

ACTIREI: REAL AND VIRTUAL

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I. INTRODUCTION

We are in the midst of an ongoing crime wave that has gone largely unnoticed. It seems to have begun with a rape that occurred in a place called LambdaMOO. There have been later rapes and other sexual assaults. There have been murders, and gangs of thugs have waylaid and robbed strangers. It has included property crime with, for example, the theft of a Bone Crusher mace in a place called Britannia. More recently, the criminal activity has become more sophisticated, involving a Ponzi scheme and money laundering. There have been concerns over child sexual abuse. And, there may have been instances of terrorist activity.

The crime wave has gone unnoticed because it has occurred not in the real world but in massively multiplayer online role-playing games, otherwise known as MMORPGs or more simply as virtual worlds.¹ But, even though the crimes occurred in virtual worlds, they may have consequences in the real world. Real people may experience anguish similar to that which they might have experienced with real-world crime. Crimes that occur in virtual worlds may also have financial consequences in the real world. These results are likely to lead to calls to punish virtual-world crimes.

Standing in the way of addressing these crimes is the First Amendment. Gameplay, or at least some sorts of gameplay, may enjoy the protection of that

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1. See *infra* notes 37-64 and accompanying text.

constitutional provision.² Participation in virtual worlds would seem to be the sort of game that does merit such protection.³ So, care must be taken in distinguishing the sort of acts that constitute protected virtual gameplay from acts that could be seen as real-world *acti rei*.

This Article will examine these issues. It will begin with a brief examination of the nature of virtual worlds,⁴ the crimes that have been occurring in those worlds,⁵ and governmental response to those crimes.⁶ The application of the First Amendment to virtual worlds will then be considered.⁷ Lastly, the Article will examine the distinctions to be drawn between virtual-world gameplay and real-world crime.⁸

II. VIRTUAL WORLDS AND CRIME

A. *The Nature of Virtual Worlds*

Virtual worlds are electromagnetic entities that exist—to the degree that they do exist—on computer servers. Just as playing boards provide the terrain for board games, virtual worlds provide the setting for role-playing games, with an environment that is far more rich and sophisticated than a board game. Virtual worlds grew out of the far less complex text-based, multi-user dungeons that appeared in the late 1970s, although it was the 1990s that saw the development of today's graphics-rich virtual worlds.⁹ In order to play these games, the player generally subscribes to an online service, and that subscription provides access to a server containing the virtual world.¹⁰ In order to “exist” in the virtual world, the player develops an in-world character—the player's avatar.¹¹ The avatar interacts with other avatars, providing a route for the player to interact with other players.¹² This interaction makes virtual worlds something more than video games, even interactive video games. There is a level of communication, not just about the game but within the game, that distinguishes virtual worlds from an earlier generation of video games.

Professor Edward Castronova, an economist who studies virtual worlds, provided an early definition of virtual worlds that still seems accurate:

2. See *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2732-35 (2011) (recognizing First Amendment protection for video games).

3. See *id.* Virtual worlds would seem to be as fully protected as video games.

4. See *infra* Part II.A.

5. See *infra* Part II.B.

6. See *infra* Part II.C.

7. See *infra* Part III.

8. See *infra* Part IV.

9. See Beth Simone Noveck, *The State of Play*, 49 N.Y.L. SCH. L. REV. 1, 6-11 (2004-2005) (offering a brief history of the development of “MMORPGs” (massively multiplayer online role-playing games)).

10. See Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 23 (2008).

11. See *id.* at 22.

12. See *id.*

A *virtual world* . . . is a computer program with three defining features:

—Interactivity: it exists on one computer but can be accessed remotely (i.e. by an internet connection) and simultaneously by a large number of people, with the command inputs of one person affecting the command results of other people.

—Physicality: people access the program through an interface that simulates a first-person physical environment on their computer screen[.] . . .

—Persistence: the program continues to run whether anyone is using it or not; it remembers the location of people and things, as well as the ownership of objects.¹³

The persistence aspect is important and means more than it might in other contexts. A simple video game, or even computer solitaire, may continue to run if the computer program has not stopped, and the program will retain information regarding the status of the game. Thus, one can take a break and come back to resume play with the state of the game remaining what it was. The difference between this situation and a virtual world is that, when one takes a break from the virtual world, the game goes on, and the actions of other players who are not on break mean the virtual world will be different when the player returns to the game.

The nature of virtual worlds offers a good deal of variation, as shown by looking simply at two of the most popular. *World of Warcraft* is set in “a world of magic, mystery, and limitless adventure.”¹⁴ That world, “Azeroth[,] is a world of swords and sorcery. Its lands are home to a vast number of races and cultures, led by kings, chieftains, lords, ladies, archdruids, and everything in between.”¹⁵ It is a goal-oriented game in which the player is “thrust[.] . . . into a central role of an ever-changing story. You and your friends will be active participants in events that are steeped in the rich lore of this fantasy universe.”¹⁶

On the other hand, *Second Life* is, at least comparatively, more ordinary.¹⁷ The player can “[e]nter a world with infinite possibilities and live a life without boundaries, guided only by your imagination. Do what you love, with the people you love, from anywhere in the world.”¹⁸ While the world is not quite

13. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier*, 2 GRUTER INST. WORKING PAPERS ON LAW, ECON., AND EVOLUTIONARY BIOLOGY issue 1, art. 1, at 5-6 (2001), available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1008&context=giwp>. A more recent definition describes a virtual world as “[a] synchronous, persistent network of people, represented as avatars, facilitated by networked computers.” Mark W. Bell, *Toward a Definition of “Virtual Worlds,”* 1 J. VIRTUAL WORLDS RESEARCH No. 1, at 2 (2008), available at journals.tdl.org/jvwr/article/download/283/237.

