

2008

Fantasy Crime: The Role of Criminal Law in Virtual Worlds

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Recommended Citation

Susan W. Brenner, Fantasy Crime: The Role of Criminal Law in Virtual Worlds, 11 *Vanderbilt Journal of Entertainment and Technology Law* 1 (2020)

Available at: <https://scholarship.law.vanderbilt.edu/jetlaw/vol11/iss1/1>

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VANDERBILT JOURNAL OF ENTERTAINMENT AND TECHNOLOGY LAW

VOLUME 11

FALL 2008

NUMBER 1

Fantasy Crime: The Role of Criminal Law in Virtual Worlds

*Susan W. Brenner**

ABSTRACT

This Article analyzes activity in virtual worlds that would constitute crime if they were committed in the real world. It reviews the evolution of virtual worlds like Second Life and notes research which indicates that more and more of our lives will move into this realm. The Article then analyzes the criminalization of virtual conduct that inflicts "harm" in the real world and virtual conduct that only inflicts "harm" in the virtual world. It explains that the first category qualifies as cybercrime and can be prosecuted under existing law. Finally, it analyzes the necessity and propriety of criminalizing the second category of conduct, both now and in the future.

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“[W]hen a man doth . . . imagine the Death of our Lord the King, . . . that . . . be . . .
Treason. . . .”¹

This mid-fourteenth century statute did something we no longer do: criminalize mere thought.² In modern Anglo-American jurisprudence, the legal phenomenon of “crime” requires the coalescence of four distinct elements: (1) *actus reus* (an overt act or a culpable failure to act), (2) *mens rea* (a blameworthy mental state), (3) causation (the consequence of *actus reus*), and (4) harm (the resultant

1. Statute of Treasons, 1351, 25 Edw. 3, c. 2, § 2 (Eng.).

2. At least in later centuries, it seems to have required either an overt act of levying war against the king or speech that could be construed as treasonous. See, e.g., Benjamin A. Lewis, Note, *An Old Means to a Different End: The War on Terror, American Citizens . . . and the Treason Clause*, 34 HOFSTRA L. REV. 1215, 1220-21 (2006); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 101 (1984).

injury to one or more victims).³ Parsing the extent to which these elements coalesced in a particular instance can be surprisingly problematic, even for conduct in the real, physical world.

Our criminal law is, after all, the product of millennia of experience in the physical world. The physical world was historically the only world we could inhabit and was, as a result, the only available venue for our abiding predilection to inflict harm upon persons or property. Criminal law therefore evolved to deal with tangible, physical harms. While criminal law has, over the last several decades, expanded its scope to encompass certain “soft harms” that involve moral or systemic injuries, its bedrock principles are ultimately grounded in tangible harm.

The physical world is no longer the necessary and inevitable arena of human activity. Cyberspace gives us a new, non-spatial arena in which we can conduct many, if not all, of the activities we carry out in the physical world. The availability of this new, conceptual vector for human activity has various consequences for criminal law.

I have written about many of these consequences elsewhere: (1) how cyberspace challenges the implementation of the systems we use to enforce our criminal laws and control crime; (2) how it can require us to broaden the way we define certain crimes—such as theft—to encompass intangibles; and (3) how it may require us to define new crimes, such as the denial of service attacks that are used to shut down access to websites and essential services. These consequences are all important and conceptually challenging, but my task here is to analyze an even more intransigent phenomenon: crime in virtual worlds like *Second Life*.

The analysis that follows is divided into three sections: Section II reviews the goals that criminal law is designed to achieve and analyzes the role that harm plays in the articulation and realization of these goals; its focus is on crime in the real, physical world. Section III describes the virtual worlds that are emerging in cyberspace. Section IV analyzes the issue of “fantasy crime,” and considers whether criminal law should be extrapolated to encompass conduct that inflicts virtual harms.

3. See WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* 13-16 § 1.2(b) (2d ed. 2003).

I. REAL CRIMES

“[C]rimes . . . are a breach . . . of the . . . duties, due to the whole community . . . in its social aggregate capacity.”⁴

By “real crime” I refer to crime that occurs entirely in the physical world. In real crime, both the conduct involved in the commission of the crime and the resulting harm that conduct inflicts occur in real, physical space. Crime has been an essential—if not foundational—concern of law since humans began living in organized groups.⁵ Organized social life requires the orchestration of the efforts and sensibilities of a diverse populace, which necessitates order.⁶

Human collectives—societies—must maintain order if they are to survive and prosper. Order has historically had two complementary aspects: external order and internal order.⁷ External order involves a society’s relationship with its physical and biological environment.⁸ Societies must implement the efforts of their individual members to deal with physical threats (e.g., earthquakes, droughts, fires) and threats posed by competing societies.⁹ Historically, societies have dealt with external human threats by creating a separate institution—the military—to discourage and resolve threats from “outsiders.”¹⁰

Societies achieve and maintain internal order by using two complementary sets of rules. The first set—the civil rules—structures the activities of those who comprise a society in predictable, productive ways.¹¹ Civil rules define relationships (e.g., ruler-ruled, husband-wife, employer-employee) and allocate tasks (e.g., farmer, teacher, mayor).¹² They also set legitimate social expectations (e.g., emancipation, safety, property ownership) and establish a baseline of order by defining the behaviors that are “appropriate” in that society.¹³ The members of a society tend to abide by its civil rules because they are socialized to believe in them; most members of a

4. WILLIAM BLACKSTONE, 4 COMMENTARIES *5.

5. See Susan W. Brenner, *Toward a Criminal Law for Cyberspace: Distributed Security*, 10 B.U. J. SCI. & TECH. L. 1, 8-11 (2004) [hereinafter Brenner, *Toward a Criminal Law for Cyberspace*].

6. See *id.*

7. *Id.*

8. See *id.* at 9-10.

9. *Id.*

10. *Id.* at 10.

11. See *id.* at 31-45.

12. See *id.* at 35-39.

13. See *id.*

society consequently believe that conforming their behavior to the civil rules is the right thing to do.¹⁴ Individuals gain approval and avoid disapproval by conforming to the dictates of the civil rules.¹⁵ But this set of rules, alone, is not enough in human societies; it suffices to maintain order in other biological systems, but because humans are highly intelligent, they have the capacity to deviate. Unlike other biological species and the artificial entities so far created, humans can, and do, deliberately violate the civil rules that are meant to maintain internal order.¹⁶

Societies deal with this issue by implementing a second set of rules—criminal rules—that reinforce the need to obey the civil rules.¹⁷ Every society will, for example, have both civil rules that define property rights and criminal rules that prohibit violating these property rights and prescribe sanctions for doing so.¹⁸ Sanctions are imposed to achieve any or all of several goals, including retribution, incapacitation, rehabilitation and deterrence.¹⁹ In the millennia since humans began to live in organized groups, the repertoire of criminal sanctions has included corporal punishment, death, incarceration, fines and banishment.²⁰ Modern societies let individuals sort out disagreements over the proper application of civil rules (e.g., civil litigation), but maintain exclusive control over their criminal rules because the violation of such rules is a profound threat to internal order.²¹ “No society can survive if its members are free to prey upon each other” by violating the personal integrity and/or property rights of other citizens.²²

This brings us to harm. Essentially, criminal law is used to control the infliction of certain types of harm within a given society.²³ As I have explained elsewhere, we cannot—given the ingenuity and

14. See *id.* at 41-42.

15. See *id.*

16. See *id.* at 41.

17. See *id.* at 42.

18. See *id.* at 42-43.

19. See *id.* at 42-46; see also *infra* note 21.

20. See *id.* at 42-46.

21. See *id.* at 45-46.

22. Susan W. Brenner & Leo L. Clarke, *Distributed Security: Preventing Cybercrime*, 23 J. MARSHALL J. COMPUTER & INFO. L. 659, 661 (2005) [hereinafter Brenner & Clarke, *Distributed Security*].

23. See, e.g., LAFAVE, *supra* note 3, § 1.2(e), at 18-19 (“The broad aim of the criminal law is . . . to prevent harm to society.”); see also JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 213 (1960) (“[H]arm’ is a central notion of penal theory.”). Professor Hall defines harm as “the loss of a value,” such as public or individual safety. *Id.* at 217.

persistence of the human psyche—hope to eliminate the infliction of all harm within a society; all we can do is control it, keep it within limits that do not undermine a society’s ability to maintain a baseline of social order.²⁴

Instead, we concentrate on controlling the incidence with which harms of particular types are inflicted on the members of a society.²⁵ We do this, as I noted earlier, by proscribing certain behaviors and by inflicting sanctions that are designed to reduce the future incidence of these behaviors and the harms they inflict.²⁶ The first task is the responsibility of the criminal law; the second is the responsibility of agencies that are charged with enforcing a society’s criminal laws.²⁷

A society’s criminal law is, therefore, a compendium of harms.²⁸ The infliction of each harm in a society’s compendium is proscribed by a rule that defines this activity as a specific crime. For the purposes of this analysis, I will divide the repertoire of potential harms into “hard harms” and “soft harms.”²⁹

A. *Hard Harms*

“What we are interested in, ultimately, is to prevent harm.”³⁰

“Hard harms” are the bedrock of the criminal law; they involve the infliction of tangible, egregious injuries to persons or property and, as such, are the oldest and most persistent harms. The cataloging of these harms has been essentially constant from the Code of Hammurabi through such subsequent enactments as the Salic Law to the common law of Blackstone’s era to the statutes of the present day.³¹ Every society must outlaw the infliction of a set of core physical

24. See, e.g., Brenner & Clarke, *Distributed Security*, *supra* note 22, at 662.

25. See *id.*

26. See *id.*

27. See *id.* (“[C]rime control requires that there be some system . . . which ensures rule violators are . . . sanctioned. There must . . . be a credible threat of retaliation for violating criminal rules; absent such a threat, the rules . . . cannot deter crime and maintain internal order.”).

28. See, e.g., BLACKSTONE, *supra* note 4, at *6.

29. I am indebted to Professor Joel Feinberg for the concept of “soft harm,” from which I extrapolated the necessary residual category of “hard harm.” See Joel Feinberg, *The “Soft Harm” of Psychic or Moral Offense as a Justification of Criminal Legislation in FOUNDATIONS OF CRIMINAL LAW* 118-21 (Leo Katz, Michael S. Moore & Stephen J. Morse, eds., 1999).

30. LEO KATZ, *BAD ACTS AND GUILTY MINDS* 153 (1987).

31. See, e.g., William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-13 (2001). Compare *The Avalon Project: Code of Hammurabi* (L.W. King trans.), <http://www.yale.edu/lawweb/avalon/medieval/hamframe.htm>, *The Avalon*

harms (e.g., murder, assault, rape) on individuals or descend into a state of chaos in which the strong exploit the weak. Each society will also typically outlaw a collateral set of physical harms (e.g., adultery, incest, child abuse), the infliction of which can erode its ability to maintain internal order.³² Since property is valued almost as highly as human life, each society will also outlaw the infliction of a set of core physical harms to property (e.g., arson and other types of damage, theft, robbery), and more evolved societies will also proscribe the infliction of a collateral set of derivative harms (e.g., fraud, counterfeiting, vandalism and forgery).

In modern societies, especially the United States, we see the extrapolation of many of the core and collateral hard harms into an almost dizzying array of crimes of varying types and degrees of severity.³³ This extrapolation is attributable to two factors: one is the refinement of penal philosophies, which have moved beyond the *lex talionis* and a default reliance on death as the punishment for criminal conduct; modern penal philosophies and modern criminal law focus on the nuances of the harm inflicted and the personal characteristics of the offender in an attempt to impose a sanction that is idiosyncratic enough to constitute fair punishment.³⁴ The other factor is the politicization of crime; the use of the penal sanction has been expanded broadly, most notably in the area of regulatory offenses.³⁵ While the criminal law of ages past was concerned primarily, if not exclusively, with retribution,³⁶ our criminal law is increasingly intended to regulate conduct in a variety of areas, most of which have little or nothing to do with inflicting the core or collateral

Project: The Salic Law, <http://www.yale.edu/lawweb/avalon/medieval/salic.htm>, and BLACKSTONE, *supra* note 4, at **148-296, with MODEL PENAL CODE §§ 210-251.4 (Proposed Official Draft 1962).

32. See Brenner, *Toward a Criminal Law for Cyberspace*, *supra* note 5, at 42-46.

33. See, e.g., Stuntz, *supra* note 31, at 513-15; AM. BAR ASS'N, CRIMINAL JUSTICE SECTION, TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, THE FEDERALIZATION OF CRIMINAL LAW 9 n. 11 (1998); Susan L. Pilcher, *Ignorance, Discretion and the Fairness of Notice: Confronting "Apparent Innocence" in the Criminal Law*, 33 AM. CRIM. L. REV. 1, 32 (1995).

34. See, e.g., Kyron Huigens, *What Is and Is Not Pathological in Criminal Law*, 101 MICH. L. REV. 811, 817-19 (2002); see also Robert M.A. Johnson, *Is It A Crime?*, 21 FALL CRIM. JUST. 1 (2006) (noting the vertical and horizontal expansion of criminal law in the United States in the twentieth century).

35. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 972-75 (2007).

36. See, e.g., *Payne v. Tennessee*, 501 U.S. 808, 819 (1991).

harms outlined above.³⁷ And that brings me to the other category of harm.

B. Soft Harms

“In all cases the crime includes an injury. . . .”³⁸

Unlike hard harms, which involve tangible injury to persons or property, “soft harms” are more difficult to categorize. Essentially, soft harms involve the infliction of some type of injury—which can be tangible or intangible—to morality, to affectivity, or to a systemic concern with the safety of individuals or the integrity of property. I will examine each type of “soft harm” below.

1. Morality

Soft harms involving injury to morality encompass a wide range of activities and a correspondingly wide range of justifications.³⁹ The crimes defined to proscribe the infliction of this type of “soft harm” include gambling, obscenity, indecency, blasphemy, public intoxication, adultery, prostitution, bigamy, fornication, sodomy, lewdness, and the consumption of certain chemical substances.⁴⁰ Soft harm crimes usually have no individual victim; instead of causing harm to an individual, the harm they inflict is assumed to constitute an injury to the “moral sense of the community.”⁴¹

37. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747 (2005); see also William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1893-94 (2000) (“[L]egislatures have an incentive to criminalize based on too-narrow majorities.”).

38. BLACKSTONE, *supra* note 4, at *5 (“In all cases the crime includes an injury.”).

39. Cf. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY, 126-27 (1993) [hereinafter FRIEDMAN, CRIME AND PUNISHMENT] (illustrating the distinction between crimes against morality and crimes against persons or property).

40. See, e.g., *id.* at 127-39, 325-57; ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 453-76 (3d ed. 1982); Model Penal Code §§ 250-251.4 (Proposed Official Draft 1962); see also N.Y. Penal Law §§ 220.16 – 46 (McKinney 2008) (controlled substance crimes). Some include incest in this category, but I think it can, at least arguably, be assigned to the category of hard harms involving injury to persons. See, e.g., PERKINS & BOYCE, *supra* note 40, at 459-62.

41. FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 39, at 126; see also *id.* at 126 (“Many crimes against morality are . . . ‘victimless crimes,’ that is, crimes about which nobody complains, or in which . . . nobody has been hurt. The crime, rather, damages us generally, rips the social fabric, or offends ‘public decency and order.’”).

While crimes in this category existed previously,⁴² the criminalization of these “soft harms” did not become widespread until the end of the nineteenth century, when “societies for the suppression of vice” became actively involved in outlawing activities that they believed were undermining the moral fabric of this country.⁴³ As a historian noted, the first three decades of the last century were “the peak period . . . in the battle against vice and moral decay” in an era of “fresh legislation and spasms of zeal in its enforcement.”⁴⁴

The zeal for using criminal law to discourage the rather uncertain infliction of soft harms in this category declined as the twentieth century wound to an end.⁴⁵ Courts have struck down as unconstitutional laws criminalizing the infliction of some of the soft harms, and repealed or enforced lackadaisically those involving many of the others.⁴⁶ Notable exceptions are laws that criminalize the production, sale and possession of controlled substances.⁴⁷ While some argue that these harms fall into the category of “victimless crimes”

42. Since the American colonists, especially the Puritans, saw no distinction between “crime” and “sin,” their criminal laws outlawed the activities listed in the previous paragraph as well as more innocuous activities such as “lying and idleness.” See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 39, at 34. By the eighteenth century, American criminal codes had “shifted focus . . . from victimless crimes [against morality] to more conventional crimes—in particular, crimes against property.” *Id.* at 54; see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 258 (1973) [hereinafter FRIEDMAN, AMERICAN LAW] (“If crime was a sin . . . before the Revolution, it gradually shifted to concern for protection of private property.”).

43. See FRIEDMAN, AMERICAN LAW, *supra* note 42, at 135-39.

44. See *id.* at 324-25; see also *id.* at 325-56.

45. See *id.* at 352-57.

46. See *id.* at 352-56; see also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional the statute criminalizing sodomy between adults); *State v. West*, 263 A.2d 602 (Md. Ct. Spec. App. 1979) (holding that statute criminalizing blasphemy violated First Amendment). Many states have de-criminalized adultery, fornication and other victimless sex crimes. See, e.g., Melanie C. Falco, Comment, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C. L. REV. 723, 737-738, 744-747 (2004); see also Sylvia A. Law, *Commercial Sex: Beyond Decriminalization*, 73 S. CAL. L. REV. 523, 526 n.8 (2000) (noting that the drafters of Model Penal Code did not criminalize adultery or fornication because “such laws are widely disobeyed and rarely enforced”) (citing MODEL PENAL CODE § 213 note on adultery and fornication (1980)). The morality soft harm statutes that survive and are enforced with some diligence tend to be those that inflict at least an attenuated hard harm on an individual victim, such as bigamy and, arguably, prostitution. See, e.g., *State v. Guadagni*, 178 P.3d 473, 477-78 (Ariz. Ct. App. 2008) (stating that bigamy is not a victimless crime); Shay-Ann M. Heiser Singh, *The Predator Accountability Act: Empowering Women in Prostitution to Pursue Their Own Justice*, 56 DEPAUL L. REV. 1035, 1041-42, 1060 (2007) (stating that prostitution is not a victimless crime).

47. See FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 39, at 354-57.

against morality, others contend that the use of controlled substances inflicts at least soft harms on actual victims.⁴⁸

Another notable exception is gambling. All fifty states regulate gambling; most outlaw all but a few types of gambling when conducted by private citizens.⁴⁹ Most states do not, however, outlaw *all* gambling.⁵⁰ In what smacks of hypocrisy, at least thirty-seven states (plus the District of Columbia) operate their own lotteries, and state-licensed casinos operate legally in at least twenty-eight states.⁵¹ States collect revenue from their lotteries and “usually collect a fairly high tax on wagers” placed in casinos they license “through a privately negotiated contract with the casino or . . . a statute that mandates a wager tax.”⁵²

Except for their continuing criminalization of the arguably soft harm associated with the use of controlled substances and their rather ambiguous denunciation of private gambling, states have moved away from criminalizing the soft harms of morality. I will return to that issue in Section III, when I consider harms in the virtual world.

2. Affectivity

Soft harms involving injury to affectivity are a relatively late addition to criminal law. Anglo-American common law really did not encompass affective harm. The closest it came was criminalizing libel. In the early seventeenth century, the English Court of Star Chamber

48. Compare Andrew Carlon, Note, *Entrapment, Punishment and the Sadistic State*, 93 VA. L. REV. 1081, 1119 (2007) (classifying drug use as victimless crime), with Jerry Cederblom & Cassia Spohn, *A Defense of Retributivism Against Criticisms of the Harm-for-Harm Principle*, 43 No. 6 CRIM. LAW BULLETIN 4 (2007) (discussing drug use and stating “potential victims include children (if drugs are used while caring for children), motorists (if drugs are used while driving), and neighbors (if drug use results in neighborhood deterioration)”), and Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1890 n. 230 (2007) (“[E]ven if cocaine use is a victimless crime that only harms the user, those distributing controlled substances are creating the victims.”).

49. See, e.g., Peter Brown, *Regulation of Cybercasinos and Internet Gambling*, in 610 PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, & LITERARY PROPERTY COURSE HANDBOOK SERIES 607, 614-15 (2000).

50. Only Hawaii and Utah ban all types of gambling, and neither operates a lottery nor licenses casinos. See *id.*

51. See, e.g., J. Nick Badgerow, *Apocalypse at Law: The Four Horsemen of the Modern Era – Drugs, Alcohol, Gambling and Depression*, 77-FEB J. KAN. B.ASS’N 19, 22 (2008) (quoting Tom Raabe, *Compulsive & Problem Gambling*, FOCUS ON THE FAMILY, <http://www.family.org/socialissues/A000000434.cfm>).

52. Christopher Grohman, *Reconsidering Regulation: A Historical View of the Legality of Internet Poker and Discussion of the Internet Gambling Ban of 2006*, 1 J. LEGAL TECH. RISK MGMT. 34, 64 (2006).

criminalized defamatory comments directed toward an individual. "The Court's rationale . . . was that libels may be penalized because they tend to create breaches of the peace when the defamed undertake to revenge themselves on the defamer."⁵³ The English colonists brought this offense with them when they came to America, and after the Revolution it became part of the criminal law of the states.⁵⁴

Because it was intended to prevent dueling and other forms of physical conflict, criminal libel has traditionally been consigned to the category of "offenses against public peace," i.e., crimes that directly threaten a sovereign's ability to maintain internal order.⁵⁵ The gravamen of the offense was publishing material that was likely to "cause disorder, riot, or breach of the peace. . . ."⁵⁶

So although it appeared to criminalize a soft harm, criminal libel was actually concerned with the traditional hard harm. As explained in Section II(A), the bedrock concern of criminal law has always been to control conduct that is likely to jeopardize internal order. Since its focus was on controlling dueling and other aggressive conduct, criminal libel's relation to malicious communications lay not with the soft harm that such communication could inflict on the victim per se, but on the consequential hard harm that the victim could inflict by retaliating against the person responsible for publishing the communication.

Criminal libel was rarely prosecuted in the United States in the nineteenth and twentieth centuries, which was one of the reasons the drafters of the Model Penal Code did not include it in their template of offenses.⁵⁷ In their commentary on this issue, the drafters said that deciding "whether to penalize anything like libel" was one of "the hardest questions" they confronted.⁵⁸ They began with the premise that "penal sanctions cannot be justified . . . by the fact that defamation is damaging to a person in ways that entitle him to maintain a civil suit."⁵⁹ After noting that penal sanctions are only

53. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data Be Criminalized*, 13 ALB. L.J. SCI. & TECH. 273, 280-84 (2003); see also PERKINS & BOYCE, *supra* note 40 at 488-92.

54. See, e.g., Susan W. Brenner, *Should Online Defamation Be Criminalized?*, 76 MISS. L.J. 705, 713-14 (2007) [hereinafter Brenner, *Should Online Defamation Be Criminalized?*].

55. See, e.g., PERKINS & BOYCE, *supra* note 40 at 477-92 (including libel in offenses against public peace, which also includes fighting, riot and forcible entry).

56. *Tucker v. State*, 275 P. 382, 382 (Okla. Crim. App. 1929).

57. See Brenner, *Should Online Defamation Be Criminalized?*, *supra* note 54, at 715-16.

58. MODEL PENAL CODE § 250.7 cmt. at 44 (Tentative Draft No. 13, 1961).

59. *Id.*

appropriate for “harmful behavior that exceptionally disturbs the community’s sense of security,” they considered whether libel falls into this category.⁶⁰

The drafters of the Model Penal Code concluded that behavior “exceptionally disturbs the community’s sense of security” for two reasons. One is that the harm inflicted “is very grave, as in rape or murder, so that even the remote possibility of being similarly victimized terrifies us.” The other is that “our alarm may, as in the case of petty theft or malicious mischief, derive from the higher likelihood that such lesser harms will be inflicted upon us.”⁶¹

The Model Penal Code’s drafters found that because “personal calumny falls in neither of these classes,” it is “inappropriate for penal control,” which probably explained “the paucity of prosecutions “ and “near desuetude of criminal libel legislation in this country.”⁶² They therefore did not include a libel provision in the final version of the Code, which appeared in 1962.⁶³ As a result, criminal libel still survives in the criminal codes of some states, but it tends to be a very minor offense and is almost never prosecuted.⁶⁴

In the United States, the only offenses that directly encompass soft harm are the related crimes of stalking and harassment (and the online versions of each). Both are relatively new crimes.

Harassment is the older offense, at least in its original form. The criminalization of harassment began about a century ago, when it became apparent that telephones could be used for less than legitimate reasons. The initial problem came from callers who used “vulgar, profane, obscene or indecent language.”⁶⁵ Concerned about the harm being done to the women and children who received such calls, states responded by adopting statutes that created the offense of “telephone harassment.”⁶⁶ The offense tended to focus only on obscene or threatening phone calls, but some states broadened their statutes to encompass more general conduct, such as “anonymous or repeated

60. *Id.*

61. *Id.*

62. *Id.* The Comment also cited First Amendment concerns. *See id.* at 45.

63. *See id.* at 45-46. The Model Penal Code’s rationale for not criminalizing libel is to some extent identical to its rationale for not criminalizing fornication or adultery. *See, e.g., supra* note 46.

64. *See, e.g.,* Edward L. Carter, *Outlaw Speech on the Internet: Examining the Link Between Unique Characteristics of Online Media and Criminal Libel Prosecutions*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 289, 289, 291 (2005).

65. *See, e.g.,* Darnell v. State, 161 S.W. 971, 971 (Tex. Crim. App. 1913).

66. *See id.; see also* Andrea J. Robinson, Note, *A Remedial Approach to Harassment*, 70 VA. L. REV. 507, 523-24 (1984).

telephone calls that are intended to harass or annoy.”⁶⁷ However, the harassment statutes then in effect generally failed to encompass more problematic conduct, such as touching a person, insulting or following someone.⁶⁸

Harassment statutes began to change in 1989, when actress Rebecca Schaeffer was stalked and killed by an obsessive fan.⁶⁹ Shocked by the Schaeffer murder and five similar murders, California legislators passed the nation’s first criminal stalking law in 1990.⁷⁰ By 1993, forty-nine states had followed suit,⁷¹ and in 1999, New York became the final state to adopt a criminal stalking statute.⁷²

Most of the early statutes followed the California model,⁷³ which criminalized harassment culminating in a “credible threat.” The California statute

has two actus reus elements. . . . First, [it] requires willful . . . and repeated following or harassment. . . . The statute defines “harasses” as requiring a course of conduct, which is a series of acts over a period of time that shows a continuity of purpose. . . . Second, the statute requires a “credible threat” . . . intended to cause the victim to reasonably fear death or great bodily injury. The . . . victim must experience both subjective and objective fear.⁷⁴

California’s approach led some to characterize stalking as an inchoate crime, on the premise that the harm it addresses is the “murder, rape or battery that the stalking . . . could” produce.⁷⁵ In this view, stalking is concerned not with a soft harm, but with preventing the infliction of a hard harm. Others argued—correctly, in my opinion—that stalking is not an inchoate crime because its real concern is with the infliction of a distinct, soft harm. As one article noted, the harm that stalking

67. See *Darnell*, 161 S.W. at 971; see also *Robinson*, *supra* note 66, at 524 (surveying telephone harassment statutes then in effect).

68. See *Robinson*, *supra* note 66, at 524.

69. See, e.g., Robert A. Guy, Jr., *The Nature and Constitutionality of Stalking Laws*, 46 VAND. L. REV. 991, 991 (1993).

70. See *id.* at 992.

71. See Paul E. Mullen & Michele Pathe, *Stalking*, 29 CRIME & JUST. 273, 275 (2002).

72. See Kimberly Wingteung Seto, *How Should Legislation Deal with Children as the Victims and Perpetrators of Cyberstalking?*, 9 CARDOZO WOMEN’S L.J. 67, 70 (2002).

73. See *Guy*, *supra* note 69, at 992.

74. *Id.* at 1000-01 (notes omitted) (describing original California anti-stalking statute).

75. Nick Zimmerman, Comment, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219, 234 (2000) (“[S]talking seeks to prevent a certain harm—murder, rape, etc.”); see also Elizabeth A. Patton, Note, *Stalking Laws: In Pursuit of a Remedy*, 25 RUTGERS L.J. 465, 508-09 (1994).

laws address is not “future harm. Stalking is wrongful because the threat of future violence causes emotional injury to the victim.”⁷⁶

Florida took a different approach. It created two crimes: basic stalking and aggravated stalking.⁷⁷ The basic stalking offense required that the stalker (1) intend to inflict emotional harm on the victim, and (2) willfully engage in repeated following or harassment of the victim.⁷⁸ The aggravated stalking offense tracked the California provision by requiring that the stalker make a “credible threat” with the intention to cause the victim to fear for her safety.⁷⁹ Basic stalking was a misdemeanor, while aggravated stalking was a felony.⁸⁰

As the years passed and lawyers and lawmakers became more familiar with the nuances of the conduct involved in and the harm inflicted by stalking, states began to expand the scope of their stalking statutes. Contemporary statutes criminalize three types of conduct: (1) conduct requiring proximity to the victim, (2) conduct that conveys a credible threat of death or injury, and (3) conduct that would cause a reasonable person “to fear physical harm or to suffer severe emotional distress.”⁸¹

The statutes in the last category are the most interesting for the purposes of this discussion, because they go beyond the concept of stalking as a crime concerned with the potential infliction of physical harm; they explicitly target the infliction of emotional distress, a purely soft harm. Missouri’s statute, for example, states that a “person commits the crime of stalking if he or she purposely, through his or her course of conduct, harasses or follows with the intent of harassing another person,” and defines “harasses” as engaging “in a course of conduct directed at a specific person that serves no legitimate purpose, that would cause a reasonable person to suffer substantial emotional distress, and that actually causes substantial emotional distress to that person.”⁸²

76. See Guy, *supra* note 69, at 1010-11.

77. See *id.* at 1004-06.

78. See *id.*

79. See *id.*

80. See *id.*

81. Naomi Harlin Goodno, *Cyberstalking, A New Crime: Evaluating the Effectiveness of Current State and Federal Laws*, 72 MO. L. REV. 125, 134-35 (2007) (footnotes omitted). For support for the proposition that threats should be classified as soft harm offenses, see generally Guy, *supra* note 69, at 1004-06.

82. MO. ANN. STAT. § 565.225 (West 2008). The Missouri statute does not define “emotional distress,” but other statutes do. The Michigan stalking statute, for example, defines it as “significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.” MICH. COMP. LAWS ANN. §

A number of other states have similar provisions,⁸³ and some courts have noted that stalking statutes are intended to prevent “emotional harm to individuals.”⁸⁴ A few states have adopted cyberstalking provisions that outlaw engaging “in a course of conduct to communicate, or to cause to be communicated, words, images, or language by or through the use of . . . electronic communication, directed at a specific person, causing substantial emotional distress to that person and serving no legitimate purpose.”⁸⁵

While a number of states incorporate harassment into their stalking statutes, either as a way of defining stalking or as a way of defining a lesser-included offense of stalking,⁸⁶ a few have harassment offenses that also make it a crime to inflict emotional distress on a victim. Delaware’s harassment statute, for instance, makes it an offense to “harass . . . another person” by insulting, taunting, or challenging them, or engaging “in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to . . . cause a reasonable person to suffer substantial emotional distress.”⁸⁷

750.411h(1)(b) (West 2004). The Michigan statute is very similar to the Missouri statute. It criminalizes stalking, which it defines as “a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, . . . harassed, or molested and that actually causes the victim to feel terrorized, frightened, . . . harassed, or molested.” *Id.* § 750.411h(1)(d); *see also id.* § 750.411h(2) (defining stalking as a crime). It then defines “harassment” as “conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress.” *Id.* § 750.411h(1)(c).

