letter law” in an earlier article. See I. Bennett Capers, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. OF LAW & SOC. CHANGE 1, 7-8 (2006). Unlike black-letter law, which brings to mind statutory law, written law, the easily discernible law set forth as black letters on a white page, “white-letter law” suggests societal and normative laws that stand side by side and often undergird black-letter law but, as if inscribed in white ink on white paper, remain invisible to the naked eye.

³³ Capers, *The Unintentional Rapist*, *supra* note __, at 1364-71.

³⁴ See, e.g., IDA B. WELLS, *Lynching Bee*, in A RED RECORD, LYNCHINGS IN THE UNITED STATES (1895).

³⁵ Capers, *Real Women, Real Rape*, *supra* note __, at 865; see also Sharon Block, *Lines of Color, Sex, and Service: Comparative Sexual Coercion in Early America*, in SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 141, 141 (Martha Hodes ed., 1999); Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675 (2002)

³⁶ See HARRIET A. WASHINGTON, *MEDICAL APARTHEID: THE DARK HISTORY OF MEDICAL EXPERIMENTATION ON BLACK AMERICANS FROM COLONIAL TIMES TO THE PRESENT* 61-68 (2008); DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 175-76 (1997).

³⁷ Capers, *Real Women, Real Rape*, *supra* note __, at 865-71; see also Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN’S L.J. 103, 118-22 (1983); Darci E. Burrell, *Recent Developments, Myth, Stereotype, and the Rape of Black Women*, 4 UCLA WOMEN’S L.J. 87, 89 (1993).

While it would be easy to cabin this history, the fact is that this history continues to inform who we think of as the prototypical rape victim, and who we think of as the prototypical rapist.³⁸ Quite simply, race matters.³⁹

B. *Agitation for Change*

One consequence of the Women's Rights movement was agitation for change. The result was nothing less than game changing, at least in terms of reforms on the books. Indeed, it can be argued that no other area of criminal law witnessed as much change.⁴⁰ Within the space of years, jurisdictions abandoned or limited the resistance requirement and concomitantly reduced the force requirement, and added degrees to the offense rape—giving prosecutors and jurors more options.⁴¹ They recognized that marriage was not the same as consent in perpetuity, and abolished marital immunities rules.⁴² Rape statutes were revised with gender-neutral language.⁴³ Jurisdictions retreated from corroboration and prompt reporting requirements.⁴⁴ Perhaps most importantly, there was a widespread adoption

³⁸ Capers, *Real Women, Real Rape*, *supra* note ___, at ___. N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1345 (2004) (exploring the association of black men as sexual predators); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 587 (2004) (observing that during the late-nineteenth and early twentieth centuries, “the law of rape incorporated the paradigm of a pathological stranger, prototypically a black man, lurking in the shadows, ready to violently assault the presumed-chaste (white) woman”); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 365 (1993) (noting the “image of Black men as a constant threat to the virtue of white womanhood”).

³⁹ See, e.g., Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 397-402 (1985) (finding that jurors remain less likely to view the rape of black women as real rape); see also Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 37-43 (2006) (reviewing studies).

⁴⁰ Cf. Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 651 (2008) (“Seldom has an aspect of the criminal law changed as dramatically as has the law governing sexual offenders.”).

⁴¹ See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 569-70, 580-84 (3rd ed. 2001).

⁴² *Id.* at 590.

⁴³ *Id.* at 570.

⁴⁴ *Id.* at 590-92.

of rape shield rules, protecting complainants from cross-examination and evidence about their sexual history at trial.⁴⁵

These changes happened relatively quickly, but this is not to suggest that rape law has been stagnant since the 1970s. Far from it, though changes have been piecemeal and have not had the same widespread impact as in earlier years. There have been efforts to move from requiring evidence of consent (yes) rather than evidence of non-consent (no).⁴⁶ For the last several years, Professors Schulhofer and Erin Murphy have been spearheading an effort to revise the sexual assault provisions of the Model Penal Code.⁴⁷ There is an awareness of sexual assault in the military and on campus like never before. Church scandals have brought the victimization of boys into the national conversation, though the sexual assault of adult men remains in the margins, largely invisible.⁴⁸ Cases like those involving Stanford swimmer Brock Turner or Harvey Weinstein have become lightning rods for discussion, as did the #Slutwalk movement a few years earlier. The most significant cultural phenomenon, however, has been the #MeToo movement, and with it the realization that unwanted sex continues to be prevalent. Indeed, one of the interesting things about the #MeToo movement is how little impact it has had on rape law itself.⁴⁹ Indeed, what #MeToo highlights is that rape law, or the law of unwanted sex, is still inadequate.

C. *The Way We Live (and Have Sex) Now*

It is common in scholarship providing an overview of rape law to stop here, and then proceed to offer a normative vision of how rape law can be reformed. But to state this should reveal how inadequate it seems. Indeed, it may explain why we have failed so badly at protecting individuals from sexual assault and other violations of their sexual autonomy. Put bluntly, if we want to protect individuals from *unwanted* sex, which involves line drawing, then it makes sense to give some thought to *wanted* sex. And to

⁴⁵ For an overview of these changes and other changes, see SUSAN CARINGELLA, ADDRESSING RAPE LAW REFORM IN LAW AND PRACTICE (2009); see also SPOHN & HORNEY, *supra* note __.

⁴⁶ See Schulhofer, *Reforming the Law of Rape*, *supra* note __, at 340-41.

⁴⁷ *Id.* at 335.

⁴⁸ See Capers, *Real Rape Too*, *supra* note __.

⁴⁹ Cf. Deborah Tuerkheimer, *Beyond #MeToo*, __ N.Y.U. L. REV. __ (forthcoming 2019); Anthony Michael Kriess, *Defensive Glass Ceiling*, __ 88 GEO. WASH. L. REV. __ (2019) (noting that much of #MeToo has been exogenous to the law, though some legal reform has resulted); Linda S. Green et al., *Talking about Black Lives Matter and #MeToo*, 32 WIS. J. OF LAW, GENDER & SOC'Y 1 (2019).

give some attention to the role the law has played in regulating both. Indeed, once we begin to think about wanted sex, the connection between regulating both unwanted sex and wanted sex becomes hard *not to see*.

