

Order Supported by Law: The Enforcement of Rules in Online Communities

by Nicolas Suzor*

I. INTRODUCTION

As online social spaces grow in importance, the complex relationship between users and the private providers of the platforms continues to raise increasingly difficult questions about legitimacy in online governance. This Article examines two issues that go to the core of legitimate governance in online communities: (1) how are rules enforced and punishments imposed, and (2) how should the law support legitimate governance and protect participants from the illegitimate exercise of power? Because the rules of online communities are generally backed by contractual terms of service, the imposition of punishment for the breach of internal rules exists in a difficult conceptual gap between criminal law and the predominantly compensatory remedies of contractual doctrine. When theorists have addressed the need for the rules of virtual communities to be enforced, a dichotomy has generally emerged between the appropriate role of criminal law for “real” crimes, and the private, internal resolution of “virtual” or “fantasy” crimes. In this structure, the punitive effect of internal measures is downplayed, and the harm that can be caused to participants by internal sanctions is systemically undervalued. At the same time, because the contractual framework does not adequately address

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punishment, providers are struggling to use various private law doctrines to achieve punitive ends when internal sanctions prove ineffective. This Article addresses this conceptual gap and provides a normative framework for enforcing community rules and imposing punishments for their breach based upon the values of the rule of law.

Online communities, from virtual worlds to social network sites, provide extremely popular platforms for diverse forms of social interaction.¹ They are used extensively for sociability, play, artistic expression, commerce, politics, and many more constantly developing forms of social discourse. As the importance of these spaces grows, it should come as no surprise that tensions begin to emerge in the relationships between the providers and the users.² Users of online communities are seeking to assert certain recognitions of fairness, due process, freedom of speech, and entitlements to virtual property, most of which are typically disclaimed in the contractual documents that purport to set the terms of participation. Courts are increasingly being asked to determine disputes over the contractual terms of service in virtual communities and to resolve the interactions between the contracts,³ copyright,⁴ tort,⁵

1. See, e.g., Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM., no. 1 (2007), <http://jcmc.indiana.edu/vol13/issue1/index.html> (describing the key features of social network sites); T.L. TAYLOR, *PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE* 10 (2006) (arguing that massively multiplayer online games are "fundamentally social spaces").

2. See, e.g., Jonathan F. Fanton, *Rights and Responsibilities Online: A Paradox for Our Times*, 13 FIRST MONDAY, no. 8 (2008), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2196/2012> (discussing the tension between the liberal democratic potential of the internet and the lack of rights of participants in privately owned social online spaces).

3. See Dan L. Burk, *Authorization and Governance in Virtual Worlds*, 15 FIRST MONDAY, no. 5 (2010), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/viewArticle/2967/2527> (explaining that the contractual framework of virtual world governance is being used to condition "authorization" as applicable under copyright, anti-circumvention, tort, and criminal law).

4. See, e.g., MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928 (9th Cir. 2010) (concerning the development and sale of a computer program designed to interoperate with World of Warcraft that enabled players to cheat by automating their actions), *amended and superseded on denial of reh'g*, No. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011).

5. See, e.g., Complaint, Blizzard Entm't, Inc. v. In Game Dollar, LLC, No. SACV07-0-589 JVS (C.D. Cal. May 22, 2007), http://virtuallyblind.com/files/in_game_dollar_complaint.pdf (concerning the sale of virtual goods against the terms of service and alleging causes of action including tortious interference with contract and trespass to chattels); Consent Order, Blizzard Entm't, Inc. v. In Game Dollar, LLC, No. SACV07-0589 JVS (C.D. Cal. Jan. 28, 2008), http://virtuallyblind.com/files/Peons_Injunction.pdf.