83. *See, e.g.*, COLO. REV. STAT. ANN. § 18-9-111(4)(b)(III) (West 2008); D.C. CODE ANN § 22-404(b) (LexisNexis 2007); FLA. STAT. ANN. § 784.048 (West 2008); IDAHO CODE ANN. § 18-7906(1)(a) (2008); LA. REV. STAT. ANN. § 14:40.2(A) (2008); MONT. CODE ANN. § 45-5-220(1) (2003); OKLA. STAT. ANN. tit. 21, § 1173 (West 2002); 18 PA. CONS. STAT. ANN. § 2709.1(a) (West 2008); TENN. CODE ANN. § 39-17-315 (West 2005); UTAH CODE ANN. § 76-5-106.5(2) (West 2008); W. VA. CODE ANN. § 61-2-9a (West 2008); WIS. STAT. ANN. § 940.32 (West 2008); WYO. STAT. ANN. § 6-2-506(a) (West 2007).

84. *Snowden v. State*, 677 A.2d 33, 38 (Del. 1996); *see also People v. Furey*, No. 2002NY009927, 2004 WL 869586, at *2 (N.Y. City Crim. Ct. Apr. 6, 2004).

85. FLA. STAT. ANN. § 784.048(1)(d). Florida has amended its stalking statute to include cyberstalking in its offense provisions. *See* FLA. STAT. ANN. § 784.048(2)-(7); *see generally* R.I. GEN. LAWS § 11-52-4.2(a) (2008).

86. *See supra* notes 83, 84 *see also* ARK. CODE ANN. § 5-71-229(a)(1) (West 2007); COLO. REV. STAT. § 18-9-111; GA. CODE ANN. § 16-5-90 (West 2000); HAW. REV. STAT. ANN. §§ 711-1106.5, 711-1106.5 (LexisNexis 2003); IDAHO CODE ANN. §§ 18-7905, 18-7906; WASH. REV. CODE ANN. § 9A.46.110 (West 2007).

87. DEL. CODE ANN. tit. 11 § 1311(a)(1) (2004); *see also* MASS. GEN. LAWS ANN. Ch. 265 § 43A(a) (West 2008); N.M. STAT. ANN. § 30-3A-2(A) (West 1997).

It has been difficult, and arguably problematic, for criminal law to encompass the infliction of purely affective harm.⁸⁸ The stalking and harassment statutes that incorporate harassment, described above, represent a compromise: while they criminalize the infliction of affective harm, they do not predicate the imposition of criminal liability purely on self-diagnosed psychic injury.⁸⁹ They incorporate a “reasonable person” standard to ensure that the imposition of liability is based not on the idiosyncrasies of a particular individual but on conduct that can be deemed to inflict an objective, ascertainable harm.⁹⁰

3. Systemic

Over a century ago, American criminal law began using “regulatory offenses” to create “forward-looking incentives yielding socially optimal outcomes.”⁹¹ These crimes, which are also known as “public welfare” offenses, resulted from a “shift in emphasis from the protection of individual interests, which marked nineteenth century criminal administration to the protection of public and social interests.”⁹²

Regulatory offenses are the product of a very different approach to criminal liability. To understand how this approach differs from the approach traditionally used in the imposition of criminal liability, it is helpful to consider an example of a particular regulatory offense—antitrust.⁹³ Antitrust prosecutions differ from traditional criminal prosecutions in that they are predicated on the infliction of a systemic harm, while traditional prosecutions are

88. For a characterization of this affective harm, see Lambèr Royakkers, *The Dutch Approach to Stalking Laws*, 3 CAL. CRIM. L. REV. 2, 19 (2000).

89. For the premise that affective harm is too idiosyncratic to provide a reliable predicate for the imposition of criminal liability, see, e.g., Janice Nadler & Mary R. Rose, *Victim Impact Testimony and the Psychology of Punishment*, 88 CORNELL L. REV. 419, 441-42 (2003).

90. See, e.g., DEL. CODE ANN. TIT. 11, § 1311(a); IDAHO CODE ANN. § 18-7906; see also *supra* note 83. The inclusion of an objective standard also prevents the affective harm statutes from being held void for vagueness. See, e.g., *People v. Cross*, 114 P.3d 1, 7 (Colo. App. 2004), *rev'd*, 127 P.3d 71 (Colo. 2006); *State v. Partowkia*, No. 39060-1-I, 1999 WL 458967 (Wash. Ct. App. July 6, 1999); see also *State v. Bryan*, 910 P.2d 212, 220-21 (Kan. 1996).

91. Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 142 (1996).

92. M. Diane Barber, *Fair Warning: The Deterioration of Scienter under Environmental Criminal Statutes*, 26 LOY. L.A. L. REV. 105, 110 (1992); see also Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 67 (1933).

93. See, e.g., Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2201 (2002).

predicated on the infliction of harm to individual victims.⁹⁴ In a traditional criminal proceeding, the state acts to vindicate its obligation to protect individual members of the social system it represents;⁹⁵ in a criminal antitrust proceeding, the state acts to vindicate its obligation to ensure the viability of an essential component of a social system.⁹⁶ The harm at issue in the latter is an erosion of the principle of competition.

Other regulatory offenses target the infliction of systemic harm as well.⁹⁷ Like antitrust prosecutions, prosecutions for other regulatory offenses also tend to be predicated on presumed harm, rather than on the actual harm that is a standard feature of traditional criminal prosecutions.⁹⁸ The regulatory offenses that currently exist essentially impose liability for not preventing the occurrence of conditions that either (1) create the potential for generalized harms constituting threats to public health and safety, or (2) result in the occurrence of specified systemic harms such as environmental damage.⁹⁹

While the commission of regulatory offenses result in the imposition of criminal liability, these offenses differ from traditional crimes in several respects. As noted above, they do not require actual harm. Most also do not require mens rea. As the Supreme Court explained in *United States v. Balint*, while “the general rule at common law was that . . . scienter was a necessary element in . . . every crime, . . . there has been a modification of this view in . . . prosecutions under statutes the purpose of which would be obstructed

94. See *U.S. v. Balint*, 258 U.S. 250, 251-52 (1922) (noting that regulatory offenses focus on “achievement of some social betterment”); see also, *Northern Pac. Ry. Co. v. U.S.* 356 U.S. 1, 5 (1958); *People v. Coria*, 985 P.2d 970, 975, (Cal. 1999); Charles S. Start, *International Cooperation in the Pursuit of Cartels*, 6 GEO. MASON. L. REV. 533 (1998); Christopher R. Leslie, Comment, *Achieving Efficiency through Collusion: A Market Failure Defense to Horizontal Price-Fixing*, 81 CAL. L. REV. 243, 273 (1993). For the individual harm encompassed by traditional prosecutions, see *supra* discussion § II(A).

95. See A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 3-2.1 (3d ed. 1993); see also *supra* discussion § II(A). The individuals being protected can be individual human beings or artificial entities, such as corporations.

96. See, e.g., U.S. DEPT. OF JUSTICE: U.S. ATTORNEYS’ MANUAL § 7-1.100 (1997), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title7/1mant.htm.

97. See *Morissette v. U.S.*, 342 U.S. 246, 255-56 (1952).

98. See *id.*; see also *supra* discussion §§ II(A), II(B)(1)-(2); see, e.g., Arthur Leavens, *Beyond Blame – Mens Rea and Regulatory Crime*, 46 U. LOUISVILLE L. REV. 1, 16 (2007). Actual harm is not required in prosecutions for the inchoate offenses of attempt, solicitation and conspiracy, but the gravamen of these offenses is preventing the infliction of such “harm.” See, e.g., LAFAVE, *supra* note 3, §§ 11.1(b), 11.2(b), 12.1(c).

99. See *infra* note 100; see also Leavens, *supra* note 98, at 14; see, e.g., *U.S. v. Park*, 421 U.S. 658 (1975); *U.S. v. FMC Corp.*, 572 F.2d 902 (2d Cir. 1978).

by such a requirement.”¹⁰⁰ And as the paragraph above noted, regulatory offenses, unlike traditional offenses, tend to emphasize liability by omission;¹⁰¹ because they are meant to create incentives to engage in socially-desirable conduct, regulatory offenses often target a failure to act when the law imposes a duty to do so.¹⁰² And while regulatory offenses are crimes, a conviction for a regulatory offense usually does not carry the moral stigma and severe penalties associated with convictions for traditional crimes like rape or murder.¹⁰³

The soft harm targeted by regulatory offenses is therefore more analogous to the harm targeted by offenses against morality than it is to offenses targeting harm to affectivity. Offenses against morality and regulatory offenses both target generalized, essentially presumptive harms. Each is concerned with protecting the integrity of a particular system. Offenses against morality are concerned with protecting the integrity of a conceptual system—the ethical and moral principles that are predominant in a given society. Regulatory offenses are concerned with protecting the integrity of any of a host of infrastructure systems, the reliability and efficacy of which is deemed essential to the survival and well-being of the members of the social system they serve.

Offenses targeting the soft harms of affectivity are analogous to traditional criminal offenses in that they are concerned with redressing and preventing injury to a specific, individual victim. They deviate from traditional criminal offenses insofar as the injuries they encompass are intangible and amorphous. As we saw above, criminal law has, thus far, made the inclusion of an objective indicator of harm an essential condition for recognizing and enforcing offenses that target the infliction of affective soft harms.

I will return to the role that harm—both hard and soft—plays in criminal law in Section IV, when I take up the issue of fantasy crime. Before that analysis, however, I will describe the context in which fantasy crime emerges.

100. 258 U.S. 250, 251-52 (1922).

101. See, e.g., John S. Baker, Jr., *Prosecuting Dioceses and Bishops*, 44 B.C. L. REV. 1061, 1062 (2003).

102. See Leavens, *supra* note 98, at 16.

103. See *Morissette v. U.S.*, 342 U.S. 246, 256 (1952).

II. VIRTUAL WORLDS

"[T]he . . . firewall between word and deed . . . is not likely to survive. . . ."104

Before describing the context in which fantasy crime emerges, I need to distinguish *the* virtual world—cyberspace—from the discrete virtual worlds it contains—worlds that, in a sense, represent the colonization of cyberspace. The essential distinction between the two phenomena is determined by how they are approached.

We all *use* cyberspace as a tool—a cross between an automobile, a telephone, a television, a map, a radio, a movie theater and more. Cyberspace transports us—visually and figuratively—to other places; it lets us communicate with people almost anywhere on the globe; it provides us with news and entertainment, on demand and on our terms. Those who merely use it as a tool do not inhabit cyberspace; they employ it situationally to enhance the efficiency and quality of their lives in the real, physical world. In that sense, cyberspace is indistinguishable from any of the consumer technologies that have been created over the last century and a half.¹⁰⁵

Some people also *inhabit* cyberspace. They use cyberspace as a tool, but they also shift a segment of their lives into one of the discrete, distinctive virtual worlds that are being established in shards of cyberspace.¹⁰⁶ These people are, in effect, colonizing cyberspace. They “live,” to varying degrees, in both the real and virtual worlds, and that raises important questions regarding the law’s application to conduct that straddles both realities.

I will take up that issue in Section IV. First, though, it is necessary to trace the history of virtual worlds.

A. MOOs, MUDs and MMORPGs

“You’re in our world now.”¹⁰⁷

104. Julian Dibbell, *A Rape in Cyberspace*, VILLAGE VOICE, Dec. 21, 1993, <http://www.villagevoice.com/specials/0543,50thdibbell,69273,31.html>.

105. See, e.g., SUSAN W. BRENNER, LAW IN AN ERA OF “SMART” TECHNOLOGY 75-122 (2007).

106. See, e.g., Shard - Wiktionary, <http://en.wiktionary.org/wiki/shard> (last visited Oct. 8, 2008) (“[A]n instance of [a massively multiplayer online role-playing game] that is one of several independent and structurally identical virtual worlds.”).

107. This is the motto of *EverQuest*, which is discussed later in this section. Product Details - EverQuest Titanium (Released January 2006), Station.com Store, <https://store.station.sony.com/hardgood.jsp?SKU=EQTNM-HG-SW0106-EQTITA> (last visited Sept. 27, 2008).

The first virtual worlds were text-based online games known as multi-user dungeons, or MUDs.¹⁰⁸ For the purposes of this analysis, we will define “game” as an interactive “form of play with goals and structure.”¹⁰⁹ Games are fun, not work; games have goals while toys (also a source of fun) do not; and games involve conflict among players, who interact and interfere with each other’s goals.¹¹⁰ A goal-oriented activity we engage in for fun but that does not involve competing against others is a puzzle, not a game.¹¹¹

MUDs, which were modeled after the role-playing game *Dungeons and Dragons*,¹¹² began to appear in the late 1970s on the bulletin board systems that were then the extent of online interaction.¹¹³ MUD gameplay takes place in a fantasy world populated by elves, goblins and other “fantasy-based races,” and players assume the role of “warriors, mages, priests, thieves, . . . to gain specific skills or powers. The object . . . is to slay monsters, . . . complete quests, . . . create a story by roleplaying, and/or advance the created character.”¹¹⁴ Using dedicated terminals on computer networks and working only with text, MUD players created the characters and “storylines” and carried out the quests.¹¹⁵

The next stage in the development of virtual worlds came in the 1990s, with the rise of MOOs. James Aspnes, a graduate student,

108. See, e.g., Peter Brown, *What You Need to Know About Virtual Worlds, Virtual Property, Advertising and Intellectual Property*, in 929 PRACTICING LAW INSTITUTE, PATENTS, COPYRIGHTS, TRADEMARKS, & LITERARY PROPERTY COURSE HANDBOOK SERIES 601, 605 (2008); see also MUD - Wikipedia, <http://en.wikipedia.org/wiki/MUD> (last visited Oct. 8, 2008).

109. Kevin Maroney, *My Entire Waking Life*, THE GAMES J., May 2001, <http://www.thegamesjournal.com/articles/MyEntireWakingLife.shtml>.

110. CHRIS CRAWFORD, CHRIS CRAWFORD ON GAME DESIGN 8 (2003); Game - Wikipedia, <http://en.wikipedia.org/wiki/Game> (last visited Oct. 8, 2008).

111. See *id.*

112. *Id.*; See MUD - Wikipedia, *supra* note 1; see also Andrew D. Schwarz & Robert Bullis, *Rivalrous Consumption and the Boundaries of Copyright Law: Intellectual Property Lessons from Online Games*, 10 INTELL. PROP. L. BULL. 13, 14 (2005) (“The origins of the MMORPG reach back to the pencil-and-paper fantasy gaming popularized by *Dungeons and Dragons*. . .”). For a description of *Dungeons and Dragons*, see *Dungeons and Dragons* - Wikipedia, http://en.wikipedia.org/wiki/Dungeons_%26_Dragons (last visited Oct. 8, 2008) (“*Dungeons and Dragons* . . . is a fantasy role-playing game . . . first published in 1974.”).

113. See, e.g., Brown, *supra* note 108, at 605

114. MUD - Wikipedia, *supra* note 108.

115. Brown, *supra* note 108, at 605; see also Jason S. Zack, *The Ultimate Company Town: Wading in the Digital Marsh of Second Life*, 10 U. PA. J. CONST. L. 225, 228 (2007).

created a MUD that had “no aim beyond social interaction.”¹¹⁶ He added features that let users create objects and virtual rooms, and “the original task of exploring a prefabricated virtual world to earn points and power was replaced by an open-ended quest to build . . . relationships and the world’s infrastructure.”¹¹⁷ Two years later, Xerox researcher Pavel Curtis took Aspnes’ idea and combined it with code that used object-oriented programming; Curtis named his new creation Lambda MOO (Lambda MUD Object Oriented). In the Lambda MOO, “[e]very player . . . [could] create . . . objects and extend the virtual space. Instead of wandering through a maze of the game designer’s imagination, they were crafting it themselves. . . . [T]housands of new places and objects emerged, and the virtual world expanded to include thousands of users, with hundreds logged on simultaneously.”¹¹⁸

The MOO-MUD worlds were popular, but “their text-based realities left a great deal to the imagination. They were models, . . . but they were not true simulacra.”¹¹⁹ They did, however, pave the way for the next stage in the evolution of virtual worlds.¹²⁰

What would become the next stage—graphical MUDs—began in the mid-1980s.¹²¹ One of the earliest and most influential graphical MUDs was *Habitat*, an online role-playing game released in 1986.¹²² Unlike its predecessors, *Habitat* was designed to exploit the still-primitive Internet: participants used a home computer—a Commodore 64—and a modem to connect to a mainframe system; once connected to the mainframe, they used special *Habitat* software to participate in its “multi-participant online virtual environment.”¹²³ *Habitat’s*

116. Viktor Mayer-Schönberger & John Crowley, *Napster’s Second Life?: The Regulatory Challenges of Virtual Worlds*, 100 Nw. U. L. Rev. 1775, 1783-84 (2006) (footnote omitted).

117. *Id.*

118. *Id.* at 1784 (footnotes omitted); see also F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 20 (2004) (noting that MOOs moved virtual worlds from “traditional D&D elements, such as killing for points” and into more social, even real-world, settings); see, e.g., Object-oriented programming - Wikipedia, http://en.wikipedia.org/wiki/Object-oriented_programming (last visited Oct. 8, 2008). We will return to LambdaMOO. See *infra* discussion § IV.

119. Mayer-Schönberger & Crowley, *supra* note 116, at 1784.

120. See, e.g., *id.*

121. See, e.g., MUD - Wikipedia, *supra* note 108.

122. See *Habitat* (video game) - Wikipedia, [http://en.wikipedia.org/wiki/Habitat_\(video_game\)](http://en.wikipedia.org/wiki/Habitat_(video_game)) (last visited Oct. 8, 2008).

123. F. RANDALL FARMER, *Social Dimensions of Habitat’s Citizenry*, in VIRTUAL REALITIES: AN ANTHOLOGY OF INDUSTRY AND CULTURE (C. Loeffler, ed., 1993), available at <http://www.crockford.com/ec/citizenry.html>. See also *Habitat* (video game) - Wikipedia, *supra* note 122.

environment was graphical, rather than text-based; participants used avatars—"online virtual bodies"—to interact with other participants and the environment.¹²⁴ *Habitat*'s success was limited by two factors: one was the "narrow bandwidth and low processing power" of the graphics chips and computers then in use; the other was its being based on a "per minute pricing model."¹²⁵ Players accessed *Habitat* through a Commodore online service provider called Quantum Link that charged them \$9.95 per month plus 6 to 8 cents for each minute they were online.¹²⁶

The next, far-more-advanced iteration of MUDs came in the mid-1990s. Two virtual world providers—Archetype Interactive and Origin Systems—changed everything by using the Internet to connect players to their worlds and eliminating per minute online charges in favor of a monthly flat fee.¹²⁷ Another world launched during this era—*Lineage*—exploited the "computer-literate . . . populace of Korea" and had one million participants seventeen months after it launched in August of 1998.¹²⁸ Three other worlds created around the same time—*EverQuest*, *Asheron's Call*, and *Final Fantasy IX*—quickly attracted over one hundred thousand users, and by the end of 2004, *EverQuest* and *Final Fantasy* each had five hundred thousand users.¹²⁹

The next stage in the evolution of virtual worlds was a move from MUDs to MMORPGs (massively multi-player online role-playing games).¹³⁰ While MMORPGs have in a sense existed since the early 1990s, in the twenty-first century they began to evolve dramatically in the texture and complexity of the experiences they provided. "As Internet access speed increased and computer-processing power improved . . . , allowing for more complicated graphics, the basic MUD

124. Brian A. White, *Second Life: A Guide to Your Virtual World* 68 (2007); see *Habitat* (video game) - Wikipedia, *supra* note 122.

125. Mayer-Schönberger & Crowley, *supra* note 116, at 1785.

126. See Quantum Link - Wikipedia, http://en.wikipedia.org/wiki/Quantum_Link (last visited Oct. 8, 2008). Until the mid-1990s, per-minute billing was standard for online commercial games. See, e.g., Mayer-Schönberger & Crowley, *supra* note 116, at 1785 n.45 (citing Ralph Koster's Home Page, <http://www.raphkoster.com/gaming/mudtimeline.shtml> (last visited Oct. 8, 2008)).

127. See Mayer-Schönberger & Crowley, *supra* note 116, at 1786. Origin System's *Ultima Online* went live in 1997, a year after Archetype Interactive released its *Meridian 59*. See *Meridian 59* - Wikipedia, http://en.wikipedia.org/wiki/Meridian_59 (last visited Oct. 8, 2008); *Ultima Online* - Wikipedia, http://en.wikipedia.org/wiki/Ultima_Online (last visited Oct. 8, 2008).

128. Mayer-Schönberger & Crowley, *supra* note 116, at 1786 (notes omitted).

129. *Id.*

130. See, e.g., WAGNER JAMES AU, *THE MAKING OF SECOND LIFE* 1-12 (2008) [hereinafter AU, *THE MAKING OF SECOND LIFE*].

evolved into sophisticated MMORPGs—complex, persistent environments that were depicted with stunning 3-D visuals.”¹³¹

MMORPGs generally continue their predecessors’ emphasis on fantasy, but they have several distinctive characteristics. As in all role-playing games, players assume the role of a fictional character, usually a character from the fantasy genre, and control “many of that character’s actions. MMORPGs are distinguished from single-player or small multi-player [role-playing games] by the number of players, and by the game’s persistent world, . . . which continues to exist and evolve while the player is away from the game.”¹³² Operationally, modern MMORPGs share certain features with *Habitat*, the graphical MUD described above. MMORPGs also use “client-server” system architecture:

The software that generates and persists the “world” runs continuously on a server, and players connect to it via client software. The client software may provide access to the entire playing world, or further “expansions” may be required . . . to . . . access . . . certain areas of the game Players generally must purchase the client software for a one-time fee, although an increasing trend is for MMORPGs to work using pre-existing “thin” clients, such as a web browser.¹³³

And like *Habitat* and its immediate successors, some MMORPGs require players to pay a monthly subscription fee to play the game.¹³⁴

MMORPGs have become incredibly popular. In the summer of 2008, a site dedicated to MMORPGs listed 294 separate MMORPGs, and the vast majority are described as “fantasy” games.¹³⁵ While MMORPGs have evolved vastly in technical complexity and sophistication, they—like MUDs—tend to be “based on traditional fantasy themes, often occurring in an in-game universe comparable to that of *Dungeons & Dragons*.”¹³⁶

To understand these themes and how they are integrated into virtual worlds, it is useful to consider an example: based on number of players, *World of Warcraft* (*WoW*) is the world’s largest fantasy MMORPG.¹³⁷ To play *WoW* in the United States, one must first buy

131. Zack, *supra* note 115, at 228-29; see also History of Massively Multiplayer Online Games - Wikipedia, http://en.wikipedia.org/wiki/History_of_MMORPGs (last visited Oct. 8, 2008).

132. Massively multi-player online role-playing game - Wikipedia, <http://en.wikipedia.org/wiki/MMORPG>.

133. *Id.*

134. *See id.*

135. *See* MMORPG.com, MMORPG Gamelist, <http://www.mmorpg.com/gamelist.cfm> (last visited Oct. 8, 2008).

136. Massively Multiplayer Online Role-Playing Game - Wikipedia, *supra* note 131.

137. *See, e.g.*, John Gravois, *Knights of the Faculty Lounge*, Chronicle of Higher Education (July 6, 2007), <http://chronicle.com/free/v53/i44/44a00801.htm>. In January 2008,

the client software, which comes with thirty days of game playing time, for \$19.99.¹³⁸ After that, a player must use a credit card to buy additional playing time.¹³⁹

The primary setting for *WoW* game play is the fictional world of Azeroth.¹⁴⁰ The *WoW* environment is populated by two types of characters: Player Characters are avatars that are controlled by a human being; Non-Player Characters are avatars controlled by the game software that interact with Player Characters either by executing simple scripted events or through artificial intelligence.¹⁴¹ Non-Player Characters carry out various roles in *WoW*: they buy and sell goods, teach skills to the Player Characters and provide a large number of services Player Characters need to play the game; some also patrol specific areas to protect them against attacks by Player or Non-Player Characters.¹⁴²

Human players select their characters from ten “races” that are divided into two factions: Alliance and Horde.¹⁴³ A character’s race determines his or her appearance, initial geographical location in the game and initial skill set.¹⁴⁴ The five Alliance races are Humans,

Blizzard Entertainment, which owns *WoW*, announced it had ten million subscribers. Press Release, Blizzard Entertainment, World of Warcraft Reaches New Milestone: 10 Million Subscribers, (Jan. 22, 2008), available at <http://www.blizzard.com/us/press/080122.html>. In 2008, *Lineage*, the still-popular Korean-based MMORPG, had between 1,000,000 and 3,000,000 subscribers, most of them in Korea. See *Lineage* (video game) - Wikipedia, [http://en.wikipedia.org/wiki/Lineage_\(video_game\)](http://en.wikipedia.org/wiki/Lineage_(video_game)) (last visited Oct. 8, 2008).

138. See Blizzard Entertainment, World of Warcraft, Amazon.com, http://www.amazon.com/World-Warcraft-Pc/dp/B000067FDW/ref=sr_1_4?ie=UTF8&s=videogames&qid=1226087426&sr=1-4. See also Subscription Options, Blizzard Entertainment, World of Warcraft, <http://us.blizzard.com/support/article.xml?articleId=21450&categoryId=2324&parentCategoryId=&pageNumber=1>.

139. See Subscription Options, *supra* note 138. Prices vary, both for the software and for playing time, depending on the region one is in, e.g., North America, Europe, Australia. See Setting Up and Managing Your Subscription, Blizzard Entertainment, World of Warcraft Europe, <http://eu.blizzard.com/support/article.xml?articleId=20430&categoryId=5120&parentCategoryId=&pageNumber=1>.

140. See World of Warcraft – Wikipedia, http://en.wikipedia.org/wiki/World_of_Warcraft. Azeroth has two primary continents: the Eastern Kingdoms and Kalimdor. See *id.* There are additional areas – Azuremyst and Bloodmyst Isles, and Teldrassil – northwest of Kalimdor. And players who buy a game expansion pack can also play on Draenor, a new planet. See *id.*

141. See *id.* There are three kinds of Non-Player Characters, or NPCs. Friendly NPCs cannot attack or be attacked by friendly characters. Hostile NPCs either belong to a faction opposing that of a Player Character or to mobs; as their name implies, hostile NPCs will attack any Player Character with whom they have a hostile relationship. Finally, neutral NPCs only attack if provoked. See *id.*

142. See *id.*

143. See *id.*

144. See *id.*

Night Elves, Dwarfs, Gnomes and Draenei; the five Horde races are Orcs, Tauren, Undead, Trolls and Blood Elves.¹⁴⁵ After a player has chosen his/her race, the next step is to select a character class from among nine potential classes.¹⁴⁶ Each character class has a set of unique abilities and talents.¹⁴⁷ The classes are Druid, Hunter, Mage, Paladin, Priest, Rogue, Shaman, Warlock and Warrior.¹⁴⁸

After settling on a race and a class, players acquire the basic, appropriate equipment for their characters; Player Characters can, and do, expand their character's possessions as they play the game.¹⁴⁹ After selecting and equipping their Character, Players embark upon the game: Their goals are to acquire in-game money, experience and property and build up the reputation of their Character; in so doing, they improve their skill set and powers.¹⁵⁰ *WoW* players do all this by exploring the game's virtual landscapes, fighting monsters, embarking on *WoW*-assigned quests, joining guilds and uniting in raiding parties to attack enemies of varying types.¹⁵¹

One of the focal points of the *WoW* experience is earning in-game money: *WoW* gold.¹⁵² As in the real world, *WoW* players need gold to buy essential and non-essential items and to advance from level to level within the game.¹⁵³ There are various ways players can earn gold, most of which involve particular skills, such as crafts, gathering or certain types of farming.¹⁵⁴ They can also earn gold by

145. See *id.* The Draenei and Blood Elf races are only available in the expansion pack. See *id.*

146. See *id.* Not all classes are available for each race. See *id.*

147. See *id.*

148. See *id.*

149. See *id.*

150. See *id.*

151. See *id.*; see also World of Warcraft, Quests F.A.Q, <http://www.worldofwarcraft.com/info/faq/quests.html> (last visited Oct. 8, 2008) (stating that quests are assigned by "questgivers," which are non-player characters who assign quests and describe their objectives to players).

152. See, e.g., Bob Jones, *Make Lots of Gold in WoW While Leveling with Ease!!!*, PR-INSIDE.COM, May 21, 2008, available at <http://www.pr-inside.com/make-lots-of-gold-in-wow-r600551.htm>.

153. See *id.* Among other things, *WoW* players can buy mounts, "new skills, updated armor and weapons, gryphon flights," pets and trinkets. See *id.*; see also Julian Dibbell, *The Life of the Chinese Gold Farmer*, N.Y. TIMES, June 17, 2007, available at <http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html> ("Every World of Warcraft player needs [gold] . . . to pay for the virtual gear to fight the monsters to earn the points to reach the next level.").

154. See Jones, *supra* note 152; see also World of Warcraft Money Making Guide, <http://www.gotwarcraft.com/guides/items/money.php> (last visited Oct. 8, 2008); Dibbell, *supra* note 153 ("[Players can] make weapons, potions and similarly useful items to sell to

performing repetitious tasks, such as killing certain types of *WoW* fauna and other creatures.¹⁵⁵

Repetitiously killing monsters, beasts or non-player characters to earn gold is known as “grinding.”¹⁵⁶ Grinding is, as a *WoW* guide noted, “one of the most boring” but also one of the “most profitable” ways for players to generate gold.¹⁵⁷ This presents *Wow* players with a choice: they can “spend hours” grinding or “they can pay someone real money to do it for them.”¹⁵⁸ In the last decade, the latter has become a lucrative endeavor (at least for some) known as “gold farming.”¹⁵⁹ Gold farmers are individuals who play *WoW* and other MMORPGs to earn *WoW* gold or the currency applicable in another, similar virtual world; they earn real world wages by the hour and work for businesses that sell the gold (or other currency) they generate online in “real-money trading.”¹⁶⁰ Gold farming is the most significant, if not only, point of intersection between the virtual environments of the MMORPGs and the real, physical world.¹⁶¹ It is also outlawed in *WoW* and other MMORPGs.¹⁶²

The fundamental themes in *WoW* are combat and material enrichment, both of which players pursue in a Tolkien-esque fantasy environment.¹⁶³ Much of the combat derives from the tension between the Horde and Alliance factions, which are “battling for control of the world” of Azeroth.¹⁶⁴

Since *WoW* is predicated on combat, it is not unusual for player characters to die in-game.¹⁶⁵ When a player dies, he becomes a ghost;

other players or even gather the herbs and hides and other resources that are the crafters’ raw materials.”).

