

TELEDILDONICS AND RAPE BY DECEPTION

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ABSTRACT

It is now possible to buy sex toys that connect to the user's phone or computer via Bluetooth and can be controlled remotely. The use of such Internet-enabled haptic sex toys involves an ineliminable risk of being deceived about particular features of one's sexual partner and/or about which person one was having "sex" with. Where this occurs, it is possible that the user would become the victim of rape-by-deception. We argue that determining whether a person using an Internet-enabled haptic sex toy has been raped or not when they are involved in a sexual encounter with someone — or something — other than that they intended requires us to confront difficult questions about the definition and significance of sexual intercourse and about the nature and harm of rape. Our discussion of these topics suggests that the use of such devices is more ethically fraught than has been appreciated to date.

Keywords: teledildonics; rape; ethics; cybersex; Internet.

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INTRODUCTION

The search for new or improved sexual pleasures plays a significant — if often under acknowledged — role in driving the development of new technologies. It was perhaps inevitable, then, that progress in ‘haptics’ — the science and technology of the transmission of touch — would spark interest in the development of haptic sex toys.¹ Consequently, it is now possible to purchase a number of sex toys that transmit touch and physical sensation via the Internet.

In this paper, we want to reflect on these technologies and some of the ethical and philosophical questions they raise for two reasons.² First, given the popularity of ordinary sex toys, and the sexual opportunities and communities made possible by the Internet, it is reasonable to assume that large numbers of people will experiment with these new remote controlled and interactive sex toys and that a significant number will use them regularly. Any ethical and/or philosophical issues they raise are thus of interest simply by virtue of the

¹ Howard Rheingold, ‘Teledildonics: Reach out and Touch Someone’ (1990) 2 *Mondo 2000* 52; Alberto Gallace and Charles Spence, *In Touch With the Future: The Sense of Touch from Cognitive Neuroscience to Virtual Reality* (Oxford University Press 2014), 225-228.

² A *full* legal analysis must, we believe, await the conclusion of this more fundamental investigation.

number of people they might affect.³ Second, the use of such devices seems to involve a not-insignificant risk of users being deceived about the identity of the person with whom they are having ‘sex’. As we shall see below, it is possible that in such cases the user would become the victim of ‘rape by deception’.⁴ Until this issue can be resolved, the design and manufacture of teleoperated and remote-controlled sex toys involves profound moral hazards.

While existing products fall short of allowing fully immersive ‘cybersex’, it seems likely that in the not-too-distant future devices that transmit a larger range of genital sensations, which we shall call Internet-enabled haptic sex toys (henceforth IEHSTs), will be developed.⁵ In order to bring the philosophical questions that interest us into stark relief and to reduce the risk of our discussion being rendered obsolete by technological progress, we shall for the most part discuss the issues raised by the use of such IEHSTs. We suggest that determining whether a person using an IEHST has been raped or not, when they are involved in a sexual encounter with someone — or something — other than that they intended, requires one to confront difficult questions about the definition and significance of sexual penetration, what counts as consent, and the nature and harm of rape. Our discussion of these topics will draw

³ Nicola Liberati, ‘Teledildonics and New Ways of ‘Being in Touch’: A Phenomenological Analysis of the use of Haptic Devices for Intimate Relations’ (2016). 23 *Science and Engineering Ethics* 801, at 801.

⁴ Rape by deception is also called ‘rape by fraud’ elsewhere in the literature.

⁵ We have chosen here to use the term ‘Internet-enabled haptic sex toys’ in the body of our text rather than the more popular term ‘teledildonics’, which we have adopted in the title, because not all of these devices are dildos; moreover it will prove crucial to the discussion that follows to be able to distinguish those IEHSTs that are teledildos from those that are penile sheaths/male masturbators.

upon the academic literature on the philosophy of sex, philosophical and feminist discussions of the nature of rape, and — in particular — the literature on rape by deception. We argue that if one allows that IEHSTs enable sexual intercourse via the Internet then they will involve a significant risk of rape by deception. This risk implies that the use of such devices would be — and, we suggest, the use of existing devices is — more ethically fraught than has been appreciated to date. We also hope, throughout our discussion, to show how thinking about IEHSTs offers a valuable opportunity to gain new insights into some old questions in the philosophy of sex.

An important limitation of our discussion is that we are only concerned with the ethical and philosophical issues that are raised by the risk of *rape* involved in the use of these devices. As will become abundantly clear in the discussion that follows, it seems likely that even if one concludes that these devices do not involve a risk of rape, they do involve a significant risk of sexual *assault*, which might itself be enough to raise ethical red flags about their design and use. However, because of the length and philosophical complexity of our investigation of the risk of rape involved, this further set of questions must remain a topic for future investigations.

Relatedly, we have not tried to settle the question of how IEHSTs should be regulated here for a number of reasons. First, as we hope our discussion demonstrates, the ethical and conceptual questions arising from the possibility of deception involved in cybersex are complex and profound. It is, we shall argue, plausible to hold that the use of IEHSTs may expose users to a risk of rape and also make it easier for malicious actors to rape people. However, it also seems likely that these devices will be popular with a class of potential users who do not share the philosophical commitments that suggest that deception in the context

of the use of IEHSTs can constitute rape. Before we can decide whether — or how — we should regulate IEHSTs, then, it is important to consider the philosophical questions we address below. Moreover, second, even if one wished to regulate to minimise the risks posed by these devices, the social acceptability, and thus the effectiveness, of such regulation is likely to depend in part on whether the regulations track people’s intuitions about the nature and significance of the wrong done by those who misuse IEHSTs in various ways. Again, then, at a bare minimum we need to know if — and when — the wrong might be rape. Third, developing good regulation in this area would require paying attention to various pragmatic and technical matters (How hard would it be to identify those who hacked into such devices? Would it be possible to ensure that minors could not access them? What means might be available to prosecute people misusing these devices across national borders?) that are beyond the bounds of our expertise. For these reasons, we have chosen to leave the question of appropriate regulation to future investigators, but hope that, by clarifying the underlying ethical and conceptual issues, our own work will make their task easier.

In section 1 of the paper we provide a brief account of the existing range of remote-controlled and interactive sex toys, as well as the likely future of this technology, and explain what we shall understand by IEHSTs for the purposes of the current investigation. Section 2 of the paper outlines the *prima facie* case for allowing that the use of IEHSTs would constitute sex rather than masturbation. In section 3, we introduce the idea of ‘rape by deception’ and discuss some of the ways it challenges our intuitions regarding rape in other contexts. Section 4 argues that the use of IEHSTs would involve an ineliminable risk of being deceived about particular features of one’s sexual partner and/or about the identity of the person with whom one was having sex. In section 5, we consider a number of hypothetical

scenarios designed to draw out the implications of such deception for the use of IEHSTs on the assumption that they do enable individuals who are separated by distance to have sex. Section 6 discusses some possible objections to our treatment of the cases in section 5. In section 7, we assume, for the sake of argument, that the use of IEHSTs only involves masturbation and discuss a number of further hypothetical scenarios intended to draw out the implications of deception on this account. Section 8 considers the question of the reasonableness of beliefs about consent in the context of cybersex involving IEHSTs. We conclude by considering the implications of our discussion for the ethics of the use and design of IEHSTs now and in the future.

1. TELEDILDONICS TODAY AND TOMORROW

There is, today, an extensive range of remote controlled sex toys available to consumers. Many of them have the ability to be controlled via applications on smartphones, and occasionally on computers. These devices connect to the user's phone (or computer) via Bluetooth and can then be controlled through the application by the user or their partner.⁶ Inevitably, these devices are being integrated with virtual reality systems and/or video chat in order to offer a more 'immersive' sexual experience.

⁶ See, for instance, Kiiroo™, 'Kiiroo – Interactive Sex Toys for Couples – Make Love to Your Partner Online!' <https://www.kiiroo.com/collections/for-couples> accessed 17th October 2019; Lovense, 'Let Long Distance Sex Toys Improve Your Love Life' www.lovense.com/long-distance-sex-toys accessed 18th October 2019.

The devices available today may already raise many of the issues we discuss below.⁷

Nevertheless, for ease of exposition, when discussing the ethics of cybersex, we will imagine a hypothetical device that would transmit the relative movement of a penis, dildo, or finger inside a synthetic orifice to drive the movement of a dildo in the vagina (or anus) of a sexual partner and the relative movements of their vagina (or anus) and the dildo back to the motions of the synthetic orifice. Such a device — an IEHST — would enable the communication and synchronisation of the genital sensations of ‘male’ (penetrating the synthetic orifice) and ‘female’ (surrounding and constricting the dildo) partners during sexual intercourse via the Internet.⁸

To our knowledge, there are no devices that meet this description currently available: existing devices are typically unable to transmit the motions of the ‘male’ partner to the ‘female’. Nevertheless, we suspect this limit will eventually be overcome. In the remote future, it is possible that virtual reality systems that include full body haptic suits will be developed, which allow transmission of all of the sensations involved in sexual intercourse, or even physical (robotic) avatars, which might be controlled by haptic suits, in order to allow

⁷ They may, of course, raise other ethical issues that are beyond the scope of the current discussion. Brett Lunceford, ‘Telepresence and the Ethics of Digital Cheating’ (2013) *Explorations in Media Ecology* 7.

⁸ There is, of course, no need for the person penetrating the synthetic orifice to actually be a man or for the person being penetrated by the dildo to be a woman: we use ‘male’ and ‘female’ here only as terms of convenience. Note also that we have chosen to speak of ‘male’ and ‘female’ users rather than ‘male’ and ‘female’ devices, as this latter formulation is potentially confusing (the male user, in our formulation, uses a device that is modelled on female anatomy).

communication of a more robust physical presence.⁹ Having examined some of the ethical issues raised by these (hypothetical) devices, we will then return at the conclusion of the paper to discuss the implications of our findings for the devices that do exist today.