property,⁶ and criminal computer trespass.⁷ There is no easy doctrinal solution to these emerging issues, and the inquiry is somewhat confused by the awkward conceptual position of punishment for breaches of private rules. The boundaries of contract and its intersection with other private and public law doctrines, however, are of great importance in setting the limiting bounds—the constitutive limits—of virtual community governance.⁸ In analyzing these limits, a conceptual framework based upon constitutional values is a useful tool in determining policy that will simultaneously encourage innovation, autonomy, and legitimacy.⁹ I have previously argued that the rule of law, as a contested discourse about limits on the exercise of governance power, provides a useful model that is more sensitive to the constitutional role of contract law in limiting private governance and the role of other legal doctrines in delineating freedom of contract.¹⁰ This Article develops a set of normative principles for the enforcement of community rules based on the values of the rule of law—particularly the avoidance of arbitrariness and the importance of both predictability and due process, tempered by an overarching requirement of consent. This approach provides a method that is able to address governance tensions in the enforcement of the rules of online communities that formal, liberal freedom of contract principles cannot.

This Article traces a distinction between acts that are deemed to be wrongful by territorial states, acts that merely depict wrongful acts, and acts that are wrongful only when viewed through the interpretative framework of the norms of particular virtual communities. The first category of acts are already proscribed by the state and the second, in the vast majority of cases, should not be. The third category presents the most interesting questions. Enforcement by territorial states of these rules can be problematic—primarily because the virtual community lacks the legitimacy required to create rules whose breach is punishable by the full weight of the state. In the contractual framework, breach of

6. See, e.g., *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (concerning the confiscation of virtual property within Second Life).

7. See, e.g., *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009) (attempting to apply the Computer Fraud and Abuse Act to a person who breached the MySpace terms of service by creating a false persona).

8. See generally Nicolas Suzor, *The Role of the Rule of Law in Virtual Communities*, 25 BERKELEY TECH. L.J. 1817 (2010).

9. See Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1269 (2000); Brian F. Fitzgerald, *Software as Discourse: The Power of Intellectual Property in Digital Architecture*, 18 CARDOZO ARTS & ENT. L.J. 337, 384 (2000).

10. See Suzor, *supra* note 8.

these rules will only give rise to compensatory remedies; there is, accordingly, a fundamental tension between the justified reluctance of states to punish citizens for the breach of private rules and the need for virtual communities to be able to maintain order in situations where participants can avoid punishments for their wrongdoing.

This Article makes several normative arguments about how community rules should be enforced in a way that encourages both autonomy and legitimacy. Part II of this Article examines the way in which rules are enforced within virtual communities and what limits may be imposed on the imposition of internal punishments. I argue that the limits imposed by contractual doctrine should be read in a way that allow providers to enforce legitimate rules that accord with community norms but restrain the enforcement of rules that are not sufficiently promulgated, enforced, or consensual.

Part III examines how providers and participants are seeking to have internal rules enforced in territorial courts and highlights the quest for punishments that extend beyond the bounds of the community. This part considers the interplay between virtual community contracts and copyright, tort, and criminal law and suggests that these doctrines should not be used to impose effectively punitive sanctions for breach of consensual internal rules.

In Part IV, recognizing that providers will sometimes need the assistance of territorial states in enforcing community rules, this Article provides an argument for the use of equitable relief in a way that encourages both legitimacy and autonomy in community governance. This Article concludes that, while territorial states should not impose punitive sanctions for breach of community rules, equitable relief should be available to support legitimate community governance where internal sanctions are ineffective.

II. INTERNAL ENFORCEMENT: THE COMPLEX NATURE OF INTERNAL RULES

In *A Rape in Cyberspace*,¹¹ Julian Dibbell famously retells an early story of community justice in a text-based virtual world called Lambda-MOO. The offender, Mr. Bungle, exploited an item in the virtual world that allowed him to depict other participants being subjected to violent sexual acts without their consent. The powerless victims could only watch as their avatars were publicly assaulted. The bond that forms between participants and their online identities is a complex one, and

