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**RAPE GOES CYBER: ONLINE VIOLATIONS OF
SEXUAL AUTONOMY**

Asaf Harduf*

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INTRODUCTION

Rape is the most severe sexual offense, involving one of the most feared and reviled acts a person can inflict on another. But what are the normative foundations of rape? Initially, the doctrine of rape was limited to penial-vaginal forceful penetration.¹ Over time, other forceful kinds of penetrations have been added: oral, anal, and later, the forceful insertion of inanimate objects.² The requirement of using force lost its exclusiveness and much of its normative power, paving the way to other kinds of rape: sex by non-forceful coercion, sex by sedation, sex with mentally incompetent people, sex by fraud, and other forms of non-consensual problematic sex.³ The normative debate about each form is ongoing and, in a manner of speaking, rape has become a limitless notion.⁴ Where will the rape offense go next? Cyberspace, apparently.⁵

The Israeli Supreme Court has recently affirmed convictions of rape by distant communication.⁶ The perpetrators conversed with children, teenagers, and adult women online, using fraud and blackmail to manipulate them into self-penetration.⁷ This groundbreaking judicial development is the inspiration behind the normative analysis offered in this Article, revolving around Western notions of rape.⁸ Should such ill-intended communications constitute rape? Is the word “rape” suitable to describe virtual scenarios and

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1. Joanne Conaghan, *The Essence of Rape*, 39 OXFORD J. LEGAL STUD. 151, 153 (2019). The traditional legal terminology used was “carnal knowledge,” which is defined as the entry of the male sexual organ into the female sexual organ. See 3 CHARLES E. TORCIA, WHARTON’S CRIMINAL LAW § 278 (15th ed. 2020).
2. See Conaghan, *supra* note 1, at 154; see CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 4 (2012), <http://www.womenslawproject.org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf> [<https://perma.cc/RZ5G-2FZ7>].
3. See, e.g., MD. CODE ANN., CRIM. LAW § 3-304(a)(2) (West, Westlaw through 2021 Reg. Sess. General Assem.) (showing addition of non-forceful means of rape in Maryland’s rape statute).
4. See Conaghan, *supra* note 1, at 155 (illustrating both sides of the debate surrounding the expansion of the definition of rape).
5. See *infra* Section II.B.
6. See *infra* notes 76–105 and accompanying text.
7. See *infra* notes 76–105 and accompanying text.
8. See *infra* notes 110–12 and accompanying text.

online communications involving sexual exploitation? Although it is tempting to intuitively say no, the normative road to the proper legal answer is more complicated than it may seem.⁹

This Article systematically scrutinizes the normative cyber rape thesis on Anglo-American doctrines of rape.¹⁰ It analytically divides the normative conception of rape into three facets and examines each separately: the physics of the offensive scenario;¹¹ the settings of the physical scenario and the manner in which sexual autonomy is violated;¹² and finally, the matter of proper criminal labeling.¹³ This Article shows that sexual autonomy is under substantial attack in cyberspace and that connecting this attack to different doctrines of rape is not such a farfetched notion.¹⁴ Nevertheless, a systematic analysis reveals normative gaps between offline and online harmfulness and wrongfulness,¹⁵ as well as normative gaps between different doctrines of rape.¹⁶ All in all, the framework of rape is unsuitable to handle these cyber-attacks.¹⁷ This does not suggest we should tolerate offensive online conduct, but rather that new and specific prohibitions are better suited to protect sexual autonomy online.¹⁸

This Article will proceed as follows. Part I reviews the offense of rape.¹⁹ It first describes the historical central developments and expansions of the offense, discussing various prominent legal constructs of rape.²⁰ It then explores the Israeli precedent applying the rape offense to technological means.²¹

9. See *infra* Section II.G (describing the reasoning behind labeling instances of virtual communications as “rape”).

10. See *infra* Part II.

11. See *infra* Section II.B.

12. See *infra* Sections II.C–F.

13. See *infra* Section II.G.

14. See *infra* Sections II.D–F (showing how the doctrines of coercion, deception, and incompetence apply in a cyber context).

15. See *infra* notes 296–305 and accompanying text.

16. See *infra* notes 296–305 and accompanying text.

17. See generally Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy Rules Through Technology*, 76 TEX. L. REV. 553, 586 (1998) (listing three reasons it is difficult for existing legal frameworks to apply to changing technologies).

18. See *infra* text accompanying notes 275–76, 285–301, 323–33. See generally *infra* Sections II.C–G.

19. See *infra* Part I.

20. See *infra* Section I.A.

21. See *infra* Section I.B.

Part II extensively analyzes the cyber rape thesis within the framework of Anglo-American doctrines of rape.²² After reviewing the rapidly growing technological developments in communication in the age of cyberspace, it normatively scrutinizes the thesis by analytically dividing the normative notion of rape into three facets and examining each separately.²³

Eventually this Article concludes that sexual autonomy is indeed under attack in cyberspace by use of other forms of technology and communication, and that there are significant normative similarities in the ways sexual autonomy is attacked offline and online.²⁴ However, applying the framework of rape to this technology seems disproportional, unfair, and distorts public messages about the harmfulness and dangerousness of the perpetrators who commit this offense. Cyber sexual offensiveness should not be tolerated, but new legal frameworks are more suitable to address it.²⁵

I. REVIEWING THE LAW OF RAPE

A. *History, Rationales, and Legal Constructs*

While much of humanity has changed for the better, some of its shameful facets seem constant. The act of rape has always been a part of human conduct around the globe.²⁶ The criminalization of rape is also far from new.²⁷ Old regimes criminalized rape to protect the honor of women's fathers, husbands, and brothers;²⁸ thus, it

22. See *infra* Section II.A.

23. See *infra* Sections II.B–G.

24. See *infra* Conclusion.

25. See *infra* text accompanying notes 311–33.

26. See Megan Lutz-Priefert, Note, *A Call for a More Permanent International Definition of Rape*, 6 CREIGHTON INT'L & COMPAR. L.J. 85, 86 (2015) (reviewing the omnipresence of rape throughout time, culture, gender, and race); see Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 225–27 (2015); see Elizabeth Hanus, Comment, *Rape by Nonphysical Coercion: State v. Brooks*, 64 UNIV. KAN. L. REV. 1141, 1143 (2016); see also Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1034 (2018) (noting that rape has existed since the earliest civilizations).

27. Hanus, *supra* note 26, at 1143; Allen, *supra* note 26, at 1034.

28. See Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 36–38 (2014); see Margo Kaplan, *Rape Beyond Crime*, 66 DUKE L.J. 1045, 1055 (2017); see Kari Hong, *A New Mens Rea for Rape: More Convictions and Less Punishment*, 55 AM. CRIM. L. REV. 259, 274 (2018); see Michael Mullen, Note, *Rape by Fraud: Eluding Washington Rape Statutes*, 41 SEATTLE U. L. REV. 1035, 1046 (2018); see also STUART P. GREEN, CRIMINALIZING SEX: A UNIFIED LIBERAL THEORY 57 (2020) (describing the ancient justification of the offense).

follows the rape offense overlooked marital coercion.²⁹ Unfortunately, in modern times, the rape phenomenon is still far from being obsolete or even uncommon.³⁰

While sexual offensiveness appears to be an ill-fated constant in human life, the offense of rape has undergone major changes throughout the years.³¹ The general paradigm of rape, revolving around coercive sex, has clearly expanded throughout the years.³²

At the end of the nineteenth century, American rape law leaned on the paradigm of the stranger rapist, lurking in the shadows, prepared to attack virtuous women.³³ Enforcement focused on African-American males while knowingly overlooking white male perpetrators.³⁴ The law required victims to fight to their death.³⁵ Sexist norms were woven into the rape law, which in turn enforced those norms.³⁶ Late in the twentieth century, women's rights movements succeeded in achieving major reforms in rape law, perceiving rape as a crime of violence and control.³⁷ The physical element of rape as a legal construct has expanded.³⁸ The FBI formerly defined rape as "the carnal knowledge of a female, forcibly

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29. See Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 BROOKLYN J. INT'L L. 153, 154–55 (2015); see Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 MICH. J. GENDER & L. 89, 92 (2015); see also Patricia J. Falk, *Husbands Who Drug and Rape Their Wives: The Injustice of the Marital Exemption in Ohio's Sexual Offenses*, 36 WOMEN'S RTS. L. REP. 265, 275–76 (2015) (analyzing marital rape in modern times).
30. See Lutz-Priefert, *supra* note 26, at 86–87 (discussing rape statistics).
31. McJunkin, *supra* note 28, at 6–7; Graceann Carimico et al., *Rape and Sexual Assault*, 17 GEO. J. GENDER & L. 359, 360 (2016); Corey Rayburn Yung, *Rape Law Gatekeeping*, 58 B.C. L. REV. 206, 211–13 (2017); Leslie Berkseth et al., Review Article, *Rape and Sexual Assault*, 18 GEO. J. GENDER & L. 743, 747 (2017) (noting that state legislatures have thoroughly changed the substantive criminal laws regarding rape during previous decades).
32. Hanus, *supra* note 26, at 1143–44.
33. Allen, *supra* note 26, at 1052–53; Randall & Venkatesh, *supra* note 29, at 158.
34. See Yung, *supra* note 31, at 229–30.
35. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1092 (1986).
36. See *id.* at 1093, 1095.
37. See SUSAN ESTRICH, REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO 4 (1987) (methodically criticizing former laws of rape and suggesting application of rape law for each instance of non-consent); see Estrich, *supra* note 35, at 1087, 1095, 1121–22, 1127, 1132.
38. *An Updated Definition of Rape*, U.S. DEP'T. OF JUST. (Jan. 6, 2012), <https://www.justice.gov/archives/opa/blog/updated-definition-rape> [<https://perma.cc/D2EZ-M7H5>].

and against her will[.]” meaning sexual intercourse.³⁹ Today we see a broader definition by the FBI and DOJ: “penetration, no matter how slight, of the vagina or anus with body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.”⁴⁰

This change is not only about expanding the offense beyond the traditional intercourse, but also about perceiving males as potential victims.⁴¹ Rape was previously a gender-specific crime—only men were the perpetrators, and only women their victims.⁴² As the crime started including male victims, that also changed by expanding the physiological concept of rape.⁴³ Evidently, coercion does not necessarily have to rely on force.⁴⁴ While many states still include this element, there is a wide academic consensus that doing so is normatively obsolete.⁴⁵

The modern conception of rape connects the offense with the need to protect the sexual autonomy of any gender.⁴⁶ Personal autonomy

39. *Id.*

40. *Id.*

41. *See id.*

42. *See* JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS 55–56, 67 (2nd ed. 2002) (writing that until 1994 rape was the most prominent gender-based offense). *But see* Penal Law, 5737–1977, § 345 (Isr.) (defining rape victims as only women under Israeli law).

43. TEMKIN, *supra* note 42, at 68–69.

44. Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335, 336–37 (2017).

45. Hanus, *supra* note 26, at 1146–48; Hong, *supra* note 28, at 274–79 (noting that most U.S. states still require force as an element of rape; arguing to discard force as a vital element); *see* Schulhofer, *supra* note 44, at 342–43, 347 (suggesting a change in the meaning of force to include all types of coercion).

46. *See* Stuart P. Green, *Lies, Rape, and Statutory Rape*, in LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM 194, 206 (Austin Sarat ed., 2015); *see* Hanus, *supra* note 26, at 1144; *see also* McJunkin, *supra* note 28, at 7 (noting that the modern normative basis of the rape offense is widely understood as a violation of sexual autonomy). *But see* Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 YALE L. & POL’Y REV. 407, 429–30 (2017) (suggesting that the law of rape is meant to protect freedom, rather than autonomy); Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 436 (2016) (claiming rape is a crime of gender inequality); McJunkin, *supra* note 28, at 43–46 (calling for acknowledgement of human dignity as the normative basis of the rape offense); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1378–80 (2013) (arguing this rationale is incoherent due to the lack of substantive criminalization of sex by fraud). *See generally* Joseph J. Fischel & Hilary R. O’Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428 (2015) (dismissing criticism and supporting sexual autonomy as the rationale of sex crimes).

is about the ability to control, choose, and decide one's lifestyle.⁴⁷ It is about self-governance and the capacity to reflect and revise one's identity and values.⁴⁸ All of the above may be considered necessary to personhood.⁴⁹ Personal autonomy is extremely valued in modern times.⁵⁰

Personal autonomy can be broken down into specific layers, one of which regards sex.⁵¹ Sexual autonomy can be perceived broadly to include the right to choose sexual activities, sexual partners, places, timing, and additional circumstances.⁵² Various actions may implicate positive and negative dimensions of sexual autonomy.⁵³

Alongside the paradigm of coercive rape, there are other paradigms, unique in the sense they do not exclude scenarios in which victims consent to intercourse, treating that consent as legally defective.⁵⁴ One of them is quite common in American jurisdictions.⁵⁵ Having sex with minors is forbidden even with their consent, sometimes between two consenting minors, which is known

47. See 3 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF* 28, 115 (1986); see Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759, 765 (2000) (explaining the notion of personal autonomy); see Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446–47, 453–54 (1983).

