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# Play Harms: Liability and the Play Conceit in Virtual Worlds

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# Play Harms: Liability and the Play Conceit in Virtual Worlds

Alec Levine\*

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## I. INTRODUCTION

On December 18, 2006, CNET News went live from their bureau in Linden with an interview of Anshe Chung.<sup>1</sup> Chung, a millionaire real estate magnate, had recently appeared on the cover of *Business Week* and earned comparisons to Trump and Rockefeller.<sup>2</sup> Before she could answer a question about her business, the interview was disrupted by a parade of giant, wriggling phalluses.<sup>3</sup> Ordinarily, such a spectacle would defy the laws of physics—but laws do not apply to Linden in an ordinary way. Linden is, in a physically literal sense, only a computer program, and Anshe Chung a computer character or “avatar.”<sup>4</sup> Chung’s real estate empire was built from coding that does not exist apart from a “virtual world” (VW) called *Second Life*.<sup>5</sup> Chung’s bank account, however, was grounded in the real world of dollars, and her image transcended *Second Life* to grace the cover of *Business Week* because she earned over \$1 million by selling land that existed only in the fantasy space of a VW.<sup>6</sup> Chung was the face of an emerging marketplace.

Eventually, the parade of phalluses stopped on its own accord, and onlookers were treated to something worse. Photos of Ailin Graef, the human player behind the avatar Anshe Chung, drifted through the interview site like snowflakes; they had been altered to portray Graef holding a giant phallus.<sup>7</sup> For a moment, the fourth wall of *Second Life* was shattered. It was clear to the residents of Linden what had happened. The digital attack was obviously the handiwork of griefers, intentionally disruptive players who are sometimes described as the “barbarians,” “psychotics,” or “terrorists” of VWs.<sup>8</sup>

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1. Daniel Terdiman, *CNET to Interview ‘Second Life’ Land Baron Anshe Chung*, CNET NEWS, Dec. 18, 2006, [http://news.cnet.com/8301-10784\\_3-6144558-7.html](http://news.cnet.com/8301-10784_3-6144558-7.html) [hereinafter Terdiman, *Anshe Chung*] (on file with the *McGeorge Law Review*).

2. Bettina M. Chin, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 BROOK. L. REV. 1303, 1306 (2007); Julian Dibbell, *Mutilated Furries, Flying Phalluses: Put the Blame on Griefers, the Sociopaths of the Virtual World*, WIRED MAG., Jan. 18, 2008, [http://www.wired.com/gaming/virtualworlds/magazine/16-02/mf\\_goons](http://www.wired.com/gaming/virtualworlds/magazine/16-02/mf_goons) (on file with the *McGeorge Law Review*).

3. Stephen Hutcheon, *Second Life Miscreants Stage Members-Only Attack*, SYDNEY MORNING HERALD, Dec. 21, 2006, <http://www.smh.com.au/news/web/good-grief-bad-vibes/2006/12/21/1166290662836.html> (on file with the *McGeorge Law Review*). Footage of the attack has circulated on the Internet ever since, despite Chung’s complaints and the threat of legal action. *Id.* Daniel Terdiman, *The Legal Rights to Your ‘Second Life’ Avatar*, CNET NEWS, Jan. 5, 2007, [http://news.cnet.com/2100-1047\\_3-6147700.html?part=rss&tag=2547-1\\_3-0-20&subj=news](http://news.cnet.com/2100-1047_3-6147700.html?part=rss&tag=2547-1_3-0-20&subj=news) [hereinafter Terdiman, *Legal Rights*] (on file with the *McGeorge Law Review*).

4. Hutcheon, *supra* note 3.

5. *Id.*

6. Terdiman, *Anshe Chung*, *supra* note 1.

7. Terdiman, *Legal Rights*, *supra* note 3.

8. JESSICA MULLIGAN & BRIDGETTE PATROVSKY, *DEVELOPING ONLINE GAMES: AN INSIDER’S GUIDE* 218 (2003); Dibbell, *supra* note 2.

The attack on Chung's interview illustrates a significant tension in VWs. VWs are increasingly used "for far more than play";<sup>9</sup> they support communities and economic activity.<sup>10</sup> VWs share an uncertain boundary with the real world, which creates regulatory challenges for both.<sup>11</sup> Although grieving attacks occur in the context of play, a real-world cognate to a grieving attack would be a node of tort and criminal liability.<sup>12</sup> Grieving attacks may inflict financial and emotional injury that spill over into a player's real life,<sup>13</sup> and it is only a matter of time before a plaintiff attempts to redress one of these injuries in court. When that day comes, the plaintiff will find himself in the position of challenging conduct that occurred in what many people would call a game.

VWs are play spaces, and should remain so lest they become "just another extension of the real world."<sup>14</sup> Grieving attacks are generally in-world nuisances that are best dealt with by VW administrators. The law may, however, ultimately guarantee the integrity of VWs as play spaces. Grieving attacks that spill out of the play conceit, and into the real world, may be addressed through real-world law. Drawing the distinction between nonjusticiable nuisance and justiciable offense is the subject of this Comment.

Part II is an introduction to VWs as communities and markets. Next, Part III examines the phenomenon of grieving in VWs. Part IV explores the current VW system of exclusive in-world regulation and concludes that it fails to deter or redress the harms inflicted by grieving attacks. Part V examines the intersection of grieving attacks and the "magic circle" of VWs and argues injuries that are consistent with the magic circle should not be actionable under real-world law.<sup>15</sup> To determine the applicability of the "magic circle," would-be regulators should balance a player's interest in pursuing a legitimate game objective against the other player's reasonable expectations of conduct under the license agreement. Finally, Parts VI and VII consider possible remedies for harms against which the play conceit does not. Part VI suggests that the values of VWs justify the

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9. F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 305 (2004); Jack M. Balkin & Beth Simone Noveck *Introduction to THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 3 (Jack M. Balkin & Beth Simone Noveck eds., 2006).

10. See Viktor Mayer-Schönberger & John Crowley, *Napster's Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 NW. U. L. REV. 1775, 1788-90 (2006) (discussing the development of virtual markets and the economic permeability of VWs and the real world).

11. *Id.*

12. See Susan W. Brenner, *Fantasy Crime: The Rule of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 62 (2008) (describing "fantasy crimes," or acts which would clearly be criminal in the real world but not in the fantasy space of VWs).

13. TOM BOELLSTORFF, *COMING OF AGE IN SECOND LIFE: AN ANTHROPOLOGIST EXPLORES THE VIRTUALLY HUMAN* 188 (2008).

14. Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 27 (2004).

15. The "magic circle" marks the privileged social space of a game. As every child knows, the rules of play sometimes trump the rules outside of the game. See generally Jesper Juul, *Keynote Address at the Philosophy of Computer Games Conference: The Magic Circle and the Puzzle Piece* (2008) (transcript available at [http://opus.kobv.de/ubp/volltexte/2008/2455/pdf/digarec01\\_03.pdf](http://opus.kobv.de/ubp/volltexte/2008/2455/pdf/digarec01_03.pdf)) (on file with the *McGeorge Law Review*).

extension of principles of criminal law to grieving attacks. Part VII concludes that limited extension of tort liability in VWs is consistent with the play conceit, if not practical, and provides compensatory mechanisms for the worst attacks.

## II. WELCOME TO THE (VIRTUAL) WORLD

### A. Play Communities

Physically, VWs are computer programs.<sup>16</sup> All that “actually happens” in a VW is an exchange of electronic transmissions between a host server and a player’s computer.<sup>17</sup> The information infrastructure creates the room for a social environment centered on play. The play of a VW may be unstructured or highly structured.<sup>18</sup> Structured VWs present players with predetermined objectives.<sup>19</sup> For example, World of Warcraft offers players fixed quests and opportunities for combat.<sup>20</sup> Unstructured VWs, or “social worlds” like Second Life, are essentially like “playing with LEGOs online,” filtered through the experience of a social networking site.<sup>21</sup> In these VWs, game designers do not define the environment or objectives of play so much as enable the players to do so.<sup>22</sup> Structured or not, VWs are marketed and sold as games.<sup>23</sup>

When a player purchases the program to run a VW, he or she buys access to a simulated, persistent environment that is as much a game as a place.<sup>24</sup> VWs continue in the absence of players; the program behind a VW “remembers the location of people and things, as well as the ownership of objects” and creates the illusion of continuity.<sup>25</sup> If VWs are games, they are games without winners or

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16. See Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 U. CHI. LEGAL F. 415, 417-18 (2008) (describing the “physical perspective” on VWs, which focuses on what “actually happens”). From the perspective the player, however, logging on to a VW amounts to entering a virtual environment. *Id.* VWs evolved from online games and inherited their simulated environments. *Id.*; see Brenner, *Fantasy Crime*, *supra* note 12, at 21-23 (describing the evolution of VWs from text-based games to immersive graphic environments).

17. See Kerr, *supra* note 16, at 418 (describing the physical process of one’s personal computer connecting to a server over the Internet).

18. Bryan T. Camp, *The Play’s the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 4 (2007).

19. *Id.*

20. *Id.*

21. Terdiman, *Legal Rights*, *supra* note 3; see also Leonard T. Nuara et al., *No Man Is an Island, Not Even in a Virtual World*, 943 PLI/PAT 523, 535 (2008) (“[Many] of the most popular [VWs] are more fairly characterized as social networking sites . . .”).

22. Camp, *supra* note 18, at 4.

23. Betsy Book, *Moving Beyond the Game: Social Virtual Worlds*, Paper Presented at State of Play Conference, New York Law School (Oct. 2004), at 11, available at [http://www.virtualworldsreview.com/papers/BBook\\_SoP2.pdf](http://www.virtualworldsreview.com/papers/BBook_SoP2.pdf) (on file with the *McGeorge Law Review*).

24. Lastowka & Hunter, *supra* note 9, at 300.

25. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, 2 THE GRUTER INSTITUTE WORKING PAPERS ON LAW, ECONOMICS, AND EVOLUTIONARY BIOLOGY 1, 6 (2001), available at <http://www.bepress.com/giwp/default/vol2/iss1/art1> [hereinafter Castronova, *Virtual Worlds*].

losers in the sense that the play is ongoing. A player's short term objectives may be frustrated, but he only "loses" if he withdraws from the play community or stops paying the subscription fees that most providers charge.<sup>26</sup>

VWs support large play communities. Thousands of players may simultaneously share a virtual environment.<sup>27</sup> "Millions of people spend a large portion of their waking lives in virtual worlds."<sup>28</sup> Over 20 million people participate in VWs, and by 2011 roughly 80 percent of Internet users are projected to have virtual identities.<sup>29</sup> The simulated space of WOW had roughly 11 million residents as of October 28, 2008—approximately the same as Cuba.<sup>30</sup>

"Avatars", or graphic proxies, provide players with an opportunity to purposefully project an identity of their choosing, mediate both social interaction and business in VW communities.<sup>31</sup> Players may form powerful attachments to virtual communities.<sup>32</sup> Behind every avatar there is a real person, and the venue of VWs does not trivialize their social interaction.<sup>33</sup>

### B. Play Markets, Real Money

Despite their background in play, many VWs function "more as extensions of reality than escapes from it."<sup>34</sup> The putative economies of VWs are not fantasy.

26. Lastowka & Hunter, *supra* note 9, at 300.

27. Castronova, *Virtual Worlds*, *supra* note 25, at 8.

28. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CAL. L. REV. 1, 9 (2004).

29. Edward Castronova, *A Cost-Benefit Analysis of Real-Money Trade in the Products of Synthetic Economies*, 8 INFO (Oct. 2006), available at <http://ssrn.com/abstract=917124> [hereinafter Castronova, *Cost-Benefit Analysis*] (on file with the *McGeorge Law Review*); see also Erin Anderssen, *Frontier Justice: Can Virtual Worlds Be Civilized?*, GLOBE & MAIL, Sept. 7, 2007, <http://www.theglobeandmail.com/servlet/story/RTGAM.20070907.wvirtual0908/BNStory/Technology/home/?pageRequested=allVW> (on file with the *McGeorge Law Review*).

30. Press Release, Blizzard Entertainment, World of Warcraft Surpasses 11 Million Subscribers World Wide (Oct. 28, 2008), <http://www.blizzard.com/us/press/081028.html> (on file with the *McGeorge Law Review*); CIA.gov, Central Intelligence Agency World Factbook: Cuba, <https://www.cia.gov/library/publications/the-world-factbook/geos/cu.html> (last visited Dec. 30, 2008) (on file with the *McGeorge Law Review*).

31. See generally Wikipedia, Avatar (Virtual Reality), [http://en.wikipedia.org/wiki/Avatar\\_\(virtual\\_reality\)](http://en.wikipedia.org/wiki/Avatar_(virtual_reality)) (last visited Sept. 25, 2010) (on file with the *McGeorge Law Review*) (defining "Avatar" as an incarnation of a real-world individual inside a virtual space). Players grow attached to their avatars and "may invest a great deal of time and effort in building up their identity and their reputation." Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2066 (2004).

32. Jack Balkin, *Commodifying Virtual Worlds*, <http://balkin.blogspot.com/2005/01/commodifying-virtual-worlds.html> (last visited Sept. 25, 2010) (on file with the *McGeorge Law Review*) (players "form virtual communities that are immensely valuable to them").

33. See Ralph Koster, *A Declaration of the Rights of Avatars*, (Aug. 27, 2000), <http://www.raphkoster.com/gaming/playerrights.shtml> (on file with the *McGeorge Law Review*) ("[Avatars] are the manifestation of actual people in an online medium, and . . . their utterances, actions, thoughts, and emotions should be considered to be as valid as the utterances, actions, thoughts, and emotions of people in any other forum, venue, location, or space."). But see Wikipedia, Internet Bot, [http://en.wikipedia.org/wiki/Internet\\_bot](http://en.wikipedia.org/wiki/Internet_bot) (last visited Sept. 20, 2010) (on file with the *McGeorge Law Review*) (describing "bots," computer programs that may simulate a human player).