11. JULIAN DIBBELL, *MY TINY LIFE: CRIME AND PASSION IN A VIRTUAL WORLD* (1998).

the reactions of those victims were equally complex. Dibbell explains that the victims' reactions were "[l]udicrously excessive" if one considered only the symbolic nature of the events, but "woefully understated" when one considered the seriousness of corporeal sexual assault.¹² The reactions of the victims can only be understood in their existence between the corporeal and the virtual, the disembodied area where the depictions and social interaction is real even if it is not physical.¹³ Only through an experiential perspective that conceptualizes this dual space can we hope to understand the meanings of acts and wrongs in virtual communities.¹⁴

In response to Mr. Bungle's actions, discussion on one of the LambdaMOO mailing lists turned to punishment, with widespread support for terminating Mr. Bungle's account—"toading" him, stripping his character of all power to interact with the virtual world.¹⁵ At the time, the explicit governance structure of LambdaMoo required community consensus before the providers would take action, and this, in turn, required extensive debate amongst the participants as to the appropriate punishments for breaking internal rules and the procedures to be followed for meting out those punishments. Seeing that the far-ranging debate was unable to be resolved, an administrator of LambdaMoo, acting alone, punished Mr. Bungle by destroying his account.¹⁶

Dibbell's retelling raises a host of interesting issues. The big ones—what it means to exist in the virtual, and how permeable the boundary between the virtual and the physical really is—are contemporary twists on discussions articulated by Foucault,¹⁷ Baudrillard,¹⁸ Descartes,¹⁹ and Plato,²⁰ to name a few.²¹ They are questions we are

12. *Id.* at 16.

13. *Id.* ("Ludicrously excessive by RL's [real life's] lights, woefully understated by VR's [virtual reality's], the tone of exu's response made sense only in the buzzing, dissonant gap between them.").

14. See generally Julie E. Cohen, *Cyberspace as/and Space*, 107 COLUM. L. REV. 210 (2007).

15. DIBBELL, *supra* note 11, at 24-25.

16. *Id.*

17. See Michel Foucault, *Ceci n'est pas une pipe*, 1 OCTOBER 7 (1976).

18. See JEAN BAUDRILLARD, *SIMULACRA AND SIMULATION 1* (Sheila Faria Glaser trans., 1994).

19. See RENE DESCARTES, *DESCARTES: MEDITATIONS ON FIRST PHILOSOPHY* 21-22 (Michael Moriarty trans., 2008); see also Christine Cornell & Patrick Malcolmson, *The Matrix, Liberal Education, and Other Splinters in the Mind*, 17 HUMANITAS 139, 149-50 (2004).

20. PLATO, *THE REPUBLIC* bk. VII, 253-91 (Benjamin Jowett trans., 1986).

21. See Jane Evelyn McGonigal, *This Might be a Game: Ubiquitous Play and Performance at the Turn of the Twenty-First Century* 5 (2006) (unpublished Ph.D.

still grappling with as we spend more time in virtual spaces and try to understand what these communities mean to us. Here, however, I want to focus on the (lack of) community consensus on how punishments are meted out in virtual communities. When is punishment for breaking the rules within a virtual community justified? Are there limits to the penalties that can be imposed, or the way in which they ought to be imposed? Importantly, when even the virtual death penalty is insufficient to deter recidivism—as when Mr. Bungle created a new account and returned to LambdaMOO under a new identity—what else can the community do to enforce their rules?

Take another example that Dibbell describes, years later, in another world where two players identify a bug in Ultima Online (UO), allowing them to purchase items from a vendor and immediately sell them back for a quick profit.²² During the week between discovering the exploit and reporting it to the provider, the exploiters managed to extract over \$150,000 worth of gold from the UO economy, gradually cashing it out, undetected, over an eight-month period.²³ A much less subtle example comes from the online game Everquest II, where a group of players found a bug that allowed them to “dupe” items on an enormous scale, inflating the virtual economy by twenty percent overnight.²⁴ The exploits raised alarms and the provider, Sony Online Entertainment (SOE), was able to trace the duped gold and ban the accounts of those responsible, removing the inflation from the virtual economy.²⁵ Regardless of whether exploiters can be caught, the damage they cause can be substantial. Not only are they responsible for significant inflation, but they also create a lot of work on the part of the customer service teams who are tasked with responding to the problem. In many cases, if the exploiters are quick enough, banning accounts and tracing proceeds is too late—by that time, they may have converted their assets and cashed out, collecting impressive windfall profits.²⁶ At this point, internal enforcement is largely moot; the damage has been done and

dissertation, University of California, Berkeley), available at <http://www.avantgame.com/dissertation.htm>.