2. THE NATURE OF CYBERSEX

While people have been writing and talking about the possibility — and the experience — of ‘having sex over the Internet’ for decades,¹⁰ the actual sex acts they have been engaging in are more plausibly described as masturbation (self-stimulation) rather than sexual intercourse.¹¹

The same criticism might be made of IEHSTs, and thus of the various possible scenarios involving IEHSTs that are the focus of our attention here. It might be argued that real sex requires two people who are actually physically contiguous and that the use of IEHSTs merely constitutes another baroque form of high-tech masturbation rather than cybersex.

⁹ Rheingold (n 1), at 345-348; Matthias Wagner and Wolfgang Broll, ‘I Wish You Were Here – Not! The Future of Spatially Separated Sexual Intercourse’ (2014). Paper presented at 50th Anniversary Convention of the AISB, London, England. doc.gold.ac.uk/aisb50 accessed 9th June 2017; Litska Strikwerda, ‘Present and Future Instances of Virtual Rape in Light of Three Categories of Legal Philosophical Theories on Rape’ (2015) 28 *Philosophy & Technology* 491, at 495-496.

¹⁰ Sherry Turkle, *Life on the Screen: Identity in the Age of the Internet* (Simon and Schuster 1995), 21.

¹¹ For an account that is more sympathetic to the idea that cybersex is sex — and which therefore anticipates some of the issues we discuss here, see Louise Collins, ‘Is Cybersex Sex?’ in Alan Soble and Nicolas Power (eds), *The Philosophy of Sex: Contemporary readings* (5th ed, Rowman and Littlefield 2008).

This question of the appropriate description of the use of IEHSTs is of more than academic interest because the ethical issues they raise are, in important regards, a function of the nature of the interaction they make possible. There are, of course, various ethical issues raised by masturbation,¹² especially by masturbation in the context of fantasies about other people. Yet, as we shall see in section 7, understanding IEHSTs as masturbation generates quite a different set of intuitions about the ethical issues involved than does understanding them as facilitating sex.

However, there are three challenges, of varying strengths, to the validity of any account of the use of IEHSTs as masturbation.

First, these devices are explicitly advertised as enabling sex between people who are geographically separated and not just as facilitating a new form of fantasy to accompany masturbation. Of course, the claims of manufacturers may be false. However, as far as we can tell, user reports also distinguish these devices from more familiar sex toys precisely because they allow the users to engage with each other in ways that mimic ordinary sex.¹³

Second, a key experimental finding with the use of haptic technology in other contexts is that, once a certain level of fidelity in the replication of sensation is reached, the technology

¹² Alan Soble, 'Masturbation, Again' in Alan Soble and Nicolas Power (eds), *The Philosophy of Sex: Contemporary readings* (5th ed, Rowman and Littlefield 2008).

¹³ See, for instance, John Biggs, 'Inside, Robot' *Techcrunch.com* (15 November 2015) <https://techcrunch.com/2015/11/15/inside-robot/> accessed 30 November 2017.

does transmit 'presence' and not just sensation.¹⁴ Once IEHSTs become sufficiently sophisticated, then, couples using these devices may feel physically present to each other to such an extent that we are inclined to admit that they are having sex and not just masturbating in tandem. Note that it is already the case that condoms prevent sexual partners' genital surfaces from actually touching but we do not typically say that that means that couples using condoms are not having sex. In a similar fashion, IEHSTs may facilitate sex despite the fact that they interrupt actual contact between people's genitals.

Third, as the discussion that followed reveals, cybersex involving IEHSTs elicits intuitions about intimacy, fidelity, and (perhaps) rape that are difficult to account for if we understand it only as masturbation.

We concede that it remains an open question how best to understand the nature of the act involved in the use of IEHSTs. Indeed, it is difficult to know what sorts of considerations would settle the question. The main part of our investigation will therefore proceed 'as if' cybersex involving IEHSTs is really sex in order to discuss some of the ethical issues it might raise if it is. In section 7, however, we will return to the question of how the issues we have discussed might look if we instead chose to understand cybersex involving IEHSTs as masturbation. Our hope is that our discussion of the ethical issues raised by the use of

¹⁴ Kim Jung and others, 'Transatlantic Touch: A Study of Haptic Collaboration Over Long Distance' (2004) 13

Presence: Teleoperators and Virtual Environments 328; Maria V. Sanchez-Vives and Mel Slater, 'From Presence to Consciousness Through Virtual Reality' (2005) 6 *Nature Reviews Neurosciences* 332.

teledildonics will itself serve to illuminate the question of the appropriate understanding of such cybersex.

3. RAPE BY DECEPTION

Philosophical discussions of rape must reckon with the cryptic nature of the topic, which is located at an ill-defined intersection of ethics and law.¹⁵ Whether or not someone is guilty of the *crime* of rape will depend upon the jurisdiction in which the act took place. In this paper, we are primarily interested in an ethical rather than a legal account of rape: we will draw upon legal discourse around rape to illustrate the ethical questions involved.

As a sociological phenomenon, rape is an intensely gendered practice, overwhelmingly involving men raping women.¹⁶ However, women may also rape women: men too may be the victims of rape by men and occasionally by women. A plausible definition should, therefore,

¹⁵ Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003), 1-7.

¹⁶ Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Simon and Schuster 1975); Catharine A. MacKinnon, *Women's Lives, Men's Laws* (Belknap Press of Harvard University Press 2005), 240-241; Patrica J. Falk, 'Not Logic, But Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud' (2013) 123 *Yale Law Journal Online* 353, at 359; Criminal Law Review, *Victoria's New Sexual Offence Laws: An Introduction* (Victorian Government Department of Justice & Regulation 2015), 1. Including rape in prisons in the analysis of the gendered nature of rape dramatically shifts the profile of the gender of the victims of rape (see Lara Stemple and Ilan H. Meyer, 'The Sexual Victimization of Men in America: New Data Challenge Old Assumptions' (2014) 104 *American Journal of Public Health* e19, at e23-e24).

not centre on the phallus.¹⁷ A woman may rape a man by inserting something into his anus or by manipulating his penis so that he penetrates someone or something.¹⁸ These observations about the definition of rape will prove relevant to our discussion of cybersex later in the paper as it becomes obvious that, if IEHSTs allow rape of a certain sort, both male and female users will be vulnerable.

It is, sadly, possible that someone might be raped using an IEHST by being physically forced, or coerced by threats, to penetrate themselves with the device against their will. However, the use of haptic sex toys linked over the Internet involves a risk of another form of rape — rape by deception.

¹⁷ As we shall see below, however, the emphasis on penetration in the definition of rape means that the penis has a power that the vagina lacks and so the definition remains phallogocentric at some level (Kylie Stephen, 'The Legal Language of Rape' (1994) 19 *Alternative Law Journal* 224, at 226; Sharon Cowan, 'All Change or Business as Usual? Reforming the Law of Rape in Scotland' in Clare McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge-Cavendish 2010), 160.

¹⁸ Some jurisdictions, continue to insist that rape must involve a man penetrating the victim with his penis (Peter F.G. Rook and Robert Ward, *Rook and Ward on Sexual Offences: Law and Practice* (5th edn, Sweet & Maxwell 2016), 9) but many now allow that penetration of the vagina or anus with any body part or with an object constitutes sexual penetration (Federal Bureau of Investigation, 'Frequently Asked Questions About the Change in UCR Definition Of Rape' (2014) <https://ucr.fbi.gov/recent-program-updates/new-rape-definition-frequently-asked-questions> accessed 3 March 2018; Strikwerda (n 9), at 503).

The idea of consent — or, rather, the absence thereof — plays a central role in the definition of rape.¹⁹ Fundamentally, rape is sexual penetration without consent.²⁰ Force and coercion

¹⁹ Lucy Reed Harris, 'Towards a Consent Standard in the Law of Rape' (1975-76) 43 *The University of Chicago Law Review* 613; J. H. Bogart, 'On the Nature of Rape' (1991) 5 *Public Affairs Quarterly* 117.

²⁰ Martha Chamallas, 'Consent, Equality, and the Legal Control of Sexual Conduct' (1988) 61 *Southern California Law Review* 777, at 797; Joan McGregor, 'Force, Consent, and the Reasonable Woman' in Jules L. Coleman and Allen Buchanan (eds), *In Harm's Way: Essays in Honor of Joel Feinberg* (Cambridge University Press 1994), 236; Patricia J. Falk, 'Rape by Fraud and Rape by Coercion' (1998) 64 *Brooklyn Law Review* 39, at 156; David Archard, 'The Wrong Of Rape' (2007) 57 *Philosophical Quarterly* 374; Robin West, 'Sex, Law, and Consent' in Franklin G. Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010).

Some authors argue — and some jurisdictions now hold — that the emphasis on penetration in the definition of rape is wrongheaded and that sexual penetration without consent is just one type of sexual assault, which consists in sexual touching or sexual activity without consent (Brownmiller (n 16); Stephen J. Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond' (1992) 11 *Law and Philosophy* 35, at 39). Subsuming penetrative rape within the broader category of sexual assault has the advantages of acknowledging the suffering and trauma experienced by individuals who are sexually assaulted but who are not subjected to penetration and of rendering the crime entirely gender-neutral in its definition. However, it has the disadvantages of requiring us to define what makes contact 'sexual', which is arguably significantly harder than defining sexual penetration, of equating acts that intuitively seem to involve very different degrees of harm (and possibly wrong), and also (relatedly) explaining why sexual assaults should be distinguished as distinct wrongs from the more general class of assaults. We have chosen here to adopt the more traditional definition of rape as penetration without consent for two reasons. First, the difficulty in agreeing on the extent of the wrong in different forms of non-consensual sexual contact is especially acute when the contact is mediated by an IEHST: by focusing on the question of penetration, we hope to avoid this difficulty. Second, it should be relatively straightforward for those who do believe that we should place the notion of sexual assault rather than rape at

can render sexual penetration non-consensual and thereby rape. However, there is a range of other circumstances in which it is plausible to think that an agreement to sexual penetration does not constitute consent.²¹ These are cases of rape by deception.²²

There are at least three different types of rape by deception that are discussed in the literature.

