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Sexbots; An Obloquy

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SEXBOTS; AN OBLOQUY

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“What sort of wife do you have?”
He did not answer.
“Do you—”
“If you weren’t an android,” Rick interrupted, “if I could
legally marry you, I would.”

—Philip K. Dick¹

Sexbots may displace humans in the sex trade (or on a wider scale) sometime between the 2020s and the 2050s.² Although some perquisites may derive from the proliferation of sexbots (lower levels of sexually transmitted diseases, for example), significant social harms can also be predicted. In anticipation of those harms, lawmakers may endorse targeted regulation or outright bans. The uncertain limits of *Lawrence v. Texas*³ and its progeny of sex-toy decisions will present vague constitutional shoals to these aims. The legislating-of-sexbots crusade will also make for strange bedfellows, politically speaking, as social conservatives aiming to maintain traditional values ally with liberals concerned with amplified objectification.

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1. PHILIP K. DICK, *DO ANDROIDS DREAM OF ELECTRIC SHEEP?* 197 (Ballantine Books 1996) (1968).

2. *Compare* PEW RESEARCH CTR., *DIGITAL LIFE IN 2025: AI, ROBOTICS, AND THE FUTURE OF JOBS* 19 (2014), <http://www.pewinternet.org/files/2014/08/Future-of-AI-Robotics-and-Jobs.pdf> (quoting Stowe Boyd, lead researcher for GigaOM Research, predicting that robotic sex partners will be “commonplace” by 2025), *with* Ian Yeoman & Michelle Mars, *Robots, Men and Sex Tourism*, 44 *FUTURES* 365, 366 (2012) (predicting displacement in the sex trade by sexbots by 2050).

3. 539 U.S. 558 (2003).

INTRODUCTION

The practice of endowing found articles with the verisimilitude of the female form for purposes of sexual attention and carnality is ageless. Seventeenth-century sailors employed cloth dummies for sex.⁴ The ersatz doll is ideal for aberrant and aggressive heterosexual male outlets insofar as its total availability and unalloyed passivity. Sexbots differ from scarecrows with exaggerated bosoms only in their closer approximation of genuine females and their more deliberately designed submissiveness. But the degree to which these mass-produced devices will mimic women will be startling; an advanced model will be essentially indistinguishable from a human being, as identic as an actor playing the part of an android in a science-fiction film. Contemplating a future populated with responsive, counterfeit human commodities that are designed for consentless penetration should affect us disagreeably on several levels. Reinforcing the objectification of women on a widespread and hyper-realistic scale will not be good.

For purposes of bounding this brief essay, I employ the term *sexbot* to refer to a commercially available gynoid with sexual functionality, an android that closely mimics human sexual behavior by means of its hardware and software. I omit personified computer programs unaffiliated with a human form, such as the operating system Samantha portrayed in the film *Her*.⁵ I ignore robots designed for tasks such as domestic chores (think: Rosie in *The Jetsons*)⁶ that are subsequently modified by their owners for sexual aims. I exclude both masculine sexbots and the troubling possibility of childlike sexbots.⁷ Instead, I focus on tangible hyper-realistic adult-like robots combining both hardware and software design aims—like Pris in the film *Blade Runner*⁸—androids distributed and marketed for the sex trade but without any degree of cognizance, sentience, or agency of their own, technologically advanced machines. Make no mistake; human ingenuity fueled by a multibillion-dollar pornography market will produce marketable sexbots, whether within five years or forty. Consideration of preemptive moral legislation should begin now, before an actual

4. ANTHONY FERGUSON, *THE SEX DOLL: A HISTORY* 16 (2010).

5. *HER* (Annapurna Pictures 2013).

6. *E.g.*, *The Jetsons: Rosey the Robot* (Hanna-Barbera Productions Sept. 23, 1962).

7. See Arielle Pardes, *Creating Child Sex Robots Is a Terrible Idea*, VICE (July 18, 2014), <http://www.vice.com/read/child-sex-robots-are-a-terrible-idea-717> (citing Katie Gotch of the Association for the Treatment of Sexual Abusers, predicting “that child sex bots are pretty likely to redirect pedophilic interests back toward human children, rather than satisfying the [pedophilic] desire outright”).