155. See Jones, *supra* note 152 (providing the example of “killing tons . . . of Furbolgs”).

156. Dibbell, *supra* note 153.

157. See World of Warcraft Money Making Guide, *supra* note 154.

158. Dibbell, *supra* note 153.

159. See *id.* Gold farming is definitely lucrative for those who own the sweatshops where employees grind away to earn gold that is then sold to *WoW* players. See *id.* In 2007 it was estimated that gold farming operations employed 100,000 workers, mostly in China, and were responsible for producing “the bulk of all the goods in what has become a \$1.8 billion worldwide trade” in *WoW* gold and other virtual currencies and virtual goods. *Id.*

160. See *id.*

161. See, e.g., *id.*

162. *Id.*

163. See, e.g., *WoW* -> Info -> Player vs. Player, <http://www.worldofwarcraft.com/pvp/> (last visited Oct. 8, 2008).

164. *WoW* -> Info -> F.A.Q. -> Horde vs. Alliance, <http://www.worldofwarcraft.com/info/faq/hordevalliance.html> (last visited Oct. 8, 2008).

165. See, e.g., Newbie Guide/Fighting and Dying – *WoWWiki*, http://www.wowwiki.com/Newbie_Guide/Fighting_and_Dying (last visited Oct. 8, 2008).

he is sent to a graveyard and his property decreases in durability, which means it is more easily destroyed.¹⁶⁶ A player can elect to remain a ghost for as long as he likes or “return to the world of the living” with no loss of status or experience.¹⁶⁷ There are three ways to do this: (1) return “to the immediate vicinity” of his body, where the player clicks a button; (2) have a character of one of the classes capable of resurrecting him do so with a spell; or (3) use a Spirit Healer (which further reduces the durability of his property and leaves him weakened with “resurrection sickness”).¹⁶⁸

The fact that death is a routine—but impermanent—aspect of participating in *WoW* might lead one to conclude that the world has no rules or law, but that is not true. The *WoW* Terms of Use set out a number of rules, most of which focus on issues outside of playing the game.¹⁶⁹ Section Five of the Terms of Use includes two sets of rules: “rules related to interaction with other users” and “rules related to game play.”¹⁷⁰

The rules governing player interactions are detailed and primarily concerned with outlawing in-game threats, harassment, stalking and “unwanted attention or discomfort,” though they also outlaw in-game scams, cheating and impersonating a “real person” without permission.¹⁷¹ The last prohibition seems to be primarily concerned with preventing players from pretending to be employees of Blizzard Entertainment (Blizzard), which owns and operates *WoW*.¹⁷² The rules also include a provision outlawing the use of *WoW* to transmit any content Blizzard deems “to be offensive, including . . .

166. See *WoW* -> Info -> Basics -> Death, <http://www.worldofwarcraft.com/info/basics/death.html> (last visited Oct. 8, 2008); see also Durability - WoW Wiki, <http://www.wowwiki.com/Durability> (last visited Oct. 8, 2008) (noting that 10% of a player's durability decreases on death).

167. See *WoW* -> Info -> Basics -> Death, *supra* note 166; see also Newbie Guide/Fighting and Dying - WoW Wiki, *supra* note 165. In other MMORPGs, players lose their property and their experience/status when they die and are resurrected.

168. See *WoW* -> Info -> Basics -> Death, *supra* note 166.

169. See World of Warcraft, Terms of Use, <http://www.worldofwarcraft.com/legal/termsofuse.html> (last visited Oct. 8, 2008). Many of the provisions deal with account creation, use of the game services, the exclusion of warranties, and the limitation of liabilities. See *id.*

170. See *id.* Section Five also includes rules “related to usernames and guild designations.” See *id.* § 5(A).

171. See *id.* § 5(B). Section 5(B)(9) outlaws scams, i.e., participating “in any action that, in the sole and absolute opinion of Blizzard, results . . . in an authorized user . . . being ‘scammed’ or defrauded out of gold, weapons, armor, or any other items that user has earned through authorized game play in the Program.” *Id.* For a review of the similar rules enforced by other MMORPGs, see Andrew Jankowich, *EULaw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTEL. PROP. 1, 43-46 (2006).

172. See World of Warcraft, Terms of Use, *supra* note 169, § 5(B)(11).

content or language that is unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or otherwise objectionable.”¹⁷³

Blizzard has a separate harassment policy, the provisions of which supplement the rules described above.¹⁷⁴ It divides harassment into three categories: (1) verbal, (2) physical, and (3) ongoing.¹⁷⁵ Verbal harassment is further divided into subcategories, including “highly inappropriate” and “moderately inappropriate” language.¹⁷⁶ Language is considered “highly inappropriate” if it targets someone for their race, citizenship or ethnicity, refers to “extreme or violent” sexual or “real life” acts, threatens harm in the real world, releases real world information about players or *WoW* employees, or insultingly refers to a player’s sexual orientation.¹⁷⁷ Language is considered “moderately inappropriate” if it is obscene, vulgar, insulting or defamatory, if it maligns religion or religious figures, or if it refers to drugs, other illegal activities, spamming and/or advertising in game.¹⁷⁸ The policy does not define physical harassment, except to note that it can encompass stealing; it also notes that ongoing harassment can take “many forms,” but that “intent” is a significant indicator of this type of harassment.¹⁷⁹

The harassment policy outlines the penalties that can be imposed for the above conduct and for violating the “rules governing game play” described below.¹⁸⁰ Penalties are imposed by Game Masters, Blizzard employees who circulate through the *WoW* world and both observe violations and respond to player complaints.¹⁸¹ Blizzard has a hierarchy of penalties, which range from a warning with accelerating suspensions (three hour, twenty-four hour, forty-eight hour and seventy-two hour) to a final warning, and then the

173. *Id.* § 5(B)(1).

174. See Blizzard Support - Harassment Overview, <http://us.blizzard.com/support/article.xml?articleId=20455> (last visited Oct. 8, 2008).

175. *See id.*

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. See Blizzard Support - Game Master Interaction Policy, <http://us.blizzard.com/support/article.xml?articleId=21503> (last visited Oct. 8, 2008); see also Game Master - *WoW*Wiki, http://www.wowwiki.com/Game_Master (last visited Oct. 8, 2008). (“[Game Masters] solve problems, disputes and sometimes punish people disobeying the Terms of Use policy.”). For a review of the very similar disciplinary penalties and procedures enforced by other MMORPGs, see Jankowich, *supra* note 171, at 43-46.

ultimate sanction, “Account Closure.”¹⁸² According to the *WoW* website, impositions of the last two are, respectively, “quite rare” and “very rare.”¹⁸³ Blizzard says it “hope[s] to give only the most minor of penalties” but “factor[s] in the severity of the infraction and how often the player has violated our policies in the past.”¹⁸⁴ Like most MMORPGs, *WoW* does not post statistics on the number and type of penalties imposed in a given period, but postings in *WoW* forums clearly indicate that penalties are being imposed.¹⁸⁵

The second set of rules—the rules “related to game play”—are quite concise.¹⁸⁶ They begin by announcing that Blizzard considers “most conduct, including player killing,” to be part of the game, and not harassment.¹⁸⁷ They then advise users that since *WoW* is a “player vs. player game,” they should protect themselves “in areas where the members of hostile races can attack [them], rather than contacting Blizzard’s in-game customer service representatives for

182. See Blizzard Support - World of Warcraft Account Penalties, <http://us.blizzard.com/support/article.xml?articleId=20221> (last visited Oct. 8, 2008); see also Martin Davies, *Gamers Don't Want Any More Grief*, THE GUARDIAN, June 15, 2006, available at <http://www.guardian.co.uk/technology/2006/jun/15/games.guardianweeklytechnologysection2>. In April of 2006, Blizzard “bann[ed] more than 5,400” *WoW* accounts in an effort to deter violations. *Id.*

183. See Blizzard Support - World of Warcraft Account Penalties, *supra* note 182. Other MMORPGs also use suspension or exclusion from the game as a sanction for outlawed behavior but one—Roma Victor—has gone a step further. In March of 2006, it crucified a player for violating the game’s rules against “ganking, or gang-killing new players as they first appear.” Posting of Mark M. to MMORPGblog, <http://mmorpg.qj.net/MMORPG-Griever-Crucified-In-Game-As-Punishment/pg/49/aid/12179> (Mar. 23, 2006, 12:59 EST). The player’s avatar was hung from a cross for seven days in the in-world village of Corstopitum. *Id.* The crucifixion was really just a way of suspending the violator: as a Roma Victor spokesman explained, “since our . . . world is historically authentic, we feel that applying this punishment to . . . virtual wrongdoers is not only appropriate, but also adds to the gaming experience by resonating with classical history.” *Id.* (quoting Kerry Fraser-Robinson, CEO of the company that created Roma Victor).

184. Blizzard Support - World of Warcraft Account Penalties, *supra* note 183; see also Blizzard Support - How to Stay in the Game (Part 2 of 2), <http://us.blizzard.com/support/article.xml?articleId=21507> (last visited Oct. 8, 2008) (“Further violations will begin to increase the severity of the penalties . . . whether the new violations are similar to previous ones or completely different.”).

185. See, e.g., Posting of Elish Hecht, to *WoW Insider*, <http://www.wowinsider.com/2008/01/11/harsher-penalties-for-av-afkers/> (Jan. 11, 2008, 19:05 EST); see also Posting of Schniblet to World of Warcraft - English (NA) Forums -> Is a final warning truly final?, <http://forums.worldofwarcraft.com/thread.html?topicId=1602233730&sid=1> (Sept. 15, 2007, 09:20 PDT); Posting of Iceeman to Unofficial World of Warcraft Forums - Suspension??, <http://www.worldofwar.net/forums/archive/index.php/t-399456.html> (June 29, 2007, 22:20 CDT).

186. For a review of the very similar rules enforced by other MMORPGs, see Jankowich, *supra* note 171, at 43-46.

187. See World of Warcraft, Terms of Use, *supra* note 169, § 5(C).

help when [they] have been killed by an enemy. . . . Nonetheless, certain acts go beyond what is ‘fair’ and are considered serious violations of these Terms of Use.”¹⁸⁸ These “serious violations” include, “but are not necessarily limited to,” three things: (1) using or exploiting errors in design or “program bugs” to gain competitive advantage over other players,¹⁸⁹ (2) violating *WoW*’s End User License Agreement,¹⁹⁰ and (3) anything Blizzard “considers contrary to the ‘essence’ of the Program.”¹⁹¹ Blizzard has indicated that gold farming falls into the last category because it “diminish[es] the gameplay experience for everyone [else].”¹⁹²

But Blizzard’s primary justification for outlawing gold farming has nothing to do with game play itself. Section Eight of the *WoW* Terms of Service makes it clear that players own none of the content they generate in the game:

You . . . have no right or title in or to any such content, including the virtual goods or currency . . . originating in the Game, or . . . associated with the Account. . . . Blizzard does not recognize any virtual property transfers executed outside of the Game or the purported sale, gift or trade in the “real world” of anything related to the Game. Accordingly, you may not sell items for “real” money or otherwise exchange items for value outside of the Game.¹⁹³

Blizzard’s position is consistent with that taken by the other MMORPGs. An empirical study published in 2006 found that “56.25% of the virtual worlds surveyed prohibited sales of virtual property outside of their world,” and 33.33% claimed “the entire world” — including content created by participants in the world—as “their virtual property.”¹⁹⁴ Additionally, 72.92% of the worlds claim “copyright in the parts of” their world that “are not created by participants.”¹⁹⁵

WoW is emblematic of other fantasy MMORPGs in its medieval European fantasy-based environment, its characters, and its emphasis on combat and on the acquisition of wealth and status. Like most, if

188. *See id.*

189. *See* Jankowich, *supra* note 171, at 43-46.

190. *See id.*; *see also* World of Warcraft End User License Agreement, <http://www.worldofwarcraft.com/legal/eula.html> (last visited Sept. 28, 2008) (End User License Agreement is not concerned with player activity within the game.).

191. *See* World of Warcraft, Terms of Use, *supra* note 169, § 5(C).

192. *WoW* -> Support -> Gold Buying,

<http://www.worldofwarcraft.com/info/basics/antigold.html> (last visited Oct. 8, 2008).

193. World of Warcraft, Terms of Use, *supra* note 169, § 8.

194. Jankowich, *supra* note 171, at 37-39. 66.67% of the worlds also barred players from selling their accounts. *Id.*

195. *See id.* at 38.

not all, of the MMORPGs,¹⁹⁶ *WoW* is a highly structured experience for its players; they can create certain items within the game, and they can engage in independent action within it, but their experience is inevitably bounded by the embedded strictures Blizzard imposes on the *WoW* virtual world.

Those who frequent *WoW* and the other MMORPGs live out scripted “heroics in an alternate realm.”¹⁹⁷ Their in-world experience is a cross between playing a traditional, real world game and acting in a play; in both, one’s actions are, to a greater or lesser extent, determined by external constraints—the game rules in the first instance and the script in the latter. While MMORPG players do have some ability to improvise, their virtual life experiences are to a great extent shaped by the often elaborate rules of the game: by the talents and limitations of their characters, by obligations the game imposes (e.g., to go on quests), and by the implicit need to improve their characters’ status and wealth.¹⁹⁸ This reality is inherent in the nature of MMORPGs. They are, after all, “role-playing” games; as such, MMORPG players assume the roles of fictional characters within certain boundaries established by the rule of the game.¹⁹⁹

The experiential restraints of the MMORPGs do not keep the MMORPGs from being fully realized virtual worlds under the definition outlined earlier.²⁰⁰ It simply means that they tend to offer participants fewer opportunities for inflicting harms of varying types than do the newer, less-structured virtual worlds.

196. There is some flexibility in how one defines “MMORPG.” Some would consider virtual worlds like *Second Life* and *HiPiHi* to be MMORPGs, but I do not, as we will see in the next section.

197. Andrea W.M. Louie, *Designing Avatars in Virtual Worlds: How Free Are We to Play Superman?*, 11 No. 5 J. INTERNET L. 3, 9 (2007).

198. See, e.g., Newbie guide - WoWWiki, http://www.wowwiki.com/Newbie_guide (last visited Oct. 8, 2008) (noting that even a character’s “rest” is structured).

199. See Role-playing game - Wikipedia, http://en.wikipedia.org/wiki/Role-playing_game (last visited Oct. 8, 2008). In role-playing games players assume the roles of fictional characters and interact with other players in a virtual world. See, e.g., *Microsoft: Hackers, Gangsters Targeting Online Role-Playing Games*, Fox News (August 18, 2008), <http://www.foxnews.com/story/0,2933,208392,00.html>. A defining characteristic of MMORPGs is “the relative freedom of the players to decide on the actions and attitudes of their characters, within the rules of the game and the constraints of the fictional world. . . . [P]layers create a shared history that . . . in collaboration between the participants.” Anders Tyghsen, Susana Tosca & Thea Brolund, *Personalizing the Player Experience in MMORPGs* 4 Macquarie University, www.ics.mq.edu.au/~atyghsen/html2/images/Personal_TIDSE.pdf.

200. See *supra* discussion § III.

B. Second Lives

"This world . . . is whatever you make it . . ." ²⁰¹

Over roughly the last decade, a few virtual worlds have arisen that "eschew the . . . medieval fantasy-based role-playing game play common to such online blockbusters as *World of Warcraft* [and other MMORPGs]." ²⁰² These worlds offer what is essentially an augmented version of reality, what one author calls "BeBop Reality." ²⁰³ BeBop Reality is "a universe in which the fundamental laws of physics and identity are open to constant improvisation by its inhabitants, who instantly modify and embellish it . . . without breaking the world's underlying structure." ²⁰⁴

The BeBop Reality worlds are, in varying degrees, attempts to realize the Metaverse, the fictional online environment Neal Stephenson described in his 1992 novel *Snow Crash*:

The Metaverse appears to its users as an urban environment, developed along a . . . road . . . that runs the . . . circumference of a . . . spherical planet. The virtual real estate . . . is available to be bought and buildings developed thereupon. . . .

Within the Metaverse, individual users appear as avatars of any form, with the sole restriction of height, "to prevent people from walking around a mile high." ²⁰⁵

1. Second Life

There are, as noted above, several worlds that to some extent attempt to realize the Metaverse, but only one—*Second Life*—was intentionally created to replicate the Metaverse and has, for all intents and purposes, achieved its goal. ²⁰⁶ I will therefore devote this section to *Second Life*, and briefly review the other Metaverse-style worlds in the next section.

Second Life is the brainchild of Philip Rosedale who, along with Mitch Kapor and other investors, founded Linden Lab, the company that would develop this particular Metaverse. ²⁰⁷ Their first attempt

201. Second Life - FAQ, <http://secondlife.com/whatis/faq.php#02> (last visited Oct. 8, 2008).

202. Daniel Terdiman, *Name that Metaverse*, CNET NEWS, Oct. 6, 2005, http://news.cnet.com/Name-that-metaverse/2100-1043_3-5890497.html (internal quotations omitted).

203. AU, THE MAKING OF SECOND LIFE, *supra* note 130 at xviii.

204. *Id.*

205. NEAL STEPHENSON, SNOW CRASH 38 (1992).

206. AU, THE MAKING OF SECOND LIFE, *supra* note 130 at 16-37.

207. *See id.*

was *Linden World*, which has been described as “the Book of Genesis turned into an action movie.”²⁰⁸ It was a primitive world inhabited by robot avatars armed with guns and grenades and by snakelike creatures that consumed the other native fauna, rock-eating birds.²⁰⁹ Users had some ability to transform *Linden World*, but it was really meant to be another, perhaps less-structured MMORPG; in other words, it was meant to be a game users would “play.”²¹⁰ That changed when Rosedale and his development team realized that what was unique and appealing about *Linden World* was its capacity to give users the ability to “build and see the results instantaneously; to share the act of creation with others; to riff off their work, . . . to collectively create.”²¹¹

They therefore set about revising *Linden World*, a process that led to a name change, among other things: *Linden World* became *Second Life* because, as a Linden staffer noted, “everybody wants a *Second Life*.”²¹² The name was also chosen because it exemplified the goals of this new world: a virtual community in which “you can be somebody different, and do something different.”²¹³

In developing *Second Life*, Linden Lab staffers sought to create a world that offered opportunities for individual self-expression instead of the structured experiences common to MMORPGs.²¹⁴ They began a beta test in November of 2002, and opened *Second Life* to the public in April of 2003.²¹⁵ In a press release issued at the time, Philip Rosedale described what *Second Life* had already become:

[T]housands of people have been . . . building . . . a vibrant online society that has the complexity . . . of the real world. . . . Our residents have built thousands of unique structures to explore—museums, nightclubs, even entire cities. Over 3,000 people have attended in-world parties, contests, events, and classes. And the in-world economy is booming—residents have bought and sold everything from designer fashions to sophisticated weapons in over 30,000 transactions.²¹⁶

His comments reflect Linden Lab’s vision of *Second Life* as “an alternative existence . . . that strives to be better than the physical

208. *Id.* at 26.

209. *See id.* at 26-27.

210. *See id.* at 26-29.

211. *Id.* at 30.

212. *Id.* at 34 (emphasis in original).

213. *Id.* at 34-35.

214. *See id.* at 28-37. For the differences between *Second Life* and a MMORPG, *see* *Second Life – FAQ*, *supra* note 201.

215. *See, e.g., Second Life Opens Public Beta*, GAMEZONE ONLINE, Apr. 28, 2003, http://pc.gamezone.com/news/04_28_03_03_11PM.htm.

216. *Id.* (quoting Philip Rosedale, CEO and founder of Linden Lab, *Second Life*’s developer).

world.”²¹⁷ *Second Life* is based on the premise that the Metaverse must be created by its users, and must, in other words, “evolve organically.”²¹⁸ Linden Lab constructs the landscape and the backdrop; everything else is “imagined and created by its Residents.”²¹⁹ This is how it explains the *Second Life* experience to potential users:

Second Life provides near unlimited freedom to its Residents. This world really is whatever you make it, and your experience is what you want out of it. If you want to hang out with your friends in a garden or nightclub, you can. If you want to go shopping or fight dragons, you can. If you want to start a business, create a game or build a skyscraper you can. It’s up to you.²²⁰

To participate in *Second Life*, Residents must be at least eighteen years old. There is a separate world—*Teen Second Life*²²¹—for Residents who are at least thirteen years old but younger than eighteen.²²² The Residents of *Teen Second Life* are transferred to *Second Life* when they turn eighteen.²²³

The plasticity and fluidity of the *Second Life* experience is one of several characteristics that distinguish it from the MMORPGs examined in the previous section.²²⁴ Another is that unlike

217. Kevin Maney, *The King of Alter Egos Is Surprisingly Humble Guy*, USATODAY.COM, Feb. 24, 2007, http://www.usatoday.com/tech/news/2007-02-04-second-life-rosedale_x.htm.

218. *Id.*

219. *Second Life* – FAQ, *supra* note 201. Users are referred to as “Residents.”

220. *Id.*

221. *See* Teen Second Life, <http://teen.secondlife.com/> (last visited Oct. 8, 2008).

222. *See* SecondLife - Terms of Service, ¶ 2.2, <http://secondlife.com/corporate/tos.php> (last visited Oct. 8, 2008). If a would-be Resident lives “in a jurisdiction where the age of majority is greater than 18 years old,” they are barred from joining *Second Life* until they reach the required age. *Id.* Structurally and experientially, *Teen Second Life* is analogous to *Second Life*. *See* Teen Second Life: FAQ, <http://teen.secondlife.com/whatis/faq> (last visited Oct. 8, 2008). There are, though, certain differences between them. The most obvious is age: to register for *Teen Second Life*, one must “provide identity verification,” a requirement meant to prevent adults from acquiring accounts. *See* Teen Second Life: Pricing, <http://teen.secondlife.com/pricing>. *See also* Teen Second Life - Wikipedia, http://en.wikipedia.org/wiki/Teen_Second_Life (last visited Oct. 8, 2008). The requirement limits the demographics of the world, which is primarily composed of teens from the U.S. and Canada. *Teen Second Life*’s virtual world is geographically smaller than the world of *Second Life*, its economy tends to be more modest in scope and in cost of virtual goods, and, of course, the content is much more PG than in *Second Life*. *See id.*

223. *See* Teen Second Life - Wiki, “What Happens When a Teen Turns 18?”, [http://wiki.secondlife.com/wiki/Teen_Second_Life#What_happens_when_a_teen_turns_18.3 F](http://wiki.secondlife.com/wiki/Teen_Second_Life#What_happens_when_a_teen_turns_18.3_F). Teens who are about to turn 18 “get an automatic notification in advance of their birthday letting them know to prepare for transfer by selling any land they might own. They . . . are invited to join a teen transfer group. Their account is removed from Teen Second Life access.” *Id.*

224. For the purposes of analysis, I will assume that *Second Life* is not a MMORPG. I base that assumption on the cumulative effect of these differentiating characteristics

MMORPGs, it can cost nothing to participate. Residents can have a “Basic Account” for free; with a Basic Account, they can access “events, shopping, building, scripting—everything you can do in” *Second Life*.²²⁵ Each additional Basic Account “costs a one-time fee of \$9.95.” A “Premium Account”—which lets Residents buy land on which they can “build . . . and live”—starts at \$9.95 per month or \$72 per year.²²⁶ Residents with Premium Accounts also receive a weekly stipend of \$300 Linden Dollars—the currency used in *Second Life*—from Linden Lab.²²⁷

In October of 2008, *Second Life* had over fifteen million Residents; in other words, fifteen million individual accounts had been opened.²²⁸ The number of accounts does not, however, translate into the number of actual Residents because many accounts are inactive and some Residents have more than one account.²²⁹ The number of inactive accounts has led to speculation as to precisely how many Residents regularly frequent *Second Life*. According to some estimates, “only a hard core estimated to number several hundred thousand are thought to be regular visitors.”²³⁰ A decline in new

discussed in the text above. See *supra* discussion § III(B)(1). While *Second Life* involves role-playing, which is perhaps the defining characteristic of a MMORPG, role-playing in *Second Life* is at once less significant and qualitatively different from the role-playing common to traditional MMORPGs. In a MMORPG, role-playing is the sole and entire purpose of participating in the online world; *Second Life* Residents play roles, but they do not have to. If a Resident chooses, she can participate in *Second Life* without playing any role other than herself (albeit in virtual form). If a Resident decides to play a new role in *Second Life*, she defines that role herself, writing on a blank slate; as we shall see, she can be pretty much anything she likes (human, animal, female, male, androgynous, adult, child, non-biological entity) and do pretty much anything she likes. In a MMORPG, players must select their characters from a menu of pre-determined avatars, each of which has predetermined characteristics; a MMORPG player has some ability to customize his avatar, but only within limits. And unlike *Second Life* Residents, MMORPG players are playing a game—the game. The game they play was created by the owner of the virtual world: it has predetermined roles, rules and an agenda. Players work to achieve certain structured objectives. I do not see *Second Life* as a game, but if participating in *Second Life* can legitimately be described as a game, it is not one game: residents create their own games, myriads of games, many of which are going on simultaneously. In that regard, again, *Second Life* is more analogous to the real world than it is to a MMORPG.

225. SecondLife - Memberships, Land, & Pricing, <http://secondlife.com/whatis/pricing.php> (last visited Oct. 8, 2008).

226. See *id.* See also SecondLife - Membership Plans, <http://secondlife.com/whatis/plans.php> (last visited Oct. 8, 2008).

227. See *id.*

228. See, e.g., *Second Life Appoints New Euro Chief to Boost Business*, Marketing Week (October 30, 2008), <http://www.marketingweek.co.uk/cgi-bin/item.cgi?id=63112&d=258&h=262&f=3>.

229. See *id.* (“only about 500,000 . . . are considered regular users”).

230. Georgina Prodhon, *New Linden CEO Could Be Named within Weeks*, REUTERS, Apr. 21, 2008, <http://secondlife.reuters.com/stories/2008/04/21/new-linden-ceo-could-be>

Premium Accounts in the first quarter of 2008 led some to conclude that “a smaller, highly engaged base of *Second Life* users is intensifying its interest in the virtual world even as *Second Life*'s appeal to new users fades.”²³¹

Interestingly, the decline in new Premium Accounts did not interfere with growth in the *Second Life* economy,²³² which leads to another distinction between *Second Life* and MMORPGs. *WoW* players need game funds—*WoW* gold—in order to prosper and progress in their game play. Also, the only ways to obtain *WoW* gold are to earn it in-game or to buy it illegally from an online vendor.²³³ *Second Life* has no such restrictions, and game currency plays a very different role in this virtual world.

As noted above, *Second Life* Premium Account holders receive a regular stipend from Linden Labs. And any Resident can import currency into *Second Life* from the real world or vice versa. They can convert the real world currency of their choice—U.S. dollars, euros, rupees, pesos, yen, etc. — into Linden Dollars, which they can spend in *Second Life*.²³⁴ Residents can also convert Linden Dollars into the real world currency of their choice in order to move money out of

named-within-weeks/; see also Posting of Astrid Zweynert to Media File >> Blog Archive - Reuters Blogs, <http://blogs.reuters.com/mediafile/2008/05/15/cutting-through-the-clutter-at-opas-global-forum/> (May 15, 2008) (noting that only 877,000 of the 13 million users visit *Second Life* every month). Testifying before Congress in April of 2008, Linden Lab CEO Philip Rosedale said that *Second Life* had “approximately six million unique registered users, roughly 50,000-60,000 of whom are online or ‘in-world’ at any one time, and roughly 900,000 of whom have been in-world during the last 30 days. Our users exchange approximately \$850,000 worth of ‘virtual currency’ per day on our platform.” *Hearing before the Subcomm. on Telecommunications and the Internet of the H. Comm. On Energy and Commerce*, 110th Cong. (2008) (statement of Philip Rosedale, Founder and Chief Executive Officer – Linden Lab), 2008 WL 854314.

231. Eric Reuters, *SL Posts Strong Economic Growth on Dwindling Enrollments*, REUTERS, Apr. 15, 2008, <http://secondlife.reuters.com/stories/2008/04/15/sl-posts-strong-economic-growth-on-dwindling-enrollments/>.

232. See *id.* (noting that *Second Life*'s economy is “growing at a rate of 15 percent annually . . .”). In 2008, “*Second Life* achieved . . . a larger total economy than real-world nations such as Dominica or Micronesia.” *Id.*; see also Reuters, *supra* note 231.

233. See *supra* discussion § III(A).

234. See, e.g., How to Make Real Life Money in the Second Life Virtual World, <http://www.danogo.com/how-to-make-real-life-money-in-the-second-life-virtual-world> (last visited Oct. 8, 2008) (“Residents regularly create new goods and services, and buy and sell them in . . . *Second Life* . . . There are also currency exchanges where Residents can exchange real world currencies for L\$. Though the exchange rate fluctuates, . . . it is reasonably stable at around L\$ 266 to one US dollar.”). See also *The Virtual World Exchange: Quarterly Results Q3/2008*, Open PR (February 10, 2008), <http://www.openpr.com/news/55593/The-Virtual-World-Exchange-Quarterly-Results-Q3-2008.html> (exchange “where users of the virtual world “*Second Life*” can exchange its fictual currency “Linden dollars” for real-world currencies such as the Euro, US Dollar, British Pound and Swiss Franc”).

Second Life.²³⁵ To facilitate these transfers, *Second Life* has its own currency exchange—LindeX—but there are also several independent currency exchanges.²³⁶ In this regard, then, *Second Life* is more analogous to a distinct nation-state than it is to a traditional “game.”

Since *Second Life* does not have the embedded game structure of a MMORPG, its Residents are not driven to acquire Linden Dollars in order to progress along a game grid of some predetermined sort. They are driven to acquire whatever quantity of Linden Dollars they need to realize the “second life” they create for themselves in Linden Lab’s world. Residents use Linden Dollars to buy land, to build homes or other structures on the land they purchase, to furnish the structures they build, and to buy clothing and other adornments (including physical modifications) for the avatars they use to live out their second lives.²³⁷

That brings us to yet another distinction between *Second Life* and a MMORPG. There is, on one level, some similarity between the activities of *Second Life* Residents and those of *WoW* players: both can earn game currency by engaging in activity inside the virtual world. As we saw earlier, *WoW* players do this by engaging in the structured quests assigned to them; they can also earn *WoW* gold by creating crafts, gathering certain items, and killing various beasts or non-player characters.²³⁸ The task of completing quests is a structurally embedded feature of *WoW*; the need to acquire gold is a functionally

235. See, e.g., Andrea Kaminski, *Exchanging Real Money in Virtual Worlds*, *E-commerce Times* (March 3, 2008), <http://www.ecommercetimes.com/story/Exchanging-Real-Money-Virtual-Worlds-61893.html?wlc=1226091500>. See generally Anita Ramasastry, *Second Life Bans Cyber Banks and Unregulated Financial Institutions*, *Findlaw* (January 24, 2008), <http://writ.lp.findlaw.com/ramasastry/20080124.html>. Cf. *Economy of Second Life* – Wikipedia, http://en.wikipedia.org/wiki/Economy_of_Second_Life (last visited Oct. 8, 2008).

236. See *SecondLife - Currency Exchange*, <http://secondlife.com/whatis/currency.php> (last visited Oct. 8, 2008); *Xstreet SL Market Summary*, <http://www.slexchange.com/modules.php?name=Currency> (last visited Oct. 8, 2008).