22. JULIAN DIBBELL, *PLAY MONEY, OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT* 207 (2007).

23. *Id.* at 242.

24. Daniel Terdiman, *Cheaters Slam 'Everquest II' Economy*, ZDNET (Aug. 11, 2005), <http://www.zdnet.com/news/cheaters-slam-everquest-ii-economy/144176>.

25. *Id.*

26. For an apparently firsthand account of a successful large scale dupe in Everquest II, see *Methical, EQ2: The Dog Days of Duping Cont. . .*, PLAGUELANDS, <http://web.archive.org/web/20090504175837/http://plaguelands.com/eq2-dogs-duping-days-cont/> (accessed by entering Plaguelands URL in the Internet Archive index).

those responsible have either fled or been banned. Does the provider have any remedy in a territorial court? Could the actions of exploiters be criminal?

These questions have not been satisfactorily answered to date.²⁷ There are difficult doctrinal issues both in the limitations of contract law and the interaction of contract with tort, copyright, and criminal law. It is important here again to distinguish between acts that are unlawful because they are proscribed by the state (in a legitimate manner) and acts that are only wrongs because they breach some internal community rule. This second category is the focus of this Article: to what extent should the law support the enforcement of consensual rules? I have argued elsewhere that the values of the rule of law can help to better conceptualize the competing tensions at play in virtual communities.²⁸ The rule of law is a contested set of values about legal limitations on the exercise of governance power that provides a useful discourse through which to examine the legitimacy of private governance and the imposition of punishment for breach of community rules. As a starting point, it is useful to begin with the words of A.V. Dicey, whose articulation of the rule of law requires “that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land.”²⁹ Immediately, this proposition highlights a serious concern about the imposition of punishments by territorial states for breaches of rules that are created, alleged, and proved by providers of virtual communities whose legitimacy cannot be guaranteed. Because the stakes are higher in territorial legal systems than in virtual communities, we should take this proposition in a stronger form when dealing with territorial law than with the internal enforcement of

27. Similar questions have been raised in illuminating articles by academic commentators over the last decade, but theorists have not yet provided a substantive answer. See F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293 (2004) (Lastowka and Hunter positing the question but leaving future regulation open). Other commentators have focused predominantly on the virtual representation of criminal acts or the use of virtual worlds to carry out territorial crimes. See, e.g., Gregor Allan, *Responding to Cybercrime: A Delicate Blend of the Orthodox and the Alternative*, 2 N.Z. L. REV. 149 (2005); Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 U. CHI. LEGAL F. 415; Brian G. Slocum, *Virtual Child Pornography: Does it Mean the End of the Child Pornography Exception to the First Amendment?*, 14 ALB. L.J. SCI. & TECH. 637 (2004); see also Caroline Meek-Prieto, Recent Development, *Just Age Playing Around? How Second Life Aids and Abets Child Pornography*, 9 N.C.J.L. & TECH. ON. 88 (2008), <http://cite.ncjolt.org/9NCJOLTOOnlineEd88>.

28. See Suzor, *supra* note 8.

29. A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 188 (10th ed. 1959).

community rules. Importantly, we should temper this argument with the recognition of later rule of law theorists and some cyberlaw theorists that discretion in enforcement of the rules is important for substantive justice and to protect the autonomy of the community.³⁰ From these basic principles, this Article develops a normative framework for evaluating methods of enforcing community rules and guiding the application of contractual doctrine.

A. *The Internal Enforcement of Community Rules*

The rules of virtual communities are almost never enforced through legal channels, although internal rules “invariably operate against a background of state rules.”³¹ Communities usually turn to the law for enforcement only when a breakdown occurs in community governance.³² Providers of virtual communities, in control of the software and the networked systems that provide the platform for the community, have almost unlimited power to enforce the rules within their respective communities. Providers enforce rules in an array of different ways that are highly contextually dependent on the rule, the circumstances, and community in question.