34. Book, *supra* note 23, at 11.

Some unstructured VWs, like Second Life, are openly marketed as economic platforms where trade is encouraged.<sup>35</sup> Even structured VWs have become economic platforms despite strict rules to the contrary.<sup>36</sup> As early as 1987, players in VWs began to participate in real-money trades (RMTs) to exchange items in the game for outside money.<sup>37</sup> In EverQuest, for example, a player willing to part with forty dollars outside the game may outfit his avatar with a “blood-bladed dagger.”<sup>38</sup> RMTs are the norm within the culture of most VWs.<sup>39</sup> Moreover, the in-world currency of many VWs is a far cry from monopoly money. Some VW currencies have an informal “black market” exchange rate with the dollar, while other currencies, like Second Life’s Linden, have formal exchange rates that are regulated by game administrators.<sup>40</sup>

The scale of economic activity in VWs is difficult to measure or dismiss. In 2005, the global level of RMTs was over \$100 million and by some estimates as high as \$1 billion.<sup>41</sup> Even a figure that falls between these two extremes, such as \$300 million, is double what VWs themselves generated in annual subscription revenue in 2002.<sup>42</sup> In 2001, Norrath alone, the on-line environment of EverQuest, was estimated to be as economically productive as the sovereign nation Bulgaria.<sup>43</sup> VW markets are not a trivial phenomenon,<sup>44</sup> and no one knows better

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35. Terdiman, *Legal Rights*, *supra* note 3 (describing “the general theory (in Second Life) is that you own what you create.”).

36. *See id.* (“In most cases, publishers of online games include in their terms of service a prohibition on so-called real-money trades”); *see also* World of Warcraft Terms of Use Agreement, ¶ 7, <http://worldofwarcraft.com/legal/termsofuse.html> (last visited Mar. 1, 2009) (on file with the *McGeorge Law Review*) (“NOTWITHSTANDING ANYTHING TO THE CONTRARY HEREIN, YOU ACKNOWLEDGE AND AGREE THAT YOU SHALL HAVE NO OWNERSHIP OR OTHER PROPERTY INTEREST IN THE ACCOUNT, AND YOU FURTHER ACKNOWLEDGE AND AGREE THAT ALL RIGHTS IN AND TO THE ACCOUNT ARE AND SHALL FOREVER BE OWNED BY AND INURE TO THE BENEFIT OF BLIZZARD.”). Rules aside, virtual merchants trade World of Warcraft items for dollars at <http://www.ige.com>.

37. Castronova, *Cost-Benefit Analysis*, *supra* note 29, at 2.

38. Mike Musgrove, *Virtual Games Create a Real World Market*, WASH. POST, Sept. 17, 2005, at A1.

39. Castronova, *Cost-Benefit Analysis*, *supra* note 29, at 14; *see also* RICHARD A. BARTLE, THE PITFALLS OF VIRTUAL PROPERTY 3 (Themis Group 2004), available at <http://www.themis-group.com/uploads/Pitfalls%20of%20Virtual%20Property.pdf> (“[Trading] in virtual property is already an established phenomenon.”).

40. Daniel Terdiman, *Virtual Gaming’s Elusive Exchange Rates*, CNET NEWS, Aug. 5, 2005, [http://news.cnet.com/Virtual-gamings-elusive-exchange-rates/2100-1043\\_3-5820137.html](http://news.cnet.com/Virtual-gamings-elusive-exchange-rates/2100-1043_3-5820137.html) (on file with the *McGeorge Law Review*); *see also* Bragg v. Linden Research, Inc., 487 F. Supp. 2d 593 n.5 (E.D. Pa. 2007) (“Although participants purchase virtual property using the virtual currency of ‘lindens,’ lindens themselves are bought and sold for real U.S. dollars. Linden maintains a currency exchange that sets an exchange rate between lindens and U.S. dollars. Third parties, including ebay.com, also provide additional currency exchanges.”); Second Life, Currency Exchange, <http://secondlife.com/whatis/currency> (last visited Dec. 25, 2008) (on file with the *McGeorge Law Review*) (listing the current Linden exchange rate).

41. Castronova, *Cost-Benefit Analysis*, *supra* note 29, at 2-4.

42. Julian Dibbell, *The Unreal Estate Boom*, WIRED MAG., Jan. 2003, <http://www.wired.com/wired/archive/11.01/gaming.html> (on file with the *McGeorge Law Review*).

43. Castronova, *Virtual Worlds*, *supra* note 25, at 44-47 (Castronova’s subsequent studies lowered the estimate, finding the cumulative gross domestic product of all VWs closer to Namibia); Mark Ward, *Virtual Gaming Worlds Overtake Namibia*, BBC NEWS, Aug. 19, 2004, <http://news.bbc.co.uk/2/hi/technology/3570224.stm> (on file with the *McGeorge Law Review*).

than the members of virtual communities. The synthetic economies of VWs have produced real-world fortunes. Anshe Chung accumulated over \$1 million through trading land that only virtually exists.<sup>45</sup> Moreover, VWs have spawned real-world companies, like IGE, whose only business is to “farm” and “trade” virtual items for RMTs.<sup>46</sup>

### C. *Playing Regulator*

VWs are increasingly complicated games that may also function as communities and markets. They call for complicated rules, and the governance of these environments is a work in progress. Laws in the real world do not hold designers responsible for policing their VWs.<sup>47</sup> They do not need to. Game administrators take responsibility for policing and ordering VWs by virtue of imposing unilateral regulations.<sup>48</sup> Because VWs are computer programs, coding is a regulatory tool.<sup>49</sup> Game administrators can alter the program that evokes the VW and make whatever changes they wish to the game environment.<sup>50</sup> Coding can, for example, filter the language used in a VW and prohibit profanity.<sup>51</sup> Regulating conduct in a VW is, however, not merely a matter of perfecting computer coding. Coding alone cannot control virtual conduct;<sup>52</sup> it is a blunt tool. In *Second Life*, for example, coding grants private landowners enough control over their land to prevent many forms of anti-social attacks, at the cost of preventing many legitimate in-game activities.<sup>53</sup>

44. Ward, *supra* note 43.

45. Rob Hof, *Second Life's First Millionaire*, BUSINESSWEEK, Nov. 26, 2006, available at [http://www.usbusinessweek.com/the\\_thread/techbeat/archives/2006/11/second\\_lifes\\_fi.html](http://www.usbusinessweek.com/the_thread/techbeat/archives/2006/11/second_lifes_fi.html) (on file with the *McGeorge Law Review*).

46. BARTLE, *supra* note 39, at 2.

47. See Walaika Haskins, *Who Polices Virtual Worlds?*, LINUX INSIDER, July 31, 2008, <http://www.ecommercetimes.com/story/64002.html> (on file with the *McGeorge Law Review*) (“Congress has said, for the most part, they are not responsible for policing their own environments. It’s totally up to them to decide how little or how much they want to do.” (quoting Eric Goldman)).

48. Bartle, *supra* note 14, at 19.

49. Balkin, *supra* note 31, at 2049.

50. *Id.*

51. Blizzard Support, Harassment Overview, <http://us.blizzard.com/support/article.xml?articleId=20455> (last visited Apr. 13, 2010) (on file with the *McGeorge Law Review*).

52. Bartle, *supra* note 14, at 25-26 (“[There] are some things that virtual world developers simply cannot stop using software alone . . . a virtual world’s code cannot hope to trap . . . antisocial behavior—even though it arises inside the virtual world.”).

53. Posting of dandelion to <http://metaverse.acidzen.org/2007/how-to-kill-a-griever> (Dec. 4, 2008) (on file with the *McGeorge Law Review*); see also Mike Sellers, *The Solution to Griefing Is . . . the FBI?*, TERRA NOVA, Dec. 21, 2005, [http://terranovalogs.com/terra\\_nova/2005/12/the\\_solution\\_to.html](http://terranovalogs.com/terra_nova/2005/12/the_solution_to.html) (on file with the *McGeorge Law Review*) (describing how changes to script options meant to stifle griefing attacks prevented legitimate in-game activity and were subsequently abandoned).



Beyond coding, game administrators regulate VWs through rules of play and contractual agreements.<sup>54</sup> These rules are memorialized in end user license agreements (EULA) or term of service agreements (TOS).<sup>55</sup> Players must assent to these agreements before accessing the VW for the first time, typically through clicking “I agree” as they begin play. These so-called “click-wrap” contracts have proven controversial, if enforceable, in other contexts.<sup>56</sup> The legality of VW EULAs and TOS contracts has not been definitively litigated, though some commentators suggest that EULAs are as unenforceable as contracts of adhesion.<sup>57</sup> The legal status of the “virtual property” at the heart of RMTs has not been litigated, but EULAs presume to address the issue. The industry standard is to disclaim any and all player property interests through EULAs.<sup>58</sup> If courts recognize virtual property as an important interest, EULAs may ultimately prove unenforceable.<sup>59</sup> Some VW designers, notably Linden Labs, expressly recognize in their EULAs players’ rights in virtual property. These rights are, however, terminable upon a violation.<sup>60</sup>

Designers have struggled to find enforcement mechanisms for VWs and the regime of code and contracting has yet to meet their inherent challenges.<sup>61</sup> Game administrators may write and enforce the “laws” in VWs, but not outside them, and the border between VWs and the real world is increasingly difficult to draw.<sup>62</sup> Some external legal regulation of VWs may be necessary to protect the interests at stake in both VWs and the real world. However, those who desire regulation the least are the grievers.<sup>63</sup>

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54. Bartle, *supra* note 14, at 26.

55. Lastowka & Hunter, *supra* note 9, at 309.

56. See *Caspi v. Microsoft Networks*, 732 A.2d 528 (N.J. Super. Ct. App. Div. 1997) (finding that an MSN customer agreed to an arbitration clause in the TOS by clicking “I agree”); see also *Scott v. Bell Atlantic Corp.*, 726 N.Y.S.2d 60 (N.Y. App. Div. 2001) (finding a click-wrap agreement valid despite the discrepancy between hyperbolic web advertising and disclaimers accompanying the agreement).

57. See Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1083 (2005) (“[EULA] provisions surpass the usual abuses of contracts of adhesion.”); see also *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (finding the Second Life’s TOS to be an adhesion contract and finding its arbitration clause unenforceable due to procedural and substantive unconscionability, but not addressing the general validity of other TOS clauses). But see Erez Reuvenai, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 290 (2007) (“EULAs are likely valid as a matter of contract law and enforceable against a virtual-world participant who assents to the EULA by clicking ‘OK’ upon loading the game.”).

58. See *World of Warcraft, Terms of Use Agreement*, ¶¶ 4-7, <http://www.worldofwarcraft.com/legal/termsofuse.shtml> (last visited Apr. 13, 2010) (on file with the *McGeorge Law Review*) [hereinafter *WOW TOS*] (reserving all rights and title to in-game content, including objects).

59. Balkin, *supra* note 31, at 2070.

60. *Second Life, What Are IP Rights?*, <http://secondlife.com/whatis/iprights.php> (last visited Dec. 25, 2008) (on file with the *McGeorge Law Review*).

61. Mayer-Schönberger & Crowley, *supra* note 10, at 1799.

62. See Balkin, *supra* note 31, at 2059 (noting the permeable boundary between game space and real space in VWs).

63. BENJAMIN TYSON DURANSKE, *VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS* 61 (2008).

## III. GRIEFERS

A. *Grief Play*

When the word “griever” outgrows VWs, it will be a synonym for spoilsport.<sup>64</sup> Unlike players who may play disruptively on occasion or misbehave in awkward virtual adolescence and later outgrow it, griefers are self-consciously aware of their status as spoilsports.<sup>65</sup> They play to disrupt and ruin the play of others,<sup>66</sup> and their conscious objective is to disrupt and harass.<sup>67</sup> They do not so much participate in the play conceit of VWs, so much as attack it.

Unlike a criminal who exploits a VW for financial advantage, a griever “does not profit in any way” from his actions.<sup>68</sup> Unlike a legitimate player, a griever does not advance in-game objectives through their actions.<sup>69</sup> Rather, for a griever, the attack and its fallout is reward enough.<sup>70</sup> Their attacks are animated by an ironic catchphrase that doubles as nihilistic philosophy: “the internet is serious business.”<sup>71</sup> Nothing that happens online is meaningful, or above a mean laugh—especially those who think otherwise.<sup>72</sup>

Though often attributable to individual malcontents, griefing is increasingly not an “isolated nuisance.”<sup>73</sup> Griefers gravitate into “guilds” of like-minded

64. See JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE* 30 (Taylor & Francis 2003) (“[T]he spoil-sport shatters the play-world itself. By withdrawing from the game he reveals that relativity and fragility of the play-world in which he had temporarily shut himself with others. He robs play of its illusion . . .”).

65. See Holin Lin & Chuen-Tsai Sun, *The ‘White-eyed’ Player Culture: Grief Play and Construction of Deviance in MMORPGs*, Proceedings of DiGRA 2005 Conference: Chanings View-Worlds in Play, 4 (on file with the *McGeorge Law Review*).

66. MULLIGAN & PATROVSKY, *supra* note 8, at 218; see also DURANSKE, *supra* note 63, at 61 (defining “griefers” as players who “participate in virtual worlds and games for the sole purpose of causing mayhem and disrupting other user’s experiences” and “griefing” as “playing a game or participating in a virtual world simply to cause grief for other players through harassment”).