237. For examples of the items *Second Life* Residents can buy, see *Xstreet SL Marketplace Popular Items*, <http://www.slexchange.com/modules.php?name=Marketplace> (last visited Oct. 8, 2008) (listing virtual animals, apparel, art, “avatar accessories,” avatar appearance modifications, building components, gadgets, “home and garden” items, “recreation and entertainment” items, scripts that improve Residents’ ability to create items or to interact with each other, services of varying types, and vehicles). This is an external marketplace for *Second Life* commodities and services; Residents can, and usually do, purchase these items from businesses inside *Second Life*. See, e.g., AU, *THE MAKING OF SECOND LIFE*, *supra* note 130 at 85-101. For a description of the often lucrative commerce in *Second Life*, see Robert Hof, *My Virtual Life*, *BUSINESS WEEK*, May 1, 2006, http://www.businessweek.com/magazine/content/06_18/b3982001.htm.

238. See *supra* discussion § III(A).

embedded correlate feature of *WoW*, since it derives from players' desire to progress in the game.²³⁹

Second Life Residents, on the other hand, have absolutely no obligation to do anything. When a new Resident first logs into *Second Life*, he or she picks the type of avatar they prefer (male or female, human or non-human);²⁴⁰ the avatar comes with clothing, which the Resident can customize to some extent without using Linden Dollars. New Residents can acquire more clothing and more modifications for their avatar's appearance (e.g., hair, skin, eyes) for no cost at Free Dove, an in-world store that gives these items away.²⁴¹ Since Free Dove is not the only establishment that gives away clothing and other items,²⁴² a Resident can do as much or as little as he or she likes once he or she has settled into *Second Life*.²⁴³ Some Residents work, either for someone else or in their own businesses; others devote themselves to artistic endeavors of varying types, online hedonism or, in a few instances, to organized crime.²⁴⁴

239. *See id.*

240. *See* MermaidDiaries: Natalia Zelmanov's *Second Life* Adventures: Day 45: Last Halloween with Flexi Wings, http://www.mermaiddiaries.com/2006/11/day-45-last-halloween-with-flexi-wings_08.html (Nov. 8, 2006, 20:00 EST) (illustrating that wings are "one of the common accessories . . ."). The next most popular category of avatar is the furry. A furry is "an avatar that has both human and animal qualities," like a "fox that has five fingers and walks on two legs." Furry - *Second Life* Wikia, <http://secondlife.wikia.com/wiki/Furry> (last visited Oct. 8, 2008). A smaller percentage of avatars take non-biological form, such as a robot. *See, e.g.*, Posting of Pixeleen Mistral to The *Second Life* Herald, <http://www.secondlifeherald.com/slh/2007/07/bashiri-mandelb.html> (July 6, 2007, 21:24 EST).

241. Posting of Tateru Nino to The *Second Life* Herald, <http://www.secondlifeinsider.com/2007/06/15/free-dove-for-free-things/> (June 15, 2007, 00:00 EST). Free Dove, a "place of free . . . goodies," only offers clothing and modifications for human avatars. *Id.* *Second Life* Residents store clothing and other items in their personal inventory, which they can access by clicking a button on the screen they use when they are accessing *Second Life*. *See, e.g.*, MermaidDiaries: Natalia Zelmanov's *Second Life* Adventures: Inventory, Clothing, and Objects Guide, <http://www.mermaiddiaries.com/2006/11/clothing-objects-and-inventory.html> (Nov. 24, 2006, 21:00 EST).

242. *See, e.g.*, Catherine Neal, *The Various Ways to Get Freebies and Linden in Second Life*, ASSOCIATED CONTENT, June 5, 2007, http://www.associatedcontent.com/article/265616/the_various_ways_to_get_freebies_and.html.

243. New Residents can also take advantage of another peculiarity of *Second Life*: Money Trees are "found all over *Second Life*. Older *Second Life* residents donate money to newer residents by donating to the Money Trees. All a new resident has to do is pick the Linden Dollars . . . off the tree to create a balance in their account." *Id.* For a demonstration, *see* YouTube - *Second Life* Money Tree, <http://www.youtube.com/watch?v=p2hSTW5jvYE>. As the demonstration shows, established Residents cannot take advantage of Money Trees.

244. *See, e.g.*, TIM GUEST, *SECOND LIVES: A JOURNAL THROUGH VIRTUAL WORLDS* 79-96 (virtual Mafia), 121-46 (virtual riches), 171-88 (virtual sex), 217-330 (virtual art) (2007).

Unlike players in most MMORPGs, *Second Life* Residents pursue activities that are, almost without exception, peaceable; its organized crime is more theatrical than threatening,²⁴⁵ and in most parts of *Second Life*, Residents are functionally indestructible.²⁴⁶ Avatars can teleport, fly, walk along the floor of oceans and fall from heights without being damaged.²⁴⁷

But there are a few areas where avatars can be injured or even killed. When *Second Life* was opened to the public in 2003, it included several regions that were “damage-enabled,” i.e., regions that let Residents “explore . . . [their] combat capabilities.”²⁴⁸ Warfare raged in these regions—known collectively as the Outlands—for a time, but waned as non-violent Residents began moving into the area.²⁴⁹ In April of 2003, Linden Lab responded to pressure from the peaceable Residents and transformed most of the Outlands into non-combat regions.²⁵⁰ The notable exception was a portion of the former Outlands known as Jessie. Jessie was moved to a remote (if such a concept exists) area of *Second Life* and parceled out among Residents who wanted land “for combat projects.”²⁵¹

Jessie still exists, and a few other combat-enabled regions have been added.²⁵² Those who are so inclined can use these areas to wage

245. See, e.g., *id.* at 79-96; see also Sigmund Leominster, *Mafia Nightclub Opens in Second Life*, THE SECOND LIFE HERALD, Jan. 22, 2008, <http://www.secondlifeherald.com/slh/2008/01/mafia-nightclub.html> (“Non-profit hopes to promote crime and fun.”). There is staged violence among Mafia families, but it does not result in actual injury except, as noted later in the text, in combat areas. See *infra* note 248 and accompanying text; see also AU, THE MAKING OF SECOND LIFE, *supra* note 130, 116. Au notes that the violence tends to be an “opt-in experience among dedicated role-players,” like members of *Second Life* mob families. *Id.*; see, e.g., *Second Life Mafia – Meeting the Mob << Janey’s Place in Second Life*, <http://janeysplace.wordpress.com/category/second-life-mafia-meeting-the-mob/> (Dec. 16, 2007).

246. See *Combat Regions - Second Life Wikia*, http://secondlife.wikia.com/wiki/Combat_Regions (last visited Oct. 8, 2008) [hereinafter *Combat Regions*] (“While *Second Life* allows the creation and usage of scripted weapons, usually a resident doesn’t take any damage by being hit by a bullet or falling from the sky.”); see also *Weapon - Second Life Wikia*, <http://secondlife.wikia.com/wiki/Weapon> (“A weapon is a scripted object that . . . pushes . . . another object and/or avatars . . .”).

247. See, e.g., *Combat Regions*, *supra* note 246; see also *New World Notes*, http://secondlife.com/notes/2003_08_18_archive.php (Aug. 18-22, 2003).

248. See *Outlands - Second Life Wikia*, <http://secondlife.wikia.com/wiki/Outlands> (last visited Oct. 8, 2008).

249. See *id.*

250. See *id.*

251. *Jessie - Second Life Wikia*, <http://secondlife.wikia.com/wiki/Jessie> (last visited Oct. 8, 2008).

252. See, e.g., *Combat Regions*, *supra* note 246.

war and engage in other types of violence.²⁵³ The “Linden Labs Combat System” goes into effect when a Resident enters one of these areas:

[T]here will be a heart with a percentage next to it on your upper menu bar. When you see this meter, it means you can be killed in the area. When this percentage drops to zero, you are then ‘dead’, and you will teleported to your home location. . . . [B]eing killed is not a big deal. You have to teleport back into the combat simulation from your home location, if you want to return to the combat. You will not lose anything (money, attachments, inventory) if you happen to die.²⁵⁴

The existence of Jessie and a few similar regions notwithstanding, most *Second Life* Residents engage in peaceful pursuits. As noted above, many of them are involved in creating original art and other items,²⁵⁵ which leads to a final distinctive characteristic of this virtual world: Residents own the rights to intellectual property they create in *Second Life*.²⁵⁶ Under the Linden Lab Terms of Service, “Residents retain intellectual property rights in the original content they create in the *Second Life* world, including avatar characters, clothing, scripts, textures, objects and designs. . . . If you create it, you can sell it, trade it, and . . . give it away for free, subject of course to our Terms of Service.”²⁵⁷

253. See *id.* *Second Life* is divided into two types of areas: safe and unsafe. “A safe rating means you can wander around without fear of attack from other avatars . . . (unless you encounter griefers, residents who harass other users). An unsafe region allows residents to simulate combat” Jonathan Strickland & Dave Roos, *How Second Life Works: The Geography of Second Life*, HOWSTUFFWORKS, <http://electronics.howstuffworks.com/second-life1.htm>.

254. Combat – *Second Life* Wiki, <http://wiki.secondlife.com/wiki/Combat>. “Damage” to an avatar “heals’ gradually over time.” *Id.* A different system applies in “User-Created Combat Systems,” which are areas that Residents configure so combat can proceed under different rules. See *id.* These rules may outlaw certain types of weapons, allow Residents who have been killed to “respawn” after a few minutes, and/or make them more effective at killing or more resistant to dying. See *id.*

255. See *supra* note 244 and accompanying text; see, e.g., *Second Life - Business Opportunities*, <http://secondlife.com/whatis/businesses.php> (last visited Oct. 8, 2008) (listing residents as fashion designers, custom avatar designers, pet manufacturers, custom animation creators, machinima set designers, jewelry makers, writers, special effects designers and game developers); see also Hof, *supra* note 237.

256. See *Second Life - FAQ*, *supra* note 201; see also *SecondLife - Terms of Service*, *supra* note 222, ¶ 3.2.

257. *Second Life - IP Rights*, http://secondlife.com/whatis/ip_rights.php (last visited Oct. 8, 2008). The “mechanics” of *Second Life* facilitate the protection of intellectual property rights, since they let a Resident “who creates an item and transfers it” to another Resident “decide whether to permit or prohibit that participant from copying or transferring the item.” Leandra Lederman, “*Stranger than Fiction*”: *Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620, 1640 (2007); see also *Second Life Inworld Help*, <http://secondlife.com/app/help/building/permissions.php> (last visited Oct. 8, 2008). The Terms of Service also state that Linden Lab retains the “right to delete” a Resident’s “Content from [its] servers . . . for any reason or no reason. . . .” *SecondLife - Terms of*

Linden Lab reportedly decided to deviate from the usual MMORPG rule that player-created content belongs to the owner of the virtual world in order to encourage commerce in *Second Life*.²⁵⁸ It has reinforced that commitment by making the unauthorized copying of a Resident's intellectual property a violation of the *Second Life Terms of Service* that results in the violator being banned from the world.²⁵⁹

The Terms of Service follow MMORPG practice by prescribing standards of conduct for *Second Life* Residents. The Terms of Service primarily do this by listing specific prohibitions:

[Y]ou shall not: (i) take any action or . . . transmit Content that infringes . . . third party rights; (ii) impersonate any person or entity without their consent . . . ; (iii) take any action . . . that violates any law or regulation; (iv) take any action . . . that is harmful, threatening, abusive, harassing, causes tort, defamatory, vulgar, obscene, libelous, invasive of another's privacy, hateful, or racially, ethnically or otherwise objectionable; (v) take any action . . . that contains any viruses, Trojan horses, . . . or other computer programming . . . intended to damage, . . . surreptitiously intercept or expropriate any system, data or personal information; (vi) take any action . . . that would violate any right or duty under any law or . . . contractual or fiduciary relationships . . . ; (vii) upload . . . or otherwise transmit any unsolicited or unauthorized advertising, or promotional materials, that are in the nature of . . . 'spam,' . . . or any other . . . solicitation . . . of such nature; (viii) interfere with or disrupt the Service or servers or networks connected to the Service, or disobey any requirements, procedures, policies or regulations of networks connected to the Service; (ix) attempt to gain access to any other user's Account or password; or (x) 'stalk,' abuse or attempt to abuse, or otherwise harass another user.²⁶⁰

Since *Second Life* is not a structured game, these prohibitions, unlike those in *WoW* and other MMORPGs, focus on general standards of conduct analogous to those expected in the real, physical world instead of on how Residents conduct themselves in pursuing uniquely in-world endeavors.²⁶¹ And they are not the only rules Residents must obey: *Second Life's* Terms of Service also require them to "read and comply with the Community standards posted on" the *Second Life* website.²⁶²

Service, *supra* note 222, ¶ 3.2. For an analysis of the impact this and other provisions of the Terms of Service may, or may not, have on Residents' rights in their intellectual property, see, for example, Steven J. Horowitz, *Bragg v. Linden's Second Life: A Primer in Virtual World Justice*, 34 OHIO N.U. L. REV. 223, 235-37 (2008).

258. See, e.g., Alan Sipress, *Where Real Money Meets Virtual Reality, the Jury Is Still Out*, WASH. POST, Dec. 26, 2006, at A01; see also Hof, *supra* note 237.

259. See Posting of corylinden to Official Second Life Blog, <http://blog.secondlife.com/2006/11/14/use-of-copybot-and-similar-tools-a-tos-violation/> (Nov. 14, 2006, 15:47 EST).

260. SecondLife - Terms of Service, *supra* note 222, ¶ 4.1.

261. See *supra* discussion § III(A) (*WoW* rules).

262. SecondLife - Terms of Service, *supra* note 222, ¶ 4.1.

The Community Standards are relatively concise, compared to the list of prohibitions quoted above. They are meant to achieve certain goals, telling Residents to “treat each other with respect . . . and refrain from any hate activity which slurs a real world individual or . . . community.”²⁶³ The Community Standards seek to achieve these goals by listing six behaviors that will cause a Resident to be suspended or, in the case of repeated violations, expelled from *Second Life*: intolerance, harassment, assault, disclosure, indecency, and disturbing the peace.²⁶⁴

The Community Standards separately prohibit “Global Attacks”: implementing “[o]bjects, scripts, or actions which broadly interfere with or disrupt the *Second Life* . . . servers or other systems.”²⁶⁵ A Resident found to have used such a device to “substantially disrupt” *Second Life* faces “a two-week suspension” and “probable expulsion from *Second Life*.”²⁶⁶ The penalties for engaging in conduct that otherwise violates the Community Standards are “a Warning, followed by Suspension and eventual Banishment from *Second Life*.”²⁶⁷

Second Life’s system for policing violations of its Terms of Service and/or Community Standards relies primarily on self-reporting;²⁶⁸ *Second Life* encourages Residents who observe a violation

263. *Second Life - Community Standards*, <http://secondlife.com/corporate/cs.php> (last visited Oct. 8, 2008). The Standards apply in all areas of *Second Life*, including “the *Second Life* Forums, and the *Second Life* Website.” *Id.*

264. *Id.* (“the ‘Big Six’”). Intolerance consists of actions that “marginalize, belittle, or defame individuals or groups inhibit the satisfying exchange of ideas and diminish the *Second Life* community.” *Id.* As to harassment, the Standards note that “[g]iven the myriad capabilities of *Second Life*,” it “can take many forms” but includes “[c]ommunicating or behaving in a manner which is offensively coarse, intimidating or threatening, constitutes unwelcome sexual advances or requests for sexual favors, or is otherwise likely to cause annoyance or alarm . . .” *Id.* Assault consists of “creating or using scripted objects which . . . target another Resident in a manner which prevents their enjoyment of *Second Life*.” *Id.* Disclosure consists of “[s]haring personal information about a fellow Resident . . . monitoring conversations, posting conversation logs, or sharing conversation logs without consent . . .” *Id.* “Content, communication, or behavior which involves intense language or expletives, nudity or sexual content, the depiction of sex or violence, or anything else broadly offensive must be contained within private land in areas rated Mature” or it will constitute indecency. *Id.* Finally, disturbing the peace is defined by example: “[d]isrupting scheduled events, repeated transmission of undesired advertising content, the use of repetitive sounds, following or self-spawning items, or other objects that intentionally slow server performance or inhibit another Resident’s ability to enjoy *Second Life* are examples of Disturbing the Peace.” *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. There are *Second Life* Liaisons -- Linden Lab employees who “assist” Residents in-world. See Category:Linden Liaisons - Second Life Wiki,

of either to file an abuse report with Customer Service.²⁶⁹ It encourages Residents to file a report even if they are not sure that what they saw was actually a violation: “There may not be any real penalties beyond a warning if it’s a grey area. After all, if you’re not sure, then the person you’re reporting may not be either. But they may also have been warned before”²⁷⁰

Filing a report is simple. The Resident clicks “Report Abuse” from a menu that appears when one is in *Second Life*.²⁷¹ This opens an “abuse report window,” which the Resident uses to submit a brief description of what occurred, as well as a screenshot if that will “help clarify things.”²⁷² After completing a report, the Resident clicks a button and sends it to Customer Service, which replies with an automated email acknowledging its receipt.²⁷³ Customer Service investigates the report and “takes appropriate action” if necessary; “appropriate action” consists of imposing one of the penalties described above.²⁷⁴

Second Life publishes a “Community: Incident Report” that “displays the twenty-five most recent disciplinary actions taken by the *Second Life* Governance Team.”²⁷⁵ There unfortunately seems to be no way to obtain longitudinal data concerning the frequency and severity of *Second Life* prohibited conduct.²⁷⁶ The disciplinary actions listed on the Incident Report specify the date when the violation occurred, where it occurred in *Second Life*, the type of violation and the sanction

http://wiki.secondlife.com/wiki/Category:Linden_Liaisons (last visited Oct. 8, 2008). They do not assist Residents with “any type of abuse report follow up.” When and How to File an Abuse Report - Second Life Wiki, http://wiki.secondlife.com/wiki/Help:When_and_how_to_file_an_Abuse_Report (last visited Oct. 8, 2008) [hereinafter Abuse Report]. But they may assist Residents who are the victims of repeated abuse. See Second Life - Online Harassment, <http://secondlife.com/policy/security/harassment.php> (last visited Oct. 8, 2008) [hereinafter Online Harassment] (“If a Linden Lab Liaison is available to help you, one will, but there are many Residents and few Liaisons.”).

269. See Online Harassment, *supra* note 268; see also Abuse Report, *supra* note 268.

270. When and How to File an Abuse Report - Second Life Wiki, *supra* note 268.

271. See Online Harassment, *supra* note 268.

272. *Id.*

273. *Id.*

274. See *id.*; see also *supra* note 268 and accompanying text; Abuse Report, *supra* note 268 (“Customer Service will determine the level of disciplinary action to be taken.”).

275. Second Life - Community: Incident Report, <http://secondlife.com/support/incidentreport.php> (last visited Oct. 8, 2008) [hereinafter Incident Report].

276. There was a dramatic increase in the number of reports being filed in the first three years of *Second Life*’s existence. See Posting of daniellinden to Official Second Life Blog, <http://blog.secondlife.com/2006/12/08/abuse-reporting-begins-overhaul/> (Dec. 8, 2006, 9:30 EST) [hereinafter daniellinden, *Overhaul*] (“Linden Lab received . . . 43 Abuse Reports during my first week of work in 2003. Jumping forward to the end of 2006, the number is closer to 2,000 *per day*.”(emphasis in original)).

imposed. A non-scientific sampling of the postings showed penalties ranging from warnings to suspensions for periods ranging from one to fourteen days.²⁷⁷ The violations included disturbing the peace, assault, indecency, and even one instance of “global attack.”²⁷⁸

It is unclear how effectively this system deals with in-world miscreants, better known as “griefers.”²⁷⁹ Anecdotal postings on various websites express dissatisfaction with *Second Life*’s inability to discourage violations of the Community Standards and Terms of Service.²⁸⁰ In 2007 Linden Lab announced it had instituted a new system for responding to abuse reports, one that used a “pattern-based methodology” to “cull[] data from every Abuse Report filed and display[] patterns based on multiple criteria.”²⁸¹ According to the announcement, this system lets *Second Life* staffers identify and respond to “serious and disruptive behavior” much more quickly.²⁸²

Around the same time it announced this system for responding to abuse reports, Linden Lab also announced that it had been beta-testing a new governance system—the Estate Level Abuse program—for Estates, privately-owned areas of *Second Life*.²⁸³ Under this

277. See Incident Report, *supra* note 275 (sampled June 1, 2008 & June 10, 2008 postings).

278. See *id.*

279. See Griever - Second Life Wiki, <http://wiki.secondlife.com/wiki/Griever> (last visited Oct. 8, 2008) (A griever is “a Second Life resident who harasses other residents.”); see also Posting of Tateru Nino to Second Life Insider, <http://www.secondlifeinsider.com/2006/11/03/who-are-the-griefers/> (Nov. 3, 2006, 2:14 EST). Griefers are common in most, if not all, virtual worlds. See, e.g., Wikipedia:Griefing - Wikipedia, <http://en.wikipedia.org/wiki/Wikipedia:Griefing> (last visited Oct. 8, 2008).

280. See, e.g., Gwyn’s Home >> Blog Archive, <http://gwynethlewelyn.net/2007/06/17/from-welfare-state-to-laissez-faire-capitalism/> (June 17, 2007) (“[Griefers are] . . . rampant, and there is almost nothing that can be done to prevent them . . . Linden Lab’s Abuse Report system is totally unable to deal with this . . . situation, since it requires effective policing, which they’re *not* doing.”) (emphasis in original); see also Eloise Pasteur, *Does Second Life’s Abuse Report System Need a Serious Overhaul?*, MASSIVELY, Jan. 15, 2008, <http://www.massively.com/2008/01/15/does-second-lifes-abuse-report-system-need-a-serious-overhaul/>; *No Justice in Second Life? – 1 Week Later*, TG JOURNAL, Mar. 1, 2008, <http://tgjournal.net/?p=23>.

281. Posting of daniellinden to Official Second Life Blog, <http://blog.secondlife.com/2007/04/18/changes-in-abuse-report-resolution/> (Apr. 18, 2007, 15:27 EST)[hereinafter daniellinden, *Changes*]; see daniellinden, *Overhaul*, *supra* note 276, (discussing the necessity of the move to this system).

282. See daniellinden, *Changes*, *supra* note 281 (“[R]esponse times . . . have been reduced from days to hours.”).

283. Posting of Chadrick Linden to Official Second Life Blog, <http://blog.secondlife.com/2007/04/20/introducing-estate-level-governance/> (Apr. 20, 2007, 12:42 EST). Estates are a “collection of regions with a particular set of rules” and an owner, who is either a Resident or “Governor Linden.” See Estate – Second Life Wiki, <http://wiki.secondlife.com/wiki/Estate>; see also Second Life - Land: Private Regions (Islands) <http://secondlife.com/land/#> (last visited Oct. 8, 2008).

program, abuse reports concerning violations occurring on private Estates are sent directly to the owners of the Estates, who resolve them “in the method in which they best see fit.”²⁸⁴ Perhaps the most interesting part of this announcement was how Linden Lab saw this program evolving:

In time, as Linden builds out more Premium Estate Services, these services will become available to the residents of *Second Life* in one form or another. As Linden uses the same tools on the mainland and develops out the *Second Life* experience our way, residents will have the option of resolving issues their way, or opting-in to the way Linden runs the *Second Life* grid.²⁸⁵

As an observer of virtual worlds noted, the Estate Level Abuse program was “a big step toward decentralized private government” in *Second Life*.²⁸⁶ When Linden Lab announced its plan to expand the program, some Residents expressed concern that Estate owners might abuse the privilege they were being given.²⁸⁷ A Linden Lab staffer responded by pointing out that “[t]his is not real life. This is *Second Life*. Many people want . . . to govern what they own.”²⁸⁸ He also noted that, even if an Estate owner was abusive, “he can run his region the way he wants,” and advised other Residents to “probably not hang out there.”²⁸⁹ These comments illustrate one limitation on the Estate Abuse Level program: it only applies to private Estates, i.e., to certain areas in *Second Life*; the rest of *Second Life* is still governed by Linden Lab.²⁹⁰

Another, though perhaps less significant, limitation is illustrated by what happened to the Estate owned by Woodbury

284. See Chadrick Linden, *supra* note 283 Estate owners can delegate the task of controlling abuse to one or more Estate Managers. See Estate Manager - Second Life Wiki, http://wiki.secondlife.com/wiki/Estate_Manager (last visited Oct. 8, 2008) (An Estate Manager “is a land manager for a privately owned island.”). See also *id.* (“An essential responsibility of an estate manager is to identify, and remove, grievers that may be attacking the island[s] they manage.”).

285. See Chadrick Linden, *supra* note 283.

286. Benjamin Duranske, *Linden Lab Takes Big Step Toward Private Legal Systems and Governments in Second Life*, VIRTUALLY BLIND, <http://virtuallyblind.com/2007/04/25/linden-lab-takes-big-step-toward-private-legal-systems-and-governments-in-second-life/>. Another observer concluded that Linden Lab was “withdrawing . . . from intervening in *Second Life*” because it had grown “beyond the ability of Linden Lab to take care of millions upon millions of non-paying users.” Gwen’s Home, *supra* note 280.

287. See Chadrick Linden, *supra* note 283.

288. *Id.* at Response no. 104 (Apr. 20, 2007, 14:31 EST).

289. *Id.* at Response no. 22 (Apr. 20, 2007, 13:48 EST); see also *id.* at Response no. 53 (Apr. 20, 2007, 15:01PM) (“No . . . owner would be able to keep you there, the tools . . . will allow you to make your own choices.”).

290. *Id.* at Response no. 22 (Apr. 20, 2007, 13:48 PM).

University, a California institution.²⁹¹ On June 30, 2007, Linden Lab deleted the Woodbury University Estate from *Second Life*: it simply “dropped off the map of the virtual world.”²⁹² Deleting the Estate “was a disciplinary move . . . for Terms of Service . . . violations.”²⁹³ It was apparently the scene of “ongoing” violations including “grid attacks, racism and intolerance, persistent harassment of other residents, and crashing” *Second Life* servers.²⁹⁴ This episode suggests that if an Estate owner were to use his or her governance authority under the Estate Abuse Level program to allow violations of the Terms of Service or Community Standards to go unchecked, Linden Labs would presumably step in to restore order. If the Estate owner were to do just the opposite—i.e., govern too strictly—Linden Lab would probably not interfere.²⁹⁵

Governance in *Second Life* is a far more complicated matter than in MMORPGs like *WoW* because, unlike MMORPGs, this world is not a “game” as defined previously.²⁹⁶ It lacks the elaborate embedded character definitions and story structure of a MMORPG; it also lacks the purposive component of traditional games.²⁹⁷ As we saw above, Residents in *Second Life* have no obligatory tasks to complete and no goals other than those they choose to set for themselves.

Second Life is a somewhat fantastical, slightly skewed replication of life in the real world; the experiences it offers are consequently real-life-plus, offering the same experiences as in real life, but with additional features that are physically or practically impossible in the real world. Many, perhaps most, of the activities

291. Woodbury University, <http://www.woodbury.edu/s/131/index.aspx> (last visited Oct. 8, 2008). Many colleges and universities have established a presence in *Second Life*. See *Second Life in Education*, <http://sleducation.wikispaces.com/educationaluses> (last visited Oct. 8, 2008).

292. Pixeleen Mistral, *Woodbury University Island Destroyed*, THE SECOND LIFE HERALD, July 1, 2007, <http://www.secondlifeherald.com/slh/2007/07/woodbury-univer.html> [hereinafter Mistral, *Woodbury University Island Destroyed*]. As noted earlier, Estates are also known as Islands. See *Second Life – Wikipedia*, *supra*, note 283 and accompanying text.

293. Mistral, *Woodbury University Island Destroyed*, *supra* note 292.

294. *Id.* (quoting “virtual eviction notice”); see Pixeleen Mistral, *Interview with Woodbury University’s Edward Clift*, THE SECOND LIFE HERALD, July 3, 2007, <http://www.secondlifeherald.com/slh/2007/07/interview-with-.html> (providing more information on the violations that resulted in eviction). Something similar seems to have happened to the Satyr sim (Estate) in 2006. See Pixeleen Mistral, *Crocodile Tears in Baku*, THE SECOND LIFE HERALD, Sept. 25, 2006, http://www.secondlifeherald.com/slh/2006/09/crocodile_tears.html [hereinafter Mistral, *Crocodile Tears*].

295. See *supra* notes 291-294 and accompanying text.

296. See *supra* notes 110-112 and accompanying text.

297. See *id.*

that Residents engage in are analogues of activity in the external, physical world. They have jobs; they buy land, build structures, and furnish them; they give parties; they get married; they have sex; they have pets; they create art and play music; they go to school; they travel; they play sports; they practice their religion; and so on.²⁹⁸ They also, as we have already seen, engage in activities—like combat—that are not a routine aspect of the real world. In Section IV, I will examine some of the other activities Residents engage in that are not a routine aspect of the real world, either because they are not tolerated there or because they simply cannot be carried out there. Before I do that, however, I want to briefly note the status of other *Second Life*-style Metaverses.

2. The Lesser Metaverses

Until recently, there were only three worlds—*Habbo*, *There* and *The Sims Online*—that could legitimately be described as Metaverse-style worlds.²⁹⁹ In April of 2008, a new world, HiPiHi—often described as “China’s answer to *Second Life*”—opened to the public in beta test form.³⁰⁰

Habbo, *There* and *The Sims Online* are lesser versions of *Second Life*. Two of them—*Habbo* and *There*—are exclusively for

298. See AU, THE MAKING OF SECOND LIFE, *supra* note 130 at 85-101 (romance and sex); Guest, *supra* note 244, at 121-46 (buying property and furniture, virtual work), 217-320 (art and music); *supra* text accompanying notes 291-294 (education); see also Sporting Activity in SL, <http://sl-adventures.com/photosS.html> (last visited Oct. 8, 2008); Second Life Travel Guide - Landmark Island, <http://www.landmarkisland.com/> (last visited Oct. 8, 2008); SL Dogs, <http://www.sldogs.com/> (last visited Oct. 8, 2008); Shona Crabtree, *Finding Religion in Second Life’s Virtual Universe*, WASH POST, June 16, 2007, at B9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501902.html>.

299. There are other online environments that can, in varying degrees, be defined as virtual worlds. See, e.g., Virtual Worlds Review: Virtual Worlds List by Category, <http://www.virtualworldsreview.com/info/categories.shtml> (last visited Oct. 8, 2008). The analysis in Part IV focuses only on *Second Life* for two reasons: one is scope, as it would be unmanageable to attempt to describe and analyze all the candidates for virtual world status. The other reason is more substantive: *Second Life* has clearly gone further than any of the others in creating a complex, sophisticated and immersive virtual environment. The three extant worlds discussed in this section have also been reasonably successful in this regard; and it is likely HiPiHi will be at least as successful as *Second Life*. It is, I submit, logical to assume that if an analysis is valid for *Second Life* and its current competitors, it will be equally applicable to the lesser worlds that already exist. See *infra* discussion § IV.

300. Posting of Duncan Riley to TechCrunch, <http://www.techcrunch.com/2008/04/21/hipihi-opens-its-doors-to-the-public/> (Apr. 21, 2008); see also Posting of Tangos to China Web2.0 Review, <http://www.cwrblog.net/524/hipihi-chinas-second-life.html> (Mar. 10, 2008).

those under the age of 18. They are, in that regard, analogous to *Teen Second Life*.³⁰¹ Functionally, each of these worlds offers a simpler, gentler experience than *Second Life* (as is appropriate for minors).