14. *What Is World of Warcraft*, BATTLE.NET, <http://us.battle.net/wow/en/game/guide/> (last visited Nov. 4, 2011).

15. *Id.*

16. *Id.*

17. For a description of *Second Life*, see www.secondlife.com.

18. *What Is Second Life?: Push the Limits*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US> (select “Start Exploring” hyperlink) (last visited Nov. 4, 2011).

ordinary, because players can fly or teleport, it is sufficiently ordinary for players to experience living their lives as a different persona.¹⁹ There are businesses and educational institutions with a presence in that virtual world.²⁰ Even National Public Radio's *Science Friday* has established a presence there.²¹

There are tens of millions of people, from countries around the globe, participating in virtual worlds.²² The game *Second Life* alone had 21.3 million account holders in 2010.²³ Many of the participants seem more at home in their virtual worlds than in the real world.²⁴ They may spend more time there.²⁵ And, according to a 2001 study of those involved in Norath, the virtual world in the game *Everquest*, some 20 percent considered Norath to be their place of residence, with their time outside that world being considered a commute to work; they work in the real world, but they live in Norath.²⁶

While some players in virtual worlds return to the real world to work, that may, in fact, not be necessary. In *Second Life*, “[v]irtual job opportunities . . . abound. There are full time dancers, models, bouncers, architects, fashion designers, psychologists, event planners and DJs, to name a few.”²⁷ Work and entrepreneurial activities can lead to an income, and while that income in *Second Life* is in Linden dollars, that currency can be exchanged for real-world currency.²⁸ Thus, virtual-world work can provide for the sustenance required by one's real-world body.

It is not only virtual currency that can be exchanged for real-world money. The same is true for other types of property amassed in a virtual world.²⁹ When an avatar transfers property to another avatar, the exchange may well have been matched by an exchange of real-world money or currency.³⁰ One player transfers something of real-world value to another, the avatars of the two players then meet in the virtual world and engage in a transfer in the opposite

19. See *What Is Second Life?: Welcome Island in Second Life*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US> (select “Welcome” hyperlink) (last visited Nov. 4, 2011).

20. See *What Is Second Life?*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US> (select “Education & Enterprise” hyperlink) (last visited Nov. 4, 2011).

21. See *Science Friday in Second Life*, SCI. LIBR. PAD (Feb. 15, 2008), http://scilib.typepad.com/science_library_pad/2008/02/science-friday.html.

22. See Noveck, *supra* note 9, at 2 (writing in a 2004 article of 20-30 million regular participants in an activity that was then quickly growing).

23. See Doug Tsuruoka, *Funny Money at Play in Online Games: Crooks Using New ‘Laundry,’* INVESTOR'S BUS. DAILY, Dec. 27, 2010, at A04, available at 2010 WLNR 25342952.

24. See Noveck, *supra* note 9, at 2.

25. *Id.*

26. Castronova, *supra* note 13, at 3.

27. *What Is Second Life?: Virtual Jobs*, SECOND LIFE, <http://secondlife.com/whatis/?lang=en-US> (select “Make Money” hyperlink) (last visited Nov. 4, 2011).

28. See Brenner, *supra* note 10, at 36.

29. See *id.* at 57.

30. See *id.* at 56-57.

direction of something of value in that world.³¹ This meeting of the players is facilitated through online sales sites.³²

Real-world commerce in virtual-world goods is significant. It was estimated, several years ago, that gamers were spending \$2 billion a year in real-world currency for virtual goods, and the real-world value of all virtual wealth is in the neighborhood of \$28 billion.³³ The record price, it would seem, for virtual-world goods was set in the sale of the Planet Calypso Virtual Space Station.³⁴ It sold for 1 million Entropian—the equivalent of \$330,000.³⁵ This may seem an incredibly large sum, but an earlier sale of Treasure Island for \$26,500 in 2004 has allowed the buyer to amass a fortune of \$1.5 million from the operation of a virtual country club and the sale of mining and hunting rights.³⁶

B. Crimes in Virtual Worlds

Getting back to the crime wave, the first instance seems to have been the rape in LambdaMOO, an unsophisticated, text-based virtual world involving a community living in a virtual California house.³⁷ A game participant, known as Mr. Bungle, used a computer program to take over and control the actions of some of the female avatars, causing them to engage in nonconsensual—from the point of view of the players whose avatars they were—and degrading sexual activities.³⁸ While no real person was assaulted, the players whose avatars were raped were said to be traumatized.³⁹ A similar incident is said to have occurred in the graphic virtual world *Second Life* in 2007, when one animated character raped another.⁴⁰ Again, no real person was assaulted, but police in Belgium opened an investigation into whether there had been a crime.⁴¹

31. See Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 98-99 (2004-2005) (noting that “[n]either buying nor selling is an isolated behavior”).

32. See *id.*

33. John Brewer, *When a Virtual Crook Struck This Gamer, He Called Real Cops: His Virtual Friendship Betrayed When Hard-Won Treasures Are Stolen, One Online Role-Player Finds Scant Justice in Vanquishing His Foe*, ST. PAUL PIONEER PRESS, Feb. 1, 2008, at A1, available at 2008 WLNR 1985337.