67. See Chek Yang Foo & Elina M. I. Koivisto, *Grief Player Motivations*, Paper Presented at Other Players Conference 2 (2004), available at <http://itu/dl/op/proceedings.htm> (on file with the *McGeorge Law Review*) (discussing the role of intent in defining grief play); Dibbell, *supra* note 2 (describing the conscious objective of griefers as to “[shatter] the world of play itself”). But see Posting of Richard Bartle, *What to Call a Griever*, [http://terranova.blogs.com/terra\\_nova/2007/10/what-to-call-a.html](http://terranova.blogs.com/terra_nova/2007/10/what-to-call-a.html) (Oct. 23, 2007) (on file with the *McGeorge Law Review*) (discussing the broad use of “griefing” to describe unintentional acts); Eve Online Support, *Grief Play*, <http://support.eve-online.com/Pages/KB/Article.aspx?id=336> (last visited Apr. 13, 2010) [hereinafter *Eve Online*] (on file with the *McGeorge Law Review*).

68. *Eve Online*, *supra* note 67; see also Farnaz Alemi, *An Avatar’s Day in Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games*, 2007 UCLA J.L. & TECH. 6, 69 (2007) (describing a sham virtual property transaction in Second Life that defrauded players of \$10,000).

69. *Eve Online*, *supra* note 67.

70. See Dibbell, *supra* note 2 (describing a common explanation of griefing as doing it for laughs, or “lulz”).

71. *Id.*

72. *Id.*

73. Martin Davies, *Gamers Don’t Want Any More Grief*, *GUARDIAN*, June 15, 2006, available at <http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>; see also BOELLTORFF,

players, such as the “Goonswarm” and “Patriotic Nigras”.<sup>74</sup> Though griefers make up a relatively small portion of virtual communities, perhaps three percent,<sup>75</sup> they are concentrated and co-operative enough to wreak virtual havoc with their attacks. The Patriotic Nigras, for example, at one point had at least 150 active members participating and cooperating in their attacks on Second Life.<sup>76</sup> Griefers are increasingly less individual miscreants and more an alternative internet culture, complete with its own “in-jokes, code words, taboos, and an increasingly articulate sense of purpose.”<sup>77</sup> In the sense that griefers are well organized and have consistent, if deviant, behavioral codes, it may be fitting to analogize them to virtual gangs.

Griefing was well known to virtual communities long before it was named.<sup>78</sup> It may be an inevitable fact of virtual life. As the number of users in a computer network increases, the “probability of [griefing] ‘attacks’ approaches certainty.”<sup>79</sup> The number of ways to spoil the play of a VW are limited only by the VW itself and the griever’s imagination. Increasingly, these methods take on legal implications that threaten the status of VWs as play spaces more than the commodification of virtual worlds themselves.

### B. *The Griever’s Tool Kit*

A griefing attack may be described in three elements: a griever commits an intentional act in the VW, which causes other players to enjoy the game less, and the griever enjoys the act.<sup>80</sup> This broad description glosses over the reality that griefing attacks are not equally objectionable. Griefing attacks are most objectionable when the harm they inflict transcends the game play of a VW. VWs share an uncertain boundary with the real world, and harms inflicted in VW play spaces may spill over into real life.<sup>81</sup> Play-spoiling stunts give rise to legal implications when there is more at stake than play.

The potential for a griefing attack to spill out of the VW and into a player’s life is limited by the physics of individual VWs and whatever situations the setting griefers find in-game to exploit.<sup>82</sup> In highly structured VWs, like Toontown Online, griefers must be content to “spam” limited dialogue options

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*supra* note 13, at 118-95 (discussing how griefing is not an individual act but connected to a “griever community”).

74. Dibbell, *supra* note 2.

75. Foo & Koivisto, *supra* note 67, at 246.

76. Dibbell, *supra* note 2.

77. *Id.*

78. See *id.* (“[E]ven before it had a name, grieverlike behavior was familiar in prehistoric text-based virtual worlds . . . where joyriding invaders visited “virtual rape” and similar offenses on the local populace.”)

79. Sellers, *supra* note 53.

80. Foo & Koivisto, *supra* note 67, at 245.

81. Mayer-Schönberger & Crowley, *supra* note 10, at 1789 (noting that VWs share a permeable boundary with the real, despite attempts to limit spill-over).

82. Foo & Koivisto, *supra* note 67, at 1.

and sabotage the game-related objectives of other players.<sup>83</sup> Less structured VWs, with more open socialization, create opportunities for communication based harassment and abuse.<sup>84</sup> Forms of real-world harassment easily translate in VWs and may spill outside the game because VWs facilitate social environments.<sup>85</sup>

Griefing is a fact of virtual life in all VWs, but unstructured VWs like Second Life are most vulnerable and present a new frontier in troublemaking potential.<sup>86</sup> In these VWs, the line between virtual and reality is most permeable, and griefing has the most potential to inflict a harm that transcends play. Griefing often amounts to defacing attacks on a player's in-game property.<sup>87</sup> Grieferers may delete items or information from a player's virtual space or an avatar's inventory.<sup>88</sup> Alternately, grieferers may exploit the open coding of certain VWs and add code rather than delete it. In one notable example, grieferers added digital fecal matter and racially charged imagery to former presidential candidate John Edward's Second Life campaign headquarters.<sup>89</sup>

The ultimate tool in the griefer's kit is the "denial of service" attack. The denial of service attack is a hacking problem that transcends VWs to crash computers or separate them from networks.<sup>90</sup> Grieferers have discovered ways to exploit the mechanics of VWs to launch denial of service attacks. In Second Life, for example, grieferers used the open coding of the VW to make self-replicating objects that overloaded the servers and crashed the entire VW—the virtual

83. Robin Torres, *Toontown Online Makes It Harder for Grieferers*, MASSIVELY, July 6, 2008, available at <http://www.massively.com/2008/07/06/toontown-online-makes-it-harder-for-grieferers/> (on file with the *McGeorge Law Review*) (describing the spamming of chat options like "You stink!" and objective spoiling acts like quitting groups as play begins to sabotage them).

84. See Balkin, *supra* note 31, at 2063 (arguing that because all VW conduct is essentially speech, communication based torts like harassment may apply in VWs). For example, World of Warcraft's Barren's chat is a venue legendary for its offensive content. See Posting of Timothy Burke to [http://terranova.blogs.com/terra\\_nova/2006/01/little\\_timmy\\_ub.html](http://terranova.blogs.com/terra_nova/2006/01/little_timmy_ub.html) (Jan. 4, 2006) (on file with the *McGeorge Law Review*) ("Any of us who've played [VWs] actively have a long personal catalogue of . . . griefing. Any given night reading Barrens chat . . . is like an encyclopedia of all the dysfunctions a modern human being can display.").

85. Foo & Koivisto, *supra* note 67, at 4.

86. Nicole Girard, *Griefer Madness: Terrorizing Virtual Worlds*, LINUX INSIDER, Sept. 19, 2007, <http://www.technewsworld.com/rssstory/59401.html> (on file with the *McGeorge Law Review*); Dibbell, *supra* note 2.

87. Eric Reuters, *Rosedale Discloses FBI Griefing Probe to Congress*, SECOND LIFE INSIDER, Apr. 1, 2008, <http://secondlife.reuters.com/stories/2008/04/01/rosedale-discloses-fbi-griefing-probe-to-congress> (on file with the *McGeorge Law Review*).

88. See Simon Canning, *ABC'S Virtual Site 'Griefed'*, AUSTRALIAN, May 23, 2007, available at <http://www.news.com.au/entertainment/story/0,23663,21780235-7486,00.html> (on file with the *McGeorge Law Review*) (describing the aftermath of a griefing attack on ABC Island, a prominent commercial site in Second Life, as a "bombed, cratered mess," where grieferers "obliterated almost every object on the site").

89. Allison Fass, *Sex, Pranks and Reality*, FORBES, July 7, 2007, available at <http://members.forbes.com/forbes/2007/0702/048.html> (on file with the *McGeorge Law Review*). Edwards' campaign hoped to use Second Life as platform for connecting with voters—instead the campaign headquarters became a griefer's canvass. *Id.*

90. Joseph Lo, Denial of Service or "Nuke Attacks", <http://www.irchelp.org/irchelp/nuke/> (last visited Dec. 25, 2008) (on file with the *McGeorge Law Review*).

equivalent of sacking Rome.<sup>91</sup> These techniques describe the current scope of grieving. As VWs develop, griefers will find new tools to exploit.

C. *Griefing's Impact: The Wages of Grief*

After an infamous career among the Patriotic Nigras, a griever known as "N3x15" issued a public apology to the residents of Second Life in which he acknowledged that he had "undoubtedly caused untold amounts of emotional and monetary harm . . . most likely repeatedly."<sup>92</sup> This uncharacteristic expression of remorse offers insight on the impact of grieving. Griefing attacks are meant to ruin play, with the foreseeable consequence of violating a player's emotional integrity; thus, grieving attacks often result in emotional injuries.<sup>93</sup>

Moreover, inasmuch as VWs are economic forums, grieving attacks also inflict financial injuries.<sup>94</sup> Griefing attacks can cause measureable economic harms.<sup>95</sup> At the very least, denial of service attacks harm the synthetic economics of VWs<sup>96</sup> and create lost business opportunities for players and corporate entities alike. In Second Life, for example, anti-commercialization griefers responded to the unwelcome presence of an American Apparel virtual store by shooting the store's customers with avatar-defacing virtual guns.<sup>97</sup> Following the attack, American Apparel closed up shop in Second Life because sales were not significant enough to justify grieving as a price of doing business.<sup>98</sup> Operating a business in Second Life has been compared to "the equivalent of running a field marketing program in Iraq," in large part because of grieving.<sup>99</sup>

Griefing attacks against virtual property take an economic toll. Granted, financial and property harms in VWs are less serious than their real-world

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91. Dibbell, *supra* note 2 (This denial of service attack exploited tools provided by Linden Labs to SL all users); *see also* Sellers, *supra* note 53 (Linden Labs changed Second Life's scripting in response to these attacks, but changed them back in response to the backlash from players who relied on the scripts for legitimate in-game activities).

92. Pixeleen Mistral, *N3x15 Ashamed of PN Griefer Thug Life: Notorious Griefer Issues Public Apology to S[ecund] L[ife] Residents and Linden Lab*, ALPHAVILLE HERALD, Dec. 14, 2008, available at <http://foo.secondlifeherald.com/slh/2008/12/n3x15-no-more-pn-griefer-thug-life.html> (on file with the McGeorge Law Review).

93. BOELLSTORFF, *supra* note 13, at 188; *see also* JULIAN DIBBELL, MY TINY LIFE: CRIME AND PASSION IN A VIRTUAL WORLD 17 (1998) (describing the emotional trauma experienced by the victims of a grieving attack).

94. *See* BOELLSTORFF, *supra* note 13, at 118-95 (stating that financial harm is a consequence of grieving attacks that disrupt business opportunities).

95. *See* Dibbell, *supra* note 2 ("[I]t's anti-civilization . . . it's wrong . . . it costs me hundreds of US dollars.").

96. *See* Nuara et al., *supra* note 21, at 540 (characterizing the prohibition of conduct in violation of a TOS as "essential to the maintenance of an orderly [virtual] society and thus, an effective environment for commerce; not unlike the real world").

97. Fass, *supra* note 89.

98. Anderssen, *supra* note 29.

99. *Id.*

cognates; virtual property is potentially infinite and more easily repaired than real property.<sup>100</sup> Nonetheless, removing a griefer's handiwork can be time consuming and expensive, and it is not difficult to accidentally delete virtual property with a value of hundreds of dollars.<sup>101</sup>

Additionally, griefing damages a VW's game environment by driving away players and their money.<sup>102</sup> Administrators invest significant resources in response to griefing attacks,<sup>103</sup> which are the source of up to twenty-five percent of customer support calls to VW administrators.<sup>104</sup> Currently, the regulatory scheme of VWs does not provide many options for dealing with these complaints.

#### IV. IN-WORLD REGULATION

Presently, griefing attacks are addressed only by game administrators through coding and contracts.<sup>105</sup> However, informal social norms serve as the first line of defense against harassment and griefing attacks.<sup>106</sup> Alternately, VW communities often develop their own enforcement mechanisms for play related conduct. Neither method of in-world regulation has proven successful in confronting the challenges posed by griefing attacks.

##### A. Informal Norms

The rules of a VW are best understood by examining how the game is played.<sup>107</sup> Peer pressure may be a more significant influence on conduct than formal rules, and some norms of player conduct are established by informal social responses, as opposed to carefully crafted codes.<sup>108</sup> Yet, the virtual anonymity of VWs works against the development of social norms. The ubiquity of griefers in VWs may correlate to the anonymity of such environments and the

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100. Brenner, *Fantasy Crime*, *supra* note 12, at 72-73.

101. Anderssen, *supra* note 29.

102. MULLIGAN & PATROVSKY, *supra* note 8, at 218

103. See Steven B. Davis, *The Cost of Insecurity—Griefing: from Anonymity to Accountability*, <http://www.secureplay.com/cheating/griefing-in-games.htm> (last visited Mar. 8, 2009) (on file with the *McGeorge Law Review*) ("The cost of managing griefing can grow rapidly for a game service provider – causing the problem to be neglected, redirecting staff from other assignments, or increasing the total staff cost for the game. For a small game, these costs can be the difference between success and failure. For a large game, these costs are a continual drag on the bottom line.").

104. Davies, *supra* note 73.

105. See Brenner, *Fantasy Crime*, *supra* note 12, at 60 (stating VW harassment is dealt with by game administrators).

106. See Susan W. Brenner, *Toward a Criminal Law for Cyberspace: Product Liability and Other Issues*, 5 U. PITT. J. TECH. L. POL'Y 2, 16 (2005) ("Most of the control exercised in human societies is informal.").