There are two reasons why I will not analyze *The Sims Online*. One is that it no longer exists. *The Sims Online* was an online version of a non-networked computer game called *The Sims*.³⁰² Players were in charge of the lives of virtual people called “Sims”; the objective was to keep one’s Sims healthy and to provide them with a secure environment and a well-adjusted personal and social life.³⁰³ Like *Second Life*, *The Sims Online* is a virtual world for adults, but unlike *Second Life*, it did not fully embrace the notion of the Metaverse. *The Sims Online* imposed the strictures and requirements of the physical world on its participants and, in so doing, denied them the opportunity to innovate and to be creative. Not surprisingly, it was never very popular.³⁰⁴ On February 27, 2008, Electronic Arts, the publisher of the game, terminated *The Sims Online*.³⁰⁵

HiPiHi is a virtual world being developed in China.³⁰⁶ One observer reports that it is “exactly like *Second Life*: avatars can fly and modify their own appearances, build houses, explore the land with planes, choppers and hot air balloons.”³⁰⁷ Like *Second Life* Residents, *HiPiHi* users will be able to “buy land and build their own houses.”³⁰⁸ Like *Second Life*, *HiPiHi* will let users own property they create in-world and the world will have its own currency.³⁰⁹ Avatar sex will be allowed “as long as it’s done in private,” but political discussions will

301. See *supra* notes 221-222 and accompanying text. I will not separately analyze these three worlds because they do not increase the possibilities for behavioral innovation and criminal activity that exist in *Second Life*.

302. See *The Sims* - Wikipedia, http://en.wikipedia.org/wiki/The_Sims (last visited Oct. 8, 2008).

303. See *id.*

304. See *The Sims Online* - Wikipedia, http://en.wikipedia.org/wiki/EA_Land (last visited Oct. 8, 2008).

305. See *id.*

306. *HiPiHi* – “Dawn of Society”: *HiPiHi* Enters Public Beta Testing, http://www.hipihi.com/news/trends_placard015e.html (last visited Oct. 8, 2008). *HiPiHi* is, at the least, modeled on *Second Life*. See Posting of Wagner James Au on GigaOM, <http://gigaom.com/2007/08/25/hipihi/> (Aug. 25, 2007, 10:49 PST) [hereinafter Posting of Au, *First Hand Look*].

307. *The Chinese Clone of Second Life: HiPiHi*, SGENREPRENEURS, Feb. 28, 2007, <http://sgentrepreneurs.com/innovation-technology/2007/02/28/chinese-clone-second-life-hipihi/> (last visited Oct. 8, 2008).

308. See Posting of Au, *First Hand Look*, *supra* note 306.

309. See *id.*

not be permissible.³¹⁰ In-world chat will be run through a filtering system that is designed to identify unacceptable speech.³¹¹

HiPiHi is currently only available in Chinese, but English and Japanese versions will be available at a later date.³¹² The developers say the restriction on political speech will only apply to Chinese users; U.S. and Japanese users will have their own, separate “worlds” in *HiPiHi*, which will apparently not be encompassed by this restriction.³¹³ *HiPiHi* will lease the virtual space for Japanese, U.S. and other national versions of *HiPiHi* to local developers, who will decide the policies for their worlds.³¹⁴

It will be interesting to see how *HiPiHi* develops. Structurally and philosophically, it is similar enough to *Second Life* that one would expect it to develop along the same lines. At the very least, *HiPiHi* suggests that non-MMORPG virtual worlds are not likely to remain a Western phenomenon.³¹⁵ There is some indication that China hopes to use its virtual worlds as a purifying influence to resolve the “moral” and “legal dilemmas” that can arise in current virtual worlds.³¹⁶ In a presentation at a virtual worlds conference, a *HiPiHi* representative explained that the “hope is that Asian virtual worlds will be able to cure some of the ills that we see in virtual worlds today.”³¹⁷

I will consider the need to “clean up” worlds like *Second Life* in Section IV. Before I take up what one observer called “the sleazy underbelly of virtual worlds,”³¹⁸ I want to speculate a bit about the future of virtual worlds.

3. Evolving Metaverse(s)

In 2007, analysts for the Gartner consulting firm predicted that by the end of 2011, 80 percent of Internet users “will have a ‘*Second*

310. *See id.*

311. *See id.*

312. *See id.*

313. *See id.*

314. *See An Informal Meeting with Xu Hui, CEO of HiPiHi*, SGENPRENEURS, Aug. 28, 2007, <http://sgentrepreneurs.com/singapore-entrepreneurs/2007/08/28/an-informal-meeting-with-xu-hui-ceo-of-hipihi/> (last visited Oct. 8, 2008).

315. Posting of Yardena Arar on PC World, <http://blogs.pcworld.com/staffblog/archives/005657.html> (Oct. 10, 2007, 15:59 PST).

316. *See id.*

317. *See id.*

318. *See id.*

Life, but not necessarily in *Second Life*.”³¹⁹ The Gartner analysts believe increased participation in virtual worlds will be a function not of the commercial opportunities they offer, but of the “collaborative and community-related aspects of these environments.”³²⁰ They also believe that the current “multiplicity of virtual environments” is a transitory stage and that the future will bring “a merging of . . . worlds into a smaller number of . . . environments that support the free transfer of assets and avatars from one to another with the use of a single, universal client.”³²¹ Gartner’s analysts are, in effect, predicting the realization of the Metaverse or, perhaps more accurately, the realization of *a* Metaverse, a real world version of the world Neal Stephenson described in *Snow Crash*.³²²

The 2007 prediction only encompassed what we might call recreational virtual worlds—worlds people occupy for non-commercial, non-professional reasons. In 2008, Gartner analysts predicted that by 2012, 70 percent of business organizations “will have established their own private worlds,” which they will successfully use for a variety of purposes.³²³ The purposes include “role-based scenario-driven” training exercises and simulations, and using virtual worlds to “provide a secure, persistent and interactive workspace to . . . improve collaboration.”³²⁴ The latter is likely to prove increasingly attractive in an era of rising fuel prices.

As the Gartner predictions illustrate, many are confident that a significant proportion of our lives will migrate online into virtual worlds of varying types. Indeed, analysts predict that cyberspace will transform from its current, text-based incarnation into a 3-D Web, “a

319. *Gartner Says 80 Percent of Active Internet Users Will Have a “Second Life” in the Virtual World by 2011*, GARTNER.com, Apr. 24, 2007, <http://www.gartner.com/it/page.jsp?id=503861> (last visited Oct. 8, 2008).

320. *See id.* (quoting Steve Prentice, vice president and distinguished analyst at Gartner.).

321. *Id. See, e.g., HiPiHi Announces Global Strategy, Investment from NGI*, VIRTUAL WORLD NEWS, Aug. 20, 2007, <http://www.virtualworldsnews.com/2007/08/hipihi-announce.html> (last visited Oct. 2, 2008) (noting that part of HiPiHi’s global strategy is cooperating with other virtual worlds to implement technical standards that will let users “interact and transact between different virtual worlds”).

322. *See supra* note 205 and accompanying text.

323. *Gartner Says 90 Per Cent [sic] of Corporate Virtual World Projects Fail Within 18 Months*, GARTNER.com, May 15, 2008, <http://www.gartner.com/it/page.jsp?id=670507> (last visited Oct. 8, 2008).

324. *See id. See, e.g., Mary K, Pratt, Have Your Avatar Call My Avatar: Doing Business Virtually*, COMPUTERWORLD, June 23, 2008, http://www.computerworld.com/action/article.do?command=viewArticleBasic&articleId=318544&intsrc=hm_list.

galaxy of interconnected virtual worlds.”³²⁵ Companies like IBM and Google—plus “a bevy” of others—are working to overcome the technical challenges to transforming our text-based Web into the virtual Web.³²⁶ Most predict the virtual web will become a reality within the next decade.³²⁷ If and when that happens, there will be no disconnect between being online—being in cyberspace— and being in a virtual world. Cyberspace will become synonymous either with a virtual world or, as noted earlier, with a series of virtual worlds connected to create a Metaverse.

While many believe the acceleration of our exodus to virtual worlds is inevitable, no one knows exactly what that will mean. Some say the real world will “fade into the background” as we move the conceptual, collaborative aspects of our lives online.³²⁸ Others agree, suggesting that even governance and citizenship will move online, as people become citizens of virtual states.³²⁹ Others believe the process will take a different path, one in which the real and virtual worlds converge.³³⁰

III. FANTASY CRIME

“Behind every avatar is a real person.”³³¹

Although no one can predict the future of virtual worlds with absolute accuracy, for the purposes of analysis in this section, I will make two assumptions, both of which I believe are supported by current trends and inferences from those trends. The first is that we will come to spend an increasing amount of time online in virtual worlds. The second assumption is that we will spend at least the majority of that time in augmented reality worlds like *Second Life* and *HiPiHi*. If those assumptions are correct, we will live a substantial part of our lives in worlds that are at once real and unreal. This

325. Aili McConnon, *Just Ahead: The Web as a Virtual World*, BUSINESS WEEK, Aug. 13, 2007, http://www.businessweek.com/magazine/content/07_33/b4046064.htm.

326. *See id.*

327. *See id.*; *see also* Posting of Don Clark to Wall Street Journal Blog, <http://blogs.wsj.com/biztech/2008/07/08/avatars-escape-second-life-leave-clothes-behind/> (July 8, 2008, 00:02 AM). In July, 2008, Linden Lab announced that *Second Life* avatars had been transferred to a virtual world operated by IBM. *Id.*

328. *See Gartner Says 80 Percent of Active Internet Users Will Have a “Second Life” in the Virtual World by 2011*, *supra* note 323.

329. *See* Guest, *supra* note 244, at 260.

330. *See id.* at 266-67.

331. *Gartner Says 80 Percent of Active Internet Users Will Have a “Second Life” in the Virtual World by 2011*, *supra* note 323.

means that what we do in these worlds can, to paraphrase a popular slogan, either “stay in those worlds” or bleed out of them to have an impact in the real world. Those alternatives have important consequences for how we develop the laws and policies governing virtual worlds.

The first step in analyzing what I am calling “fantasy crime” is to define precisely what fantasy crime is. To do that, I need to parse two dichotomies.

The first is the crime-cybercrime dichotomy. As discussed in Section II, this dichotomy assumes that cybercrime is a phenomenon distinct from, yet sharing certain characteristics with, traditional crime. Crime is the infliction of socially-intolerable harms on members of a society; crime is destructive and/or disruptive activity that undermines a nation-state’s ability to maintain internal order.³³² Cybercrime is essentially computer-mediated crime; that is, it consists of using computer technology to inflict harms.³³³ The harms inflicted by cybercrime can be harms that societies have historically outlawed (e.g., theft, fraud) or new, virtual harms (e.g., the harm resulting from a distributed denial of service attack).³³⁴ In either event, cybercrime is justifiably distinguished from crime because the technology involved in its infliction (1) allows criminals to inflict harm on a scale greater than that possible in the real world, and (2) makes it increasingly difficult for law enforcement to respond effectively to cybercrime.³³⁵ In these and other regards, cybercrime is conceptually and empirically distinct from traditional crime.³³⁶

This leads to the second dichotomy. Cybercrime is an omnibus term encompassing any criminal activity the commission of which involves the use of computer technology. As such, it encompasses cybercrime committed both in “public” areas of cyberspace and in “private” areas, i.e., in virtual worlds like *Second Life*.³³⁷ I examine that dichotomy in the first section below. In the next section I will consider whether an emerging, elusive phenomenon—what I am

332. See *supra* discussion § II.

333. See *id.*

334. See generally Susan W. Brenner, *Cybercrime Metrics: Old Wine, New Bottles?*, 9 VA. J.L. & TECH 13, 21-27 (2004), available at http://www.vjolt.net/vol9/issue4/v9i4_a13-Brenner.pdf.

335. See *id.*

336. See *id.*

337. “Public” areas are the sectors of cyberspace one can access without having to enter a Metaverse, which is a virtual world access that requires creating a user account and an avatar. See *supra* discussion § III. “Public” areas are the sectors we can explore with our own personas; “private” areas are those that require us to assume a distinct persona, one that exists only within the confines of that area, or virtual world. See *id.*

calling fantasy crime—can legitimately be included in this dichotomy, i.e., whether it in fact constitutes a type of cybercrime.

A. Cybercrime

“[T]here’s nothing virtual about online crime.”³³⁸

As I noted above, cybercrime encompasses a variety of crime. As such, it involves the infliction of a socially intolerable and socially proscribed harm.³³⁹ As I also noted above, the harm inflicted by cybercrime can be traditional or new.³⁴⁰ In either event, the impact of the harm is felt in the real, physical world.

If a fraudster uses spam email messages to defraud a thousand people out of, for example, an average of \$1,500 each, there is a cybercrime that inflicts a traditional harm (the wrongful deprivation of someone’s money or property) in the real world. The methodology used to inflict the harm is novel, but the harm itself is not. This is, I submit, true of all cybercrime.

Cybercrime is merely a subset of crime;³⁴¹ as such, it is a constituent component of a congeries of conceptual categories and operational methodologies, the purpose of which is to control human activity that negatively affects a nation-state’s ability to maintain order in the real world.³⁴² Indeed, until the end of the last century, such activity could occur only in the real world.

That is, in a sense, still true of cybercrime. While criminals can use cyberspace as a vector for the infliction of harm and thereby free themselves from the constraints of physical reality, the ends they seek—and the harms they inflict—are still grounded in physical reality. That is true regardless of whether a cybercriminal steals data by copying it, or inflicts physical injury—or even death—by sabotaging a civilian aircraft control system. In either instance, the harm is felt in the real world: the owner of the data is incrementally deprived of control over that property; the victims of the compromised air traffic control system suffer physical injury or death in airplane crashes.

338. Press Release, The Fraud Advisory Panel, Government Should Extend Legislation into Virtual World, Says Fraud Watchdog (May 1, 2007), *available at* http://www.fraudadvisorypanel.org/newsite/pdf_show.php?id=31 (quoting Steven Philippsohn, Chairman of the Fraud Advisory Panel’s Cybercrime Working Group).

339. *See supra* discussion §§ II, IV.

340. *See supra* discussion § IV.

341. *See, e.g.*, Randal C. Picker, *Cybersecurity: Of Heterogeneity and Autarky*, in *THE LAW AND ECONOMICS OF CYBERSECURITY* 115, 117 (Mark F. Grady & Francesco Parisi eds., 2005) (“Cybercrime is just crime over the Internet.”).

342. *See supra* discussion §§ I, II.

Those examples both involve the infliction of “hard harms,” but the physical grounding of harm is equally inevitable when a criminal uses cyberspace to inflict one of the “soft harms” the criminal law recognizes.³⁴³ Online gambling is outlawed in the United States at the federal and state levels.³⁴⁴ The rationale for doing so is the same as that given for outlawing gambling that occurs entirely in the real world: the laws protect those who cannot control themselves from losing money they cannot afford to lose, and thus from victimizing themselves and those who depend on them.³⁴⁵ The same is true for the rationale used to extrapolate stalking and harassment laws to encompass the improper use of cyberspace to inflict soft harms.³⁴⁶ Indeed, all of the cybercrime laws we have are based on the same rationales that form the foundation of society’s criminal laws because, as I noted before, those laws, like all of our criminal laws, are concerned with deterring the infliction of harm in the real, physical world. The physical world is where we ultimately reside; it is where the mechanisms that enforce crime and cybercrime laws are designed to operate. And it has, until recently, been the only venue for human activity.

What about cybercrime in virtual worlds? As I noted earlier,³⁴⁷ cybercrime can be committed in both the “public” areas of cyberspace and in the “private” areas of virtual worlds. Does the above analysis apply to cybercrime committed in a virtual world? Logically, it would seem that cybercrime committed “in” a virtual world is, by definition, not committed “in” the real world and cannot, therefore, result in the infliction of a harm (hard or soft) encompassed by real world crime/cybercrime laws.

The flaw in this logic is that it assumes that the commission of a cybercrime “in” a virtual world occurs wholly “in” that virtual world. More precisely, it assumes not only that the *conduct* involved in the commission of the cybercrime occurs in the virtual world but also that the harm the conduct inflicts exists only in that virtual world. Both

343. See *supra* discussion § II.

344. See, e.g., Michael D. Schmitt, Note, *Prohibition Reincarnated? The Uncertain Future of Online Gambling Following the Unlawful Internet Gambling Enforcement Act of 2006*, 17 S. CAL. INTERDISC. L.J. 381, 382 (2008); see also Chuck Humphrey, State Gambling Law Summary, <http://www.gambling-law-us.com/State-Law-Summary/> (last visited Oct. 8, 2008).

345. See, e.g., James N. Brenner, Note, *Betting on Success: Can the Unlawful Internet Gambling Enforcement Act Help the U.S. Achieve Its Internet Gambling Policy Goals?*, 30 HASTINGS COMM. & ENT. L. J. 109, 112-15, 130 (2007).

346. See, e.g., Joseph Audal, Quincy Lu & Peter Roman, *Computer Crimes*, 45 AM. CRIM. L. REV. 233, 268 (2008).

347. See *supra* discussion § IV.

assumptions are incorrect: unless we decant our consciousnesses into computer media and abandon the physical world,³⁴⁸ the conduct involved in committing a cybercrime “in” a virtual world cannot occur entirely in that virtual environment. The perpetrator and the victim are physically located in the physical world, and the physical world is the locus of the activity (their conduct) that has certain effects in the virtual world (or, perhaps more accurately, is perceived as having certain effects in the virtual world). The conduct involved in committing a cybercrime “in” a virtual world will to some extent occur “in” that virtual world, but it ultimately remains grounded in physical reality.

And while the conduct can manifest itself “in” the virtual world, the harm cannot. As I explained earlier, a cybercrime necessarily and inevitably results in the infliction of a recognized, proscribed harm in the physical world.³⁴⁹ If the harm resulting from conduct “in” a virtual world does not bleed out into the real world, then there is no cybercrime. Consider that for a moment: if one avatar engages in activity that has a negative effect on another avatar, but the negative effect has absolutely no consequences in the real world, can it be a cybercrime?

I think it might be helpful to illustrate my point with some examples. Assume, first, that Avatar X likes a jacket that Avatar Y owns and wears on occasion. When Avatar Y is not wearing the jacket, he keeps it in the closet of his virtual apartment in *Second Life*. Avatar X goes into the closet when Avatar Y is away and takes the jacket. Has he committed a cybercrime? Has Avatar Y suffered a harm in the real world?

First, assume Avatar Y got the jacket from Free Dove.³⁵⁰ It cost him nothing; as we saw earlier, Free Dove gives clothing to new *Second Life* Residents. In this version of our scenario, Avatar Y is justifiably aggravated because he has lost the use of his virtual jacket—a collection of bytes and pixels. But he has sustained no legal harm in the real world. He lost an intangible that has value only within the virtual world of *Second Life*, and its value is presumably limited there; since he was given the jacket, he may not be able to sell it to another Resident. That is, there may be no interest in buying something one can get for free from Free Dove or another source. If he

348. See, e.g., Bruce F. Katz, *Neuroengineering the Future* 4, 345-355 (2008); See also *Mind uploading* -Wikipedia, http://en.wikipedia.org/wiki/Mind_transfer (last visited Oct. 8, 2008).

349. See *supra* discussion § IV.

350. See *supra* notes 245-247 and accompanying text.

could not have sold the jacket, he cannot claim to have lost revenue in the form of Linden Dollars, revenue he could have, if so inclined, transferred out of *Second Life* and into a real-world bank account. And since the jacket does not constitute intellectual property in which Avatar Y can assert a cognizable legal interest,³⁵¹ Avatar X's misappropriation of the virtual construct again inflicts no harm in the real world and cannot qualify as a cybercrime.

Now assume that instead of being given the jacket, Avatar Y paid one hundred Linden Dollars for it (approximately fifty cents in U.S. currency). In this version of our scenario, Avatar Y does sustain a monetary loss—albeit a concededly *de minimis* one—that can be construed as the infliction of a real world harm, i.e., the harm of having one's property stolen. Conceptually, Avatar X's conduct constitutes the cybercrime of theft (using computer technology to steal property) because Avatar Y has suffered a harm that has an impact in the physical world.³⁵² The harm is, of course, of such a slight magnitude it is highly unlikely Avatar X would be prosecuted for what he did,³⁵³ but this illustrates the point I want to make about cybercrime in virtual worlds.

As noted earlier, people can, and do, import and export real world money—often large sums of it—into and out of virtual worlds.³⁵⁴ They use the real world money they import into virtual worlds like *Second Life* to acquire virtual property of a value far exceeding fifty cents. Anshe Chung, for example, is the *Second Life* avatar of a woman who owns between 1 and 2.5 million dollars worth of virtual land in *Second Life*; over the last four years, she has made substantial profits by buying, developing and selling virtual land.³⁵⁵ She is not

351. Cf. Posting of Janey Bracken to SL iReports, <http://secondlife.blogs.cnn.com/2008/03/02/content-theft-in-second-life/> (Mar. 2, 2008, 18:15 EST) (describing theft of what may be intellectual property).

352. As we saw earlier, a Dutch teenager was prosecuted for stealing virtual furniture in *Habbo*. See Posting of Wagner James Au to GigaOM, <http://gigaom.com/2007/11/18/why-virtual-theft-should-matter-to-real-life-tech-companies/> (Nov. 18, 2007, 2:03 PST) [hereinafter Posting of Au, *Why Virtual Theft Should Matter*]. The furniture, like the jacket hypothesized in the text above, had a monetary value in the real world, so the theft constituted an in-game cybercrime. See *id.*

353. Thefts of much larger sums have not resulted in prosecution. See, e.g., Ouchquack Stern, *DarkLife Robbed – Developer Blames Open Source SL*, THE SECOND LIFE HERALD, Feb. 25, 2007, http://www.secondlifeherald.com/slh/2007/02/darklife_robbed.html.

354. See *supra* notes 235-236, 238-240 and accompanying text.

355. See AU, THE MAKING OF SECOND LIFE, *supra* note 130 at 151-52; Guest, *supra* note 244, at 138-39; see also Anshe Chung's Dreamland, <http://dreamland.anshechung.com/> (last visited Oct. 8, 2008).

alone; as I noted earlier, *Second Life* has a robust and thriving economy.³⁵⁶

Virtual property has value in the real world. *Second Life* Residents can buy and sell *Second Life* property—of all types—on external marketplaces, including eBay.³⁵⁷ In 2007, eBay banned trades in MMORPG virtual property from its site, but made an exception for *Second Life* because it does not consider *Second Life* to be a “game.”³⁵⁸ Virtual property from *Second Life* and from MMORPGs like *WoW* is widely traded online; as one observer noted, the “trading of virtual items in the real world is believed to be worth hundreds of millions of dollars.”³⁵⁹ Some people even earn their living by trading in virtual property.³⁶⁰

It is consequently not surprising that people have been prosecuted for stealing virtual property that has value in the real world. In 2007, a Dutch teen was charged with theft for stealing furniture from other *Habbo* users.³⁶¹ In 2005, Japanese police arrested a Chinese exchange student for stealing virtual property in an Asian MMORPG, *Lineage*.³⁶² And South Korea police have a

356. See *supra* notes 233-234 and accompanying text.

357. See *supra* note 237; see also Adam Turner, *eBay Exempts Second Life from Ban on Selling Virtual Items*, ITWIRE, Jan. 31, 2007, <http://www.itwire.com/content/view/9063/53/>.

358. See Turner, *supra* note 357. The exemption is also, no doubt, attributable to the fact that *Second Life* Residents own the virtual property they create. See *supra* § III(B)(1).

359. See Turner, *supra* note 357.

360. See, e.g., JULIAN DIBBELL, *PLAYMONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT* (2006).

361. In November, a 17-year-old Dutch teenager was arrested “for allegedly stealing virtual furniture from ‘rooms’ in *Habbo*”. “*Virtual Theft*” Leads to Arrest, BBC News (November 14, 2007), <http://news.bbc.co.uk/2/hi/technology/7094764.stm>. Dutch police also questioned five 15-year-olds who were allegedly involved in the theft. See *id.* The teens were alleged to have misappropriated 4,000 Euros (then approximately \$5,800) worth of *Habbo* furniture by tricking the victims into giving them their passwords. See *id.*

Habbo has good reason to take virtual theft seriously: unlike most MMORPGs, *Habbo* relies on the sale of virtual property, instead of paid subscriptions, for its revenue. See Wagner James Au, *Why Virtual Theft Should Matter to Real Life Tech Companies*, GigaOm (November 18, 2007), <http://gigaom.com/2007/11/18/why-virtual-theft-should-matter-to-real-life-tech-companies/>. Since *Habbo* has been “phenomenally” successful, other virtual worlds are utilizing the same model. *Id.* That means they need to ensure the security of user-purchased property or face the possibility of “a sudden devaluation of their virtual economy.” *Id.* And while this problem may be more significant in worlds that utilize the *Habbo* model, it is also likely to be significant in any virtual world—including *Second Life*—that relies on in-world commerce for at least part of its revenue stream. See generally *id.*

362. See, e.g., *Student Arrested for Robbing Another Player Inside an Online Game*, INFORMATION WEEK, Aug. 22, 2005, <http://www.informationweek.com/news/security/showArticle.jhtml?articleID=169500364>.

special section that deals with in-game crime; it apparently receives thousands of reports of theft and other crimes.³⁶³

Virtual theft has not yet led to prosecution in the United States, even when the stolen property has value in the real world. In 2008, someone broke into Geoff Luurs' account on the MMORPG *Final Fantasy XI* and took "the items and currency" he had collected in four years of play.³⁶⁴ He suspected another player of having committed the theft and went to the Blaine, Minnesota police department, asking them to investigate.³⁶⁵ They refused, even though he explained that the items were worth "about \$3,800" and could be sold "to gamers who would rather pay for it than play for it."³⁶⁶ The officers told Luurs the items were "devoid of monetary value," and therefore no theft had taken place.³⁶⁷ That, of course, is incorrect. The officers clearly did not understand, or were simply unfamiliar with, the concept of virtual property with equivalent value in the real world. In time, that will most certainly change in Blaine, Minnesota as well as elsewhere.

While virtual theft prosecutions are rare, and apparently unknown in the United States, law enforcement agencies around the world are still taking in-world cybercrime seriously. In 2007, Europol and the United Kingdom's Serious Organised Crime Agency announced that they were "concerned" about criminals and terrorists using *Second Life* to launder money, stating that "policing the movement of money in *Second Life* presents challenges, as funds may be transferred across borders."³⁶⁸ A few months earlier, Britain's Fraud Advisory Panel cited a "growing risk" of theft, fraud, identity

363. See, e.g., Mark Ward, *Does Virtual Crime Need Real Justice?*, BBC NEWS, Sept. 29, 2003, <http://news.bbc.co.uk/2/hi/technology/3138456.stm>.

364. See Oli Welsh, *US Police Refuse to Investigate MMO Theft*, EUROGAMER, Feb. 4, 2008, http://www.eurogamer.net/article.php?article_id=91991.

365. *Id.*; see also Posting of Earnest Cavalli to Wired Blog Network, <http://blog.wired.com/games/2008/02/police-refuse-t.html> (Feb. 4, 2008, 16:25:19 EST).

366. See John Brewer, *When a Virtual Crook Struck This Gamer, He Called Real Cops*, ST. PAUL PIONEER PRESS, Jan. 31, 2008, at A1, available at 2008 WLNR 1985337.

367. See Welsh, *supra* note 364; see also Brewer, *supra* note 366 (stating that if the perpetrator "didn't steal any value, he didn't commit a crime."). The police's refusal to investigate may also have been a matter of prioritizing scarce resources; since investigating cybercrimes often requires special expertise and great deal of time, smaller police forces are often disinclined to pursue them.

368. Chris Gourlay & Abul Taher, *Virtual Jihad Hits Second Life Website*, TIMES ONLINE, Aug. 5, 2007, http://www.timesonline.co.uk/tol/news/world/middle_east/article2199193.ece. As the title indicates, law enforcement agencies are also concerned about terrorists using *Second Life* and similar worlds to plan or even rehearse terrorist attacks. See *id.* Europol has "recruited security consultants" to advise it on "the use of *Second Life* for fraud and terrorism." See *id.*

theft, money laundering, and tax evasion in virtual worlds.³⁶⁹ And in 2008, U.S. Attorney General Michael Mukasey noted that technology “has created brand-new avenues for money laundering, with the proliferation of . . . virtual world[s] . . . like *Second Life*.”³⁷⁰

Money laundering was also a concern when Federal Bureau of Investigation (FBI) agents looked into the legality of gambling in *Second Life*, which had “[h]undreds of casinos offering poker, slot machines and blackjack.”³⁷¹ Linden Lab invited the FBI in, as part of its effort to determine if the in-world gambling violated U.S. laws (which seemed likely).³⁷² In August of 2007, Linden Lab banned gambling in *Second Life*, citing “conflicting gambling regulations around the world.”³⁷³ Linden Lab said it would “remove violators’ virtual equipment,” might “suspend or terminate” the accounts of Residents who flouted the ban, and might “report user information to authorities.”³⁷⁴

As these examples illustrate, it is already apparent that in-world cybercrime can and no doubt will be addressed by real world legal systems and law enforcement agencies.³⁷⁵ Law enforcement response to virtual world cybercrime is nascent in many countries (with South Korea being probably the most notable exception), but that will change as officers develop an appreciation for the real world consequences of in-world crime. Virtual world cybercrime is essentially in the same position “public” cybercrime was in a decade or so ago, when officers had not yet learned that virtual crime inflicts real harm.³⁷⁶ As our increased use of cyberspace produced a concomitant rise in the incidence of cybercrime, officers in the United States and elsewhere learned to take “regular” cybercrime seriously.

369. See The Fraud Advisory Panel, *supra* note 338.

370. Michael B. Mukasey, Attorney Gen., Remarks at the CSIS Forum on Combating International Organized Crime (Apr. 23, 2008), available at 2008 WLNR 7551268.

371. Adam Pasick, *FBI Checks Gambling in Second Life Virtual World*, REUTERS, Apr. 4, 2007, <http://www.reuters.com/article/technologyNews/idUSHUN43981820070405?pageNumber=1&virtualBrandChannel=0>.

372. See *id.*

373. Rachel Konrad, “*Second Life*” Bans Gambling, ABC NEWS, Aug. 2, 2007, <http://abcnews.go.com/Technology/story?id=3440536&page=1>; see Posting of Robin Linden on Official Second Life Blog, <http://blog.secondlife.com/2007/07/25/wagering-in-second-life-new-policy/> (July 25, 2007, 16:05 EST).

374. See Konrad, *supra* note 373.

375. In 2008, Linden Lab CEO Philip Rosedale told Congress he asked the FBI to investigate cybercrime in *Second Life*. Eric Reuters, *Rosedale Discloses FBI Griefing Probe to Congress*, REUTERS, Apr. 1, 2008, <http://secondlife.reuters.com/stories/2008/04/01/rosedale-discloses-fbi-griefing-probe-to-congress/>.

376. See, e.g., Marc D. Goodman, *Why the Police Don't Care about Computer Crime*, 10 HARV. J. L. & TECH. 465, 477-90 (1997).

As virtual worlds come to play an increasingly important role in our lives, the authorities will come to appreciate the need to take in-world cybercrime just as seriously.