48. See Chiesa, *supra* note 46, at 420 (stating there is no universal definition of autonomy, but the central understanding is that autonomy is about capability of “self-rule”).

49. See McJunkin, *supra* note 28, at 8 (connecting autonomy with personhood, which is required for flourishing).

50. Daniel Susser et al., *Online Manipulation: Hidden Influences in a Digital World*, 4 GEO. L. TECH. REV. 1, 35 (2019) (stressing that autonomy lies at the normative core of liberal democracies).

51. See Green, *supra* note 46, at 206–08 (comparing personal autonomy to property law, in the sense that personal autonomy is made of a bundle of rights).

52. See *id.* at 208 (illustrating sexual autonomy).

53. *Id.* at 207; Hanus, *supra* note 26, at 1144 (stressing that sexual autonomy has a negative dimension—freedom from unwanted sex—and a positive dimension—freedom to pursue sexual relationships that are mutually desired); see Chiesa, *supra* note 46, at 421, 432–33 (distinguishing “autonomy,” the capacity for self-determination in accordance with one's authentic or true values, from freedom, which is the ability to act without significant external constraints).

54. See *infra* text accompanying notes 55–62.

55. See Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 119 (“All states and the federal government have enacted a collection of crimes aimed at punishing sex between two persons when at least one is under the age of consent.”).

as “statutory rape.”⁵⁶ This niche reflects the concept of the incompetent victim.⁵⁷

The second paradigm, while being wide in theory, is relatively narrow in practice. It is comprised of situations in which the victim agreed to an act without comprehending it as sexual, or agreed to have intercourse with the perpetrator who had disguised himself as the victim’s spouse—i.e., “rape by fraud.”⁵⁸ This niche reflects the uninformed victim.

There are also other forms of rape. Rape by sedation is typically devoid of any consent by the victim.⁵⁹ Self-intoxication is more complex, at least in cases in which a person can still speak and move; one might suggest intoxication does not allow meaningful consent, but nevertheless, some consent is possible.⁶⁰ However, sedation is not relevant in cyber contexts, for the time being, and there is no technology to sedate another online user from afar.⁶¹ On the other hand, coercion, incompetence, and fraud are all present online,⁶² and their rape doctrines may be adapted for the electronic world. In one country, that has already happened.⁶³

56. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 404 (1984); see Lewis Bossing, Note, *Now Sixteen Could Get You Life: Statutory Rape, Meaningful Consent, and the Implications for Federal Sentence Enhancement*, 73 N.Y.U. L. REV. 1205, 1226, 1240 (1998); see Daryl J. Olszewski, Comment, *Statutory Rape in Wisconsin: History, Rationale, and the Need for Reform*, 89 MARQ. L. REV. 693, 693–94 (2006); see Anna High, *Good, Bad and Wrongful Juvenile Sex: Rethinking the Use of Statutory Rape Laws Against the Protected Class*, 69 ARK. L. REV. 787, 791–836 (2016); see also Asaf Harduf, *Statutory (Is Not) Rape: Reshaping the Criminalization of Underage Sex, and Beyond*, 56 CRIM. L. BULL. 871, 871 (2020) (reviewing and criticizing laws of statutory rape).

57. See Harduf, *supra* note 56, at 901.

58. See Rubinfeld, *supra* note 46, at 1395–1402 (discussing laws regarding rape by fraud).

59. See Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 133–34 (2002) (discussing cases of drug rape; reviewing American legislation and calling for a legal reform).

60. See Hong, *supra* note 28, at 289–90 (claiming that intoxicated people lack the ability to meaningfully distinguish wanted sex from unwanted sex, and that the crime of rape by intoxication is underinclusive).

61. See generally Nora Fitzgerald & K. Jack Riley, *Drug-Facilitated Rape: Looking for the Missing Pieces*, NAT’L INST. JUST. J., Apr. 2000, at 8, 13 (“Drug-facilitated rape may be initiated in social settings, like parties and clubs, not traditionally considered high-risk environments.”).

62. See *infra* Sections II.D–F.

63. See *infra* text accompanying notes 64–112.

B. Rape Meets Technology: The Israeli Precedent

The general expansions of the rape offense and its legal construct—e.g., the direct use of force to overpower the will of another, other ways of coercion, and the inclusion of underage and fraudulent sex—have brought an astonishing judicial expansion to the concept of rape in Israel: “rape by communication.”⁶⁴

Prior to the Declaration of the Establishment of the State of Israel in 1948—a few years after the Holocaust—Britain had governed Palestine for many years and established a local common law system without juries.⁶⁵ The Penal Code in Israel was similar to codes the British used for other colonies and territories.⁶⁶ At the birth of its independent legal framework, Israel adopted most mandatory laws enacted by the British.⁶⁷ While the Israeli legal system is based in common law, it also includes aspects of civil law.⁶⁸ Throughout its first decades, the Israeli judicial system was significantly influenced by British law and looked at British precedents to resolve legal debates.⁶⁹ In time, the Israeli courts gained confidence and no longer needed to rely on foreign rulings to resolve cases.⁷⁰ However, many of the laws set by the British sovereignty are still in effect even today,⁷¹ as are a few of the Ottoman regime laws which preceded the British rule.⁷²

Israel’s rape offense is defined in section 345 of its Penal Code, 1977, and includes five equal alternative forms of non-aggravated rape: (1) intercourse with a woman without her freely given consent;

64. See *infra* text accompanying notes 73–112.

65. Steven J. Colby, Note, *A Jury for Israel?: Determining When a Lay Jury System Is Ideal in a Heterogeneous Country*, 47 CORNELL INT’L L.J. 121, 126–27 (2014).

66. See Shlomo Guberman, *Development of the Law in Israel- The First 50 Years*, ISR. MINISTRY OF FOREIGN AFFS. (June 19, 2000), <https://mfa.gov.il/mfa/aboutisrael/israelat50/pages/development%20of%20the%20law%20in%20israel-%20the%20first%2050%20yea.aspx> [https://perma.cc/WH96-N8SL].

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See Ron Harris & Michael Crystal, *Some Reflections on the Transplantation of British Company Law in Post-Ottoman Palestine*, 10 THEORETICAL INQ. L. 561, 564–68, 582–87 (2009).

72. See, e.g., George E. Bisharat, *Land, Law, and Legitimacy in Israel and the Occupied Territories*, 43 AM. U. L. REV. 467, 493–94 (1994); Natalie Orpett, *The Archaeology of Land Law: Excavating Law in the West Bank*, 40 INT’L J. LEGAL INFO. 344, 389 (2012).

(2) intercourse with a woman with her consent, obtained by deceit with respect to the identity of the person or the nature of the act; (3) intercourse with a woman below the age of fourteen, even with her consent; (4) intercourse with a woman by exploiting her state of unconsciousness or other condition that prevents her from giving her free consent; and (5) intercourse with a woman by exploiting the fact that she is mentally ill or deficient.⁷³ Intercourse is defined as “introduc[ing] any part of the body or any object into the woman’s sex organ.”⁷⁴ Following the gender-specific history of the offense, rape is still only defined as an offense against women under Israeli law.⁷⁵

At the end of 2011, for the first time in Israel and perhaps in human history, the prosecution indicted a person for “facilitating rape” in what can be defined as “verbal rape” or “communicative rape.”⁷⁶ A sixty-nine-year-old male was accused of causing rape, after he had phoned a minor, presented himself as a physician and instructed her to penetrate herself.⁷⁷ That same week, the prosecution indicted a fifty-year-old man for rape, after posing online as a teenage boy, causing a minor to penetrate herself.⁷⁸ Eventually the charges were dropped, and the defendant pled guilty to aggravated indecent acts.⁷⁹

To date, the new intriguing paradigm of communicative rape has received critical judicial attention only in two short decisions. In 2012, an IDF twenty-nine-year-old male soldier was indicted for maliciously causing rape.⁸⁰ He falsely presented online as a

73. Penal Law, 5737–1977, § 345(a) (Isr.).

74. § 345(c).

75. *Id.*; see also TEMKIN, *supra* note 42, at 55–56, 67–69 (noting that, until 1994, rape was the most prominent gender-based offense, as it was only considered penile penetration of a vagina).

76. See CrimA 34264-12-11 Israel vs. Melamed (Dec. 18, 2011) (Isr.) (on file with author). It appears that the prosecution and the defense reached an agreement; besides the indictment, there is no trace of this case. See *id.* The remainder of Section I.B. discusses several Israeli criminal cases that signify the early recognition of cyber rape as a punishable offense. The following Israeli judicial opinions and court filings are published and readily available solely in Hebrew. All referenced authorities are on file with the Author, and his interpretation and analysis are contained in the subsequent discussion.

77. *Id.*

78. See Case (DC CT) 40230-12-11 State of Israel v. Sabach (Dec. 21, 2011) (Isr.) (on file with author).

79. See CrimA 538/13 Sabach v. State of Israel (Dec. 26, 2013) (Isr.) (on file with author).

80. Case (DC Hi) 1520/12 State of Israel v. Danino (May 7, 2012) (Isr.) (on file with author).

nineteen-year-old female soldier, pushing teenage girls to penetrate themselves, sometimes by blackmail.⁸¹ At the bail hearing, the District Judge briefly endorsed the possibility of a new legal paradigm of rape, but nonetheless suggested it seemed somewhat disproportionate regarding the level of punishment for such actions.⁸² The prosecution took the hint and later dropped the rape charges; the defendant pled guilty to aggravated indecent acts and was sentenced to two years imprisonment.⁸³

The last time this paradigm received any critical judicial attention was in 2015.⁸⁴ At a preliminary hearing, the district court briefly denied the defense claim that such actions do not constitute rape, stressing the necessity of protecting minors online.⁸⁵ This case also ended in a plea bargain, replacing the rape offense with aggravated indecent acts.⁸⁶

At this point, one might get the impression that the verbal rape paradigm was but a prosecutorial tool, pushing defendants into pleading guilty to lesser charges. On the other hand, some defendants have also pled guilty to charges of causing rape, asking the court for leniency.⁸⁷ One of these defendants, charged with causing rape, sodomy, and indecent acts against thirty-three minors, was sentenced to fourteen years of imprisonment.⁸⁸ In 2015, at the sentencing appeal, the Israeli Supreme Court stressed the severity of the acts but nevertheless granted the appeal and reduced the sentence to twelve years.⁸⁹ It should be noted that the Supreme Court of Israel did not address the new rape paradigm at all in this specific case.⁹⁰ In 2016, two defendants pled guilty at the district court and were therefore convicted in multiple cases of “facilitating rape” against

81. *Id.*

82. *See id.* The defendant made bail. *Id.*

83. *See* CrimA 2656/13 Doe v. State of Israel (Jan. 21, 2014) (Isr.) (on file with author). The Supreme Court of Israel denied the defendant’s appeal. *See id.*

84. *See* Case (DC TA) 41309-12-14 State of Israel v. Morovati (Mar. 16, 2015) (Isr.) (on file with author).

85. *Id.*

86. *See* Case (DC TA) 41309-12-14 State of Israel vs. Morovati (July 8, 2015) (Isr.) (on file with author). The defendant was sentenced to eighteen months’ imprisonment. *Id.*

87. *See* CrimA 707/14 Doe v. State of Israel (July 6, 2015) (Isr.) (on file with author).

88. *Id.*

89. *Id.*

90. *See id.*

minors.⁹¹ Later that year, another defendant pled guilty to facilitating rape by blackmailing a young adult.⁹² This was the first application of the new rape paradigm related to an adult victim—i.e., a young female soldier.⁹³ At the sentencing appeal, once again the Supreme Court raised no questions whatsoever regarding the new groundbreaking rape paradigm.⁹⁴ It only emphasized the severity of abusing a young person and added a sentence of five years imprisonment instead of 3.5 at the end of 2018.⁹⁵ The Supreme Court denied the defendant's appeal against his 4.5 year sentence.⁹⁶ Judge Alex Stein emphasized the severity of the actions without addressing the pioneering prosecutorial thesis.⁹⁷

Thus far, the last appearance of the innovative paradigm of facilitating rape against minors at the Supreme Court of Israel was in March 2020, when, once again an online child abuser was charged with causing rape, indecent acts, threats and more.⁹⁸ In the District Court, the defendant moved for dismissal, claiming that the legality principle⁹⁹ denies the possibility of charging him with offenses of rape and indecent acts from a distance.¹⁰⁰ The District Court denied the claim, but allowed the defendant to make an elaborate plea at the end of the case.¹⁰¹ According to the agreed upon plea bargain, the rape indictment was dismissed and the defendant admitted to the other offenses before being sentenced to three years of imprisonment.¹⁰² In his appeal, the defendant claimed, once again, that when performed from a distance, there can be no conviction for rape and indecent act offenses.¹⁰³ The Supreme Court maintained that the defendant's claims have no legal basis, as there is no importance to the distinction between physical indecent acts and

91. Case (DC Hi) 9232-07-15 State of Israel v. Timsut (Mar. 28, 2016) (Isr.) (on file with author); Case (DC CT) 34838-04-15 State of Israel v. Gavrilov (Apr. 11, 2016) (Isr.) (on file with author).