The law's regulation of unwanted sex, however inadequate, has never operated alone. At the same time the law prohibited the Blackstonian version of rape—man/woman/force/sex/nonconsent—the law was also active in policing wanted sex. Indeed, Anne Coughlin has persuasively argued that “we cannot understand rape law unless we study [it] not in isolation, but in conjunction with the fornication and adultery prohibitions with which it formerly resided and, perhaps, continues to reside.”⁵⁰ Allow me to add the bans on same-sex sex and polygamy⁵¹ and even seduction⁵² to the list of laws that operated in conjunction with rape laws. One could also add Comstock laws and the Motion Picture Production Code, which aimed to protect traditional family values by regulating the circulation of “obscene” material.⁵³ In short, the law has always played an active and disciplining role in suppressing sexual difference altogether, and channeling the one type of sex—heterosexual sex—to marriage, or what Ariela Dubler calls the “marriage cure.”⁵⁴

⁵⁰ Coughlin, *supra* note ___, at 6.

⁵¹ Interesting, in *Reynolds v. United States*, 98 U.S. 145 (1879), the Court not only upheld a criminal law prohibiting polygamous marriage, but went on to equate polygamous marriages with “depotism” and monogamous marriages with democracy. *Id.* at 165-66. For a discussion of the absurdity of this linkage, see Jill Elaine Hasday, *Women's Constitution*, at 21-22 (on file with author).

⁵² See Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1 (2012) (using the history of statutes criminalizing seduction to argue that marriage has been used and continues to be used as state-imposed discipline).

⁵³ For a fascinating discussion of the origins of the Comstock Act and Hays Code, see Geoffrey R. Stone, *Sex and the Constitution* 153-78 (2017). It is telling, for example, that the Motion Picture Production Code was troubled by the use of the word “damn” in *Gone With the Wind*, but not the suggested rape scene in the film. See STEVE WILSON, *THE MAKING OF GONE WITH THE WIND* 36 (2014). The Motion Picture Production Code also barred depictions of interracial relationships and “sexual perversion,” i.e., homosexuality. See generally Bob Mondello, *Remembering Hollywood's Hays Code, 40 Years On*, NPR.ORG. (Aug. 8, 2008), <https://www.npr.org/templates/story/story.php?storyId=93301189>; VITO RUSSO, *THE CELLULOID CLOSET: HOMOSEXUALITY IN THE MOVIES* (1987).

⁵⁴ See Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 117 YALE L.J. 756 (2006); see also Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809 (2010).

Here too, race mattered. Because state-approved sex had to be not just heterosexual sex in the privacy of the marital home, but also same-race sex.⁵⁵ Indeed, this racial policing likely explains why interracial couples were so often the target of cohabitation prohibitions.⁵⁶ In the case of intra-racial heterosexual couples, there was at least the possibility that their sexual congress might metastasize into marriage; there was no such possibility with many interracial couples, at least not until 1967 when the Court invalidated anti-miscegenation statutes in *Loving v. Virginia*.⁵⁷ (A similar sexual policing also explains why same-sex sex was so heavily policed—consider the pastime of heterosexuals making out in cars and lovers' lanes,⁵⁸ and the different policing brought to bear on gay men in parks⁵⁹—and how a necessary corrective to such discriminatory policing was not just *Lawrence v. Texas*,⁶⁰ but also *Obergefeld v. Hodges*.⁶¹) In short, it is not just unwanted sex that the law regulates, but also wanted sex.⁶²

⁵⁵ Indeed, it would be even more accurate to say race and gender mattered. During the colonial period, laws were modified to turn a blind eye to consensual and non-consensual sex between white men and black slave women, and to mark any offspring as property. At the same time, laws and norms prohibited unions between black men and white women. For example, in 1664 Maryland declared it a “disgrace to the Nation” for “English women [to] intermarry with Negro slaves.” Both Maryland and Virginia eventually made it an offense for white women to have sexual relations with black men. Thomas Jefferson even lobbied for banishment of any white woman who bore a black child. See IBRAM X. KENDI, *STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA* 40-41, 117 (2016).

⁵⁶ See, e.g., *McLaughlin v. Florida*, 379 U.S. 184 (1964) (invalidating a cohabitation law targeting different-race couples). A same-race couple living together could pass as married and escape scrutiny. By contrast, because interracial marriage itself was barred, the fact that a different race couple was living together was on its face proof of a crime: either they were violating marriage laws, or they were violating cohabitation laws.

⁵⁷ 388 U.S. 1 (1967)

⁵⁸ See, e.g., Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 145 U. PA. L. REV. 705 (1995).

⁵⁹ See, e.g., Jordan Blair Woods, *Don't Tap, Don't Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 J. OF GENDER, RACE, AND JUSTICE 545 (2009).

⁶⁰ 539 U.S. 558 (2003) (invalidating same-sex sodomy laws as violating the right to liberty under the Due Process Clause).

⁶¹ 135 S.Ct. 2071 (2015) (holding that the right to marry is a fundamental liberty and that prohibiting same-sex couples from marrying violates due process).

⁶² As I have written previously, by marking which conduct it deems illicit, it “also indirectly marks other conduct as licit”:

Before engaging in line drawing to distinguish illicit sex from licit sex, it also makes sense to have an open discussion about how we have sex now, or at least how we had it before the pandemic hit. As Deborah Tuerkheimer noted several years ago, “women’s sexuality and our sense of its dimensions have continued to evolve.”⁶³ We know that, of women between the ages of 18 and 49, most engaged in oral sex pre-pandemic, and that almost half engaged in anal sex.⁶⁴ Mary Fan noted that we were existing in a “casual sex culture,” where young adults were “abandoning traditional dating and increasingly engaging in casual sex with people they do not know very well,” including “sex outside of relationships or in concurrent relationships.”⁶⁵ In fact, it is very likely that these descriptions only begin to cover how we have been having sex. For example, a recent survey of over 200 individuals over the age of 18 revealed that approximately 44% had engaged in sex in a public place, that 21% had been tied up or tied up someone else as part of sex, that more than half had engaged in mutual masturbation, and that approximately 32% had engaged in spanking as part of sex.⁶⁶ Another study, focusing on men, showed that 15% had performed anilingus, and that 24% had received anal fingering.⁶⁷ Add to this the prevalence of casual sex apps even post-pandemic, such as Grnder and Tinder, the latter of which is used by approximately a quarter of all adults between the ages of 25 and 34.⁶⁸ Some other data points: The most popular search term for women consumers of

For example, a law that criminalizes same-sex sex almost by definition gives its imprimatur to heterosexual sex, contributing to what Adrienne Rich long ago terms “compulsory heterosexuality.” A law that penalizes adultery not only condemns sex outside of marriage, but concomitantly privileges sexual fidelity within marriage. . . . In short, the criminal law has always played favorites.”