First, there are cases where an individual is deceived about the nature of the act to which he or she has consented. For instance, where a woman consents to allow a doctor to place a medical instrument inside her vagina but he then places his penis inside her vagina, this is almost universally agreed to be rape.²³ Slightly more controversially, where a sexually naïve woman consents to allow a doctor to place his penis inside her vagina on the understanding that he is only conducting a 'medical procedure', it seems plausible that she has not thereby

the heart of our analysis of sex crimes to extrapolate from our discussion to the conclusions that would follow from adopting this more inclusive definition.

²¹ Jane E. Larson, "'Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction' (1993) 93 *Columbia Law Review* 374, at 420.

²² Joel Feinberg, 'Victims' Excuses: The Case of Fraudulently Procured Consent' (1986) 96 *Ethics* 330; Chamallas (n 20), at 814.

²³ Ernst W. Puttkammer 'Consent in Rape' (1924) 19 *Illinois Law Review* 410 at 419; Falk (n 20), at 53-54; Russell L. Christopher and Kathryn H. Christopher, 'Adult Impersonation: Rape by fraud as a Defense to Statutory Rape' (2007) 101 *Northwestern University Law Review* 75, at n. 18; Donald A. Dripps, Ronald N. Boyce and Rollin M. Perkins, *Criminal law and Procedure: Cases and Materials* (13th edn, Foundation Press 2016), 311.

consented to sex (indeed, although she may not understand what sex involves she may know that she doesn't want to have sex with the doctor) and thus has been raped.²⁴

Second, there are cases where a person is deceived about the identity of the person with whom they are having sex.²⁵ For example, if a man sneaks into a woman's bed and the woman has sex with him believing him to be her partner it seems clear that the woman has not consented to have sex with the man she does in fact have sex with.²⁶

Third, there are cases where a person is deceived about some feature of his or her sexual partner or their relationship with them that, it is reasonable to hold, was essential to their decision to consent to have sex with them. A key case for the legal discussion surrounding rape by deception involves a woman being misled that she is married to a man and

²⁴ Compare *R v. Williams* [1923] 1 K.B. 340 (H.L.). This case must be distinguished from the more oft-discussed case wherein the woman does understand that she is being asked to consent to sexual intercourse but is brought by deception to believe that the intercourse is medically necessary (*Boro v. Superior Court* 210 Cal. Rptr. 122 (1985)).

²⁵ Jonathan Herring, 'Mistaken Sex' (2005) *Criminal Law Review* 511, at 512.

²⁶ Stephen J. Schulhofer, 'The Gender Question in Criminal Law' (1990) 7 *Social Philosophy and Policy* 105, at 135; Falk (n 20), at 67-69. Cases where the deception involves spousal impersonation are sometimes alleged to be cases of the first sort, on the grounds that marital sex and extramarital sex are different 'acts' (Christopher and Christopher (n 23), at n. 19; Vera Bergelson, 'Sex, Lies and Law: Rethinking Rape-By-Fraud' in Chris Ashford, Alan Reed and Nicola Wake (eds), *Legal Perspectives on State Power: Consent and Control* (Cambridge Scholars Publishing 2016.)

consenting to sex on the understanding that she is married to her partner).²⁷ A more controversial, but still, we believe, plausible case of rape by deception is where a man promises to pay a sex worker for sex whilst having no intention of doing so, with the result that the sex worker has sex with him (falsely) believing that she will be paid for her services.²⁸ Finally, a recent conviction for rape by deception in Israel involved a case where a woman was deceived about the religion and ethnicity of her partner.²⁹ In each of these cases it might be argued that the victim's consent was vitiated by their being deceived and thus that, in the absence of consent, the sex is rape.³⁰

²⁷ Falk (n 20), at 28; John Kleinig, 'The Nature of Consent' in Franklin G. Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (Oxford University Press 2010), 17. See *R v. Papadimitropoulos* (1975) 98 C.L.R. 249 (in which the Australian High Court ruled that this was not rape because the woman was aware of the nature of the act to which she was consenting). As per the note above, deception regarding the existence of a marital relationship between the partners is sometimes treated as an instance of the first sort of rape by deception.

²⁸ Puttkammer (n 23), at 422; Falk (n 20), at 150. Notoriously, UK law does not recognise this as a case of rape: *R v. Linekar*, [1995] Q.B. 250 (C.C.A.).

²⁹ See CrimC (Jer) 561/08 *State of Israel v Kashour* [2010]. For discussion, see Aeyal Gross, 'Rape by Deception and the Policing of Gender and Nationality Borders' (2015) 24 *Tulane Journal of Law & Sexuality* 1, at 11-21.

³⁰ Herring (n 25); Tom Dougherty, 'Sex, Lies, and Consent' (2013) 123 *Ethics* 717; Tom Dougherty, 'No Way Around Consent: A Reply to Rubenfeld on Rape-By-Deception' (2013) 123 *Yale Law Journal Online* 321 www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubenfeld-on-rape-by-deception accessed 1st December 2017.

The idea of rape by deception remains controversial and is fiercely contested in both the legal and the philosophical literature.³¹ The possibility of rape by deception is challenging to certain accounts of both the wrong and the harm of rape, given that the person who has been raped does not necessarily experience any suffering nor indeed understand the experience as being rape at all.³² Where the deception is later revealed, the individual deceived may experience the characteristic moral and psychological harms associated with rape.³³ However, it is also possible that the victim never learns that she has been deceived and thus that she has been raped.³⁴ Those who emphasise the traumatic nature of the subjective experience of rape to explain either the harm or the wrong of rape will therefore struggle to situate rape by deception alongside other forms of rape.³⁵

³¹ Falk (n 20), at 44 and 133; Ben A. McJunkin, 'Deconstructing Rape by Fraud' (2014) 28 *Columbia Journal of Gender and Law* 1.

³² Dougherty, 'Sex, Lies, and Consent' (n 30), at 726.

³³ Susan J. Brison, *Aftermath: Violence and the Remaking of a Self* (Princeton University Press, 2002); Corey Rayburn Yung, 'Rape Law Fundamentals' (2015) 27 *Yale Journal of Law & Feminism* 1, at 21-22.

³⁴ This possibility also exists in cases where women are raped while they are unconscious (Archard (n 20), at 377). What is unsettling about rape by deception is the possibility that the subjective experience of being raped and of consensual sex might be identical.

³⁵ In the absence of a claim about the psychological — that is, subjective — impacts of sexual penetration it is not obvious why sexual penetration without consent should be considered a form of wrong distinct from other physical assaults (such as battery) or infringements of autonomy (such as the breaking of promises) (John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (4th series, Oxford University Press 2000), 194). For an extended discussion of this problem, including a

Moreover, certain sorts of minor deception, at least, seem ubiquitous in the context of sexual relations.³⁶ Courts and critics have often worried that, if every instance of a person being deceived about *anything* that was in fact a condition of their consent to sex (for instance, that their partner was single) is acknowledged to be rape, too many otherwise unremarkable sexual encounters will turn out to be rape.³⁷ Attempts to draw the line between those sorts of deceptions that risk rape and those that do not will inevitably be controversial because of the moralism involved in determining what sorts of features of persons — and beliefs about features of persons — should reasonably be held to be relevant to the validity of consent.³⁸

Often legislation and/or courts distinguish between deception with regards to the nature of the act ('fraud in the factum') and deception related to the circumstances which lead an individual to consent to sex ('fraud in the inducement').³⁹ According to a number of authorities, only fraud in the *factum* vitiates consent.⁴⁰ Yet, as Rubinfeld and Wertheimer

proposed solution, see Wertheimer (n 15), at 89-118, and Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Ashgate 2005), 219-242.

³⁶ Sarah Buss, 'Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints' (2005) 115 *Ethics* 195, at 220-222.

³⁷ Vivian Berger, 'Review Essay: Not So Simple Rape' (1988) 7 *Criminal Justice Ethics* 69, at 76; Schulhofer (n 20), at 54; Christopher & Christopher (n 23), at 89-90; Bergelson (n 26), at 166-167.

³⁸ Chamallas (n 20), at 833; Dougherty, 'Sex, Lies, and Consent' (n 30), at 730.

³⁹ Puttkammer (n 23); Feinberg (n 22), at 331-335; Stuart P. Green, 'Lies, Rape, and Statutory Rape' in Austin Sarat (ed), *Law and Lies: Deception and Truth Telling in the American Legal System* (Cambridge University Press 2015), 197-200.

⁴⁰ Falk (n 20), at 157; Christopher and Christopher (n 23), at n. 48; Joshua Dressler, *Understanding Criminal Law* (7th edn, LexisNexis 2015), 590; Bergelson (n 26), at 154-155.

each argue at length, this distinction is neither as clear, nor as obviously morally significant, as its advocates suppose.⁴¹ Distinguishing between deception regarding the nature of the act and deception regarding the supposed inducements to the act inevitably requires adjudicating on the appropriate way of describing the act to which an individual consents (is it “penetration”? “Sex”? Or “Sex with [for instance] my husband”?) in a fashion that should be more controversial than is usually recognised.⁴² Even in the paradigmatic cases that supposedly involved deception regarding the *factum*, where a person consents to penetration by a medical instrument but is in fact penetrated with a penis, or consents to an act without understanding that it constitutes *sexual* penetration, the victim consents to ‘penetration of the vagina’ (or anus), which implies that it is actually the reasons for the penetration (the inducement) that are at issue. Furthermore, it beggars belief to claim that — except in very particular and unusual circumstances — when consenting to sex one is consenting only to ‘sex’ and not to sex with a particular person.⁴³ Moreover, deception regarding the inducement to sex denies the person deceived the opportunity to make an autonomous decision about engaging in intercourse just as much as deception about the

⁴¹ Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 *Yale Law Journal* 1372; Wertheimer (n 15). See also: Puttkammer (n 23), at 423; Falk (n 20), at 159; McGregor (n 35), at 181-190; Christopher and Christopher (n 23), at 85-87; Kleinig (n 27), at 17.

