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Griefing, Massacres, Discrimination, and Art: The Limits of Overlapping Rule Sets in Online Games

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As long as there have been games there have been rules. And as long as there have been rules there has been the possibility of breaking them.[1]

INTRODUCTION

This Paper examines some of the issues that arise from massively multiplayer online games (MMOGs), not only from the existence of game platforms across global jurisdictions, but also from the ways in which a number of different rule

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1. Julian Kücklich, *Homo Deludens: Cheating as a Methodological Tool in Digital Games Research*, 13 CONVERGENCE 355, 362 (2007).

sets apply to games. Much as citizens find themselves subject to the rules of particular local authorities, state governments, and federal governments—and sometimes there are tensions between the different sets of rules these bodies seek to implement—the intersection of game rules, legal rules, and social norms or community rules also creates a number of tensions worth exploring.

We are interested in the question of whether there are any legal rights or norms that should override game rules, and also in the issue of enforcement of rules and accountability. In considering people's consciousness and deployment of various rule sets, we are engaged in a study that employs frameworks from critical legal pluralism and legal consciousness studies.[2] Online digital games provide an interesting case study for the negotiation of intersecting rule sets or "laws" (in a very expansive definition of law that includes socially constructed normative orders). Our reason for doing so is, in part, to address the phenomenon we have observed of state-based law competing with other rule sets and not always succeeding in being the central and dominant force in regulation of online environments.

To tease out the issues we will first consider the function of rules in games and the ways in which they deliberately alter the rules of "everyday life." Understanding games as necessarily deploying alternate sets of rules then raises the question of whether there are any rules that should be quarantined from such changes. Should game companies be constrained in the contractual agreements they enter into with players about the way affairs proceed inside a gamespace? At what point and for what reasons might a participant reasonably turn to the external legal system for redress for an in-game injustice? And at what point should governments intervene in the conduct of the game? Should there be limits placed on the rights a contract can ask a participant to forgo, and in what circumstances? In what ways should governments consider intervening in matters such as content regulation, discrimination, hate speech, freedom of speech, privacy, and other causes of action? These are all questions complicated by the existence of game platforms that cross national boundaries and legal rule sets, as well as the issues that may subsequently arise from the cross-cultural diversity of standards and norms. Thus, this Paper works in the territory of critical legal theory and its intersection with some forms of legal pluralism. It investigates "the dynamic interconnections between normative orders,"[3] positioning the law among

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2. For discussion of the tenets and arguments for and against these frameworks see ROSIE HARDING, REGULATING SEXUALITY: LEGAL CONSCIOUSNESS IN LESBIAN AND GAY LIVES 8–34 (2010). She argues that a combination of studies in legal consciousness and legal pluralism offers not only an empirical description of actual deployments and understandings of law and legality in everyday life, but a means of theoretical critique of legal centrism and legal monism that is pervasive in legal studies.

3. Margaret Davies, *Legal Pluralism*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH, 806 (Peter Cane & Herbert Kritzer eds., 2010)*; see also* John Griffiths, *What Is Legal Pluralism?*, 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986).

a set of competing orders that span social, community, commercial, and global contexts. The Paper suggests that explicit rule sets, found in orders such as the law and game codes, compete with tacit and social rules that introject such systems. The multilayering of the various competing orders makes for a dynamic and constantly changing process of negotiation of the limits of different rules (encompassing legal, illegal, and nonlegal rules) by players and by game owners, designers, and regulators. It is a process-oriented approach that attempts to understand the different discursive constructions present within MMOG spaces.

MMOGs can have player populations the size of small nations (World of Warcraft had 11.1 million registered and active accounts in 2011).[4] They are usually proprietary spaces, despite their often quasi-public feel. Given the relatively large numbers of people subjected to the governance of private corporations within these spaces, and given that many of these players spend significant amounts of time and frequently money on the game world, the issue of how rules are both established and enforced within game worlds is important.

We begin this Paper by exploring the nature of gamespace. Rather than characterizing gamespace as separate from "the real world" and quarantined by the magic circle, we use the concept of heterotopias, as outlined by Foucault, as a more useful prism for understanding the altered articulation of rule sets found in gamespaces. This Paper will then consider a range of in-game activities by players and question whether such activities, including modding, griefing, and cheating,[5] should be characterized as legitimate forms of behavior, social activism, and/or protest, and therefore be protected by the application of external laws. We will analyze a spectrum of disruptive practices and assess the legitimacy of antisocial activity in MMOGs according to various community norms and ethical and legal criteria, including the legality of such behavior under the terms of the relevant End User License Agreements (EULAs) and applicable external laws. Our argument suggests that the emergent gameplay in online games, and the tacit community norms that result from unpredictable and somewhat unregulated play, create a level of uncertainty and tension about which regulatory body should arbitrate and resolve conflict. In examining four cases where conflict has arisen, and considering the characterization of the conflict by the participants and the strategies they employed to resolve the conflicts, we can observe the various constructions of legality that emerge.

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4.   Frank Cifaldi, *World of Warcraft Subscriptions Continue to Decline, Though More Slowly*, GAMASUTRA (Aug. 3, 2011), http://www.gamasutra.com/view/news/36351/World_of_Warcraft _Subscriptions_Continue_To_Decline_Though_More_Slowly.php.

5.   The term "modding" refers to modification to the game and its assets made by players and can encompass changes to artwork, coding and artificial intelligence algorithms. "Cheating" refers to breaking rules, and "griefing" refers to deliberately spoiling play for other players. These terms are discussed more thoroughly below.

I. GAME RULES, THE MAGIC CIRCLE, AND HETEROTOPIAS

Games achieve their status as games through devising sets of rules that vary from the "rules" of everyday life. Players then consent to these rules in order to enter the game and play. Huizinga first defined a game through its establishment of this magic circle in 1938 in his seminal work *Homo Ludens*.[6] Huizinga examined the way in which a separate order is created by the game rule set. He suggested that the game world was completely separate from the ordinary world. While some games theorists argue for this separation,[7] other theorists have since argued that this complete separation is a myth.[8] There are many ways in which the ordinary world intrudes, and the boundary between game world and ordinary world is permeable.[9] As Consalvo suggests, "the concept of the magic circle seems static and overly formalist. Structures may be necessary to begin gameplay, but we cannot stop at structures as a way of understanding the gameplay experience."[10] Those who argue for the magic circle are, in some ways, arguing for a separate jurisdiction in which the state should have no role, and in which game owners and providers should hold the power to determine the conduct of the game.[11] While such schemas seem neat in their delineation of powers, they tend to ignore the agency and power of the communities and players as well as the introjections of the nongame world into the game world, despite the cries for adherence to the

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6. JOHAN HUIZINGA, HOMO LUDENS: A STUDY OF THE PLAY ELEMENT IN CULTURE (Beacon Press 1971) (1938); *see also* KATIE SALEN & ERIC ZIMMERMAN, RULES OF PLAY: GAME DESIGN FUNDAMENTALS (2004).

7. *E.g.*, RICHARD BARTLE, DESIGNING VIRTUAL WORLDS (2004); EDWARD CASTRONOVA, SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES (2005); F. Greg Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1, 3 (2004); Richard Bartle, *Pitfalls of Virtual Property*, THEMIS GROUP (April 2004), http://www.themis-group.com/uploads/Pitfalls%20of %20Virtual%20Property.pdf.

8. Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 McGill Law Journal 427 (2008) [hereinafter Fairfield, *Anti-Social Contracts*]; Joshua A.T. Fairfield; *The God Paradox*, 89 B.U. L. Rev. 1017 (2009) [hereinafter Fairfield, *The God Paradox*]; Joshua A.T. Fairfield, *The Magic Circle*, 92 Vand. L. Rev. 823 (2009); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005).

9. *See* Rebecca Farley, *Game*, 3 M/C: J. MEDIA & CULTURE 5 (2000), *available at* http://journal .media-culture.org.au/0010/game.php, for a discussion on the persistence of physical injury incurred in sport beyond the duration of the game; *see also* MIA CONSALVO, CHEATING: GAINING ADVANTAGE IN VIDEOGAMES (2007) (considering the area of walk-throughs, game guides, cheats and alternate reality games that all breach the boundary); Edward Castronova, *The Price of Bodies: A Hedonic Pricing Model of Avatar Attributes in a Synthetic World,* 57 KYKLOS 173 (2004); Richard Heeks, *Current Analysis and Future Research Agenda on "Gold Farming"* (Development Informatics: Working Papers Inst. for Dev. Pol'y and Mgmt., Manchester U. 2008), *available at* http://www.sed.manchester .ac.uk/idpm/research/publications/wp/di/di_wp32.htm (on secondary economies that move the game economy into the sphere of real economic activity).

10. Mia Consalvo, *There is No Magic Circle*, 4 GAMES AND CULTURE 408, 415 (2009).

11. *E.g.*, Richard Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19 (2004); Edward Castronova, *The Right to Play*, *in* STATE OF PLAY: LAW AND VIRTUAL WORLDS 68, 68 (Jack M. Balkin & Beth S. Noveck eds., 2006).

separation.[12] The conception of power inherent in the magic circle is very much a top-down understanding.[13] The simplification of space into a coherent and self-contained bubble of social activity ruled by the game owners or providers ignores the reality of the many bottom-up resistances, strategies, and negotiations that take place, without necessarily referencing state-based law or owner-based rules and their mechanisms of governance. It also ignores the cultural baggage that all players and regulators bring with them into the space from outside. All space is socially constructed,[14] and all games will operate on the basis of socially constructed understandings of the players, the game designers, and the providers. To dream of a separation of the gamespace from other social spaces is to wish for a utopian simplicity that will never be available.