I. Bennett Capers, *Home is Where the Crime Is*, 109 MICH. L. REV. 979, 988 (2011).

⁶³ Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1464 (2012).

⁶⁴ *Id.*

⁶⁵ Mary Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 537-43 (2011).

⁶⁶ Debby Herbenick et al, *Sexual Diversity in the United States: Results from a Nationally Representative Probable Sample of Adult Women and Men*, PLOS.COM, July 20, 2017.

⁶⁷ Michael Castleman, *Heterosexual Anal Play: Increasingly Popular*, PSYCHOLOGYTODAY.COM, Dec. 1, 2010.

⁶⁸ See <https://www.statista.com/statistics/814698/share-of-us-internet-users-who-use-tinder-by-age/>. Although Tinder is not solely for casual sex, nearly half of surveyed respondents state they use Tinder specifically for “hooking up.” See Sammy Nickalls, *More than 50% of People Who Use Tinder Do It Out of Boredom*, ESQUIRE.COM, Sep. 7, 2017, <https://www.esquire.com/lifestyle/sex/a12149373/tinder-statistics-study/>

online porn, after “lesbian,” is “threesome.”⁶⁹ A recent study suggests that fewer than half of teens (ages 13 to 20) identify as “exclusively heterosexual.”⁷⁰ There is evidence that many adults find kissing more intimate than sex, even though sexual assault laws tend to regulate only the latter.⁷¹ And that a lot of women worry about why their boyfriends don’t want sex more.⁷² Studies also show that women underreport consensual sexual activities, especially activities that may be frowned upon such as having multiple sexual partners.⁷³ By contrast, because multiple sexual partners is often viewed as a badge of honor among men, men tend to over-report the number of their sexual partners.⁷⁴ What else? People are increasingly ceding control with technology, allowing others to remotely operate sex toys, sometimes referred to as teledildonics.⁷⁵

All of this is a far cry from the notions of sex during the time of Blackstone when we defined rape as forced vaginal penetration by a male despite nonconsent. It is also a far cry from how we had and thought about

⁶⁹ Michael Castleman, *Surprising New Data from the World’s Most Popular Porn Site*, PSYCHOLOGYTODAY.COM, March 15, 2018. The next most popular search term for women consumers, after lesbian and threesome, are “big dick,” “ebony,” and “gangbang.” *Id.*

⁷⁰ Zing Tsjeng, *Teens These Days are Queer AF, New Study Says*, VICE.COM, Mar. 10, 2016.

⁷¹ Noam Shpancer, *What’s in a Kiss?*, PSYCHOLOGYTODAY.COM, Nov. 3, 2013. The current proposed revisions to the MPC criminalize nonconsensual touching of certain intimate body parts, but does not criminalize nonconsensual kissing. Thus, knowingly touching someone’s inner thigh without consent is criminal under the revisions. “Stealing” a kiss is not. See §§ 213.0(6)(c) and 213.7.

⁷² STEPHENS-DAVIDOWITZ, *supra* note __.

⁷³ Shervin Assari, *Why Men and Women Lie About Sex, and How This Complicates STD Control*, THECONVERSATION.COM, April 2, 2017.

⁷⁴ *Id.*

⁷⁵ See, e.g., *The Future is NOW: 13 Remote-Controlled Sex Toys Available Today*, HUFFPOST.COM (Apr. 8, 2016), https://www.huffpost.com/entry/the-future-is-now-13-remo_b_9645460?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_referrer_sig=AQAAAMzGXfPkTnjDUWKDQC4J3eF8-inL-TenvOobxWs2i3EmszDHsFui_msZFGct2Kdsmu_7vtbQJeI0SbQYQ7rX8L1IKW1V_Lyr9Mdxrck8-x-EcPv5OmcYgvbG9JJI0hm8dHPJKleL08wPF9wQ9qggAt3dnFBF1-YU3ftA_Pu1AgmY.

sex just a few decades ago. Consider that long after the MPC was drafted, female sexuality in particular was still thought of as:

romantic, non-genital, passive/responsive, monogamous, and not open to autonomous expression. In this stereotype, the normal woman is so chaste that her arousal can scarcely be termed sexual, but is instead a purely emotional response: “romantic longing.” . . . Female sexual desire [becomes] not so much an end in itself as . . . a means for fulfilling other needs and desires: love and motherhood.⁷⁶

We’ve come a long way, baby.⁷⁷ And it is the fact that we have traveled so far that should prompt a series of questions. If, for example, we believe the best way to protect sexual autonomy is to insist, through laws and norms, that consent be obtained before sex, then what do we mean by sex? If consent is to be based on the totality of the circumstances, what might that mean given the myriad ways in which we communicate and have sex now? And if we’re serious about reforms to reduce unwanted sex, should we not invite to the table everyone to think about wanted? As a case in point, the invited participants in the American Law Institute’s project to re-write the Model Penal Code’s sexual assault provisions include professors and judges, prosecutors and defense lawyers, and victim rights advocates. It does not include Dan Savage or any sex worker or sex expert.⁷⁸ Indeed, it hardly includes anyone under 40. And there are other questions still. What might rape law look like if we abandon our antiquated notions about how people have sex, and really think about how people have sex now? Indeed, what might rape law look like if we could let go of the historical baggage that rape law brings with it, if we could slake off the centuries of patriarchy and norms, and start anew? If we stopped seeing sex “as something that is *done to, not by, women?*”⁷⁹ And if we recognized sex as something that is done to, not just by, men? With a tabula rasa, starting afresh, what might rape law look like

⁷⁶ Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 199 (2001) (quoting Rebecca Marie Young, *Sexing the Brain: Measurement and Meaning in Biological Research on Human Sexuality* 251, 299 (2000) (unpublished Ph.D. dissertation)).

⁷⁷ “You’ve Come a Long Way, Baby” was both an advertising slogan and a frequent refrain of the early feminist movement. See Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy* in Hibbs, 58 STAN. L. REV. 1871, 1871 (2006) (discussing phrase).