92. CrimA 8720/15 State of Israel v. Pinto (Sept. 11, 2016) (Isr.) (on file with author).

93. *See id.*

94. *See* CrimA 3792/18 Doe vs. State of Israel (Nov. 11, 2018) (Isr.) (on file with author).

95. *See id.*

96. *Id.*

97. *See id.*

98. *See* CrimA 1195/19 Doe vs. State of Israel (Mar. 3, 2020) (Isr.) (on file with author).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

online ones.¹⁰⁴ Since the Supreme Court did not directly address the verbal rape thesis, it is clear, once again, that this thesis does not provoke judicial criticism.¹⁰⁵

So, although it was never critically affirmed in a formal verdict by any court in Israel,¹⁰⁶ verbal rape seems to be a legal reality in Israel.¹⁰⁷ It is doubtful that future verdicts will nullify the thesis, since a few people have already been convicted and sentenced based on it.¹⁰⁸ Whether this legal reality is worthy or not is an entirely different question.

This Article will not review the Israeli history of rape law and how the legal provisions defining rape have developed, sometimes by bizarre accidents, allowing the creative prosecution to give rise to a new form of a rape offense.¹⁰⁹ The central question is not doctrinal, but normative. This Article inquires whether or not the rape offense should cover such scenarios. When a person is brought by ill-intended communication to sexually touch or penetrate themselves while the perpetrator is far away, should the legal notion of rape apply? Can words generate rape from afar?

The Israeli example proves that this expansion is more than an academic exercise.¹¹⁰ Although this groundbreaking development is the inspiration for this Article, by no means will this Article examine the legal doctrines of rape in Israel and assess their applicability to online scenarios. The following analysis will revolve around Anglo-American notions and constructs of rape and examine if there is a normative basis to take these notions further—i.e., into the cyber world.¹¹¹ Such an intricate question requires analysis of rape law, its purpose and boundaries, as well as the implied interaction between law and technology.¹¹²

104. *Id.*

105. *See id.*

106. *See id.*

107. *See supra* notes 76–105 and accompanying text.

108. *See supra* notes 87–105 and accompanying text.

109. *See supra* notes 76–105 and accompanying text.

110. *See supra* notes 76–105 and accompanying text.

111. *See* discussion *infra* Section II.C.

112. *See infra* Sections II.C–G.

II. SEXUAL OFFENSIVENESS GOES CYBER

A. *Communication in the Age of Cyberspace*

The ability to send someone a message from afar is nothing new. For millennia, human and animal messengers have delivered messages in this manner.¹¹³ As technology and economies evolved, sending messages became easier and cheaper.¹¹⁴ People learned to read and write and the printed word revolutionized the world of communication.¹¹⁵ Professional post offices were born, and every person could send a letter, even to the far side of the globe.¹¹⁶ The telegraph opened the door for instantaneous communication.¹¹⁷ Later the telephone enabled people to hear the voice of others from a distance in real time.¹¹⁸ A person could now talk to friends, foes, rivals or strangers directly; the communication could contain any content, including harmful or even criminal content.¹¹⁹ Then came cyberspace.

Cyberspace offers people numerous rich and innovative possibilities and courses of action, including diverse ways of communication.¹²⁰ While every new communication technology has brought its own advancements, as well as challenges, some suggest that cyberspace is especially advanced and challenging.¹²¹ What post offices and the telephone made cheap, cyberspace quickly made free:

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113. *E.g.*, ITHIEL DE SOLA POOL, *TECHNOLOGIES OF FREEDOM* 76 (1983) (noting the Persian and Roman Empires' use of couriers on horseback).
 114. *See, e.g., id.* at 98–100.
 115. *See, e.g.*, Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49, 74–76, 95–96 (2016) (explaining the impact of the printing press and the evolution of literacy in the United States).
 116. *See, e.g.*, POOL, *supra* note 113, at 79.
 117. *See* West, *supra* note 115, at 96.
 118. *See, e.g.*, Henry H. Perritt, Jr., *Cyberspace and State Sovereignty*, 3 J. INT'L LEGAL STUD. 155, 158 (1997).
 119. *See, e.g., id.*; *Katz v. United States*, 389 U.S. 347, 348 (1967) (stating the petitioner was convicted of transmitting wagering information by phone from Los Angeles to Miami and Boston).
 120. *See* Perritt, Jr., *supra* note 118, at 160–64.
 121. *See* POOL, *supra* note 113, at 91–96 (recounting the challenges of fitting evolving telegraphic communications into legal frameworks); *see* Perritt Jr., *supra* note 118, at 162–63 (discussing how the internet challenges traditional sovereign state boundaries and shapes legal institutions); *see also* Henry H. Perritt, Jr., *The Internet Is Changing the Public International Legal System*, 88 KY. L.J. 885, 886–87 (2000) (describing challenges set by older communication technologies and claiming that the challenges set by cyberspace are unique).

people with online access can reach anyone, publish content, and hear anyone else's voice from around the globe.¹²²

Regardless of the critical economic aspect, cyberspace introduced many innovations to the world of communication.¹²³ One is the combination of voice and picture: the live video feed, a technology which was once considered science fiction, is now a common banal reality.¹²⁴ This revolutionary technology opened many new possibilities, including sexual ones,¹²⁵ making it easier to locate others with similar sexual taste.¹²⁶ For example, one can see the sexual acts of others in real time.¹²⁷ When the two are consenting adults, that is usually not considered a legal problem, or at least not a sex offense.¹²⁸ In other situations, it can become offensive and abusive.¹²⁹

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122. See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1807, 1815, 1821, 1831, 1837 (1995) (foreseeing how the availability of speech possibilities would change the world).
123. See Amitai Etzioni, *Implications of Select New Technologies for Individual Rights and Public Safety*, 15 HARV. J.L. & TECH. 257, 261 (2002) (describing the shift from old communication methods to cyberspace).
124. See Tiffany N. Beaty, Comment, *Navigating the Safe Harbor Rule: The Need for a DMCA Compass*, 13 MARQ. INTELL. PROP. L. REV. 207, 208 (2009).
125. See Edward Castronova, *Fertility and Virtual Reality*, 66 WASH. & LEE L. REV. 1085, 1092–93 (2009) (detailing how technology enables sexual options); see Robert Bloomfield & Benjamin Duranske, *Protecting Children in Virtual Worlds Without Undermining Their Economic, Educational, and Social Benefits*, 66 WASH. & LEE L. REV. 1175, 1185–86 (2009); see Mark A. Lemley & Eugene Volokh, *Law, Virtual Reality, and Augmented Reality*, 166 U. PA. L. REV. 1051, 1076–77, 1082–83 (2018); see Lillian Esposito, Note, *Sexual Ageplay in Virtual Reality: Practicing Free Speech or Producing Child Pornography?*, 40 CARDOZO L. REV. 1913, 1921–24 (2019); see also Yusef Al-Jarani, *All Fun and (Mind) Games? Protecting Consumers from the Manipulative Harms of Interactive Virtual Reality*, 2019 U. ILL. J.L. TECH. & POL'Y 299, 350 (2019) (describing possibly harmful new capabilities of sex via virtual reality).
126. GREEN, *supra* note 28, at 45 (noting that the internet enables sexual possibilities for people with idiosyncratic sexual tastes and interests).
127. E.g., Matthew Green, Comment, *Sex on the Internet: A Legal Click or an Illicit Trick?*, 38 CAL. W. L. REV. 527, 530 (2002).
128. See *United States v. Thomas*, 74 F.3d 701, 711–12 (6th Cir. 1996) (affirming conviction of disseminating obscenity online); see also John F. McGuire, Note, *When Speech is Heard Around the World: Internet Content Regulation in the United States and Germany*, 74 N.Y.U. L. REV. 750, 759–60 (1999) (discussing the *Thomas* case and other criminal aspects of disseminating obscenity and pornography online).
129. E.g., Melissa Farley et al., *Online Prostitution and Trafficking*, 77 ALB. L. REV. 1039, 1079–80 (2014).

A second related innovation is smart phones.¹³⁰ Communication devices were historically stationary, usable only in designated places.¹³¹ The combination of smart phones and cyberspace has made it possible to use one's communication device almost anywhere one goes.¹³² Smart phones are much more than just "phones."¹³³ One can use them for video chats, as they are also video cameras. Smart phones can also take numerous high-quality photos and store them for free.¹³⁴ Thirty years ago, video cameras were very expensive, large, and heavy, ensuring that videos were neither spontaneous nor very secretive.¹³⁵ Nowadays, filming a video is just another smartphone application.¹³⁶ A few decades ago, one needed a camera to take about thirty pictures, and each photo cost money to send to a third-party for developing, all before knowing how they would turn out.¹³⁷ Nowadays, one can take infinite high-resolution photos for free, observe them immediately, and later post them or send them to someone without the involvement of others.¹³⁸ Such photographs may be related to sex, as one can take pictures of their naked body and send them to current or potential partners.¹³⁹

Again, this is not considered a problem for consenting adults. Technology is typically neither evil nor benevolent; it only provides new possibilities for people to act upon.¹⁴⁰ Some of them are

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130. Hayley S. Strong, Casenote, "Sexting" to Minors in a Rapidly Evolving Digital Age: *Frix v. State Establishes the Applicability of Georgia's Obscenity Statutes to Text Messages*, 61 MERCER L. REV. 1283, 1283 (2009).
131. Joshua A.T. Fairfield, *Mixed Reality: How the Laws of the Virtual Worlds Govern Everyday Life*, 27 BERKELEY TECH. L.J. 55, 58 (2012).
132. *Id.*
133. Strong, *supra* note 130, at 1283.
134. *E.g.*, Fairfield, *supra* note 131, at 61–62.
135. See Steven Siegel, Note, *The Video Revolution and the First Amendment: Democratization of Media Production and Public Access to the Future "Electronic Public Forum"*, 8 N.Y. L. SCH. J. HUM. RTS. 257, 260 (1990).
136. See C. Scott Brown, *Smartphone Stills Are Getting so Much Better, but What About Video?*, ANDROID AUTH. (March 23, 2019), <https://www.androidauthority.com/smartphone-video-features-964546/> [<https://perma.cc/Y7AW-LPRY>].
137. See Siegel, *supra* note 135, at 260.
138. See *supra* notes 133–34, 136 and accompanying text.
139. See Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1897–98 (2019) (acknowledging the ability to share our naked bodies online).
140. See Joseph H. Sommer, *Against Cyberlaw*, 15 BERKELEY TECH. L.J. 1145, 1156 (2000) (describing technology as the manipulation of the physical, biological, and logical world); see also Arthur J. Cockfield, *What is Legal Knowledge?: Towards a Law and Technology Theory*, 30 MAN. L.J. 383, 386 (2004) (stressing the dual nature of technology).

criminal as cyberspace paves numerous criminal roads,¹⁴¹ some of them are virtual versions of old crimes, and some are innovative.¹⁴²

A third innovation of cyberspace is the rich possibility of conversing with strangers.¹⁴³ Cyberspace is often a world of fantasy and lies.¹⁴⁴ Impersonating another in real life can be hard and dangerous. On the other hand, going online, creating fictitious profiles, and talking to strangers is both easy and relatively safe.¹⁴⁵ No one sees the user for who they are, which makes them uninhibited, for better or worse.¹⁴⁶ One can find the courage to speak to someone attractive, speak the truth, advocate for values, and become the best version of themselves.¹⁴⁷ But they can also turn to the darkest corners of the net and become the worst version of themselves.¹⁴⁸

Cyber communication is closely related to another innovative aspect of cyberspace, which is seemingly modest at first glance.¹⁴⁹ Next to richer forms of communication—e.g., voice chat and video

