
VIRTUAL CRIMINAL LAW DUALISM

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Since the start of the new millennium, technological and societal changes have initiated a transition from physical to virtual spaces. This far-reaching phenomenon has extended to the law and legal institutions, including the criminal law domain. This essay coins the term “virtual criminal law dualism” to describe the dynamic relationship between the virtual and physical spaces in the criminal law sphere. We contend that the transition to virtual spaces has manifested in two distinct aspects. The first relates to formal doctrinal, procedural, and institutional changes that the mainstream criminal law and procedure have undergone due to the emergence of virtual spaces and technological developments (“changes from within”). The second relates to the transformation of criminal law and procedure that occurs under the influence of activities taking place in virtual platforms (“changes from the outside”). By exploring the simultaneous developments stemming from the transition to virtual spaces, we analyze the meaning of these developments, discuss their implications, and offer future directions regarding their potential expansion. We argue that the interplay between virtual and physical spaces is normatively neither encouraged nor discouraged in and of itself. Its value relies on the overarching objectives of the criminal legal system and its capacity to further those objectives.

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I. INTRODUCTION

Since the new millennium, technological and societal changes have initiated a transition from physical to virtual spaces. This intriguing and far-reaching phenomenon has extended to law and legal institutions, including criminal law. This essay explores the dynamic relationship between the virtual and physical spaces in the criminal law sphere¹ and aspires to identify its two key components, what we define as “virtual criminal law dualism.” We contend that the transition to virtual spaces has manifested in two key aspects.

First, mainstream criminal law and procedure have undergone dramatic changes due to the emergence of virtual spaces and technological developments, what we later define as changes “from within.” In substantive criminal law, new offenses have been enacted to meet new circumstances and conditions for committing crimes and creating harm in the virtual sphere.² Traditional definitions of *Actus Reus* and *Mens Rea* for existing offenses have been creatively re-interpreted to criminalize conduct in virtual spheres that did not fall within the traditional doctrines initially created in the pre-virtual era.³ In the procedural context, official criminal processes have gradually transitioned to virtual settings. In the last few years, and under COVID-19 protocols, this phenomenon has increased exponentially. Today, virtual hearings have become routine in many criminal courts worldwide.⁴ Moreover, official state actors in criminal law have started

1. Scholars have started to envision and analyze the interplay between physical and virtual worlds since the 1990s. *See generally, e.g.*, David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403 (1996). For the purpose of this Essay, when we speak about “virtual spaces,” we refer to real-world occurring online (e.g., social media platforms, Zoom, and the Internet more broadly), as opposed to virtual worlds in their most purified form (e.g., computer games, *see* Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 U. CHI. L.F. 415).

2. *See* Peter Coe, *The Social Media Paradox: An Intersection with Freedom of Expression and the Criminal Law*, 24 INFO. & COMM’NS TECH. L. 16, 31 (2015).

3. *See, e.g.*, Part II; Asaf Harduf, *Rape Goes Cyber: Online Violations of Sexual Autonomy*, 50 U. BALT. L. REV. 357, 376 (2021); Wayne Rumbles, *Theft in the Digital: Can You Steal Virtual Property?*, 17 CANTERBURY L. REV. 354, 371 (2011).

4. Ayyan Zubair, Note, *Confrontation after COVID*, 110 CALIF. L. REV. 1689, 1692–94, 1704 (2022).

utilizing virtual spaces as extensions of their physical presence. These new non physical settings have dramatic effects on evidential and procedural aspects, such as the meaning of the right to be present or the right to be cross-examined in criminal procedures, but more broadly, they spur conceptual debates on fundamental underlying criminal law principles and rationales.⁵

Second, it is no longer possible to ignore alternative and nonofficial domains outside the formal federal, state, and local law-making channels, where criminal legal matters are discussed, challenged, and restructured. Issues like police brutality, racial inequities in the criminal legal system, the #MeToo movement, and other domains in which the criminal legal system fails illustrate the rich and important social debates often initiated in and continuing to occur through virtual domains.⁶ Social media and blog posts are the most paradigmatic forms of this phenomenon, providing examples of alternative avenues for advancing law and policy. Online collaborative discourse platforms allow community members, including crime victims, suspects, family members, and witnesses, to share their experiences with the criminal legal system and stimulate public discourse on its functioning⁷ while promoting what they perceive as “doing justice.” For some, social media provides a ventilation outlet, a space to obtain support and promote personal healing processes; for others, an alternative setting to achieve goals traditionally performed by the criminal legal system.⁸

This Essay offers a preliminary exploration of the interplay between physical and virtual spaces in the criminal law domain, what we conceptualize as “virtual criminal law dualism.” Through exploring the simultaneous developments stemming from the transition to virtual spaces, we will analyze the meaning of these developments, discuss their implications, and offer future directions regarding their potential expansion. As we will show, the phenomenon of virtual criminal law dualism raises various questions regarding the very nature of criminal law and the function of the criminal legal system, as well as the interplay between the formal criminal legal system and its stakeholders, including community members who turn to online channels to promote their notions of justice and to obtain redress.

A multitude of questions emerge from conceptualizing virtual criminal law dualism. One such question is how the virtual space provides a new model of lay participation in criminal conflict resolution making, alongside the advantages

5. Andrew Guthrie Ferguson, *Courts Without Court*, 75 VAND. L. REV. 1461, 1466 (2022) (leveraging the transformative impact of online courts amid the COVID-19 pandemic to argue that transitions to online spaces offer an opportunity to rethink basic values and power dynamics within the criminal legal system).

6. Bennett Capers, *Punishment Without the State*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (drawing parallels between certain features of public virtual spaces and ‘state-administered criminal law,’ and contending that these functions could potentially reclaim power to “us, ‘we, the people’”).

7. Hadar Dancig-Rosenberg, Roy Rosenberg & Anat Peleg, *Post or Prosecute? Facebook, the Criminal Justice System, and Sexual Assault Victims’ Needs*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (presenting findings of a survey based on 499 responses from sexual assault survivors who participated in social discourse about sexual assault on Facebook, showing that survivors perceived the capacity of Facebook to address their needs to be higher than that of the criminal legal system in fourteen of eighteen victims’ needs).