⁷⁸https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_participants.

⁷⁹ Franke, *supra* note __, at 199.

now? And to quote the queer and feminist theorist Katherine Franke, “Can the law protect pleasure?”⁸⁰ Is it possible that by answering these questions, we might realize that the “overwhelming attention we have devoted to prohibitions against bad or dangerous sex has obscured, if not eliminated, a category of desires and pleasures in which women”—and men—“might actually want to indulge”?⁸¹

II. FUTURE SEX

Reports of the death of utopia have been greatly exaggerated.

—Caitríona Ní Dhúill, *Sex in Imagined Spaces*⁸²

Science fiction isn’t just thinking about the world out there. It’s also thinking about how that world might be—a particularly important exercise for those who are oppressed, because if they’re going to change the world we live in, they—and all of us—have to be able to think about a world that works differently.

—Samuel Delany⁸³

Thus far I have focused attention on the failure of our efforts to reduce unwanted sex, which I attribute in part to our failure to talk openly and honestly about wanted sex. This final part goes a step further to ask what a future world where there is little or no unwanted sex would actually look like, and if there are necessary preconditions to such a world. Specifically, this part turns to how feminist futurists have imagined a world where sexual autonomy is the norm. And it asks “[w]hat happens to gender arrangements, to sexual identities and sexual and reproductive practices, when they are imagined anew within the fictional space of a utopian order?”⁸⁴

The point of exploring how feminist futurists have imagined utopia free from unwanted sex is not necessarily so that we can mark a particular

⁸⁰ *Id.* at 183.

⁸¹ *Id.* at 200.

⁸² CAITRÍONA NÍ DHÚILL, *SEX IN IMAGINED SPACES: GENDER AND UTOPIA FROM MORE TO BLOCH 1* (2010).

⁸³ Samuel R. Delany, *The Art of Fiction No. 210*, 197 *PARIS REVIEW* 27 (2011).

⁸⁴ *Id.* at 2.

feminist vision as our end point, but to use these visions “as a necessary stimulus to socio-political transformation.”⁸⁵ Put differently, the point is to prompt *us* to consider what an ideal future with unwanted sex might look like. Literary theorist Caitríona Ní Dhúill’s observation is useful here: “[B]y portraying differently constructed social orders, [these alternative futures] draw attention to the constructedness of social orders generally, thus suggesting that existing structures are not inevitable.”⁸⁶ The point, in other words, is to consider what social structures we expect will be part of, and even necessary to, a world without unwanted sex. The hope is that this exercise can “get people to imagine what they want and don’t want down the road, and maybe do something about it.”⁸⁷

To be clear, most early imaginings of sexual futures would today strike us as decidedly retrograde. There is the 1938 short story, “Helen O’Loy,” about a scientist who designs the perfect wife by creating a robot.⁸⁸ There is Robert Heinlein’s novel *Podkayne of Mars*, featuring a female protagonist who, however adventurous in the opening pages, by the end embraces traditional notions of gender and sex, proclaiming, “We were designed for having babies. A baby is a lot more fun than differential equations.”⁸⁹ Far more typical, however, was a failure to imagine women in anything that went beyond a secondary or even tertiary role. In the much-heralded film *2001: A Space Odyssey*, women are almost entirely absent, except as mini-skirt wearing stewardesses and an assistant to a male scientist.⁹⁰ In the original *Star Trek* series, the only prominent female cast member is Lt. Uhura, a “communications officer,” whose job recalls a switchboard operator.⁹¹ The remaining women, usually new ones each

⁸⁵ Michael J. Griffin & Tom Moylan, *Introduction*, in *EXPLORING THE UTOPIAN IMPULSE: ESSAYS ON UTOPIAN THOUGHT AND PRACTICE* 11-18 (Michael J. Griffin & Tom Moylan eds., 2007).

⁸⁶ DHÚILL, *supra* note __, at 8.

⁸⁷ Piercy, *supra* note __.

⁸⁸ Lester Del Rey, *Helen of Troy*, in *SCIENCE FICTION HALL OF FAME* 73 (Robert Silverberg ed., 1971). As one SF scholar observed, the robot-wife “learns about romance from TV soap operas, cooks, cleans, and sobs her heart out when her ‘husband-inventor’ arrives home late from work. Beverly Friend, *Virgin Territory: Women and Sex in Science Fiction*, 14 *EXTRAPOLATION* 49, 49 (1972).

⁸⁹ ROBERT HEINLEIN, *PODKAYNE OF MARS* 56 (1963).

⁹⁰ See Barry Keith Grant, *Of Men and Monoliths: Science Fiction, Gender, and 2001: A Space Odyssey*, in *STANLEY KUBRICK’S 2001: A SPACE ODYSSEY, NEW ESSAYS* 65 (Robert Kolker ed., 2006).

⁹¹ Marc Bernandin, ‘*Star Trek Beyond*’ Stars on ‘Uncomfortable Conversations, *Sulu’s Sexual Orientation, and the Future*, L.A. TIMES, July 21, 2016 (observing that

episode, largely appear as sexual conquests of the main character Captain Kirk, a “footloose, carefree adventurer, the James Bond of interstellar travel.”⁹²

Other futurist works explore future sex, but are decidedly dystopian. I am thinking here of Aldous Huxley’s *Brave New World*,⁹³ George Orwell’s *Nineteen Eighty-Four*,⁹⁴ Margaret Atwood’s companion novels *The Handmaid’s Tale*⁹⁵ and *The Testament*,⁹⁶ and Naomi Alderman’s recent best seller, *The Power*.⁹⁷ Or if not completely dystopian, at least dystopian-ish. An example of the latter is Sally Gearheart’s *The Wanderground*, which concludes that “women and men cannot yet, and may not ever, love one another without violence; they are no longer of the same species.”⁹⁸

What motivates my inquiry, however, is not *dystopia*, but its opposite, *utopia*. More importantly, I want to consider utopian visions as not just light entertainment, but as a critical practice.⁹⁹ After all, as literary theorist Frances Bartkowski observes, the utopian voice “is always tendentious; it has designs on the reader.”¹⁰⁰ (It is not insignificant that the work that coined the term utopia—Thomas More’s *Utopia*, written in 1516—discusses, among other things, sexual relations in utopia and the harshness of

“[f]or all of ‘Star Trek’s groundbreaking including in 1966, Uhura was kind of a switchboard operator.”); see also *TO BOLDLY GO: ESSAYS ON GENDER AND IDENTITY IN THE STAR TREK UNIVERSE* (Nadine Farghaly & Simon Bacon eds. 2017).