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141. See Charlotte Decker, Note, *Cyber Crime 2.0: An Argument to Update the United States Criminal Code to Reflect the Changing Nature of Cyber Crime*, 81 S. CAL. L. REV. 959, 964 (2008) (noting every new technology provides criminal opportunities, but cyberspace provides endless opportunities).
142. See Marc D. Goodman, *Why the Police Don't Care About Computer Crime*, 10 HARV. J.L. & TECH. 465, 471–72 (1997); see Michael Edmund O'Neill, *Old Crimes in New Bottles: Sanctioning Cybercrime*, 9 GEO. MASON L. REV. 237, 282 (2000); see Neal Kumar Katyal, *Criminal Law in Cyberspace*, 149 U. PA. L. REV. 1003, 1047–48, 1071–72 (2001); see Joel R. Reidenberg, *States and Internet Enforcement*, 1 U. OTTAWA L. & TECH. J. 213, 224–25 (2003); see also Susan W. Brenner, *Toward a Criminal Law for Cyberspace: Distributed Security*, 10 B.U. J. SCI. & TECH. L. 1, 50–51, 65, 68–70 (2004) (analyzing if and how cybercrime differs from offline crime).
143. See AMANDA LENHART & MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, TEENS, PRIVACY & SOCIAL NETWORKS: HOW TEENS MANAGE THEIR ONLINE IDENTITIES AND PERSONAL INFORMATION IN THE AGE OF MYSPACE, 33–34, 36 (2007), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/media/Files/Reports/2007/PIP_Teens_Privacy_SNS_Report_Final.pdf.pdf [<https://perma.cc/Y2MD-XX5R>].
144. See Paris Martineau, *Internet Deception is Here to Stay—So What Do We Do Now?*, WIRED (Dec. 30, 2019, 7:00 AM), <https://www.wired.com/story/internet-deception-stay-what-do-now/> [<https://perma.cc/63AW-VXZF>].
145. See Katyal, *supra* note 142, at 1047–48.
146. See Andrea Chester & Di Bretherton, *Impression Management and Identity Online*, in THE OXFORD HANDBOOK OF INTERNET PSYCHOLOGY 223, 223–25 (Adam N. Joinson et al. eds., 2007) (noting that in cyberspace we can create new versions of ourselves, including versions impossible to create offline).
147. See *id.* at 223–24.
148. See *id.* at 224.
149. See *infra* notes 150–53 and accompanying text.

chat—cyberspace, personal computers, and smart phones also offer the possibility to simultaneously converse in writing only, all in a fluent, easy, and accessible way.¹⁵⁰ A written conversation may at times be more disguised and it might feel more impersonal, as no one hears the intonation of the other user's voice.¹⁵¹ Psychologically, it might be easier to threaten someone by written words than by their own voice, to blackmail someone, and perhaps to violate their sexual autonomy.¹⁵² Distance weakens empathy and accountability, and requires less audaciousness.¹⁵³

Any person may use technology, mainly cyberspace or telecommunication, to bring another to sexually touch oneself.¹⁵⁴ Whenever it is done with a free, informed, and competent form of consent, it is seemingly none of our business. However, if consent is defective, lacking freedom, information, or competency, should we call it “rape?”

As discussed above,¹⁵⁵ this Article analyzes the concept of cyber rape by looking at the three facets of the notion of rape: the physics of the act,¹⁵⁶ the settings of sexual interaction, with consideration of attacks on sexual autonomy and the ability to replicate these things online;¹⁵⁷ and proper labeling of offensive sexual conduct in cyberspace.¹⁵⁸

150. See Shashank V. Joshi et al., *The Use of Technology by Youth: Implications for Psychiatric Educators*, 43 ACAD. PSYCHIATRY 101, 101–02 (2019) (discussing various means of modern communication and usage rates for different age brackets).

151. See ADAM N. JOINSON, UNDERSTANDING PSYCHOLOGY OF INTERNET BEHAVIOR: VIRTUAL WORLDS, REAL LIVES 25 (2003); see also John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCH. & BEHAV. 321, 322 (2004) (acknowledging the disinhibition effect online due to user's feeling of anonymity).

152. See Katelyn Y.A. McKenna, *Through the Internet Looking Glass: Expressing and Validating the True Self*, in THE OXFORD HANDBOOK OF INTERNET PSYCHOLOGY 205, 212 (Adam N. Joinson et al. eds., 2007) (suggesting that online communication's elimination of physical hints disinhibits the users).

153. See Katyal, *supra* note 142, at 1071.

154. E.g., Martie P. Thompson & Deidra J. Morrison, *Prospective Predictors of Technology-Based Sexual Coercion by College Males*, 3 PSYCH. VIOLENCE 233, 233–35 (discussing study on the emerging threat of “technology-based coercive behaviors” and potential risk factors for predatory behavior).

155. See *supra* notes 10–13 and accompanying text.

156. See *infra* Section II.B.

157. See *infra* Section II.C.

158. See *infra* Section II.G.

B. *Cyber Rape: The Physics of Offline Rape Versus Communicative Rape*

As stated above, rape as a concept historically only included penial-vaginal penetration.¹⁵⁹ Although that changed a while ago in many countries,¹⁶⁰ in order to include more scenarios, rape still requires some sort of sexual penetration¹⁶¹ of only one of the three penetrable parts.¹⁶² Accordingly, non-penetrative sexual assaults are, per definition, not rape: no penetration, even a partial one,¹⁶³ means no rape.¹⁶⁴ What happens to these physics when technology enters the picture?

On the one hand, penetration is still possible. The offline rape typically includes penetration by the perpetrator and that act cannot be done from a distance yet.¹⁶⁵ Nevertheless, bringing someone to self-penetration is clearly possible, even from the other side of the globe.¹⁶⁶ Note the difference between penetration and masturbation: whereas male masturbation typically does not involve penetration, this act is excluded from the current notions of rape.¹⁶⁷ Bringing

159. See *supra* notes 1–5 and accompanying text.

160. See Conaghan, *supra* note 1, at 171–72 (reviewing legislation in different countries with regards to the element of penetration or lack thereof, and its normative vitality).

161. See Allen, *supra* note 26, at 1062 (acknowledging the distinction between rape and battery, based on the rationale of sexual autonomy).

162. See Baker, *supra* note 26, at 227–28 (claiming that rape is unique regarding the emotional, relational, hedonic, and dignitary injuries resulting from particular parts of the body being touched or invaded and suggesting that this focus is related to physiological or cultural reasons).

163. See Lutz-Priefert, *supra* note 26, at 97–98 (discussing requirement of penetration and alternative definitions; supporting the FBI’s broad definition of penetration, including any amount of vaginal or anal penetration by a body part or object).

164. But see Alberto Cadoppi & Michael Vitiello, *A Kiss Is Just a Kiss, or Is It? A Comparative Look at Italian and American Sex Crimes*, 40 SETON HALL L. REV. 191, 193 (2010) (reviewing broad Italian definition of rape—i.e., CODICE PENALE [C.P.] art. 609-bis (Italy)—that requires no penetration and looks for coercion of sexual acts); GREEN, *supra* note 28, at 64–65 (discussing broad conceptions of offenses equivalent to rape in Canada, which do not require penetration).

165. See Tyler Patrick Lovejoy, Comment, *A New Playground: Sexual Predators and Pedophiles Online: Criminalizing Cyber Sex Between Adults and Minors*, 20 ST. THOMAS L. REV. 311, 325–26 (2008) (stating that a sexually explicit conversation can rise to the level of sexual conduct and be communicated over the phone without penetration).

166. See *id.* at 325–27.

167. See Robert Sparrow & Lauren Karas, *Teledildonics and Rape by Deception*, 12 L., INNOVATION & TECH. 175, 195–96 (2020) (stressing the physiological differences in online masturbation and its significance to the law of rape).

people to masturbate in sexual ways without penetrations is left out of any rape doctrine: no penetration, no rape.¹⁶⁸ However, normatively speaking, one certainly might suggest there should not be a difference between self-penetration and other forms of intimate self-touching. One may certainly be sexually victimized, objectified, and humiliated, with self-penetration or without it.¹⁶⁹

On the other hand, self-penetration seems very different from penetration by another person's organs or wielded inanimate objects. In the offline rape, the victim feels the offender's body on top or against their own and might also feel the rapist's fluids defile their body. However, as we go online, the offender is not present, and the victim does not necessarily feel the self-penetration as an offender's bodily invasion. Therefore, the online transition makes the offensive scenario less intrusive.¹⁷⁰ The offender's scent and taste are also left out of the picture. Even the offender's proximity and visualization are missing, which lessens the physical invasiveness. In these cases, the force of penetration is not determined by the offender, even with regards to insertion of inanimate objects, unless those objects are operated from a distance.¹⁷¹ The offender is less in control of the situation, which in turn means that less coercive pressure is experienced by the victim.¹⁷² Since the victim has more control over their own body, it might decrease any pain their touch may cause. This significant change of physics might alleviate the victim's stressful experience.

Looking at the physics of sexual offensiveness online reveals an exclusive method.¹⁷³ Exploiting the victim and causing them to self-

168. *See id.* (illustrating the differences of the possibility of penetration while using internet-enabled haptic sex toys between males and females while stating that if there is no penetration, there is no possibility of being raped).

169. *See* Conaghan, *supra* note 1, at 171–72 (stressing that sexual autonomy is violated even without penetration).

170. *See* Sparrow & Karas, *supra* note 167, at 195 (discussing the sensations essential to physical sexual acts, which are arguably not present in offline rape).

171. *See* Lemley & Volokh, *supra* note 125, at 1094; *see also* Sparrow & Karas, *supra* note 167, at 178 (discussing the possibility of remote operation of sex toys during online communications).

172. *See* Lemley & Volokh, *supra* note 125, at 1099–101 (discussing factors present in online interactions that limit the offender's power such as the choice not to place a haptic device on one's private areas, the ability to define an individual's version of consent online, and the ability to change the user's avatar).

173. *Compare* Baker, *supra* note 26, at 228 (discussing how an essential part of rape has been the non-consensual touching of certain parts of the body), *with* Sparrow & Karas, *supra* note 167, at 191 (discussing how the use of haptic technology can result in rape even when there is apparent consent or no physical touching by the predator).

execute the penetration introduces a unique method of violating the victim's rights—there is no way around it for the perpetrator. Namely, we are not witnessing a nuance of a known sexual offense paradigm, but instead, a new paradigm of sexual offensiveness.¹⁷⁴

In addition, coercive rape requires the rapist to be aware that the victim does not consent.¹⁷⁵ Criminal law doctrine requires the coercive rapist to be aware, in real time, that the penetration is against the victim's free will.¹⁷⁶ This doctrine sharpens the aggression and offensiveness of the physical act: the physical rapist must, physically or figuratively, meet the victim's eyes and see their victimization in real time.¹⁷⁷ The perpetrator might even find pleasure in hurting another victim's body and soul, or experience sexual pleasure while seeing others suffer, objectified, and exploited. On the other hand, penetration by distant communication offers the perpetrator a convenient mental detachment from the experience of wronging another being.¹⁷⁸ In offline rape by fraud, deception allows the perpetrator to avoid looking into the victim's eyes while the latter realizes the truth and discovers victimization.¹⁷⁹ In online self-penetration by fraud, the perpetrator does not need to look into the eyes of the victim while they commit the offense.¹⁸⁰

174. See Sparrow & Karas, *supra* note 167, at 196–97 (discussing the limitations on claims which can be brought if the use of internet-enabled haptic sex toys is deemed masturbation rather than sex).

175. See Kaplan, *supra* note 28, at 1073–74 (claiming that dominant social norms discourage partners from recognizing cues of non-consent).

176. See Victoria Brown et al., Review Article, *Twenty-First Annual Review of Gender and the Law: Annual Review Article: Rape & Sexual Assault*, 21 GEO. J. GENDER & L. 367, 373 (2020) (writing that most states have provisions banning sexual contact that is coerced, or that the perpetrator knew was not consented to).

177. See generally *An Updated Definition of Rape*, *supra* note 38 (explaining U.S. Justice Department's rape definition and the difference between rape and forcible rape).

178. See generally Heather Murphy, *What Experts Know About Men Who Rape*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/health/men-rape-sexual-assault.html> [<https://perma.cc/2HUZ-6JQP>] (“Indeed, experts note one last trait shared by men who have raped: they do not believe they are the problem.”).

179. See Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 48 (1998) (explaining rape by deception).

180. See generally Jan M. Olsen, *Swedish Man Gets 10 Years for Online Rape of American, Canadian Teens*, USA TODAY (Nov. 30, 2017, 9:24 PM), <https://www.usatoday.com/story/news/world/2017/11/30/sex-offenses-online-rape-parenting-teens/911966001/> [<https://perma.cc/JK6G-C8MU>] (“A 41-year-old Swedish man was convicted of rape and sentenced to 10 years in prison . . . for coercing young teenagers . . . to perform sexual acts in front of webcams by threatening them or their families.”).