⁴² Feinberg (n 22), at 335; McGregor (n 35), at 185; McJunkin (n 31), at 9-14.

⁴³ Heidi M. Hurd, ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 1216, at 146; Kleinig (n 27); Deborah Tuerkheimer, ‘Sex Without Consent’ (2013) 123 *The Yale Law Journal Online* 335, at 347; Green (n 39), at 232; Bergelson (n 26), at 176-179.

nature of the act.⁴⁴ In other contexts, including the law of contract, consent is vitiated by deception about a much wider range of matters, including the inducement to contract.⁴⁵

Given the extent of the controversy about rape by deception and the difficulty and complexity of the philosophical and legal issues involved, we cannot hope to settle this controversy here. Nevertheless, we hope to show that if one has *any* intuitions that some cases of deception in the context of agreement to sexual penetration constitute rape, the advent of teledildonics raises a number of puzzling philosophical questions as well as significant ethical concerns.

4. IDENTITY AND THE INTERNET

As we have already intimated, the use of IEHSTs involves a non-negligible risk that users will be deceived about the identity of the people with whom they are putatively having sex.

There are two different ways in which the user of an IEHST might come to have false beliefs about the identity of their partner.⁴⁶

⁴⁴ Bogart (n 19), at 125; Herring (n 25); Dougherty, 'Sex, Lies, and Consent' (n 30).

⁴⁵ Harris (n 19), at 639; Susan Estrich, 'Rape' (1986) 95 *The Yale Law Journal* 1087, at 1120; Falk (n 20), at 154-155; Larson (n 21); McGregor (n 35), at 182-183; Rubinfeld (n 41), at 1377.

⁴⁶ As we shall discover below, the use of IEHSTs also allows for the possibility that people might be deceived about whether they are having sex with someone at all. However as this deception would typically be achieved by someone fraudulently representing themselves as being involved in a sex act, we have chosen not to offer a separate discussion of this possibility here.

The first is as a result of a conscious act of deception by their sexual partner regarding their identity. Given what we know about identity — and 'sex' — online, we anticipate that some people will gain sexual pleasure out of sexual encounters in which they are pretending to be someone else. Deception regarding both one's actual identity (who one, in fact, is) and also various features of one identity (what one, in fact, is like) are clearly possible in the context of IEHSTs. Indeed, the Internet makes possible, and perhaps even encourages, deceptions about matters that are significantly harder to disguise in (most) personal encounters.⁴⁷ Increasingly, computer programs are capable of representing themselves as human beings, such that, in some contexts at least, one can no longer even be sure whether one is interacting with a human being or not.⁴⁸ The fluidity of identity online thus makes sex over the Internet a risky proposition.

The second way in which people might come to be deceived about the identity of their partner is as a result of the link between the two devices being hacked such that a third party controls one or other of the devices without the knowledge of either partner.⁴⁹ We anticipate

⁴⁷ Turkle (n 10), at 210-232; Lindsay Van Gelder, 'The Strange Case of the Electronic Lover: A Real-Life Story of Deception, Seduction, and Technology' in Rob Kling (ed), *Computerization and Controversy: Value Conflicts and Social Choices* (Academic Press 1996.)

⁴⁸ Liberati (n 3).

⁴⁹ The track record of the designers of existing teleoperated and/or interactive sex toys does not inspire much confidence here, with several products having been revealed to have very poor security. See, for instance: Pen Test Partners, 'Vulnerable Wi-Fi Dildo Camera Endoscope. Yes Really' (3 April 2017) www.pentestpartners.com/blog/vulnerable-wi-fi-dildo-camera-endoscope-yes-really accessed 1st December 2017; Alex Hern, 'Someone Made a Smart Vibrator, So of Course it got Hacked' *The Guardian Online* (10 August

that some individuals will find it pleasurable or amusing to have sex with people without their knowledge or to swap other people's sexual partners without their consent. It is also possible that such hacking might be motivated by the prospect of financial gain via subsequent blackmail. If the device is hacked, the users will be deceived about the actual identity of the persons they having sex with; as a consequence they are also highly likely to be deceived about the particular features of the people they are actually having sex with.

5. TELEDILDONICS AND RAPE BY DECEPTION

Let us now turn to consider the issues that would arise if cybersex involving IEHSTs is penetrative sex. Our investigation will proceed by considering a number of hypothetical scenarios in order to test and clarify our intuitions.

Imagine that:

A woman is about to have sex with her husband, who is currently overseas, using an IEHST. A third party maliciously hacks this individual's connection with their partner so that the woman's teledildo is connected to the hacker's sex toy instead of her husband's. (**'Hacked Spouse'**)

2016) www.theguardian.com/technology/2016/aug/10/vibrator-phone-app-we-vibe-4-plus-bluetooth-hack

accessed 1 December 2017.

Given that — by hypothesis — the woman and the hacker are having sex, and the assumption that the hacker does not have a reasonable belief that the woman consents to sex,⁵⁰ this seems to be a case of rape by deception wherein the hacker rapes the woman.⁵¹

This first case highlights the fact that when using an IEHST the subjective experience of consensual sex and of being raped may be identical. If the victim never learns of the deception (perhaps the hacker also provided their partner with the telemetry arising from a previous sex act between them so that neither partner realise that the communication was intercepted) then she or he will never know that they have been raped nor experience any suffering as the result of the rape. Nevertheless — assuming that this is indeed sex and therefore rape — the person raped has been profoundly wronged. As we noted above, this possibility also arises with rape by deception more generally. However, given the ever-present risk of deception involved in sex via the Internet, it seems especially pertinent to the use of IEHSTs. Even after enjoying sex with such devices, one could never be sure whether one had been raped or not.

The next two scenarios we shall consider rely on — and highlight the implications of — a distinctive feature of IEHSTs that we have thus far neglected. Once the connection between human bodies is mediated by the Internet, there is no reason why the conventional pairing of organs in coitus should be maintained. The motions of a penis moving inside a penile sheath,

⁵⁰ We defend this assumption below.

⁵¹ Some jurisdictions are more likely to treat this as rape as a matter of law on the grounds that the deception here involves the nature of the act (marital sex versus adulterous sex) and not just the inducement to sexual penetration.

or of a vagina (or anus) moving around a dildo, may be transmitted with equal facility to drive the movements of a dildo or a penile sheath. IEHSTs therefore allow for a 'cybernetic sex change' whereby people of either sex can — as far as their sexual partner is concerned — possess either male or female genitalia.⁵²

Now imagine that:

A lesbian woman is using a teledildo to have cybersex with a person who they have only met online. This latter person represented themselves as a woman but is in fact a man who has connected a penile sheath to the woman's teledildo via the Internet rather than the dildo she thought was connected. The woman who has been deceived has a strong homosexual sexual preference and is disgusted by the thought of heterosexual intercourse: she would never have consented to have sex with a man.

('Gender Deception I')

Is this a case of rape by deception? By hypothesis, the woman deceived would never have consented to sex except for the deception. If her consent was vitiated, she did not consent to sex and — assuming that the person deceiving her is aware of this — has arguably therefore been raped.⁵³ Given the extent of deception about gender on the Internet, this is a worrying conclusion.

⁵² Liberati (n 3).

⁵³ See Aeyal Gross, 'Gender Outlaws Before the Law: The Courts of the Borderlands' (2009) 32 *Harvard Journal of Law and Gender* 165, and Gross (n 29), for the legal treatment of cases involving deception about gender in the context of sexual intercourse.

It might be argued that the fact that a person can't tell if they are having sex with a man or a woman cuts against the claim that cybersex involving IEHSTs is sex. We will discuss this argument further below. However, it is worth noting that it is not impossible that someone might be deceived about the sex of their partner in a sexual encounter in the real world. In oral sex performed via a 'glory hole' for instance, a man may expect to be fellated by a woman and in fact be fellated by a man (or vice versa) and be none the wiser. For that matter, it is not impossible that a man having penetrative sex with someone might be deceived about their sex. The possibility of deception about one's sex during intercourse fails to distinguish cybersex from ordinary sex.

That deceiving one's sexual partner about one's sex during intercourse constitutes rape might be disputed on the grounds of a commitment to a controversial essentialism about sex. Why assume that a person's sex is a deep feature of their identity such that being deceived about it would vitiate consent, especially given that deception about other features of one's identity (e.g. one's 'real' eye colour when one is wearing coloured contact lenses) would not? Note, however, that a belief about the sex of their partner is likely to be essential to the consent to sex of anyone whose sexual preferences are heterosexual or homosexual. Consequently, a concern with the sex of one's partner is neither necessarily heteronormative nor homophobic.⁵⁴ Moreover, if sex is not held to be a relevant feature of an individual's

⁵⁴ Nor need it be transphobic, as the claim that sex is a 'deep' feature of persons is compatible with the idea that people can change sex. However, as Gross (n 53; n 29) argues, the claim that deception about gender might contribute to a sex act being rape is in tension with some forms of queer politics, which emphasise the fluid and socially constructed nature of sex/gender. Alex Sharpe, 'Criminalising Sexual Intimacy: Transgender Defendants

identity when it comes to assessing the validity of other persons' consent to have sex with the individual, it's difficult to see how any other feature of a person could be held to be. One might then wonder how deception about the identity of the person with whom one was having sex could constitute rape, as identity has now been made independent a person's particular features. Thus, this line of argument will struggle to allow the possibility of rape by deception in cases involving the malicious substitution of sexual partners at all.