⁹² Anne Cranny-Francis, *Sexuality and Sex-Role Stereotyping in Star Trek*, 12 *SCI. FI. STUDIES* 274, 274 (1985).

⁹³ ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932). Whether the novel is dystopian is debated. It depicts a world where citizens’ needs are all met, and where there is unlimited sexual gratification. The government distributes the drug soma to keep citizens happy. However, the novel’s protagonist craves to know suffering, which he views as essential to being human.

⁹⁴ GEORGE ORWELL, *NINETEEN EIGHT-FOUR* (1948). In the novel, sex for pleasure is a crime. The Party aspires to a world in which procreation “will be an annual formality, like the renewal of a ration card. We shall abolish the orgasm.”). *Id.* At 336-37.

⁹⁵ MARGARET ATWOOD, *THE HANDMAID’S TALE* (1985). As the character Aunt Lydia explains to the women who have been kidnapped and forced into become child bearers in exchange for protection, the past was about “freedom to. Now you are being given freedom from. Don’t underrate it.” *Id.* At 33.

⁹⁶ MARGARET ATWOOD, *THE TESTAMENT* (2019).

⁹⁷ NAOMI ALDERMAN, *THE POWER* (2017).

⁹⁸ SALLY MILLER GEARHEART, *WANDERGROUND* 115 (1979).

⁹⁹ DHÚILL, *supra* note __, at 7 (embracing utopian fiction as also a “critical practice”).

¹⁰⁰ Bartkowski, *supra* note __, at 9.

the penal code.)¹⁰¹ In particular, I am interested in the handful of decidedly feminist utopias—part of what Marleen Barr calls “feminist fabulations”¹⁰²—that we find in science fiction. Though even in narrowing the focus to feminist utopias, some further culling is necessary. For starters, I am putting to the side the feminist utopias that exclude men altogether.¹⁰³ Charlotte Perkins Gilman’s *Herland* and Joanna Russ’s *The Female Man* fall in this category.¹⁰⁴ I put them aside because, as literary scholar Marleen Barr observes, these women-only utopias “fail to answer a question important to women who are not separatists: how do men and women live together with dignity and equality.”¹⁰⁵ I am also putting to the side utopias that depend on genetic modifications, such as Ursula LeGuin’s *The Left Hand of Darkness*, in which individuals have both sets of sexual organs and typically “have no predisposition to either sexual role.”¹⁰⁶ Although the end result may seem ideal—there is “no unconsenting sex, no rape . . . coitus can be performed only by mutual invitation and consent; otherwise it is not possible”¹⁰⁷—the means of getting there do not.¹⁰⁸

That leaves non-separatists, and dare I say plausible, feminist utopias, such as Ursula LeGuin’s *The Dispossessed*,¹⁰⁹ Samuel Delaney’s *Triton*,¹¹⁰

¹⁰¹ THOMAS MORE, *UTOPIA* (1516).

¹⁰² MARLEEN BARR, *LOST IN SPACE: PROBING FEMINIST SCIENCE FICTION AND BEYOND* 13 (1993) (defining “feminist fabulation as an umbrella term that includes science fiction, fantasy, utopian literature, and mainstream literature (written by both women and men) that critiques patriarchal fictions.”).

¹⁰³ It is possible that these feminist writers viewed a utopia with men as a non-starter, an impossibility, an oxymoron. As the futurist Joanna Russ writes, “If men are kept out of these [feminist utopias] it is because men are dangerous. They also hog the good things in this world.” JOAN RUSS, *TO WRITE LIKE A WOMAN: ESSAYS IN FEMINISM AND SCIENCE FICTION* 77 (1995). To my knowledge, there is no male counterpart: outside of gay fiction, male writers do not imagine all male utopias.

¹⁰⁴ CHARLOTTE PERKINS GILMAN, *HERLAND* (1915); JOANNA RUSS, *THE FEMALE MAN* (1975)

¹⁰⁵ BARR, *supra* note ___, at 69-70 (1993).

¹⁰⁶ URSULA LE GUIN, *THE LEFT HAND OF DARKNESS* 90 (1969). Note too that there is “no division of humanity into strong and weak halves, protective/protected, dominant/submissive, owner/chattel, active/passive.” *Id.* at 93.

¹⁰⁷ *Id.* at 93.

¹⁰⁸ *Id.* I am also putting to the side Delany’s *Stars in My Pocket Like Grains of Sand*. In his novel, gender is contingent; the pronouns “he” and “she” are not about sex organs, but rather are assigned depending on whether one desires or is desired.

¹⁰⁹ URSULA K. LE GUIN, *THE DISPOSSESSED* (1974).

¹¹⁰ SAMUEL DELANY, *TRITON* (1976).

Marge Piercy's *Woman on the Edge of Time*,¹¹¹ and Octavia Butler's utopia-in-waiting in *Parable of the Sower*¹¹² and *Parable of the Talents*.¹¹³ What is notable is that so many of these feminist utopias "not only ask the same questions and point to the same abuses; they provide similar answers and remedies."¹¹⁴ It is telling, for example, that in these feminist utopias, not only is there no unwanted sex, there is also complete gender equality. It is perhaps also telling that these utopias depict communal, classless societies where government plays no role, or a very limited one.¹¹⁵ Perhaps most importantly, these feminist utopias are all sexually permissive and today would be described as "sex positive."¹¹⁶ In *Woman on the Edge of Time*, for example, since almost everyone exists on a sexual continuum, bisexuality is the norm, so much so that it is barely perceived as a category at all. It just *is*. Indeed, even gendered pronouns have been retired; an individual is simply a "per."¹¹⁷ Similarly, in *The Dispossessed*, all forms of sexual activity are treated as respectable, whether they are monogamous or casual or heterosexual or not. In addition, in perhaps the most feminist of these utopias—*Woman on the Edge of Time*—pregnancy has been decoupled from biological sex, and gender has been decoupled from child-rearing; in a sense, these visions engage with and concretize the theoretical writings of Shulamith Firestone in *The Dialectic of Sex*¹¹⁸ and Dorothy Dinnerstein in *The Mermaid and the Minotaur*.¹¹⁹ Since Part One of this essay emphasized how race has shaped the application of the law of unwanted sex, it pays to mention how these utopias treat race. In these feminist utopias, race exists, but has ceased to divide people or matter. As a member of the utopian society in *Woman on the Edge of Time* explains:

[W]e decided to hold on to separate cultural identities. . . .
We want there to be no chance of racism again. But we don't

¹¹¹ PIERCY, *supra* note __.