Further, the experience of the offender is inherently different.¹⁸¹ The offender's senses do not experience the online scenario as they do offline.¹⁸² The offender does not get to touch and smell; at times, the offender does not get to hear; sometimes the offender does not even get to see; and when the offender does see, the sight is relatively limited.¹⁸³ If the act is filmed, the offender can review the recorded crime and revisit it later,¹⁸⁴ disseminate or use it to further blackmail, or employ other forms of criminality that typical coercive rapes may not include.¹⁸⁵

C. *Cyber Rape: The Settings Leading to Communicative Rape*

There is nothing inherently wrong with sexual penetrations. Many of us practice them, desire them, and fantasize about them, as human culture is widely and deeply sexual.¹⁸⁶ What makes sexual penetrations criminal is not their physics, but rather how they are carried out—i.e., their settings, the lack of consent to sex, or defective consent.¹⁸⁷ The normative foundations of rape are sexual penetrations combined with the violation of personal autonomy.¹⁸⁸

181. See *infra* notes 182–85 and accompanying text.

182. See *infra* note 183 and accompanying text.

183. See generally Jenny Morber, *What Science Says About Arousal During Rape*, POPULAR SCI. (May 31, 2013), <https://www.popsoci.com/science/article/2013-05/science-arousal-during-rape/> [<https://perma.cc/G8YM-Q7VG>] (explaining that rapists often try to get a physical response from their victims to feel dominant).

184. See Kelly Muldavin, *Cruel to Be Kind: The Societal Response to Technology and Youth Sexual Expression*, 23 LEWIS & CLARK L. REV. 425, 446–47 (2019) (explaining the lasting dangers in taking and sending sexual pictures to others).

185. See Danielle Citron & Mary Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 346 (2014); see Berkseth et al., *supra* note 31, at 808–11 (describing the phenomenon of revenge porn, which includes the dissemination and watching of private sex); see John Kip Corwell, *Sexting: 21st-Century Statutory Rape*, 66 SMU L. REV. 111, 115 (2013) (describing the intrusion to privacy in technological sexual contents); see also Stuart P. Green, *To See and Be Seen: Reconstructing the Law of Voyeurism and Exhibitionism*, 55 AM. CRIM. L. REV. 203, 209–10, 214–39 (2018) (analyzing the proper criminalization of voyeurism and claiming that it significantly infringes the victim's sexual autonomy due to lack of consent).

186. See Justin R. Garcia et al., *Sexual Hookup Culture: A Review*, 16 R. GEN. PSYCH. 161, 161–63 (2012) (analyzing the differences in sexual relationships throughout history).

187. See Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 150 (2011) (explaining that the common law definition of rape included both a lack of consent and a physical act of violence).

188. See *supra* text accompanying notes 1–5.

Under the notion of personal autonomy, one is free to be harmed if they so choose, even when others deem this choice folly,¹⁸⁹ thus denying paternalism as the subjugation of self-determination to the notion of what is best for that person.¹⁹⁰ Personal autonomy wields the power of consent.¹⁹¹ It plays important roles in numerous fields of law.¹⁹² It relates to human rights, making moral changes and turning illegal actions into legal ones.¹⁹³ Consent can sometimes modify an array of rights and suspend duties to act or to avoid acting in certain manners.¹⁹⁴ Substantive criminal law treats people as rational and turns compliance into a wall that separates accepted actions and criminalized actions.¹⁹⁵ Consent is often the sole difference between criminal and legal acts, as its absence begets a social harm; “*volenti non fit injuria*,” meaning to one who is willing no harm is done.¹⁹⁶ Consent excludes various offenses like rape, kidnapping, theft, and burglary.¹⁹⁷

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189. See 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 115 (1984) (illustrating consensual self-harm).
190. See FEINBERG, *supra* note 47, at 57, 68–69; see also Dan-Cohen, *supra* note 47, at 765 (explaining paternalism).
191. See Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO STATE J. CRIM. L. 397, 402 (2016) (describing consent as a power and as an internal mental choice with willed acquiescence that comports with the consentor’s autonomy); see Roseanna Sommers, *Commonsense Consent*, 129 YALE L.J. 2232, 2235 (2020) (explaining that consent is morally important because it expresses personal autonomous will); see also Chiesa, *supra* note 46, at 426 (portraying consent as “the vehicle through which legal actors translate concerns about autonomy into legally workable standards and rules.”).
192. See Peter Westen, *Some Common Confusions About Consent in Rape Cases*, 2 OHIO STATE J. CRIM. L. 333, 333 (2004) (illustrating the role of consent in contract, property, and tort law); see also Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 21 (2015) (noting consent has different meanings across various areas of law including a relatively broad definition in criminal law).
193. See Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121, 124 (1996).
194. See Westen, *supra* note 192, at 334.
195. See Vanessa E. Munro, *Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy*, 41 AKRON L. REV. 923, 924 (2008) (explaining the role of consent in criminal law).
196. *Volenti non fit injuria*, BLACK’S LAW DICTIONARY (11th ed. 2019); see also Vera Bergelson, Lecture, *The 2008 David J. Stoffer Lecture: Autonomy, Dignity, and Consent to Harm*, 60 RUTGERS L. REV. 723, 723 (2008).
197. See Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 171–74 (2007) (elaborating on the history of consent in substantive criminal law).

Although the role of consent is not always coherent,¹⁹⁸ at least in some cases, its importance is clear.¹⁹⁹ It defines the line between legal and illegal, between social acceptance and criminalization.²⁰⁰ Consent has a crucial function in the rape offense, signaling the moral line between criminal and socially accepted sexual contact.²⁰¹ Nevertheless, although rape scholarship revolves around consent,²⁰² it remains a vague concept²⁰³—in spite of being the most discussed term regarding this offense—and there is no unified understanding regarding this critical issue.²⁰⁴

Consent is a vague concept because is not a narrow notion, but a very expansive one. One might wonder if it is a mental state or an expression,²⁰⁵ or suggest diverse and complex ways to distinguish various forms of consent: factual consent versus legal consent, practical consent versus imputed consent, and so forth.²⁰⁶ Indeed, it has both a generic meaning and a very specific meaning simultaneously.²⁰⁷ So it is not always clear what we mean when we say there is no consent.

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198. Dan-Cohen, *supra* note 47, at 768–73 (discussing consensual slavery); see Bergelson, *supra* note 197, at 214–25; see Bergelson, *supra* note 196, at 729–34.
199. See Bergelson, *supra* note 197, at 214–25.
200. See *supra* text accompanying notes 187–97.
201. See *supra* text accompanying notes 187–97.
202. ESTRICH, *supra* note 37, at 1095–96, 1121; TEMKIN, *supra* note 42, at 90–136 (analyzing consent regarding rape); see also Craig T. Byrnes, Comment, *Putting the Focus Where It Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, 10 YALE J.L. & FEMINISM 277, 278, 283 (1998).
203. See Munro, *supra* note 195, at 940–41 (noting the deeply distorted meaning of consent, which has become unrecognizable and useless in the rape law context; calling to rephrase the term of consent to clarify rape law).
204. See Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 958–59 (2008).
205. See Westen, *supra* note 192, at 340–43; see also PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* 4–7 (Routledge 2016) (2004) (elaborating on the four basic notions of consent).
206. Sharon Cowan, *The Trouble with Drink: Intoxication, (In)capacity, and the Evaporation of Consent to Sex*, 41 AKRON L. REV. 899, 902–04 (2008); see Westen, *supra* note 192, at 340–41; see also H.M. Malm, *The Ontological Status of Consent and its Implications for the Law on Rape*, 2 LEGAL THEORY 147, 148 (1996) (discussing the meaning of consent).
207. See Westen, *supra* note 192, at 342–44.

Typically, we mean one of four options.²⁰⁸ First, we might mean there is a complete lack of consent in light of the victim's persistent refusal, or due to the victim's lack of any knowledge of the act.²⁰⁹ Second, we might mean that consent is not freely given, but derived from direct coercion.²¹⁰ Third, the consent is uninformed because compliance is based on false understandings of the scenario, the requested act and its consequences, the identity and traits of the requesting party, and so forth.²¹¹ Fourth and finally, the consent is incompetently given because some people are considered legally unfit to consent to some acts.²¹²

Section I.A described three types of offensive sex: coercive sex, fraudulent sex, and sex with an incompetent victim.²¹³ Each type of violation involves a different level of consent, protecting a different layer of sexual autonomy by assessing freedom, information, and competency.²¹⁴ Can the levels of consent be violated from a distance, and are these violations normatively equal to their offline counterparts?

D. Cyber-Coercive

Coercion is more than force, much more. Indeed, many laws do not count sex based on nonphysical coercion as rape.²¹⁵ However, even an insinuated threat—e.g., a threat of public humiliation or of

208. See Green, *supra* note 46, at 212–14; see also Chiesa, *supra* note 46, at 422–23 (measuring consent and autonomy along the dimensions of non-coercion, competency, and information).

209. See Green, *supra* note 46, at 212.

210. See Bergelson, *supra* note 197, at 188–89 (explaining that even freedom from direct coercion is extremely valuable); see also Munro, *supra* note 195, at 924, 931 (addressing exploitive practices that challenge the freedom of choice).

211. See Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 344–45 (2013) (stressing the imperfection of information in any decision to have sex).

212. See Green, *supra* note 46, at 212 (describing the capacity to consent and explaining that a person who is unconscious, heavily intoxicated, of very low intelligence, mentally ill, or a minor may be deemed incapable of giving consent).

213. See *supra* notes 46–63 and accompanying text.

214. See *supra* notes 46–63 and accompanying text.

215. Hanus, *supra* note 26, at 1149, 1151 (stating that many U.S. states do not criminalize rape by nonphysical coercion and the states that do criminalize nonphysical coercive sex as rape lack supporting case law); see also Kimberly Kessler Ferzan, *Consent and Coercion*, 50 ARIZ. ST. L.J. 951, 969–70, 992–93 (2018) (analyzing draft revisions to the Model Penal Code dealing with “Sexual Assault by Coercion or Exploitation,” including intercourse by coercion and proposing an alternative—“Sex by Threat”).

termination from employment²¹⁶—can be effective without the use of force or weapons.²¹⁷ Sometimes, for example, when the victim feels compelled to do anything asked by the perpetrator, threats are not needed.²¹⁸ If we think free will is worthy of protection, we should not consider the use or threat of force as a crucial element for rape convictions.²¹⁹ Those who believe criminal coercion includes more than force and threats of force might agree coercion is even possible online.

What happens to free will in cyberspace? Freedom of consent is certainly vulnerable online.²²⁰ Social pressures can push sexual actions online, along with blackmail or “sextortion.”²²¹ A person might threaten and blackmail another into action, including self-penetration. Blackmail might work from great distances, for instance by threatening to publish intimate photos, because such threats have nothing to do with physical proximity. Even if threats and intimidation tactics are in some respects weaker from afar because coercion is off the table, freedom is never completely safe.²²² Fear and terror can rise from great distances. Obviously, blackmail scenarios severely violate freedom of consent.²²³ But is this violation

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216. GREEN, *supra* note 28, at 117–22 (reviewing coercive threats and describing hypothetical scenarios); see Ferzan, *supra* note 215, at 976–77; see also Michal Buchhandler–Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 442–44 (2010) (discussing threats that lead to intercourse).
217. See Schulhofer, *supra* note 44, at 339 (describing a continuum of force, including various threats).
218. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 718–19 (2000) (discussing scenarios of peer pressure and non-force coercion).
219. Baker, *supra* note 26, at 228 (stressing that disregarding and “[o]verriding the victim’s will that she not to be touched in that particular area by that particular person constitutes the gravamen of rape”); see also Hanus, *supra* note 26, at 1168–70 (arguing to criminalize nonphysical coercion of sex as rape and suggesting that the rationales of criminalizing rape also apply to nonphysical coercion of sex).
220. See, e.g., Aaron Robbins, Note, *Solving the Sextortion Puzzle: Piecing Together a Model State Sextortion Statute*, 53 VAL. U. L. REV. 761, 761–62, 764–65 (2019) (describing nonconsensual sextortion in an online dating scenario and explaining that threats are the basis for sextortion).
221. See *id.* at 763, 768–73 (defining and illustrating sextortion using U.S. legal cases); see also Muldavin, *supra* note 184, at 441–43, 447–50 (discussing the problem of teen peer pressure for sexting and the problem of sextortion).
222. See Robbins, *supra* note 220, at 766–67.
223. See Falk, *supra* note 179, at 52, 73, 86 (discussing sex by extortion as rape and describing cases of blackmail).

normatively equal to the violation entailed in a physically coercive rape?