8. *Id.*

and risks of such a process to the democratization of the legal process and democracy more broadly. Additionally, it remains to be explored how the virtual space conforms with or challenges traditional and modern theories and justifications for punishment, including offering alternative justifications for using state power in criminalizing behavior. Furthermore, the virtual space puts laws in flux, creating new offenses while existing offenses are redefined or left by the wayside. It remains to be seen what the relationship between the traditional criminal law arena and the virtual one will or should be: should the virtual space be considered a complementary domain to the criminal legal system or rather an alternative one, and under what circumstances? The legal field must also determine how to reconcile the push to create new criminal prohibitions tailored to protect social values in the virtual space with the need to protect other potentially conflicting interests, such as freedom of speech. Additional questions require attention, e.g., what is the potential of the virtual sphere to promote justice for victims of crime, and what is the meaning of achieving informal justice as opposed to formal justice? What are the similarities and differences between various informal spaces that could function as criminal conflict resolution mechanisms? What is the potential interplay between these virtual spaces and other informal, lay-centered criminal justice models that offer a bypass route to the criminal legal system (such as restorative justice)? How can key stakeholders in criminal law-making interact with these informal channels, and should they do so? How can or should the criminal arena take into account informal processes and interactions between victims, assailants, and relevant community members in their decision-making processes? And what are the opportunities and challenges of state usage of the virtual domain to advance justice? What are the consequences and implications of such use on defendants' rights, equality, transparency, accessibility, procedural justice accounts, and other fundamental principles in criminal law?

Some of these issues are discussed in this symposium. By adopting multidisciplinary perspectives and methodological approaches, the symposium's authors offer innovative ways to examine how the interplay between virtual and physical spaces challenges not only the most fundamental principles of criminal law and procedure but also how we should think of and understand our criminal legal system in action. Overall, we believe that the dualism identified is an important catalyst in keeping criminal law and procedure a dynamic and vibrant domain of the law that contributes to criminal law's crucial ability to remain connected with its constituents—the public. At the same time, given that virtual spaces are here to stay, we discuss several concerns related to their increased presence and potential negative impact on core principles of criminal law and democracy more broadly. In conclusion, we argue that while physical and virtual interplay have negative and positive traits, we should consider neither physical nor virtual spaces as normatively “good” or “bad.” Instead, we should consider the dualism identified in this Essay as a potential tool to achieve broader goals of the criminal legal system. We illustrate our argument using two such goals: reducing incarceration rates and advancing truth-seeking in the criminal process.

The Essay proceeds as follows. Part II discusses the first aspect of virtual criminal law dualism. It explores how the virtual sphere shapes and reconstructs the mainstream criminal law and procedure from within: how the transition to virtual domains affects existing criminal doctrines, procedure, and legal rules. Part III focuses on the second aspect of virtual criminal law dualism. It explores how the virtual sphere shapes and reconstructs mainstream criminal law and procedure from the outside: how it creates a competing or complimentary system initiated independently. Part IV analyzes this dualism's normative implications and suggests some future directions regarding its potential expansion and importance to the future of the criminal legal system.

II. FIRST ASPECT OF VIRTUAL CRIMINAL LAW DUALISM: SHAPING CRIMINAL LAW AND PROCEDURE FROM WITHIN

The first aspect of criminal law dualism relates to those instances in which the virtual sphere shapes and reconstructs mainstream criminal law and procedure from within; that is, how existing criminal law doctrines, procedures, and, more broadly, structures and concepts, are affected merely by the introduction of and transition to virtual domains. We entitle this aspect “from within” as it focuses on formal institutional responses to the transition into virtual spheres. We identify several facets of this aspect.

At the substantive level, we first identify a host of *new offenses* particularly tailored to address the unique challenges posed by virtual spaces to traditional criminal concepts and categories. For example, recent conversations around the criminalization of revenge porn, a phenomenon that is a direct product of virtual spaces that the traditional criminal law did not know how to address based on previously existing doctrine. In less than ten years, the phenomenon of revenge porn has produced a host of often conflicting case laws and has ultimately led to the adoption of new legislation across almost all U.S. states.⁹ An academic debate has also emerged about the classification of revenge porn offenses – whether they should be classified as an infringement of privacy, harassment, or sexual offenses, with various suggestions for designing the scope of their *Actus Reus* and *Mens Rea* according to the identified protected social value that underlies the offense, and given other conflicting considerations such as freedom of speech.¹⁰ This debate has been affected, among other things, by testimonies of revenge porn victims regarding the nature and severity of the damage done to them by these acts, amplified by the virtual sphere's unique characteristics.¹¹ Similarly, other additional crimes happening in virtual spaces challenge traditional definitions of *Actus Reus* and *Mens Rea*. For example, questions related to

9. Roni M. Rosenberg & Hadar Dancig-Rosenberg, *Revenge Porn in the Shadow of the First Amendment*, 24 U. PA. J. CONST. L. 1285, 1288 (2022).

10. Roni M. Rosenberg & Hadar Dancig-Rosenberg, *Reconceptualizing Revenge Porn*, 63 ARIZ. L. REV. 199, 206–18 (2021).

11. See generally Clare McGlynn et al., *'It's Torture for the Soul': The Harms of Image-Based Sexual Abuse*, 30 SOC. & LEGAL STUD. 1 (2021).

“virtual rape” reconstruct concepts like the physicality of force, the violation of autonomy, and the appropriate criminal labeling.¹² More broadly, the criminalization of actions in cyberspace falls under this category, including computer-related offenses, gambling, extortion, security, and more, all require the criminal legal system to rethink its traditional concepts and adapt accordingly to the new realities happening in virtual spaces.¹³

Questions of prior restraint and censorship are also strongly related to those issues, as they often require a new balance between competing interests and rights and reconceptualization of the harm occurring in nonphysical spaces.¹⁴ Scholars have addressed the unique challenges of online content moderation to traditional free speech jurisprudence, particularly along the prevention (ex-ante) versus punishment (ex-post) divide, and offered different factors that should be addressed when choosing a regulatory regime.¹⁵ Other scholars provided an additional illustration of the unique challenges inherent to virtual spaces in the context of online criminal records, for example, how errors in criminal records—a disturbing phenomenon in and of itself—can be exacerbated in the virtual world, exponentially increasing the collateral consequences to individuals with criminal pasts.¹⁶

Our first aspect of criminal law dualism has another facet, however. While the first facet focused on the need to create *new* criminal laws and policies to preserve criminal law’s relevance to the new virtual spaces, this second facet reflects situations in which already *existing laws or procedures* are—voluntarily or (most likely) nonvoluntarily—applied as-is in virtual settings. In these scenarios, at least at first, there are no formal changes to the existing laws or procedures, but for the transition from physical to nonphysical spaces. This transition sheds new light on existing laws and procedures routinely applied and, as such, can challenge or require a reconceptualization of constitutional and/or procedural protections. Even more broadly, such a transition to virtual spaces forces us or, more positively, gives us an opportunity to rethink the logic and power structures at the core of the criminal legal system.