¹¹² OCTAVIA BUTLER, *PARABLE OF THE SOWER* (1993).

¹¹³ OCTAVIA BUTLER, *PARABLE OF THE TALENTS* (1998). Butler's companion novels are set in a dystopian future, but their protagonist envisions a utopian end goal centered around a belief system described as Earthseed.

¹¹⁴ RUSS, *TO WRITE LIKE A WOMAN*, *supra* note __, at 136.

¹¹⁵ Russ makes a similar observation. *See id.* at 136-39.

¹¹⁶ For an overview of sex positive feminism, see Ummi Khan, *Let's Get It On: Some Reflections on Sex-Positive Feminism*, 38 *WOMEN'S RTS. L. REP.* 346 (2017); Margot Kaplan, *Sex-Positive Law*, 89 *N.Y.U. L. REV.* 89, 94-98 (2014).

¹¹⁷ PIERCY, *supra* note __, at 57..

¹¹⁸ SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX* 213 (1970).

¹¹⁹ DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* (1976).

want the melting pot where everybody ends up a thin gruel.
We want diversity, for its strangeness breeds richness.¹²⁰

A similar sentiment pervades Butler's novels. Indeed, one of the tenets of the feminist vision in *Parable of the Sower* is "Embrace diversity. Or be destroyed."¹²¹

Again, the point of looking to feminist visions of utopias is to use them "as a necessary stimulus to socio-political transformation"¹²² and motivate *us* to consider what an ideal future with unwanted sex might look like. The point too is for us to raise questions about that future, questions that range from the seemingly mundane to the seemingly consequential.

For example, in our future world free from unwanted sex and unwanted sexual advances, are men still the primary initiators of sex, or has sexual pursuit been de-gendered? Do men grow their hair long, or only women? Are there still segregated restrooms, or what critical theorist Jacques Lacan aptly called "urinary segregation,"¹²³ and the expressive normative message of sexual difference inherent in such a division? Are there still things straight couples do in public without a care in the world, things that can trigger violence when done by other couples, like holding hands?¹²⁴ Do people hug each other when they greet, or has this fallen out of fashion in response to concerns about unwanted touching? Do people, wanting and

¹²⁰ PIERCY, *supra* note __, at 96-97. Indeed, one of the most feminist things about Piercy's novel is that it features a poor woman of color, Connie Ramos, who has experienced both domestic violence, child abuse, and racism, as its protagonist.

¹²¹ BUTLER, *PARABLE OF THE SOWER*, *supra* note __, at 181. Or as one scholar put it, "Difference, disagreement, and diversity provide the life force of [Butler's] utopias." See Michelle Erica Green, "There Goes the Neighborhood": *Octavia Butler's Demand for Diversity in Utopias*, in *UTOPIAN AND SCIENCE FICTION BY WOMEN: WORLDS OF DIFFERENCE* 166, 168 (Jane L. Donawerth & Carol A. Kolmerten eds., 1994).

¹²² Michael J. Griffin & Tom Moylan, *Introduction*, in *EXPLORING THE UTOPIAN IMPULSE: ESSAYS ON UTOPIAN THOUGHT AND PRACTICE* 11-18 (Michael J. Griffin & Tom Moylan eds., 2007).

¹²³ Jacques Lacan, *The Agency of the Letter in the Unconscious*, in *ECRITS: A SELECTION* 161, 167 (Alan Sheridan trans., Norton 1977).

¹²⁴ See Matt Stopera, *15 Things All Straight People Do That 2/3 of Gay People Are Still Afraid To*, BUZZFEED.COM, March 19, 2019 (summarizing the violence lesbian and gay people experience simply from holding hands in public).

needing physical contact,¹²⁵ instead cuddle pets and robots?¹²⁶ Speaking of robots, how common are sex robots, embedded with “haptic interfaces” in their external membrane for maximum realism?¹²⁷ Is the commodification of sex still illegal, or is exchanging sex for money viewed on par with being a social worker, or a personal trainer? Have using apps to signal interest in sex become the norm?¹²⁸ Do the Alexas and Siris of the future function as panopticons, ever present police, to deter sex without consent? Or will Alexa and Siri seem curious relics, since we will have all become cyborgs, as the cyberfeminist Donna Haraway predicts.¹²⁹ With our devices, is the concept of consent a relic of the past, looked upon as a curious formality in a world in which “desire can’t help but make itself known. It speaks, it demands, it begs.”¹³⁰ Has the line “between object and subject become[] hopelessly blurred”?¹³¹ “I want you because you want me because I want you because

¹²⁵ Suzanne Degges-White, *Skin Hunger: Why You Need to Feed Your Hunger for Contact*, PSYCHOLOGYTODAY.COM (Jan. 7, 2015), <https://www.psychologytoday.com/us/blog/lifetime-connections/201501/skin-hunger-why-you-need-feed-your-hunger-contact>

¹²⁶ Already animatronic pets are used to provide tactile comfort to residents at nursing homes. See Brittany Britto, *Animatronic Pets at Retirement Homes a Sign of How Robots Will Contribute to Our Lies*, BALTIMORESUN.COM, March 30, 2017.

¹²⁷ For more on the future of sex robots, see Jenny Kleeman, *The Race to Build the World’s First Sex Robots*, THEGUARDIAN.COM, Apr. 27, 2017; see also DAVID LEVY, LOVE + SEX WITH ROBOTS: THE EVOLUTION OF HUMAN-ROBOT RELATIONSHIPS (2007).