It may be more useful to use Foucault's notion of heterotopias to characterize gamespaces, not as separate, but as cultural spaces reordered in a way that is still working in relation to everyday spaces.[15] In recognizing that every society still has a notion of the sacred and profane—that there still remain some spaces that are "sacred"[16]—Foucault suggests that some of these spaces are not utopian (which he characterizes as placeless places—because they are aspirational, never real) but heterotopian—connected to all other spaces at the same time as they invert them. The heterotopic space contains orders that operate on an oppositional logic to ordinary everyday spaces without insisting on a complete separation.[17] Foucault suggests we have entered an era where space is conceptualized according to the relationships among sites.[18] Heterotopias are particular kinds of sites that we can read through the following six characteristics.

First, every culture has these spaces. "They are sites that have a general relation of direct or inverted analogy with the real space of society."[19] They take varied forms, but often involve the corralling of deviant behaviors.[20] In relation to games, it is often suggested that games are places to experiment with taboo behaviors; for instance, to be terribly violent or behave "badly" or perhaps deviate from gender norms by playing as a character of another gender. Some consider a game as an opportunity to discharge aggressive feelings in a safe way which has no

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12.   Joshua A.T. Fairfield, *The Magic Circle*, 11 VAND. J. ENT. & TECH. L. 823, 824 (2009).

13.   Lastowka & Hunter, *supra* note 7, at 10.

14.   BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1991); DOREEN B. MASSEY, SPACE, PLACE AND GENDER (1994).

15.   Michel Foucault, *Of Other Spaces*, DIACRITICS, Spring 1986, at 22, *available at* http://foucault.info/documents/heteroTopia/foucault.heteroTopia.en.html.

16.   *Id.*

17.   *See* GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 117–118 (2010).

18.   Foucault, *supra* note 15, at 23.

19.   *Id.* at 24.

20.   *Id.* at 25.

"real" effect on other people.[21] We can thus identify a particular discourse about games that positions them as deliberately available for deviant behavior. However, this becomes problematic in working out how to regulate gamespace. How do the "referees" in a game ensure that the tacit rules about deviant behavior are both agreed upon and understood? How far can the boundaries be pushed before the deviant behavior is considered too poor even for the game? These are highly contingent matters.[22]

Second, the function of the heterotopic space can change over time. In arguing for historical and cultural specificity, Foucault uses the cemetery in western cultures as an example of a heterotopic space that shifts from its place in the center of town, next to the church, before it eventually occupies a space on the edge of town. In this process, death has been transformed within these cultures from being understood as a transition to heavenly space to being an "illness" associated with contagion. Thus the cemetery still exists as a space, but it transforms with the evolving culture.[23] Thinking about this in relation to online games allows for an understanding of the role of games to change and evolve, and the emergent nature of gamespace to be understood. Online digital games and their functions will always be historically and culturally specific in their significance and in the ways they change over time. Flexibility rather than rigidity is a useful aspect of the model when thinking about the tacit rules of gamespaces. Humphreys and others[24] have argued elsewhere that MMOGs in particular are in constant production—never a finished text in the way of some other media products—and that players contribute in significant ways to the evolution of games through their playing and their productive activities such as modding.[25] In part it is their social interactions that drive this emergent and evolving characteristic. Thus, in understanding and developing policies and attitudes toward the conduct of games, we need to remain flexible and open to the contingencies and specificities of games.

Third, a "heterotopia is capable of juxtaposing in a single real place several

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        21.   *See* Brad J. Bushman & Jodi L. Whitaker, *Like a Magnet: Catharsis Beliefs Attract Angry People to Violent Video Games,* 21 PSYCHOL. SCI. 790 (2010); Thomas Nys, *Virtual Ethics*, 17 ETHICAL PERSP. 79 (2010).
        22.   *E.g.*, Melissa de Zwart, *Piracy vs. Control: Models of Virtual World Governance and Their Impact on Player and User Experience*, 2 J. VIRTUAL WORLDS RES. 3 (2009) (discussing the world of EVE Online, where players are encouraged to engage in piracy, murder, and looting).
        23.   Foucault, *supra* note 15, at 25.
        24.   John A. Banks, *Opening the Production Pipeline: Unruly Creators*, *in* WORLDS IN PLAY: INT'L PERSP ON DIGITAL GAMES RESEARCH 143 (Suzanne De Castell & Jennifer Jenson eds., 2007); Sal Humphreys et al., *Fan Based Production for Computer Games: User Led Innovation, the 'Drift of Value' and the Negotiation of Intellectual Property Rights*, 114 MEDIA INT'L AUSTL. 16 (2005); Hector Postigo, *Video Game Appropriation Through Modifications*, 14 CONVERGENCE 59 (2008).
        25.   Sal Humphreys, *Productive Players: Online Computer Games' Challenge to Conventional Media Forms*, 2 J. COMM. & CRITICAL/CULTURAL STUD. 36 (2005).

spaces, several sites that are themselves incompatible."[26] The aptness of this description for online games—where players sit in a room (maybe a bedroom, a lounge room, or an Internet cafe in a specific country) and play in a gamespace inside the global network and through screens representing three-dimensional scenarios quite different from the room—is clear. The multiplicity of spaces that pertains to the single experience is one of the things that complicates regulation. Foucault talks of the development of oriental gardens over thousands of years as spaces where a larger universe is represented within the smaller space of the garden so that the walker experiences something quite other than the surrounding location would afford.[27] This description fits rather well with the space of online games, where fictional worlds are created and experienced contiguously with offline spaces.

Fourth, heterotopias are linked to slices of time.[28] One example of this that Foucault gives is that of the festival or fairgrounds. A person enters the space for a delineated period of time and experiences something different. Games are very much linked to slices of time. A person plays for a length of time, and then stops playing. The game is marked off temporally as well as spatially.

Fifth, heterotopias are not public spaces—entry requires permission, and exclusions are made. There is a "system of opening and closing that both isolates them and makes them penetrable."[29] Sometimes entry requires rituals, sometimes entry is compulsory, sometimes it is very open—but the space is defined by exclusions rather than fulfilling requirements to enter. MMOGs have a number of rituals (logging on, for instance) and requirements (payment of fees, etc.) that mark the start of playing, and a number of means of exclusion (from community exclusions using social mechanisms to computer-coded denials of access to commercial mechanisms that require payment for access). As mentioned earlier, the gamespaces available online are for the most part proprietary rather than public.

Finally, heterotopias function *in relation to* all other space that remains. Foucault suggests they can either work as a space of illusion that exposes the illusion of real spaces, or as a space of order in the face of the chaos of real space.[30] We can see how digital games can fit either of these ways of characterizing space—reflecting back the real world we live in, in ways that expose it to scrutiny and reflection, or making possible a sense of order and control to prevail when no such thing is available to us in our real lives.

Understanding online gamespaces through the model of heterotopias gives us the ability to characterize games not as completely separate, and hence subject

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26.   Foucault, *supra* note 15, at 25.
27.   *Id.*
28.   *Id.* at 26.
29.   *Id.*
30.   *Id.* at 27.

only to the rules of the game, but as spaces interrelated with other "real" spaces and subject to a variety of cultural and legal rules. The articulation of that complexity is something that publishers, legal practitioners, governments, and players are still exploring and negotiating.[31]

Online game worlds as heterotopias continue the tradition of all games' dependency on rule sets as a mechanism of differentiation from real-world spaces, and on player consent to such rule sets. In this way, game worlds can be quite different from other online spaces (such as social networking sites or virtual worlds). It is important to make this distinction and to understand that discussions about the intersection of legal rules and online game rules do not necessarily pertain to other online virtual worlds that do not characterize themselves as games. However, the permeability of the game-world boundary does create interesting grey areas that excite much debate about "jurisdiction." Who should be responsible for enforcement, and of which rule set, is not always clear. It is not clear, for example, in games such as World of Warcraft, where players may spend upwards of twenty hours a week inside the gamespace, that all activity constitutes gameplay.[32] (For example, players may spend time socially within a game, as opposed to actually playing the game.) This is an example of the permeability of the space and its embeddedness in other places and cultural or social regimes.

Because interactivity allows for the agency of players to varying degrees, much of what occurs in game worlds is derived from player action, creativity, and imagination. The consequent emergent behaviors, tacit rules and norms, and user-generated content present a reality of bottom-up construction of "legality." How are we to understand the role of state-based law and its articulation with this emergent and socially constructed set of negotiations, as well as with the game-based rules? And given the various cultural tolerances across the globe for different kinds of behavior, which legal rule sets should be brought to bear in a cross-jurisdictional setting? Understanding how the players themselves construct a sense of legality and negotiate conflict (which is, at another level, often the heart of gameplay itself) gives us insights into the flows of power and resistance that exist within the gamespace, and a clear example of the decentering of state-based law as the determining set of rules through which people operate.[33] Thus, we argue not only for the social construction of space, but also for the social construction of legality pertaining to that space.