Non-legal enforcement of rules in virtual communities happens on a number of different levels. Most obviously, control over the software gives providers enormous power within the community.³³ Providers are able to impose a variety of internal punishments, from warnings and threats to suspension or expulsion from the community, including other punishments specific to the nature of the community—like loss of privileges, confiscation of property, or temporary incapacitation.

Providers of virtual communities usually adopt some means of imposing sanctions on those participants they find to be breaching the rules—ranging from a simple reprimand to suspension and eventually cancellation of the subscriber’s account. Blizzard Entertainment’s (Blizzard) World of Warcraft (WoW), for example, explicitly sets out a tiered penalty policy, going so far as to quote Abraham Lincoln: “Let us

30. See, e.g., T.R.S. ALLAN, CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW 15-17 (2001); RONALD DWORKIN, LAW’S EMPIRE 226 (1986) (discussing law as integrity as continuously interpretive); Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 33 (2004-2005); Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 196 (2004-2005).

31. Greg Lastowka, *Rules of Play*, 4 GAMES & CULTURE 379, 388 (2009).

32. See generally ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

33. See Bartle, *supra* note 30, at 26-27.

have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it.”³⁴ In the policy, Blizzard explains that punishment is required to maintain the integrity of the servers and to protect the experience of other participants:

[S]ometimes disciplinary action must be taken against disruptive players who are causing damage to other's play experiences or the service itself. Though taking disciplinary action is never pleasant, we must take action against certain individuals in order to maintain the quality of service for all.³⁵

Blizzard sets out a “pyramid” of penalties—starting at warnings for minor infractions, moving up to suspensions of various lengths, from three hours to three days, and to a final warning and account closure, based upon the severity of the infraction and the participant's prior violations.³⁶

Most other providers do not go to such lengths to explain their enforcement policies. Facebook, for example, merely states that if a participant “violate[s] the letter or spirit of this Statement, or otherwise create[s] risk or possible legal exposure for us, we can stop providing all or part of Facebook” to that participant.³⁷ Many smaller communities leave enforcement of the rules to the provider's discretion. In all communities, the discretion that providers have in enforcing the rules occurs within and informs a continuous discourse about community understandings of what is proper and just, and providers are often in a continual struggle to shape the expectations of the community.³⁸

In addition to direct intervention, community rules are enforced through automated means, which are also extremely varied. Control over the code gives providers enormous power not only to define what is permissible within the community, but also what is possible. Providers can directly modify the software code in order to allow or prohibit certain types of behavior, which means that “the normative boundaries are

34. *Account Penalties*, BLIZZARD SUPPORT, http://us.blizzard.com/support/article.xml?locale=en_US&articleId=20221 (last visited Aug. 22, 2011); Abraham Lincoln, Cooper Union Address (Feb. 27, 1860).

35. *Account Penalties*, *supra* note 34.

36. *Id.*

37. *Statement of Rights and Responsibilities*, FACEBOOK, cl. 14 (Apr. 26, 2011), <http://www.facebook.com/terms.php>.

38. See Sal Humphreys, *Ruling the Virtual World: Governance in Massively Multiplayer Online Games*, 11 EUR. J. CULTURAL STUD. 149 (2008) (discussing the multiple layers of control and power relations that construct governance in virtual worlds); see also TAYLOR, *supra* note 1, at 136 (discussing the way in which participants in virtual worlds can shape social norms in a way that conflicts with the authorial vision of developers).