34. See *World Record Set for Sale of a Virtual Item*, FUTURE CRIMES, www.futurecrimes.com/virtual-world-crime/world-record-set-for-sale-of-a-virtual-item (last visited Nov. 4, 2011).

35. *Id.*

36. See *id.*

37. See Susan W. Brenner, *Is There Such a Thing as “Virtual Crime”?*, 4 CAL. CRIM. L. REV. 1, 102-03 (2001).

38. See *id.* Various other accounts of this incident may be found. See, e.g., F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 294-95 (2004-2005).

39. See Brenner, *supra* note 37, ¶ 104.

40. See Alan Sipress, *Does Virtual Reality Need a Sheriff?*, WASH. POST (June 2, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/06/01/AR2007060102671.html>.

41. See *id.*

In an interesting domestic-violence/murder case, a forty-three-year-old woman in Japan killed her online husband.⁴² She was angry because her avatar's husband suddenly divorced her avatar without any inkling that the divorce was about to occur.⁴³ She had earlier obtained login information from the person controlling the husband, and she used that information to log in and kill the online husband.⁴⁴

The virtual sexual mistreatment of children also occurred in *Second Life*. It involved an adult avatar who engaged in sexual activity with a child avatar although the players controlling both avatars were, in fact, themselves adults.⁴⁵ Thus, again, there was no real-world victim.⁴⁶

There have been assaults and robberies in *World of Warcraft*: “Gangs of animated characters have repeatedly preyed upon lone travelers, killing them and making off with their virtual belongings.”⁴⁷ And, in *Lineage II*, a player “used game bots—automated characters that have been tweaked—to beat up and rob other players’ characters”; the proceeds were then sold on eBay.⁴⁸ There has also been less violent property crime. For example, a Bone Crusher mace was stolen in *Ultima Online*’s world Britannia and offered for sale to other gamers.⁴⁹ In just one more example, in 2008, a Minnesota man found his player account in *Final Fantasy XI* looted, with his collection of jewels, charms, and rare coins gone; the goods were said to be worth \$3,800 if sold to other gamers.⁵⁰

On a more sophisticated level, there was a Ponzi scheme in *Second Life*.⁵¹ The Ginko Bank had been offering a 60% annual return on investments in Linden dollars.⁵² It eventually collapsed.⁵³ At the time of the collapse, the bank was said to have deposits with a total worth of 200 million Linden dollars, which was the equivalent of approximately \$750,000.⁵⁴

42. See Mari Yamaguchi, *Angry Online Divorcee ‘Kills’ Virtual Ex-Hubby*, MSNBC.COM (Oct. 23, 2008, 10:48 AM), http://www.msnbc.msn.com/id/27337812/ns/technology_and_science-games/t/angry-online-divorcee-kills-virtual-ex-hubby/#.TokjXrLLLbM.

43. *Id.*

44. *Id.*

45. See Brenner, *supra* note 10, at 91-92.

46. See Sipress, *supra* note 40.

47. *Id.*

48. *Student Arrested for Robbing Another Player Inside an Online Game*, INFO. WEEK (Aug. 22, 2005, 2:24 PM), www.informationweek.com/news/169500364. Bots are “characters that can do repetitive tasks automatically (to, for instance, earn game ‘currency’) or very quickly.” *Id.*

49. See Lastowka & Hunter, *supra* note 38, at 299-301.

50. See Brewer, *supra* note 33.

51. See Tim Stevens, *Second Life Virtual Bank Collapses, Losses at \$750K*, SWITCHED (Aug. 16, 2007, 1:12 PM), <http://www.switched.com/2007/08/16/second-life-virtual-bank-collapses-losses-at-750k/>; Bryan Gardiner, *Bank Failure in Second Life Leads to Calls for Regulation*, WIRED (Aug. 15, 2007), http://www.wired.com/gaming/virtualworlds/news/2007/08/virtual_bank.

52. Gardiner, *supra* note 51.

53. Stevens, *supra* note 51.

54. *Id.*

There has also been some money laundering. Money laundering involves putting dirty money into the financial system, doing something to clean that money, and then taking it out.⁵⁵ There appears to be less policing of the inflow and outflow of money into virtual worlds than into real-world financial institutions.⁵⁶ Cleaning through the purchase and sale of virtual goods also appears to attract less attention.⁵⁷ Amir Orad, an expert in anti-crime software, explains how one could use *World of Warcraft* to launder money:

I can accumulate the value of the gold coins (virtual money) used in the game. I would either buy (these coins) using my dirty cash from a friend or employ some low-cost labor (game accomplices) in India or China. I would then sell the coins to someone else in the game in return for real money. This can be done through a credit-card transaction or PayPal.

On the surface, it's very legitimate—I got some friends to move money to me in return for some service. Then I take those funds and integrate them back into the financial environment to buy assets. The beauty of it is that I had dirty money in one hand and, at the end, I have what looks like legitimate money in the other hand.⁵⁸

This is more than just a theoretical possibility. Money actually has been moved from China to Korea through this sort of online laundering.⁵⁹ The method also appears to have been used by Colombian drug cartels.⁶⁰ One great advantage to this sort of laundering is the fact that it might go unnoticed. As one writer explained such laundering:

Another method involves a criminal opening hundreds of separate MMORPG accounts. Crooks then buy and sell things in the virtual world to and from themselves.

On the surface, the transactions seem to be routine. The small amounts used in each transaction are hard to detect.