Since in-world cybercrime is merely the transposition of “regular” cybercrime into a new virtual context, it should not require the adoption of new, virtual-world-specific cybercrime laws. As we saw earlier, harassment tends to be a problem in MMORPGs and in virtual worlds; so far, it is being dealt with by the entity that operates the MMORPG or virtual world. That, I think, is the appropriate default approach for dealing with the problem. While in-world harassment will inevitably inflict some residual affective harm on the victim in the real world, its primary effect is likely limited to the virtual experiential context. It is therefore reasonable to assume that, in most instances, those who control the environment from which the conduct sprang—the operator of the MMORPG or virtual world—can best address it. As we saw earlier, they have the power to suspend offending players or ban them entirely.³⁷⁷

That approach may not be adequate, however, if the effects of in-world harassment leak out of the virtual world to cause substantial harm in the victim’s “real” life. Criminal charges might be appropriate in this situation; the case could be prosecuted under existing law as long as the jurisdiction’s harassment statute encompasses the use of electronic signals for the purpose of harassing another.³⁷⁸ This dichotomous approach should also be appropriate for in-world stalking or fraud or any other crime that can be committed without physical contact.³⁷⁹ The two-tiered approach is not appropriate when in-world activity results in the infliction of death, physical injury to persons, or damage to property in the real world. In these instances, the hierarchy of harm noted above is reversed: the primary effects of the harmful conduct are felt in the real world. While some residual harm may also be inflicted in the virtual environment, it pales in significance to the external harm. Here, the virtual environment is a vector for inflicting a traditional, hard harm in the physical world; since this constitutes the commission of a crime (albeit by non-traditional means), the perpetrators must be prosecuted

377. See *supra* discussion § III.

378. See *supra* discussion § II(B)(2). The “jurisdiction” in question would be the jurisdiction where the victim resides and the jurisdiction where the perpetrator resides, if the two are in different locations. See, e.g., Susan W. Brenner & Bert-Jaap Koops, *Approaches to Cybercrime Jurisdiction*, 4 J. HIGH TECH. L. 1, 10-21 (2004). It could also be the location of the virtual world or MMORPG, i.e., the location of the servers hosting the virtual environment. See *id.*

379. See *infra* discussion § IV(B)(2) (discussing virtual rape).

for what they have done. That should not be difficult; as I noted earlier, statutes specifically outlawing the use of cyberspace to inflict these harms have been adopted at the federal level and in several states.³⁸⁰

The problematic aspect of using our criminal laws and criminal justice system to control in-world cybercrime lies not in defining offenses or establishing jurisdiction but, as with “regular” cybercrime, in finding the resources and expertise necessary to enforce our laws in this new context. Regular cybercrime challenges our law enforcement system because of its complexity, because it tends to be transnational, and because it tends to be committed on a scale far exceeding that possible in the physical world.³⁸¹ Another factor complicating the enforcement of our existing and, I think, quite adequate cybercrime laws is that it represents a new quantum of crime that is added to the real world crime to which officers must continue to respond.³⁸² In-world cybercrime will to some extent further exacerbate this aspect of the general cybercrime enforcement problem, since it constitutes an additional increment of new crime that is added to the real world crime and “public” crime to which officers must respond.

B. Fantasy Crime

“Virtual worlds liberate us from our bodies, but not from one another.”³⁸³

To analyze the phenomenon I am calling “fantasy crime,” we must understand the role harm plays in criminal law. Therefore, the first section below reviews the nature and import of harm. The next section addresses the relationship between fantasy and harm.

1. Harm

In the sections above, I defined cybercrime as the use of computer technology to inflict the socially intolerable harms that are

380. See, e.g., 18 U.S.C. § 1030(a) (2000); see also CONN. GEN. STAT. ANN. § 53a-301(a)(West 2003); MICH. COMP. LAWS ANN. § 750.543p(1) (West 2004). The text refers to cyberterrorism statutes, which could be used to prosecute those who used a virtual environment to cause death, injury, and/or property damage in the real world for political reasons. If someone used such an environment to inflict these or other hard harms for personal reasons, they could be prosecuted under traditional criminal statutes. The only distinctive factor in this scenario is the use of non-traditional methods to inflict the harms, but as noted earlier, the method is generally irrelevant in defining and assessing criminal liability. See *supra* notes 339-346 and accompanying text.

381. See Brenner, *Toward a Criminal Law for Cyberspace*, *supra* note 5, at 49-75.

382. See *id.* at 80-81.

383. See, e.g., Guest, *supra* note 244, at 114.

outlawed—criminalized—by modern nation-states.³⁸⁴ The harm is inflicted in either the public or private areas of cyberspace.³⁸⁵ This definition may seem to be all encompassing since it ostensibly incorporates all the criminal activity that occurs online, but it may not be. It exhausts the digital geography of cyberspace; there is no residual virtual forum for criminal activity because the public and private areas comprise the malleable totality of cyberspace.³⁸⁶ The definition is also conceptually exhaustive since it construes cybercrime as an omnibus term comprising the use of computer technology—which subsumes the use of cyberspace—to commit any crime outlawed by modern nation-states.³⁸⁷ It therefore encompasses the use of computer technology to commit any crime anywhere in cyberspace.

The definition's potential deficiency lies in a residual category of online activity that may or may not constitute the commission of real world crime. This category—the phenomenon I am calling “fantasy crime”—has not previously been defined, presumably because it is difficult to define. It has certain identifiable characteristics: it involves activity in cyberspace, usually in a virtual world like *Second Life*.³⁸⁸ The activity consists of, or involves, conduct that would constitute the commission of a crime in the real world. That is, it results in the infliction of a hard or soft harm that has been more or less generally outlawed by the nations of the world. And while such activity might seem to constitute cybercrime committed in a private area of cyberspace,³⁸⁹ it cannot readily be assigned to that category of cybercrime because the harm apparently inflicted is fictitious—a fantasy.

In Section IV(A), I examined the cybercrime committed in private areas of cyberspace; an essential defining characteristic of this type of cybercrime is that it results in the infliction of a harm

384. See *supra* discussion §§ IV-IV(A). For a summary of these harms, see *supra* discussion § II.

385. See *supra* discussion §§ IV-IV(A).

386. They encompass the confines of cyberspace because these “areas” are defined conceptually, not geographically. When a new generally accessible website is added, its functionality makes it part of the “public” areas of cyberspace, and when a new MMORPG or virtual world is added, its functionality makes it one of the “private” areas of cyberspace.

387. The definition is a conceptual, not an operational, definition. As such, it can encompass the use of computer technology (and cyberspace) to inflict any harm that has been outlawed by a modern nation-state. Whether the use of computer technology to inflict a particular harm is a crime in a given state depends upon the law in that jurisdiction.

388. Fantasy crime could occur in a MMORPG like *WoW*, but, so far, it seems to be more common in virtual worlds like *Second Life* and, to a lesser extent, *The Sims Online*. Cf. *The Sims Online* – Wikipedia, *supra* note 307.

389. See *supra* discussion § IV(A).

recognized by the criminal law of the physical world. As noted in Section II, criminal law has historically targeted the infliction of a fairly extensive repertoire of hard harms and in the last few decades has expanded to encompass the infliction of a few soft harms as well. This focus on the infliction of harm embedded a specific dynamic in the traditional structure of a crime: perpetrator inflicts proscribed harm on victim.³⁹⁰ The perpetrator's participation in the dynamic is active, volitional, and intentional; the victim's participation is passive and compelled, and neither intentional nor desired.³⁹¹

A modified version of the dynamic is embedded in the structure of the victimless crimes that evolved in the last century or so. There may be no victim at all in the traditional sense;³⁹² the victim may be both the perpetrator and the presumptive victim of the outlawed activity;³⁹³ or the victim may belong to a class of people whose generalized and often presumptive victimization results from reckless or negligent conduct on the part of those responsible for providing essential goods or services.³⁹⁴ The dynamic has also been modified to encompass frustrated efforts to inflict prohibited "harm."³⁹⁵ The law of inchoate crimes authorizes the prosecution of those who embark on a course of conduct that is intended to culminate in the infliction of a proscribed harm but does not because they are interrupted before they achieve their goal.³⁹⁶ All of these modifications preserve the essential dynamic: for a crime of whatever type to have been committed, there must have been a perpetrator, an actual or contemplated harm, and a victim who was the actual or contemplated target of that harm.

The conceptual structure of crime also includes an embedded assumption: although criminal law has expanded to encompass a few soft harms, its ultimate concern is always with the infliction of harm

390. See, e.g., United Nations General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, ¶¶ 1-2, U.N. Doc. A/RES/40/34/Annex (Nov. 29, 1985), available at www2.ohchr.org/english/law/victims.htm. There can be multiple perpetrators and/or multiple victims, and harms can be inflicted simultaneously or sequentially. Harm can also be inflicted indirectly, as when a perpetrator destroys property belonging to someone else; in scenarios like this, the victim is not "harmed" directly in the way a murder victim is "harmed," but still sustains a proscribed harm at the hands of the perpetrator..

391. See generally MARK M. LANIER & STUART HENRY, *ESSENTIAL CRIMINOLOGY* 13-22 (1998).

392. See *supra* discussion § II(B)(1) (discussing, *inter alia*, adultery, fornication, and statutory rape).

393. See *supra* discussion § II(B)(1) (discussing, *inter alia*, illegal gambling and drug use).

394. See *supra* discussion § II(B)(3).

395. See *supra* note 97 and accompanying text.

396. See *id.*; see also *supra* notes 75-76.

in the physical world. As we saw in Section II(B)(2), this concern with objective, tangible harm was, for some time, an impediment to criminalizing harassment and stalking that it did not involve threats of death or physical injury. While soft stalking and harassment have been outlawed by many jurisdictions in the United States and elsewhere,³⁹⁷ the influence of the concern with tangible harm persists, as the criminalization of these activities is not predicated solely on the infliction of affective harm; instead, the offense definitions require that the person accused of stalking or harassment have engaged in conduct that can objectively be deemed to cause harm.³⁹⁸

Criminal law's concern with tangible harm is understandable and justifiable. Criminal law evolved to maintain order in society and its goal is to prevent the members of a particular society from harming each other in ways that erode the social fabric and physical infrastructure of that society. That is why society does not punish thoughts; aside from anything else, thoughts cannot inflict harm that threatens the existence of social order.³⁹⁹

As explained in Section III, human activity of various types is increasingly migrating online, much of it into the artifices we experience as virtual "places." As discussed in Section IV(A), activity in these spaces can cause harm in the real, physical world and criminal law can address this phenomenon with relatively little conceptual difficulty because it involves the infliction of traditional, tangible "harm." As we will see in the next section, these virtual "places" also allow their inhabitants to engage in activity that does not actually inflict tangible harm, but either simulates the infliction of such harm or otherwise seems to implicate the concerns of the criminal law. This brings us to fantasy crime.

2. Fantasy

In analyzing fantasy crime, I will rely exclusively on activity that has occurred or could occur in *Second Life*. I focus on *Second Life* for two reasons. The first reason is that it is a Metaverse, not a MMORPG; as such, it offers an open, unstructured experience—essentially the opportunity to live a more or less skewed version of real life. As such, it offers greater opportunities to engage in novel,

397. See *supra* discussion § II(B)(2).

398. See *supra* notes 88-90 and accompanying text.

399. See *Fanning v. Chace*, 22 A. 275, 275 (R.I. 1891). Furthermore, criminalizing thoughts would have little deterrent effect and could be manipulated and abused. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.01(B) (3d ed. 2001); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U. L. REV. 579, 588 n.17 (2005).

unconventional activities. The second reason is that *Second Life* is the most evolved of the extant Metaverse worlds. Therefore, while it is reasonable to assume future Metaverses will be more technologically sophisticated, *Second Life* is likely to be a reliable indicator of the forces that will draw people to Metaverses and, in some instances, prompt them to engage in what some will regard as problematic activity: fantasy crime.

In the first two sections below, I focus on whether activity in *Second Life* inflicts harms analogous to those resulting from the commission of two types of real world crimes: victimless crimes and traditional crimes.⁴⁰⁰ In the third section, I analyze whether criminal law should apply to the infliction of virtual harms that are analogous to those inflicted in the real world.

a. Victimless Crimes

Gambling was once common in *Second Life*, but it has either disappeared or gone underground since Linden Lab banned it in 2007.⁴⁰¹ Gambling in virtual worlds falls primarily into the category of in-world cybercrime because players' winnings or losses tend to have an impact—a harm—in the real world.⁴⁰² If they lose money in a *Second Life* casino, the effects of the loss may be indistinguishable from a loss in a real world casino; as we saw earlier, Residents import real world funds into *Second Life*.⁴⁰³ If someone gambles in-world with funds imported from their external bank account, the loss—the harm—is identical to the loss resulting from real world gambling.⁴⁰⁴ Therefore, to the extent in-world gambling inflicts external harm, it constitutes in-world cybercrime, not fantasy crime. There is, however, a residual scenario that might constitute fantasy crime: if a Resident were to gamble in *Second Life* (assuming such opportunities still

400. I am not including a treatment of crimes targeting systemic harm of the type analyzed in Section II(B)(3), because, as far as I can tell, virtual worlds have no need for such crimes. Avatars do not need to be concerned about the purity of the substances they consume or the air they do not breathe, and they have no reason to be concerned about injury caused by faulty products or services. Concerns such as these may arise as virtual worlds increase in complexity, but it would be premature to speculate about how crimes targeting systemic harms may evolve in this context. In Section IV(B)(2), I address a different kind of systemic harm that is more analogous to the harms encompassed by traditional crimes.

401. See *infra* notes 440-443 and accompanying text.

402. See *supra* discussion § IV(A).

403. See *supra* discussion § III(B)(1).

404. There could be correlate real-world harm if someone were to win and, say, not pay taxes on their in-game income.

exist)⁴⁰⁵ using only *Second Life*-derived Linden Dollars,⁴⁰⁶ the effects of his or her losses would presumably occur only in *Second Life*. The question, of course, is whether that harm should be addressed by criminal law. This issue is explored in the next section.

Drug use is another victimless crime.⁴⁰⁷ There is at least one recreational drug available in *Second Life*: Seclimine, a “virtual hypnotic.”⁴⁰⁸ When a Resident’s avatar consumes Seclimine, an animation program (and a fair amount of imagination) replicates the effects of consuming a psychoactive drug like LSD.⁴⁰⁹ The company that produces and markets Seclimine describes it as “very addictive.”⁴¹⁰ Residents sell it to other Residents in exchange for a commission and discounted purchases for their own use.⁴¹¹ Does the production, sale, and use of Seclimine in *Second Life* produce harms analogous to the harms real drugs inflict in the physical world? Seclimine cannot result in physical addiction because it is not, and cannot be, consumed by a human being; it consists of computer script, not chemicals. And it is difficult to understand how it could produce a psychological addiction because, again, it is—quite fictively—consumed by an avatar, not by the person the avatar represents. If there is no addiction, there seems little or no risk that Seclimine users will deplete their funds and otherwise destroy their lives in pursuit of the drug.⁴¹² And if there is no harm to those who use Seclimine, it is difficult to see how those who sell it are harming their customers. The

405. See, e.g., Dusan Writer’s Metaverse >> Gambling Returns to Second Life, <http://dusanwriter.com/?p=655> (last visited Oct. 8, 2008).

406. These funds would come from the stipend Premium Account holders receive or from funds the Resident earned through working or other activities in *Second Life*. See *supra* § III(B)(1).

407. See, e.g., Erik Luna, *Traces of a Libertarian Theory of Punishment*, 91 MARQ. L. REV. 263, 270 (2007).

408. Seclimine, <http://www.seclimine.com/home.html> (last visited Oct. 8, 2008).

409. See Warren Ellis, *Second Life Sketches: News from Nowhere*, REUTERS, Feb. 16, 2007, <http://secondlife.reuters.com/stories/2007/02/16/second-life-sketches-news-from-nowhere/>; Posting of Gideon Television to YesbutNobutYes: Helping You to Lead the Way, http://www.yesbutnobutyes.com/archives/2006/09/helping_you_to.html (Sept. 10, 2006).

410. See Seclimine - Products, <http://www.seclimine.com/products/seclimine.html> (last visited Oct. 8, 2008). It also offers a disclaimer: “This is not a real drug . . . All feelings . . . are the result of a hypnotic induction and suggestion. This is for entertainment purposes only while in *Second Life*.” *Id.*

411. See Posting of Gideon Television, *supra* note 409; Seclimine - Business Opportunities, <http://www.seclimine.com/businessopportunities.html> (last visited Oct. 8, 2008). As with everything in *Second Life*, recreational drug use is inexpensive; the most powerful version of Seclimine costs 30 Linden Dollars (less than a quarter) for 1 dose and 300 Linden Dollars (about \$1.50) for 12 doses. See Seclimine - Products *supra* note 410.

412. The risk of fund depletion is further reduced by the inexpensiveness of the drug. See *infra* note 479.

only hint of harm I can see here is the possibility that the use of this virtual hypnotic might induce the Residents who use it to try real drugs in the physical world.

Prostitution is common in *Second Life*,⁴¹³ which brings us to avatar sex. Residents can customize the avatars they are given initially,⁴¹⁴ that can include modifying an avatar so it can engage in sexual activity. Base avatars, those that have not yet been personalized by their Resident, are not anatomically complete, but Residents can buy genitalia for their avatars and can customize the avatar's secondary sexual characteristics.⁴¹⁵ They can buy "skins" to make their avatars appear to be nude.⁴¹⁶ And they can buy "props" with "attached software . . . to animate the user's avatar through the motions of sex. Sometimes, the script is attached to a . . . sphere, called a 'pose ball.'"⁴¹⁷

While avatar prostitutes are not the only ones taking advantage of this aspect of *Second Life*, they are the only ones who exploit it for financial advantage. The men and women who do this usually work for an escort service or a "virtual bordello."⁴¹⁸ Like their real world counterparts, *Second Life* prostitutes charge clients for their services and give the owner of the escort service or bordello a percentage of their earnings for support that he or she provides, such as accommodations, clothing, and customers.⁴¹⁹ The currency used in these transactions is Linden Dollars, so prices are quite modest by real world standards.⁴²⁰ Unlike their real world counterparts, *Second Life* prostitutes tend to work part-time ("for the thrills, for the extra

413. See, e.g., Bonnie Ruberg, *Peeking up the Skirt of Online Sex Work*, THE VILLAGE VOICE, Aug. 8, 2007, <http://www.villagevoice.com/2007-08-28/columns/peeking-up-the-skirt-of-online-sex-work/> (last visited Oct. 8, 2008) (describing "literally thousands of online escorts").

414. See *supra* discussion § III(B)(1).

415. See also Mitch Wagner, *Sex in Second Life*, INFORMATION WEEK, May 26, 2007, <http://www.informationweek.com/news/software/hosted/showArticle.jhtml?articleID=199701944> (last visited Oct. 8, 2008); see, e.g., Xcite!, <http://www.getxcite.com/store.php> (last visited Oct. 8, 2008).

416. See Wagner, *supra* note 415.

417. See *id.*

418. See *id.*; see also Ruberg, *supra* note 413. Female avatars make up most of *Second Life's* prostitutes, but up to half of the female avatars in *Second Life* are operated by men. *Id.*

419. See *id.*; see, e.g., Lexa Dryke, *The Working Girls of Second Life*, THE LOOKING GLASS, July 9, 2007, http://www.slookinglass.com/index.php?option=com_content&task=view&id=54&Itemid=154 (last visited Oct. 8, 2008).

420. See, e.g., Guest, *supra* note 244, at 180-86 (\$3 for an hour); Dryke, *supra* note 419 (stating that 2500 Linden Dollars— or \$10—an hour is "high-priced").

cash, or both”).⁴²¹ Does their activity inflict harm analogous to the harm that has led to the criminalization of prostitution in the real world? There is no risk of disease, death, or physical injury to *Second Life*'s sex workers or their customers; as we saw earlier, an avatar cannot die, and since an avatar has no physical existence, it cannot be injured or become ill.⁴²² And since virtual prostitutes cannot be physically restrained without their consent, there seems to be no risk of their being enslaved by pimps and madams (as is often the case in the real world).⁴²³

Concerns about morality historically contributed to the criminalization of prostitution,⁴²⁴ but since no sexual activity actually occurs in *Second Life*, that harm is also absent. Indeed, *Second Life* prostitution is more accurately described as pornography than as prostitution. In the United States, non-obscene pornography is protected by the First Amendment and cannot be criminalized.⁴²⁵ Therefore, even if we construe *Second Life* prostitution as pornography, it cannot inflict harm justifying the imposition of criminal liability.

Adultery and bigamy are considered victimless crimes, even though each involves the infliction of a (concededly soft) harm on a particular victim.⁴²⁶ Either can occur in *Second Life*. Residents marry in-world and, while the ceremonies are not legally binding,⁴²⁷ they can become the basis of a stable, committed virtual relationship.⁴²⁸ Since many who marry in *Second Life* are married in the real world, Residents may find themselves engaged in cross-world bigamy and/or adultery. As long as the *Second Life* relationship remains in the virtual world, though, it cannot constitute either. Bigamy consists of

421. Ruberg, *supra* note 413.

422. See generally *supra* discussion § III(B)(1).

423. But see Destiny Welles, *The Ins and Outs of a Second Sex Life*, THE REGISTER, Jan. 9, 2007, http://www.theregister.co.uk/2007/01/09/good_sex_in_second_life/page2.html (last visited Oct. 8, 2008) (stating that emotional abuse may be used to keep some in virtual prostitution).

424. See, e.g., Brian Fay, *Review of Sex, Drugs, Death, and the Law*, 58 N.Y.U. L. REV. 1231, 1235 (1983) (arguing the reason prostitution and drug use “are criminalized is that, according to common morality, they are immoral”).

425. See *Miller v. California*, 413 U.S. 15, 23-24 (1973). Child pornography can be criminalized, but we will address that issue in the next section. See *supra* discussion § IV(B)(2)(b)(ii)(bb)

426. See *supra* discussion § II(B)(1).

427. See, e.g., Tara Sena-Becker, *Arrange Your Cyber-Wedding*, SUITE 101, Mar. 6, 2008, http://weddingservicesreceptions.suite101.com/article.cfm/cyber_weddings (last visited Oct. 8, 2008).

428. See, e.g., Alexandra Alter, *Is This Man Cheating on His Wife?*, WALL ST. J., Aug. 10, 2007, available at <http://online.wsj.com/public/article/SB118670164592393622.html>.

entering into a legally-recognized marriage when one of the persons being married “has a living spouse.”⁴²⁹ Since the law does not recognize *Second Life* unions, such virtual marriages cannot support a charge of bigamy. Laws criminalizing bigamy target the harm that duplicative marriages inflict on an existing marital relationship; since no valid marriage can occur in *Second Life*, its unions do not constitute bigamy.⁴³⁰ And since the partners in *Second Life* unions do not physically engage in sexual intercourse, their activity cannot support a charge of adultery either.⁴³¹

While *Second Life*'s virtual relationships do not inflict the harms traditionally targeted by bigamy and adultery, they can still inflict emotional pain, especially when one of the parties to an ostensibly committed virtual relationship strays with another avatar.⁴³² Since the other party will experience the pain of the betrayal in the real world, one could argue for creating a new crime—a variation on adultery or bigamy—to encompass this soft harm. But this is not advisable; as we saw earlier, law has essentially abandoned the practice of criminalizing the infliction of relationship-based soft harms. States still prosecute bigamy, but most have decriminalized adultery; those that have not generally do not enforce their laws, and for good reason.⁴³³ Even if we assume avatar-on-avatar conduct inflicts the same measure of harm, equivalent to conduct in the external world, statutes criminalizing the online infliction of relationship-based soft harms are inconsistent with twenty-first century culture and may be unconstitutional.⁴³⁴ To paraphrase one author, criminal law is not, and should not become, an arbiter of relationships.⁴³⁵

This effectively exhausts the category of victimless crimes. Historically, such crimes also included alcohol abuse and “certain sexual activities” (a euphemism for homosexuality), but the analysis

429. DEL. CODE ANN. tit. 11, § 1001 (1989).

430. See, e.g., *Davis v. Beason*, 133 U.S. 333, 342 (1890) (finding that bigamy destroys “the purity of the marriage relation” and disturbs “the peace of families”).

431. See, e.g., Adam Reuters, *Savage Love on Second Life “Adultery,”* REUTERS, May 2, 2007, <http://secondlife.reuters.com/stories/2007/05/02/savage-love-on-second-life-adultery/>; Alter, *supra* note 428.

432. See AU, THE MAKING OF SECOND LIFE, *supra* note 130 at 96-103.

433. See *supra* notes 45-46 and accompanying text.

434. See *supra* discussion § II. See, e.g., Gabrielle Viator, Note, *The Validity of Criminal Adultery Prohibitions after Lawrence v. Texas*, 39 SUFFOLK U. L. REV. 837 (2006). Such statutes would also be impossible to enforce: many would ignore them, assuming, no doubt correctly, that police would not be able to enforce the laws with any degree of efficacy. *Id.* at 859-60.

435. See *id.* at 860.

above encompasses the harms these activities were deemed to inflict.⁴³⁶ Insofar as there is simulated alcohol use and abuse in *Second Life*,⁴³⁷ the harm analysis for such activity should be identical to the analysis regarding the use of Seclimine. And since the Supreme Court has held that euphemistic “sexual activity” statutes are unconstitutional, the concerns, legitimate or otherwise, addressed by those statutes are not longer part of the criminal law.⁴³⁸

b. Traditional Crimes

In reviewing *Second Life* analogues of traditional crimes, I begin with crimes that inflict lesser harms and progress to those that inflict serious harms. Since I cannot analyze every crime, I will focus on two categories: crimes that harm property (lesser harms), and crimes that harm people (serious harms).

i. Property Harm

In Section IV(A), I analyzed a hypothetical theft in *Second Life*, where Avatar X stole a virtual jacket from Avatar Y. I concluded that if Avatar Y bought the jacket with funds that have value in the real world, then the theft constitutes an in-game cybercrime. Since the virtual property was purchased with “real” money, its loss inflicts a harm that resounds in the physical world. I also concluded that if Avatar Y received the jacket for free, no in-game cybercrime had been committed; I deferred on the issue of whether the theft of virtual property not purchased with “real” money inflicts harm of which the criminal law should take cognizance.

I will now address that issue. Before I begin, though, I need to note its implications. While the hypothetical focused on virtual theft, the analysis of whether the loss of virtual property not purchased with real world funds constitutes a harm cognizable by the criminal law will also apply to other property-loss crimes. If a *Second Life* Resident extorts virtual property from another Resident, the same dichotomy arises. If the property was purchased with funds having value in the real world, then the extortion constitutes an in-game cybercrime; if it

436. See, e.g., Joseph A. Colquitt, *Rethinking Entrapment*, 41 AM. CRIM. L. REV. 1389, 1397 n.51 (2004) (quoting EDWIN KIESTER, JR., CRIMES WITH NO VICTIMS – HOW LEGISLATING MORALITY DEFEARS THE CAUSE OF JUSTICE 3-4 (ALLIANCE FOR A SAFER N.Y. 1972)).

437. Simulated alcohol use seems to exist, but does not seem to be a predominant aspect of the *Second Life* experience. See, e.g., Posting of Wagner James Au, to *Second Life* News, http://secondlife.com/notes/2004_01_05_archive.php (Jan. 8, 2004, 11:13 EST).

438. See *Lawrence v. Texas*, 539 U.S. 558, 571-72 (2003).

was not, then the analysis we are about to embark upon will determine the nature of the harm inflicted. The same will be true of other property deprivation crimes, such as fraud, arson, vandalism, etc.

If a Resident of *Second Life* deprives another Resident of virtual property that has no independent value in the real world, does that act inflict harm? It obviously inflicts harm in a literal sense; there has, as a dictionary notes, been “a change for the worse.”⁴³⁹ The real issue for our purposes is not the zero-sum question of whether there has been *a* harm; there has clearly been *some* harm to the Resident who lost the property. Criminal law does not, though, concern itself with every harm; it only targets harms the infliction of which can erode social order.⁴⁴⁰ The dispositive issue—here and in other traditional crimes—is the degree of harm inflicted. We are, after all, analyzing digital analogues of physical events; the harms that result from artifice are (so far, anyway) necessarily less momentous than the ones we deal with in the physical world.

Why is that true? Or perhaps I should ask: is that true? I am assuming that the harms inflicted via *Second Life* are in effect inferior to the harms we encounter in the real world; that assumption implicitly structured our consideration of victimless crimes in the section above. Is it valid? If so, why?

Pure virtual property damage crimes may best illustrate why virtual harms are (so far) categorically inferior to their real world counterparts. In pure virtual property damage crimes, the harm manifests itself exclusively in the virtual environment. In the hypothetical above, Avatar Y lost the possession and use of his virtual jacket and consequently suffered some harm, some injury. But while that harm is analogous to the harm inflicted by real world theft, it is of a lesser magnitude. Theft has been, and for the most part still is, a zero-sum phenomenon.⁴⁴¹ If someone steals my jacket in the real world, I suffer what is in varying degrees a zero-sum harm. If the jacket is unique and the police cannot recover it, I sustain a total loss; I cannot replace it and thereby return to the status quo ante.⁴⁴² If the

439. Harm definition, Dictionary.com, <http://dictionary.reference.com/browse/harm> (last visited Oct. 8, 2008). See also Concise Oxford English Dictionary 649 (10th ed. rev. 2002) (harm defined as to “have an adverse effect on”).

440. See *supra* note 400 and accompanying text. See also *supra* discussion § II.

441. See Susan W. Brenner, *Is There Such a Thing as “Virtual Crime”?*, 4 CAL. CRIM. L. REV. 1, ¶¶ 39-50 (2001).

442. I may be able to mitigate the consequences of my loss by purchasing a surrogate, but that in no way eradicates the zero-sum harm I sustained as a result of the

jacket is fungible, I can replace it, but I will still effectively sustain a zero-sum loss: I buy a new jacket, which costs, say, the same as the old one; I have now lost the entire value of a jacket of that type, even though my ability to use such a jacket has been restored.⁴⁴³ In either alternative, I sustain a zero-sum harm. This harm-loss calculus applies to other property loss crimes, such as fraud and extortion; it also applies to property destruction crimes like arson and property damage crimes like vandalism.⁴⁴⁴

Does this calculus also apply to the virtual analogues of these crimes? It does, yet it does not. The inherently zero-sum quality of the harms that property crimes inflict in the real-world is a function of the nature of real world property. Like all items in the real world, property is tangible; as such, it is a binary construct. I have money or I do not; I have a laptop or I do not; I have an automobile or I do not; and so on. This aspect of real world property also means that it is finite, i.e., subject to the laws of nature.⁴⁴⁵ Property in the real world exists in limited quantities and is usually the product of significant effort; I can use my money to buy a laptop or an automobile, but I cannot create either. That is why, as noted above, I cannot avoid a zero-sum loss if you steal from me; if you take my laptop, I can buy another if I have the funds to do so, but I will still sustain a zero-sum loss because I “lose” the value of the laptop.

theft. I have not returned to the status quo ante; I have merely reconciled myself to the loss.

443. If the replacement jacket costs more than the original, one could argue that I have sustained a zero-sum-plus loss, i.e., I have lost more than the value of the original jacket. It seems to me the correct conclusion is that I sustained a zero-sum loss consisting of the price I paid for the original jacket, which I no longer have. Since I have the replacement jacket, I do not see how either this jacket or its cost can be considered a loss.