8. *BLADE RUNNER* (Warner Bros. 1982).

urgency arises, not later. After sexbots enter commerce, the proverbial horse will be out of the barn.

I. PROPOSED LEGISLATION

At least two primary varieties of sexbot legislation should be considered. The first is an outright ban or meaningful availability restrictions similar to municipal laws governing pornography and nude dancing. Shops selling or leasing sexbots could be proscribed in specified geographical areas; purchase and use could be limited to adults; licensing and oversight could be implemented.⁹ Alternatively, a broad and straightforward prohibition on the sale, marketing, or possession of sexbots could be legitimately considered. Similar interdictions of sexual devices and aids have been moderately successful.¹⁰ Several state statutory attempts can be identified, with a few having been jettisoned as unconstitutional.¹¹ None of the attempts, however, have criminalized mere possession of sexual devices. These laws have more cautiously proscribed only distribution and sale.

The probity of banning vibrators and other “sex toys” is questionable.¹² Fully evolved sexbots will present an entirely different and more consequential set of policy considerations. Outright bans of sexbots should be thoughtfully debated both for the maintenance of community morals and to deter further commercial investment in the development of sexbots. Proactive legislation could dampen aggressive investments in sexbot technology.

A second legislative option might consider a form of licensing and oversight coupled with a kind of mandatory reporting requirement for sexbots comparable to mandatory reporting legislation applicable to healthcare workers and educators in regards to criminal sexual acts.¹³ Legislation could require sexbot software that wirelessly transmits

9. See Alan C. Weinstein, *Zoning Restrictions on Location of Adult Businesses*, 31 URB. LAW. 931 (1999).

10. E.g., MISS. CODE ANN. § 97-29-105 (2016).

11. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 741 (5th Cir. 2008) (noting statutes in eight states—Texas, Mississippi, Alabama, Virginia, Louisiana, Kansas, Colorado, and Georgia—four of which were held to be unconstitutional).

12. See Danielle J. Lindemann, *Pathology Full Circle: A History of Anti-vibrator Legislation in the United States*, 15 COLUM. J. GENDER & L. 326, 346 (2006) (concluding that judicial review of vibrator use has returned us “to the Victorian epoch”).

13. See generally Lisa M. Smith, *Lifting the Veil of Secrecy: Mandatory Child Abuse Reporting Statutes May Encourage the Catholic Church to Report Priests Who Molest Children*, 18 LAW & PSYCHOL. REV. 409 (1994).

reports of defined acts of violence or perversion to law enforcement.¹⁴ This kind of legislation would not be aimed at protecting sexbots as property since abuse and even destruction of private property is typically viewed as incident of ownership.¹⁵ Rather, reporting of misdeeds would be prophylactic. High-risk individuals could be triaged for early intervention and treatment before they become criminal sex offenders.

The constitutionality of sexbot reporting requirements will turn largely on Fourth Amendment search and seizure jurisprudence.¹⁶ Since reasonable expectations of privacy turn on societal expectations, the quicker that legislators identify violent and perverse acts against sexbots as indefensible in terms of privacy, the less legitimately expectations of privacy can be asserted once sexbots are fully online.¹⁷ A Fourth Amendment privacy expectation turns on both the subjective expectation of the individual defendant and whether society is prepared to objectively recognize that expectation of privacy as reasonable in a given context.¹⁸ Legislators should map defined acts of depravity and violence against sexbots that fall outside any sanctuary of privacy, and they should do so prior to significant numbers of sexbots entering the marketplace. *Katz v. the United States*¹⁹ held that there was a legitimate expectation of privacy in phone booth conversations.²⁰ If, however, Congress had mandated that phone calls where one caller was yelling (exceeding, say, eighty decibels) would be automatically recorded and transmitted to the police—and did so before any phone booths were installed—the result in *Katz* may have been different. Similarly, carving out certain sexbot activities as beyond the scope of privacy protections in advance of the appearance of sexbots could reduce legitimate expectations of privacy in that sphere.