The outbreak of the COVID-19 pandemic dramatically increased situations in which legal proceedings moved from physical to virtual spaces, and allowed scholars to explore the effects of those transitions on certain rights of the accused,

12. Harduf, *supra* note 3.

13. Audrey Guinchard, *Crime in Virtual Worlds: The Limits of Criminal Law*, 24 INT’L REV. L., COMPUT., & TECH. 175, 176 (2010).

14. See, e.g., Ariel L. Bendor & Michal Tamir, *Prior Restraint in the Digital Age*, 27 WM. & MARY BILL RTS. J. 1155, 1156–58 (2019).

15. Vincent Chiao & Alon Harel, *Content Moderation Online: Regulation Ex Ante Versus Ex Post*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (identifying four principal factors that should be addressed when choosing between ex-ante and ex-post regulatory regimes: fit, error costs, transparency, and normative adaptation, with the latter receiving particular attention in their analysis in a world of online content moderation).

16. Sarah Lageson, *Criminally Bad Data: Inaccurate Criminal Rewards, Data Brokers, and Algorithmic Injustice*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (describing how such errors occur and documenting their potential harms but also situating them through three theoretical lenses: due process and equal protection harm, informational privacy harm, and reputational harm. Lageson further discusses current legal challenges in access to remedies and offers innovative solutions to regulate criminal records).

such as the defendant's right to presence in detention hearings¹⁷ or the Sixth Amendment right of the accused "to be confronted with the witnesses against him."¹⁸ The transition to virtual spaces in these settings, however, offers new opportunities to engage with core questions and conceptualizations of criminal law and procedure, not only in the context of particular rights¹⁹ but also in broader contexts related to questions of hierarchy, tradition, and alternatives to carceral control through physical spaces.²⁰ As such, the mere transition from physical to virtual spaces allows us to reimagine criminal law in new and previously unexplored ways and crystallizes the purpose and meanings of our legal system.

In the context of the right to be present at virtual detention hearings, scholars have suggested that fulfilling arrestees' right to be present does not depend on their mode of presence (physical or virtual) but rather on whether they are given a meaningful opportunity to participate, that is, to understand the hearing and influence its process and outcome.²¹ In case of a gap between courtroom events and the proceeding apparent on remote arrestees' screen, there might be a need to develop alternative technological structures whereby all participants connect to a shared virtual courtroom space, thus improving the arrestee's opportunity to participate in the hearing. Similarly, in the context of the Sixth Amendment right to confrontation, the meaning of the "virtual" arises too. Many—if not most—commentators pointed at the unconstitutionality of the right in the virtual realm, primarily due to the accused's inability to engage in "face-to-face confrontation." It was argued, however, that the experiences from the COVID-19 era can teach us that the right to confrontation should, in fact, be recognized more broadly than a right to in-person court proceedings: as a substantive right to challenge governmental proof, that in some instances could be better protected through "virtual" forms outside of the courtroom.²²

Another example of how virtual spheres provide a new space for applying existing roles or functions of criminal legal actors that were applied in traditional ways before the internet—which also seems to bridge between the first and second aspects of the dualism—is how law enforcement agencies, particularly police departments, utilize virtual platforms to communicate with the public, present themselves, and deliver or receive information. As a veteran police officer indicated about the use of social media by her department, the techno-social

17. Ayelet Sela & Hadar Dancig-Rosenberg, *The Right to Presence, via Screens: Court Observations in Remote Criminal Detention Hearings*, 54 HEB. U. L. REV. (forthcoming 2023).

18. Andrea Roth, *The Fallacy of "Live" Confrontation: A Surprising Lesson from Virtual Courts*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (building on COVID-19 experiences and drawing on critiques of the "liveness" concept in music and remote instruction, Roth offers an insightful analysis of the scope and meaning of the "liveness" requirement of the Sixth Amendment right to confrontation).

19. For example, based on observations of virtual hearings occurring during the COVID-19 pandemic, Sela & Dancig-Rosenberg, *supra* note 17, suggest that detainees' right to presence during detention hearings should not be evaluated based on the physical presence but more substantially on the ability of the detainee to meaningfully participate in the hearing.

20. Ferguson, *supra* note 5, at 1475.

21. Erin Sheley, *The Dignitary Confrontation Clause*, 97 WASH. L. REV. 207, 243 (2022).

22. Roth, *supra* note 18.

features that enable users to communicate and respond (such as ‘like,’ ‘share,’ and ‘comment’) create an opportunity for the police to change perceptions, build trust, and even educate.²³ The use of social media by the Boston Police Department during the Boston Marathon bombing in 2013 provides an example of the benefits derived from turning to social media in a time of crisis to solicit information from the public, disseminate updates and announcements, and refute false information reported by the media, thus creating a reliable and accessible online channel that people could count on.²⁴ Scholars, however, pointed out that police departments rarely use social media for creating “anything resembling a true dialog,” such as hosting online events, responding to messages, or engaging actively in a conversation with the public.²⁵

III. SECOND ASPECT OF VIRTUAL CRIMINAL LAW DUALISM: SHAPING CRIMINAL LAW AND PROCEDURE FROM THE OUTSIDE

As opposed to the first aspect we discussed above—how criminal laws, procedures, and the routine work of law enforcement agencies are transformed from inside the formal system—the second aspect explores the transformation that occurs from the outside, namely using informal platforms. We identify two main—and related—facets of this aspect. *First*, virtual platforms replace or complement the formal criminal legal system. *Second*, virtual platforms offer a forum for challenging, discussing, and debating criminal legal issues. As such, under this second aspect, conversations on virtual platforms are initiated outside of the formal legal system but can meaningfully inform officials about potential issues of concern within the criminal legal system. Indeed, recent years have shown that some of these “external” interventions have affected criminal laws and policies.²⁶

In general, social media networks today provide a space where people can get together virtually to engage, debate, consult one another, share information and expectations, express emotional reactions, and even plan how to translate their virtual collective sentiments into an action in the real world.²⁷ Indeed, some argue the techno-social features of the internet, in general, and of social media networks, in particular, have made these virtual spheres a natural place for serving as a potential public square due to their accessibility, unlimited participation

23. Stephanie H. Slater, *Social Media and the Boynton Beach, Florida Police Department*, in *SOCIAL MEDIA FOR GOVERNMENT: THEORY AND PRACTICE* 135, 139 (Staci Zavattaro & Thomas Bryer eds., 2016).