107. Kerr, *supra* note 16, at 422.

108. Charlie Devereux, *Anarchy On-line*, CNN, Aug. 24, 2007, <http://edition.cnn.com/2007/TECH/08/23/virtual.bullying> (on file with the *McGeorge Law Review*); Balkin, *supra* note 31, at 2069.

weak social norms for enforcing behavior.<sup>109</sup> The scope of VWs limits the development of social norms. Anthropologists theorize that one hundred and fifty is the maximum number of people that can maintain a social relationship before “civil society breaks down because individuals no longer feel a connection with other members of the group.”<sup>110</sup> Amidst thousands of virtual strangers represented by avatars, many players may not feel a sense of community. The mechanics of strong VW communities, including “friends lists, reputation stats, and other features both to tie players more closely to the game and create an environment that reduces anonymity for misbehaving players,” may restrict the prevalence of griefing by promoting stronger social norms.<sup>111</sup> Some who have considered the problem of VW social interaction conclude virtual communities should be segmented into smaller numbers so players are exposed and subject to community norms.<sup>112</sup> This would, however, limit one of the most striking features of VWs: massive interactivity.

Moreover, greater exposure to social norms is not likely to deter griefers. Griefers are already exposed to their own parallel development of social norms,<sup>113</sup> which insulate them from the disapproval of virtual communities. Eliciting disapproval from mainstream virtual communities is the main goal of the griever’s play. Social punishments do not deter conduct if the user is not as invested in his reputation as the “mainstream user base.”<sup>114</sup> Ultimately, social norms do not provide social cohesion in VWs or limit misbehavior.<sup>115</sup> Rather, social norms provide the context for griefing attacks. Further, in the aforementioned case of the anti-commercialization griefers who attacked American Apparel, griefing might serve as an assertion of the norms of play. In other words, griefing may be a struggle to define an emerging set of social norms within VWs.

## B. Community Rules

Community-created enforcement mechanisms for confronting griefers are more deliberate than informal social responses. Players may join collectively to pool and share “expertise, resources, moral support and the motivation to prevent

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109. DURANSKE, *supra* note 63, at 188.

110. Devereux, *supra* note 108. For more on “Dunbar’s number theory,” see R.I.M Dunbar, *Co-Evolution of Neocortex Size, Group Size and Language in Humans*, 16 BEHAVIORAL & BRAIN SCIENCES 681-735, available at <http://www.bbsonline.org/documents/a/00/00/05/65/bbs00000565-00/bbs.dunbar.html> (on file with the *McGeorge Law Review*) (arguing that biology limits the number of stable social relationships to 150 at a time).

111. Davies, *supra* note 73.

112. Devereux, *supra* note 108.

113. Dibbell, *supra* note 2.

114. Mayer-Schönberger & Crowley, *supra* note 10, at 1799-1800.

115. See generally Phillip Stoup, *The Development and Failure of Social Norms in Second Life*, 58 DUKE L.J. 311 (2008) (arguing that Second Life will fail to develop social norms that will maximize resident welfare, thus necessitating formal regulatory schemes).

and withstand attacks.”<sup>116</sup> Taken to an extreme, this strategy produces “anti-griefing vigilantes,” or players who report grievers to the game administrators and take in-game measures to stop on-going attacks.<sup>117</sup> The authority of vigilantes to act, as well as their relationship with game administrators, is uncertain.<sup>118</sup> These groups pose problems of their own and are often difficult to distinguish from the grievers they battle.<sup>119</sup> However well organized, “strike-back techniques are not a desirable way to maintain order in cyberspace.”<sup>120</sup>

Alternately, in-world local governments and regulatory bodies comprised of players may be well-suited for confronting the regulatory challenges posed by grievers.<sup>121</sup> Yet the punishments available under this approach, such as “public shaming and direct retribution,”<sup>122</sup> are not likely to deter an anonymous griever who takes pride in disruption and believes the “internet is serious business.”<sup>123</sup> Moreover, they cannot address harms outside the game. Because grievers have no in-game goals, preventing and punishing their behavior through penalties associated with in-game conduct or participation is useless. Ultimately, community enforcement mechanisms face many of the same problems as game administrator enforcement mechanisms.<sup>124</sup>

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116. Brenner, *Toward a Criminal Law*, *supra* note 106, at 31.

117. Peppermint Fizz, *The Justice League of Second Life: Bad Boyz Ignore the Lindens—But Stand Down for Batman*, June 10, 2007, ALPHAVILLE HERALD, [http://www.secondlifeherald.com/slh/2007/06/the\\_justice\\_lea.html](http://www.secondlifeherald.com/slh/2007/06/the_justice_lea.html) (on file with the *McGeorge Law Review*).

118. See Catherine Holahan, *The Dark Side of Second Life*, BUSINESS WEEK, Nov. 11, 2006, available at [http://www.businessweek.com/technology/content/nov2006/tc20061121\\_727243.htm](http://www.businessweek.com/technology/content/nov2006/tc20061121_727243.htm) (on file with the *McGeorge Law Review*) (discussing the various issues to be addressed before “grassroots justice” can succeed in VWs).

119. See Nikola Shirakawa, *Former JLU Member Speaks Out: Anti-Griever Justice League Unlimited Threatens Privacy and Acts Like Grievers*, ALPHAVILLE HERALD, Aug. 4, 2007, <http://www.secondlifeherald.com/slh/2007/08/former-jlu-memb.html> (on file with the *McGeorge Law Review*) (detailing security and harassment concerns raised by anti-griefing groups and observing that “the problem with anti-grievers is that they always turn into grievers themselves”).

120. Brenner, *Toward a Criminal Law*, *supra* note 106, at 31.

121. See Alemi, *supra* note 68, at 93-94 (proposing a two-tiered virtual justice system, with in-world courts for in-game conduct and real-world courts as a venue of last resort for dealing with virtual crimes and torts); see also Local Government Study Group, *Benefits of Local Government in Virtual Worlds*, <http://lgsg.wetpaint.com/page/Benefits+of+local+governance+in+virtual+worlds?t=anon> (last visited Mar. 1, 2009) [hereinafter *Local Government*] (on file with the *McGeorge Law Review*) (advocating regulation by in-world local governments to deal with grievers).

122. See Alemi, *supra* note 68, at 51 (arguing that community enforcement mechanisms offer strong regulatory mechanisms).

123. Dibbell, *supra* note 2.

124. The challenges that grieving poses for VW self-regulation receive a detailed examination in Julian Dibbell’s chronicle of the early VW LambdaMoo. See DIBBELL, *supra* note 93. LambdaMoo faced less complicated challenges than modern VWs. It was not party to RMTS. Game administrators enacted a regulatory experiment in virtual Athenian democracy. *Id.* at 18. Administrators attempted to make no decisions regarding the social life of the community, but rather enact the communities’ will. *Id.* This regulatory scheme was tested by a griever who “sexually assaulted” others players by means of a voodoo-doll script. *Id.* at 13. Enacting, or identifying the will of the community proved difficult. Eventually a wizard took it upon himself to summarily ban the griever, thereby creating nearly as much controversy as the “sexual assault.” *Id.* at 25. In response to the attack, LambdaMoo’s designers refined the social order with the addition of general ban commands to eject



C. Formal Rules

When informal social norms fail, formal social control may be exercised against violators of proscriptive rules.<sup>125</sup> The proscriptive rules of play in VWs are memorialized in the EULAs, or “social contracts” of VWs, and are enforced by game administrators.<sup>126</sup> In the absence of real-world authority on the matter, EULAs are functionally the law of VWs. Anything not explicitly forbidden under the EULA is acceptable within a VW, while anything forbidden is considered an offense.<sup>127</sup> If the EULA is law, then griefers are the violent felons of VWs.<sup>128</sup>

The techniques griefers employ in their attacks are generally breaches of EULA and TOS and thus are grounds for sanction.<sup>129</sup> For example, the proscriptive rules of Second Life are formalized in the Community Standards, which articulate the “Big Six” behaviors that result in a suspension or ban.<sup>130</sup> The Big Six include intolerance, harassment, assault, disclosure, indecency, and disturbing the peace.<sup>131</sup> Griefing breaches the Big Six as a matter of course.<sup>132</sup> However, in-world enforcement mechanisms are not well-equipped to deal with a

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“berserker” characters and an ad hoc mediation system for resolving disputes. *Id.* The system was tested, and proved unsatisfactory, when a respected community member was accused of harassment. *Id.* at 82. Dibbell observed that “no matter how close the mediation system came to procedural perfection, it might never quite feel adequate to managing the complex webs of interrelationship that put the reality in virtual reality.” *Id.* at 110.

125. Brenner, *Toward a Criminal Law*, *supra* note 106, at 16.

126. Balkin, *supra* note 31, at 2049.

127. Kerr, *supra* note 16, at 422.

128. Tateru Nino, *Who Are the Griefers?*, SECOND LIFE INSIDER, Nov. 3, 2006, available at <http://www.secondlifeinsider.com/2006/11/03/who-are-the-griefers> (on file with the *McGeorge Law Review*).

129. See generally Second Life, Terms of Service ¶ 4.1, <http://secondlife.com/corporate/tos.php>. (last visited March 3, 2009) [hereinafter Second Life TOS] (on file with the *McGeorge Law Review*) (prohibiting conduct “that is harmful, threatening, abusive, harassing, causes tort, defamatory, vulgar, obscene, libelous, invasive of another’s privacy, hateful, or racially, ethnically or otherwise objectionable”); see WOW TOS, *supra* note 58 ¶ 9(B)-(vi) (prohibiting “unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or otherwise objectionable” and forbidding players to “[h]arass, threaten, stalk, embarrass, or cause distress, unwanted attention, or discomfort to any user of the game”).

130. Second Life, Community Standards, <http://secondlife.com/corporate/cs.php> (last visited Apr. 14, 2010) [hereinafter Community Standards] (on file with the *McGeorge Law Review*).

131. *Id.*

132. *Id.* For example, the griefing attack on Anshe Chun arguably violated all of the “Big Six.” Intolerance is demonstrated by “derogatory or demeaning language or images in reference to another Resident’s race, ethnicity, gender, religion, or sexual orientation.” *Id.* The photo-shopped images of Chung holding a phallus are animated by gender animus. Harassment may be demonstrated by conduct “likely to cause annoyance or alarm.” *Id.* The penis bomb meets this standard by any definition. Assault occurs when a player “uses scripted objects which singularly or persistently target another Resident in a manner which prevents their enjoyment of Second Life.” *Id.* This is a fair description of the self-spawning items that disrupted Chung’s interview. A photo of Ailin Graef was published during the course of the attack, which may constitute a breach of disclosure. *Id.* The attack involved graphic depictions of sexual organs in a public area, hence it was indecent. *Id.* Finally, the attack disrupting a public event, and would be a breach of the peace under community standards. *Id.*

griever's breaches.<sup>133</sup> The rules of play are enforced through exclusion. Game administrators may temporarily or permanently ban an account from the VW for violations of the rules of play.<sup>134</sup> In structured VWs that rely on a subscription model, like World of Warcraft, a ban is a heavy penalty. A player who invests months of game play in acquiring in-game skills, items, and reputation is unlikely to risk it all for the thrill of griefing if he anticipates a ban.<sup>135</sup> Yet, "[g]riefers will pay to grief, if it comes to that."<sup>136</sup>

VWs are large and poorly supervised,<sup>137</sup> and it is widely acknowledged that bans are an ineffective enforcement mechanism.<sup>138</sup> To facilitate the supervisory process, some game administrators provide reporting mechanisms for violations of the rules of play.<sup>139</sup> However, even when a griever comes to the attention of the authorities, they are generally only banned if the intent to disrupt is explicitly demonstrated.<sup>140</sup> Further, imposing a ban often has a negligible impact on griefers, who see banning as a "badge of honor."<sup>141</sup> A griever who is not eventually banned is doing it wrong.

More significantly, bans do not deter or prevent griever attacks. Though VWs rely on exclusion to enforce the rules of play, they also rely on inclusion—the more players a VW boasts the more successful it is. In many unstructured VWs, notably Second Life, accounts are free and largely disposable.<sup>142</sup> Griefing flourishes in the anonymity afforded by free accounts.<sup>143</sup> When a game

133. See Brenner, *Fantasy Crime*, *supra* note 12, at 44 ("It is unclear how effectively this system deals with in-world miscreants, better known as 'griefers.' Anecdotal postings on various websites express dissatisfaction with Second Life's inability to discourage violations of the Community Standards and Terms of Service.").

134. Balkin, *supra* note 31, at 2049; see also Second Life TOS, *supra* note 129, at ¶ 4.1 ("Any violation . . . may result in immediate and permanent suspension or cancellation of your Account.").

135. See Mayer-Schönberger & Crowley, *supra* note 10, at 1793 ("Expulsion as an enforcement mechanism is effective because participants in virtual worlds incur significant social and financial costs when they are forced to leave."). Note that in VWs with free accounts, this logic does not apply.

136. Nino, *supra* note 128.

137. DURANSKE, *supra* note 63, at 191.

138. Sellers, *supra* note 53.

139. See Second Life TOS, *supra* note 129 (suggesting that residents report violations with the Abuse Reporter, a function in the basic game interface). Note that in Second Life, handling attacks that occur on private property is left to the discretion of the property owner, who has tools to exclude the griever from the property. RICHARD MANSFIELD, HOW TO DO EVERYTHING WITH SECOND LIFE 27 (2007). Abuse reports may be a potential griefing tool, in that false accusations may have potential reputational and financial consequences. BOELLSTORFF, *supra* note 13, at 195.

140. Foo & Koivisto, *supra* note 67, at 246.

141. *Id.*

142. See Second Life, Membership Plans, <http://secondlife.com/whatis/plans.php> (last visited Apr. 14, 2010) (on file with the *McGeorge Law Review*) (offering information on Second Life membership plans, including free accounts).