In the end, all the virtual money is funneled to a master account held by the criminal, who then cashes it into real money.⁶¹

There is also difficulty in ascertaining jurisdiction. It is not at all easy to figure out where the crime occurred.⁶²

55. See Doug Tsuruoka, *Cash in the Millions Circulating Via Games: Virtual World Provides a More Open Environment for Laundering of Money*, INVESTOR'S BUS. DAILY, Dec. 27, 2010, at A04, available at 2010 WLNR 25342951 (interview with Mr. Orad).

56. See Tsuruoka, *Funny Money at Play in Online Games*, *supra* note 23.

57. See *id.*

58. Tsuruoka, *Cash in the Millions Circulating Via Games*, *supra* note 55.

59. *Id.*

60. See Tsuruoka, *Funny Money at Play in Online Games*, *supra* note 23.

61. *Id.*

There have also been terrorist activities, as jihadists are thought to have been using the virtual world *Second Life* to recruit terrorists and to teach skills such as reconnaissance and surveillance.⁶³ There have been attacks upon avatars and virtual property, including one against the Australian Broadcasting Corporation's building in *Second Life*.⁶⁴

C. Government Responses to Virtual-World Crime

These crimes have led to appeals for government intervention and prosecution. Because virtual property and currency have real-world value, these virtual acts have had a real-world impact for which people have sought redress.⁶⁵ Some countries have in fact responded.⁶⁶ Belgian police, at least, treated seriously the reported 2007 rape in *Second Life*.⁶⁷ Japanese authorities were reported to have made an arrest of the person who carried out the virtual muggings in *Lineage II*.⁶⁸ Germany also, reportedly, at least looked into the virtual child sexual abuse in *Second Life*, suggesting that it could be a violation of its child pornography laws.⁶⁹

Sometimes, charges may be based on occurrences in the real world and accompanied by virtual-world consequences. That was the case with the Japanese woman who killed her online husband.⁷⁰ She was not charged with murder, but she accomplished the murder through gaining access to the account of the player whose avatar was her avatar's husband.⁷¹ She had obtained log-on information from the other player and was charged with illegally accessing a computer account.⁷²

This should also have been the result in the theft of the online goods of the Minnesota man.⁷³ He actually managed to provide the name of the suspect to his local police, but the police refused to take any action.⁷⁴ They saw the goods taken as having no monetary value, so they saw no theft, despite evidence provided as to the prices that could have been obtained selling those virtual goods online.⁷⁵ Even disregarding the question of value, the theft was

62. *See id.*

63. Chris Gourlay & Abul Taher, *Virtual Jihad Hits Second Life Website*, THE SUNDAY TIMES (Aug. 5, 2007) (on file with author).

64. *Id.*

65. *See Sipress, supra* note 40.

66. *Id.*

67. *See supra* notes 40-41 and accompanying text.

68. *See Sipress, supra* note 40.

69. *See id.* This result could not have been obtained in the United States, given the Supreme Court's conclusion that virtual child-pornography is protected by the First Amendment. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 254-57 (2002).

70. *See Yamaguchi, supra* note 42.

71. *See id.*

72. *See id.*

73. *See text accompanying supra* note 50.

74. *See Brewer, supra* note 33.

75. *See id.*

accomplished by hacking into the victim's player account, and any applicable unlawful access charge could have been brought.⁷⁶

Perhaps the highest level of consideration of crime involving virtual worlds is found in a congressional hearing.⁷⁷ In September 2010, the House Financial Services Subcommittee on Oversight and Investigations held a hearing on terrorism financing.⁷⁸ Stephen I. Landman, the Director of National Security Law and Policy at the Investigative Project on Terrorism, said that the government and its international partners had closed off the real-world financial system to terrorists, but he warned that the Internet could revolutionize such financing.⁷⁹ He expressed particular concern over the use of virtual worlds to launder money.⁸⁰ His suggestion was that virtual worlds have to be brought within the coverage of the Bank Secrecy Act; if they were declared to be "money services businesses," they would have to register with the government and report large transactions.⁸¹

Whether in the context of the war on terrorism or out of more private concerns over player property, calls for the application of criminal law would seem likely to grow. The terrorism aspect is obvious, but the private, virtual property concerns are also very real. The virtual goods do have value; indeed, they can have great value. They are also subject to appropriation or destruction in a manner similar to those faced by real-world goods. The impact on real-world goods may lead to criminal charges, and there are certain to be more and more calls for similar protection of virtual goods. But, any potential responses in the United States may be limited by whatever protection the First Amendment may afford the activities that take place in virtual worlds. It is to First Amendment considerations that we now turn.

III. THE FIRST AMENDMENT AND GAMEPLAY

Virtual worlds could be seen as a more complex version of video games, and until the recent past there was reason to question whether video games should enjoy the protection of the First Amendment.⁸² The first case to examine the status of video games was a 1982 challenge to a limit placed on the

76. *See id.* Of course, if they had treated the report differently, seeing it as a cyber crime involving unauthorized access to a computer online account, the result could have been different. *See id.* But as a reported property crime, the perception that there was no real-world value led to the decision. *See id.*

77. *See A Review of Current & Evolving Trends in Terrorism Financing: Hearing Before the Subcomm. on Oversight & Investigations of the Comm. on Fin. Servs.*, 111th Cong. 7-9 (2010) (statement of Stephen I. Landman, Dir., Nat'l Sec. Law & Policy, The Investigative Project on Terrorism), available at 2010 WLNR 19343632.