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31. *E.g.*, European Network & Info. Security Agency, Virtual Worlds, Real Money (2008), *available at* http://www.enisa.europa.eu/activities/identity-and-trust/past-work-areas/massively-multiplayer-online-games-and-social-and-corporate-virtual-worlds/security-and-privacy-in-virtual-worlds-and-gaming.

32. For an extended ethnographic study of the range of player experiences in World of Warcraft, see William Sims Bainbridge, The Warcraft Civilization (2010).

33. See Patricia Ewick & Susan S. Silbey, The Common Place of Law (1998), for a discussion of how peoples' understandings and construction of the law and legality create or constitute legality.

II. End User License Agreements

The end user license agreement (EULA) is the mechanism that attempts to articulate the terms of interface between rule sets of the game and real-world law, and between the publishers and the players. Often these lengthy contracts are used in conjunction with a terms of service agreement and a rules of conduct document. There are a number of difficulties with the EULA as an instrument of governance in these contexts.

First, the fact that lawyers draft the terms of the EULAs of many games for the purpose of avoiding liability and risk, and not for the purpose of governance, creates a fundamental flaw in the EULA as a governance document.[34] Thus, while there may be supplementary rules such as the rules of conduct, the rules as laid out in a EULA may never actually align with the practices of the publisher in its governance of the online game. Players often see the EULA terms as unenforced, so many players do not see them as meaningful documents.[35] This is not helped by the language that most EULAs are written in—high legalese—and the inability of most users to understand them. They are standard-form clickthrough contracts that are rarely read. They do not represent meaningful informed consent on the part of the player, and as such they stand apart from the user's understanding of game rules and from the user's consent to participate in the game.[36] The first set of game rules that is meaningful to the player is likely to be the rules that are hard coded (rules which can be changed only if the user changes the game's source code) into the environment and that are difficult to break without cheating. The second set is likely to be the community rules and norms that are tacit within the environment and that may vary—from community to community and server to server.[37] As the EULAs tend to cater to worst-case scenarios and try to manage risk for the company when things go terribly wrong, they are not uniformly enforced by the game managers or customer service team that works inside the game, and therefore many players do not see the EULAs as relevant.

The EULA is the contractual document between the private parties of the player and the game provider, but it is also the interface between private law and public law. It is the document that courts consider when either private party seeks

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34.   Lastowka, Virtual Justice, *supra* note 17, at 94 ("In essence, the contractual rules of the average world are not designed as mechanisms of governance but as defensive measures to protect virtual world owners.").

35.   Melissa de Zwart & David Lindsay, *Governance and the Global Metaverse*, *in* Emerging Practices in Cyberculture and Social Networking 65, 77–78 (Daniel Riha & Anna Maj eds., 2010).

36.   Fairfield, *Anti-Social Contracts, supra* note 8, at 447–59.

37.   *See* T.L. Taylor, *Does WoW Change Everything? How a PvP Server, Multinational Player Base, and Surveillance Mod Scene Caused Me Pause*, 1 Games and Culture 318 (2006) (discussing European servers and their difference from U.S. servers, as well as community policing and lateral surveillance within games).

redress for a variety of injustices.[38] As such, it can be seen to articulate the relationship between government, real-world law, players, game publishers, and game rules. Sadly, it generally fails as a meaningful articulation of this relationship, being a one-sided document that attempts to secure the position of the publisher rather than to establish governance protocols.[39] Further undermining the effectiveness of the EULA as a governance and/or problem solving mechanism is the fact that players have no input into its drafting or negotiation. Although a contract is often lauded as enabling a context-specific bargain for the benefit of both parties, a EULA is drafted on behalf of the provider and imposed upon the user. As the player has no opportunity to negotiate its terms, the EULA cannot be seen as having been endorsed or adopted by the players, who have no choice regarding their participation in the game other than exit. Further, as the contract is between the provider and the player, it does not provide an effective mechanism for regulation of conduct between players. It is purely a regulatory mechanism imposed from above.[40]

We need to consider the EULA as just part of a complex raft of regulatory regimes in operation—from the computer code to the community norms, from the government content regulation schemes to the publishers' in-game community management.

III. BREAKING THE RULES

One way to examine the issues at stake here is to look at various rule-breaking scenarios to see what the recent responses have been, and to explore the discussions and controversies that have been generated around such incidents. Cheating in games comes in many forms.[41] Some forms of cheating are reasonably straightforward cases of breaking the explicit rules of the game. However, there are some forms of cheating where things are not so clear: where the behavior of the player or players may be breaking either the internal, implicit, social, and

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38.   See, for example, the litigation relating to Second Life (which is not an MMOG, but shares many relevant characteristics, including a one-sided EULA), *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007), and *Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735 (E.D. Pa. 2011).

39.   Dan L. Burk, *Authorization and Governance in Virtual Worlds*, 15 FIRST MONDAY 1 (May 3, 2010), *available at* http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2967/ 2527; Dale Clapperton & Stephen Corones, *Unfair Terms in "Clickwrap" and Other Electronic Contracts*, 35 AUSTL. BUS. L. REV. 152 (2007); Andrew Jankowich, *EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 1–5 (2006).

40.   Melissa de Zwart, *Contractual Communities: Effective Governance of Virtual Worlds*, 33 U.N.S. WALES L.J. 605 (2010); Fairfield, *Anti-Social Contracts*, *supra* note 8; Fairfield, *The God Paradox*, *supra* note 8; Jankowich, *supra* note 39.

41.   Definitions of cheating can be found in CONSALVO, *supra* note 9; Stefano de Paoli & Aphra Kerr, *The Assemblage of Cheating: How to Study Cheating as Imbroglio in MMORPGs*, FIBRECULTURE J. (July 10, 2010), *available at* http://sixteen.fibreculturejournal.org/the-assemblage-of-cheating-how-to-study-cheating-as-imbroglio-in-mmorpgs; Stefano de Paoli & Aphra Kerr, *We Will Always Be One Step Ahead of Them*, J. VIRTUAL WORLDS RES. (Feb. 2010), *available at* http://journals.tdl.org/jvwr/ article/view/865.

community norms of the game, *or* the legal or cultural norms of the outside world, on the understanding that gamespace is a heterotopic space where such norms are available for reordering. Given that these are usually implied understandings, the enforceability of such norms comes into question time and again. The coexistence of explicit and implicit rules, and the variety of assumptions made about the interactions between these rules and norms are where many certainties come unstuck. Game publishers as service providers have the job of maintaining functional services based on a combination of explicit and implicit rules and norms associated with the game and the nongame context of the game. Given the often cross-jurisdictional and cross-cultural scope of the game service, this can be a particularly difficult task.[42]

Players may have many motivations to cheat: to gain advantage in a game, to win at all costs, to overcome being "stuck." Definitions vary from player to player. One player may consider using a walk-through guide to a game as cheating, and another may consider it a legitimate strategy.[43] Definitions are often contextual rather than universal. Some players expect others to cheat and may, on occasion, cheat themselves, based upon their understanding that everyone else is cheating. Some players break the rules to spoil the game for other players—what Consalvo calls "spoilsport behavior."[44] Kücklich points out that some players cheat as a form of playing—as a meta-game of playing with the game rules.[45] He suggests that cheating can be a way of denaturalizing the coherence of gamespace—of bringing out the underlying coded rule structure of the space.[46] It can be a form of resistance to corporate governance of the space, or lateral peer-to-peer policing. There can be social functions of cheating that establish power relations among players.

Sometimes the definition of cheating varies between the player and the publisher. What the publisher thinks of as exploiting a bug in the code, the player may think of as particularly advanced play, built on an accumulation of knowledge and expertise about the game, unavailable to lesser players, and derived through a complex understanding of the game.

IV. GRIEFING

Griefing is a form of play that has overlap with cheating but is not always defined as cheating. Griefing involves players "purposefully engaging in activities

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42.   *See* Taylor, *supra* note 37.
43.   Consalvo, *supra* note 10, at 409.
44.   *Id.*
45.   Kücklich, *supra* note 1, at 355–67.
46.   *Id.*

to disrupt the gaming experience of the other players."[47] Griefing is seen to be malicious and damaging to the experience of other players, rather than directed at gaining advantage or progressing in the game. It might be characterized as breaking community norms and expectations more than code or explicit rule sets. Foo and Koivisto identify four different categories of motivation in players who are grief players.[48]

Some motivations are game influenced: they are enabled by the anonymity available, by boredom, or by greed. Players may be testing the limits of the game, or perhaps succumbing to game pressure, where the bad behavior is the result of being overwhelmed by the demands of the game.[49]

The second set of motivations Foo and Koivisto[50] identify are player influenced. A player may operate out of spite, to exploit victim vulnerability, or to exact revenge on other players.

The third set of motivations is griefer influenced. The griefer may set about griefing other players in order to become part of a group—a form of ritualization and group identity. This can also be seen as reputation driven—usually within the griefer group, but also if the player is seeking a broader reputation as someone who is "bad."

The final set of motivations appears to be driven by the internal state of the player.[51] The player may be in a bad mood, or acting on a desire for power or attention. The player may take pleasure and enjoyment from grief play or, finally, may construe the behavior as role-play and perfectly within character for his or her current avatar role.

Thus, in games there are numerous ways in which rules are broken through cheating and griefing. The rules may be the explicit rules set up through code or the code of conduct, or the tacit rules of community norms, which are open to challenge, misunderstanding, and negotiation. They may also be the rules of real-world law.