143. See Morris Vig, Griefing Must Stop NOW—And Linden Labs Can Stop It, <http://secondarts.wordpress.com/2007/11/13/griefing-must-stop-now-and-linden-lab-can-stop-it/> (last visited Apr. 14, 2010) (on file with the *McGeorge Law Review*) (proposing to fight griefing by eliminating user features, including coding and free accounts in Second Life).

administrator bans a griefer, the griefer can reappear with a new account in a matter of minutes.<sup>144</sup> A single griefer may use and discard hundreds, perhaps thousands, of accounts.<sup>145</sup> Moreover, so long as there is one griefer in the VW who can deliver “griefer packs” to other players, bans cannot stop ongoing attacks. Griefers have demonstrated the ability to re-launch attacks within minutes of being banned.<sup>146</sup> Griefers may even use other players’ accounts to launch attacks.

In-world enforcement is desirable because it forecloses the necessity of real-world enforcement. However, in-world enforcement cannot deter griefers or prevent griefing attacks from developing into potentially “real” harms. Bans neither remedy the in-world injury caused by griefing nor the spill over injury to the real life of the victim. If legal remedies are available to the victims of a griefing attack, the real-world injury should dictate the choice of remedies. The type of harm suffered in play is, however, in large part determined by the specific game a griefer disrupts.

## V. THE RULES OF PLAY

### A. *Injuries In and Out of Games*

The first step in extending existing principles of law to griefing attacks is to identify a cognizable injury. In-game injuries may be addressed with internal remedies, which VW administrators are in the best position to apply.<sup>147</sup> However, injuries suffered in VWs can spill over into a player’s real life, and game administrators are not in a position to redress such harms.<sup>148</sup> Real-world law should at least be considered as an option when an injury transcends the VW and is not otherwise redressable.<sup>149</sup>

Determining whether a griefing attack creates an internal or external injury is no simple task, because both may extend from a single transaction. Consider the example of a griefer who commits “virtual rape” against another player’s avatar. The griefer obviously does not physically violate the other player.<sup>150</sup> All that has

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144. Eric Schmidt, *Griefers: Harbingers of “In-World” Torts?*, TECH LAWFORUM (Jan. 28, 2009) <http://www.techlawforum.net/internet-policy/net-law/griefers-online-worlds-torts/> (on file with the *McGeorge Law Review*).

145. Girard, *supra* note 86.

146. Roderick Jones, *Jailing Griefers*, <http://metasecurity.net/2007/06/20/jailing-griefers/> (last visited Apr. 14, 2010) (on file with the *McGeorge Law Review*).

147. Kerr, *supra* note 16, at 425.

148. Mayer-Schönberger & Crowley, *supra* note 10, at 1789 (noting that VWs share a permeable boundary with the real, despite attempts to limit spill-over).

149. Kerr, *supra* note 16, at 417.

150. *Id.* at 419. *But see* Brenner, *Fantasy Crime*, *supra* note 12, at 77 (“Injury is not a required element of rape; the gravamen of the crime is non-consensual sexual intercourse. So if a Second Life avatar had sex with another avatar without the latter’s consent, it would presumably constitute rape under existing criminal statutes.”).

actually happened, physically, is a series of offensive, disembodied digital exchanges. The in-game injury is negligible. Nonetheless, the rape is objectionable because from a virtual perspective the victim has suffered an emotional harm—the victim’s avatar and emotional integrity have been attacked.<sup>151</sup>

Griefing attacks always happen in-game, and always impact a real player to some degree.<sup>152</sup> Thus, to determine whether an injury is internal or external, it may be helpful to focus on the venue where the harm is primarily felt.<sup>153</sup> Returning to the example of virtual rape, the harm is sort of emotional assault. If the harm is primarily felt in-game, then the harm is primarily internal and game administrators are in the best position to regulate it.<sup>154</sup> However, if we find instead that the emotional trauma exists, legal action could be justified.<sup>155</sup>

Injury alone cannot be the determinative factor in extending legal sanctions to griefers. The distinction between internal and external harms unduly simplifies the play conceit of VWs. These worlds are “play spaces”<sup>156</sup> first and foremost, and the possibility of legal action must be informed by the play conceit. A harm that is consistent with the play conceit, however far it extends into the real world, should not be an actionable harm. After determining there is an external injury that game administrators are in no position to redress, the next step in extending the law to griefing attacks should be to consider if the injury was inflicted in a manner consistent with the rules of play. Griefing is generally a deviation from the rules of play, yet injuries inflicted within these rules should not be legally cognizable, regardless of whether they were inflicted by griefers.

### B. *The Magic Circle*

The rules of play are often legally significant. What would otherwise be a legal battery is only a jab between two competing boxers.<sup>157</sup> The law treats the boxer’s punch differently than the brawler’s out of respect for the “magic circle” of the ring, and an agreement between the boxer and his opponent transcends mutual combat to become play. The “magic circle” theory of play posits that players establish the rules of a play space through shared expectations and consent.<sup>158</sup> The magic circle marks a boundary that players cross to reach the

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151. DIBBELL, *supra* note 93, at 17 (describing the severe emotional trauma suffered by a victim of VW “cyber rape”).

152. See Brenner, *Fantasy Crime*, *supra* note 12, at 55 (“[U]nless we decant our consciousnesses into computer media and abandon the physical world, the conduct involved in committing a cybercrime ‘in’ a virtual world cannot occur entirely in that virtual environment.”).

153. *Id.* at 60.

154. *Id.*

155. *Id.*

156. Lastowka & Hunter, *supra* note 9, at 305 (noting that VWs are primarily play spaces).

157. ADAM EPSTEIN, *SPORTS LAW* 63 (Cengage Learning 2002).

158. DURANSKE, *supra* note 63, at 178-79.

“special social and psychological space of a game.”<sup>159</sup> Play that takes place within the magic circle should be protected from the real world and vice versa, so the rules of play often trump those outside the game.<sup>160</sup> Magic circle protection is desirable for VWs, because it preserves the integrity of the play spaces, while at the same time is flexible enough to protect “serious” conduct by incorporating it into the rules of play.

In exchange for exposure to different rules, participants receive the benefits of play.<sup>161</sup> The rules of play vary between and within VWs. For example, player-versus-player combat is the norm in most structured VWs, but generally impossible in social VWs.<sup>162</sup> In Second Life, combat is prohibited in public areas.<sup>163</sup> An attack in a public space would violate the rules of play,<sup>164</sup> which could be a griefer’s technique. However, consenting Second Life residents may access private combat-enabled areas and battle to their hearts’ content.<sup>165</sup> Thus, it may be helpful to think of the VW’s magic circle as a series of circles through which players navigate.

The “magic circle” has been criticized as simplistic and binary.<sup>166</sup> It is not the distinction between play and non-play spaces that is significant, but rather, the awkward liminal space between the two. Players must consent to play, and the magical circle is constantly in negotiation<sup>167</sup>—a sort of contract that resonates with the very nature of VWs. VWs are “play spaces” where the rules of play temporarily supersede those of society.<sup>168</sup> The lines of a VW’s magic circle are not as clear as the four corners of a boxing ring.<sup>169</sup> In unstructured VWs, without predetermined objectives, finding the play conceit is tricky. “Play” seems a poor descriptor for much of what occurs in VWs.<sup>170</sup> Players may use a VW for a variety of reasons from socialization to business.<sup>171</sup> And yet, the magic circle is largely a matter of expectation and consent. A player’s expectations are informed

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159. Juul, *supra* note 15.

160. *Id.*

161. Bartle, *supra* note 14, at 23.

162. See WOW TOS, *supra* note 58 ¶ 9(C) (“[P]layer-killing the enemies of your race and/or alliance, including gravestone and/or corpse camping, is considered a part of the Game.”).

163. See Community Standards, *supra* note 130 ¶ 3 (stating that most areas in Second Life are “safe areas” where combat is forbidden).

164. See *id.* (noting that pushing, shoving, or using persistent objects against another player in a safe area constitutes assault, a violation of the Community Standards).

165. Second Life, Things to Do, <http://secondlife.com/app/help/thingstodo/combat.php> (last visited Apr. 14, 2010) (on file with the *McGeorge Law Review*).

166. Juuls, *supra* note 15, at 58-60.

167. Marinka Copier, “Connecting Worlds. Fantasy Role-Playing Games, Ritual Acts and the Magic Circle,” Changing Views—Worlds in Play, DIGRA 2005 Conference, at 61-62, available at <http://www.digra.org/dl/db/06278.50594.pdf> (on file with the *McGeorge Law Review*). Griefing may be the rough edges of this negotiation. *Id.*

168. Lastowka & Hunter, *supra* note 9, at 305.

169. Kerr, *supra* note 16, at 421.

170. Balkin & Noveck, *supra* note 9, at 3.

171. Balkin, *supra* note 31, at 2044.

by informal social norms, but also by the EULA, which they must consent to before joining play. Thus, these contractual agreements are the nearest we can come to explicitly outlining the diameter of the magic circle.<sup>172</sup>

Applying magic circle protection to games as unstructured as VWs is challenging. The rules of play may not always be readily apparent from the EULA.<sup>173</sup> Moreover, the values justifying legal regulation differ between VWs, and any would-be regulator should be mindful of player expectations and designer intent.<sup>174</sup> A court called upon to consider magic circle protection could apply the standard on a case-by-case basis. This standard would require balancing the competing interests implicated by VWs. For example, Duranske proposes that an “activity that occurs in a virtual world is subject to real-world law if the user undertaking the activity reasonably understood, or should have reasonably understood, at the time of acting, that the act would have real-world implications.”<sup>175</sup> This amounts to measuring the subjective intent of the actor. The magic circle is, however, a boundary that players negotiate, and players must always be aware of the implications play has for real life. Regardless of ill intent or subjective awareness of the real-world implications of the act, the law has no need to cross over if the act is consistent with the rules of play and the expectations of the parties. To determine when a player is entitled to magic circle protection, the player’s interest in pursuing a legitimate in-game objective should be balanced against the reasonable expectations of the injured party. The EULA should be the barest version of both.

For example, if a VW’s EULA promotes and protects economic activity, then economic activity falls within the agreed-to rules of play. In this VW, a griever who attacks an economic activity has pursued an invalid in-game objective that is inconsistent with the rules of play and the expectations of the players. The attack would not be entitled to magic circle protection. Conversely, in a VW that provides for the theft and destruction of virtual property, approving of these acts through the rules of play, injuries to virtual property would not be actionable, but rather would be “part of the rules of the game.”<sup>176</sup> Although such acts should arguably cause a harm primarily felt outside the game (depending on the status of virtual property and its dollar value), they occur in the context of shared expectations and mutual consent. Therefore, these acts should be provided with the protection of the magic circle, regardless of the player’s subjective intent.

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172. Kerr, *supra* note 16, at 422.

173. See Balkin, *supra* note 31, at 2066-67 (noting that many game spaces lack clear cut rules and that in places where the EULA is silent, there is a gray area).

174. See *id.* at 2074 (“Virtual spaces that are ‘noncommodified’—not in the sense that the owners do not make money from them, but in the sense that they avoid real-world commodification—deserve different treatment from legislatures than virtual spaces that are pathways for commerce. This distinction will protect the ability of both the designers and the players to choose which kinds of worlds they want to create and inhabit.”).

175. DURANSKE, *supra* note 63, at 75.

176. Kerr, *supra* note 16, at 419.

An approach that relies on the play conceit to distinguish between non-cognizable and cognizable harms in VWs is consistent with how the law treats play generally. Analogies to gambling provide examples where the rules of play trump property interests.<sup>177</sup> Courts defer to the rules of the game to determine property interest in the context of a consensual card game.<sup>178</sup> To draw an analogy to grieving, the malicious intent of a card player is not legally relevant so long as he abides by the rules of the game. And yet, cheating in such a contest could be considered a crime. In this instance, a player did not lose money as part of a game he consented to, but rather through fraud or misrepresentation.<sup>179</sup> By analogy, a griever who finds a way to damage in-game property in a way the play conceit does not provide is a cheater. The harm he inflicts is not part of abiding by the rules of the game, but exploiting them for a good, mean laugh.

Sports analogies also illustrate this dynamic. Generally, a football player who suffers an injury during play has no cause of action against the other players, even if the injury is crippling and the product of a foul.<sup>180</sup> However, when a player commits a foul with a deliberate intent to injure, there may be a cause of action regardless.<sup>181</sup> Hockey may be a rough game, but when Marty McSorley infamously struck an opposing player in the head with his stick, the law pierced the “magic circle” and reached the rink, because McSorley’s actions deviated from the “common practices and norms” of play.<sup>182</sup> Attacking a fellow player with a hockey stick does not advance a valid in-game objective in a manner consistent with the rules of play and is not something other players consent to.

If we understand VWs as play spaces, roughly analogous to a football field or card table, grieving would be covered by these principles. There are, however, gray areas. Grieving can be either like an unsportsmanlike, yet legally insignificant tackle in football, or a unsportsmanlike and actionable attack with a hockey stick. As previously noted, to determine when grieving crosses the line from play to actionable harm, the alleged griever’s interest in pursuing a valid in-game objective should be balanced against the interests and expectations of the victim. Two well-known grieving attacks illustrate the challenges of this balancing act.

In a popular VW, EVE Online, the griever guild known as Goonswarm destroyed a coveted and expensive in-game ship with a horde of weaker ships.<sup>183</sup>

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177. *Id.* at 420; *see also* Temple v. State, 215 S.W. 965 (Tex. Crim. App. 1919) (finding that a card player who took his opponent’s money did not commit theft if his opponent had been cheating).

178. Kerr, *supra* note 16, at 420.

179. *Id.* at 420-21.

