Rape Goes Cyber: Online Violations of Sexual Autonomy

Asaf Harduf
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. Over time, other forceful kinds of penetrations have been added: oral, anal, and later, the forceful insertion of inanimate objects. 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. The normative debate about each form is ongoing and, in a manner of speaking, rape has become a limitless notion. Where will the rape offense go next? Cyberspace, apparently.

The Israeli Supreme Court has recently affirmed convictions of rape by distant communication. The perpetrators conversed with children, teenagers, and adult women online, using fraud and blackmail to manipulate them into self-penetration. This groundbreaking judicial development is the inspiration behind the normative analysis offered in this Article, revolving around Western notions of rape. 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).


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.  

This Article systematically scrutinizes the normative cyber rape thesis on Anglo-American doctrines of rape. It analytically divides the normative conception of rape into three facets and examines each separately: the physics of the offensive scenario, the settings of the physical scenario and the manner in which sexual autonomy is violated, and finally, the matter of proper criminal labeling. 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. Nevertheless, a systematic analysis reveals normative gaps between offline and online harmfulness and wrongfulness, as well as normative gaps between different doctrines of rape. All in all, the framework of rape is unsuitable to handle these cyber-attacks. 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.

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

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.
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. 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.

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. 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.

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. The criminalization of rape is also far from new. Old regimes criminalized rape to protect the honor of women’s’ fathers, husbands, and brothers; thus, it

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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.
27. Hanus, supra note 26, at 1143; Allen, supra note 26, at 1034.
follows the rape offense overlooked marital coercion.\textsuperscript{29} Unfortunately, in modern times, the rape phenomenon is still far from being obsolete or even uncommon.\textsuperscript{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.\textsuperscript{31} The general paradigm of rape, revolving around coercive sex, has clearly expanded throughout the years.\textsuperscript{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.\textsuperscript{33} Enforcement focused on African-American males while knowingly overlooking white male perpetrators.\textsuperscript{34} The law required victims to fight to their death.\textsuperscript{35} Sexist norms were woven into the rape law, which in turn enforced those norms.\textsuperscript{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.\textsuperscript{37} The physical element of rape as a legal construct has expanded.\textsuperscript{38} The FBI formerly defined rape as “the carnal knowledge of a female, forcibly


\textsuperscript{30} See Lutz-Priefert, supra note 26, at 86–87 (discussing rape statistics).

\textsuperscript{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).

\textsuperscript{32} Hanus, supra note 26, at 1143–44.

\textsuperscript{33} Allen, supra note 26, at 1052–53; Randall & Venkatesh, supra note 29, at 158.

\textsuperscript{34} See Yung, supra note 31, at 229–30.

\textsuperscript{35} See Susan Estrich, Rape, 95 YALE L.J. 1087, 1092 (1986).

\textsuperscript{36} See id. at 1093, 1095.

\textsuperscript{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.

and against her will[,]” meaning sexual intercourse.\textsuperscript{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.”\textsuperscript{40}

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

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

\begin{itemize}
\item \textsuperscript{39.} \textit{Id.}
\item \textsuperscript{40.} \textit{Id.}
\item \textsuperscript{41.} \textit{See id.}
\item \textsuperscript{42.} \textit{See} JENNIFER TEMKIN, \textit{RAPE AND THE LEGAL PROCESS} 55–56, 67 (2nd ed. 2002) (writing that until 1994 rape was the most prominent gender-based offense). \textit{But see} Penal Law, 5737–1977, § 345 (Isr.) (defining rape victims as only women under Israeli law).
\item \textsuperscript{43.} TEMKIN, \textit{supra} note 42, at 68–69.
\item \textsuperscript{45.} Hanus, \textit{supra} note 26, at 1146–48; Hong, \textit{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); \textit{see} Schulhofer, \textit{supra} note 44, at 342–43, 347 (suggesting a change in the meaning of force to include all types of coercion).
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is about the ability to control, choose, and decide one’s lifestyle.\textsuperscript{47} It is about self-governance and the capacity to reflect and revise one’s identity and values.\textsuperscript{48} All of the above may be considered necessary to personhood.\textsuperscript{49} Personal autonomy is extremely valued in modern times.\textsuperscript{50}

Personal autonomy can be broken down into specific layers, one of which regards sex.\textsuperscript{51} Sexual autonomy can be perceived broadly to include the right to choose sexual activities, sexual partners, places, timing, and additional circumstances.\textsuperscript{52} Various actions may implicate positive and negative dimensions of sexual autonomy.\textsuperscript{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.\textsuperscript{54} One of them is quite common in American jurisdictions.\textsuperscript{55} Having sex with minors is forbidden even with their consent, sometimes between two consenting minors, which is known

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\textsuperscript{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”).
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\textsuperscript{49} See McJunkin, supra note 28, at 8 (connecting autonomy with personhood, which is required for flourishing).
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\textsuperscript{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).
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\textsuperscript{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).
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\textsuperscript{52} See id. at 208 (illustrating sexual autonomy).
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\textsuperscript{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).
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\textsuperscript{54} See infra text accompanying notes 55–62.
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\textsuperscript{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.”).
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as “statutory rape.” 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

57. See Harduf, supra note 56, at 901.
58. See Rubenfeld, supra note 46, at 1395–1402 (discussing laws regarding rape by fraud).
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).
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 under-age and fraudulent sex—have brought an astonishing judicial expansion to the concept of rape in Israel: “rape by communication.”