24. EDWARD F. DAVIS III, ALEJANDRO A. ALVES & DAVID ALAN SKLANSKY, *SOCIAL MEDIA AND POLICE LEADERSHIP: LESSONS FROM BOSTON 2* (2014).

25. Marty Berger & David A. Sklansky, *Crime, Community, and the Shadow of the Virtual*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (exploring how the concepts of “community safety” in the physical realm has evolved in response to the influence of the virtual world). But note, however, the potential of increased dissemination of misinformation and false narratives through social media and how this potential can be misused by criminal legal sectors. See discussion *infra* Section IV.B.

26. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7.

27. *Id.* See also Jeffrey L. Blevins, James Jaehoon Lee, Erin E. McCabe, & Ezra Edgerton, *Tweeting for Social Justice in #Ferguson: Affective Discourse in Twitter Hashtags*, 21 *NEW MEDIA & SOC’Y* 1636 (2019); Rob Eschmann, Julian Thompson & Noor Toraif, *Tweeting Toward Transformation: Prison Abolition and Criminal Justice Reform in 140 Characters*, 93 *SOCIO. INQUIRY* 496 (2023).

capacity, and relatively limited regulation of free speech.²⁸ At least to some, social media and other virtual platforms have indeed become the new “public square.”²⁹ Others claim, however, that, in fact, virtual spaces have done little to truly liberalize the flow of information but instead duplicate social structures and existing hierarchies into new platforms.³⁰ Whichever view one may hold, at least in theory, we can identify some transition from exclusive, often geography-dependent groups controlling traditional mediums of communication to (potentially) more open groups. These platforms vary from local groups to international ones, from groups focusing on specific criminal law matters (e.g., specific criminal cases, court decisions, and policies regarding a particular type of offense) to groups focusing on changes to the criminal legal system more broadly either through reforms or other means, including abolishing different facets of the system or even the system as a whole.

Given this nature of social media, many have identified the potential of turning social media into spaces where one can enhance notions of informal, community-based justice, break social hierarchies and state-driven inequalities, and return the power which has been lost in light of the professional-led machinery of criminal justice, to the laypeople (“we, the people”)³¹—what we consider the first facet of this aspect. The court of public opinion can function as a bypassing, alternative route to circumvent the bureaucratic, entangled state-managed system.³² It can serve as a sphere of deliberation and participation, where community members, often excluded from formal conversations, can be active, involved, and make a difference.³³ For example, some victims of crime have used social media as informal reporting channels, in which they share their stories of victimization and even name their alleged perpetrators.³⁴ During the #MeToo campaign, many victims posted personal testimonies. They revealed the assailant’s identifying details to warn others, create deterrence, elicit awareness about the failed criminal legal system, and exercise the public’s right to know.³⁵ Sometimes, individuals utilized online reporting instead of turning to the formal system.³⁶ There are cases in which social media platforms were used for initiating a process of informal evidence collection against alleged perpetrators (e.g., sexual

28. Capers, *supra* note 6.

29. *Id.*

30. Mary Anne Franks, *Beyond the Public Square: Imagining Digital Democracy*, 131 YALE L.J.F. 427, 428 (2021).

31. Capers, *supra* note 6.

32. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7; Hadar Dancig-Rosenberg & Anat Peleg, *Online Shaming and the Power of Informal Justice*, 47 HARV. J.L. & GENDER (forthcoming 2024).

33. Jürgen Habermas, *Reflections and Hypotheses on a Further Structural Transformation of the Political Public Sphere*, 39 THEORY, CULTURE, & SOC’Y 145, 159–60 (2022). While recognizing this potential inclusivity (or what he entitles the “dissolution of boundaries”), Habermas also identifies the fragmentizing nature of new media. See also Kathryn Russell-Brown, *Critical Black Protectionism, Black Lives Matter, and Social Media: Building a Bridge to Social Justice*, 60 HOWARD L.J. 367, 405 (2017).

34. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7; Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146 (2019).

35. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7; Tuerkheimer, *supra* note 34.

36. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7; Tuerkheimer, *supra* note 34.

predators,³⁷ cops who used illegal force,³⁸ violent people³⁹) without necessarily the intention to bring these cases to prosecution. For some, the formal system could not provide any remedies (e.g., in cases in which the statute of limitation applied); for others, the toll of turning to the formal criminal legal system was perceived as too high, so that victims were seeking for alternative route to execute what they perceived as ‘doing justice.’ For example, studies show that from victims’ perspective, online spaces can often respond better to most of their needs than the criminal legal system.⁴⁰ More specifically, in one of the empirical studies based on a survey that survivors filled in, there was not a single need (out of eighteen potential needs) for which a majority of respondents believed that the criminal legal system could provide an adequate solution.⁴¹ More worrisome was the finding that most of the respondents perceived the criminal legal system as incapable of addressing even the classic criminal justice oriented needs (e.g., deterrence, incapacitation, severe punishment).⁴² Similarly, in another study, survivors justified using the practice of online shaming by stating that it could outperform the criminal legal system in achieving classic goals of criminal law (e.g., prevention, deterrence, incapacitation, denunciation).⁴³

Beyond social media being utilized as a de-facto form of the alternative justice system, social platforms have also been used by individuals and collectives to spur or criticize the existing criminal process – what we identify as the second facet of the external aspect. Some have used it for calling on prosecutors to push forward criminal proceedings;⁴⁴ some have used it to express their expectations from the system, either to find someone guilty or to impose harsh punishment on convicted offenders, and others have used it to encourage victims to file a complaint with the police to exhaust state power against people who commit crimes.⁴⁵ Furthermore, virtual spaces advance and increase public debate about criminal legal issues among various communities of interest, including communities often marginalized by the legal system. Online public debates include questioning the justification of criminalizing certain conduct,⁴⁶ criticizing criminal justice policies and systemic issues such as racism,⁴⁷ discussing and assessing the functioning of law enforcement agencies,⁴⁸ criticizing decisions made in specific cases,⁴⁹ and calling for legislative and policy reforms.⁵⁰

37. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7; Tuerkheimer, *supra* note 34.

38. Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 395 (2016).