180. Balkin, *supra* note 31, at 2068.

181. *Id.*

182. Kerr, *supra* note 16, at 421-22; *see also* Hackbart v. Cincinnati Bengals, 601 F.2d 516 (10th. Cir. 1979) (finding the defendant, a football player, could be held liable for injuries inflicted with a reckless disregard for his opponent’s safety when he struck a kneeling opposing player on the back of the neck, from behind, after the play had ended).

183. Dibbell, *supra* note 2.

The victims lost a valuable in-game resource, but the real injury seemed external to the game. In a matter of hours, the Goonswarm destroyed virtual property that took months of effort to acquire and was valued at roughly \$10,000.<sup>184</sup> EVE Online's EULA explicitly disclaims any property interest and forbids RMTs, therefore foreclosing a discussion on whether the destruction of the ship constituted an economic injury.<sup>185</sup> Yet, even assuming the lost ship was property entitled to legal protection, the attack occurred in a gray area of play. Unpleasant as it may be, the attack should be protected by the magic circle

The grieving attack was connected to a legitimate in-game objective.<sup>186</sup> EVE Online is designed to be ruthless and unforgiving, and the destruction of ships is built into its' play conceit.<sup>187</sup> The victims of the attack should have expected that such attacks could occur in EVE Online, and they manifested consent to property attacks by playing in the vicious environment of the VW. Thus, even if the harm is not primarily external to the game, it is within the play conceit and cannot pass the second criteria for legal liability. The lost value of the ship, and any attendant emotional injury, must be trumped by the magic circle because the griefers were fundamentally playing a game.

The specific details of the attack, if framed differently, might warrant a different outcome. The Goonswarm used a series of disposable, low-power user accounts to swarm and overwhelm their victims.<sup>188</sup> These accounts may have been established with fraudulent personal information. Although it is a gray area, this may constitute an abuse of game mechanics or an "exploit" in breach of the EULA.<sup>189</sup> The swarming nature of the attack itself may also be susceptible to description as an exploit, or violation of the rules of play. If the attack were an exploit, then it would be analogous to cheating in cards, and magic circle protection would not be warranted—the magic circle does not admit fraud and misrepresentation; EVE may elevate fraud to a game. A player must advance a valid in-game objective by legitimate means to claim magic circle protection. However, even if it was a breach of the EULA, there would be a negligible injury if the ship was not really property. The rules of play, hence the magic circle, in EVE Online do not protect RMTs, and the only harm left is the emotional injury

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184. *Id.*

185. EVE Online Support, EVE Online Policy on Online Auction Sites, <http://support.eve-online.com/Pages/KB/Article.aspx?id=30> (last visited Apr. 17, 2010) (on file with the *McGeorge Law Review*).

186. EVE Online explicitly defines "grief play" as not advancing an in-game objective. Examples of play-based grieving include significantly stronger players attacking weaker characters that pose them no threat. *Id.*; see <http://www.eveonline.com/pnp/banning.aspxhttp://support.eveonline.com/Pages/KB/Article.aspx?id=336> (on file with the *McGeorge Law Review*).

187. Dibbell, *supra* note 2.

188. *Id.*

189. EVE Online, Terms of Service, <http://www.eveonline.com/pnp/terms.asp> (last visited Apr. 17, 2010) (on file with the *McGeorge Law Review*). "You may not exploit any bug in EVE Online to gain an unfair advantage over other players." *Id.*



suffered while playing in the VW—far less attractive to litigate than a \$10,000 loss.

A more challenging example of the pitfalls of the magic circle is the infamous World of Warcraft “funeral bomb.”<sup>190</sup> This grieving attack is noteworthy for its cruelty, and for the frequency in which involved parties crossed the uncertain threshold between VWs and real life. A young woman died, leaving behind a World of Warcraft account and many grieving friends.<sup>191</sup> The dead woman’s friends honored her memory by organizing a World of Warcraft funeral for her.<sup>192</sup> The venue was the server she played on, a player-versus-player environment where inter-player violence was the norm.<sup>193</sup> The surrealism of a funeral in World of Warcraft cannot be overstated. In World of Warcraft, avatar killing is like catch and release fishing. A slain avatar loses nothing but the few moments of time it takes to get back into the game.<sup>194</sup> Still, few would argue that the funeral was not a heartfelt gesture.

Mourners suspended their play and arrived at the funeral unarmed out of respect to an avatar and the woman behind it who would no longer be playing.<sup>195</sup> The funeral did not go as planned. Mourners were slaughtered by a group of malcontents known as Serenity Now who had not forgotten they were playing on a player-versus player server; the funeral site was a legitimate venue for player killing.<sup>196</sup>

One could technically argue the attack was not a grief. The server was open to player killing, and killing the mourners was a valid in-game objective.<sup>197</sup> Under the expectations of the EULA and informal social norms, the players should have anticipated an attack. Mourning was not a valid game objective. And yet, the attack was a grief in that it meets the necessary elements: it was an intentional act, it caused other players to enjoy World of Warcraft less, and griefers enjoyed it.<sup>198</sup> In-game, the harm was trivial—at worst the victims lost the few moments it took them to resurrect. In the real world, many people were extremely distraught over the attack.<sup>199</sup> The griefers advanced their player-versus-player objectives in a manner not inconsistent with World of Warcraft’s explicit rules regarding

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190. For the curious, or callous, footage of the attack is available at YouTube, see *Serenity Now Bombs a World of Warcraft Funeral*, <http://www.youtube.com/watch?v=IHJVolaC8pw> (last visited Apr. 17, 2010).

191. Gabe Graziani, *Massacre in Winterspring: The Most Shocking Attack in WoW History!*, PC GAMER MAG. 80, July 2006 (on file with the *McGeorge Law Review*).

192. *Id.*

193. *Id.*

194. See Brenner, *Fantasy Crime*, *supra* note 12, at 27-28 (describing how death in World of Warcraft is routine and impermanent and results only in lost time).

195. Graziani, *supra* note 191, at 80.

196. *Id.*

197. *Id.*

198. Foo & Koivisto, *supra* note 67, at 245.

199. *Id.*

harassment,<sup>200</sup> yet inflicted a real-world harm anyway. It was arguably a grief within the play conceit. Whether or not the harm was sufficient to sustain an intentional infliction of emotional distress (IIED) claim is beside the point; the harm was built into the game related expectations of the players, which were momentarily suspended by the victims. Still, it is difficult to advance the argument that the attack was motivated by play objectives when one considers the griefers posted several gloating videos of the attack on-line.

### C. Protecting Play

Any extension of legal liability to VW conduct must be carefully tailored around the play conceit. Game designers currently enjoy sovereign control of VWs and understandably recoil at the prospect of external regulation of their environments.<sup>201</sup> The imposition of legal rules may limit designers' freedom to develop their worlds, transforming them from administrators into custodians.<sup>202</sup> In the context of VWs, this not an idle danger; absolute control of a VW allows designers to protect the game conceit and preserve the integrity of play spaces.<sup>203</sup> Legal regulation poses a challenge to VWs as play spaces—with unfettered regulation, a VW “would be just another extension of the real world.”<sup>204</sup> The more VWs are exposed to the law, the less desirable they are as play spaces.<sup>205</sup> And yet, grieving attacks make VWs less desirable as play spaces, especially when they spill over into real-world harms. The law should preserve and protect the integrity of the play conceit, but not at the expense of the players.

Some virtual harms transcend VWs.<sup>206</sup> When grieving attacks inflict a real-world injury, there is presently nowhere for the victim to turn but the VW rules of play. The current scheme of VW regulation does not adequately deter or punish grieving attacks, let alone address their real-world harms. Developers have a strong incentive to stop grieving and are best positioned to fight it before it

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200. See generally Blizzard Support, Harassment Overview, [http://us.blizzard.com/support/article.xml?locale=en\\_US&articleId=20455&pageNumber=1&searchQuery=harassment+overview](http://us.blizzard.com/support/article.xml?locale=en_US&articleId=20455&pageNumber=1&searchQuery=harassment+overview) (last visited Apr. 17, 2010) (on file with the *McGeorge Law Review*) (classifying “other categories” of harassment with emphasis on intent rather than specific language or physical harassment).

201. Balkin, *supra* note 31, at 2071.

202. Bartle, *supra* note 14, at 37.

203. *Id.* at 27.

204. *Id.*

205. See Mayer-Schönberger & Crowley, *supra* note 10, at 1820 (“The more liability imposed on providers for enforcing real-world rules in their virtual worlds, the less these providers may be able to delegate virtual world rulemaking to their participants. In turn, this inability to delegate reduces the attractiveness of such virtual worlds.”); see also John William Nelson, *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea*, 41 MCGEORGE L. REV. 281, 308-09 (2010).

206. See Balkin, *supra* note 31, at 2059 (acknowledging that virtual harms may affect those outside the game).

creates real-world injuries.<sup>207</sup> Yet griefing remains a pervasive part of VWs.<sup>208</sup> If the rules of play cannot create order in VWs, or at least manage virtual deviants, other rules may be necessary. These rules must be consistent with the rules of play.

Some players may bristle at the notion that the magic circle of a VW could be penetrated by the law.<sup>209</sup> But griefing is often a deliberate departure from the magic circle.<sup>210</sup> To claim a VW is just a play space, and then purposefully deviate from the rules of play while invoking its protection, is no defense to the extension of the law to VWs.<sup>211</sup> However, as the examples of *Eve Online* and *World of Warcraft* illustrate, not all damaging or offensive conduct that players would label as “griefing” violate the rules of play. In these instances, griefers should be entitled to magic circle protection, however harmful or offensive their actions, if they pursued legitimate in-game objectives in a manner not inconsistent with the player’s expectations under the EULA. The alternative places intolerable burdens on VWs as play spaces. If a griefing attack results in an external injury that is not entitled to the protection of the play conceit, the extension of penalties and remedies associated with existing criminal and tort law may be warranted.

## VI. CRIMINAL LAW

### A. Crimes Against Play

Legal liability is not inconsistent with the play conceit in VWs. Griefing is the equivalent of “in-world crime,” and may also constitute the elements of a real-world crime.<sup>212</sup> The play conceit does not presume to privilege play that constitutes a substantive offense. For example, *World of Warcraft* explicitly excludes “unlawful” activity from the play conceit by reserving it as grounds for a ban.<sup>213</sup> *World of Warcraft*’s play conceit assumes that criminal behavior never furthers a legitimate in-game objective. Under these rules of play, there is no

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207. Local Government, *supra* note 121.

208. DURANSKE, *supra* note 63, at 186.

209. *Id.* at 62.

210. *See id.* at 193 (“When a user intentionally steps outside the magic circle (e.g., by circumventing the game or virtual world’s mechanical restrictions, or by flagrantly violating its terms of Service) in order to attack another user . . . [t]he defendant’s cry of “it’s just a game” rings hollow when the defendant willfully chooses not to treat the world as a game in the first place.”).

211. *Id.* at 62.

212. *See* Dan Hunter, Virtual Crime 101 (2003), [http://terranova.blogs.com/terra\\_nova/2003/10/virtual\\_crime\\_1.html](http://terranova.blogs.com/terra_nova/2003/10/virtual_crime_1.html) (on file with the *McGeorge Law Review*). “Turns out that the main type of in-world crime (we think) is griefing. Of course this can take many forms, depending on the nature of the world. But in general it seems that crime [equals] griefing within world.” *Id.*; *see also* DURANSKE, *supra* note 63, at 61 (“the intrusion of real-world law means that [griefers] could be taken to court, in some cases even jailed, for some of the more shockingly antisocial and cruel things that they do.”)

213. WOW TOS, *supra* note 58, at ¶ 15.

need for a specialized body of law to address grieving. Traditional principles of criminal law may be applied to cyber-situated misconduct<sup>214</sup> and could lead to the imposition of criminal liability for conduct in VWs.<sup>215</sup> The novelty of the venue of VWs alone should not preclude the application of law to VWs, especially when VW activity inflicts unacceptable social harms.<sup>216</sup> The question is then, when can a grieving attack inflict enough social harm to warrant suspension of the play conceit.

### B. Community Harms: Obscenity

Much of the play in VWs is essentially speech,<sup>217</sup> presumably even grieving. Granted, it may seem a stretch to call it speech when grievers employ pornographic or obscene images for their shock value, as they often do,<sup>218</sup> but such judgment is more visceral than legal. Anti-obscenity statutes represent a category of existing laws that criminalize harms inflicted upon morality.<sup>219</sup> If courts were to construe existing statutes criminalizing the display of obscenity to extend to computers and VWs, griever attacks may satisfy the elements of the statutes. In theory, a griever who posts obscenity could be criminally liable for inflicting an injury to the public's morality. Yet, imposing criminal liability in this situation is problematic.

Obscenity is a crime without individual harms; the injury is to the moral sense of the community.<sup>220</sup> Thus, obscenity is measured by community standards which have proven extraordinarily difficult to define in the context of the Internet. What does seem clear is that under the current state of the law, obscenity would be measured by the standards of a "real world community" and not a virtual community.<sup>221</sup> Those exposed to the obscene grieving attack are,

214. See Susan W. Brenner, *Is There Such a Thing as "Virtual Crime"?*, 4 CAL. CRIM. L. REV. 1 (2001) (arguing that the principles used to impose liability for crimes can be extended to "cybercrimes" without the need for additional bodies of law). But see *id.* at 121 ("We may decide to create a distinct law of cybercrimes for social policy reasons because we believe that there are sound reasons specifically to denounce cyber-situated misconduct.").

215. See DURANSKE, *supra* note 63, at 61 ("[T]he intrusion of real-world law means that [grievers] could be taken to court, in some cases even jailed, for some of the more shockingly antisocial and cruel things that they do.").