Autonomy is not binary but scalar.²²⁴ While our freedom of choice is vulnerable online, autonomy is not annihilated completely in cyberspace and in other forms of distant communication.²²⁵ We enjoy one special form of privilege there—the freedom to instantaneously cease and terminate communication without facing immediate physical danger. Closing online windows is the simplest of actions, one done numerous times daily by any user (minors and children included). One can also simply block specific users, which is a miserable one and by no means an ideal choice. Nevertheless, a fragment of personal autonomy remains—the capacity to choose between cooperation and other forms of action. The latter includes ignoring the demand and terminating all communications with the blackmailer; seeking help of parents, family, friends and community; and finally, calling the police.²²⁶ Those are all risky choices, and we must not judge victims who succumb to criminal tactics. Still, these choices are more available and accessible in online coercion than in direct physical coercion.²²⁷ In the offline world, victims who choose to resist potentially put themselves in further danger.²²⁸ Physical rapists who coerce victims to perform acts of self-penetration might threaten violence if the victim refuses to comply by moving to perform the penetration with their own physical organs or objects, often much more brutally.²²⁹ This is not the case for victims who are physically distant from the perpetrators.²³⁰

Theoretically, all victims are potentially stronger from a distance when not required to physically defend themselves, a danger which often arises in physical confrontations, even for unconscious

224. Chiesa, *supra* note 46, at 423 (arguing that autonomy is scalar and includes different degrees).

225. *See id.* at 425–26 (“The degree of autonomy that obtains in any given situation is directly proportional to the amount of information that the agent has prior to acting.”).

226. *See* Muldavin, *supra* note 184, at 449–50 (discussing infrequent reporting in sextortion cases).

227. *See infra* notes 228–32 and accompanying text.

228. *See* Kaplan, *supra* note 28, at 1056 (stressing that the resistance element in rape law requires the victim to place herself in danger of increased force and injury). *But see* Baker, *supra* note 26, at 255 (arguing that resistance is effective in reducing rape, while not increasing the chances of injury).

229. *See* Sparrow & Karas, *supra* note 167, at 196.

230. *See id.* at 181–82.

victims.²³¹ Similarly, victims of subtler online coercion have more options than victims who physically confront the coercing party.²³²

E. *Cyber-Deceitful*

The law of rape does not forbid intercourse derived from fraudulent temptation, as long as the deceived party was well aware of agreeing to intercourse.²³³ At most, Anglo-American law criminalizes a very narrow array of sex by fraud, like “medical treatment,” which involves intercourse or impersonation of a spouse in the dark of night.²³⁴ These acts are often considered lighter offenses, or even not criminalized at all.²³⁵ Nonetheless, since fraud and autonomy are not compatible,²³⁶ fraudulent sex is, by definition, offensive and violates the victim’s sexual autonomy.²³⁷ If we perceive fraudulent sex as problematic, and possibly even as rape, we can go one step further and examine the potential of fraud from afar.

What happens to sexual fraud in cyberspace? Honesty and trust, important social values,²³⁸ which are seemingly protected under the doctrine of rape by fraud, are actually more vulnerable to manipulation from a distance.²³⁹

231. See Falk, *supra* note 59, at 131–33 (stressing that many sedated victims wake up in the middle of the sexual attack).

232. See *supra* notes 220–31 and accompanying text.

233. See McJunkin, *supra* note 28, at 9–12.

234. *Id.* at 8–9 (stressing Nebraska is the only state with a broad rape statute that criminalizes all fraud relating to nominal identity; however, no state court has ever affirmed a rape conviction for impersonating a boyfriend, girlfriend, lover, or friend); Hong, *supra* note 28, at 287–88; Alexandra Brodksy, *Rape-Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal*, 32 COLUM. J. GENDER & L. 183, 197–98 (2017) (criticizing U.S. laws related to consensual sex involving nonconsensual lack of condom use or removal); see also Rubinfeld, *supra* note 46, at 1397–1402.

235. See Russell L. Christopher & Kathryn H. Christopher, *Adult Impersonation: Rape by Fraud as a Defense to Statutory Rape*, 101 NW. U. L. REV. 75, 92–97 (2007) (noting that less than a third of American jurisdictions criminalize impersonating a spouse for sex as rape).

236. Sommers, *supra* note 191, at 2239–40 (explaining that deception thwarts autonomy); see also Rubinfeld, *supra* note 46, at 1379, 1402–03 (emphasizing that fraud—“one of autonomy’s two greatest enemies, along with force”—violates sexual autonomy).

237. See Kristen L. Isaacson, Note, *Rape by Fraud or Impersonation: A Necessary Addition to Michigan’s Criminal Sexual Conduct Statute*, 44 WAYNE L. REV. 1781, 1799–1800 (1999) (writing that because sexual contact obtained by fraud or impersonation is devoid of consent, it breaches sexual autonomy).

238. See Caroline Forell & Anna Sortun, *The Tort of Betrayal of Trust*, 42 U. MICH. J.L. REFORM 557, 564–66 (2009) (elaborating on the value of trust).

239. See Susser et al., *supra* note 50, at 29, 31–32.

Online we often do not see the counterpart who contacts us.²⁴⁰ It is therefore hard to identify who is on the other side—as it may be a man or a woman, an adult or a minor, and so on—because we often lack any visible hints.²⁴¹ Online relationships depend less on the visible traits which are crucial offline;²⁴² therefore, informed consent is more challenging to obtain than in the physical realm.²⁴³ Passing information to others seems almost inherently more vague and often also dubious online.

Fraud is much easier online than in the physical world, because one's online identity can be elusive and malleable.²⁴⁴ Identity can be easily disguised and hidden, concealing material information from the other party.²⁴⁵ In real life, a seventy-year-old male cannot impersonate a seven-year-old girl—his appearance and voice will expose him immediately. In the digital world, on the other hand, he surely and easily can.²⁴⁶ Unlike offline encounters, cyberspace enables users to portray themselves differently.²⁴⁷ It is not surprising that impersonation is pervasive in social networks.²⁴⁸ The

240. See *infra* notes 241–43 and accompanying text.

241. This is not a new observation. See Sara Kiesler et al., *Social Psychological Aspects of Computer-Mediated Communication*, 39 AM. PSYCH. 1123, 1125–26 (1984).

242. See JOANIE FARLEY GILLISPIE & JAYNE GACKENBACH, CYBER RULES: WHAT YOU REALLY NEED TO KNOW ABOUT THE INTERNET 86 (2007) (suggesting that online relationships are less dependent on visible traits, which are crucial offline).

243. See Sparrow & Karas, *supra* note 167, at 199–201.

244. See Lemley & Volokh, *supra* note 125, at 1100–01 (stressing the easiness of online impersonations and the challenges of consent).

245. See Nazgole Hashemi & Tannaz H. Hashemi, *Don't Let Them Fool Ya: An Examination of Regulation Crowdfunding as a Framework for Federal Protection Against Online Dating Risks*, 53 U. S.F. L. REV. 421, 428–32 (2019) (explaining the dangers of deception in online dating).

246. See *supra* notes 143–48 and accompanying text.

247. See Katelyn McKenna & Gwendolyn Seidman, *You, Me, and We: Interpersonal Processes in Electronic Groups*, in THE SOCIAL NET: HUMAN BEHAVIOR IN CYBERSPACE 191, 207 (Yair Amichai-Hamburger ed., 2005) (portraying the uniqueness of electronic communication).

248. Kori Clanton, Note, *We Are Not Who We Pretend to Be: ODR Alternatives to Online Impersonation Statutes*, 16 CARDOZO J. CONFLICT RESOL. 323, 325–29 (2014) (addressing the failure to hold social media platforms liable for identity theft); Colleen M. Koch, Comment, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233, 239–45, 248–51 (2017) (analyzing identity theft on social networks and the legal responses thereto); see also Maksim Reznik, Comment, *Identity Theft on Social Networking Sites: Developing Issues of Internet Impersonation*, 29 TOURO L. REV. 455, 457–72 (2013) (explaining common forms of

information highway promises no informed consent, as lies and deception are abundant on every road.²⁴⁹ Some of those deceitful roads lead to physical encounters, including romantic and sexual ones.²⁵⁰ Other roads lead to sexual communication, some of which lead to self-penetrations.²⁵¹ Technology offers greater opportunities for deception, and provides a vaster, more diverse pool of potential victims.²⁵²

While impersonation and deception seem easier and richer online, in certain contexts they are harder and perhaps also less appealing for the offenders.²⁵³ Impersonating a real person, rather than a fictitious one, may prove tricky. For instance, impersonating one's spouse online is far from easy, for one usually has specific communication mediums with their spouse; and even when one gains access to that medium, the transition to sexual communication is more complicated because sexual interaction between spouses already has specific features, times, and places.²⁵⁴ Impersonating a physician online is not difficult, but gaining enough trust to falsely move another into self-penetration is more complicated.²⁵⁵ The perpetrators' motivation and satisfaction in such acts are certainly different, as they cannot touch, smell, or even be physically close to their victim.²⁵⁶

identity theft on social media—e.g., the creation of fake accounts and impersonating existing accounts).

249. See Sparrow & Karas, *supra* note 167, at 186–92 (stressing that cyberspace facilitates deception in various contexts).
250. See Irina D. Manta, *Tinder Lies*, 54 WAKE FOREST L. REV. 207, 230–35 (2019) (analyzing the different types of lies used on dating websites based on their severity).
251. See Sparrow & Karas, *supra* note 167, at 178–79 (analyzing futuristic self-penetrations that will be done remotely by digital online sex toys).
252. See Manta, *supra* note 250, at 234–35 (stressing the increase of opportunities for wrongdoers concerning technology).
253. See, e.g., Scott Matteson, *10 Tips for Dealing with an Online Impersonator*, TECHREPUBLIC (July 1, 2019, 10:17 AM), <https://www.techrepublic.com/article/10-tips-for-dealing-with-an-online-impersonator/> [<https://perma.cc/9BLA-Z44W>] (examining the difficulties of online impersonation).
254. See Christopher & Christopher, *supra* note 235, at 99–102; see, e.g., Victor Luckerson, *Can You Go to Jail for Impersonating Someone Online?*, TIME (Jan. 22, 2013), <https://business.time.com/2013/01/22/can-you-go-to-jail-for-impersonating-someone-online/> [<https://perma.cc/A88F-N5HX>] (describing intimate partner impersonation).
255. See Christopher & Christopher, *supra* note 235, at 84; see, e.g., *State v. Maxwell*, 825 A.2d 1224, 1225–27 (N.J. Super. Ct. Law Div. 2001) (detailing case involving defendant who impersonated a physician to coerce minors into self-penetration).
256. See *supra* notes 169–72 and accompanying text.

F. *Cyber-Incompetent*

Historically, the statutory rape offense criminalized sex with young females, including consensual sex, perceiving them as in need of special legal protection, and defending their “innocence” to preserve the girls as attractive potential brides and prevent them from becoming “financial burdens” on their fathers.²⁵⁷ The modern statutory rape offense is gender-neutral,²⁵⁸ and it now seeks to preserve morality or protect minors from themselves, perceiving them as easily susceptible to coercion and manipulation.²⁵⁹ It also tries to prevent physical consequences like pregnancy and sexually transmitted diseases.²⁶⁰ If we perceive teenagers and children as susceptible to sexual abuse and incapable of providing meaningful consent to sexual acts, we can take it a step further.

What happens to sexual incompetency online? Cyberspace requires minimal hardware, software, and connection—it does not account for legal competency.²⁶¹ In fact, minors abound in cyberspace, probably at higher rates than adults.²⁶² Minors converse

257. Meredith Cohen, Comment, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & POL’Y 717, 725–27 (2008); Lisa Pearlstein, Note, *Walking the Tightrope of Statutory Rape Law: Using International Legal Standards to Serve the Best Interests of Juvenile Offenders and Victims*, 47 AM. CRIM. L. REV. 109, 111–12 (2010) (describing the history of statutory rape); see also Tina M. Allen, Comment, *Gender-Neutral Statutory Rape Laws: Legal Fictions Disguised as Remedies to Male Child Exploitation*, 80 U. DET. MERCY L. REV. 111, 112–13 (2002).

258. Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1076, 1080–81 (1999) (noting that statutory rape laws protect vulnerable minors from harms of sexual activities); see also Olszewski, *supra* note 56, at 695.

259. High, *supra* note 56, at 791 (writing that public discourse focuses on minors’ presumed immaturity and inexperience and their susceptibility to sexual manipulation and coercion); see also Norah M. Roth, Note, *It’s Not Rape-Rape: Statutory Rape Classification Under the Armed Career Criminal Act*, 85 ST. JOHN’S L. REV. 1653, 1676 (2011) (claiming that adolescents may be particularly susceptible to manipulation and coercion by adults).