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47. JESSICA MULLIGAN & BRIDGETTE PATROVSKY, DEVELOPING ONLINE GAMES 250 (2003); *see also* Burcu Bakioglu, *Spectacular Interventions in Second Life: Goon Culture, Griefing and Disruption in Virtual Spaces*, 1 J. VIRTUAL WORLDS RES. 3 (Feb. 2009), *available at* http://journals.tdl.org/jvwr/article/view/348.

48. Chek Yang Foo & Elina M.I. Koivisto, Grief Player Motivations (Dec. 2004) (paper presented at the Other Players Conference, Center for Computer Games Research, IT University of Copenhagen, Denmark, Dec. 6–8, 2004), *available at* http://www.medeley.com/research/grief-player-motivations [hereinafter Foo & Koivisto, Grief Player Motivations]; *see also* Chek Yang Foo & Elina M.I. Koivisto, Defining Grief Play in MMORPGs: Player and Developer Perceptions (2004), in Proceedings of the 2004 ACM SIGCHI International Conference on Advances in Computer Entertainment Technology 245–50, *available* at http://dl.acm.org/citation.cfm?id=1067375 [hereinafter Foo & Koivisto, Defining Grief Play].

49. Foo & Koivisto, Grief Player Motivations, *supra* note 48, at 1–2; Foo & Koivisto, Defining Grief Play, *supra* note 48, at 2–3.

50. Foo & Koivisto, Grief Player Motivations, *supra* note 48.

51. Foo & Koivisto, Defining Grief Play, *supra* note 48, at 3.

V. User-Generated Content, Creativity, and Pushing the Boundaries

In this context, it is important to recognize that players are not passive in their relationship to the game. As well as "playing," and thereby interacting with the game, many are also deliberately creating content for the game.[52] This is particularly so in the context of the creation of "mods": modifications to the game in the form of tools, user-interface enhancements, new character skins, new levels to play, new code, and new artificial intelligence, often shared with other players over the Internet.[53]

Within this culture of creating add-ons and mods, there has inevitably also arisen a culture of tweaking and distorting the dominant game narrative. A mod might have the effect of throwing the balance of the game or giving unfair advantage to some players. It may detract from the original game in the eyes of some. It represents a loss of control of such production and content by the game provider.[54] Publishers take different stances towards mod communities—some encourage them, drawing on the advantages of collective intelligence, while others consider the loss of control too difficult to incorporate into production and service provision, and attempt to close down at least some of the player-generated creative effort.[55] The player productivity represents the shift towards distributed authorship that the onset of the digital network has inspired. It is part of a more generalized "crisis of expertise" where amateurs and enthusiasts produce creative outputs that rival those of their paid counterparts, and a consonant shift in the perceived location of expertise occurs.

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52.   Greig de Peuter & Nick Dyer-Witheford, *A Playful Multitude? Mobilising and Counter-Mobilising Immaterial Game Labour,* Fibreculture J. (Dec. 1, 2005), http://five.fibreculturejournal .org/fcj-024-a-playful-multitude-mobilising-and-counter-mobilising-immaterial-game-labour   ("Over the last decade or so, authoring tools have been increasingly packaged with computer games, helping to foster a vibrant participatory culture of game modding, or modification. Modders deploy a range of techniques, from changing characters' appearances—skins—and weapons, to designing new scenarios, levels or missions, up to radical departures that amount to building a whole new game— a total conversion—using various authoring tools."); *see also* Olli Sotamaa, *When the Game Is Not Enough*, 5 Games & Culture 239 (2010) [hereinafter Sotamaa, *When the Game Is Not Enough*]; Olli Sotamaa, Computer Game Modding, Intermediality and Participatory Culture (2004) [hereinafter Sotamaa, Computer Game Modding] (unpublished seminar paper), *available at* http://www.uta.fi/ ~olli.sotamaa/documents/sotamaa_participatory_culture.pdf.

53.   Sotamaa, *When the Game is Not Enough*, *supra* note 52, at 3, 5–7; Sotamaa, Computer Game Modding, *supra* note 52.

54.   Jennifer R. Whitson, *Rule Making and Rule Breaking: Game Development and the Governance of Emergent Behaviour*, Fibreculture J. (July 10, 2010), http://sixteen.fibreculturejournal.org/rule-making-and-rule-breaking-game-development-and-the-governance-of-emergent-behaviour.

55.   *See* Yochai Benkler, The Wealth of Networks (2006) (discussing the efficiencies and advantages of such collective activities); Pierre Lévy, Collective Intelligence (Robert Bononno trans., Perseus Books 1997) (illustrating the concept of collective intelligence); *see also* J.C. Herz, *Harnessing the Hive: How Online Games Drive Networked Innovation*, 20 Release 1.0, at 1 (2002).

The inevitable consequence of the rise of user-generated content in the games sphere is, as with music and video mash-ups, a chaotic and profligate use of material that is harvested from other areas of popular culture:

> Modders often import content for an altered game from some other pop culture artefact—either from another game, perhaps owned by a company other than the one that made the original game, or from another media, such as a film. In doing this, these modders are constructing a "commons" of images, characters, and themes, in violation of the corporate enclosures that divide them up into carefully policed proprietary domains.[56]

These mods give rise to intellectual property (IP) issues that are generally strictly monitored and enforced by the IP owners. For example, in 2001 a mod was produced for Quake 3 which featured characters and weapons from Duke Nukem 3D, a title owned by Apogee. Apogee contacted the team that created the successful and well-received mod and threatened them with legal action, stopping development of the mod.[57] Thus, we see the publishers drawing upon real-world law in order to address player activities.

Increasingly these activities have taken on a slightly subversive attitude, prompted at least in part by the strong assertion of IP rights.[58] While most modders are motivated by their love of and desire to extend and improve their gaming experience, some are using the game to critique it or the broader culture. "The wide diffusion of game-making know-how, and the availability of easy to use authoring devices, such as Flash, has led to a spate of alternative games that contribute to the circulation and provocation of struggles associated with feminist, counter-globalisation, and anti-war movements."[59]

As Irene Chien has observed in the case of machinima (movies made within games, using game environments and characters to enact scenarios not necessarily associated with the game theme, and then publishing these movies on the Internet), and in particular machinima made in violent war games, it is its very self-reflexivity that allows its creators "to make such potent critiques of mediated war fantasy."[60] The example discussed by Chien is the well-known Red vs. Blue series which employs the characters and context of the Halo universe to critique both the repetitive and violent nature of the game and the banality and meaninglessness

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56. De Peuter & Dyer-Witheford, *supra* note 52.

57. *See* Postigo, *supra* note 24, at 62–66 (discussing a similar issue generated by the creation of the GI Joe mod for Battlefield 1942).

58. *See* Dorothy E. Warner & Mike Raiter, *Social Context in Massively-Multiplayer Online Games (MMOGs): Ethical Questions in Shared Space*, 4 INT'L REV. INFO. ETHICS 46 (2005). Griefing may also occur as a response to censorship, for example, the ban in Germany on the display of Nazi symbols and U.S. restrictions on nudity and sex.

59. De Peuter & Dyer-Witheford, *supra* note 52.

60. Irene Chien, *Playing Against the Grain: Machinima and Military Gaming, in* JOYSTICK SOLDIERS 240, 241 (Nina B. Huntemann & Matthew Thomas Payne eds., 2010).

of war, in particular, the Iraq war.[61] The characters in the game cannot die, and therefore they cannot even use death to escape their meaningless existence as cannon fodder for unseen powers.

   User creativity and user-generated content can thus represent a loss of control for publishers, but can also engender nonplay activities such as social critique, political protest, and other forms of activity that bring issues of freedom of speech—a right derived from real-world law—into the proprietary spaces of games.

VI. POLICING AND SANCTIONS—WHOSE JOB IS IT TO ENFORCE RULES?

   Within this complex system then, we have a number of different rule sets in play. There are the explicit and often hard-coded game rules. There are legal documents such as end user license agreements, terms of service, and rules of conduct. There is a range of community norms inside the game and outside the game. These may well be at odds with each other, and the heterotopic function of games as spaces of otherness and reordering legitimates (at least in the minds of some players) the differences between internal game community norms and external societal community norms. However, as with most community norms, the rules are tacit, open to interpretation and misunderstanding. There are also rules in the form of the laws of society and government regulations. Sometimes there is a clear case for the consensual suspension of these rules, as when a game like EVE Online makes piracy and theft part of the gameplay.[62] But other laws may be less open to suspension through consent.

   Operating within this complex environment of overlapping rules are players who are differently motivated and differently located (making some jurisdictional questions and cultural norms questions even more complicated), and who may break the rules in a range of ways. They may deliberately cheat and break explicit game rules, or they may indulge in griefing that contravenes community norms. They may even engage in productive and creative behaviors that result in mods that break real-world laws. They may engage in acts that contravene game norms, but which they argue are part of a right to free speech and protest.

   The task of governance is distributed across a similar number of levels.[63] Players themselves act to police community norms, game providers have customer service or game community managers who attempt in-game governance, lawyers and publishers police a variety of infringements around IP, and the government may act to regulate content. But there is often a blurring of boundaries between

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61.   *Id.*
62.   De Zwart, *supra* note 22.
63.   *See* Sal Humphreys, *Ruling the Virtual World: Governance in Massively Multiplayer Online Games*, 11 EUR. J. CULTURAL STUD. 149 (2008).

the jurisdictions of these various bodies, particularly in the face of the emergent activities of players, which are both hard to control and hard to predict.