39. Capers, *supra* note 6.

40. Dancig-Rosenberg, Rosenberg & Peleg, *supra* note 7.

41. *Id.*

42. *Id.*

43. Capers, *supra* note 6.

44. See Dancig-Rosenberg & Peleg, *supra* note 32; Capers, *supra* note 6.

45. Aya Gruber, *A Tale of Two Me Toos*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (portraying two parallel tendencies within the #MeToo movement, one punitive-driven and the other nonpunitive).

46. For example, simple possession of certain drugs such as marijuana.

47. Russell-Brown, *supra* note 33.

48. *Id.*

49. *Id.* at 406.

50. *Id.* at 407.

IV. THE NORMATIVE IMPLICATIONS OF THE VIRTUAL CRIMINAL LAW DUALISM

A. *Advantages and Pitfalls*

We contend that “virtual criminal law dualism” raises numerous normative questions. Clearly, virtual spaces are here to stay, and exploring criminal law solely through physical spaces is no longer realistic or meaningful. Virtual and physical spaces will continue to live together, constantly reflecting and challenging each other. We argue that while some positive aspects of this dynamic could encourage such interrelations, there are at least equally concerning elements in the dualist nature of this interplay and the constant struggle of the criminal law to find a balance between the physical and the virtual.

As an initial premise, we recognize the importance of the virtual sphere and its potential contribution to criminal law-making in the physical world. The changes we termed “from within” demonstrate how criminal law and procedure are being developed and enriched because of the emergence of virtual spheres. For example, enacting new criminal offenses that forbid harmful acts in the virtual sphere is, at least to a certain extent, a positive development, demonstrating efforts to keep criminal law updated, relevant, and timely by providing public protection from new dangers. Reforms in substantive criminal law convey normative messages to the public about right and wrong in a constantly changing technological reality in which lines are still blurred. In addition, the new virtual criminal proceedings emerging in the legal system in recent years have provided unique opportunities to rethink the traditional proceedings previously used as a default and make improvements accordingly. At the same time, creating new offenses in the virtual world and utilizing new technologies for handling criminal proceedings online pose unique challenges—from how to define the elements of new offenses given competing interests (e.g., freedom of speech) to how to ensure transparency, accessibility, and procedural justice when physical presence is no longer necessary. Furthermore, it can be argued that any expansion of criminal laws on human behavior is inherently problematic and thus emphasizes the negative aspects of the interplay between physical and virtual spaces.

The changes we termed “from the outside” have equally meaningful contributions to advancing criminal law. First, officials and institutions can use social media as a communication channel with the public. Social media enable criminal justice officials to reach larger audiences quickly and efficiently online, deliver messages in crises, and receive factual information regarding crime and safety.⁵¹ Furthermore, social media can also serve as a resource (if limited) to

51. See, e.g., DAVIS III ET AL., *supra* note 24. As previously mentioned, the utilization of social media by formal criminal legal institutions, such as the police, serves as a bridge between the two aspects we have identified. Consequently, it can also be examined within the context of the first aspect (“changes from within.”) We have chosen to address the implications of the official use of online platforms under the second aspect mostly for editorial reasons, as many of these implications are also closely intertwined with the overarching themes discussed within this section.

learn about the community's views and sentiments, including lay people's attitudes, intuitions, and moral judgments about what should be criminalized and what the punishment should be for various wrongdoings.⁵² Social media platforms may reflect the community's view of criminal justice, as many of them, as mentioned above, are open to all, relatively accessible in today's technological reality, not heavily regulated in terms of free speech, and reflect the most up-to-date public discourse.⁵³ Therefore, the 'wisdom of crowds' can be found on these platforms. On the other hand, as indicated, discourse on social media often preserves and perpetuates structural social hierarchies and is less accessible to certain social groups, thereby amplifying only certain voices at the expense of others.⁵⁴ In this sense, it is questionable whether social media platforms can genuinely represent the whole variety of voices democratically and inclusively, namely if they can serve as a reliable platform to learn about laypeople's perceptions. It seems more reasonable to see them as only one domain out of many from which to learn about the community's sentiments.

Either way, even if we assume, with the necessary caution, that social media platforms can teach us something (not everything!) about lay people's moral judgments, should lay intuitions expressed on virtual platforms matter regarding criminal laws and policies? The theory of empirical desert—not discussed in the social media context—supports lay deference, namely considering lay intuitions of justice when shaping and designing criminal law and punishment rules.⁵⁵ Beyond idealistic reasons that highlight community empowerment or the enhancement of the criminal legal system's democratization process,⁵⁶ there is a practical reason to do so: as long as prosecutors and judges—alongside other policymakers—take political positions, institutional deference to laypeople may be beneficial.⁵⁷ It is naive to think that criminal legal actors are not attuned to public sentiments, at least to some extent. The political structure of the system creates incentives for those who occupy political positions to keep track of their voters'

52. Itay Ravid & Rotem Dror, *140 Characters of Justice? The Promise and Perils of Using Social Media to Reveal Lay Punishment Perspectives*, 2023 U. ILL. L. REV. (forthcoming Oct. 2023) (contending that there is "a potential, if limited, to learn from social media about justice judgments in society," while recognizing the substantial methodological and normative limitations of doing so).

53. *But see id.* (raising concerns about the actual inclusiveness of social media).

54. Franks, *supra* note 30, at 438.

55. Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1566 (2017) (exploring the reasons to support and criticize lay deference and finding that lay intuitions of justice include retributive proportionality).

56. Scholars have identified a variety of additional benefits of taking into account laypeople's perceptions and intuitions in the context of criminal justice, including legitimizing the penal institutions and supporting deterrence aims. See Albert W. Dzur, *The Myth of Penal Populism: Democracy, Citizen Participation, and American Hyperincarceration*, 24 J. SPECULATIVE PHIL. 354, 360–62 (2010) (arguing that inclusion of lay deference in penal policy-making is fundamental to the criminal justice system); Robinson, *supra* note 55, at 1580–88 (depicting the benefits that come from including laypeople consideration in criminal law); Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1858 (2000) (exploring the value of including lay intuitions of justice in the Model Penal Code).

57. Ravid & Dror, *supra* note 52.

expectations.⁵⁸ Indeed, research shows the influence of public opinion on prosecutors' and judges' discretion towards marijuana crimes⁵⁹ and even on the use of the death penalty.⁶⁰ In addition, criminal cases that receive media coverage can affect broad trends in judicial decision-making.⁶¹ This reflects some of the pitfalls in expanding the presence and meaning of virtual spaces, given the potential effects of the unofficial online crimo-social "proceedings" on "real-life" stakeholders, including prosecutors, defense lawyers, judges, and additional policy-makers. On the other hand, all these studies suggest that laypeople's sentiments influence the criminal legal system, whether one likes it or not.