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. The Penal Code in Israel was similar to codes the British used for other colonies and territories. At the birth of its independent legal framework, Israel adopted most mandatory laws enacted by the British. While the Israeli legal system is based in common law, it also includes aspects of civil law. Throughout its first decades, the Israeli judicial system was significantly influenced by British law and looked at British precedents to resolve legal debates. In time, the Israeli courts gained confidence and no longer needed to rely on foreign rulings to resolve cases. However, many of the laws set by the British sovereignty are still in effect even today, as are a few of the Ottoman regime laws which preceded the British rule.

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;

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64. See infra text accompanying notes 73–112.
67. See id.
68. See id.
69. See id.
70. See id.
(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. Intercourse is defined as “introduc[ing] any part of the body or any object into the woman’s sex organ.” Following the gender-specific history of the offense, rape is still only defined as an offense against women under Israeli law.

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.” 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. 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. Eventually the charges were dropped, and the defendant pled guilty to aggravated indecent acts.

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. 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.


nineteen-year-old female soldier, pushing teenage girls to penetrate themselves, sometimes by blackmail. 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. 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.

The last time this paradigm received any critical judicial attention was in 2015. 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. This case also ended in a plea bargain, replacing the rape offense with aggravated indecent acts.

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. One of these defendants, charged with causing rape, sodomy, and indecent acts against thirty-three minors, was sentenced to fourteen years of imprisonment. 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. It should be noted that the Supreme Court of Israel did not address the new rape paradigm at all in this specific case.

In 2016, two defendants pled guilty at the district court and were therefore convicted in multiple cases of “facilitating rape” against

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81. See id. The defendant made bail. Id.
82. See id. The Supreme Court of Israel denied the defendant’s appeal. See id.
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.
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

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.
99. Id.
100. Id.
101. Id.
102. Id.
103. Id.
online ones.\textsuperscript{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.\textsuperscript{105}

So, although it was never critically affirmed in a formal verdict by any court in Israel,\textsuperscript{106} verbal rape seems to be a legal reality in Israel.\textsuperscript{107} It is doubtful that future verdicts will nullify the thesis, since a few people have already been convicted and sentenced based on it.\textsuperscript{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.\textsuperscript{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 themself 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.\textsuperscript{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.\textsuperscript{111} Such an intricate question requires analysis of rape law, its purpose and boundaries, as well as the implied interaction between law and technology.\textsuperscript{112}

\textsuperscript{104. Id.}
\textsuperscript{105. See id.}
\textsuperscript{106. See id.}
\textsuperscript{107. See supra notes 76–105 and accompanying text.}
\textsuperscript{108. See supra notes 87–105 and accompanying text.}
\textsuperscript{109. See supra notes 76–105 and accompanying text.}
\textsuperscript{110. See supra notes 76–105 and accompanying text.}
\textsuperscript{111. See discussion infra Section II.C.}
\textsuperscript{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:

\(^{113}\) 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.


\(^{116}\) 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

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).


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).


A second related innovation is smart phones. Communication devices were historically stationary, usable only in designated places. The combination of smart phones and cyberspace has made it possible to use one’s communication device almost anywhere one goes. Smart phones are much more than just “phones.” 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. Thirty years ago, video cameras were very expensive, large, and heavy, ensuring that videos were neither spontaneous nor very secretive. Nowadays, filming a video is just another smartphone application. 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. 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. Such photographs may be related to sex, as one can take pictures of their naked body and send them to current or potential partners. 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. Some of them are

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132. Id.
133. Strong, supra note 130, at 1283.
134. E.g., Fairfield, supra note 131, at 61–62.
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).
criminal as cyberspace paves numerous criminal roads, some of them are virtual versions of old crimes, and some are innovative.

A third innovation of cyberspace is the rich possibility of conversing with strangers. Cyberspace is often a world of fantasy and lies. 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. No one sees the user for who they are, which makes them uninhibited, for better or worse. One can find the courage to speak to someone attractive, speak the truth, advocate for values, and become the best version of themselves. But they can also turn to the darkest corners of the net and become the worst version of themselves.