inherently malleable.”³⁹ Some rules are hard-coded into the community platform, directly restraining participant behavior. The ability to communicate is an important example; the design choices that are made will influence the structure of conversations that participants can have within the community.⁴⁰ These types of restraints are variously effective—some, like word filtering, prevent participants from using a list of words deemed offensive in conversation with other participants but are relatively trivial to bypass by changing spellings or using an evolving language and dialogue.⁴¹ Other approaches are much more effective but more limiting—like providing only a set of seemingly innocuous options for conversation and prohibiting all other forms of written or spoken communication within the environment.⁴² Where more free-form communication is permitted, participants are often notified that all communications occur under the watchful gaze of omnipresent surveillance.⁴³ The operation of code-based constraints is obviously not limited to communication; nearly all of what is commonly considered to be possible and much of what is considered to be acceptable within a community is bounded by the technical rules that constrain behavior. Because these code-based regulations are pervasive and often go unnoticed, seemingly innocent design decisions can

39. Claude T. Aiken IV, *Sources of Law and Modes of Governance: Ethnography and Theory in Second Life*, 10 PITTSBURGH J. TECH. L. & POL'Y 1, 14 (2009).

40. See, e.g., Mark McGuire, *Ordered Communities*, 7 MEDIA/CULTURE J., no. 6, ¶ 9-11 (2005), <http://journal.media-culture.org.au/0501/06-mcguire.php> (discussing the limited textual chat, automated filtering, and surveillance culture that is aimed at making interaction in Habbo Hotel safe for teenagers); Beth Noveck, *Unchat: Democratic Solution for a Wired World*, in DEMOCRACY ONLINE 21 (Peter M. Shane ed., 2004) (discussing the way in which the various design features of a purpose built chat system can influence discourse in the context of a practical test application aimed at encouraging deliberative discourse called “Unchat”).

41. See, e.g., McGuire, *supra* note 40, at ¶ 9-11.

42. See, e.g., Matt Casamassina, *Update: Mario Kart Wii Text Chat Details*, IGN (Feb. 27, 2008), <http://wii.ign.com/articles/855/855033p1.html> (limiting all chat to preset menu options); *Parent's Guide*, CLUB PENGUIN, http://www.clubpenguin.com/parents/club_penguin_guide.htm (last updated Mar. 21, 2011) (providing two chat options, “Ultimate Safe Chat[, which] limits what users can say to a predefined menu of greetings, questions and statements, as well as emotes, actions and greeting cards” and “Standard Safe Chat[, which] allows players to type their own messages to other users. Every message is filtered to allow only preapproved words and phrases, and block attempts to communicate a phone number or other personally identifiable information.”).

43. See Christopher Dodds, *Avatars and the Invisible Omniscience* (Aug. 2007) (unpublished M.A. dissertation, RMIT University), available at <http://adt.lib.rmit.edu.au/adt/uploads/approved/adt-VIT20080424.100301/public/02whole.pdf>; McGuire, *supra* note 40, at ¶ 11-12.

seriously shape the conceivable possibilities of behavior within the environment.⁴⁴

The enforcement of social norms and rules does not necessarily need to involve the direct agency of the provider. Social norms are also continuously enforced through participation in the community by the participants themselves, reinforcing understandings of acceptable behavior.⁴⁵ Where there is sufficient unity of purpose and shared ethos, members of a community can collectively generate, evolve, and apply rules in the day-to-day activities within that community. Wikipedia provides an example of a community that predominantly utilizes this mode of governance, where the rules for editing are generated through an ongoing discourse between participants, rather than routinely enforced by an overseeing entity.⁴⁶ Wikipedia provides a formal policy detailing the ways in which a participant can be banned from editing the encyclopedia—complete with procedures for arbitration and appeals.⁴⁷

Wikipedia has a particularly formal and visible community governance framework—one that requires considerable effort on behalf of community participants to create and maintain. Similar examples of real legitimate participant-led governance may be rare, given the difficulty of generating and maintaining real consensus in a disparate community.⁴⁸ Participa-

44. See LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 82-83 (1999).

45. See Sal Humphreys, *Massively Multiplayer Online Games Productive Players and Their Disruptions to Conventional Media Practices* 155 (2005) (unpublished Ph.D. thesis, Queensland University of Technology), available at <http://eprints.qut.edu.au/16119/> (“Subtler forms of regulation that relate to social norms are also a part of the game, as they are of any community. Players police each other’s behaviour.”); see also TAYLOR, *supra* note 1, at 36.