Now imagine that:

A heterosexual man is having sex, using an Internet-enabled penile sheath, with a person he has only met online. This person has represented themselves as a woman but is in fact a man. The man who has been deceived has a strong heterosexual preference and is disgusted by the thought of homosexual intercourse: he would never have consented to have sex with another man. (**'Gender Deception II'**)

Has this man been a victim of rape? It might seem that he has, by analogy with the previous case. Yet, importantly, before we can answer this question we must answer another one. The question of rape — as opposed to sexual assault — only arises in the context of sexual penetration. If the man who has perpetrated the deception is using a teledildo then sexual penetration occurs — the man who is deceived penetrates someone (arguably) against his will. However, if the man perpetrating the deception connects another penile sheath then

and the Legal Construction of Non-Consent' (2014) 3 *Criminal Law Review* 2073, argues, further, that the pattern of prosecutions for deception about gender reveals these to be transphobic in practice.

penetration does not occur and so there can be no question of rape.⁵⁵ Similarly, if a heterosexual man's penile sheath's connection to his regular partner, via the Internet, is hacked, as per **Hacked Spouse**, then whether he is vulnerable to rape or not will depend upon whether the hacker chooses to connect a dildo or a penile sheath to the hijacked device.

Gender Deception II highlights the fact that those using Internet-enabled *dildos* will be vulnerable to rape whether the dildo is linked to another dildo or to a penile sheath, but those using Internet-enabled penile sheaths will only be vulnerable to rape if the penile sheath is linked to a dildo. On the assumption that women are more likely to penetrate themselves whilst using teledildos in the course of cybersex than are men, this means that insofar as there is a risk of rape by deception when using IEHSTs, women are significantly more vulnerable to rape in this context than are men.

For ease of exposition, in our discussion of the scenarios below, we will usually ignore this complexity and assume that the conjunction of devices involved is such that each scenario does include sexual penetration. Nevertheless, in each case it is possible that the question of rape does not arise because the deception results in two penile sheaths being connected to each other.

Now consider:

⁵⁵ We must admit that we struggle to decide whether this version of **Gender Deception II** should be allowed to involve sex or not. Such interactions are clearly sexual but are they cases of sexual intercourse?

A hacker ‘crosses the wires’ between four IEHSTs so that both partners in each of two sexual encounters have sex with someone other than the person with whom they believe they are having sex. (**‘Crossed Wires’**)

The one person who clearly has done something wrong in this scenario is the hacker, who caused the victims to have sex with people other than those with whom they intended to have sex. Although the hacker has not themselves had sex, we might conclude that they have raped both participants in each sex act with the other: their crime is something akin to coercing someone at gunpoint to rape a third party.⁵⁶ According to this way of thinking, none of the people having sex has raped anyone, although all four of them have been raped.

Note, however, that this essentially legalistic account of what has occurred in **Crossed Wires** is at odds, at least to some degree, with an ordinary language account that arguably reflects a countervailing set of moral intuitions. If we describe the hacker’s wrongdoing as having tricked people into *raping each other*, then this implies that each person in each coupling

⁵⁶ A more accurate analogy might be the notorious case of *DPP v Morgan*, [1976] A.C. 182 (H.L.) or an incident that occurred in Wyoming in 2009 wherein a man impersonated his ex-girlfriend and placed an advertisement on Craigslist, soliciting violent and abusive sex, with the result that another man raped her (see DeeDee Correll, ‘Former Boyfriend Used Craigslist to Arrange Woman’s Rape, Police Say’ *Los Angeles Times* (Online, 11 Jan 2010) <https://www.latimes.com/archives/la-xpm-2010-jan-11-la-na-rape-craigslist11-2010jan11-story.html> accessed 1 December 2017). However, in order to avoid prejudicing the discussion of deception and consent below we have chosen here to emphasise the less controversial case of coercion.

raped the other.⁵⁷ This in turn implies that the subjective experience of raping someone, of being raped, and of consensual sex while using IEHSTs might be identical.⁵⁸ Moreover, because the hacker has themselves not had sex with, nor penetrated, anyone, we may start to doubt whether they have raped anyone. This doubt may grow if we are informed that the hacker had ‘crossed the wires’ of thousands of IEHSTs from halfway around the world and without knowing who, if anyone, would be using the particular sex toys he/she had caused to connect to other devices chosen at random. In the limit case, we might imagine that the connections between the couples’ sex toys had gone askew as a result of careless programming by the designer of the sex toys, or the online system whereby they connect, rather than of the malicious actions of any individual.

It might be objected that, while they have clearly been wronged, none of the people actually having sex in **Crossed Wires** satisfy the ‘fault element’ (what is often called the *mens rea*) for rape. The role that the perpetrator’s mental state should play in determining whether or not

⁵⁷ That someone who is brought to rape another person as a result of deception might themselves thereby be considered a victim of rape by deception is argued by Rubinfeld (n 41), at 1414, and by Christopher and Christopher (n 23).

⁵⁸ The idea that the subjective experience of raping someone, of being raped, and the subjective experience of consensual sex could be identical is so counterintuitive that we might be inclined to conclude that this case could not possibly constitute rape. However, if we allow that there might be some real-world cases of rape wherein the rapist sustains a belief that the sex was consensual, then presumably in such cases the rapist’s subjective experience of sex is not markedly different from their experience of consensual sex in other circumstances: as we’ve already observed, the possibility that the experience of consensual sex and rape might be the same is implied by the very idea of rape by deception.

rape has occurred is a matter of ongoing controversy. The idea that rape is a matter of the perpetrator's beliefs about the meaning of their action rather than the experience of the victim has been vigorously challenged by feminist critics of traditional rape law.⁵⁹ As a result, in many jurisdictions it is no longer a defence to rape that the perpetrator in fact believed that the victim consented to sex, rather the relevant question with regards to the intention of an alleged rapist is whether any belief they had regarding the consent of the person with whom they had sex was reasonable in the circumstances.⁶⁰ What it is reasonable to believe about the consent of one's partner in a sexual encounter involving IEHSTs is difficult to discern. On the one hand, in the scenario we are considering, *ex-hypothesi* the people about to have sex could not have known that they were about to have sex with someone other than their intended partner. On the other hand, as we have observed, given the risk of deception in any exchange conducted over the Internet, users of IEHSTs can never be 100% sure of the identity of the person with whom they are having sex. Whether this means that it could not be reasonable to believe that one's partner was consenting to sex (given that they might be mistaken about one's own identity) is unclear. We will return to consider the question of the appropriate description of the consent involved, and the reasonableness of beliefs about consent, in sex via IEHSTs below.

⁵⁹ Keith Burgess-Jackson, *Rape: A Philosophical Investigation* (Dartmouth Publishing Company 1996), 146; Clare McGlynn, 'Feminist Activism and Rape Law Reform in England and Wales: A Sisyphean struggle?') in Clare McGlynn and Vanessa E. Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010), 141.

⁶⁰ Criminal Law Review (n 16), at 4-5.

All the scenarios we have considered thus far might be argued to involve deception only in the *inducement* to sex. But consider:

A woman is using an Internet-*capable* teledildo for the purposes of masturbation. She believes the sensations provided by the teledildo are the result of it running a recorded program of sex with a famous porn star. In fact, a hacker has surreptitiously linked an IEHST to the woman's teledildo such that the hacker and the woman are engaged in cybersex without the woman's knowledge.⁶¹ (**'Unintended Intercourse I'**)

Presuming the hacker does not have a reasonable belief that the woman is consenting to intercourse, this seems to be a case of rape by deception. However, in this case the deception arguably involves the nature of the act rather than the inducement. The woman 'consents' to masturbation but in fact engages in sex.

It might be argued that because the woman consents to sexual penetration when she sets out to masturbate, **Unintended Intercourse I** is still a case of deception regarding the inducement to penetration. We are inclined to think that sex and masturbation are different 'acts' and that consent to one is not consent to the other: penetrating oneself and being penetrated by another person seem to be quite different things. However, it must be admitted that this would have the at least somewhat counter-intuitive implication that the following scenario also involves rape.

⁶¹ The possibility of transmitting and interacting with recordings of sexual activity involving IEHSTs raises a number of perplexing questions related to the asynchronous nature of all cybersex that we do not have space to consider here. Sparrow thanks Lawrence Reeves for drawing these issues to his attention.

A woman believes she is having sex with her husband, who is currently overseas, using a teledildo. However, unbeknownst to her, her husband has maliciously substituted a recording of the telemetry produced by a male porn star moving his penis inside a penile sheath for the telemetry that was supposed to originate in the husband's sex toy. The woman would not have consented to masturbate at this time.

('Masturbation by Mistake')

In this case, the woman has consented to sex but in fact has engaged in masturbation, which, we suggested, is a different act. Presumably, then, this must also be a case of rape by deception wherein the deception involved regards the nature of the act rather than the inducement to sexual penetration.

That someone could be held to be a victim of rape when they are caused to masturbate as a result of deception might be thought to be a challenge to the very idea that rape by deception is possible in the context of the use of IEHSTs: we shall discuss the plausibility of rape by deception in the context of masturbation further below. In any case, a variation on **Unintended Intercourse I** generates the intuition about deception regarding the nature of the act without risking the counter-intuitive conclusion that there exists a possibility of being raped as a result of being brought to masturbate as a consequence of deception. Consider:

A man is using an Internet-enabled penile sheath for the purposes of masturbation.