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


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.\footnote{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.\footnote{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.\footnote{152} Distance weakens empathy and accountability, and requires less audaciousness.\footnote{153}

Any person may use technology, mainly cyberspace or telecommunication, to bring another to sexually touch oneself.\footnote{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?”\footnote{155}

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

\footnote{150} See Shashank V. Joshi et al., \textit{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).

\footnote{151} See Adam N. Joinson, \textit{Understanding Psychology of Internet Behavior: Virtual Worlds, Real Lives} 25 (2003); see also John Suler, \textit{The Online Disinhibition Effect}, 7 CYBERPSYCH. & BEHAV. 321, 322 (2004) (acknowledging the disinhibition effect online due to user’s feeling of anonymity).

\footnote{152} See Katelyn Y.A. McKenna, \textit{Through the Internet Looking Glass: Expressing and Validating the True Self}, in \textit{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).

\footnote{153} See Katal, supra note 142, at 1071.

\footnote{154} E.g., Martie P. Thompson & Deidra J. Morrison, \textit{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).

\footnote{155} See supra notes 10–13 and accompanying text.

\footnote{156} See infra Section II.B.

\footnote{157} See infra Section II.C.

\footnote{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. Although that changed a while ago in many countries, in order to include more scenarios, rape still requires some sort of sexual penetration of only one of the three penetrable parts. Accordingly, non-penetrative sexual assaults are, per definition, not rape: no penetration, even a partial one, means no rape. 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. Nevertheless, bringing someone to self-penetration is clearly possible, even from the other side of the globe. 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. Bringing

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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.
people to masturbate in sexual ways without penetrations is left out of any rape doctrine: no penetration, no rape.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{171} The offender is less in control of the situation, which in turn means that less coercive pressure is experienced by the victim.\textsuperscript{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.\textsuperscript{173} Exploiting the victim and causing them to self-
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).


Further, the experience of the offender is inherently different. The offender’s senses do not experience the online scenario as they do offline. 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. If the act is filmed, the offender can review the recorded crime and revisit it later, disseminate or use it to further blackmail, or employ other forms of criminality that typical coercive rapes may not include.

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. 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. The normative foundations of rape are sexual penetrations combined with the violation of personal autonomy.

181. See infra notes 182–85 and accompanying text.
182. See infra note 183 and accompanying text.
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).
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, thus denying paternalism as the subjugation of self-determination to the notion of what is best for that person. Personal autonomy wields the power of consent. It plays important roles in numerous fields of law. It relates to human rights, making moral changes and turning illegal actions into legal ones. Consent can sometimes modify an array of rights and suspend duties to act or to avoid acting in certain manners. Substantive criminal law treats people as rational and turns compliance into a wall that separates accepted actions and criminalized actions. 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. Consent excludes various offenses like rape, kidnapping, theft, and burglary.

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 consenter’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.”).
194. See Westen, supra note 192, at 334.
Although the role of consent is not always coherent, at least in some cases, its importance is clear. It defines the line between legal and illegal, between social acceptance and criminalization. Consent has a crucial function in the rape offense, signaling the moral line between criminal and socially accepted sexual contact. Nevertheless, although rape scholarship revolves around consent, it remains a vague concept—in spite of being the most discussed term regarding this offense—and there is no unified understanding regarding this critical issue.

Consent is a vague concept because it is not a narrow notion, but a very expansive one. One might wonder if it is a mental state or an expression, 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. Indeed, it has both a generic meaning and a very specific meaning simultaneously. So it is not always clear what we mean when we say there is no consent.

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.
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).
207. See Westen, supra note 192, at 342–44.
Typically, we mean one of four options. 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. Second, we might mean that consent is not freely given, but derived from direct coercion. 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. Fourth and finally, the consent is incompetently given because some people are considered legally unfit to consent to some acts.

Section I.A described three types of offensive sex: coercive sex, fraudulent sex, and sex with an incompetent victim. Each type of violation involves a different level of consent, protecting a different layer of sexual autonomy by assessing freedom, information, and competency. 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. 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 employment—can be effective without the use of force or weapons.

Sometimes, for example, when the victim feels compelled to do anything asked by the perpetrator, threats are not needed. 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. 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. Social pressures can push sexual actions online, along with blackmail or “sextortion.” 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. Fear and terror can rise from great distances. Obviously, blackmail scenarios severely violate freedom of consent. 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).
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).
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).
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. While our freedom of choice is vulnerable online, autonomy is not annihilated completely in cyberspace and in other forms of distant communication. 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. 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. In the offline world, victims who choose to resist potentially put themselves in further danger. 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. This is not the case for victims who are physically distant from the perpetrators.