¹²⁸ Such apps are already being promoted on college campuses. See Maya Salam, *Consent in the Digital Age: Can Apps Solve a Very Human Problem*, N.Y. TIMES, March 2, 2018, <https://www.nytimes.com/2018/03/02/technology/consent-apps.html>; Meg Graham, *New Apps Urge Mutual Consent, ‘Yes Means Yes,’ When It Comes To Sex*, CHI.TRIB.COM, July 02, 2015, <https://www.chicagotribune.com/bluesky/originals/ct-we-consent-app-michael-lissack-bsi-20150720-story.html>

¹²⁹ Or rather, Donna Haraway argues that we are already cyborg, given our symbiotic relationship with technology such as cars and smartphones. For Haraway, embracing our cyborg selves is also a way of undoing gender hierarchies.

See DONNA J. HARAWAY, *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*, in SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE 149 (1991) In this sense, it might be more accurate to ask whether in the future, we will have embraced our cyborg nature.

¹³⁰ Maya Dusenbery, *Dispatch from the Post-Rape Future*, in THE FEMINIST UTOPIA PROJECT: FIFTY-SEVEN VISIONS OF A WILDLY BETTER FUTURE 10 (Alexandra Brodsky & Rachel Kauder Nalebuff eds. 2015).

¹³¹ *Id.* at 24.

you want me”¹³² Are there sex clubs? Do people speak honestly? Or is sex still viewed with something akin to shame, spoken of with circumlocution and evasion? Do only men go topless, or women too?¹³³ Have we unsexed pregnancy?¹³⁴ Have we unsexed mothering?¹³⁵ Do we continue to give toys of aggression to boys and toys of future maternity to girls? Do women still ride on the back of motorcycles?¹³⁶ Are men and women equal? Will we still think “women and children first”?¹³⁷ Are queers and straight people equal? Do we still racialize sex and sexualize race? Do people speak honestly? Do condoms require four hands to open?¹³⁸ Does the Supreme Court still police women’s bodies? Is there still mass incarceration, and do we still shackle pregnant prisoners during birth?¹³⁹ Have we abolished prisons?¹⁴⁰ Do

¹³² *Id.*

¹³³ Nassim Alisobhani, *Female Toplessness: Gender Equality’s Next Frontier*, 8 U.C. IRVINE L. REV. 299 (2018).

¹³⁴ David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 1 (2019) (arguing that much of the carework of pregnancy can be disaggregated from gender).

¹³⁵ Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57 (2012). Rosenblum argues “that ‘mothering’ and ‘fathering’ have been inappropriately tethered to biosex.” He goes to argue:

“Mothering” should be unsexed as the primary parental relationship. “Fathering,” correspondingly, should be unsexed from its breadwinner status. In an ideal world, people now considered “mothers” and “fathers” would be “parents” first, a category that includes all forms of caretaking.

Id. at 60.

¹³⁶ Jessica Glenza, *Women Shift Gears in Motorcycle Culture: “It’s About Being on the Front of the Bike,”* GUARDIAN.COM (Aug. 16, 2015) (noting the association of women as passengers on bikes, “the subjugated companions of outlaw biker men,” the rear seat is even referred to as the “bitch seat”).

¹³⁷ The term “women and children first” originated as a norm for evacuation procedures in case of an emergency. For a critique of the concept as predicated on gender stereotypes and chivalry, and as inconsistent with gender equality, see generally WOMEN AND CHILDREN FIRST: FEMINISM, RHETORIC, AND PUBLIC POLICY (Sharon M. Meagher & Patrice DiQuinzio eds., 2005).

¹³⁸ This is a reference to a “consent condom” developed in Argentina which requires four hands to open. See Marissa Dellatto, *The ‘Consent Condom’ Takes Four Hands to Open*, NYPOST.COM (April 4, 2019), <https://nypost.com/2019/04/04/this-consent-condom-takes-four-hands-to-open/>

¹³⁹ See, e.g., Priscilla Ocean, *Punishing Pregnancy: Race, Incarceration, and the Shackling of Pregnant Prisoners*, 100 CALIF. L. REV. 1239 (2012).

¹⁴⁰ See, e.g., ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? 9, 42 (2003); Amna Akbar, *Toward a Radical Imagination of the Law*, 93 N.Y.U. L. REV. 405, 430 (2018);

women and men say “no” when they’re thinking “no,” and “yes” when they’re thinking “yes,” addressing at least some of the problems raised by scholars such as Aya Gruber and Kimberly Ferzan?¹⁴¹ Is there still erotic role-playing and kink, from puppy masks¹⁴² to tree sex¹⁴³ to old-fashioned BDSM? To borrow from futurist Joanna Russ, in this utopia, are women “erotic integers and not fractions waiting for completion”?¹⁴⁴ Do people speak honestly? Has power been reconfigured? Is everyone equal?

All of these questions are interconnected, and relate to unwanted sex. While they do not directly respond to Schulhofer’s question, the question that opened this essay, “What went wrong?”, they certainly seem essential to answering the question that lies just beneath his question, and the question that motivates so many of us writing and thinking about rape law: “How do we make things go right?” What is our utopia, our *alter mundus*? For us, does utopia—a Greek pun that could mean two things—lean towards “no place” (*utopia*) or “the good place” (*eutopia*)?¹⁴⁵ All of these questions seem essential if we are serious about mapping a way to a future perfect that does not involve missteps and misdirection and the perpetuating or exacerbating the current ills of the criminal justice system.

This is my hope: That when we reach our future perfect, we will look back and wonder about our dysfunctions, our circumlocutions, and how they contributed to both misunderstandings and bad intentions and, yes, unwanted

Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 284 (2007).

¹⁴¹ See, e.g., Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 405 (2006); Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397 (2016).

¹⁴² Blake Montgomery, *We Live in Packs*, N.Y. TIMES (April 26, 2019), <https://www.nytimes.com/2019/04/26/style/pup-play.html>

(describing the rise in puppy play, a subgenre of gay BDSM which often involves participants donning puppy masks).

¹⁴³ See Neil McArthur, *Ecosexuals Believe Having Sex with the Earth Could Save It*, VICE.COM (Nov. 2, 2016), https://www.vice.com/en_us/article/wdbgyq/ecosexuals-believe-having-sex-with-the-earth-could-save-it

(quoting a member of the ecosexual movement as describing the movement as encompassing, on one end, people who enjoy skinny dipping and naked hiking, and on the other hand, “people who roll around in the dirt having an orgasm” and “people who fuck trees, or masturbate under a waterfall.”)

¹⁴⁴ RUSS, TO WRITE LIKE A WOMAN, *supra* note __, at 142.