216. See Brenner, *Virtual Crime*, *supra* note 214, at 19 ("We must accept the possibility that unacceptable social harms can be inflicted inside cyberspace and act accordingly, . . . when the need to do so arises.").

217. Balkin, *supra* note 31, at 2053.

218. Reuters, *supra* note 87.

219. Brenner, *Fantasy Crime*, *supra* note 12, at 8.

220. *Id.* One might hesitate to explain this to the person exposed to the obscenity, however.

221. See *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002) (upholding a federal statute regulating obscene material on the Internet that applied local community standards in determining obscenity, even though an individual has no control over which geographic areas have access to the material). *Ashcroft* rebuked the lower court's fears that the law "would effectively force all speakers on the Web to abide by the 'most puritan' community's standards." *Id.*; see also *Reno v. American Civil Liberties Union*, 521 U.S. 844,

however, members of the virtual community. Inasmuch as a virtual community has articulable community standards, they are the true context for the impact of an obscene image in a VW. For example, pornographic material freely circulates in Second Life and other VWs,<sup>222</sup> and Second Life's official Community Standards provide a place for the arguably obscene. Such materials are permissible in private areas rated "Mature."<sup>223</sup> Public spaces are required to follow "PG" guidelines, and violators of this policy may be banned.<sup>224</sup>

A specific injury may be unnecessary to sanction a griever under an obscenity statute,<sup>225</sup> but just because grieving attacks may correspond to the elements of an offense does not mean that criminal punishment is the ideal punitive response to the attack. Game administrators are positioned to quickly respond to obscenity based grieving attacks. For example, if Second Life administrators had difficulty stopping the phallic themed attack on Anshe Chung as it progressed, they were at least in the position to do something, in real time and within the framework of the VW. Attempting to punish an obscene grieving attack through criminal charges would send a powerful symbolic message, but not just to grievers. The deterrent value could also chill desirable in-world activity, and courts should not usurp the virtual community's role as arbiters of community standards. Despite the shortcomings of in-world enforcement it seems best scaled to the potential injury of a griever's obscenity.

### C. Individual Harms: Cyberbullying Statutes

"Cyberbullying" laws, essentially harassment or stalking statutes targeted at electronic mediums, protect against individual harms.<sup>226</sup> Grieving is a specialized sub-species of the cyberbullying genus. Thirteen states already have cyberbullying laws of varying strictness, and more may follow.<sup>227</sup> Cyberbullying emerged in the public's consciousness with the sad case of Megan Meier, a teen who committed suicide after being harassed on the social-networking site

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877-78 (1997) ("[T]he 'community standards' criterion as applied to . . . a nation wide audience will be judged by the standards of the community most likely to be offended by the message.").

222. See Regina Lynn, *Stroker Serpentine, Second Life's Porn Mogul, Speaks*, WIRED MAG., Mar. 30, 2007, [http://www.wired.com/culture/lifestyle/commentary/sexdive/2007/03/sexd\\_drive0330](http://www.wired.com/culture/lifestyle/commentary/sexdive/2007/03/sexd_drive0330) (on file with the *McGeorge Law Review*) (discussing the success and prevalence of virtual pornography in Second Life).

223. Community Standards, *supra* note 130, at ¶ 5.

224. *Id.*

225. See *American Amusement Machine Assoc. v. Kendrick*, 244 F.3d 572, 575 (7th Cir. 2001) (finding no showing of harm necessary under an obscenity statute because "offensiveness [was] the offense").

226. See Cyberbullying, <http://www.cyberbullying.us> (last visited Apr. 17, 2010) (on file with the *McGeorge Law Review*) (defining "cyberbullying" as "willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices"); Bradley A. Areheart, *Regulating Cyberbullies Through Notice-Based Liability*, 117 YALE L.J. 42, 1 (Supp. 2007) (noting victims of cyberbullying, like victims of grieving attacks, are generally left with no recourse).

227. Courtney Holliday, *MySpace-Hoax Trial Shines Light on Federal Cyberbullying Bill*, <http://www.firstamendmentcenter.org/news.aspx?id=20905> (last visited Mar. 3, 2009) (on file with the *McGeorge Law Review*).

MySpace.<sup>228</sup> In response, Congress drafted HR 6123, or The Megan Meier Cyberbullying Prevention Act, which was introduced in May of 2008.<sup>229</sup> The Act is representative of the approach of these statutes. It provides that, “[w]hoever transmits in interstate or foreign commerce any communication, with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person, using electronic means to support severe, repeated, and hostile behavior, shall be fined under this title or imprisoned not more than two years, or both.”<sup>230</sup> The Act’s scope is broad enough to cover grieving attacks. In fact, it may be unconstitutionally broad.<sup>231</sup>

Cyberbullying laws are designed to provide remedies for otherwise unredressable injuries.<sup>232</sup> The problem of reporting such injuries suggests they may be better addressed through alternate forms of civil liability, perhaps under = IIED suits, which would put the burden of action on the complainant, rather than on regulatory bodies such as game administrators or states. The harms of cyberbullying are felt outside the game, and in many instances, the pervasive anonymity of the Internet makes it difficult to punish cyberbullies.<sup>233</sup>

General cyberbullying statutes are not properly suited to address grieving. The grieving attack on the funeral illustrates that antagonistic behavior that is felt outside of the game might be largely consistent with the game itself—the expectations of the players are informed by the play conceit and are worlds away from the users of a social networking site. Short of a game-related suicide or similar calamity, it is hard to imagine a griever-related attack inflicting an injury that courts would attempt to redress under a cyberbullying statute.

#### D. Global Injuries: Denial of Service Attacks

The griever’s deadliest weapon, a denial of service attack, is an internet-specific offense that requires no extension of existing laws; denial of service attacks are already a federal crime under the National Information Infrastructure Protection Act (the Act) of 1996 and are also outlawed in other jurisdictions.<sup>234</sup>

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228. *Id.*

229. *Id.*

230. Megan Meier Cyberbullying Prevention Act (Introduced in House), H.R. 1966, 111th Cong. § 881(a) (2009).

231. Eugene Volokh, *The Crime of Severe, Repeated, and Hostile Communication with the Intent to Cause Substantial Emotional Distress?*, <http://volokh.com/posts/1212694919.shtml> (last visited Mar. 8, 2009) (on file with the *McGeorge Law Review*).

232. See Holliday, *supra* note 227 (noting that, according to the Act’s author, the absence of federal law criminalizing cyberbullying means cyberbullies go unpunished).

233. Areheart, *supra* note 226, at 1.

234. Joseph Lo, *Denial of Service or “Nuke Attacks”*, <http://www.irchelp.org/irchelp/nuke/> (last visited Mar. 3, 2009) (on file with the *McGeorge Law Review*); see also Tom Esponer, *U.K. Outlaws Denial-of-Service Attacks*, CNET NEWS, May 11, 2006, [http://news.cnet.com/2100-7348\\_3-6134472.html](http://news.cnet.com/2100-7348_3-6134472.html) (on file with the *McGeorge Law Review*) (describing a provision of the Police and Justice Bill 2006 as making it “an offense to impair the operation of any computer system” punishable by up to ten years imprisonment).

Under the Act, it is a crime to intentionally, knowingly, or recklessly cause damages to a protected computer provided that the damages exceed \$5,000 over a one year period or aggregate over \$5,000 to multiple computers over a one year period.<sup>235</sup> In a VW with a vibrant synthetic economy like Second Life, it is not a stretch to imagine potentially larger damages resulting from a denial of service attack. Game administrators loathe to involve outside regulators in their VWs, but they are quick to reach out to the law in response to denial of service attacks. Second Life's administrators turned over customer information to the FBI in the wake of a series of denial of service attacks, and requested legal intervention.<sup>236</sup> A denial of service prosecution would be a useful, if not symbolic, tool for punishing griefers, and it poses no challenges to the play conceit.

### E. Property Attacks

Griefing attacks also implicate statutes penalizing property crimes. Griefing attacks that target the money behind VWs have obvious legal implications.<sup>237</sup> In Second Life, griefers take advantage of a "razor thin disclaimer" in the TOS that distinguishes between real dollars and the fictional, yet valuable, in-game currency.<sup>238</sup> One griever credited this disclaimer as all that kept him from a ride in "the FBI party van."<sup>239</sup>

Recognizing virtual property rights would conceivably criminalize most property-based griefing attacks. Many commentators have called for legal protection for virtual chattels.<sup>240</sup> Others have focused on guarding against the theft of virtual chattels.<sup>241</sup> Griefing attacks may be analogous to theft, vandalism, or trespass. As previously noted, many VWs require players to agree they have no rights to property as a condition of participation.<sup>242</sup> The enforceability of these agreements is an unresolved question,<sup>243</sup> though they may ultimately prove enforceable. Other VWs, like Second Life, may recognize property interests in their players: intellectual property rights.<sup>244</sup> No court has ruled on the status of virtual property or the general validity of such agreements. Developers have

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235. 18 U.S.C. § 1030(a)(4)

236. Reuters, *supra* note 87.

237. See Dibbell, *supra* note 2 ("Once real money is at stake, 'serious business' starts to look a lot like, well, serious business, and messing with it starts to take on buzz-killing legal implications.").

238. *Id.*

239. *Id.*

240. See generally Alfred Fritzsche, *Trespass to (Virtual) Chattels*, 8 U.C. DAVIS BUS. L.J. 235 (2007) (arguing for a cause of action of trespass to virtual chattels for game administrators who threaten RMT activity)

241. See generally Andrea Vanina Arias, *Life, Liberty, and the Pursuit of Swords and Armor: Regulating the Theft of Virtual Goods*, 57 EMORY L.J. 1301 (2008) (arguing the theft of virtual goods should be legally cognizable).

242. WOW TOS, *supra* note 58 ¶¶ 2-7 (reserving all rights and title to in-game content, including objects).

243. Balkin, *supra* note 31, at 2070.

244. See Second Life TOS, *supra* note 129, at ¶ 3.2.

strong objections to extending property interests to players, noting that it makes developers custodians, not game designers, and limits their control over the environments they design.<sup>245</sup> Some jurisdictions are open to protecting virtual property. For example, a Dutch teen was arrested for the theft of virtual chattel—and there are comparable instances of criminal prosecution related to VWs in other countries.<sup>246</sup> The few people in United States jurisdictions who have tried to invoke legal protection for virtual property have not found relief. One unfortunate player of Final Fantasy who lost in-game property worth \$4,000 went to the police, only to be told that no crime had been committed because virtual property was not property.<sup>247</sup>

If courts prove willing to treat virtual property as equivalent to real or personal property, many grieving attacks could be the functional and legal equivalent of vandalism. Vandalism “consists of knowingly damaging or destroying real or personal property owned by someone else without having that person’s consent to do so.”<sup>248</sup> For example, the infamous grieving attack on John Edwards’ Second Life headquarters was literally damaging, if only in a VW.<sup>249</sup> Moreover, denial of service attacks may be framed as vandalism in that they damage the functional aspect of a web property, such as a VW in general at the macro level.<sup>250</sup>

So long as the vandalism act occurs outside the magic circle of the game and results in identifiable damages, the only thing preventing the application of the law is the unsettled nature of the property.

#### F. Viability

The enforcement of criminal law against griefers presents a host of practical problems. As a tool for social control, criminal law is at best a blunt instrument,<sup>251</sup> and it may be poorly suited for making the fine distinctions that the play conceit of VWs require. Moreover, monitoring VWs would place a tremendous burden on the State and the VW, without leading to significant enforcement. The

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245. BARTLE, *supra* note 39, at 3.

246. ‘Virtual Theft’ Leads to Arrest, BBC NEWS, Nov. 14, 2007, <http://news.bbc.co.uk/2/hi/technology/7094764.stm> (on file with the *McGeorge Law Review*). Note that in this instance, the “theft of chattel” could be characterized as an actual theft, or credit fraud. Kerr, *supra* note 16, at 423.

247. Andrew Gioia, Virtual Worlds: Real Theft?, <http://blog.mttl.org/2008/10/virtual-worlds-real-theft.html> (last visited Dec. 25, 2008) (on file with the *McGeorge Law Review*).

248. Brenner, *Virtual Crime*, *supra* note 214, at 69.

249. See Fass, *supra* note 89 (describing how vandals defaced former senator John Edwards’ Second Life headquarters).

250. See Brenner, *Virtual Crime*, *supra* note 214, at 75 (“In the virtual world, property can be a dynamic concept, as in the case of a web site which offers services or information to the public; in this context, vandalism also encompasses conduct that is designed to damage or destroy the dynamic, functional aspect of web property.”).

251. Kerr, *supra* note 16, at 428.



investigatory and jurisdictional challenges of policing VWs cannot be overstated.<sup>252</sup>

The responses to these investigatory and regulatory challenges may not be desirable. Criminal penalties have a chilling effect on socially desirable activities that may border on criminal.<sup>253</sup> Although criminal acts are not entitled to magic circle protection, some activities that fall in gray areas of play may be discouraged. Still, it is not inconceivable that specific acts of grieving may require legal action, especially if the attack satisfies the elements of a substantive criminal offense that transcends the VW, such as in a denial of service attack.

## VII. TORT LIABILITY AND GRIEFING

### A. Grieving: In-World Tort

In many VWs, the rules of play anticipate real-world legal disputes may arise. Second Life's TOS provides that in-game dispute resolution is not a legal judgment, and any dispute resolution has no bearing on "real-world legal disputes."<sup>254</sup> The TOS preserves the possibility that in-game disputes between players may be settled by real-world law and makes explicit reference to torts as grounds for a ban.<sup>255</sup> If the EULA is the barest sketch of the magic circle, then torts are explicitly beyond the play conceit. It requires little imagination to frame grieving as a tort.<sup>256</sup> In VWs where the EULA promotes property interests, the rules of play are violated when a player attacks these property interests. Moreover, inasmuch as VWs are social spaces and games, communication torts should not fall within the play conceit.