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

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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 themself 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 supra notes 220–31 and accompanying text.
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 Rubenfeld, supra note 46, at 1397–1402.
236. Sommers, supra note 191, at 2239–40 (explaining that deception thwarts autonomy); see also Rubenfeld, 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. Isaaacson, 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).
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
information highway promises no informed consent, as lies and deception are abundant on every road.\textsuperscript{249} Some of those deceitful roads lead to physical encounters, including romantic and sexual ones.\textsuperscript{250} Other roads lead to sexual communication, some of which lead to self-penetrations.\textsuperscript{251} Technology offers greater opportunities for deception, and provides a vaster, more diverse pool of potential victims.\textsuperscript{252}

While impersonation and deception seem easier and richer online, in certain contexts they are harder and perhaps also less appealing for the offenders.\textsuperscript{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.\textsuperscript{254} Impersonating a physician online is not difficult, but gaining enough trust to falsely move another into self-penetration is more complicated.\textsuperscript{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.\textsuperscript{256}
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. The modern statutory rape offense is gender-neutral, and it now seeks to preserve morality or protect minors from themselves, perceiving them as easily susceptible to coercion and manipulation. It also tries to prevent physical consequences like pregnancy and sexually transmitted diseases. 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. In fact, minors abound in cyberspace, probably at higher rates than adults. Minors converse


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,
children were less exposed to pornography because they could not access it so easily.\textsuperscript{268} For a while now, the reality has been materially different.\textsuperscript{269} Pornography is but a fraction of the problematic content available online.\textsuperscript{270} Technology and social practices have changed and sexual content is everywhere.\textsuperscript{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.\textsuperscript{272} Even if it makes us uncomfortable, adolescents are sexual creatures and they engage in sexual acts both online\textsuperscript{273} and offline.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{269} Michael D. Birnhack & Jacob H. Rowbottom, \textit{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); \textit{see also} Daniel Mark Cohen, \textit{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).
  \item \textsuperscript{271} \textit{See} GREEN, \textit{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”).
  \item \textsuperscript{272} Muldavin, \textit{supra} note 184, at 441–42 (discussing how modern media influences young people to engage in sexual exploration via sexting); \textit{see also} High, \textit{supra} note 56, at 787–88 (noting how the Internet exposes youth to sexual content more than ever before).
  \item \textsuperscript{273} \textit{See} Airelle Mills, \textit{Juvenile Sexting: A Harsh Reality}, 43 T. MARSHALL L. REV. ONLINE 3, 5–6 (2019); \textit{see also} Muldavin, \textit{supra} note 184, at 437–40 (describing teen peer sexting as a normalized part of teenage lives).
  \item \textsuperscript{274} \textit{See} High, \textit{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).
\end{itemize}
somewhat wider than their capacity to consent to physical sex. 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.

G. Cyber Rape: Proper Labeling and Public Paradigm

Rape is clearly a unique offense known to be extremely traumatic. It invokes severe legal and social stigmatization. Only a handful of offenses enflame such social loathing. Criminal stigma is a powerful condemnation tool. 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. Because the legal label of “rapist” is significant, it is important to use it carefully and coherently.

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.


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 meaning\(^{289}\) 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.


\(^{286}\) See Green & Kugler, supra note 284, at 515–16.


\(^{288}\) 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.\textsuperscript{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.\textsuperscript{295}

This general approach also applies to rape.\textsuperscript{296} Proper labeling means not only fairness to offenders, but also benefits to the public, marking the severity and the danger of the offense.\textsuperscript{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.\textsuperscript{298}

The danger of coercive rape is ignoring another’s free will with the preparedness to violate it,\textsuperscript{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.\textsuperscript{300} The danger of statutory rape is different as well—i.e., sexual attraction to minors— 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

\textsuperscript{294} See George P. Fletcher, \textit{The Metamorphosis of Larceny}, 89 Harv. L. Rev. 469, 473 (1976) (discussing the image of thieves and how that image influenced criminal law).

\textsuperscript{295} See Clarkson, supra note 285, at 554–55.

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

\textsuperscript{297} See Green, supra note 28, at 72.

\textsuperscript{298} See infra text accompanying notes 299–301.

\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{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, \textit{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.
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.
The dangers of verbal rape entail deception, manipulation, and coercion, all of which are far from being insignificant and marginal in nature. Nevertheless, they are usually dealt with under different legal frameworks. 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. This law was applied to a verbal rape scenario, regarding someone posing as a physician who brought a child to engage in self-penetration.

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. When the victim is under fourteen, there is no need to show force or threat. One who knowingly contacts a minor in order to perform such action is also criminally liable. 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. 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).
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).
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. It is not completely clear whether this law can be applied to online sexual activity.

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

Five American states passed laws to explicitly prohibit sextortion.

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

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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).
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).
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
(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.