444. Fraud and extortion are property loss crimes because money is property; when the harm inflicted is a loss of money, the analysis is even simpler because money is a consummately fungible commodity. The harm to someone who loses money to a fraudster or an extortionist is not the loss of particular currency; it is the loss of a particular sum, which will be remediated only if the police seize the funds from the perpetrator. In property destruction crimes like arson, the analysis is functionally analogous to the harm-loss analysis in the text above. If an arsonist destroys a commercial building on my property, I cannot recover the building; I can replace it by constructing another, but that will probably cost me at least as much as the old building was worth. Here, too, I sustain a zero-sum loss. When the property loss is less than total—as with most vandalism—I lose the quantum of value that has been depreciated by the damage. I can either accept that loss or remediate it and thereby sustain the consequential loss consisting of the expenditure of the funds needed to do so.

445. Finite definition, Dictionary.com, <http://dictionary.reference.com/browse/finite> (last visited Oct. 8, 2008). See also Concise Oxford English Dictionary 532 (10th ed. rev. 2002) (“finite defined as “limited in size or extent”).

That is not necessarily true in *Second Life* and other virtual environments. Since it is a construct, virtual property can be recreated in most, if not all, instances. If someone takes the virtual Mona Lisa I have in my *Second Life* flat,⁴⁴⁶ I can either recreate the painting (if I created it originally or acquired the script needed to create it)⁴⁴⁷ or have someone else do so. Neither is possible in the real world: whoever has the Mona Lisa has it; it cannot be recreated and cannot exist in two (or three or forty) places at once.

The infinite quality of virtual property impacts on the harm inflicted by virtual property crimes.⁴⁴⁸ In the hypothetical above, the victim, Avatar Y, lost a virtual jacket and was therefore harmed to some degree. The harm Avatar Y sustains is necessarily mitigated by the fact he has options that are not available to a correlate victim in the real world. If the jacket is unique, Avatar Y, like his real world counterpart, cannot simply replace it by buying another, but he may be able to reconstruct it himself (particularly if it was his own creation). If he can reconstruct the otherwise irreplaceable jacket, what harm has he suffered? Here, he loses the time and effort involved in reconstructing the jacket, but that harm is far less than the zero-sum harm his real world counterpart unavoidably sustains.⁴⁴⁹

What if he cannot reconstruct the jacket himself? What if a uniquely gifted *Second Life* designer, who sells her designs but not the scripts needed to replicate them, created it? Avatar Y's only option here is to pay her to reconstruct the jacket, assuming she is willing to do so. If she is willing to do so, the harm he sustains will be in one respect analogous to the harm a real world person would sustain in the same situation, i.e., he loses the price of the jacket. Are the harms equivalent in this scenario? I submit that they are not: as noted earlier, items in *Second Life* cost much less than in the real world (because they are virtual constructs and can therefore be produced inexpensively).⁴⁵⁰ Even in this alternative, Avatar Y suffers less harm

446. See, e.g., Xstreet SL Marketplace - DaVinci - Mona Lisa, <http://www.slexchange.com/modules.php?name=Marketplace&file=item&ItemID=664571> (last visited Oct. 8, 2008).

447. See Primitive - Second Life Wiki, <http://wiki.secondlife.com/wiki/Prim> (last visited Oct. 9, 2008); see, e.g., Guest, *supra* note 244, at 3-4, 13-16 (describing a Resident who created a replica of the Twin Towers in *Second Life*, which he repeatedly destroyed to reproduce the towers' collapse on 9/11; his avatar carried the script for recreating the Twin Towers in his pocket).

448. Infinite definition, Dictionary.com, <http://dictionary.reference.com/browse/infinite> (last visited Oct. 9, 2008) (defining infinite as "unbounded or unlimited").

449. And that harm may be minimal. See *infra* note 516.

450. See generally Creation Portal, Second Life Wiki, http://wiki.secondlife.com/wiki/Creation_Portal (last visited Oct. 9, 2008).

than his real world counterpart; he will have to pay to have the jacket recreated, but the price will be a tenth, perhaps even a hundredth, of what a real world victim would pay to replace a comparable item (assuming that is possible). Inevitably, then, Avatar Y sustains harm, but on a significantly reduced level from the harm that theft, fraud, or arson inflicts in the real world.

There is another, more amorphous factor that also mitigates the harm that results from property loss or damage in virtual environments like *Second Life*. In the above analysis of the harm resulting from Avatar Y's hypothetical loss of his virtual jacket, we implicitly assumed an operational equivalence between Avatar Y's losing his virtual jacket and me losing my real world jacket. In other words, we assumed equivalence in the utilitarian value of the two jackets. But they are not actually equal. If our hypothetical jackets are the kind I wear to keep warm in the fall and winter, then mine has a value for me that the virtual jacket cannot have for Avatar Y. Avatars do not need clothing to protect themselves from the elements. Instead, they just wear clothes to be fashionable and to avoid nudity. Both jackets therefore have value as clothing (fashion and covering), but Avatar Y's jacket lacks the utility value my jacket also possesses. That means Avatar Y sustains a lesser degree of harm (no lost utility value) when his jacket is stolen; unlike me, Avatar Y does not really *need* his jacket. It is essentially an affectation.

While the differential utility value of the real and virtual jackets may seem a trivial matter, the import of that differential becomes more significant as we move from clothing to other types of property, such as computers or cars or buildings or appliances. If someone steals my car in the real world, I have sustained a utilitarian loss as well as a financial loss; without my car, I no longer have my own means of transport. In *Second Life*, avatars can fly and transport from place to place, so cars are, again, essentially an affectation—a toy. The same is true to a great extent for other types of personal property: Residents can buy appliances, furniture (couches, beds, lamps, tables, etc.), and computers for their avatars; they can also buy or build homes (apartments, condos, houses). None of those items are essential. Avatars do not feel fatigue or gravity and they do not sleep, so they really do not need furniture; providing furniture is, again, essentially an affectation on the part of the human Resident. The same is true for other *Second Life* property except, perhaps, for property a Resident uses to earn income in the virtual world. That property would have a utilitarian value, and while the value might not be equivalent to that of analogous property in the real world, it would

differentiate this type of virtual property from virtual property as pure affectation.

Generally, then, property crimes like theft, fraud, arson, and vandalism inflict harm in *Second Life* that is analogous to, but less serious than, the harm such crimes inflict when they are committed entirely in the real world. That means we *could* extrapolate the principles of criminal liability to encompass the conduct that inflicts these virtual “harms.” The real issue is whether we *should* do so. We will return to this issue in Section IV(B)(3). Before we can analyze the propriety of importing criminal liability into virtual worlds, however, we need to consider the infliction of personal harm online.

ii. Personal Harm

I will use three crimes—rape, murder, and pedophilia—to analyze the extent to which activity in *Second Life* inflicts harm analogous to the harm people inflict on each other in the physical world. I chose these crimes for two reasons: (1) each has occurred in *Second Life*, so we know they are not mere possibilities; and (2) they exemplify serious harms that individuals inflict on each other.⁴⁵¹

aa. Virtual Rape

Rape is far from new in virtual worlds. In 1993, Julian Dibbell reported a virtual rape that occurred in Lambda MOO, the MUD described earlier.⁴⁵² It happened on a Monday night in a Lambda MOO living room so “packed with chitchatters” that it was “synonymous . . . with a party.”⁴⁵³ A player using the avatar of Mr.

451. Rape exemplifies its own harm and serves as an example of sexually-oriented activities some regard as morally and/or legally problematic. *Second Life*, for example, has a thriving and very visible BDSM (Bondage & Discipline, Dominance & Submission, Sadomasochism) community. See, e.g., *Second Life* BDSM Role Play Sims, http://www.virtual-bdsm.com/bdsm_roleplay.html (last visited Oct. 9, 2008). And it has slavery, which is often sexually oriented. See *Slave Nia's Second Life*, <http://niapreez.blogspot.com/> (last visited Oct. 9, 2008); *High Voltage Metal Shop -Chained Beauty Slave Auctions*, <http://www.hvmetalshop.com/hvmetalshop/phpBB3/viewtopic.php?f=17&p=13> (last visited Oct. 9, 2008). Murder exemplifies the ultimate personal harm, and, in so doing, serves as an example of battery and other assault harms, though we will touch on an extreme form of BDSM later in this section. See, e.g., Wendell Homer, *Art of Darkness - Capture Roleplay*, *THE SECOND LIFE HERALD*, Oct. 9, 2007, <http://foo.secondlifeherald.com/slh/2007/10/art-of-darkness.html> (describing one avatar brutally beating another).

452. See *supra* discussion § III(A).

453. Julian Dibbell, *A Rape in Cyberspace*, *THE VILLAGE VOICE*, Dec. 23, 1993, available at http://www.juliandibbell.com/texts/bungle_vv.html.

Bungle—a “fat, oleaginous” clown—entered the room and used a subprogram to force avatars to perform sadistic or humiliating sexual acts on each other.⁴⁵⁴ The “virtual rape” outraged the victims and those who saw or heard about the attacks.⁴⁵⁵ There was, as Dibbell notes, no physical rape. “[T]o the extent that Mr. Bungle’s assault happened in real life at all, it happened as a sort of Punch-and-Judy show, in which the puppets and the scenery were made of nothing more substantial than digital code and . . . creative writing.”⁴⁵⁶ But while the attacks were evanescent, their effects were not; the victims were traumatized to varying degrees.⁴⁵⁷ The Lambda MOO community debated what should be done with Mr. Bungle.⁴⁵⁸ Some wanted him barred from the virtual world, but others felt that such a punishment was too harsh. After listening to the discussions, a “wizard”—one of the programmers who operated the world—terminated Mr. Bungle’s existence in Lambda MOO.⁴⁵⁹

The Lambda MOO virtual rape anticipated issues that are beginning to arise in evolved virtual worlds like *Second Life*. In the Lambda MOO case, the community chose to resolve the matter internally instead of going to law enforcement.⁴⁶⁰ In 2007, Belgian police announced they were going to “patrol in *Second Life*” after a Belgian citizen had reportedly been raped there.⁴⁶¹ That story gave rise to online speculation as to whether rape was possible in *Second Life*.⁴⁶² As noted above, avatars can engage in sexual activity, and in a post responding to this speculation, one person described being raped in *Second Life*.⁴⁶³ She, though, was not traumatized by the event, noting that while it “was non-consensual,” it “was between the equivalent of dolls.”⁴⁶⁴

454. See *id.* In real life, Mr. Bungle was a university student, as were most of the participants in Lambda MOO. *Id.*

455. *Id.*

456. *Id.*

457. *Id.*

458. *Id.*

459. *Id.*

460. See *id.* See also A Rape in Cyberspace - Wikipedia, http://en.wikipedia.org/wiki/A_Rape_in_Cyberspace (last visited Oct. 9, 2008).

461. See Posting of Aimee Weber to Second life Insider Blog, <http://www.secondlifeinsider.com/2007/04/21/belgian-police-patrols-second-life-to-prevent-rape/> (Apr. 21, 2007, 14:05 EST).

462. See, e.g., Posting of Darius Sartre to VTOR, <http://www.vtoreality.com/2007/how-exactly-does-virtual-rape-even-occur-in-second-life/909/> (May 4, 2007).

463. See *id.* at Response no. 4 (May 6, 2007, 3:45 EST).

464. See *id.*

Her reaction may not be typical. As a self-described *Second Life* “newbie,” she may not have had the emotional investment in her avatar that more experienced Residents often develop. The Belgian police’s reaction to a reported virtual rape suggests some Residents do find such an experience traumatic.⁴⁶⁵ For the purposes of analysis, we will assume virtual rape has the capacity to inflict emotional trauma equivalent to that experienced by the Lambda MOO victims. We will assume, in other words, that it harms the victim. The question is whether that harm is sufficiently analogous to the harm a real world rape victim suffers to warrant the imposition of criminal liability for virtual rape.⁴⁶⁶

One factor differentiating virtual and real rape is physical injury; although virtual rape can inflict emotional trauma, it cannot cause physical harm.⁴⁶⁷ Avatars in *Second Life* and other virtual worlds are vastly evolved iterations of Lambda MOO’s text-based digital constructs, but they still lack flesh that can be injured.⁴⁶⁸ That alone is not dispositive of whether virtual rape could be prosecuted under real world criminal law. Injury is not a required element of rape;⁴⁶⁹ the gravamen of the crime is non-consensual sexual intercourse.⁴⁷⁰ 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.⁴⁷¹

For the purpose of analysis, I will assume virtual rape constitutes rape under existing criminal statutes. That is, I assume an encounter like the one the *Second Life* newbie described—an avatar purposefully having sex with another without her consent—satisfies the definition of rape insofar as its mens rea and actus reus

465. See Regina Lynn, *Virtual Rape Is Traumatic, But Is It A Crime?*, WIRED, May 4, 2007, http://www.wired.com/culture/lifestyle/commentary/sexdrive/2007/05/sexdrive_0504 (last visited Oct. 9, 2008) (noting the emotional trauma virtual rape can inflict on those immersed in their virtual lives).

466. If not, then virtual rape would presumably be dealt with in-world, as with Lambda MOO. It could probably be sanctioned, for example, under *Second Life*’s community standards and/or terms of service. See *supra* notes 261-265 and accompanying text.

467. See Sartre *supra* note 462, at Response no. 4 (May 6, 2007, 3:45 EST).

468. See *supra* discussion § III(B)(1).

469. See, e.g., *Meadows v. Commonwealth*, 178 S.W.3d 527, 532 (Ky. Ct. App. 2005).

470. See, e.g., MODEL PENAL CODE § 213.1 (2001).

471. Some might argue that an assault consummated via bytes and pixels does not qualify as sexual intercourse under the definitions used in rape statutes. The definitions assume physical sexual intercourse between two human beings, not avatar-on-avatar encounters. See, e.g., LA. REV. STAT. ANN. § 14:41 (2007). Since this argument really goes to the type and magnitude of the harm inflicted in virtual rapes, it is subsumed by the analysis presented later in the text. See *infra* discussion § IV(B)(1).

are concerned. But does such an encounter inflict harm commensurate with that inflicted by real world rape? While physical injury is not the sole gravamen of rape, those who study the offense believe it is not irrelevant either; the consensus seems to be that the harm in rape encompasses “physical and emotional injury.”⁴⁷² According to one author, if crimes “against the person were ordered from least to most severe, emotional injury might be first, producing the least severe harm; followed by physical injury; then rape, causing even more injury than a general physical assault; then murder, obviously causing the most severe harm.”⁴⁷³

Under that ordering of harms,⁴⁷⁴ virtual rape would fall into the first, “least severe harm” category. It cannot inflict physical injury, but can inflict emotional harm.⁴⁷⁵ It might, therefore, be appropriate to approach virtual rape as a variation of harassment or stalking. As we saw in Section II(B)(2), harassment and stalking statutes target affective harm; they also require that the perpetrator have engaged in a course of conduct that is inferentially and objectively likely to cause emotional injury.

Harassment and stalking statutes represent a compromise between criminal law’s historic insistence on tangible harm and the emergent realities of the twenty-first century; law has not, and cannot, criminalize the mere infliction of emotional harm. Doing so would in effect implement “thought crime in reverse”; instead of being prosecuted for my own thoughts, I could be prosecuted for yours, i.e., for your perhaps distorted perception of my words or actions.

We cannot take that path for many reasons. Like the criminalization of thoughts, it would invite abuse and would not be an

472. Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS L. REV. 637, 655 (2006); see also *Coker v. Georgia*, 433 U.S. 584, 611-12 (1977) (Burger, C.J., dissenting).

473. Deborah M. Golden, *It’s Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN’S L.J. 37, 60 (2004).

474. I accept this hierarchy of harms for the purposes of analysis. One could, for example, reasonably object to the assumption that rape necessarily inflicts more severe harm than other crimes involving physical injury.

475. See Lynn, *supra* note 465 (noting that the effects of virtual rape can be emotionally “devastating”); see also Posting of Benjamin Duranske on Reader Roundtable, Response 12 of Robbie, <http://virtuallyblind.com/2007/04/24/open-roundtable-allegations-of-virtual-rape-bring-belgian-police-to-second-life/> (Apr. 24, 2007):

Embodied consciousness is where a human . . . becomes so naturalised in an environment—whether it is . . . operating an online character . . . or any other technological interaction . . . —that . . . the technology acts as a mental extention [sic] of their body. . . . [A] person can become incredibly involved with their online equivalents, to the point where they suffer real emotional damage from an unfair exploitation of their character.

effective deterrent.⁴⁷⁶ An even more important objection to this approach is that it is fundamentally inconsistent with the purposes of the criminal law; as I noted earlier, criminal law is meant to control the infliction of harms the net effect of which is to erode social order. While we suffer varying degrees of harm from affective injuries, they do not rise to the level of harms that can erode a society's ability to maintain social order, at least not in the real world. Harassment and stalking statutes use the requirements of repeated conduct and objectively definable affective harm to strike a balance between our evolving ability to inflict soft harm and the criminal law's need to focus on tangible harms.

Could we adapt either offense so it encompasses virtual rape? We would presumably have to discard the "course of conduct" requirement, since a modified version of harassment or stalking targeting virtual rape would need to encompass a single, isolated attack (as in the real world). To ensure that the modified offense did not encompass purely idiosyncratic, subjective harm, we would need a definition of offense conduct that sufficiently encompassed objective harm to limit its applicability to truly egregious situations—those that clearly inflicted the harm with which we are concerned. One option would be to incorporate the conduct that constitutes virtual rape into the definition of criminal harassment; the expanded offense would target virtual rape as a means of inflicting affective harm (rather than as a sex crime).⁴⁷⁷

While this may seem an eminently satisfactory approach, there is a complicating factor. We have assumed that virtual rape, like its real world counterpart, involves non-consensual sexual intercourse. And that is true of *some*, but not all, virtual rape. In the unreal worlds of cyberspace, rape can be non-consensual or consensual. Consensual rape, an oxymoron in the real world, is an accepted

476. See *supra* note 466 and accompanying text. It would also be empirically unmanageable, since every slight, every insult, every harsh word could support prosecution.

477. See *supra* note 88 and accompanying text. Since harassment—criminal and otherwise—often has a sexual component, it seems to be the appropriate predicate for our modified offense. See, e.g., Posting of Hiro Pendragon on Second Tense, <http://secondtense.blogspot.com/2007/05/virtual-rape-seriously-seriously.html> (May 7, 2007). Stalking can have a sexual component, but is also often prompted by other motives. See, e.g., Paul E. Mullen et al., *A Study of Stalkers*, 156 AM. J. PSYCHIATRY 1244, 1244-49 (1999). Using harassment is also consistent with *Second Life's* community standards, which include sexual advances in the category of harassment. See *supra* note 265 and accompanying text.

practice in virtual worlds.⁴⁷⁸ The *Second Life Herald*, for example, described how Woodhen, a Resident, “allowed herself to be savagely raped by an animal, his claws rending her clothes and skin as she wept and pleaded. The ordeal lasted four hours.”⁴⁷⁹ Note that she “allowed” herself to be raped. In the story about the incident, Woodhen said she and her attacker typed “descriptions of the rape at each other It was my first time going that dark, going that hard, so trying to keep up the level of detail with someone . . . is a huge blast. It was a lot like writing a horror novel.”⁴⁸⁰

The existence of consensual virtual rape complicates the analysis in several respects. For one thing, it means that we could not simply use the conduct constituting virtual rape as the definition of offense conduct in a free-standing virtual rape provision or, as suggested above, in a criminal harassment statute. In the real world, rape and consent are antonyms, and consent is a defense to a charge of rape.⁴⁸¹ In real world rape cases, consent is actually a failure-of-proof defense; it means that no crime occurred.⁴⁸² Should we apply the same rule in the virtual world, or is there some reason to treat consensual virtual rape as inflicting a harm that criminal law should address?

That brings me to the central issue in the phenomenon I am calling “fantasy crime”: how should the law deal with conduct in virtual worlds that replicates serious criminal activity in the real world? Consensual rape is a singular, flawed example of such activity; it is not a particularly good example of this phenomenon because we recognize consent as nullifying the harm in what appears to be rape in the real world. Consent nullifies the harm because lack of consent is a defining characteristic of the crime of rape; it differentiates perfectly legitimate conduct from criminal conduct. Sexual intercourse between

478. See, e.g., Posting of Shataina to GameGreene, <http://www.gamegreene.com/node/447> (Feb. 22, 2005, 6:33 EST) (discussing consensual rape in MMORPGs); see also Chris Mohney, *Second Life: Rape for Sale*, GAWKER, Dec. 15, 2006, <http://gawker.com/news/second-life/second-life-rape-for-sale-222099.php>; Many Ways to Rape, Living in the Metaverse, <http://metaverse.acidzen.org/2007/many-ways-to-rape> (last visited Oct. 9, 2008).

479. Holmer, *supra* note 451. As we saw in § III(B)(1), the Residents of *Second Life* can select avatars that have human, animal, or even non-biological form. Sex between human-style avatars and animal avatars is not uncommon. *Supra* discussion § III(B)(1).

480. Holmer, *supra* note 451. When this incident occurred, Residents communicated by text. By 2007, they could communicate orally. See Posting of Stephany Linden to the Official Second Life Blog, <http://blog.secondlife.com/2007/08/02/the-second-life-voice-viewer-is-live/> (Aug. 2, 2007, 3:19 PM).

481. See, e.g., *State v. Camara*, 781 P.2d 483, 486 (Wash. 1989).

482. See, e.g., Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 208, 208 n.24 (1982).

adults is not a crime; forced sexual intercourse is. In this regard, rape is unique; we do not recognize consent as a defense to other personal injury crimes, like murder or pedophilia, because neither encompasses otherwise legitimate activity.

I will examine virtual murder and pedophilia in the next section. First, we need to decide if consensual virtual rape inflicts a harm justifying the application of any level of criminal liability. Since this is consensual activity involving adults—a type of “dark” role playing—it does not harm the ostensible victim. As we saw above, the Resident whose avatar plays the victim in the encounter suffers no physical injury, and since the activity is consensual, she should not suffer the emotional trauma we analyzed earlier. If she subsequently experiences some emotional trauma as a result of the episode, this is not a matter cognizable by the criminal law; the putative victim’s consent nullifies the harm here.

According to some, that does not end the harm analysis of virtual rape. They argue that virtual rape inflicts what is in essence a systemic harm, but one that is very different from the systemic harms that I examined in Section II(B)(3). Those who take this view claim that “playing” rape online desensitizes people to the harm of rape in the real world and can “create people who are inured to the idea.”⁴⁸³ Some say it “creates a mindset where that behavior is acceptable and can then bleed into” real life.⁴⁸⁴ Others disagree; they say acting out virtual rape can prevent real rape “by giving the person a ‘safe’ outlet,” i.e., a way to sublimate their desires.⁴⁸⁵ There does not seem to be any reliable research that supports either view.⁴⁸⁶

On its face, the argument that virtual rape inflicts a systemic harm of the type described above seems to be nothing more than an iteration of the generally discredited claim that movies, television or publications “incited” people to commit violent acts.⁴⁸⁷ Such claims are usually raised in civil cases brought by the relatives of those who fell victim to such acts; courts have consistently dismissed these

483. Holmer *supra* note 451, at Response of Artemis Fate (Oct. 4, 2007, 12:27 EST).

484. Many Ways to Rape, *supra* note 478.

485. *Id.*

486. *See id.* (quoting Avalon Birke, Director of the Counseling Center in *Second Life*).

487. *See generally* Stephen F. Rohde, *Killer Defense: The Current Litigation Over Copycat Crimes Arising Out of the Movie Natural Born Killers Represents a Threat to the Historical Protections of the First Amendment*, 23 APR L.A. LAW. 29 (2000); L. Lin Wood & Corey Fleming Hirokawa, *Shot by the Messenger: Rethinking Media Liability for Violence Induced by Extremely Violent Publications and Broadcasts*, 27 N. KY. L. REV. 47, 51-55 (2000).

claims on First Amendment grounds, since speech is protected even if it has “a tendency to lead to violence.”⁴⁸⁸

The outcome in these cases may or may not be dispositive of the dispute noted above, i.e., whether virtual rape in *Second Life* inflicts a generalized social harm that requires the use of criminal liability to discourage it. I am assuming the First Amendment applies in *Second Life* because it is, insofar as a virtual world can be “located” in a physical place, in the United States; Linden Lab’s offices are in California and its Terms of Service specify California as the exclusive forum for resolving disputes.⁴⁸⁹ If we assume that Linden Lab and, by extension, *Second Life* are “in” the United States, the First Amendment should apply in *Second Life*; as others have noted, this conclusion should hold even if we construe *Second Life* as a private place analogous to a real world company town.⁴⁹⁰ If we decide the First Amendment applies in *Second Life*, we will then have to decide what it encompasses, i.e., what constitutes speech and what does not.

Those who believe virtual rape should be criminalized because it inflicts a generalized systemic harm of the type noted above could distinguish it from the incitement claims brought in the cases cited above on the grounds that virtual rape is criminal conduct, not speech, and is therefore outside the protections of the First Amendment.⁴⁹¹ There is at least some merit to this argument.

The incitement cases referenced above involved written or visual material that was created by an artist and viewed by someone who committed violent crimes; in holding that the First Amendment barred the claims brought in these cases, courts have found that the “benefits society reaps from the free flow and exchange of ideas outweigh the costs society endures by receiving reprehensible or

488. *Hess v. Indiana*, 414 U.S. 105, 109 (1973); *see, e.g., Byers v. Edmondson*, 826 So. 2d 551, 556-57 (La. Ct. App. 2002); *see generally Zamora v. State*, 361 So. 2d 776 (Fla. Dist. Ct. App. 1978).

489. *See Second Life - Terms of Service*, <http://secondlife.com/corporate/tos.php> (last visited Oct. 9, 2008).

490. *See Peter S. Jenkins, The Virtual World as a Company Town: Freedom of Speech in Massively Multiple On-Line Role Playing Games*, 8 J. INTERNET L. 1-5 (2004).

491. Conduct can constitute speech protected by the First Amendment. *See, e.g., Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 571-74 (1995). But the First Amendment does not protect criminal conduct, even when it involves speech. *See, e.g., Hill v. City of Houston*, 789 F.2d 1103, 1121 (5th Cir. 1986); *see also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978). So, if virtual rape is mere conduct, i.e., non-expressive activity, it is outside the First Amendment. It is also outside the First Amendment if it incorporates expressive activity or other speech into conduct involved in committing a crime. *See U.S. DEPARTMENT OF JUST., REPORT ON THE AVAILABILITY OF BOMBMAKING INFORMATION* (1997), *available at* www.usdoj.gov/criminal/cybercrime/bombmakinginfo.html.

dangerous ideas.”⁴⁹² They have also held that speech does not incite violence merely because it portrays violence.⁴⁹³ Whether this rationale encompasses virtual rape in *Second Life* and other virtual worlds depends on how we resolve two issues. One is the issue noted above: whether virtual rape is (1) speech protected by the First Amendment, or (2) criminal conduct not protected by the First Amendment.

Opponents of criminalizing virtual rape could argue that virtual rape is speech—that it is in effect a performance, not criminal conduct. It is true, as we saw earlier, that consensual virtual rape is an exercise in role playing that involves two or more Residents. It seems to me that to sustain this argument, its proponents would also have to demonstrate that the “performance” had some expressive utility, i.e., it conveyed some ideas or artistic content.⁴⁹⁴ Perhaps they could do this by extrapolating from the premise noted above, i.e., that virtual rape helps the virtual rapist sublimate urges he or she might otherwise act upon in the real world; they might argue that consensual virtual rape performances demonstrate the harm of rape and thereby promote our understanding of why rape is wrong.⁴⁹⁵ Those who take the opposite position on consensual virtual rape could counter by arguing that even if virtual rape constitutes speech, it loses its First Amendment protection because it is likely to incite violent conduct in the real world.⁴⁹⁶

Opponents of criminalizing virtual rape could also argue that the First Amendment cannot protect consensual virtual rape because it is criminal conduct, not speech.⁴⁹⁷ That brings us to the other issue: we are assuming the First Amendment applies “in” *Second Life*, but we have not considered the scope of the protection it provides. Should we deem everything in *Second Life* to be speech protected by the First Amendment? That would be consistent with the view that activity in *Second Life* is fantasy, a form of play-acting. The other alternative is to parse activity in *Second Life* into “conduct” and “speech” elements. This would have the virtue of replicating the dichotomy we maintain in the real world between conduct and speech. But if we take this approach, how do we decide what is “conduct” and what is “speech”?

Some say everything that occurs in *Second Life* is speech because the processes of creating and interacting in virtual worlds

492. *Byers*, 826 So.2d at 557.

493. *See id.*

494. *See supra* note 491.

495. *Cf. Byers*, 826 So.2d at 557.

496. *See id.* at 555-56.

497. *See supra* note 491.

consist exclusively of communication.⁴⁹⁸ They correctly point out that virtual worlds have no pre-existing, tangible existence; everything in a world like *Second Life* is fabricated by humans, who construct and sustain the world by communicating with each other (by text or voice) and with systems they use to create digital artifices that pass as houses, cars, clothes, etc.⁴⁹⁹ In a sense, those who take this view are arguing that everything we do in *Second Life*—such as dancing, shopping, and taking drugs—is a presentation, a collaborative, improvisational movie. Others argue that while virtual reality is inherently representational, we can still extrapolate the speech/conduct dichotomy we apply in the real world to virtual worlds like *Second Life*.⁵⁰⁰

If we adopt the first approach, then the First Amendment would protect everything that occurred in *Second Life* unless an exception deprived an activity of the protection.⁵⁰¹ Virtual rape would presumptively be protected unless it was shown, on a case-by-case basis, that a particular rape constituted criminal conduct instead of speech. In that scenario, there seems to be no reason to outlaw consensual virtual rape; the purpose of criminal law is to establish clear definitional boundaries between conduct that is accepted and conduct that is not. We could, no doubt, develop a consensual virtual rape prohibition that encompassed the requirement that the proscribed activity constitutes conduct instead of speech, but such an exercise seems pointless because it would not accomplish its purpose. Those who advocate outlawing consensual virtual rape do so because they believe it can incite violence in the real world; they oppose it as a class of activity. A statute that accommodates the default First

498. See, e.g., “Diavlog” of Robert Wright and Jack Balkin to Bloggingheads.tv Forum, <http://bloggingheads.tv/diavlogs/388?in=34:09&out=00:39:27> (Oct. 11, 2007) (video of Balkin’s argument).

499. See *id.*

500. See, e.g., Posting of Consciouscat to Bloggingheads.tv, <http://forums.bloggingheads.tv/phorum/read.php?1,15963,15967#msg-15967> (Oct. 11, 2007, 12:59 EST).

One way to see this is to consider a *Matrix*-like scenario which includes distinct, real consciousnesses that are hooked up to each other via computer (which creates . . . a common virtual world). In such a world, if I hit some guy Phil, my intention to do so results ultimately in a representation reaching Phil’s brain (from the central computer, say)—which in turn creates for Phil visual experiences of ‘my hand’ moving, sensations of pain, etc.

The fact that all I’ve really done . . . is initiate a flow of information from my brain (via computer) to Phil’s brain . . . doesn’t mean that in such a *Matrix* world there can be no speech/non-speech distinction. There can be . . . after all, there’s still a principled distinction between hitting Phil and calling him a jerk. It’s just that the distinction ultimately has to be cashed out in representational terms.

501. See *supra* note 491; see also *Byers*, 826 So.2d at 555-56.

Amendment protection accorded to consensual virtual rape in this scenario would target a narrow subset of consensual virtual rape and therefore fail as a conclusive denunciation of the behavior and as an effective deterrent.