46. Malte Ziewitz, Ph.D. Candidate, University of Oxford, Presentation at Games Convention Online, Leipzig (Aug. 2009); see also Christian Pentzold & Sebastian Seidenglanz, *Foucault@Wiki: First Steps Towards a Conceptual Framework for the Analysis of Wiki Discourses*, PROCEEDINGS OF THE 2006 INTERNATIONAL SYMPOSIUM ON WIKIS 59 (2006), http://www.interactiondesign.org/references/conferences/proceedings_of_the_2006_international_symposium_on_Wikis.html; Andrea Forte, Vanesa Larco & Amy Bruckman, *Decentralization in Wikipedia Governance*, 26 J. MGMT. INFO. SYS. 49 (2009). It is important to note that Wikipedia’s founder, Jimmy Wales, continues to hold ultimate power over the operation of Wikipedia and is not necessarily bound by internal governance procedures.

47. *Wikipedia: Banning Policy*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, (Oct. 10, 2009, 6:14 AM), http://en.wikipedia.org/w/index.php?title=Wikipedia:Banning_policy&oldid=319014811.

48. See, e.g., A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) (explaining participant-led governance in the context of the Internet Engineering Task Force and showing the difficulty of achieving consensus).

tory governance, however, is not always such a formal and acknowledged endeavor. In all communities, governance occurs at the point of every interaction between participants, as the boundaries of what is acceptable behavior are continuously and fluidly redefined and enforced.⁴⁹ These forms of governance take on more or less formality depending on the environment. For example, inter- and intra-guild relations set relatively rigid governance structures in many Massively Multiplayer Online Role-Playing Games (MMORPGs).⁵⁰ In EVE Online, player-led councils make strategic design decisions.⁵¹ In some environments, lawmaking structures create a hybrid governance regime between the developers and the participants.⁵² On the other end of an imaginary scale of formality, understandings of social conventions are created and reinforced through continuous conversations between participants in any community. For example, conceptions of netiquette—internet etiquette—in discussion fora and mailing lists,⁵³ or the complex understandings of what is appropriate behavior and what is considered grieving in virtual worlds, are all generated not solely by the dissemination of rules from the provider but also from participation in the community itself.⁵⁴

The agency of the provider can be expressed within ongoing communal governance to a greater or lesser degree. Malte Ziewitz points out that eBay, for example, makes use of community norms and practices to encourage effective ordering over a loose-knit network while minimizing the costs of direct regulation.⁵⁵ In this way, eBay is able to influence “community values” as to what it means to be a positive participant in

49. Nikolas Rose, *Government, Authority and Expertise in Advanced Liberalism*, 22 *ECON. & SOC'Y* 283, 286 (1993) (“The forms of power that subject us, the systems of rule that administer us, the types of authority that master us – do not find their principle of coherence in a State nor do they answer to a logic of oppression or domination or the other constitutive oppositions of liberal political philosophy – least of all, its ways of dividing the political from the non-political. The force field with which we are confronted in our present is made up of a multiplicity of interlocking apparatuses for the programming of this or that dimension of life, apparatuses that cannot be understood according to a polarization of public and private or state and civil society.”).

50. See TAYLOR, *supra* note 1, at 44-46.

51. See Pétur Jóhannes Óskarsson, *The Council of Stellar Management, Implementation of Deliverative, Democratically Elected Council in EVE*, EVE ONLINE, <http://www.eveonline.com/download/devblog/CSM.pdf> (last visited Oct. 12, 2011).

52. See Law, A TALE IN THE DESERT, <http://www.atitd.org/wiki/tale4/Law> (last updated Apr. 7, 2011).

53. See Joel R. Reidenberg, *Governing Networks and Rule-Making in Cyberspace*, 45 *EMORY L.J.* 911, 920 (1996).

54. See Humphreys, *supra* note 38; Greg Lastowka, *The Planes of Power: EverQuest as Text, Game and Community*, 9 *GAME STUD.*, issue 1 (2009), <http://gamestudies.org/0901/articles/lastowka>.