Figure 1: Rules and Norms Pertaining to Online Games
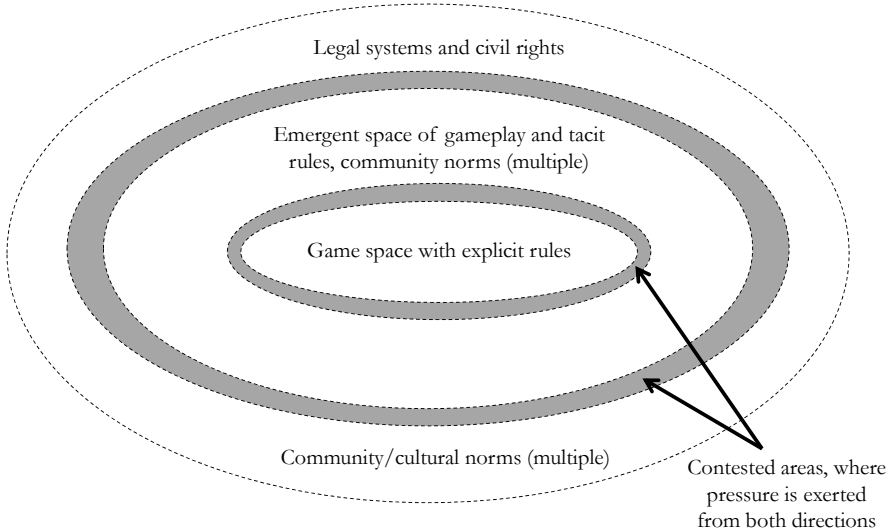
The emergent space created by player interactivity and community exerts pressure both in an inward direction on the game rules, and an outward direction on the legal rules and norms of the world outside the game, even as those same rule systems exert pressure on the players and publishers to behave in particular ways. The EULA is the instrument that is supposed to manage the interface between the systems, but it currently seems inadequate to the task.

VII. CASE STUDIES

We want to look at four different cases of rule breaking and the responses to them as they illustrate a number of different ways that disruptions raise issues about rules and their enforcement.

The first, Twixt, looks at the behavior of a player who followed the rules of the game but not the tacit community rules. The second is the case of the World of Warcraft funeral massacre, in which one guild massacred the players of another guild while they were holding a funeral for a member who had died in real life. This was a case of breaking some external community norms but not game rules. The third case is about the gay, lesbian, bisexual, and transgender (GLBT) World of Warcraft guild that was threatened with account bans for advertising a queer-friendly guild in the general chat channel of the game. In this case, the game management sought to apply a game rule in a rather distorted manner and was

threatened with legal action on the grounds of discrimination. This case looks at the intersection of real-world law, game rules, and community policing. The fourth case examines the work of a performance artist who logged into the America's Army game (a recruitment tool used by the U.S. Army) with the name "dead-in-iraq" and, over a period of some months, typed in the names of all the soldiers killed in the Iraq war. This case raises issues of freedom of speech within gamespaces, but also looks at the question of breaking the community norms of a game by failing to play.

A. Case Study One: Twixt

In the first case study, the behavior of David Myers (an academic games theorist who subscribes to a formalist understanding of games) in the superheroes game City of Heroes (CoH) raises questions of playing against the socially agreed norms of the community while complying with the broader game rules (and possibly narrative).[64] Myers, through his avatar Twixt, attracted the wrath of the player community, inspiring death threats both inside and outside of the game world. Myers rigidly adhered to three sets of behaviors permitted by the game rules but modified by social norms within the game. These behaviors were:

- ❖ Engaging in aggressive player versus player (PvP) conduct in areas that other players had mutually agreed should be set aside for leveling up.[65] This involved acts of "droning" and "teleporting" foes into nonplayer characters (NPCs);
- ❖ Refusing to abide by the social agreement not to enter into PvP (heroes versus villains[66]) conduct when the other players were engaged in "farming"[67] or friendly "fight club" competitions. Again, adhering rigidly to the game narrative, Twixt attacked farming villains and interrupted friendly competitions whenever he regarded it as advantageous to do so; and
- ❖ Refusing invitations to join teams of other players, demonstrating Twixt's unwillingness to team with other players.[68]

In defense of his actions, Myers explained:

According to player custom and according to a long series of discussions

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64.   *See* David Myers, *What Formalism Is*, POST-KATRINA BLOG (Jan. 18, 2006), http://dmyersloyola.wordpress.com/2006/01/18/what-formalism-is.

65.   "Levelling up" refers to the promotion of a player within the levels of a game based on skill or performance.

66.   Heroes and villains are the two opposing factions within the game on which PvP interactions are based. Twixt was played in the Hero faction.

67.   "Farming" in a gaming context refers to repetitive play to harvest items that are useful in trade with other players.

68.   *See* David Myers, *Play and Punishment: The Sad and Curious Case of Twixt* (July 20, 2009) (research paper), *available at* http://www.scribd.com/doc/91941537/Myers-Play-Punishment-031508 (Myers's own account of Twixt's conduct and the responses it evoked).

on the CoH/V public online forums, droning and tp'ing into npcs were forbidden. But, from Twixt's point of view, droning and other sorts of aggressive teleporting were quite useful to delay or otherwise thwart villain intentions, particularly in cases where the villain contingent out-numbered hero players within the zone. Therefore, Twixt used the teleport-foe tactic whenever necessary and available; and this single tactic was considered his most severe breach of social etiquette.[69]

Inevitably, Twixt's behavior annoyed the other players, who began to send public messages denouncing his behavior:

> Ok . . . where did this person come from. I know tp foe'ing into mobs is considered "legal" but this person is really getting out of hand. I can deal with his droning no problem, but now he's resorted to tp'ing into turrets and letting you get killed seriously . . . is there anything you can do about this particular individual. i mean it's pretty bad when his own faction hates him, but this guy has got to go.[70]

Over time, Twixt continued to engage in his solo rule-based play, ignoring the criticisms and pleas from the other players to desist. Twixt celebrated and listed his successes in capturing the RV zone[71] "hundreds of times"[72] over the course of the year, posting the combat log listing those players Twixt had defeated, eliciting even more vitriol from the other players. Finally, he was evicted from his "Champion-based supergroup"[73] after droning (killing) the villain alt (alternate avatar) of one of the super-group members. Myers recounts the following period of time when he started to receive increasingly threatening messages: "threats of computer sabotage, real-life violence, and a variety of less speculative (and more achievable) in-game harassments and abuses."[74]

Myers observed that with social rules "in effect, the CoH game becomes less a game and more a society."[75] His repeated attempts to explain that his conduct was consistent with the rules of the game fell on a completely unreceptive audience. Myers notes that "because of the recalcitrance of Twixt's opponents, it became increasingly difficult to interpret embedded player social rules, orders, and behaviours within RV as anything other than a means of repressing individual play and players such as Twixt."[76] Twixt became the subject of a "kill Twixt" game plan. Myers notes that any players who were tempted to follow Twixt's lead were

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69.   *Id.* at 7.

70.   *Id.* at 11.

71.   RV, or Recluse's Victory, was the particular PvP zone where Twixt spent most of his game time, introduced into City of Heroes in 2006.

72.   *Id.* at 12.

73.   Myers, *supra* note 68, at 13.

74.   Myers, *supra* note 68, at 14 (Myers notes that this behaviour manifested itself in very similar patterns on all three servers Twixt was playing on).

75.   David Myers, *Was Twixt's Behavior Worthy of Wrath?*, POST-KATRINA BLOG (July 8, 2009), http://dmyersloyola.wordpress.com/2009/07/08/was-twixt's-behavior-worthy-of-wrath.

76.   Myers, *supra* note 68, at 15.

subjected to the same social pressure and ultimately altered their gameplay or left RV. He observes that this outcome limited both the number of new tactics and new players who could challenge the dominant players in that zone.[77]

Myers concludes that Twixt's worst transgression in terms of the dominant player population was that his tactics "made him *unlikable*."[78] Ultimately, the dominant social group was repressive and acted to prevent individuals exploring idiosyncratic play.

Thus the sociocultural norms of the game in this case trumped the explicit, coded game rules. As community groups do not have access to the same regulating mechanisms as the programmers who use game code or the community managers employed by the game publisher, they deploy sanctions and exclusions familiar to us from the contexts of our everyday lives. People ganged up on Twixt and resorted to threats, public humiliation, and exclusion from formal group structures. While Twixt refused to conceptualize the gamespace as an inherently social space with social norms, other players clearly deployed a more nuanced understanding of the space that incorporated the flexibility and emergent characteristics of the space rather than a letter-of-the-law approach. Thinking through Foucault's heterotopic frame, the space has the characteristics of changing over time, with the changes driven by social forces.

B. Case Study Two: The World of Warcraft (WoW) Funeral Massacre

In this example we see the convergence of online and offline spaces, events, and issues result in a long debate over who should take responsibility for what some players read as griefing and others read as legitimate gameplay. We use it to illustrate the way in which policing behavior and applying rules is not straightforward in this arena. Although we think there are no real grounds for any application of real law in this situation, we use it as a means of exploring how cultural norms from outside the game were used by some players and ignored by others. Thus, a sense of "moral" transgression arose, with some players arguing that such sensibilities should be suspended in the gamespace and others clearly drawing a line at how many of our ideas of respectful behavior can be suspended within the gamespace.