14. Cf. *Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800, 811–12 (W.D. Wis. 2007) (describing school officials' duty to report sexual assault of a student by a teacher under Wisconsin law).

15. See, e.g., *Nat'l City Bank v. Case W. Reserve Univ.*, 369 N.E.2d 814, 818–19 (Ohio Ct. C.P. Lorain Cnty. 1976) (holding that a directive in a will that the decedent's personal residence be razed in order to prevent its use for commercial purposes did not violate public policy).

16. See generally Mark Rapisarda, *Privacy, Technology, and Surveillance: NSA Bulk Collection and the End of the Smith v. Maryland Era*, 51 GONZ. L. REV. 121 (2015).

17. Cf. *Rideout v. Commonwealth*, 753 S.E.2d 595, 600 (Va. Ct. App. 2014) (holding defendant lacked a reasonable expectation of privacy in his personal computer files because he had installed software designed for sharing files over the internet).

18. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

19. 389 U.S. 347 (1967).

20. *Id.* at 348, 359.

II. LEGAL IMPEDIMENTS

Thirteen years ago, the United States Supreme Court, in *Lawrence v. Texas*, overruled *Bowers v. Hardwick*,²¹ a 1986 decision that had upheld as constitutional the criminalization of homosexual sodomy.²² While Justice Kennedy, writing for the majority in *Lawrence*, applied rational basis scrutiny to the Texas sodomy statute at issue, he spoke in elevated terms of the rights of adults to enter into intimate relationships within their own homes along with the right of privacy.²³ Ultimately, the holding in *Lawrence* rested on a determination that Texas lacked a legitimate state interest to criminalize sodomy in the particular context of that case.²⁴ The viability of sexbot legislation, in turn, will be dependent on a sustainable reading *Lawrence*.

Since (and also prior to) *Lawrence*, a number of courts have considered the constitutionality of bans on the distribution of devices marketed primarily for the stimulation of genitals.²⁵ These “sex toy” cases inform a reading of *Lawrence* geared towards sexbot restrictions. The legislation of dildos and artificial vaginas, in other words, is a close analogue to the proscription of sexbots. Both classes of chattels constitute commercially distributed sex aids. Some sex devices manufactured today do have legitimate medical uses for treating sexual dysfunction or incontinence, despite “their reputation as . . . naughty novelty item[s].”²⁶ Sexbots may also. But for present purposes, it will be assumed that sexbots will not constitute adaptive devices for individuals with sexual dysfunctions. Statutory exceptions for these kinds of uses could easily be implemented.

Three chief post-*Lawrence* “sex toy” cases can be identified: *Williams v. Attorney General of Alabama*,²⁷ *1568 Montgomery Highway, Inc. v. City of Hoover*,²⁸ and *Reliable Consultants, Inc. v.*

21. 478 U.S. 186 (1986).

22. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

23. *E.g., id.* at 562 (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”). *See generally* DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012).

24. *Lawrence*, 539 U.S. at 578.

25. *See* David C. Minneman, Annotation, *Constitutionality of State Statutes Banning Distribution of Sexual Devices*, 94 A.L.R.5th 497 (2001) (collecting cases).

26. *Id.* § 2[b]. “[V]ibrators remain an important tool in the treatment of anorgasmic women who may be particularly susceptible to pelvic inflammatory diseases, psychological problems, and difficulty in marital relationships.” *Id.* The rights of individuals with disabilities to utilize sexual aids to achieve intimacy with their partners should not be discounted.

27. 378 F.3d 1232 (11th Cir. 2004).

28. 45 So. 3d 319 (Ala. 2010).