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2733 (2011) (explaining "that video games qualify for First Amendment protection").

number of video games allowed in restaurants, gift shops, and record stores.⁸³ The federal court held that the First Amendment applies only when there is the conveyance of information or the communication of an idea and that it did not occur with video games.⁸⁴ It seemed to the court to be no different from pinball machines or games such as chess or baseball.⁸⁵

There were similar results in 1983 and 1984, involving a generation of video games such as *Ms. Pac-Man* and *Donkey Kong*.⁸⁶ Some of those courts did, however, say that future video games might be sufficiently communicative and expressive as to merit the protection of the First Amendment.⁸⁷ Seven years later, in 1991, the U.S. Court of Appeals for the Seventh Circuit again recognized the possibility of First Amendment protection for video games without actually coming to any conclusion in the case before it.⁸⁸

The first, and only, case to conclude that modern video games were not protected by the First Amendment—this time in the context of violent video games—was the federal district court case, *Interactive Digital Software Ass'n v. St. Louis County*.⁸⁹ The federal district court in that case failed to find the communication required for the guarantee of free expression to apply, seeing video games as unlike motion pictures and more like bingo or board games.⁹⁰ The district court was reversed by the U.S. Court of Appeals for the Eighth Circuit.⁹¹ That court said:

If the [F]irst [A]mendment is versatile enough to “shield [the] painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll,” . . . we see no reason why the pictures, graphic design, concept art, sounds, music, stories, and narrative present in video games are

83. *See Am.'s Best Family Showplace Corp. v. City of New York*, 536 F. Supp. 170, 172 (E.D.N.Y. 1982).

84. *Id.* at 173.

85. *Id.* at 174.

86. *See Malden Amusement Co. v. City of Malden*, 582 F. Supp. 297 (D. Mass. 1983); *Caswell v. Licensing Comm'n*, 444 N.E.2d 922 (Mass. 1983); *Marshfield Family Skateland, Inc. v. Town of Marshfield*, 450 N.E.2d 605 (Mass. 1983); *People v. Walker*, 354 N.W.2d 312 (Mich. Ct. App. 1984); *Tommy & Tina, Inc. v. Dep't of Consumer Affairs*, 459 N.Y.S.2d 220 (N.Y. Sup. Ct. 1983), *aff'd*, 464 N.Y.S.2d 132 (N.Y. App. Div. 1983), *aff'd*, 464 N.E.2d 988 (N.Y. 1984).

87. *Marshfield Family Skateland*, 450 N.E.2d at 609-10; *Walker*, 354 N.W.2d at 317 n.3.

88. *See Rothner v. City of Chicago*, 929 F.2d 297 (7th Cir. 1991).

89. *Interactive Digital Software Ass'n v. St. Louis Cnty.*, 200 F. Supp. 2d 1126, 1134-35 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954, 959 (8th Cir. 2003). A slightly earlier violent video game case had assumed that at least some video games are protected. *See Am. Amusement Mach. Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 952 (S.D. Ind. 2000), *rev'd on other grounds*, 244 F.3d 572 (7th Cir. 2001). The district court, despite its assumption of protection, concluded that the games can be regulated. *Id.* at 981. The appellate court disagreed with the lower court's basis for overriding the protection due the games. *See Kendrick*, 244 F.3d at 574, 580.

90. *Interactive Digital*, 200 F. Supp. 2d at 1134.

91. *Interactive Digital*, 329 F.3d at 959-60.

not entitled to a similar protection. The mere fact that they appear in a novel medium is of no legal consequence.⁹²

It appeared to the court that the sophistication of the games—the art and the story lines—had advanced to the point of deserving the protection of the First Amendment.⁹³

I have argued elsewhere that the district court in this case was correct.⁹⁴ Improved story lines and art should not have been enough to distinguish the modern games from their ancestors.⁹⁵ The government and the courts should not be making decisions regarding constitutional protection based on principles of literary or artistic criticism.⁹⁶ The reason I believed that video gameplay was not protected was that the player does not communicate with anyone.⁹⁷ I suggested that the design, production, and even display of the games came within the scope of the First Amendment, but the child's play fell outside its protection.⁹⁸

I would not come to the same conclusion with regard to virtual worlds. Virtual worlds are not just video games. They are a combination of video game and social media. In virtual worlds, players are clearly communicating. Whatever the proper status of video games, virtual worlds involve sufficient communication to come within the scope of the First Amendment. Thus, limits on gameplay will have to be examined under that Amendment. Any application of criminal law to events that occur in a video game must be careful to take this protection into account.

IV. DISTINGUISHING REAL- FROM VIRTUAL-WORLD CRIME

There has been a growing body of scholarship discussing the application of criminal law to virtual worlds, although sometimes without much focus on the First Amendment. Rather than survey all of that literature in the context of this short Article, we will look at some of the better efforts in the area.

One such effort is by Professor Orin Kerr.⁹⁹ He notes that the elements of crimes are generally physical, so “misconduct that draws social significance from its meaning in virtual reality normally will have no resonance with[in] criminal statutes.”¹⁰⁰ He sees actions that are allowed under the rules of the game as internal activity that will not count as criminal activity, but cheating

92. *Id.* at 957 (internal citation omitted).

93. *Id.*

94. See Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 L. REV. M.S.U.-D.C.L. 51, 93-105.

95. See *id.* at 100-01.

96. See *id.*

97. *Id.* at 101-05.