Briefly, a guild on a PvP server (in which it is legitimate for players to attack each other in certain zones of the game) had one of its long-standing members die in real life. Guild members decided to hold a memorial service for her in World of Warcraft, which was the context from which most of them knew her. Another guild from the opposing faction swarmed into the memorial service and massacred all the players from the mourning guild. They then posted a video of the massacre online on YouTube that included footage of the massacre and

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77.   *See id.*
78.   *Id.* at 19.

finished with a banner screen with the text "Sorry for your loss" and "Yes we know we are assholes. :-D."[79] Outrage and debate ensued at this behavior, which was defined by some as griefing, and by others as legitimate play that did not break any rules. What was interesting about the bulletin board discussions, both among players and also among academic commentators on Terra Nova, was the complete lack of consensus about the legitimacy and morality of this event.[80]

To distil the main points that emerged, some people asserted that it is the players' responsibility to look after themselves in this context. The mourning guild members should have known better on a PVP server and protected themselves adequately or held the memorial in a safe zone. They also should not have stepped outside the rules of the game—they broke the "role-playing magic circle" and brought real-world issues into the gamespace without the consent of other players. They expected other players to consent to a temporary rule change (i.e., not to kill them while they held their service) without consultation or agreement with those other players. Therefore, the players holding the memorial were at fault rather than the players who killed them.

Others invoked morality as the issue, observing that some players are bullies, and that in-game actions have out-of-game consequences. This stance clearly eschews the idea of the magic circle as a convenient fiction that ignores real-world intrusions that are clearly part of the game. The opinion here was that people should behave better, and should not be given license to behave badly by the publisher. The genuinely grieving players were greatly upset by the experience. There was a role for the publisher here to intervene and punish poor behavior.

While some argued that it was an issue for the publisher/service provider to police, others argued that game mechanics and publisher policing would never provide adequate protection from griefers unless also backed by strong communities and self-regulation enabled by the game. This would entail stronger structural mechanisms to allow players a measure of power to police each other. This was presented as both a design issue and a community-building issue, with the need for strong communities seen as the basis of action to address griefing.

Other people suggested it was a game issue. Games are about stylized conflict—the conflict cannot be taken out of them. In fact, games need conflict and grant permission to players to behave in ways different from the ordinary world. Thus, games are experimental sites for trying out things that are unacceptable in the ordinary world, and the behavior of the attacking guild was fine and did not necessarily reflect the moral and ethical framework of the participants, nor how they would behave in ordinary world contexts.

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79. *Serenity Now Crashes a WoW Funeral*, YOUTUBE, http://www.youtube.com/watch?v=l28HbENng7Q&feature=fvst (last visited June 11, 2012).

80. *See* Nate Combs, *The Price of Serenity*, TERRA NOVA BLOG (Apr. 15, 2006), http://terra nova.blogs.com/terra_nova/2006/04/serene.html?cid=6a00d8341c022953ef00d83483ee4953ef #comment-6a00d8341c022953ef00d83483ee4953ef.

Other people raised the possibility of in-game behavior transgressing real-world law, although it is not clear how this particular incident would have done so. Perhaps the most pertinent issue within this block of opinion is that of consent, and whether players actually do give informed consent to the rules of the game or whether there are too many tacit rules for this to ever be possible.

Some suggested that it is the publisher's responsibility as service providers who make money out of encouraging people into mediated social connections to attend to the functioning of those social connections rather than falling back on the "it's just a game" excuse for nonintervention. Publishers need to incentivize good behavior and punish unwanted behavior more strongly.

Finally, and importantly, the diversity among players in terms of their level of investment in the game was raised as one of the key elements that led to such a lack of consonance between player understandings of what was acceptable behavior. Players invest differently in the game—it means many things to many people. Some play more by the "it's just a game" motto and some play with a deep emotional investment and a sense of "fair play" not shared by everyone.

The variety of opinions on this issue is instructive and shows that issues of scale may have brought games to a new point of definition. In a game where the player numbers are relatively small—on a sports field, for instance—it is possible for a shared understanding to be reached, not only of the explicit rules but also of the tacit rules and norms that determine attitudes and behaviors that fall outside of the written code (although even on the sports field such consensus is not guaranteed). In a game where there are millions of players, such consensus will never be reached. Not only will there be variations in understanding from within geographically co-located players, there will also be cross-cultural differences with players from all over the globe entering the game with naturalized expectations about particular behaviors that are simply not understood by players from different cultures.

C. Case Study Three: The GLBT Guild Recruitment Ad in WoW

In early 2006 a player in World of Warcraft posted a message in the general chat channel of her server seeking to recruit new members for her guild. This is not an unusual practice, and is seen by many as a legitimate way to increase guild numbers. This player, Sara Andrews, advertised that her guild was gay, lesbian, bisexual, and transexual/transgender (GLBT) friendly—meaning it was not exclusively a guild for GLBT people, but that it was friendly toward GLBT people and that some of their members identified as GLBT. In a game where one of the most frequent terms of abuse is to call someone gay or a faggot, the relief of finding such a group for a GLBT person can be important. However, the customer service manager on duty at the time sent a warning to Sara Andrews, telling her it was against the harassment policy of the game to use explicit language

around sexuality in the game. According to Daniel Terdiman in an article on CNet News, the customer service person warned that

> her recruiting was a violation of the game's harassment policy, specifically the section of that policy regarding sexual orientation . . . . The harassment policy specifically prohibits language that "insultingly refers to any aspect of sexual orientation pertaining to themselves or others." Since Andrews was hardly insulting herself, she couldn't understand how or why the harassment policy was being applied to her.[81]

She was warned that if she did not stop she risked being banned from the game. The customer service team further justified its move by suggesting that having an openly GLBT guild would invite harassment of its members and therefore it contravened policy. Blizzard, the publisher that runs the game, initially released a statement saying, in part:

> We encourage community building among our players with others of similar interests, and we understand that guilds are one of the primary ways to forge these communities. . . . However, topics related to sensitive real-world subjects—such as religious, sexual or political preference, for example—have had a tendency to result in communication between players that often breaks down into harassment.[82]

Andrews made the issue public and there was extended commentary on websites, forum boards, and news sites.[83] Lambda Legal, a prominent legal organization that works on GLBT civil rights, sent a letter to Blizzard pointing out some areas where litigation was possible on the basis of current antidiscrimination laws. Having outlined the situation and noted the public explanations offered by Blizzard for its policy and response, Lambda Legal's letter went on to say:

> We are very concerned that Blizzard's policy, as expressed in the foregoing statement, discriminates against LGBT gamers. Although preventing harassment is an admirable goal, a requirement that LGBT people remain invisible and silent is not an acceptable means of reaching that goal. . . .
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>   . . . .

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81. Daniel Terdiman, *Online Game Warns Gay-lesbian Guild*, CNET NEWS (Jan. 31, 2006, 4:15 AM), http://news.cnet.com/Online-game-warns-gay-lesbian-guild/2100-1043_3-6033112.html?tag=mncol;txt.

82. *Id.*

83. *See, e.g.*, Neva Chonin, *MMORPG! WOW! TOS! GLBT! Sexual Harassment!*, SFGATE (Feb. 5, 2006), http://articles.sfgate.com/2006-02-05/entertainment/17281709_1_sexual-orientation-harassment-blizzard-entertainment; Brian Crecente, *WoW: Blizzard Gets Gay Rights Warning*, KOTAKU (Feb. 6, 2006, 6:12 PM), http://kotaku.com/153075/wow-blizzard-gets-gay-rights-warning; Vicious Sid, *Blizzard Retraction: Gay Guilds, Players Welcome in World of Warcraft*, GAME PRO (Mar. 9, 2006), http://www.gamepro.com/article/news/52575/blizzard-retraction-gay-guilds-players-welcome-in-world-of-warcraft; Terdiman, *supra* note 81; Mark Ward, *Gay Rights Win in Warcraft World*, BBC NEWS (Feb. 13, 2006, 8:42 AM), http://news.bbc.co.uk/2/hi/technology/4700754.stm.