Earle.²⁹ *Williams* upheld an attempt at prohibiting the commercial distribution of sexual aid devices.³⁰ *Hoover* also concluded that public morality supplies a sufficient justification for the ban of sexual devices.³¹ *Earle*, however, struck down a Texas statute criminalizing the sale, advertising, or lending of devices designed or marketed for sexual stimulation.³² The *Earle* court explained its reasoning: “An individual who wants to legally use a safe sexual device during private intimate moments alone or with another is unable to legally purchase a device in Texas, which heavily burdens a constitutional right.”³³ The rationale is problematic for sexbot regulations, and it rests on *Lawrence*’s directionless reasoning.³⁴

The best illustration of the elusiveness of *Lawrence*’s borders is an unpublished report by Magistrate Judge Komives in the Eastern District of Michigan in *Kuch v. Rapelje*.³⁵ Ronald Kuch’s girlfriend had asked him to bury the carcass of her Labrador retriever in a wooded area on her property.³⁶ Three days earlier, the dog had been fatally struck by a car.³⁷ Kuch was arrested after an animal control officer observed him having sexual relations with the dog’s carcass.³⁸ Following his conviction, he filed a habeas petition in federal court, asserting that “Michigan’s sodomy statute [wa]s unconstitutionally vague and overly broad as applied to defendants who use animal carcasses for sexual purposes.”³⁹

Magistrate Judge Komives’ report recommending that the court reject Kuch’s habeas petition is thoughtful and reasoned, not dismissive, nor cursory. Noting *Lawrence*’s sweeping incantations about a substantive due process right for two consenting adults to engage in private sexual contact, Magistrate Judge Komives rejected the aspects of the *Lawrence* decision that “could be read as ‘effectively

29. 517 F.3d 738 (5th Cir. 2008); see also *This That & the Other Gift & Tobacco, Inc. v. Cobb County, Ga.*, 439 F.3d 1275 (11th Cir. 2006); *PHE, Inc. v. State*, 877 So. 2d 1244 (Miss. 2004).

30. *Williams*, 378 F.3d at 1250. *Williams* boasts a complex procedural history. See *Hoover*, 45 So. 3d at 332–37 (tracing “*Williams I*” through “*Williams VI*”).

31. *Hoover*, 45 So. 3d at 341.

32. *Earle*, 517 F.3d at 745.

33. *Id.* at 744.

34. *Id.* at 745.

35. Report & Recommendation, *Kuch v. Rapelje*, No. 2:09-CV-12872 (E.D. Mich. 2010), 2010 WL 3419823.

36. *Id.* at 2.

37. *Id.*

38. *Id.*

39. *Id.* at 4.

decree[ing] the end of all morals legislation.”⁴⁰ He rejected Kuch’s reading of *Lawrence* that States cannot regulate private sexual conduct absent an injury.⁴¹ *Lawrence*, he concluded, “found the constitutional flaw in the statute not to be the statute’s regulation of sexual conduct *per se*, but its more widespread regulation of the types of intimate, personal relationships into which consenting adults may enter.”⁴² *Lawrence*, in other words, did not recognize a liberty interest in sexual acts but in forming meaningful personal relationships by means of (*inter alia*) sex with one another. Magistrate Judge Komives’ report impliedly took judicial notice of the fact that meaningful personal relationships cannot be formed with dogs, deceased or otherwise, by means of sodomy.⁴³

Applying this ratiocination to sexbot legislation—even sweeping outright bans on sexbot possession—yields a constitutional outcome. Sexbots, like dogs, are chattels, not persons with whom it is possible to form bonds of intimacy. Accordingly, states would have free reign in legislating the broadest prohibitions of sexbots on the basis of perceived morality, a malleable public end.⁴⁴ A rejoinder from sexbot proponents might attempt to link the private nature of a sexbot liaison with *Lawrence*’s vague contours. A sexbot encounter in one’s own home is private, technologically aided masturbation. Masturbation is more of a solitary (private) act and thereby more deserving of privacy-based substantive due process protections than sexual relations (which involve more than one person) as a means to cement personal relationships, the argument might go. This line of thinking should fail. As Magistrate Judge Komives’ report in *Kuch* notes, “[A]t no point in *Lawrence* did the Court suggest that there is a fundamental constitutional right to engage in any particular sex act, and the Court did not apply strict scrutiny to the Texas sodomy law at issue.”⁴⁵ So understood, *Lawrence* presents no constitutional impediments to sexbot rules.