98. See *id.* at 103-05.

99. See Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 U. CHI. LEGAL F. 415 (2008).

100. *Id.* at 418.

should suffice to bring criminal law to bear.¹⁰¹ This rule makes sense in the context of the example he employs. He discusses a February 2000 incident in a National Hockey League game between the Boston Bruins and the Vancouver Canucks.¹⁰² Marty McSorley of the Bruins hit the Canucks player Donald Brashear in the head with a hockey stick, causing a concussion, and later, memory loss.¹⁰³ Professor Kerr seems to agree with the decision of a Canadian court to charge McSorley with assault because the hit was beyond what is allowed by the rules of the game.¹⁰⁴

Professor Kerr is correct in his conclusion that McSorley ought to have been charged, but for perhaps slightly different reasons. Rather than simply being beyond the rules of the game, the McSorley hit may be seen as an act that was not even within the game. Liability in the hockey assault results perhaps more from the fact that the act upon which it is based is a real-world act. A game like hockey, involving the bodies of real people, is not in a separate world. The fact that the assault occurred during the play of the game should probably not provide McSorley any more of a shield than if Bobby Fischer had shot Boris Spassky during a chess match.

An alternative case of cheating that appears to be more purely within the game arose in the recent past in baseball. Derek Jeter pretended to be hit by a pitch and was awarded first base.¹⁰⁵ It was clear from video replay that he had not been hit.¹⁰⁶ This would seem to be cheating,¹⁰⁷ but it would be odd to assert any real-world criminality. This is not just because it had no real-world impact. Money may have been bet on the game, and any impact on what team would make the playoffs would have serious financial implications. The conclusion that there should be no real-world criminal liability is because the act was purely part of the game, even if perhaps in violation of the rules, or at least of good sportsmanship, not that there was no real-world impact.

Professor Kerr does seem to allow for some practices that might be considered cheating in virtual worlds to still remain insulated from the criminal law.¹⁰⁸ He suggests that courts might assume that anything permitted by the computer code running the game, and not forbidden by the end-user license or terms of service, should be considered a part of the game, and that widely recognized norms among gamers could provide the same insulation.¹⁰⁹ A violation of an end-user license or terms of service, however, seems to ring more in terms of a contract action rather than a criminal violation. Any action that occurs purely within a virtual world might well be seen as protected by the

101. *See id.* at 419-20.

102. *Id.* at 421.

103. *Id.*

104. *See id.* at 421-22.

105. *See Derek Jeter Cheater*, YOUTUBE (Sept. 16, 2010), www.youtube.com/watch?v=9U9jttDSUCg.

106. *See id.*

107. In the interest of disclosure, this author is a Red Sox fan.

108. *See Kerr, supra* note 99, at 416, 421-23.

109. *See id.* at 422.

First Amendment, and it is at least questionable that the provisions of a license should be sufficient to override that protection.

Professor Susan Brenner has suggested that real-world impact should be what determines when virtual-world crime becomes real-world crime.¹¹⁰ She concludes that that which she characterizes as “fantasy crime” occurring purely within a virtual world should not lead to real-world liability.¹¹¹ So, even if one avatar performs an act toward another avatar that would be criminal among real people, it should not lead to liability.¹¹² For example, virtual drug use, prostitution, adultery, and bigamy should not lead to real-world liability.¹¹³ She is also skeptical over real-world criminal liability for virtual-world murder, rape, and pedophilia.¹¹⁴ There is a lack of real-world, physical harm, and she notes that the law cannot make criminal the infliction of emotional harm.¹¹⁵

When virtual-world acts have an actual impact on the real world, she sees criminal liability in the real world as more plausible.¹¹⁶ Thus, given the real-world value of virtual assets, virtual property crime has real-world impact and might be the subject of criminal liability.¹¹⁷

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.¹¹⁸

For criminal liability to attach, it must have “a direct, corrosive effect on social order in the real world” and “must resound in physical reality.”¹¹⁹ While virtual-world property crime may be seen to have this effect, she recognizes the complexity involved in finding that impact in other areas.¹²⁰

Professor Brenner recognizes the impact of the First Amendment in applying criminal law to virtual-world acts.¹²¹ It does not seem clear, however, that impact on the real world would be sufficient to overcome that constitutional protection. There is a great deal of material protected by the First

110. See Brenner, *supra* note 10, at 54-60.

111. *Id.* at 54-56, 61-62.

112. *See id.* at 55-56.

113. *See id.* at 65-70.

114. *See id.* at 75-94.

115. *Id.* at 78.

116. *See id.* at 53-57.

117. *See id.*

118. *Id.* at 55.

119. *Id.* at 96.

120. *See id.*

121. *See id.* at 82-85.

Amendment, from pornography to an accurate news report impacting corporate earnings, that has an impact that some might see as negative on the real world.¹²² While there may be some argument as to how direct the harm is, that would seem equally arguable with regard to any virtual-world activity's impact on the real world.

She also suggests that there will be a growing call for the application of criminal law to virtual worlds:

[M]any 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 extrapolate our existing criminal law to cyberspace or develop a new (fantasy) criminal law for the virtual worlds.¹²³

She would seem almost undoubtedly correct in her view that there will be such a call, but it is important to recognize the limitations the First Amendment would place on responding to that call.