260. Pearlstein, *supra* note 257, at 112–13 (describing how teenage pregnancy rekindled the enforcement of statutory rape in the 1990s); Oberman, *supra* note 218, at 734–38 (attacking the historic rationale of teenage pregnancy); see High, *supra* note 56, at 822 (noting various harms of underage sex); see also Elizabeth Hollenberg, Note, *The Criminalization of Teenage Sex: Statutory Rape and the Politics of Teenage Motherhood*, 10 STAN. L. & POL’Y REV. 267, 269–71 (1999).

261. See *infra* notes 262–76 and accompanying text.

262. See Emily DiRoma, Comment, *Kids Say the Darndest Things: Minors and the Internet*, 2019 CARDOZO L. REV. DE NOVO 43, 47 (2018) (citing Amanda Lenhart,

with each other and adults online, sometimes about sex, and sometimes while touching themselves in a sexual manner.²⁶³

Unlike truth and awareness, which are often made to be vague online, it is hard to say if and how cyberspace affects competency. Competency falls in the realm of formal law and is not an objective state.²⁶⁴ If competency is an age-based trait, cyberspace cannot do anything in that respect; it makes no one older or younger.²⁶⁵ However, if competency is about personal abilities, perhaps cyberspace does affect it somehow.

One might argue that cyberspace has no such effects, and that minors are as vulnerable as before—or even more so—because of the gap between sophisticated and experienced adults versus innocent minors online. Innocence can surely be exploited online, specifically when it comes to minors and other incompetent victims.²⁶⁶

Alternatively, if innocence is what statutory rape aims to protect, we are losing the battle in certain respects.²⁶⁷ Before cyberspace,

Teens, Social Media & Technology Overview 2015, PEW RSCH. CTR. (Apr. 9, 2015), <https://www.pewresearch.org/internet/2015/04/09/teens-social-media-technology-2015/> [<https://perma.cc/3VVW-HKF6>] (stressing the major role of the internet in children and teenage lives nowadays).

263. See Muldavin, *supra* note 184, at 427, 437–40 (discussing how teen internet and mobile phone use has normalized teenage sexual exploration via sexting).

264. See High, *supra* note 56, at 794 (arguing the approach to competency in the realm of statutory rape law is problematic as an objective bright-line rule and not as a subjective spectrum).

265. See Chester & Bretherton, *supra* note 146, at 223–24.

266. DJ Mico, *Protecting the Digital Playgrounds: Narrowly Tailoring the Meaning of “Social Media” to Prohibit Sexual Predators from Using Social Media*, 51 U. PAC. L. REV. 123, 124–25 (2019); Marilyn M. McMahon & Elizabeth A. Kirley, *When Cute Becomes Criminal: Emoji, Threats and Online Grooming*, 21 MINN. J.L. SCI. & TECH. 37, 60–61 (2019); Stephen Beemsterboer, Student-Written Article, *COPPA Killed the Video Star: How the YouTube Settlement Shows that COPPA Does More Harm Than Good*, 25 ILL. BUS. L.J. 63, 73–74 (2020); Jaynee Mathis, *Updating the Law to Keep Pace with Newsfeeds and Online Victimization: The Need for Limited Access to Sex Offenders’ Online Identifiers*, 49 SW. L. REV. 169, 179–80 (2020); Justine Wagner, *Immersive Virtual Reality: Minnesota Legislature’s Opportunity to Protect Children from Sexual Exploitation by Enacting a Well-Defined Criminal Statute*, 46 MITCHELL HAMLIN L. REV. 407, 412–14 (2020) (highlighting the increased internet access of children and their vulnerability to sexual abuse online); see also Kelsey K. Chetosky, Comment, *Minnesota v. Muccio: The Constitutionality of Minnesota’s Sexual Grooming Law*, 114 NW. U. L. REV. ONLINE 1, 2–3 (2019).

267. Jordan Franklin, Comment, *Where Art Thou, Privacy?: Expanding Privacy Rights of Minors in Regard to Consensual Sex: Statutory Rape Laws and the Need for A “Romeo and Juliet” Exception in Illinois*, 46 J. MARSHALL L. REV. 309, 317 (2012) (arguing that the legislative intent behind statutory rape laws is to protect the innocence of children); see also Cohen, *supra* note 257, at 727–28.

children were less exposed to pornography because they could not access it so easily.²⁶⁸ For a while now, the reality has been materially different.²⁶⁹ Pornography is but a fraction of the problematic content available online.²⁷⁰ Technology and social practices have changed and sexual content is everywhere.²⁷¹

One might suggest that the amount of sexual content exposure online means that many adolescents are more curious and interested in some forms of sexual activity.²⁷² Even if it makes us uncomfortable, adolescents are sexual creatures and they engage in sexual acts both online²⁷³ and offline.²⁷⁴ Even if contributing to their decision to engage in sexual activity online is potentially harmful, one might claim that it is not as harmful as having physical intercourse. Perhaps the legal protection should be different, thinking that their capacity to consent to online communication is

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268. Yochai Benkler, *Net Regulation: Taking Stock and Looking Forward*, 71 U. COLO. L. REV. 1203, 1239–40 (2000) (stressing that children’s access to pornography changes dramatically online, making the compartmentalization of pornography difficult); *see also* Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 503–04 (1999).
269. Michael D. Birnhack & Jacob H. Rowbottom, *Shielding Children: The European Way*, 79 CHI.-KENT L. REV. 175, 181 (2004) (noting that children have free, instant, and anonymous access to extreme sexual content, and there are no significant limitations on children’s exposure to pornography); *see also* Daniel Mark Cohen, *Unhappy Anniversary: Thirty Years Since Miller v. California: The Legacy of the Supreme Court’s Misjudgment on Obscenity*, 15 ST. THOMAS L. REV. 545, 552 (2003).
270. *See* Amitai Etzioni, *On Protecting Children from Speech*, 79 CHI.-KENT L. REV. 3, 34–40 (2004) (maintaining that children’s exposure to violent content is more harmful than their exposure to pornography, yet this content is widespread and unbound by law); *see also* Scott A. Pyle, Note, *Is Violence Really Just Fun and Games?: A Proposal for a Violent Video Game Ordinance That Passes Constitutional Muster*, 37 VAL. U. L. REV. 429, 479–82 (2002) (discussing the possibility of limiting children’s exposure to violent video games).
271. *See* GREEN, *supra* note 28, at 194 (claiming that new technologies and new social practices have “lowered the threshold of what society regards as private while increasing the potential for resulting harm to victims”).
272. Muldavin, *supra* note 184, at 441–42 (discussing how modern media influences young people to engage in sexual exploration via sexting); *see also* High, *supra* note 56, at 787–88 (noting how the Internet exposes youth to sexual content more than ever before).
273. *See* Airelle Mills, *Juvenile Sexting: A Harsh Reality*, 43 T. MARSHALL L. REV. ONLINE 3, 5–6 (2019); *see also* Muldavin, *supra* note 184, at 437–40 (describing teen peer sexting as a normalized part of teenage lives).
274. *See* High, *supra* note 56, at 796–97, 837 (stressing that intercourse and other sexual acts are common among American youth, including those legally unable to consent).

somewhat wider than their capacity to consent to physical sex.²⁷⁵ On the other hand, considering their limited capacities and greater vulnerabilities to other ways of violating their sexual autonomy—including coercion and deception—we should provide them with greater legal protection.²⁷⁶

G. *Cyber Rape: Proper Labeling and Public Paradigm*

Rape is clearly a unique offense known to be extremely traumatic.²⁷⁷ It invokes severe legal and social stigmatization.²⁷⁸ Only a handful of offenses enflame such social loathing.²⁷⁹ Criminal stigma is a powerful condemnation tool.²⁸⁰ This tool loses parts of its vitality as the offense grows ever wider: the more the offense expands, the vaguer its social message will become.²⁸¹ Because the legal label of “rapist” is significant, it is important to use it carefully and coherently.²⁸²

275. A minor’s increased ability to consent in online communication is based on the assumption that the other party is not fraudulent (a matter related to rape by fraud and not to statutory rape). See Milda Macenaite & Eleni Kosta, *Consent for Processing Children’s Personal Data in the EU: Following in US Footsteps?*, 26 INFO. & COMM’NS TECH. L. 146, 154–55 (2017).

276. See Muldavin, *supra* note 184, at 443–52 (analyzing how sexual coercions involving sexting harms teenagers).

277. Baker, *supra* note 26, at 253–54; Mary Graw Leary, *Affirmatively Replacing Rape Culture with Consent Culture*, 49 TEX. TECH L. REV. 1, 21–22 (2016) (claiming that rape inflicts one of the most severe types of traumas, with long-term adverse outcomes); Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 282–83 (2016) (arguing that the separation between rape and sex is trauma); Yung, *supra* note 192, at 20–21 (distinguishing rape from ordinary batteries, stating the former includes a violation of an individual’s psyche with high risks of physiological and psychological effects, like post-traumatic stress disorder, depression, and suicide); see also Allen, *supra* note 26, at 1075.

278. See John Gardner & Stephen Shute, *The Wrongness of Rape*, in OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW 1, 4–6, 8–9 (John Gardner ed., 1st ed. 2008).

279. See Allen, *supra* note 26, at 1037.

280. See *id.* at 1053–54 (illustrating the role of stigma; defining stigma as the marking of a person, identifying them as criminal, deviant, and otherwise deserving of ostracism and condemnation).

281. See Green, *supra* note 46, at 219–20.

282. *Id.* (arguing “autonomy is a highly variegated concept,” and that some of its facets are more important than others); TEMKIN, *supra* note 42, at 67 (discussing the proposition of introducing a severity ladder to rape law); see also Glanville Williams, *Rape is Rape*, 142 NEW L.J. 11, 13 (1992) (stressing the importance of distinguishing between different types of rape).

In the context of criminal law, rape is a legal term established by a legislature and a normative component entailing two possible messages.²⁸³ The name often tells a social story; however, the unification of several scenarios under one title or term as opposed to separate offenses and designations sends another message.²⁸⁴ The notion of proper labeling suggests that an offense should accurately describe the forbidden conduct, to precisely convey the wrongness and harmfulness it entails, and to reflect the differing levels of severity for different actions.²⁸⁵ The law must fairly represent the nature and harshness of the violation.²⁸⁶ This is the principle of fair labeling.²⁸⁷

The legal label of a crime can be very valuable. While reviewing someone's criminal record, the legal label signals to the public and authorities the message of who a person is.²⁸⁸ It has an expressive meaning²⁸⁹ and must be as accurate and sharp as possible.²⁹⁰ Names for offenses send social messages and should be as clear as possible, even if other forces will modify them later.²⁹¹ An accurate label is beneficial to public perception.²⁹² The public cognitively relates labels to what people know and think of certain words; the public's perception is important for social condemnation, which is essential to substantive criminal law.²⁹³

283. See TEMKIN, *supra* note 42, at 67.

284. See Stuart P. Green & Matthew B. Kugler, *Community Perceptions of Theft Seriousness: A Challenge to Model Penal Code and English Theft Act Consolidation*, 7 J. EMPIRICAL LEGAL STUD. 511, 511 (2010).

285. See C.M.V. Clarkson, *Theft and Fair Labeling*, 56 MOD. L. REV. 554, 554–55 (1993).

286. See Green & Kugler, *supra* note 284, at 515–16.

287. See STUART P. GREEN, THIRTEEN WAYS TO STEAL A BICYCLE: THEFT LAW IN THE INFORMATION AGE 52–54 (2012) (explaining the principle of fair labeling).

288. See Hong, *supra* note 28, at 269.

289. Erik Luna, *Principled Enforcement of Penal Codes*, 4 BUFF. CRIM. L. REV. 515, 539, 546 (2000); Hong, *supra* note 28, at 292 (discussing expressive powers of law); see also Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 391, 397–400 (1997) (portraying the expressive power of law as equal to its coercive power).

290. See Chiesa, *supra* note 46, at 419 (noting that “the law often needs to adopt bright line rules” to clarify “vague moral standards”).

291. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 520–23 (2001) (stressing that the expressive power of legislators is impeded by the police, the prosecution, and the courts).

292. See GREEN, *supra* note 28, at 72 (stressing laws should recognize the degrees of blameworthiness viewed between two or more types of conduct in legal cases).

293. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404–05 (1958) (reviewing the role of condemnation in criminal law).