With this in mind, public debates on social media regarding criminal legal issues could attract criminal legal actors who seek to get a sense of what the people they are supposed to serve think about these issues. Social media platforms can mediate between criminal legal actors and community members and make accessible the latter's opinions and expectations regarding the former's operation. This could be particularly helpful in cases of local, geographic-based online social networks, where neighbors discuss joint local problems, such as safety issues in their neighborhood ('neighborhood watch' groups).⁶² But this could also be helpful in cases of cross-geographic online networks which call for a broader change in policies at the state, national, or local levels, such as police brutality,⁶³ the prevalence of using carceral measures,⁶⁴ and racial discrimination by law enforcement actors against communities of color.⁶⁵ Undoubtedly, social media platforms have played a pivotal role in bringing attention to social issues the criminal legal system has long overlooked or suppressed. Examples include the impactful #BLM movement, which shed light on police brutality against the Black community, and the #MeToo movement, which unveiled the pervasive rape culture deeply rooted in corporate America.⁶⁶ In addition, listening to laypeople's intuitions might help criminal legal actors increase trust and respect for criminal legal institutions and the government in general.⁶⁷ Institutional actors can use social media networks as a valuable tool (albeit far from perfect) to gauge public opinion, evaluate the level of trust community members have towards

58. *Id.*

59. See generally Michael J. Nelson, *Responsive Justice? Retention Elections, Prosecutors, and Public Opinion*, 2 J.L. & CTS. 117 (2014).

60. See Paul Brace & Brent D. Boyea, *State Public Opinion, the Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 365–71 (2008) (studying the influence that public opinion concerning capital punishment has on elected judges).

61. See Itay Ravid, *Judging by the Cover: On the Relationship Between Media Coverage on Crime and Harshness in Sentencing*, 93 S. CAL. L. REV. 1121, 1165–71 (2020) (depicting empirical evidence to support the idea that media coverage affects judicial decision-making in criminal trials and further argues for ways to mitigate media's effect on judges).

62. *Id.*

63. Russell-Brown, *supra* note 33, at 405–07.

64. Lageson, *supra* note 16.

65. For instance, the Black Lives Matter campaign and see also Russel-Brown, *supra* note 33.

66. Gruber, *supra* note 45.

67. See Joshua Kleinfeld & Hadar Dancig-Rosenberg, *Social Trust in Criminal Justice: A Metric*, 98 NOTRE DAME L. REV. 815, 862 (2022).

them, and consider changing policies, priorities, and modes of operation accordingly.⁶⁸

Equally important—and related—virtual spaces can potentially reduce the use of criminal laws and punishment in society. By turning to online communities and alternative networks that coexist outside of the formal criminal process, members of society indicate that the needs and interests of different stakeholders do not necessarily need to be met by the traditional use of state power. For example, victims sometimes choose alternative, informal channels instead of the formal system.⁶⁹ Moreover, online emphasis on the existing system’s shortcomings increases the popularity and interest in developing “soft” nonpunitive (or at least less punitive) procedures within the criminal law, such as collaborative, therapeutic-oriented justice. As such, the virtual spaces not only identify problems in the existing “physical” criminal legal system but also offer alternatives – including those that undermine entirely existing legal proceedings. Indeed, choosing an alternative “virtual” path can suggest that traditional “physical” criminal legal proceedings might not achieve some of their intended goals, either because they *cannot* (thus suggesting they may be improved) or because they *should not* (and therefore their continued use should be scrutinized).

While we recognize the latter as a potentially positive outcome of the above processes, given its capability to reduce the use of state power through criminal law, we also acknowledge the complexity of that phenomenon, as represented by the former. For example, think about the case of sexual assault victims we discussed earlier. Victims indeed opt out of using the criminal legal system, but not necessarily because they do not believe in punishment, but because they do not trust the system as a whole.⁷⁰ As such, we see examples of victims who have utilized criminal law terminology and methodology to accuse and even “punish” their alleged assailant online without initiating a formal criminal legal process. This demonstrates what might happen to the criminal legal system should many (or hypothetically all) victims abandon the formal, state-managed criminal process in favor of informal, alternative justice channels. When victims, the main actors initiating the criminal process, no longer feel that turning to the formal system has a significant added value, criminal processes might dramatically decrease as noted elsewhere: “[T]he ability of the system to satisfy its broader public interest depends on the willingness of victims to cooperate with it . . . [o]ther competing mechanisms that do not complement the criminal legal system but provide a substitute for it could undermine the attractiveness of the criminal legal system for victims and discourage them from resorting to it.”⁷¹ The existence of the parallel universe of online justice channels, therefore, calls for reforms in the

68. For more on the challenges of doing so, see Ravid & Dror, *supra* note 52.

69. See, e.g., *supra* notes 37–46 and accompanying text.

70. Catherine M. Reich, Gwendolyn D. Anderson & Richard Maclin, *Why I Didn't Report: Reasons for Not Reporting Sexual Violence as Stated on Twitter*, 30 J. AGGRESSION, MALTREATMENT & TRAUMA 478, 478 (2021) (estimating a reporting rate between the range of 10% to 37%); Bonnie S. Fisher, Leah E. Daigle, Francis T. Cullen & Michael G. Turner, *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 24–26 (2003).

71. Dancig-Rosenberg, Rosenberg, & Peleg, *supra* note 7.

criminal legal system so that it will become more attentive and accessible to victims and retain its function as an optional channel. In addition to the need to provide victims who are interested in formal legal response an adequate path to turn to, the criminal legal system should serve the public interest in general (e.g., the need to investigate sexual assault cases in order to prevent more harm and enhance assailants' accountability). Still, without victims' cooperation, the public interest will not be served.