Some of the early (but still insightful) work in this area was done by Professors Gregory Lastowka and Dan Hunter.¹²⁴ They examine virtual crime generally but pay particular attention to property crime.¹²⁵ They state that at least much that is thought of as virtual crime is not real crime.¹²⁶ They assert that "the representations of villainy that occur in interactive games are generally understood as speech and nothing more, and thus are within the scope of constitutional free speech protections."¹²⁷ In looking at the theft of property or vandalism destroying such property, they conclude that such acts should generally not be considered criminal, but they see the possibility of liability where someone exploits the game's software for financial gain.¹²⁸

They go on to consider the already mentioned incident in which a Bone Crusher mace was stolen in *Ultima Online*'s world, Britannia.¹²⁹ The virtual theft of the mace occurred entirely within the game.¹³⁰ That, presumably, would not be a real crime. The mace, however, was then offered for sale.¹³¹ A

122. *See id.* at 68.

123. *Id.* at 96-97.

124. *See* Lastowka & Hunter, *supra* note 38, at 293.

125. *See id.* at 294-99. In a later, interesting article they considered property theory as it applies to virtual goods. *See* F. Gregory Lastowka & Dan Hunter, *The Laws of Virtual Worlds*, 92 CALIF. L. REV. 1 (2004).

126. *See* Lastowka & Hunter, *supra* note 38, at 294-99.

127. *See id.* at 297.

128. *See id.* at 294.

129. *See id.* at 299-304.

130. *See id.*

131. *See id.* at 302 n.46.

buyer, a real person, agreed to purchase the mace for real-world money, and the thief agreed.¹³² The question Lastowka and Hunter address is whether the thief was guilty of the real-world crime of selling stolen property.¹³³ This is a more interesting question than whether the original theft should be considered a real crime. The theft was entirely within the virtual world; the sale had a real-world aspect.

In the view of Lastowka and Hunter, the best defense to the charge of selling stolen goods is not that virtual property is inherently incapable of being stolen, but that, in a sense, Bone Crusher maces are meant to be stolen.¹³⁴ Because the rules of the game allow this sort of appropriation, the theft is not a wrongful conversion, so the sale is not of stolen property.¹³⁵ As they conclude, “it seems highly unlikely that virtual property ‘crimes’ that are entirely consistent with software and contractual game rules would be criminally prosecuted.”¹³⁶ Because the rules of the game allow this virtual theft, then just as there could be no criminal liability for the theft of second base in a baseball game, criminal liability should not arise from the theft of the mace.¹³⁷

As a justification for their position that the allowance of appropriation within the rules of the game bars criminal liability, Lastowka and Hunter argue that the game’s norms supersede the norms of real-world society.¹³⁸ As they put it, “[t]he norms of game play supercede [sic] the standard rules of society, and the magic circle will only be broken if a player violates the game rules.”¹³⁹ If the rules allow theft, the act should not be considered criminal.¹⁴⁰

As to when they would seem to allow criminal liability, that seems to turn on a combination of an act being allowed by the software and not being in violation of the end-user license.¹⁴¹ Again, actions that are “entirely consistent with software and contractual game rules” are exempt from criminal liability.¹⁴² Lastowka and Hunter would seem correct with regard to the first factor. If an act is inconsistent with the software, that would be an indication that something untoward, and perhaps criminal, has occurred. At least if the software makes an appropriation impossible, there must have been some intercession in the operation of the software. There, then, could be criminal liability, but it would be a hacking sort of offense rather than theft.

The reliance on the end-user license seems less reasonable. If the rules and the license disallow theft, rather than the software, and there is an

132. *See id.* at 301-02.

133. *See id.* at 301.

134. *See id.* at 304-05.

135. *See id.* at 310.

136. *Id.*

137. *See, e.g., id.* at 305-07.

138. *See id.* at 305.

139. *Id.*

140. *See id.* at 304-07.

141. *See id.* at 307-11.

142. *Id.* at 310.

appropriation, there may be a violation of the license.¹⁴³ That would seem to be a matter between the platform owner and the player, leading, perhaps, to the player being excluded from the game, or at most, a contract action. There is still no theft in a real-world sense. This is not because the virtual-world goods have no real-world value; they do. Nor is it because there has been no real-world effect; because the goods have value, there has been a theft. It is because, whatever the rules may say, the theft occurred completely within the game.¹⁴⁴

So how do we distinguish those acts that can result in real-world criminal liability from those acts that are gameplay protected by the First Amendment? The key would seem to be a careful examination of the *actus reus* that is said to lead to criminal liability. If the *actus reus* is purely within the game, it would seem to be protected by the First Amendment, unless there is some First Amendment exception, and it could not be the basis for criminal liability. If the *actus reus* is a real-world act, then criminal liability may result.

This is not a failure to take into account the other basic element of criminality, the *mens rea*. But, it seems less likely that there would be confusion over the locus of the *mens rea*. The *mens rea* would seem always to be real world, while the nature of the *actus reus* may be more open to debate. The *mens rea* of a real-world defendant will be a real-world state of mind. It is, of course, at least theoretically possible that a player might release a bot on a virtual world and that the bot may do harm, but that harm, because it is purely within the game, would seem an unlikely basis for real-world criminality. Furthermore, although the player arguably may not have intended any of that virtual-world harm, the player may have been negligent or reckless in releasing the bot. That would be a real-world *mens rea*, so the issue would remain as to whether or not there was a real-world *actus reus*.

Returning to the crimes already discussed, the earliest rape in LambdaMOO and later sex crimes in *Second Life* are easily seen not to have the real-world *acti rei* required for real-world criminality. The acts complained of occurred purely in the virtual world.¹⁴⁵ They were solely gameplay. Whether or not the rules of the game were violated, and for that matter, whether they provide for some in-game penalty, nothing criminal occurred in the real world.