Although Blizzard is well within its rights to insist that players avoid referring to other gamers in an "insulting manner," Blizzard cannot issue a blanket ban on any mention of sexual orientation or gender identity. There is nothing "insulting" about identifying oneself as gay, lesbian or transgender, nor does the announcement of a guild for LGBT gamers constitute "harassment" in any sense of the word. If other players react insultingly to the mere presence of LGBT gamers, then Blizzard should discipline the harassers, not attempt preemptively to silence the potential victims of harassment.[84]

They went on to describe the legal issues as they see them:

Online environments are public accommodations, subject to regulation as such. Discrimination against LGBT individuals in the provision of public accommodations is clearly prohibited by California law. It has been so for more than fifty years. Insisting that LGBT persons not discuss their sexual orientation or gender identity can constitute discrimination under California law.[85]

Essentially, Lambda Legal was arguing that antidiscrimination laws enacted to deal with public places should apply to the contractually controlled virtual environment of World of Warcraft, which, it may be remembered, has a population of over eleven million. However, the argument that online worlds are places of public accommodations in which content could be regulated under federal and state antidiscrimination laws was dismissed in the recent case filed in the U.S. District Court for the Central District of California, *Stern v. Sony Corporation*,[86] which concerned a claim by a plaintiff with visual and learning difficulties that Sony should be required to enable modifications to facilitate visual and auditory cues so that the plaintiff could play games such as Everquest. The judge dismissed the claim on the basis that the relevant provisions of the Americans with Disabilities Act,[87] applied only to physical places, or goods or services connected to physical places. Thus, the argument that online environments are places of public accommodation, advanced by Lambda Legal, is unlikely to succeed due to a rejection of a similar argument in *Stern*.[88]

Eventually Blizzard reversed its decision and offered an apology to Sara Andrews. It said the initial decision was a mistake and that it was going to ensure that the thousand or so customer service representatives working in the game

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84.   Crecente, *supra* note 83.
85.   *Id.* (citations omitted).
86.   Stern v. Sony Corp., No. CV09-7710PA, 2010 WL 326224 (C.D. Cal. Oct. 23, 2009); *see also infra* note 103 and accompanying text.
87.   42 U.S.C. §§ 12101–12213 (2006 & Supp. III 2009).
88.   It is acknowledged that the status of the GLBT guild relates to discrimination rather than disability, however, it is the characterization of the "place of public accommodation" that is the key legal concept being considered here. It is also noted that the decision in *Stern* would be merely persuasive, rather than binding upon the court hearing the GLBT Blizzard case.

would undergo sensitivity training in order to avoid a repetition. They also indicated they would be looking at their policy on harassment.

This case illustrates again the interweaving of the different levels of rules and norms and the issues that arise around enforcement. The explicit rules of conduct for the game seem to be designed to prevent harassment and discrimination within the game. In practice the rules manifestly fail to do this as repeated harassment of GLBT folk is common within the game. Thus, enforcement of this rule is not reflected in the practices of the customer service people operating within the game, and cultural norms are at variance with the game rules. However, when the rules were then used to justify the silencing of GLBT people, those people sought remedy from the set of outside legal rules that guarantees civil rights (in some jurisdictions). For Blizzard, it is difficult to say what motivated them more—the public controversy that erupted, which threatened their reputation and thus their bottom line, or the threat of legal and very public action against them. In this case the rules of the game were not in contradiction to the legal rules of the ordinary world, but the enforcement and the practices within the private corporate space went against that rule set. Given that accountability within private policing regimes is almost nonexistent,[89] a remedy had to be sought in a more accountable sphere.

The outcome for Sara Andrews and other GLBT people playing the game in this case was positive, but the process of taking Blizzard to task on this required a certain robustness, as well as a capacity to mobilize larger networks of support. It should be kept in mind that many players, dealt with unfairly by private governance systems, do not have access to such resources and mostly, one must assume, take no action in the face of discriminatory behavior by corporations.

Like the previous case, this one deals with kinds of behavior that can be considered legitimate within gamespaces but that may be illegitimate in nongame spaces. Perhaps this is also an illustration of where cultural norms do not align with formal rules—either inside the game or outside. Homophobic taunting and hate speech are still relatively common in many people's everyday lives. This cultural norm persists despite being against the law in many jurisdictions. These same cultural norms are brought by some players into the game, where again they contravene game rules, and again there is a misalignment of culture and rules, and the discretionary power of regulators to enforce such rules becomes a factor.

D. Case Study Four: dead-in-iraq

America's Army is an online game released by the U.S. Army in 2002 for free download. It has, like most online games, evolved through a series of versions, with America's Army 3 being released in 2009. It is now encompassed as a core

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     89.   Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49 (2004).

aspect of the larger Army Game Project.[90] The purpose of the game is "to educate the American public about the US Army and its career opportunities, high tech environment, values, and team-work."[91] The game has proven to be extremely popular outside of its purpose as a recruiting tool, with nine million registered users by early 2008.[92] It is also available in versions for Xbox, Xbox LIVE, arcade, and mobile devices. The America's Army game is supported by a range of additional content, including the website, which provides regular updates on the lives of the "Real Heroes."[93]

Even within this tightly maintained and heavily supported environment, with a clear message proposed by its publisher, there is room for divergence. As Allen observes, "[G]roups of players continually reinscribe the game with new meanings that are divergent from the official Army message."[94] Of particular interest in the context of this study is the work of Joseph DeLappe.

In March 2006 DeLappe logged into America's Army using the name dead-in-iraq, and commenced manually typing the name, age, service branch, and date of death of each U.S. service person who had died in the Iraq conflict into the game's text messaging system. He describes the work as "a fleeting, online memorial to those military personnel who have been killed in this ongoing conflict. My actions are also intended as a cautionary gesture."[95] He does not engage in any of the gameplay, rather he continues to type in names until, inevitably, he is killed: "After death, I hover over my dead avatar's body and continue to type. Upon being re-incarnated in the next round, I continue the cycle."[96] This conduct frequently evokes abuse from the other players who generally do not understand what he is doing. This confusion is forgivable because DeLappe does not stop typing to explain his actions, and the players are left to work it out for themselves or from accounts they have picked up in the media. DeLappe observed that the other players are "generally hostile"; however, on occasion players have defended his actions and even once stood in front of him to

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90.   This includes the Virtual Army Experience ("VAE"), which travels around the U.S. to events such as air shows and state fairs. This interactive gaming experience (or simulation) takes place inside a carnival tent, and enables small groups of players (over the age of thirteen) to participate in a short segment of the game while seated in life-size props, such as Black Hawk helicopters and Humvees. In these props the participants shoot at the enemy on the screen and experiencing shaking of the vehicle. For a discussion of the VAE and its ancillary activities, see Robertson Allen, *The Army Rolls Through Indianapolis: Fieldwork at the Virtual Army Experience*, 2 TRANSFORMATIVE WORKS & CULTURES (2009), *available at* http://dx.doi.org/10.3983/twc.2009.0080.

91.   Robertson Allen, *The Unreal Enemy of America's Army*, 6 GAMES & CULTURE 38 (2011) (citing U.S. ARMY, AMERICA'S ARMY: OPERATIONS 1 (1999), *available at* http://www.gamefront .com/files/service/thankyou?id=669011).

92.   *Id.* at 43.

93.   *Id.*

94.   Allen, *supra* note 91.

95.   Joseph DeLappe, *Dead-in-Iraq, 2006-Ongoing*, U. NEV. RENO, http://www.unr.edu/art/ delappe/gaming/dead_in_iraq/dead_in_iraq%20jpegs.html (last visited June 11, 2012).

96.   *Id.*

take the bullets.[97] In part, it is his refusal to play that is provocative in a supposedly dedicated play space. His political critique repurposes the space for cultural and political purposes that resonate outside of the game. But America's Army could likewise be characterized as existing for the real-world purpose of recruiting people to the army. In this way we see the concept of the magic circle broken down, and the space more readily identified as a heterotopia that operates in conjunction with other spaces. DeLappe, when directly questioned about breaking the illusion of the magic circle, responded: "I see these works as a way to break through and perhaps expand the notion of 'the magic circle' in gaming. We do not 'play' in contexts that are unrelated to our political, social and economic realities."[98]

Chan observes:

> By claiming such a lineage of radical cultural practice for dead-in-iraq and by bringing a type of online performance art to the virtual streets this time, DeLappe is in essence advocating a social refunctioning of art in general and digital game art in particular. His work draws attention to how online spaces have effectively become normalised. Such virtual turf is now considered part of everyday space.[99]

It is this last comment which is most contested. In exactly whose space is DeLappe protesting when he is engaging in his act of memorial, and does it matter? Are online games public spaces? And in particular, is an online space run by a public institution such as the U.S. Army a public space? As discussed above, with respect to the GLBT guild example, should there be a right to freedom of speech in such spaces? Chan notes that "De Lappe's project directs attention to questions about the ownership of Internet space."[100] In particular, Chan notes the complaints of the players of the game and questions what implications this has for the consideration of who owns the ludic space of the game.

DeLappe himself characterizes the online spaces he engages with as "public spaces." In a 2010 interview he stated, "I first engaged in performing in game spaces upon the realization that these online environments could be considered a new type of public space. I definitely consider my work to have a direct lineage to street theatre/interventions, etc."[101]

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97. Mathias Jansson, *Interview: Joseph DeLappe, Pioneer of Online Game Performance Art*, GAMESCENES (May 20, 2010, 10:31 PM), http://www.gamescenes.org/2010/05/interview-with-joseph-delappe-a-pioneer-of-on-line-performancewhen-did-you-start-to-use-on-line-gaming-for-your-performances.html.

98.   *Id.*

99.   Dean Chan, *Dead-in-Iraq: The Spatial Politics of Digital Game Art Activism and the In-Game Protest, in* JOYSTICK SOLDIERS: THE POLITICS OF PLAY IN MILITARY VIDEO GAMES 272, 278 (Nina B. Huntemann & Matthew Thomas Payne eds., 2010).

100.   *Id.* at 280*; see also* Ren Reynolds, *Dead-in-Iraq*, TERRA NOVA (May 5, 2006), http://terranova.blogs.com/terra_nova/2006/05/deadiniraq_.html.