Furthermore, whereas victims are not formal parties to the adversarial criminal process, and their rights do not exceed information receipt and participation in specific junctions of the process,⁷² on social media platforms, victims have become 'private prosecutors' and even 'private judges.' As such, we witness an unprecedented use of social sanctions through social media platforms that may not deprive liberty the same way the criminal legal system does but still punish or sanction individuals, sometimes harshly. Victims who prefer to use shaming over formal complaints illustrate this problem because, in their eyes, it better achieves the goals of deterrence, retribution, and prevention. While you take punishment away from criminal courts (which some might consider a positive outcome of virtual spaces), you face a transition into boycott and cancel culture through social networks. This phenomenon of social punishment that sometimes replaces institutional punishment raises concerns. Indeed, one may argue that ostensibly public shaming is less punitive in the institutional sense because one avoids the heavy hand of formal authorities. Still, in practice, it is doubtful whether the punitive-social effect is reduced. Indeed, scholars have warned that turning social media into the new 'public square' represents "mob justice," "cancel culture run amok," and vigilantism.⁷³ It is not hard to think about cases in which people have lost their social status, reputation, job, and even social and familial connections due to accusations of criminal-oriented conduct before these accusations have been formally approved in court.⁷⁴ And more than that, all these alternative online proceedings are initiated by individuals and develop freely in the virtual space without the protections offered in the criminal process, including proportionality, the presumption of innocence, and orderly procedures—all designed to safeguard individuals from an excessive exercise of state power, as well as power in a broader sense. This is not to say that the formal, state-managed criminal legal system is free of flaws; as we all know, it is flawed. It is just to say that executing justice in the parallel universe of the online sphere has some high costs on the accused. In cases where formal criminal proceedings were taken, and these ended with a conviction, such costs might be justified to be considered during the sentencing stage. Furthermore, courts had also considered the 'social punishment' that convicted people endured online when determining their

72. Capers, *supra* note 6.

73. Capers, *supra* note 6, at 5. See also Caitlin Flanagan, *The Conversation #MeToo Needs to Have*, THE ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-right-conversation-for-metoo/551732/> [<https://perma.cc/L9YU-P32M>] ("Zero tolerance should go hand in hand with two other things: due process and proportionality. These words... seemed not to register within the larger, 'burn it down' spirit animating the mob.").

74. Capers, *supra* note 6, at 5.

sentence.⁷⁵ But what about cases where formal criminal proceedings ended with no conviction, but the alleged assailant was punished online? And what about those cases that never reached the formal system? What measurements should be used, if at all, to ensure that “punishing” online is done proportionally? How should these measurements be used, and by whom?

Another concerning component of the virtual space can be viewed as the flip side of the positive effects we identified above. While we can advance conversations on how to reduce the use of state power through criminal law, virtual spaces can also advance voices that call for more punitivism and increased use of the criminal laws in spaces where some believe they are not used enough or are not used at all.⁷⁶ A key challenge in addressing this concern is the limited ability to control messages over virtual spaces after they were released to the virtual realm. Also, there is no one entity that operates collectively online and can be accountable as a representative of the public. Every individual can thus interpret someone else’s call as a call for increased use of punitive measures. Consequently, even conversations that were not initially intended to advocate for additional carceral power could either evolve to or have the unintended practical effect of increasing the use of the penal system.

B. *Moving Forward in a Virtual-Physical Hybrid*

It is difficult to predict where the development of online platforms will take us. As mentioned, this is not necessarily bad, as the networks can positively affect the legal systems by prompting and accelerating changes in existing laws and policies. Furthermore, social networks are a space of high social value that allows opportunities for expressing the voices of different people in society and should be recognized and protected as such. Yet, the networks are a realm of uncertainty. It is difficult to anticipate and predict how processes that started for given reasons will develop over time and what results they will eventually cause. The question we should investigate is how we may resolve the tension between the positive and negative vectors overarching the virtual-physical interplay. That is, how we can enjoy the advantages of virtual space as a tool for promoting democratic discourse (recognition of complexity, broad social sharing, willingness to challenge existing laws and criminal institutions alongside open discourse about the disutility of some of these laws and institutions) without paying too high a price for improper use of the criminal stigma or the power inherent in social discourse.

We claim that a potentially amenable approach to ease that tension would be identifying some of the general goals criminal law wishes to advance and seeking whether and how physical and virtual spaces can align to advance such

75. See Charmaine Patterson, *Aspiring Nashville Singer Who Shot Homeless Man After He Asked Her to Move Her Car Avoids Jail*, PEOPLE (Nov. 7, 2022), <https://people.com/crime/aspiring-nashville-singer-who-shot-homeless-man-in-2017-sentenced-to-nearly-1-year-of-probation/> [https://perma.cc/ZF96-9BHQ].

76. Gruber, *supra* note 45; Aya Gruber, *#MeToo and Mass Incarceration*, 17 OHIO ST. J. CRIM. L. 275, 279 (2020); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 202 (2020).

goals. While we do not practically expect to reach a consensus regarding the former, we identify at least two goals that receive meaningful support and can illustrate our points: *first*, narrowing the scope and presence of state-led punitive criminal legal processes, and *second*, the need to preserve fact-based criminal legal system in order to advance truth and accuracy.

As for the first goal, we are witnessing processes occurring both in the physical and virtual spaces that wish to offer alternatives to traditional punitive criminal proceedings. In the formal-physical criminal legal system, it is evident that while the adversarial, punitive criminal legal process is still the main “door”⁷⁷ of the criminal legal system, it is no longer the only state-led response to crime.⁷⁸ Over the last decades, in part due to the realization of the system’s failed and often inhumane treatment of both offenders and victims, particularly along racial lines, we have noticed a variety of new or alternative processes. Some of these are more rehabilitative, nonpunitive, and collaborative (e.g., problem-solving court processes),⁷⁹ and others are restorative and community-oriented (e.g., restorative justice processes that are embedded within the formal system) that have emerged and assimilated in the legal system.⁸⁰ This phenomenon, also termed “multi-door criminal justice,”⁸¹ highlights that adversarial, punitive justice has started losing its monopoly as the only state-led response to crime. This explains why today, we can find a less monolithic approach in the criminal legal system regarding the criminal processes that should be utilized in various circumstances. In similar veins, policies and laws aiming to reduce the state’s involvement in criminalizing certain behaviors also got traction.⁸²

In virtual spaces such as social media discourse, we can also notice a few parallel conflicting narratives developing in the discussion on similar issues. In addition to the punitive-, retributive-oriented discourse, which calls for increased prosecution and more severe punishments, several additional conversations also aim to reduce the utilization of the traditional criminal legal process. Some of these conversations are more restorative and rehabilitative and call for using “softer” dispute resolution measures, either state or non-state-led.⁸³ At the same time, we see more conversations calling to abolish the current system altogether.⁸⁴ A fascinating example of these parallel discourses has been manifested around #MeToo. Whereas some called for increased punitivism against sex

77. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1799 (2012).