He believes the sensations provided by the penile sheath are the result of it running a recorded program of sex with a porn star. In fact, a hacker has surreptitiously linked a teledildo to the man's penile sheath such that the hacker and the man are engaged in (penetrative) cybersex without the man's knowledge. (**'Unintended Intercourse II'**)

As we shall discuss further below, *masturbation* via a penile sheath does not involve sexual penetration: no one penetrates anyone, nor is anyone penetrated. Thus in **Unintended Intercourse II** the deception very clearly involves the nature of the act: the man has not consented to sexual penetration but is caused to penetrate someone. Moreover, in a case analogous to **Masturbation by Mistake**, wherein a man thinks that he is having sex but is in fact only masturbating, the question of rape does not arise, as sexual penetration does not occur. If any of the scenarios we have considered here involves rape, **Unintended Intercourse II** does.

6. SOME REFLECTIONS

At various points in our treatment of these hypothetical scenarios two different lines of objection have emerged, which potentially challenge aspects of our treatment of all of the scenarios.

First, it might be argued that given that identity can never be guaranteed in transactions conducted over the Internet, those who choose to use IEHSTs necessarily consent to sex with partners whose identities are somewhat indeterminate. If this were the case, then none of **Hacked Spouse**, **Gender Deception I**, **Gender Deception II**, or **Crossed Wires** would involve rape.

It is clearly possible to consent to have sex with people whose identities are entirely indeterminate. Thus, for instance, a participant at a masked sex party might consent to sex with people whose identity she or he would never become aware of. Indeed, we suspect that the capacity of IEHSTs to facilitate anonymous sexual encounters will be precisely what makes them attractive to some users.

In ordinary circumstances, though, consent in the knowledge of a risk is not consent to the thing risked.⁶² If a woman knows that there is a risk of a male friend forcing herself upon her if she spends the night at his house, she is not thereby consenting to have sex with him by spending the night, nor is she not raped if he does force himself upon her.⁶³ Absent further argument, we cannot simply assume from the use of an IEHST that the user has consented to have sex with whoever they do in fact have sex. Knowing that one might be deceived is not the same as consenting to be deceived.

However, given that — as we have conceded — it must be possible, in particular contexts, to consent to sex with people about whom one does not know key facts, up-to-and-including their identity, mightn't the use of IEHSTs be one of those contexts? Perhaps by connecting an IEHST to the Internet individuals thereby grant permission to whoever is at the other end of that connection to have sex with them. This thought is most easily entertained if we understand consent as something that needs to be performed⁶⁴ — communicated to the other party — in which case we might think that the use of an IEHST is sufficient to grant consent to the other party, whoever they may be. If, instead, we think of consent as

⁶² Kleinig (n 27), at 18.

⁶³ Hurd (n 43), at 125-126. See also the discussion in Dougherty, 'Sex, Lies, and Consent' (n 30), at n. 37.

⁶⁴ Schulhofer (n 20), at 76; McGregor (n 20); Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press 1998), 271, 280; McGregor (n 35), at 125-131; Kleinig (n 27), at 10.

consisting in a subjective approval of the actions of another⁶⁵ then perhaps it is plausible to insist that one cannot approve a sex act to be committed via an IEHST without thereby approving sex with whoever happens to be at the other end of the connection.⁶⁶

Indeed an analogous argument is sometimes pursued to explain why cases of deception in the context of ordinary (real-world) sex do not count as rape. When it comes to sex, it is sometimes argued, by analogy with the ‘caveat emptor’ assumed in buying a used car, the transaction is governed by *caveat amator* — or ‘lover beware’ — with the implication that the ‘lover’ cannot complain if they do not get precisely what they anticipated.⁶⁷ In particular, this line of argument is supposed to rule out deception in the *inducement* to sex as constituting rape.

As we observed above, this way of treating deception in the context of consent to sexual relations flies in the face of our treatment of deception in other exchanges where consent it is vital — most obviously, commercial contracts — and where deception in a wide range of matters, including the inducement to consent, is often held to vitiate consent. It seems especially problematic if we understand consent to be a matter of subjective approval as, *ex*

⁶⁵ Larry Alexander, ‘The Moral Magic of Consent (II)’ (1996) 2 *Legal Theory* 165; Hurd (n 43); Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate Publishing 2004), 27-31.

⁶⁶ ‘Approval’ here is deliberately equivocal between the willing of the act of the other (Hurd (n 43)) or some other intentional state that alters the ethical character of the actions of the party to whom consent is granted, such as the waiving of the right to object to their actions (Alexander (n 65)). See Westen (n 65), at 25-63.

⁶⁷ Larson (n 21), at 413; Wertheimer (n 15), at 193; Herring (n 25), at 511.

hypothesi, the deceived party would not have engaged in sexual penetration except for the deception and therefore presumably does not approve of the act in which they are in fact engaged.⁶⁸ Any suggestion that this argument is *more* plausible in the context of sex involving IEHSTs must, we believe, rely on a claim about the relative lack of harm resulting from deception about identity in this context. As we noted earlier, arguments about the harm of rape are particularly problematic in the context of rape by deception because it is always possible that the person deceived never learns of the deception and therefore never realises that they have been raped. We should be extremely cautious, therefore, about concluding that the wrong of rape by deception in a particular context is any less if people experience less suffering as a result of being raped in that context. Moreover, we think it is likely that many victims of deception of the sorts involved in all of the scenarios above *will* experience significant psychological distress should they become aware of the deception.⁶⁹ The intuition that they will not trades on the thought that sex involving IEHSTs is not ‘really’ sex.

The social meanings and conventions that determine the scope of consent in particular contexts are themselves subject to social contestation and revision.⁷⁰ It is therefore possible that eventually a consensus will emerge that consent to the use of IEHSTs constitutes consent to sex with whoever turns out to be connected to the other end. A key indication that this has become the case would be that people cease to care about deception in this context because they expect nothing less. Until that point, however, as long as we think of

⁶⁸ Dougherty, ‘Sex, Lies, and Consent’ (n 30), at 734.

⁶⁹ Compare Larson (n 21), at 380 and 453, and Falk (n 16), at 361-362.

⁷⁰ McGregor (n 35), at 127-129.

cybersex as sex, we should adopt the same attitude towards consent to (and thus deception in) cybersex as we do to consent to (and thus deception in) other forms of (real) sex.

Note that even on this generous interpretation of the consent implied in the use of IEHSTs it is implausible to think that the individuals involved in **Unintended Intercourse I** and **Unintended Intercourse II** have consented to sex. It seems highly unlikely that social understandings around the nature and use of IEHSTs will evolve to the point where the expectation is that these devices should always be assumed to be connected to the Internet even when all the indications are that they are not connected. Thus even if consent to cybersex via IEHSTs is understood as consent to sex with people whose actual identity is indeterminate, there may be a risk of being raped by deception while masturbating with these devices.⁷¹

A second possibility to emerge from our discussion is — as we have just seen — that IEHSTs do not transmit enough of the bodily and sensuous experience of sexual intercourse to actually constitute sex. The focus on genital — as opposed to a broader range of — sensations in both the design of IEHSTs and our account of the issues raised by their use reflects a particular masculine notion of sex and — it might be argued — it is only the

⁷¹ That is, where this occurs the individual intends to masturbate but in fact participates in sexual intercourse against their will. Whether consent to penetration in the context of masturbation and in the context of sexual intercourse should both be understood as tokens of ‘consent to penetration’, with the result that **Unintended Intercourse I** is *not* rape is an independent question. Note that because in **Unintended Intercourse II** the man does not consent to penetration at all, this issue does not arise.

impoverished nature of this concept that makes it possible for people to have sex with someone other than the person they intended and be none the wiser.

There is, we concede, something to this objection. Nevertheless, we should be cautious about drawing conclusions on the basis of any account, beyond the most minimal, of what sensations are essential to sex. For instance, couples may have sexual intercourse in the dark, or fully clothed, or via a glory hole that prevents any contact between their bodies other than between their genitals. We would be reluctant to conclude that any of these did not constitute sex. Moreover, even if we were to concede that existing devices do not enable sex, it seems likely that much more sophisticated devices will be developed in the future that will transmit many more — perhaps even all — of the sensations involved in sexual intercourse. Yet, as we have already observed, in theory at least, any exchange of information via the Internet is liable to hacking, and so the issues that we have identified here may still arise. The fundamental source of the dilemmas we discuss here seems to be the relation between the virtual and the real, which will remain a problem as long as people are having sex via the Internet.

7. MASTURBATION AND DECEPTION

If IEHSTs do *not* permit sex, then the act involved must be either one of simultaneous self-stimulation or mutual masturbation. However if IEHSTs do not transmit sufficient bodily presence to facilitate sex, it is difficult to see how they could transmit touch sufficient for mutual masturbation. Thus in this section, we consider how cases wherein people are deceived about the people they are interacting with using IEHSTs look in the light of the assumption that such interactions are best characterised as simultaneous self-stimulation.

Understanding interactions involving IEHSTs as simultaneous *self*-stimulation itself involves some challenges given that the movements of each partners' sex toy are in fact generated and controlled by the other partner. While it seems plausible to think of the use of existing remote-controlled sex toys, which are, for the most part, dildos and penile sheaths, as masturbation, this intuition becomes more difficult to sustain if we imagine people engaged in intercourse with robot avatars of their partners.

Nevertheless, as long, and insofar, as users place devices into or onto their own bodies and can remove them at any time there is arguably a sense in which individuals using *teledildos* penetrate themselves rather than are penetrated by another person.⁷² By contrast, a person masturbating using a penile sheath does not penetrate anyone (nor are they penetrated) while doing so. Thus, one implication of understanding cybersex involving IEHSTs as mutual masturbation is that the asymmetry between the situation of those using teledildos and those using penile sheaths that we noted previously becomes even more pronounced.