101.   Jansson, *supra* note 97.

While Chan characterizes this question as being about "Internet space," there is a vast difference between gamespace and Internet space in general. In particular, it is arguable that the space in a game environment is owned by the game provider. The provider has not only created and maintained that environment, but it is hosted on servers that it owns or leases. While a user may pay a subscription fee, there are an increasing number of free-to-play online games, such as America's Army. Increasingly people are congregating in places that are owned by corporations rather than town halls or squares.

MMOGs are social spaces. For some, gaming is as much about socializing as it is about attaining the game object. Thus, as previously mentioned, not all in-game activity is playing. Is this realization enough to turn them into public spaces? Recent U.S. case law would suggest not. In 2009 Erik Estavillo, a keen gamer, was banned from the Sony PlayStation 3 Network (PSN) on the basis of violation of the PSN terms of service. In particular, Sony claimed that Estavillo had engaged in repeated abusive verbal conduct while playing the game Resistance: Fall of Man. Sony's ban meant that Estavillo could no longer access any of the games or services provided by the PSN. This impacted his ability to socialize (given that he was confined by his numerous disabilities and ailments to his home), and it also prevented him from accessing the money in his Play Station Network Wallet Fund. Estavillo brought an action against Sony alleging that the ban violated his free speech rights under the First Amendment, as well as secondary liability claims relating to breach of contract, claiming 55,000 dollars in damages. Estavillo's claim provided an opportunity for a U.S. court to consider directly the issue of whether the First Amendment would operate to protect freedom of speech in a virtual world context. Several U.S. academics had argued that online spaces, such as virtual worlds and MMOGs, could be analogized to a "company town," thus satisfying the exception to the principle that the First Amendment operates to guarantee freedom of speech only against abridgement of that right by state or federal governments, rather than private actors.[102] This exception operates where the private corporation acts as the government, providing services and regulation in a corporate town.

In his short judgment in *Estavillo v. Sony Computer Entertainment America*, Judge Whyte dismissed Estavillo's claim on the basis that it failed to allege facts sufficient to state a First Amendment claim against Sony.[103] He stated:

> Sony's network is not similar to a company town. The Network does not serve a substantial portion of a municipality's functions, but rather

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102.   Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043 (2004); Peter S. Jenkins, *The Virtual World as a Company Town: Freedom of Speech in Massively Multiple Online Role Playing Games*, 8 J. INTERNET L. 1 (2004); Jason S. Zack, *The Ultimate Company Town: Wading in the Digital Marsh of Second Life*, 10 U. PA. J. CONST. L. 225 (2007).

103.   Estavillo v. Sony Computer Entm't Am., No. C-09-03007 (RMW), 2009 WL 3072887 (N.D. Cal. Sept. 22, 2009).

serves solely as a forum for people to interact subject to specific contractual terms. Every regulation Sony applies in the Network is confined in scope only to those entertainment services that Sony provides. Although the Network does include "virtual spaces" such as virtual "homes" and a virtual "mall" that are used by a substantial number of users . . . these "spaces" serve solely to enrich the entertainment services on Sony's private network.[104]

Rather than acting as a municipal government (as some commentators have characterized virtual world providers), "Sony is merely providing a robust commercial product," according to Judge Whyte's opinion.[105] Neither did Sony have any structural or functional nexus to a state or federal government. Therefore, there was no basis to sustain a claim on the First Amendment. For this reason, the claims under state law were also dismissed. It is possible that a stronger case could be made with respect to a social virtual world. Given this role of the game provider, how much responsibility should it bear for promoting ethical or responsible play within that environment?[106]

Asked about the opportunities presented by online and game performances, DeLappe stated:

> [I]t is a subversive stance to say that online environments represent a new type of public space. I am an artist very concerned with reaching an audience—with affecting change—one cannot do so working in a vacuum (whether that vacuum is the private artists [sic] studio or the art world). Very important to me that the work get out there in a way that both represents taking agency and presenting creative experiences that interrupt or intervene within these online contexts.[107]

DeLappe's conduct is not in direct breach of the EULA. However, under the terms of the Code of Conduct, players may be voted out of a session of the game as a consequence of engaging in a range of behavior that is deemed to be unacceptable, such as harassment, foul language, and refusal to follow orders. DeLappe has been vote-kicked out of the game on occasion for "chat spam."[108]

Gregson suggests that politically motivated griefing is unlikely to be successful because rather than inspiring and converting the other players, it merely causes them frustration, shutting them off from the overall message.[109] This does seem to be borne out by DeLappe's experiences.

However, as Joshua Fairfield has commented with respect to dead-in-iraq:

> The willingness to speak in contravention of the law is the single greatest

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104. *Id.* at *2.
105. *Id.*
106. Warner & Raiter, *supra* note 58.
107. Jansson, *supra* note 97.
108. Chan, *supra* note 99, at 281–82.
109. Kimberly Gregson, *Bad Avatar! Griefing in Virtual Worlds*, 10 M/C: J. MEDIA & CULTURE 1 (Oct. 2007), *available at* http://journal.media-culture.org.au/0710/06-gregson.php.

purveyor of political content. When nuns protest weapons by trespassing, or dead-in-iraq reads out the war dead online, let's be clear: they're breaking the law of trespass, or the licence agreement they signed when they logged in. But that doesn't change the analysis a single whit.

Sometimes breaking the rules *is* the message.[110]

Perhaps DeLappe's actions can best be understood in the context of Foucault's heterotopias. For DeLappe, the game platform of America's Army is a space from which he can comment upon America's involvement in Iraq. It is an environment which is (relatively) safe and one to which he can relate as an artist, promoting nonviolent protest. Yet the analogy and message are clear. Thus the role of online spaces as art and protest spaces, contingent to, and looking upon (yet separate from) all aspects of the everyday, is emerging.

CONCLUSIONS

Each of these cases demonstrates a different set of norms or rules in play. With Twixt we see the rule-abiding player being ejected by other players for transgressing in-game social norms that have emerged from gameplay and interaction among players. In the WoW massacre we see players being condemned for transgressing out-of-game cultural or social norms, even though they were within the bounds of the game rules and those who were transgressing the in-game rules were the ones seen to be the injured parties. In the WoW GLBT case we see the game rule enforcers—the publishers—being called to account for their rule implementation. And when in-game strategies of redress failed, the shadow of an out-of-game legal system was brought to bear. In the final case, DeLappe's transgressions directly tie the out-of-game issues of war to the in-game context, provoking mixed responses from players, and testing the boundaries of freedom of speech as it extends into proprietary space.

The point of this exploration has been to map out some of the overlapping laws and social and cultural norms in a way that illustrates the dynamic complexity of negotiations around rules, laws, and sociocultural norms that arise in specific contexts such as MMOGs. Using a Foucauldian framework of heterotopias allows us to characterize gamespace as more complex than that space envisaged by the magic circle. Heterotopic space can accommodate the dynamic and complex range of meanings and processes that take place—there are no jarring contradictions when it becomes apparent that the limits of different normative and legal orders are constantly in flux. No hardbound magic circle attempts to contain activities within a single sphere, but rather the permeabilities of the boundaries of gamespace can be acknowledged and worked with. The framework of heterotopias seems to provide a better model with its understanding of these

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110. Joshua Fairfield, Comment to *Dead-in-Iraq*, TERRA NOVA (May 8, 2006, 1:57 PM), http://terranova.blogs.com/terra_nova/2006/05/deadiniraq_.html (scroll to comment 25).

spaces as "something like counter-sites . . . all the other real sites that can be found within the culture, are simultaneously represented, contested, and inverted."[111]

This kind of analysis provides an empirically descriptive theory about rules, jurisdictions, and norms. It doesn't tell us what the role of law, game publishers, community managers, or players *should* be, but it does tell us something of what the limits of rules sets may be as the competition between them is negotiated at multiple levels. Implicit in the magic circle conception of games is an understanding of power as being wielded through a top-down structure. The arguments so far have been about whether the game's publisher or the real-world law should be in control of games. The exploration in this Paper and the framework of heterotopias suggests instead that not only do many different stakeholders wield the power, but that they wield it at many levels. Rather than top-down, it can be seen as bottom-up, distributed, occurring in the minutiae of behaviors. Foucault suggests that we can understand the operations of power by examining this granularity at the quotidian level. We can see how the various strategies deployed by different stakeholders or actors within this sphere generate a range of behaviors and outcomes, only some of which can be attributed to the law.

The law can be seen to be only one arm of the operations of power at work here, and the End User License Agreement in particular holds only limited power to determine the terms under which people conduct themselves within online games spaces. The case studies show that people's expectations are culturally as well as jurisdictionally derived. This has implications for the manner in which courts might approach cases brought before them. In particular, as Fairfield and others have suggested, it requires a greater willingness to approach MMOGs as meaningful spaces, rather than merely to dismiss them as games or spaces governed solely by one-sided contracts.[112] Online games are clearly more than contractual spaces; they facilitate engagement, creativity, friendship, and protest. They form part of the everyday experiences of millions of users and therefore provide an important domain for human interaction. Foucault's heterotopic view may provide a useful framework for further meaningful and constructive work towards effective and fair lawmaking in this area.

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111. Foucault, *supra* note 15, at 24.

112. Fairfield, *Anti-Social Contracts*, *supra* note 8; Edward Castronova, *Lights Going Out in the Anti-RMT Bunker*, TERRA NOVA (Feb. 16, 2010), http://terranova.blogs.com/terra_nova/2010/02/lights-going-out-in-the-antirmt-bunker.html.