78. RACHEL PORTER, SOPHIA LEE & MARY LUTZ, *BALANCING PUNISHMENT AND TREATMENT: ALTERNATIVES TO INCARCERATION IN NEW YORK CITY* 3–7 (2011).

79. *Id.*

80. Hadar Dancig-Rosenberg & Tali Gal, *Restorative Criminal Justice*, 34 CARDOZO L. REV. 2313, 2314–15 (2013).

81. Hadar Dancig-Rosenberg & Tali Gal, *Multi-door Criminal Justice*, 22 NEW CRIM. L. REV. 347 (2019); Richard A. Bierschbach, *Equality in Multi-Door Criminal Justice*, 23 NEW CRIM. L. REV. 60, 61–62 (2020).

82. For example, some initiatives led by progressive prosecutors. And see, e.g., Itay Ravid and Amit Haim, *Progressive Algorithms*, 12 U.C. IRVINE L. REV. 527 (2022).

83. Gruber, *supra* note 45.

84. See Thomas Ward Frampton, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2010, 2014 (2021).

crimes perpetrators, others pointed to the need to adopt different approaches, emphasizing the concerns of utilizing penal populism to strengthen a harsh criminal legal system.⁸⁵

Witnessing such parallelism between the physical and the virtual emphasizes the potential strength of fostering interaction between the two to advance the shared goal of reducing the presence of the formal, punitive criminal legal system. We further argue that there is, in fact, an interplay between those trends that should be recognized and, to a certain extent, encouraged as a broader process aiming to achieve that goal. The interplay seems rational: trends in the criminal legal system do not stay hidden from the public. The increase in conversations and formal adoptions of laws and policies that are nonadversarial and nonpunitive, alongside discourse in the formal system about the need for criminal legal reform, reaches people's ears and internalizes their attitudes regarding issues related to the use of state power in order to punish. These attitudes are reflected through laypeople's engagement—the way they write their posts online and their content, which in turn might affect criminal legal officials who are exposed to the social media discourse and interested to know the public's (their voters) preferences. In this sense, there might be a reciprocal, circular process of effect between trends in both realms: What is going on in the criminal legal system affects laypeople's opinions and expectations >> they, in turn, express their views in virtual spaces >> criminal legal officials are influenced by these opinions >> criminal legal officials and institutions make reforms and promote policies that would satisfy a variety of expectations (punitive and restorative) >> these policies are discussed, again, on social media, and the circle (hopefully) continues. Figure 1 below illustrates this circular process. To that end, the physical and the virtual can develop a healthy, productive relationship.

FIGURE 1: THE CIRCULAR INFLUENCE BETWEEN VIRTUAL AND PHYSICAL SPHERES



85. Gruber, *supra* note 45.

As for the second goal, which is preserving a fact-based, truth-seeking criminal legal system, we see some intriguing developments related to the status and importance of facts in both the criminal legal system and the virtual world. In the criminal legal system, we have seen an overall decline in the traditional fact-finding mission of the adversarial system. The phenomenon of the “vanishing trial,” according to which evidentiary hearings seldom occur, and instead, most cases end in guilty pleas, most strikingly represents this already decades-long trend.⁸⁶ This current reality of criminal trials undermines the fact-finding role of everyone involved in the process—from prosecutors and defense lawyers to judges, thus weakening the importance of factual truth in favor of the legal truth or other interests such as efficiency. In social media, we have faced a somewhat parallel reality in which facts, empirics, and evidence have ceded their power to personal opinions, fake news, and manipulated information. While much of this phenomenon’s virtual presence can be attributed to socio-technological advancements that allowed sophisticated data manipulation, it has long sailed out of the virtual waters, equally taking over physical spaces. As a result, this era has been termed by many as the “post-truth” era.⁸⁷ Is there any connection between these two trends, that is, in the reduction in factual truth-seeking in the “physical” criminal process and the broader reduction in the value of facts in virtual spaces? Is there any chance for mutual effects between the physical and virtual worlds in this context?

We argue that, potentially, the answer is yes. As noted, with time, we see a constant reduction in the value of truth and, as a result, in the accountability of those we expect to adhere to it. At the same time, in both physical and virtual spaces, we also witness different processes in which people have called for adopting mechanisms to counteract the rapid expansion of distorted, fake, and manipulated facts, threatening to take control of the way we consume and process information. As such, we can see, for example, increased fact-checking endeavors by digital platforms to enhance credibility, newspapers adopting fact-checking policies, and additional mechanisms aspiring to re-establish the quest for “real” evidence. We can further envision additional evidence-gathering mechanisms that offer an alternative (or at least complement) to traditional police-led processes. These tendencies offer another illustration in which the physical and the virtual offer a hybrid (and collaborative) process to achieve a more accurate, truth-seeking criminal legal process. Furthermore, while still speculative, we cannot but wonder whether virtual platforms’ calls to advance truth-seeking and evidence-based exploration might affect broader truth-seeking conversations in physical spaces that can tackle additional core components of criminal processes such as investigations or even plea bargains, which—as we just discussed—can be perceived as antithetical to that mission.

86. Robert P. Burns, *What Will We Lose if the Trial Vanishes*, 37 OHIO N.U. L. REV. 575, 593 (2023).

87. See, e.g., Robert V. Kozinets, Andrew D. Gershoff & Tiffany Barnett White, *Trust in Doubt: Consuming in a Post-Truth World*, 5 J. ASS’N FOR CONSUMER RSCH. 130 (2020).

V. CONCLUSION

In this short Essay, we investigated a phenomenon we termed “virtual criminal law dualism,” which is the interplay between virtual and physical spaces in the criminal realm. A new, potentially collaborative space in which the criminal legal system operates, negotiates, and (hopefully) evolves. We identified the different facets of this phenomenon and offered some thoughts as to the great potential—and risks—of these facets. Each of the symposium contributions also shed light on some of these facets, highlighting the promise and perils this phenomenon entails. We hopefully convinced our readers that while physical or virtual spaces are a descriptively important phenomenon that deserves deeper conceptualization, they do not have a normative value in and of themselves. Instead, as we argue, they should be recognized for their potential to work in concert to advance broader goals of the criminal legal system, which cannot be achieved solely through physical or virtual spaces. Tackling the complex challenges the criminal legal system faces thus requires breaking the traditional dichotomy between physical and virtual spaces. It may sound abstract or idealistic, but it is happening around us all day, every day, and the criminal legal system shouldn’t stay behind.