143. *See id.*

144. This brings us back to a player faking being hit by a pitch in a baseball game. *See supra* notes 105-106 and accompanying text. Of course, it may be that Jeter's actions did not violate any particular rule because the situation has simply not been addressed. There is an interesting rule in yacht racing that would then serve as another example. Rather than addressing every conceivable issue, the yacht racing rules include in Part I Rule 2 what is known as the "Fair Sailing" rule. *See INT'L SAILING FED'N, THE RACING RULES OF SAILING FOR 2009-2012*, at 7 (2009-2012 rev. ed. 2008), available at [http://www.sailing.org/tools/documents/RRS20092012with2010changes-\[8222\].pdf](http://www.sailing.org/tools/documents/RRS20092012with2010changes-[8222].pdf) (last visited Nov. 4, 2011). The rule provides that "[a] boat and her owner shall compete in compliance with recognized principles of sportsmanship and fair play." *Id.* It seems unlikely that a violation of this rule, while it may lead to a race disqualification, would lead to criminal liability.

145. *See* Brenner, *supra* note 37, ¶ 106.

Although players controlling the victim avatars may have been upset, they were upset about losing a game, albeit perhaps in a particularly upsetting way.

The murder of the avatar by its avatar ex-wife, controlled by a player in Japan was, of course, not a real murder. If the ex-wife avatar killed her former husband through actions within the game, there should be no criminality. There was, however, real-world activity that may serve as the *actus reus* for real-world crime.¹⁴⁶ The player had obtained information that enabled her to hack into the account of the person controlling her ex-husband avatar, and it was through that unauthorized access that she was able to kill her virtual ex-husband.¹⁴⁷ The real-world hacking is a sufficient *actus reus*, not for murder, but for a charge based on unauthorized computer access.¹⁴⁸

The assaults, robberies, and thefts that have occurred in a number of virtual worlds, including the theft of the Bone Crusher mace, also do not have real-world *acti rei*.¹⁴⁹ Again, they occurred purely within the game. The Minnesota case, however, is a different matter.¹⁵⁰ While the property taken was virtual property, it was not taken through acts that occurred within the game. It appears, instead, that the person taking the property hacked into the account, and that may be real-world crime.¹⁵¹ If the local police were correct in refusing to look into the crime, it would not be because nothing of value had been taken; it could be justified only by the police, perhaps, not having jurisdiction over this sort of computer crime.

The Ponzi scheme presents a particularly interesting case.¹⁵² It, too, would also seem purely within the game and not to provide an adequate *actus reus* for real-world criminality. A Ponzi scheme would seem to be a form of fraud, and it would be important to know where the untruthful assertion necessary for fraud was made. If the solicitation of deposits occurred purely within the game, that would seem not to be a real-world crime. If, instead, there were real-world statements that people should join the game, buy game dollars, and invest those dollars in the Ponzi scheme, along with a real-world assertion of a high return, that would seem as real a crime as any other Ponzi scheme.

With regard to money laundering, there are three sorts of steps involved, and two of them have real-world aspects.¹⁵³ Moving real-world money into virtual-world assets and turning the later virtual-world assets into real-world money would both involve real-world *acti rei*. The purchases and repurchases within the game that launder the money, however, would seem non-real world. This would suggest that the best place to attack this sort of money laundering is in the initial and final stages. Requiring that money—presumably above a

146. See Yamaguchi, *supra* note 42.

147. See *id.*

148. See *id.*

149. See Lastowka & Hunter, *supra* note 38, at 301-07.

150. See *supra* note 50 and accompanying text.

151. See *supra* note 76 and accompanying text.

152. See *supra* notes 51-54 and accompanying text.

153. See *supra* note 55 and accompanying text.

certain level—used to purchase virtual-world assets be reported, along with proceeds above a certain level from the sale of virtual-world assets, could be backed by criminal penalties.

Concerns over terrorist recruitment and training may require resorting to another aspect of First Amendment jurisprudence. If the recruitment activities and training occur purely within the game, it would seem to come within the protection of the First Amendment.¹⁵⁴ But, as with any other constitutional protection, First Amendment protection is not absolute.¹⁵⁵ In particular, speech which poses a “clear and present danger” of bringing about imminent lawless action, and is intended to incite the action, may be the basis for criminal prosecution.¹⁵⁶ Terrorists using virtual worlds to recruit and train would seem to present that danger.

V. CONCLUSION

The argument that real-world criminality should not be based on a virtual-world *actus reus* will not provide as much protection of virtual-world property as players controlling that property might want. And, it may leave players open to emotional distress for virtual-world harm done to their avatars. There is, admittedly, a sort of “get over it” and “it’s only a game” flavor to the conclusions presented. But it is a game, and as with other similar games, gameplay would seem to be protected by the First Amendment.¹⁵⁷ So, players may be constitutionally required to get over it, or at least to seek redress within the game, rather than through governmental entities limited by the First Amendment.

It is true that property that may be lost through virtual-world *acti rei* may be extremely valuable, and players may face a loss of real-world value that could have been realized through the sale of their virtual assets. That interest would not be protected under the suggested limited view of the application of real-world criminal laws. Perhaps the result of this will be a lessening of the real-world value of virtual assets. If those virtual assets lack protection, their value would be discounted by the risk of loss, and there would seem to be less incentive for virtual investment. While that may be upsetting to ardent gamers, it is less clear that those of us who spend our lives in the real world should be all that concerned.

154. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732-36 (2011).

155. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

156. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1965).

157. See *Brown*, 131 S. Ct. at 2732-36.