Whereas if the use of IEHSTs counts as sex there is a risk that those using a penile sheath may be raped when it is connected to a teledildo in such a way that they are brought to penetrate someone without their (the person using the penile sheath) consent, if the use of IEHSTs counts as masturbation then there is no possibility of being raped while using an Internet-enabled penile sheath. Again, on the (plausible) assumption that women are more likely to penetrate themselves whilst using IEHSTs than are men, this means that insofar as there is a

⁷² We will presume for the sake of argument that those using teledildos will use them to penetrate themselves and not (just) to stimulate themselves by vibrations transmitted via the external surfaces of the body.

risk of rape by deception when masturbating, women are significantly more vulnerable to rape when using an IEHST than are men.

Moreover, it does not follow from the fact that someone is penetrating himself or herself that he or she cannot thereby be a victim of rape. For instance, if a person is coerced at gunpoint to penetrate themselves with a dildo, ethically, if not legally, this is a clear case of rape.⁷³ Similarly — if more controversially — were a malicious doctor to instruct a sexually naïve woman to penetrate herself vaginally with a dildo on the pretence that this was a ‘medical procedure’; it is possible that this would be judged to be rape in at least some jurisdictions.

This latter possibility in turn suggests that a case where a person penetrates themselves with a teledildo without understanding the nature of the act as a result of the deception might also be argued to constitute rape by deception. However, deeming the use of IEHSTs to be masturbation rather than sex seems to limit the extent to which it is plausible to claim that

⁷³ In such a case, it is clear that the victim experiences sexual penetration against their will. However, as we discuss further below, in so far as the victim penetrates himself or herself there are difficulties involved in conceptualising this as occurring without consent, which renders the legal treatment of the case problematic. Moreover, some jurisdictions distinguish between penetration in the context of sexual intercourse and sexual penetration occurring in other contexts with only the former being named ‘rape’ and the latter identified as some (lesser?) form of sexual assault. For instance, under the British *Sexual Offences Act 2003*, rape requires penetration of “the vagina, anus or mouth of another person with his penis” (s. 1); ‘non-penile’ sexual penetration (i.e. “with a part of [another person’s] body or by [another person] with anything else” (s. 4.4)) may be an offence of ‘Causing a person to engage in sexual activity without consent’ (see s. 4). That being said, some jurisdictions do recognise this as rape. For instance, under Victorian law (Aust.), such a case would be charged as ‘Rape by compelling sexual penetration’ (see *Criminal Law Review* (n 16), at 7).

people are deceived about the nature of the act in which they are involved. One case in which this is plausible is where a person has been maliciously deceived to believe that penetration with a teledildo is medically necessary. However, in such a case the nature of the dildo as an IEHST is irrelevant to the nature of the crime. Another case, in which the capacities of teledildos do play a key role, is:

A woman is masturbating with a teledildo, which is recording her sexual activity and making available to a large audience online, having been maliciously deceived that it was an ordinary dildo. She would never have knowingly consented to penetrate herself with a teledildo. (**'Dildo Deception'**)

In such a case, it *might* be argued that a teledildo is so different to a dildo that the use of each constitutes a different act. We say 'might' because we are conscious that cases involving similar, if not identical, invasions of privacy in the context of ordinary (real-world) intercourse, such as where a woman consents to sex without realising that it is being filmed and streamed online, are often judged *not* to be rape.⁷⁴ Nevertheless, one might well think

⁷⁴ See, for instance, the episode described in Christopher Knaus and Michael Inman, 'ADFA Skype Scandal Cadets Sentenced, Avoid Jail' (2013) *The Canberra Times*, October 23. The manufacturers of a popular remote-controlled sex toy, 'We vibe', recently reached a court settlement in the USA with several thousand purchasers of this toy, who had sued for damages for the stress and anxiety associated with a loss of privacy when it was revealed the device was, unbeknownst to them at the time, transmitting data about their use of the device to the company's servers (see Lucy Cormack, 'We-Vibe sex Toy Manufacturer Settles US Class Action For Almost \$4 Million' *The Sydney Morning Herald* (Online, 15 March 2017) <https://www.smh.com.au/business/consumer-affairs/wevibe-sex-toy-manufacturer-settles-us-class-action-for-almost-4-million-20170315-guye1y.html> accessed 30 November 2017). To our knowledge, though, no one has suggested that the manufacturer was

that the intimate, and bodily, nature of the invasion of privacy involved in the unintended use of a teledildo makes it different to being filmed and thus a different act to masturbation with an ordinary dildo.

In contrast, it is difficult to mobilise relevant intuitions in cases analogous to **Hacked Spouse**, **Crossed Wires**, **Unintended Intercourse I**, and **Unintended Intercourse II** (as we shall see momentarily, **Gender Deception I**, **Gender Deception II**, and **Masturbation by Mistake** play different roles in the dialectic) if we consider the use of IEHSTs to be coordinated self-stimulation. If IEHSTs permit sex, these scenarios involve people having sex with persons other than those they consented to have sex with and the intimate bodily involvement of the other person makes it plausible to think that this means that it is a different act.⁷⁵ However, if the use of IEHSTs constitutes only self-stimulation then in these cases the person is caused to masturbate at the same time as a person who was not the person they believed them to be. The ‘act’ remains masturbation and the deception involves the reason for engaging in it. Thus, understanding the use of IEHSTs as coordinated self-stimulation makes these scenarios akin to the way **Gender Deception I** and **Gender Deception II** appeared in the previous section.

guilty of *rape* despite the fact that (we presume) some of the users of these devices had penetrated themselves with the devices, but would not have done so had they known that the device was reporting on them, and that the manufacturer did not reasonably believe that such users were in fact consenting to penetration. That this argument was *not* made, however, may reflect the particular jurisdiction in which this case arose: we suspect that an argument could be made along these lines in some jurisdictions with a more expansive definition of rape.

⁷⁵ Hurd (n 43), at 127.

Indeed, insofar as in all these cases a person masturbates when they didn't intend to, they all appear to be variants of **Masturbation by Mistake**.

Yet as we noted above, that deceptions that concern the inducement to penetration are less corrosive of autonomy than deceptions about the nature of the act is far from clear. Notice, moreover, that it remains true in each of these cases that the person would not have masturbated had they known the relevant facts about the person with whom they were coordinating their masturbation. The other party's deception caused them to penetrate themselves when otherwise they would not have.

Nevertheless, we concede that there appear to be serious impediments to counting these cases as rape. Consider:

A man calls a telephone sex hotline and inserts a dildo into his anus at the encouragement of the person at the other end of the call, who identifies herself as 20-year-old 'Sexy Sarah' and tells him she is sexually excited and masturbating during the call. Unbeknownst to him sexy Sarah is in fact a 50-year-old woman named Jane who was completing a crossword during the call. The man would not have penetrated himself had he known the real identity of his interlocutor. Further, Jane is aware of that fact. (**'Phone Sex'**)

We doubt that many of our readers will admit this to be an instance of rape even though it seems clear that the man has been brought by means of deception to penetrate himself where he would not otherwise have done so.⁷⁶

Perhaps part of the explanation lies in the difficulties involved in thinking about what it means to consent to an act that one performs oneself.⁷⁷ Performative accounts of consent struggle to get a grip as there is no-one to authorise to perform the act. Subjective accounts of consent allow more room to conclude that a person might not really have wanted to do what they did as a result of deception. Yet, even if the action is held not to be fully autonomous in this instance, one might still wonder whether penetration in such cases occurs 'against the will' of the person who is masturbating.⁷⁸ Moreover, we normally think of consent as something that is provided *to* another person even if we think of consent as an internal approval of the actions of that person.⁷⁹

It is also possible that the difficulties involved in countenancing the possibility of rape when people are caused to penetrate themselves while masturbating as a result of deception

⁷⁶ Although we note that Gross (n 29) reports an Israeli case wherein a male defendant was charged with rape by deception after having brought young girls to touch themselves sexually by pretending to be a woman (p. 46).

⁷⁷ Yung (n 33), at 32-33.

⁷⁸ Note that we do not believe that the distinction between deception regarding the act and the inducement is doing any work here: it would not, it seems to us, make any difference if the man had rung the chat line expecting to speak to sexy Sarah, a real person with whom he had had phone sex before, only to have Jane answer and pretend to be Sarah.

⁷⁹ Hurd (n 43), at 123-124; McGregor (n 35), at 114.

reveals the limits of an account of rape as an infringement of sexual autonomy. Rubinfeld argues that the only way to avoid reaching implausible conclusions about either the nature of rape by deception or the prevalence of rape by deception is to reinstate a force requirement into our understanding of the definition of rape.⁸⁰ While we are deeply uncomfortable with this suggestion, it must be admitted that our discussion of the possibility of rape by deception in the context of masturbation does seem to lend some credibility to his argument.⁸¹

As long as the use of IEHSTs is conceptualised as self-stimulation, then, it is significantly harder to mobilise the intuition that it will involve a risk of rape by deception. This is itself somewhat puzzling given that, increasingly, contemporary accounts of rape focus on the fact of sexual penetration and do not require that it occurs in the context of sexual intercourse *and* that masturbation with a teledildo involves penetration that is clearly sexual. If one is sufficiently committed to an account of rape as a violation of sexual autonomy and to the idea that deception about inducements as well as acts may render acts heteronomous, however, then even if those using IEHSTs are not having sex it might be held that there remains a risk that users will be raped as a result of deception by another party.

8. THE REASONABLENESS OF BELIEFS ABOUT CONSENT TO CYBERSEX

⁸⁰ Rubinfeld (n 41), at 1395-1440.

⁸¹ Rubinfeld's paper (n 41) has itself been subject to trenchant criticism by a number of respondents, including Yung (n 33), Falk (n 16), and Dougherty, 'No Way Around Consent' (n 30).