Whenever it is published that a person has been convicted of a certain crime without any specific details, we can assume that the public's perception will cognitively relate it to the social paradigm of that crime.²⁹⁴ So, if we label offenses regardless of what the public knows and perceives, we might lose the communicative power of the offense's meaning and the related benefits in terms of labeling. An accurate label is not only fair to perpetrators and victims; it also sharply clarifies the harms caused by the offense, the dangerousness of the offenders, and perhaps also possible strategies and tactics for the public's protection in accordance with those dangers.²⁹⁵

This general approach also applies to rape.²⁹⁶ Proper labeling means not only fairness to offenders, but also benefits to the public, marking the severity and the danger of the offense.²⁹⁷ When looking at the offline world, the dangers presented by coercive and fraudulent sex, as well those presented by sexual acts committed with an incompetent individual, are quite different.²⁹⁸

The danger of coercive rape is ignoring another's free will with the preparedness to violate it,²⁹⁹ thus the accurate legal warning is to stay away from that person, and to avoid physical proximity and contact. The danger of fraudulent rape is different, using social manipulation and abuse of trust, and therefore the accurate legal warning should tell people to be extremely careful when accepting someone's claims as truth and in relying on their assertions.³⁰⁰ The danger of statutory rape is different as well—i.e., sexual attraction to minors³⁰¹—and the legal warning would be to keep our children away.

What happens to the above dangers in cyberspace? Physical consequences like pregnancy and transmitted diseases are

294. See George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 473 (1976) (discussing the image of thieves and how that image influenced criminal law).

295. See Clarkson, *supra* note 285, at 554–55.

296. See Green, *supra* note 46, at 220 (emphasizing the importance of fair labeling in rape law).

297. See GREEN, *supra* note 28, at 72.

298. See *infra* text accompanying notes 299–301.

299. But see Conaghan, *supra* note 1, at 175 (pointing to the understanding of the essential harm of rape as the erasure of women's subjectivity).

300. See Falk, *supra* note 179, at 50–51 (stressing that sex by fraud often involves a special kind of sexual predator who uses the same method against multiple victims, sometimes strategically, thus separating them from forceful rapists).

301. Attraction between minors is different than attraction between minors and adults, and attraction by adults to children is very different than attraction by adults to teenagers nearing adulthood. See PHILIP JENKINS, BEYOND TOLERANCE: CHILD PORNOGRAPHY ON THE INTERNET 27 (2001) (distinguishing adult attraction to adolescents from adult attraction to children).

theoretically impossible.³⁰² Outside the technological scenarios, rape is when perpetrators and victims are present at the same place at the same time. Therefore, when we hear someone is a rapist, we might keep our distance. However, distance provides no shelter on cyberspace. On the contrary, distance is the perpetrator's specialty.³⁰³ Distance is a disinhibiting, effective, and empathy-free criminal tool.³⁰⁴ This is a different and unique type of sexual danger, derived from deception, manipulation, or even coercion.³⁰⁵

Indeed, pedophiles who approach children online often use fake personas and misrepresent themselves, through deception, manipulation, and sometimes blackmail.³⁰⁶ The verbal rape thesis suggests a normative difference from that of the physical forms of rape.³⁰⁷ Distant manipulation always requires a self-inflicted act of penetration.³⁰⁸

Furthermore, geographical distance between perpetrators and victims means the absence of possible immediate physical escalation, a potential danger in fraudulent rape and sometimes in statutory rape when victims change their mind and cease cooperating.³⁰⁹ No wonder the verbal rape phenomenon is new even for pedophiles.³¹⁰ The possibilities of adults to reach children, lie to them about their age, meet them, win their trust and heart, and finally bring them to agree to sexual activity, are much more limited offline.³¹¹ Those who succeed in manipulation in the real world are not likely to forego full

302. See Castronova, *supra* note 125, at 1092–93 (stressing that although technology offers many sexual options, online fertilization is not amongst them).

303. See Mathis, *supra* note 266, at 186 (noting that sexual danger to children has moved from the parks to cyberspace).

304. See Suler, *supra* note 151, at 322 (noting that an online perpetrator is less inhibited because of the anonymity in contacting someone at a distance).

305. See *infra* text accompanying notes 306–14.

306. See *Child Sexual Exploitation*, FBI (May 10, 2016), <https://www.fbi.gov/news/stories/threat-from-pedophiles-online-is-vast-and-extensive> [<https://perma.cc/B6RA-9BRN>] (“The pedophiles tricked their young victims by creating fake profiles on social networking sites, where they posed as teenagers to lure children to their websites.”).

307. See *infra* notes 309–14 and accompanying text.

308. See *supra* text accompanying notes 160–74.

309. See *supra* notes 238–56 and accompanying text.

310. See Mathis, *supra* note 266, at 186 (referring to the internet as a “new ‘modern public square’” that presents novel dangers to children).

311. See *supra* text accompanying notes 238–52.

intercourse.³¹² The dangers of verbal rape entail deception, manipulation, and coercion, all of which are far from being insignificant and marginal in nature.³¹³ Nevertheless, they are usually dealt with under different legal frameworks.³¹⁴ These frameworks may be general, outdated offenses. Alternatively, they may be unique and new. A general framework might be for non-sexual offenses, like fraud and blackmail, or some sort of a sexual offense, if the language employed is broad and abstract enough.

For example, the rape offense in New Jersey was replaced with a general offense of sexual assault in 1978, and the term of penetration was widened to include intercourse, anal sex, oral sex, as well as inserting fingers or objects into another's vagina or rectum, either by the perpetrator or under the perpetrator's instruction.³¹⁵ This law was applied to a verbal rape scenario, regarding someone posing as a physician who brought a child to engage in self-penetration.³¹⁶

In California, the general provisions in the penal code include a scenario in which the perpetrator inserts something to the victim's genitalia against their will.³¹⁷ When the victim is under fourteen, there is no need to show force or threat.³¹⁸ One who knowingly contacts a minor in order to perform such action is also criminally liable.³¹⁹ These provisions were used to convict a sixty-year-old perpetrator who deceived a sixteen-year-old girl into online communication and later into self-touch.³²⁰ There is also a federal law which covers an interstate persuasion of minors to engage in

312. See Roth, *supra* note 259, at 1676 (explaining that adolescents are more susceptible to manipulation and ultimately believing it was their own decision to participate in sexual conduct).

313. Sparrow & Karas, *supra* note 167, at 202–03 (stressing the severity of online sexual deception); see also Manta, *supra* note 250, at 247 (emphasizing the personal and collective harm of sexual fraud related to online dating).

314. See Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 60–61 (2008) (discussing the lack of a specific legal framework dealing with virtual crimes).

315. See N.J. STAT. ANN. § 2C:14-1(c) (West 2020). The word “rape” does not appear in New Jersey’s criminal code. See *id.*; see also WIS. STAT. ANN. § 940.225(5)(b)(1)(a) (West 2019) (Wisconsin’s sexual assault statute is similar to New Jersey’s).

316. See *New Jersey v. Maxwell*, 825 A.2d 1224, 1226 (N.J. Super. Ct. Law Div. 2001).

317. See CAL. PENAL CODE § 261 (West 2020).

318. See *id.* § 289.

319. See *id.* § 288.3(a).

320. See *People v. Shapiro*, 175 Cal. Rptr. 3d 54, 56–57 (2014) (denying constitutional challenge to California’s statute prohibiting contacting a minor for the purpose of committing various crimes, including sexual penetration of a minor, and approving sentence of 240 days’ imprisonment).

prostitution or sexual activity.³²¹ It is not completely clear whether this law can be applied to online sexual activity.³²²

Hitherto, no state has formally defined the scenarios thoroughly examined here as “rape.”³²³ There are some specific prohibitions that address such scenarios, at least regarding minors.³²⁴ Louisiana has criminalized “[i]ndecent behavior with juveniles,” including “[c]omputer-aided solicitation of a minor.”³²⁵ Idaho has created a specific offense of “[e]nticing a child through use of the Internet or other communication device.”³²⁶ Canada has a specific provision regarding minors, titled “Invitation to sexual touching,” which may apply to the above described scenarios.³²⁷ When the acts involve dissemination of photographs, they are subject to prohibitions under child pornography laws.³²⁸ Five American states passed laws to explicitly prohibit sextortion.³²⁹

Such special offenses present new terminology, which tells a new story, helping us to differentiate them from the old traditional and general offenses.³³⁰ The labels of criminal offenses convey legal

321. See 18 U.S.C. § 2422(b) (2018).

322. Compare *United States v. Fugit*, 703 F.3d 248, 254 (4th Cir. 2012), with *United States v. Taylor*, 640 F.3d 255, 260 (7th Cir. 2011).

323. See Susan W. Brenner, *The Council of Europe’s Convention on Cybercrime*, in CYBERCRIME: DIGITAL COPS IN A NETWORKED ENVIRONMENT 207, 208 (Jack M. Balkin et al., eds., 2006) (arguing that although many types of acts are possible online, rape is not); see Brenner, *supra* note 314, at 77; see also Lemley and Volokh, *supra* note 125, at 1083 (applying the normative meaning of rape to virtual groping performed by avatars against other avatars, causing emotional distress to users of violated avatars).

324. See IDAHO CODE ANN. § 18-1590A (West 2020). See generally LA. STAT. ANN. §§ 14:81, 14:81.3 (2020).

325. See LA. STAT. ANN. §§ 14:81, 14:81.3 (2020); see also *Louisiana v. Whitmore*, 58 So. 3d 583, 585–87, 590–93, 595–97 (La. App. 2 Cir. 3/2/11) (denying constitutional challenge and affirming defendant’s four-year prison sentence for conversing online with an undercover police agent and attempting to induce a minor to self-touch).

326. IDAHO CODE ANN. § 18-1590A (West 2020); see also *Idaho v. Glass*, 190 P.3d 896, 899–900, 905 (Idaho 2008) (approving a fifteen-year sentence for defendant who conversed online with a police agent posing as a child).

327. See Criminal Code, R.S.C. 1985, c C-46 § 152 (Can.).

328. See Mills, *supra* note 273, at 9 (stressing the broadness of child pornography laws, which often include peer sexting between teenagers).

329. See Robbins, *supra* note 220, at 776, 781–84 (reviewing new legislation in Alabama, Arkansas, California, and Utah).

330. Clay Calvert et al., *Playing Legislative Catch-Up in 2010 with a Growing, High-Tech Phenomenon: Evolving Statutory Approaches for Addressing Teen Sexting*, 11 PITT. J. TECH. L. & POL’Y 1, 5–6 (2010) (discussing the new phenomenon of sexting); see

messages to society about the sexual abuse of minors, online or in general.³³¹ Simultaneously, the labels employed also send the message that although criminal law will not tolerate such conduct, the law still sees material differences between certain types of actions and forms of rape.³³² This message might be supplemented by the law's message that only minors can be the victims of such offenses, excluding adults as potential victims. Adults can be the victims of rape, sexually coerced, and deceived online, but some states have not created special offenses to protect them in this new offensive world.³³³

CONCLUSION

A very familiar saying is that the law always lags behind technology.³³⁴ But it is not only technology that changes, as the law constantly evolves.³³⁵ When society and law enforcement run into new offensive scenarios, we get the chance to rethink our existing criminal offenses and societal values. This is a great opportunity to reflect on important developments in technology and the law.

What is rape? Numerous academic research projects have been conducted on rape, perhaps more so than on any other offense; yet sometimes the more we study rape, the less we grasp its normative essence.³³⁶ The cyber rape thesis compels us to deeply reflect once again upon rape as a criminal offense, inspect its normative boundaries, and examine if it can take on a digital form. Can rape be done from afar, through words? One can be deceived, manipulated, and coerced into self-penetration from a distance.³³⁷ Should such illicit communication be considered rape? The answer illuminates what rape was, what rape is, and what rape might become in the future.

also Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 801–02 (1988) (describing how feminism manifested the acknowledgement of sexual harassment as a unique legal harm).

331. See *supra* notes 323–30 and accompanying text.

332. See *supra* text accompanying notes 323–30.

333. See *supra* notes 6–9, 324–31 and accompanying text.

334. Reidenberg, *supra* note 17, at 586; see Michael L. Rustad, *Private Enforcement of Cybercrime on the Electronic Frontier*, 11 S. CAL. INTERDISC. L.J. 63, 87, 97 (2001) (analyzing the problems that outdated laws cause with technological crimes).

335. See Robin Feldman, *Historic Perspectives on Law & Science*, STAN. TECH. L. REV. 1, 15–17 (2009) (observing that the law is constantly changing).

336. See, e.g., Conaghan, *supra* note 1, at 177 (concluding that “it is difficult to identify or defend an ‘essence’ of rape”).

337. See *supra* Sections II.B, II.C.

The new technological world encourages us to embark upon a new and unfamiliar journey.³³⁸ That journey, in turn, obligates us to sincerely ask ourselves how well we understand the rationales of criminal offenses, the boundaries between them, and the frontiers of the criminal realm, realizing how difficult those questions are. Once we realize the depths of these challenges, we can start working on the solutions.

338. *See supra* text accompanying notes 334–37.