¹⁴⁵ DHÚILL, *supra* note __, at 5;

sex. We will understand how the use of force could be an aggravating factor, but react with perplexity that it was once the sine qua non to prove rape. Looking back, we will ponder why people had so much trouble saying no; but really, we will ponder why people had so much trouble asking: *Want to?* We will see how this contributed to mistake of fact defenses—I thought she was into it—the fact that people didn’t ask, didn’t answer, and didn’t speak honestly. We will question our prudishness about naming victims,¹⁴⁶ and how such prudishness contributed to the notion of their being property value in women, that being a rape victim marks one as damaged goods.¹⁴⁷ We will look back at the gendered assumptions in rape law, and even the gendered assumptions of progressive reformers—from the drafters of the MPC¹⁴⁸ to Schulhofer¹⁴⁹ to many Advisors of the ALI’s current effort to revise the MPC’s sexual assault provisions¹⁵⁰—with surprise. We will be embarrassed not only by the benefit of the doubt given to white men accused of sexual assault, but also the presumption of guilt imposed on black men,¹⁵¹ and how feminist reforms challenged the former while ignoring the latter.¹⁵² We will

¹⁴⁶ See Deborah W. Denno, *Perspectives on Disclosing Rape Victims’ Names*, 62 *FORDHAM L. REV.* 125 (1994).

¹⁴⁷ Bennett Capers, *Rape, Truth, and Hearsay*, 40 *HARV. J. L. & GENDER* 183, 186 n.17 (2017).

¹⁴⁸ Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled And Replaced*, 1 *OHIO ST. J. CRIM. L.* 207, 210 (2003) (critiquing the MPC’s gender specific requirement for rape).

¹⁴⁹ The one shortcoming in Schulhofer’s *Unwanted Sex* is its reliance on the trope of weak female victims and male perpetrators. His language, too, is often gendered, as for example when he writes that a woman’s right to sexual autonomy too often does “not exist—until she begins to scream or fight back physically.” SCHULHOFER, *supra* note __, at 10. I doubt Schulhofer would have chose the word “scream” in the case of a male victim. Even in its discussion of doctors, lawyers, therapists, and other professionals who may exert their power to negotiate sex, Schulhofer seems to have trouble imagining anything other than a male professional.

¹⁵⁰ For example, a preliminary draft of the proposed revisions to the MPC’s Sexual Assault Provisions included, among intimate body parts, a woman’s breast but not a man’s breast, a distinction that seems both gendered and hetero-normative. See ALI, *MPC: SEXUAL ASSAULT AND RELATED OFFENSES, PRELIMINARY DRAFT NO. 8* (Sept. 15, 2017), https://www.ali.org/smedia/filer_private/a6/38/a6389eff-dd7a-4252-9efc-2cebd9f0c42e/mpc_sexual_assault_-_pd_8_-_booked4.pdf

¹⁵¹ Capers, *The Unintentional Rapist*, *supra* note __, at 1371-74

¹⁵² Capers, *Real Women, Real Rape*, *supra* note __, at 859-71.

question the easy turn to governance feminism,¹⁵³ carceral feminism,¹⁵⁴ the turn to state violence, and wonder why, comparatively, we paid so little attention to healing victims. We will wonder, “Why prisons?,” and what exactly we were expecting to accomplish other than more unwanted sex, both in prison and when prisoners were released. We will certainly cringe at the way we ignored male victim rape, other than to make jokes about dropping the soap in prison.¹⁵⁵ We will wonder why so many advocates against unwanted sex were silent when the specter of bestial black and brown men—think *Birth of a Nation*, think Willie Horton, think “When Mexico sends its people, they’re not sending their best... They’re rapists”¹⁵⁶—was co-opted to promote white supremacy, to disenfranchise blacks, to win a Presidential election, to shut down the government for the sake of a border wall.

We might even look back to this point in time and think not only of the issues raised here, and the MeToo movement, and the absence of women in President Trump’s administration to say nothing of his casual sexism, but also litigation before the Court. In April 2019, the Court heard oral argument in the case *Iancu v. Brunetti*.¹⁵⁷ In dispute: whether the U.S. Patent and Trademark Office’s refusal to register the clothing brand FUCT, pursuant to Section 2(a) of the Lanham Act, violated the Free Speech Clause of the First Amendment. What upstaged the legal issue, however, was the Justices’ discomfort in saying the brand name FUCT during oral argument.¹⁵⁸ Even

¹⁵³ See Janet Halley et al., *From the International to the Local in Feminist Legal Responses to Rape Prosecution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J. OF L. & GENDER 335 (2006) (coining the term to describe “the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power”); see also JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 20-22 (2006)

¹⁵⁴ For a discussion of the rise of carceral feminism, see Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 368-73 (2016).

¹⁵⁵ See, e.g., Capers, *Real Rape Too*, *supra* note __.

¹⁵⁶ Michelle He Yee Lee, *Donald Trump’s False Comments Connecting Immigrants and Crime*, WASHPOST.COM, July 8, 2015, https://www.washingtonpost.com/news/fact-checker/wp/2015/07/08/donald-trumps-false-comments-connecting-mexican-immigrants-and-crime/?noredirect=on&utm_term=.ea54929947b2

¹⁵⁷ No. 18–302, Jan. 4, 2019, 139 S.Ct. 782, 2019 WL 98541 (case below *In re Brunetti*, 877 F.3d 1330 (C.A. Fed. 2017)).

¹⁵⁸ Adam Liptak, *A Vulgar Term Goes Unmentioned as It Gets Its Day in Court*, N.Y. TIMES (April 15, 2019),

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the Solicitor General avoided saying the word, opting instead to call it a "profane past participle form of a well-known word of profanity and perhaps the paradigmatic word of profanity in our language."¹⁵⁹

If nothing else, I suspect in our future perfect world, we'll be comfortable saying people fuck. Men fuck women. Women fuck women. Women fuck men. Men fuck men. In combinations of twos and threes and a host of other permutations. They use tongues and assholes and strap ons and lips and breasts and hands and fists and apps and remote devices. I suspect in this future world, like the worlds imagined in feminists futures, we will be comfortable with all of the above. And with that comfort, we will make laws accordingly. Until we make laws unnecessary.

<https://www.nytimes.com/2019/04/15/us/politics/supreme-court-vulgarity-trademark.html?searchResultPosition=1>.

¹⁵⁹ *Id.*