In our discussion of most of the scenarios above, we have assumed that the ‘fault element’— what is often described as the *mens rea* — necessary for non-consensual sexual penetration to constitute rape is present by virtue of the perpetrator’s deception. Where A has deceived B in order to bring it about that B agrees to sexual penetration, this is strong *prima facie* evidence at least that A does not possess a reasonable belief that B has consented to penetration. However, in several of the scenarios the question of what it is reasonable for the alleged perpetrator to believe about the putative victim’s consent is less clear. In particular, in **Crossed Wires** it is plausible to think that the deceived parties might possess a reasonable belief that their unconsenting (because of the deception) partners were in fact consenting.

What we should judge it reasonable to believe about other people’s consent to sex (or masturbation) via IEHSTs is at least in part a function of how we understand consent to the use of devices.

For instance, if a social convention emerges that all those involved in cybersex using IEHSTs have thereby consented to have sex with whoever they do in fact have sex with then, absent contraindications, it will be reasonable to believe that your partner is consenting even if one is aware of the possibility that they may not have intended to have sex with you (for instance, if the connection turns out to be hacked). Regulation of IEHSTs may have an important part to play here in either stipulating, supporting, or controverting the reasonableness of beliefs about consent in different circumstances. Whether it could be reasonable to believe that one’s sexual partner has consented to sex when one has deliberately deceived them in order that they agree to engage in sexual penetration, where otherwise they would not have, will depend upon our answers to larger questions about the scope of consent discussed above.

Yet even on this most generous account of consent, assumptions about consent to sex require further defence, as one final scenario demonstrates. Consider:

A 15-year-old child, who is beneath the statutory age of consent, uses an IEHST while pretending to be a 20-year-old person online. An adult has cybersex with the child believing them to be an adult: they would not have consented to sex with the child had they known their real age. (**'Underage User'**)

If we think that those who use an IEHST have consented to have sex with whoever they do in fact have sex with then presumably the adult has not been a victim of rape by deception. By contrast, the child, who — by law at least — cannot consent, has been the victim of (statutory) rape by the adult.⁸² Moreover, legally, in many jurisdictions, the adult cannot possess a reasonable belief that a child of this age has consented to sex. Not only have they had sex with a child without the child's consent, then, but they did so in the absence of a reasonable belief that the child consented to sex. Given that, we presume, people will often have no way of telling the age of the person they are having sex with using IEHSTs, this is obviously an extremely troubling conclusion.

Confronted with this implication we might abandon the claim that — in the context of cybersex at least — it is not possible to possess a reasonable belief that a child beneath the

⁸² This in turn opens up space to argue that, because rape and sex are different acts, the adult has in fact been deceived about the nature of the act rather than the inducement to sex, in which case we might conclude that the adult has also been raped. Christopher and Christopher (n 23) argue that it may well be the case in as many as 30 USA jurisdictions that adults charged with statutory rape in similar (real-world) circumstances have themselves been victims of rape by deception.

statutory age of consent has consented to sex. However, notice that this line of thought addresses the reasonableness of belief about consent and does not contest the claim that children *cannot* consent to sex. Once we concede that *some* people — namely young children — using IEHSTs do not (because they cannot) consent to sex, then users of these devices can only maintain a reasonable belief that their partner has consented to sex if they have taken reasonable precautions to exclude this possibility or (perhaps) if we judge the risk of such encounters to be suitably small.

If we think of consent as subjective approval of a particular act then the reasonableness of belief about a partner's consent to sex will depend upon the efforts an individual has gone to determine this. If an individual has deliberately deceived their partner in order that their partner 'consents' to sex then it will not be reasonable for them to believe that their partner is consenting.⁸³ In ordinary contexts, asking someone whether they consent to sex will typically suffice to establish whether they consent to sex and thus ground a reasonable belief about this matter. However, in the context of cybersex involving IEHSTs, that one's partner is explicitly indicating consent to sex will not rule out the possibility that they are not in fact consenting because they are below the age of consent (as per **Underage User**) or because the connection has been hacked so that they think they are consenting to sex with someone else (as per **Crossed Wires**). Knowing that some users may be below the age of consent, then, users of IEHSTs must take reasonable precautions to prevent having sex with such individuals.

⁸³ Thus in **Underage User** it may well be the case that the adult is (also) a victim of rape depending on whether or not we hold it to be plausible that a person beneath the statutory age of consent could nonetheless possess the *mens rea* for rape. As Christopher and Christopher (n 23) recount, some USA jurisdictions do allow that this is possible (p. 80).

Knowing that there is a possibility that the connection might have been hacked, the reasonableness of users' belief about consent will depend upon the effort they have made to communicate key facts about their own identity in order to reduce the chances of someone having sex with them inadvertently.

There is clearly much more that could be said about how to assess the reasonableness of beliefs about consent to sex in the context of the use of IEHSTs: reasons of space prevent us from pursuing this matter further in the current context. Because, as we have argued, the risk of deception remains ever present, given a sufficiently demanding account of what is required in order to possess a reasonable belief, it may not be possible to sustain such a belief in the context of cybersex via IEHSTs, which would render their use dangerous and probably unethical. If the extent of deception online is sufficiently large then this may also turn out to be the case even if our account of the reasonableness of beliefs about consent is less demanding. Moreover, it seems clear that, at least in some of the cases where an individual is perpetrating a deception (most obviously in **Hacked Spouse**, **Unintended Intercourse I**, and **Unintended Intercourse II**), absent an extremely implausible account of what people consent to when they consent to the use of an IEHST, the perpetrator will not be able to sustain a reasonable belief that the victim of the deception was consenting to sexual penetration. That is to say, such individuals may possess both the fault element (*mens rea*) and the *actus reus* for rape. Arguments about the reasonableness of beliefs about consent in the context of the use of IEHSTs are therefore unlikely to support the claim that there is no risk of rape involved in the use of these devices.

CONCLUSION

The prospect of people having cybersex via Internet enabled haptic sex toys raises many philosophical and ethical issues. In particular, as our discussion here has demonstrated, the use of IEHSTs seems to involve a significant risk of rape by deception. That such a risk exists is especially clear if we think of these devices as enabling sexual intercourse but it *may* also exist even if we think of them as facilitating only coordinated self-stimulation. While both male and female users of such devices would be vulnerable to rape in certain circumstances there is a significant — and philosophically intriguing — asymmetry in the circumstances in which men and women are at risk. The possibility that children below the age of consent might use these devices is particularly unsettling and should either prompt an exception to the general rule that it is not possible to possess a reasonable belief that a child beneath a certain age is consenting to sex or a concerted effort to find a way of preventing this from happening. However, the precise circumstances in which users might become the victims of rape depend upon our answers to controversial questions concerning: the definition of rape by deception and, in particular, the distinction between deception regarding the ‘act’ and deception regarding inducement to sex; the ontology of consent; and, what is required in order to sustain a reasonable belief that a sexual partner is consenting. These matters are themselves so contested that it is difficult to reach firmer conclusions about the ethics of the use of IEHSTs. Nevertheless, it seems clear that those who do believe that IEHSTs will eventually facilitate sexual intercourse should acknowledge the real risk of rape by deception involved in the use of such devices. Moreover, even where there is not a risk of rape there remains a real risk of sexual assault and/or serious moral wrongs to users who are deceived about who they are engaged in sexual relations with. We suspect that these issues constitute a serious, and under-appreciated barrier, to the ethical design and use of IEHSTs

What do these conclusions imply for the ethics of the design and use of existing remote control and teleoperated sex toys? As we observed at the outset, existing devices currently fall short of being fully fledged IEHSTs because they do not allow the ‘male’ user to move the dildo in and out of the body of the ‘female’ user. If we think that the use of such devices may nevertheless involve sexual penetration of the ‘female’ user by the ‘male’ user then, where this occurs, the issues raised by existing devices will be identical to those raised by fully-fledged IEHSTs. If we think that these devices merely serve to coordinate self-stimulation though, then the users of teledildos will only be vulnerable to rape if being caused to penetrate oneself as a result of deception constitutes rape. Those penetrating penile sheaths would be vulnerable to sexual assault only if being brought to masturbate (without penetration) as a result of deception constitutes a sexual assault.⁸⁴ Thus, existing devices seem to involve a risk of rape only if we think that they allow sexual penetration or if we endorse an expansive account of the scope of rape by deception. Nevertheless, insofar as they will allow deception that will vitiate consent to intimate sexual activity, and will involve a risk of unintentionally engaging in sexual acts with people below the age of consent, they still involve a significant risk of users suffering sexual assaults and/or serious moral wrongs. Again, we suggest that this implies that the use of such devices is more ethically fraught than has so far been appreciated.

The risk of rape involved in the use of IEHSTs establishes, we believe, a strong *prima facie* case for the regulation of their design and use as they start to be developed and also for the regulation of the design, and perhaps the use, of existing internet enabled sex toys. In

⁸⁴ Note that it remains possible that genuine IEHSTs would in fact allow sexual intercourse even if we conclude that existing devices only support coordinated self-stimulation.

particular, manufacturers should be required to make every effort to secure their devices, and the connections between them, from hacking. Regulation of internet enabled sex toys may also have a role to play in shaping, and perhaps even determining as a matter of law, the reasonableness of beliefs about consent in the context of cybersex. However, beyond that, it is difficult to say, because, as we have shown here, determining the nature and scope of the wrong involved in the use of such devices in various circumstances requires us to confront a difficult set of questions about the definition and significance of sexual penetration, the nature and scope of consent, the reasonableness of beliefs about consent to sex, and the harm of rape. We hope this initial examination of how these questions interrelate in the context of internet enabled haptic sex toys will assist scholars and policy makers confront the regulatory dilemmas posed by the internet enabled sex toys that exist today as well as those likely to be developed in the future.

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