What about the other approach? Can we distinguish speech and conduct in worlds like *Second Life*? I think we can. I think the “everything in virtual worlds is speech” theory is too literal and therefore overbroad. It seems to me that the distinction between speech and conduct implicitly recognizes two things. One is that speech is more likely to convey expressive content that can benefit society; the other is that conduct is more likely to inflict harm that can erode a society’s ability to maintain the order it needs to survive and prosper. The distinction is far from perfect; words can inflict harm, and conduct can convey expressive content.⁵⁰² But the harms words inflict are inferior to those that result from conduct; and while some conduct is expressive, most is not. As far as criminal law is concerned, the categories represent a rough benchmark of potential for harm. If we look at them that way, we can implement the distinction in worlds like *Second Life*. To do so, we simply operate on the basis of analogy. As someone noted, there is a “distinction between hitting Phil and calling him a jerk,” and it applies whether the act or the words occur in real life or in *Second Life*.⁵⁰³ Virtual rape may be consummated by using voice or text communications instead of flesh, but it still constitutes conduct; the participants experience it as conduct and the observers, if any, perceive it as conduct. This was implicit in our analysis of virtual theft; if Avatar Y steals Avatar X’s jacket, we have the representational analogue of the real world conduct constituting theft.

If we can differentiate speech and conduct in *Second Life*, the First Amendment will not *presumptively* protect consensual virtual rape. It may, as I noted earlier, protect particular instances of consensual virtual rape as expressive performance, but that possibility would not effectively nullify an effort to criminalize virtual rape, as in the approach analyzed above. The First Amendment would simply become a potential defense to be raised by those charged with consensual virtual rape.

It seems, then, that we *could* criminalize consensual virtual rape. The more difficult, and still unresolved, question is whether we *should* do so. As I noted earlier, virtual rape is a flawed example of conduct that apparently replicates real world criminal activity in a

502. See *supra* § II(B)(2).

503. See Conciouscat, *supra* note 500.

virtual environment because consent is a defense to a charge of rape. That means there is no harm to the putative victim in consensual rape, which is the most common type of rape in *Second Life*. There is harm to the victim in nonconsensual virtual rape but, as we have seen, it could be addressed (1) in-world by community standards that sanction players for sexual harassment, or (2) by incorporating virtual rape into existing harassment laws. There therefore seems to be no need to criminalize virtual rape as rape, i.e., as conduct that inflicts harm on an individual victim.

The only harm that could support criminalizing virtual rape—especially consensual virtual rape—is the systemic harm that I analyzed above. Instead of assessing whether that harm justifies the use of criminal liability in this context, I am going to address that issue in the next section, because the notion of generalized harm can also be used to argue for applying criminal liability to virtual murder and pedophilia. Since consent is not a defense to either crime, they should serve as a more useful analytical metric for the harm analysis.

bb. Virtual Murder and Pedophilia

In real life, consent is usually not involved in the commission of murder or pedophilia, and is not a defense when it is; in *Second Life*, however, consent is inevitably involved in the commission of both. As noted above, *Second Life* avatars are virtually indestructible, which means they can be killed only if they consent.⁵⁰⁴ This can occur in either of two ways. An avatar can kill another without the target avatar's immediate consent in combat-enabled areas like Jessie; avatars assume the risk of (i.e., consent to) being killed by entering one of these areas.⁵⁰⁵ Killing avatars in a combat-enabled area is not murder; it is the product of military-style combat.⁵⁰⁶

For an avatar to be murdered in a non-combat-enabled area of *Second Life*, he must consent to being killed. I cannot find any reported cases of mundane avatar murder in *Second Life*; by mundane murder, I mean the kind of killings that routinely occur in real life, those prompted by passion (e.g., spouse-on-spouse murder), profit (e.g., robberies) or revenge (e.g., an ex-employee goes postal). So far, murder in *Second Life* is far from mundane. I have found reports of avatar mannequins (constructs not belonging to a Resident) being

504. See *supra* notes 248-255 and accompanying text.

505. See *id.*

506. See, e.g., *Everyone Gangs up on the Alliance Navy*, THE SECOND LIFE HERALD, Apr. 15, 2007, http://foo.secondlifeherald.com/slh/2007/04/everyone_gangs_.html.

murdered. Perhaps the most notorious instance involved the fabricated avatar of a “hermaphrodite hooker” that was placed on a bed in a carefully constructed crime scene, complete with blood splatter on the walls, as an amusement at a party; the scene included pose balls that let guests “strangle the dead hooker” and “have sex with it.”⁵⁰⁷ They apparently did both.⁵⁰⁸

It is not uncommon for “real” avatars to allow themselves to be killed, as in “Dolcett play.” Dolcett play derives from the work of a cartoonist who specializes in graphic depictions of “the hanging, decapitation, butchering, live skewing, roasting, and eating of women.”⁵⁰⁹ And that is what happens in Dolcett play; an avatar, apparently always a female avatar (which may or may not belong to a woman),⁵¹⁰ submits to being killed in any of the above ways, after which her body is butchered, cooked, and eaten.⁵¹¹ But murder is not exclusively a function of Dolcett play; I have, for example, found graphic descriptions of the torture-murder of two female avatars.⁵¹²

Murder in *Second Life* is, of course, not murder; avatars come back to life.⁵¹³ Since virtual murder, whether it is part of Dolcett play or an independent activity, does not result in a loss of life and is necessarily consensual, it seems that here, as with consensual virtual

507. Neal Stewart, *The W-Hat Birthday: Cake, Ice Cream and Murdered-Hooker Bloodbath*, THE SECOND LIFE HERALD, Apr. 29, 2005, http://foo.seconddlifheerald.com/slh/2005/04/the_what_birthd.html; see *supra* note 478 and accompanying text (mentioning pose balls).

508. Stewart, *supra* note 507; see *supra* note 477 and accompanying text (pose balls).

509. *Dolcett Play: Broadly Offensive? Naw, It's What's for Dinner*, THE SECOND LIFE HERALD, June 10, 2007, http://www.seconddlifheerald.com/slh/2007/06/dolcett_play_br.html.

510. See *supra* note 418.

511. See, e.g., Wendell Holmer, *Greta Ghia Is a Roaster*, THE SECOND LIFE HERALD, Mar. 4, 2008, <http://foo.seconddlifheerald.com/slh/2008/03/greta-ghia-is-a.html> (last visited Oct. 9, 2008) [hereinafter Holmer, *Greta Ghia Is a Roaster*]. For the process of butchering someone killed in Dolcett play, see, e.g., My Little Dolcett Girl, *Memoirs of a Second Life Slut*, <http://seconddlifslut.wordpress.com/2007/08/02/my-little-dolcett-girl/> (Aug. 2, 2007, 19:49 EST).

512. See *Losing One's Head*, *Memoirs of a Second Life Slut*, <http://seconddlifslut.wordpress.com/2007/08/02/losing-ones-head/> (Aug. 2, 2007, 19:38 EST):

I arrived in a very dark . . . place . . . part rape house, part slaughter house. After knocking me around . . . he strung me up by my feet and slit my throat. . . . I was . . . gurgling on my own blood and I could see it pooling . . . on the floor. When he released me, he bound my hands and forced me to lean over a block of wood. I begged . . . him not to kill me. . . . I kept begging . . . as the ax swung down and . . . my avatar's head was gone, replaced with a bloody stump . . . spewing blood.

For a torture murder, see *My Little Dolcett Girl, Memoirs of a Second Life Slut*, *supra* note 511.

513. See *supra* notes 248-255 and accompanying text. And torture is not torture, at least not in the conventional sense, because avatars cannot feel pain. See *id.*

rape, there is no harm to the victim. But while consent is a defense to a charge of rape, it is not a defense to a charge of murder.⁵¹⁴ As we saw above, consent is a defense to rape because it nullifies the harm rape targets, i.e., nonconsensual sexual intercourse; if the putative victim consented to sexual intercourse, there was no harm and therefore no crime. That rationale does not apply to other crimes because the harm targeted by most crimes, including murder, is not nullified by the victim's consent. Criminal prosecutions are brought by the state, not by aggrieved parties; their purpose is, as noted earlier, to deter and thereby control conduct that inflicts harms that erode social order. Since crime is in effect an injury to the state, "private persons cannot license crime" and "the criminal cannot be excused by . . . consent."⁵¹⁵

But there is no real harm when an avatar is murdered. In the real world, victims cannot consent to having their lives taken, but in the virtual world murder is a charade. The victim returns to life, having endured no pain or physical suffering, and since the victim consented to his or her (or its) demise, the event presumably did not inflict emotional trauma. Here, again, we have no individual harm that could justify the use of criminal liability to discourage a virtual analogue of a real world crime.

We might, though, have an analog of the systemic harm we considered in our analysis of virtual rape.⁵¹⁶ The systemic harm here is the danger that those who murder and/or observe murders in *Second Life* will "carry out their fantasies" in real life.⁵¹⁷ In analyzing this harm, I will assume that we can differentiate conduct and speech in *Second Life* so that while the First Amendment can be raised as a defense in a particular virtual murder case, it does not bar the criminalization of virtual murder as such.⁵¹⁸ That brings us to the issue I reserved above: whether systemic harm such as this can, and should, justify the use of criminal liability.

The issue, as we saw above, is essentially incitement: whether we should use criminal liability to discourage the production of

514. See, e.g., *Sanders v. State*, 7 P.3d 891, 894-95 (Wyo. 2000); *Gentry v. State*, 625 N.E.2d 1268, 1273 (Ind. Ct. App. 1993).

515. 40 AM. JUR. 2D *Homicide* § 105 ("The right to life . . . is inalienable.").

516. See *supra* discussion § IV(B)(2)(b)(ii)(aa).

517. *Supra* Holmer, *Greta Ghia Is a Roaster* note 511, at Response by Sweet Jesus (Mar. 4, 2008).

518. See *supra* discussion § IV(B)(2)(b)(ii)(aa). If that assumption is invalid, and everything that occurs in *Second Life* is speech, then the First Amendment would protect virtual murder unless it falls into one of the exceptions that deprive speech of such protection. See *id.*

material that incites people to inflict harms proscribed by the criminal law. In analyzing virtual rape, I noted that courts usually dismiss incitement claims on First Amendment grounds.⁵¹⁹ Since I am assuming virtual murder is, for the most part, non-expressive conduct that is outside the scope of the First Amendment,⁵²⁰ my focus here will be on the essentially empirical issue of whether the possibility of the systemic harm described above could justify using criminal liability to proscribe virtual murder. Conceptually, the use of criminal liability would be based on the premise that committing virtual murder is a generalized, indirect way of aiding and abetting virtual murder or soliciting virtual murder.⁵²¹

I do not believe the possibility of such systemic harm can justify the use of criminal liability for this purpose, at least not at this point in our experience with virtual life. While studies have shown that playing violent video games—which are to some extent analogous to *Second Life*—increases aggressive behavior and thinking, none of the studies have shown a causal link between playing violent games and committing violent acts.⁵²² If there is no causal link between virtual-game violence and real violence, the systemic harm postulated above becomes a mere possibility and, as such, cannot warrant the criminalization of murder, rape, or other violence in *Second Life*. That proposition is valid if we accept that the results of research into the effects of game violence can be extrapolated to *Second Life*, which, as I noted earlier, is not a game.⁵²³

While I tend to assume the proposition is valid, I can see an argument to the effect that violence in *Second Life* is different from violence in the games these studies examined. The two are alike in that activity in both occurs in a digitally created, essentially

519. See *supra* discussion § IV(B)(2)(b)(ii)(aa).

520. See generally *supra* note 491 and accompanying text (arguing that virtual rape is non-expressive). The analysis developed above should apply here as well. See *supra* discussion § IV(B)(2)(b)(ii)(aa).

521. See, e.g., *State v. Pino*, No. WD-07-020, 2008 WL 2779225, at *5 (Ohio. Ct. App. 2008) (noting that inciting the commission of a crime constitutes aiding and abetting); *U.S. v. Hays*, 62 M.J. 158, 162 (C.A.A.F. 2005) (stating that inciting the commission of a crime constitutes solicitation). Liability would attach even though the commission of one virtual murder did not result in the commission of others. See MODEL PENAL CODE §§ 2.06(3)(a)(ii), 5.02. The conceptual premise could also be based on the international law offense of publicly inciting genocide. See, e.g., Jane E. Stromseth, *Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 268 n.34 (2007).

522. See, e.g., Roxanne Christ & Farnaz Alemi, *Clean Games*, 31 MAY L.A. LAW. 42, 44-46 (2008); Gregory Kenyota, Note, *Thinking of the Children: The Failure of Violent Video Game Laws*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 785, 802-03 (2008).

523. See *supra* note 224.

cartoonish world, which might reinforce participants' understanding that what goes on there is divorced from what goes on in real life; that could mitigate the effects of aggression that develops in either context. They are, however, not alike when it comes to the way their respective participants experience violence. As we saw in Section III(A), violence in video games (and MMORPGs) is highly scripted; it is an embedded, routine aspect of playing the game. Violence in *Second Life* is different; like violence in the real world, it is more personal and is often integrally associated with sexuality.⁵²⁴ In a sense, violence in *Second Life* is more adult than violence in video games, and that *might* distinguish it from the violence analyzed in the studies cited above. There *might* be more of a causal nexus between violence in *Second Life* and violence in the real world than there is for video games. But absent empirical research verifying that hypothesis, there is no basis for outlawing murder or other virtual violence in *Second Life* or other, similar worlds.

That brings me to our final crime: virtual pedophilia. Virtual pedophilia is a version of ageplay; in ageplay, "a physical adult takes on the role of a child."⁵²⁵ Ageplay can be perfectly innocuous; some use it as part of inner child therapy or merely to "express a childlike side."⁵²⁶ It can also be used for what is in effect virtual pedophilia: a Resident whose avatar is an adult has virtual sex with a Resident whose avatar is a child.⁵²⁷ In 2007, the *Second Life Herald* published an interview with "Emily Semaphore," a thirty-five year old who "works as a librarian" in the real world; in *Second Life*, she "roleplays as a thirteen year old girl" and manages "JailBait," a virtual club "dedicated to age-play."⁵²⁸ She said that half of ageplay is sexually oriented.⁵²⁹ Emily engages in sexual ageplay with her husband, who plays her "father."⁵³⁰ Incest seems to be a common ageplay scenario.⁵³¹ There are also escort services that provide child avatars for ageplay.⁵³²

524. See, e.g., My Little Dolcett Girl, *supra* note 511.

525. Ageplay - Wikipedia, <http://en.wikipedia.org/wiki/Ageplay> (last visited Oct. 9, 2008).

526. *Id.*; see also Posting of Tateru Nino to Second Life Insider, <http://www.secondlifeinsider.com/2007/03/04/thoughts-on-ageplay/> (Mar. 4, 2007, 2:01 EST).

527. As we saw in § III(B)(1), residents in *Second Life* are adults, so the only children are adults using a childlike avatar. See *supra* discussion § III(B)(1).

528. Urizenus Sklar, *Ageplay in Second Life: Interview with Jailbait Manager Emily Semaphore*, THE SECOND LIFE HERALD, Jan. 28, 2007, http://www.secondlifeherald.com/slh/2007/01/ageplay_in_seco.html.

529. See *id.*

530. *Id.*

Ageplay came to public notice in 2007, when a Sky News reporter visited Wonderland, an area of *Second Life* in which ageplay was common.⁵³³ According to the reporter, it was an area where “pedophiles cruise and kids are solicited.”⁵³⁴

‘At first site [*sic*] it looks like a real-life playground.

‘Here child-like avatars are not just playing on swings—they’re offering sex. These are virtual children of all ages—even toddlers.

‘After talking to one child I was offered a range of sordid and sick sexual acts.

‘My avatar had entered a virtual pedophile ring.’⁵³⁵

The report triggered outrage, much of which may have been due to a misunderstanding. As we saw earlier, there are no minors in *Second Life*; the “children” in Wonderland were adults. The Sky News reporter, and many who saw his reports, apparently assumed the avatars were “real” children and the adults with whom they had virtual sex were “real” pedophiles.⁵³⁶

So the activity was virtual, not real; and some believe it does not involve pedophiles or pedophilia. According to Emily Semaphore, most Residents involved in ageplay do not want to “play sexually with [real life] children.”⁵³⁷ She thinks people misunderstand ageplay:

Dateline NBC parades sexual predators out to convince people that everyone is out to prey on their children. So, people assume that anyone who ageplays in a sexual way, must be a pedophile. . . . Our culture fetishizes the sexuality of youth, but then seeks to punish us for responding to it. In [*Second Life*] one is able to . . . take on the appearance of a young person . . . and that is frightening to people who only

531. See Pixeleen Mistral, *Alliance Navy Landowner SL Incest/Ageplay?*, THE SECOND LIFE HERALD, June 7, 2008, <http://foo.secondlifeherald.com/slh/2008/06/alliance-navy-m.html>; Pixeleen Mistral, *Intersexed Avatar Children Hard to Find*, THE SECOND LIFE HERALD, Feb. 15, 2007, http://foo.secondlifeherald.com/slh/2007/02/intersexed_avat.html.

532. See Pixeleen Mistral, *AgePlay Sex Groups Grow 1% per Week*, THE SECOND LIFE HERALD, Mar. 9, 2007, http://www.secondlifeherald.com/slh/2007/03/ageplay_sex_gro.html [hereinafter Mistral, *AgePlay Sex Groups Grow 1% per Week*].

533. See, e.g., Posting of Tateru Nino to MASSIVELY, <http://www.massively.com/2008/03/03/sky-news-targets-sexual-ageplay-in-second-life-again/> (Mar. 3, 2008, 22:55 EST).

534. Duncan Riley, *Virtual Paedophilia Report Bad News for Second Life*, TechCrunch (October 30, 2007), <http://www.techcrunch.com/2007/10/30/virtual-pedophilia-report-bad-news-for-second-life/>.

535. *Id.*

536. See, e.g., *Pedophiles Lure Kids in Virtual Online World*, WORLDNETDAILY, Oct. 31, 2007, <http://www.worldnetdaily.com/index.php?fa=PAGE.view&pageId=44299>.

537. Sklar *supra* note 528.

see the childlike appearance and are convinced that something illegal . . . is happening.⁵³⁸

Was something illegal happening in Wonderland? Since both parties to the sexual encounters were adults, the encounters did not constitute child molestation under existing law.⁵³⁹ And since the Residents whose adult avatars participated in the encounters knew they were having virtual sex with an adult, not a child, they did not constitute attempted child molestation either.⁵⁴⁰

That leaves us with a version of the systemic harms examined earlier in this section and in the section above: the possibility that sex with a child avatar will encourage those involved to have sex with children in the real world or those who observe such activity to do so. These issues were widely debated after Sky News discovered Wonderland, and the dichotomy we examined in connection with virtual rape often came up in these discussions: some thought virtual pedophilia could encourage sex with real children, while others saw it as an “outlet” that could prevent them from doing so.⁵⁴¹ One expert said that ageplay is not likely to promote the molestation of real children, at least not when the Resident playing the adult does not persistently “play the role of someone sexually aggressing a child.”⁵⁴²

The Supreme Court addressed a version of this issue in 2002 when it decided *Ashcroft v. Free Speech Coalition*.⁵⁴³ In *Ashcroft*, the Department of Justice asked the Court to uphold a statute criminalizing the manufacture, distribution, and possession of virtual child pornography; one of its arguments was that “virtual child pornography whets the appetites of pedophiles and encourages them to engage in illegal conduct.”⁵⁴⁴ The Court held that the statute violated the First Amendment.⁵⁴⁵ In so doing, it noted that the

538. *Id.*

539. *See, e.g.*, GA. CODE ANN. § 16-6-4(a) (West 2006) (stating that molestation consists of activity with a child under sixteen).

540. *See, e.g.*, CAL. PENAL CODE § 647.6(a)(2) (West 2008).

541. *See supra* notes 484-486 and accompanying text; *see, e.g.*, *Virtual Pedophilia in Second Life Causes Concern*, CTV, Nov. 4, 2007, http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071104/second_life_071104/20071104/; Posting of Katrina Tandino to Xstreet SL, <http://www.slexchange.com/modules.php?name=Forums&file=viewtopic&t=58063&postdays=0&postorder=asc&start=60&sid=> (July 12, 2008, 20:37 EST); *see also* Posting of Caliandris Pendragon to Second Life Insider, <http://www.secondlifeinsider.com/2006/08/15/age-play-rights-and-risks/> (Aug. 15, 2006, 5:51 EST).

542. Daniel Terdiman, *Phony Kids, Virtual Sex*, CNET News, Apr. 12, 2006, http://news.cnet.com/Phony-kids%2C-virtual-sex---page-2/2100-1043_3-6060132-2.html.

543. *Ashcroft v. Free Speech Coal*, 535 U.S. 234 (2002).

544. *Id.* at 253.

545. *Id.* at 256.

Department of Justice had “shown no more than a remote connection” between viewing virtual child pornography and “any resulting child abuse.”⁵⁴⁶ The *Ashcroft* Court’s holding presumably applies to sexual ageplay in *Second Life*: screenshots of sex between adult and child avatars are photographic child pornography, and a video of the acts is video child pornography.⁵⁴⁷ Since no real child is involved, both presumably constitute virtual child pornography and, as such, are legal in the United States.⁵⁴⁸

The *Ashcroft* decision has probably not permanently resolved the legality of virtual child pornography and, by extension, of sexual ageplay in *Second Life*. In its opinion, the *Ashcroft* Court said the government cannot criminalize virtual child pornography without demonstrating “a significantly stronger, more direct connection”

546. *Id.* at 253.

547. *See, e.g.*, Posting of Eloise Pasteur to Second Life Insider, <http://www.secondlifeinsider.com/2007/05/11/transcript-of-the-german-piece-about-age-play/> (May 11, 2007, 17:55 EST) (noting that a German prosecutor declares a video of ageplay to be child pornography, which is banned by German law).

548. Virtual child pornography is illegal in other countries. In 2007, German officials announced that they were investigating sexual ageplay in an effort to apprehend and prosecute those responsible; if convicted, they could be imprisoned “between three months and five years.” *German Prosecutors Pursue Child Porn in “Second Life,”* DW-WORLD.DE, Aug. 5, 2007, <http://www.dw-world.de/dw/article/0,2144,2481582,00.html>; *see also* Jan Libbenga, *Dutch Demand Ban of Virtual Child Porn in Second Life*, THE REGISTER, Feb. 21, 2007, http://www.theregister.co.uk/2007/02/21/dutch_demand_ban_on_virtual_child_porn/. In May of 2007, Linden Lab announced that neither ageplay nor real child pornography would be tolerated in *Second Life*. Posting of Robin Linden on the Official Secondlife Blog, <http://blog.secondlife.com/2007/05/09/accusations-regarding-child-pornography-in-second-life/> (May 9, 2007, 22:32 EST). This announcement seems to have been prompted by a German investigation into whether real child pornography was being traded in *Second Life*. *See, e.g.*, Kate Connolly, *Germany Investigates Second Life Child Pornography*, THE GUARDIAN, May 8, 2007, <http://www.guardian.co.uk/technology/2007/may/08/secondlife.web20>. In November of 2007, after the Wonderland story appeared, Linden Lab issued a “clarification” in which it explained that sexual ageplay “has been disallowed in recognition of our Community Standards . . . and international laws.” Posting of Ken D. Linden to the Official Secondlife Blog, <http://blog.secondlife.com/2007/11/13/clarification-of-policy-disallowing-ageplay/> (Nov. 13, 2007, 17:10 EST). Some perceived Linden Lab’s actions as efforts to accommodate foreign laws banning virtual child pornography. *See, e.g.*, Lillani, *The Second Life Of . . .*, <http://lillani.wordpress.com/2007/05/16/foreign-laws-ageplay-etc/> (Oct. 9, 2008, 17:05 EST). That may not be the end of the story. In March of 2008, the owner of the Wonderland area in *Second Life* was exploring the possibility of moving it to a new site—Litesim.com—that was scheduled to go live later in 2008. *See* Eric Reuters, *Ageplay Sim Eyes New Grid*, REUTERS, Mar. 11, 2008, <http://secondlife.reuters.com/stories/2008/03/11/ageplay-sim-eyes-new-grid/>. “Moving off the *Second Life* Grid would allow Wonderland autonomy from Linden Lab, which has banned ageplay within its borders.” *Id.* And, of course, ageplay still survives in other areas of *Second Life*. *See, e.g.*, Mistral, *AgePlay Sex Groups Grow 1% per Week*, *supra* note 532; *see also* Secod Life - Community: Incident Report, July 5, 2008, <http://secondlife.com/support/incidentreport.php> (noting warnings issues for ageplay violation).

between it and “resulting child abuse.”⁵⁴⁹ There may come a time when the government can provide compelling scientific evidence linking virtual child pornography with child molestation. If and when it does, the Court will have to revisit the *Ashcroft* issue; if it finds that the link justifies the criminalization of virtual child pornography, the holding might be able to extrapolate the infliction of other virtual harms, such as virtual rape and murder. I suspect this outcome is unlikely; if there were a direct causal link between fictive and real violence, it seems to me that it should have already become apparent, given our longstanding and accelerating predilection for graphic portrayals of violence in the media.

There may be another way to avoid the *Ashcroft* holding and criminalize sexual ageplay in *Second Life*, if one is so inclined. *Ashcroft* arguably does not apply to ageplay because in the opinion the Court only addressed the passive act of viewing already-created virtual child pornography. *Second Life*, which did not exist when *Ashcroft* was argued or decided, adds a new dimension to virtual child pornography. In *Second Life*, ageplay participants simulate child molestation. That factor might be the “stronger, more direct connection” between virtual child pornography and child molestation that the Supreme Court demanded in *Ashcroft*; if it is, it might lead the Court to uphold the criminalization of ageplay.⁵⁵⁰ If the Court were to do this, this holding might also be extrapolatable to virtual rape and murder.

IV. FINAL THOUGHTS

In the 1956 movie *Forbidden Planet*, Earth astronauts land on the planet Altair.⁵⁵¹ They find a scientist who is reconstructing technology that was created by the Krell, Altair’s original inhabitants.⁵⁵² He tells them that the Krell all died 200,000 years before “in a single night of inexplicable destruction.”⁵⁵³ After an invisible creature with tremendous strength attacks the astronauts

549. *Ashcroft*, 535 U.S. at 253.

550. See, e.g., Caroline Meek-Prieto, *Just Age Playing Around? How Second Life Aids and Abets Child Pornography*, 9 ONLINE EDITION N.C. J. L. & TECH. 88 (2008), available at <http://jolt.unc.edu/articles/volume-9/just-age-playing-around-how-second-life-aids-and-abets-child-pornography>.

551. *Forbidden Planet* - Wikipedia, http://en.wikipedia.org/wiki/Forbidden_Planet (last visited Oct. 3, 2008).

552. *Id.*

553. *Id.*

and their ship, they investigate the technology he is studying.⁵⁵⁴ They discover that the Krell created a gigantic machine that gave them the ability to “materialize anything they wanted” by simply thinking of it.⁵⁵⁵ When an astronaut dies while using the Krell machine, the others realize what the Krell did not: it unleashes the user’s subconscious.⁵⁵⁶ As the Krell slept that tragic night, their ids acted “out their darkest urges” and destroyed them.⁵⁵⁷

The Krell’s story is an instructive analogy for some of the issues raised by virtual worlds like *Second Life*. Similar to the Krell machine, virtual worlds let us act out the desires and fantasies we have historically kept to ourselves; this is, as we have seen, particularly true of our “darkest urges.” As long as the consequences of us realizing those fantasies stay in the virtual realm, the fantasies should not be the concern of the criminal law, at least as it is currently configured. As we saw earlier, criminal law is concerned with controlling the infliction of harms that undermine social order in the physical world. As long as the effects of *Second Life* fantasies—however dark—stay in *Second Life*, the harms they inflict cannot threaten order in the real world and therefore should not be the concern of the criminal law.

The problem we are beginning to grapple with is a variation of the problem the Krell overlooked. Our newfound ability to realize the discreditable ideas and impulses we have always harbored but never have been able to express may have unintended consequences. The repellant things we do in a virtual world may leak into the real world in varying degrees and with varying effects. We will have to decide what our level of tolerance is for virtual activities we would find disgusting and horrifying if they were to occur in the real world. What if someone recreated the Auschwitz death camp in *Second Life*, complete with Residents who served as its Nazi overlords and tragic inmates? That would be illegal in many European countries, but not in the United States.⁵⁵⁸ Should it be illegal here? Personally, I think

554. *Id.*

555. *Id.*

556. *Id.*

557. *Id.* The astronauts realize the beast attacking them is created by the scientist’s subconscious, a product of his hostility toward the intruders. He is fatally injured in a struggle with the monster; the astronauts leave, after setting the machine to destroy itself and the planet. *See id.*

558. *See*, Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Bundesgesetzblatt [BGBI] I, §§ 86-86a, available at <http://www.iuscomp.org/gla/statutes/StGB.htm#86>; *see also* Council of Europe, *Additional Protocol to the Convention on Cybercrime*, CETS 189, (2003), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/189.htm>.

not, even though I find many of the things I have seen in *Second Life* to be inexplicably abhorrent. I would find the virtual Auschwitz to be abhorrent, but I do not see how it can legitimately be the concern of real-world criminal law. Nothing that happens there is "real." No one is killed or tortured or enslaved or otherwise harmed in a way that threatens the maintenance of order in the real world.⁵⁵⁹

In this Article I have tried to illustrate the usually nebulous harms attributable to some of the edgy activities in *Second Life*. So far, the argument for criminalizing an activity in a virtual world like *Second Life* is that it has a direct, corrosive effect on social order in the real world. I tried to identify such harm resulting from three of the edgier *Second Life* activities, and failed. I am glad I failed; my goal is to illustrate the complexity of the issues that arise in this context, not to provide a blueprint for virtual criminalization. I fear that the novelty and strangeness of these new worlds will result in an overreaction, an effort to criminalize what many simply do not understand.

This does not mean substantial harms cannot and will not leak out of virtual worlds and into the real world. If that happens, the analysis outlined in Section IV(A) applies; virtual harms that erode social order in the real world constitute cybercrime and can be dealt with as such.

The more interesting, and more challenging, scenario is a reverse-Krell scenario in which harms inflicted in virtual worlds *do* become a significant threat to our ability to maintain order in the real world. For now, the concerns of the criminal law lie exclusively in the real world; virtual worlds may serve as vectors for the harms criminal law recognizes, but the harms must resound in physical reality, because that is where our lives are grounded. We may some day fly spaceships and find worlds like Altair, but that possibility lies in the far distant future. As we saw earlier, many knowledgeable people predict that the conceptual and emotional aspects of our lives will increasingly migrate online into virtual worlds far more sophisticated than *Second Life*. If that is true, then it seems reasonable to assume we will approach a tipping point at some stage in that process, i.e., a point at which we are sufficiently invested in virtual life that harms which resound only in the cyber domain necessitate the application of the criminal law. We will then have to decide if we want to

559. Putting one's violent virtual fantasies online is not a crime, even when they involve a "real," identifiable victim. See *U.S. v. Alkhabaz*, 104 F.3d 1492, 1494-96 (6th Cir. 1997).

extrapolate our existing criminal law to cyberspace or develop a new (fantasy) criminal law for the virtual worlds.