Redressing grieving attacks does not require novel law, but rather the extension of existing laws. Computer-mediated torts may be treated by existing tort principles.<sup>257</sup> Broadly, the rationales for tort law are not changed by the environment of VWs. Tort law is a source of deterrence and compensation; the threat of compensation informs the strength of deterrence.<sup>258</sup> Tort deters the affluent, not the judgment proof,<sup>259</sup> and the nearly anonymous grievers would seem functionally, if not technically, judgment proof. If tort serves as an

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252. See *id.* at 427-28 (noting the potential options for policing online activity, such as fines or criminal law).

253. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1206 (1985).

254. Second Life TOS, *supra* note 129, at ¶ 5.

255. *Id.*

256. See Schmidt, *supra* note 144 (speculating that Second Life may experience in world tort claims).

257. See Keith N. Hylton, *Property Rules, Liability Rules, and Immunity: An Application to Cyberspace*, 87 B.U. L. REV. 1, 5 (2007) (arguing that, although cyberspace torts are novel there "is no need for a special field of cybertort law").

258. Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 217 (1996).

259. Posner, *supra* note 253, at 1205.

adequate deterrence to conduct, then criminal penalties are unnecessary.<sup>260</sup> Tort liability comes with a price: it may discourage otherwise beneficial acts. If there is social utility in conduct that causes harm, the activity should be encouraged.<sup>261</sup> Griefing itself has minimal social utility, but the play in VWs has a high social utility. To stifle the former without deterring the latter, courts should focus on the play conceit if asked to consider a VW tort.

Torts generally belong to one of two classes: personal and property attacks.<sup>262</sup> Both classes apply in VWs. Personal torts are not limited to bodies, but extend to reputational or emotional injuries.<sup>263</sup> that may be harmed in VWs. The law may redress either, through defamation or IIED theories. If virtual property is recognized as something independent of intellectual property, tort protection would also apply to virtual property.<sup>264</sup> Tort actions against grievers could either be framed as an intentional tort by the griever, or the tort of negligence against a game administrator.

## B. Suits Against Grievers

Griefing attacks seem very much like intentional torts. Intentional torts focus on the ends, not the means; the actor derives pleasure from the harmful consequences of the act, as opposed to the act itself.<sup>265</sup> A griever intends to upset and humiliate his victim when he acts. Returning to the unfortunate example of Anshe Chung, grievers did not disrupt her interview with digital genitalia just for the sake of disruption. Rather, they acted for the anticipated consequence: Chung's humiliation and embarrassment. Griefing attacks are generally defined by a conscious intent.<sup>266</sup> The question is, when is intent justification for legal liability?

### 1. Tort Protection for Virtual Property

Some courts have applied trespass law to online activity in the context of servers and e-mail.<sup>267</sup> If virtual land is a legally cognizable property interest, then a griever who enters another virtual land has committed trespass. Granted, in VWs there will be many instances of players accidentally or intentionally

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260. *Id.* at 1204.

261. *See* Hylton, *supra* note 257, at 16 ("If society is made better off, after all, by the very activity that causes injury, that activity should be encouraged.").

262. 74 AM. JUR. 2D *Torts* § 3 (2009).

263. *Id.*

264. DURANSKE, *supra* note 63, at 186.

265. *Kawaauhau v. Geiger*, 523 U.S. 57, 58 (2008).

266. *Foo & Koivisto*, *supra* note 67, at 246.

267. *See generally* *Sotelo v. Direct Revenue*, 384 F. Supp. 2d 1219 (N.D. Ill. 2005) (applying trespass elements to computers); *CompuServe, Inc. v. CyberPromotions*, 962 F. Supp. 1015 (S.D. Ohio 1997) (applying trespass elements online).

intruding on otherwise private areas. Under the standards of the Restatement, the remedy available would be limited by the harm inflicted.<sup>268</sup> Thus, a virtual hobo who wanders into another's property inflicts de minimis injury that is not worth litigating. However, the griefers who bombed John Edwards's campaign headquarters may have done something worth fighting over.<sup>269</sup> Moreover, if virtual land is economically productive, in the cases of rents or business, then grieving attacks that interfere with that business may amount to a "seizure" and be recoverable.<sup>270</sup> Ultimately, this would only be a speculative approach, given the unsettled status of virtual property, and the jurisdictional difficulties of an online tort are beyond the scope of the current law and this Comment's inquiry.

## 2. Grieving as Intentional Infliction of Emotional Distress

The goal of a griever is to distress his victims, and so IIED seems an obvious fit for grieving attacks.<sup>271</sup> Yet, it bears remembering that "[there] is no occasion for the law to intervene in every case where someone's feelings are hurt."<sup>272</sup> The law only intervenes when the hurt is so intense that no reasonable man could be expected to endure it.<sup>273</sup> Thus, IIED claims are purposefully difficult and must meet a threshold test for outrageousness.<sup>274</sup> Following the Restatement, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community."<sup>275</sup> Demonstrating the outrageousness of a grieving attack seems intuitively straightforward—if it fails to outrage, it is not a grieving attack. Yet, what constitutes "outrageousness" in a VW community is a complicated, fact-sensitive inquiry, further confused by the free speech concerns at play in VWs.<sup>276</sup> IIED may only fit for the most egregious cases, "wildly outside the [typical] forms of mistreatment."<sup>277</sup> Regardless of these problems, IIED is the most natural tort extension to grieving.

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268. RESTATEMENT (SECOND) OF TORTS § 871 cmt. C (1979) ("If the subject matter is land, the remedy may be by an action of tort for the amount of harm done to the land . . .").

269. See Fass, *supra* note 89 (describing vandals defacing former senator John Edward's Second Life headquarters).

270. See *id.* (stating that, in instances where land is "seized" and then regained, actions for the "value of the use of the land during the period of the detention" are appropriate).

271. DURANSKE, *supra* note 63, at 62; Balkin, *supra* note 31, at 2068.

272. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1969).

273. *Id.*

274. DURANSKE, *supra* note 63, at 186.

275. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.

276. Balkin, *supra* note 31, at 2068-69.

277. *Id.* at 2069.

IIED claims may fall under a recklessness standard,<sup>278</sup> which is not a good fit for the magic circle of VWs. Consider Serenity Now's "funeral bomb" attack. The griefers arguably pursued a valid in-game objective,<sup>279</sup> albeit with reckless indifference to the consequences of their attacks. If we characterize such attacks as "unlawful" or harassing, they would fall outside World of Warcraft's rules of play, and the game has already built in space for liability.<sup>280</sup> Yet, many VWs encourage their players to disregard the in-game objectives of rival players. Pursuing a valid in-game objective, which is necessarily adverse to other players, should not give rise to tort liability, regardless of a griever's malicious intent. To do otherwise erases the magic circle. Ultimately, a test for outrageousness must measure whether IIED is outrageous in the norms of play.

### 3. Viability

A lawsuit against the functionally anonymous griever behind a disposable avatar in one of the many jurisdictions connected by VW may be quite an unpleasant chore.<sup>281</sup> It is not impossible, however, for VWs to gather information on misbehaving players. In the example of Second Life, Linden Labs has proven willing to turn over customer identification and records for the purpose of identifying griefers who launched denial of service attacks.<sup>282</sup> But even if an individual griever can be identified, he may prove judgment proof and legal action may be prohibitively costly.<sup>283</sup> Game administrators would make attractive and obvious targets for tort suits. Legal action against game administrators, however, fails for reasons of its own.

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278. See generally RESTATEMENT (SECOND) OF TORTS § 46 (1) (1965) (stating that an intentional infliction of emotional distress claim is satisfied by recklessness); see also *Shults v. U.S.*, 995 F. Supp. 1270, 1275 (D. Kan. 1998) (stating that recklessness satisfies the standard of intentional infliction of emotional distress under Mississippi law).

279. Graziani, *supra* note 191, at 80.

280. See WOW TOS, *supra* note 58 (prohibiting "unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or otherwise objectionable . . .").

281. Jason Zack, *The Ultimate Company Town: Wading in the Digital Marsh of Second Life*, 10 U. PA. J. CONST. L. 225, 237-38 (2007) (noting that Second Life may arguably be subject to California law, because the servers are located there, and Avatars must "travel" to a California server to enter Second Life). If grieving is implicated in a tort action, the intent of the griever may make jurisdiction easier. See *Calder v. Jones*, 465 U.S. 783 (1984) (finding California jurisdiction appropriate in a libel action arising out of intentional conduct in Florida that was allegedly calculated to cause injuries in California). Note that the anonymous nature of VWs may complicate the effects test of jurisdiction and that the *Calder* test may be difficult to apply to VWs. See also *Young v. New Haven*, 315 F.3d 256, 265 (4th Cir. 2002) (finding the mere posting of a comment on a website insufficient to establish personal jurisdiction without purposeful targeting of the forum state).

282. Sellers, *supra* note 53.

283. See Areheart, *supra* note 226, at 1 (discussing the procedural difficulties of suits against cyberbullies, or internet based tort suits).

C. Third Party Tort Liability for Game Providers

Under a theory of negligence, an alternate target of a tort suit may not be the griever himself, but rather the game administrators.<sup>284</sup> A player may assert that the game administrators negligently coded and regulated a VW in such a manner to allow a griefing attack to inflict an injury. For example, it is not impossible to imagine Anshe Chung arguing that Linden Labs was negligent in the attack on her interview.

Chung's hypothetical argument is consistent with general principles of third-party liability. A party that is positioned to redress another's bad acts through exercising control, or capable of passing on costs associated with liability and thus impacting activity levels, may be subject to liability for the acts of a third-party.<sup>285</sup> VWs satisfy both criteria. Game administrators exercise control over their environments through coding and contracts.<sup>286</sup> By maintaining the sole power of exclusion they are the only actors postured to impact activity levels.

However, if griefing is an inevitable fact of VW life that frustrates earnest attempts at regulation, punishing the providers for the inevitable conduct of a few rogue players would be inappropriate. From a practical standpoint, a tort action over griefing must confront the problem of causation. Providers may argue they should not be held responsible for the deliberate acts of third parties, especially if the acts are in violation of rules they have established. The intervening acts of a third party will not absolve a defendant of negligence liability if the plaintiff relied on the defendant to take preventative steps or the defendant failed to protect the plaintiff even though they were capable of it.<sup>287</sup> Liability for griefing may be arguable under either theory, considering the in-world role VW administrators assume. The nature of VWs makes it difficult, if not impossible, to avoid the harms of griefing. Moreover, EULAs and TOS contracts could offer remedies for griefing attacks. They do not.

Even if game administrator liability would protect players, it also seems certain to make VWs less attractive play spaces,<sup>288</sup> where the freedom to play will be circumscribed to avoid liability. The competitive dynamics of VWs and the uncertainty of jurisdiction may compromise the effectiveness of real-world law in VWs.<sup>289</sup> In any event, suing a game administrator is ultimately speculative. Under

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284. Pixeleen Mistral, *Dreamland Accuses LL of Aiding & Abetting Griefers!!!*, ALPHAVILLE HERALD, Nov. 13, 2007, <http://foo.seconddlifeherald.com/slh/2007/11/dreamland-accus.html> (on file with the *McGeorge Law Review*) (Anshe Chung's Second Life business sent patrons a notice urging a class action law suit against Linden Labs to motivate Linden Labs to do something about griefers).

285. Areheart, *supra* note 226, at 2.

286. Mayer-Schönberger & Crowley, *supra* note 10, at 1818.

287. Hylton, *supra* note 257, at 30-31.

288. Mayer-Schönberger & Crowley, *supra* note 10, at 1820.

289. *See id.* at 1821 ("Taken in combination, we cautiously suggest that . . . the competition of virtual providers over users through the active marketing of their regulatory frameworks and the competition between lawmakers over attracting revenue-generating corporations to their jurisdictions—may diminish the ability of

current federal law, a provider like Linden Labs or Blizzard Entertainment could not be held liable for a third parties communication-based grieving because the CDA effectively immunizes Internet Service Providers from tort liability. The CDA was passed in 1996 to regulate pornographic material on the Internet, but section 230 added sweeping protection for Internet companies, directing, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."<sup>290</sup> Due to the liberal judicial interpretation of section 230, acts under the CDA receive greater immunity than possible under traditional tort law.<sup>291</sup> Under the Communications Decency Act (CDA), Internet publishers are not treated like other publishers for vicarious liability claims.<sup>292</sup> Thus, under the present law, a victim of grieving would have no claim against the game providers, who may arguably be in the best position technically and financially to redress an in-game injury.

### VIII. CONCLUSION

The economic and social values of VWs deserve more protection than the current regime of self-governance affords. The need for greater protection is illustrated by grieving attacks that lead to real-world injuries. Yet, defending against griefer attacks is more a matter of respecting the rules of play than extending legal principles into the play. VWs are games, however, and should remain so lest they become "just another extension of the real world."<sup>293</sup> If a real-world injury occurs in the play space of a VW, regulators should balance the competing values of protection and play by weighing a player's interest in pursuing a legitimate game objective against the other player's reasonable expectations of conduct under the EULA. Doing so will help to draw a line between rough play and spoiling play and maintain the integrity of VWs as play spaces. But even then, the available legal remedies or causes of action must be tailored around the play conceit. To do otherwise is to spoil play and to be the envy of griefers.

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real-world lawmakers to efficiently regulate virtual worlds.").

290. U.S.C. § 230(c)(1) (2009).

291. *Id.*; Hylton, *supra* note 257, at 37.

292. See *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998) (finding America Online immune to defamation section 230 of the CDA); see also *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007) (finding a website operator immune under the CDA).

293. Bartle, *supra* note 14, at 27.

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