40. *Id.* at 15 (alteration in original) (quoting *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting)).

41. *Id.* at 16.

42. *Id.* at 15.

43. *See id.* at 16 (“[Bestiality] laws do not implicate a liberty interest possessed by consenting adults in forming meaningful, intimate relationships.”).

44. *But see Lawrence*, 539 U.S. at 577 (emphasizing that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is *not* a sufficient reason for upholding a law prohibiting the practice” (emphasis added) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

45. Report & Recommendation, *supra* note 35, at 18.

III. POLITICAL IMPEDIMENTS

Conservatives should coalesce around an anti-sexbot platform on account of the threats sexbots will pose to the stability of marriage and traditional values.⁴⁶ Liberals should resist the unchecked proliferation of sexbots because of the ways in which sexbots will reinforce inequality, validate the commercialization of women, and exacerbate the commoditization of violence against women.⁴⁷ Despite their common interests, otherwise unaligned political camps typically avoid working toward the same goal. Rather, they tend to either cede authority over the issue to the other camp or successfully claim it as their own. The aversion to working together is especially puissant with sexual-related political themes. This tendency can be seen in the campaigns against human trafficking (ceded by feminists to establishment law enforcement), prostitution (same), and the pornography industry (which incurs the scorn of feminists but operates without so much as a blush from most conservatives).⁴⁸

Admittedly, I am exaggerating and oversimplifying this political dynamic in the name of rhetoric, but the point is an important one. The industry with an interest in resisting attempts at municipal restrictions or regulation of sexbots is a financial juggernaut. To combat this foe, liberals and conservatives cannot divide their armies. They will need to coordinate their efforts to pursue broad-based sexbot legislation and do so before sexbot proliferation and the inertia of the market makes legislation to combat bots that much more obstreperous.

46. See Daniela Hernandez, *Let's Not Ban Sex Robots Just Yet*, FUSION (Sept. 15, 2015, 12:12 PM), <http://fusion.net/story/198174/pro-sex-robots/> (explaining that “[e]ven the most sexually active people won’t have as much data with which to improve their performance in bed [as sexbots, which] will be able to please you in ways that may be impossible for a human.”).

47. *Id.*

48. Compare Press Release, Fed. Bureau of Investigation, Phoenix Div., Super Bowl Sex Trafficking Operation (Feb. 18, 2015), <https://www.fbi.gov/phoenix/press-releases/2015/super-bowl-sex-trafficking-operation> (describing “the National Day of Johns, during which Arizona arrested 150 customers soliciting prostitution and a second week-long operation that resulted in the arrest of 84 johns”), with Andy Campbell, *Sex Trafficking Hype Surrounding the Super Bowl Does More Harm Than Good*, HUFFINGTON POST (Feb. 5, 2016, 4:43 PM), http://www.huffingtonpost.com/entry/super-bowl-sex-trafficking-harmful_us_56b4e08be4b08069c7a7068b (quoting Professor Bridgett Carr’s criticisms of focusing too much on a single sex trafficking event: “Is the service industry upping the use of labor trafficking victims during the Super Bowl? Who are the people cleaning our hotel rooms? Why are we narrowing this discussion to sex trafficking?”).

CONCLUSION

Fornicatory androids are coming. The emerging impact of these robots is still nascent. Robot-law scholar Ryan Calo predicts that robots will “accomplish both useful and unfortunate tasks in unexpected ways.”⁴⁹ Sexbots may perform some public good, replacing prostitutes and pornography actors with sanitized technology, but the hyper-realism and degeneracy of sexbots will outweigh these advantages. By failing to appreciate these public harms from the widespread distribution of sexbots, a greater acceptance of rape and vice may be fueled. Sexbots will numb already dulled sensibilities. Sex robots can be expected to reinforce the “switching off” of empathy that prostitution engenders. Sexbots may cultivate a multiplication of brutish acts and a flowering of cheapened morals. The salient characteristics of sexbots will be debauchery and degradation. The law should be shaped in anticipation of these dangers, and the sooner, the better.

49. Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CALIF. L. REV. 513, 515 (2015).