55. See Ziewitz, *supra* note 46.

the eBay community, and thereby subtly shape the way in which participants experience and behave on the auction site. This subtle form of governance reflects Foucault's understanding of governmentality⁵⁶—as Rose describes it, “[t]o govern without governing *society*, that is to say, to govern through the regulated and accountable choices of autonomous agents—citizens, consumers, parents, employees, managers, investors.”⁵⁷ This non-obvious form of governance regulates by influencing and shaping behavior and is generally effective precisely because it is non-obvious.

B. Limits on Internal Punishment

The first issue to analyze is what sort of limits may be applied to punishments imposed wholly within a virtual community. While the contractual terms generally appropriate a broad discretion to the provider, the limits imposed by contract law will shape the possibilities of internal enforcement. It is useful here to return to the well-worn⁵⁸ example of *Bragg v. Linden Research*,⁵⁹ where Linden alleged that Bragg had broken the Second Life rules by exploiting a loophole that allowed him to purchase land for significantly under market value and terminated his account.⁶⁰ Bragg, on the other hand, argued that he had done nothing wrong and that, even if he had, the punishment was excessive, as Linden had confiscated several thousand dollars worth of his in-world property. Bragg sought judgment on the basis of consumer protection law, fraud, conversion, intentional interference with contractual relations, breach of contract, unjust enrichment, and tortious breach of the covenant of good faith and fair dealing.⁶¹

Rule of law values suggest that the provider ought to be able to enforce the rules of the community in order to maintain a cohesive

56. Michel Foucault, *The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 208, 219-23 (Hubert L. Dreyfus & Paul Rabinow eds., 1982) (discussing the nature of power and the power relationship in governance).

57. Rose, *supra* note 49, at 298.

58. For a more detailed overview of the issues, see Joshua A.T. Fairfield, *The God Paradox*, 89 B.U. L. REV. 1017, 1047 (2009); Bobby Glushko, *Tales of the (Virtual) City: Governing Property Disputes in Virtual Worlds*, 22 BERKELEY TECH. L.J. 507 (2007); Steven J. Horowitz, *Bragg v. Linden's Second Life: A Primer in Virtual World Justice*, 34 OHIO N.U. L. REV. 223 (2008); Hannah Yee Fen Lim, *Virtual World, Virtual Land but Real Property*, SING. J. LEGAL STUD. 304 (2010); Juliet M. Moringiello, *What Virtual Worlds Can Do for Property Law*, 62 FLA. L. REV. 159 (2010).

59. 487 F. Supp. 2d 593 (E.D. Pa. 2007).

60. See *id.* at 596-97.

61. See *id.* at 597 & n.8.

community.⁶² A system of sanctions is not a strict requirement of good governance, but many communities adopt one in order to deter and punish breaches of the peace.⁶³ Rule of law theory, however, suggests limits on punishment—that are not arbitrary,⁶⁴ that rules of behavior are clear, understood, and predictable,⁶⁵ and that rules are imposed in a way that is equal and fair.⁶⁶ Apart from procedural safeguards, rule of law theory also highlights a requirement of proportionality in punishment.⁶⁷ Proportionality is used as an analytical method of evaluating the conflict between the needs of the society in maintaining order and the citizen's interests to be free from excessive interference or punishment.⁶⁸ Under both utilitarian and retributive conceptions of punishment, there is an assumption that the punishment ought to be proportional to the wrong-doing.⁶⁹ The rule of law requires that the

62. For example, one of Lon L. Fuller's eight routes to failure for legal systems is a divergence between the rules as posited and as practically enforced. LON L. FULLER, *THE MORALITY OF LAW* 39 (rev. ed. 1969).

63. JOHN RAWLS, *A THEORY OF JUSTICE* 240 (11th prtg. 1981) (citing THOMAS HOBBES, *THE LEVIATHAN*, chs. XIII-XVIII (1988)) ("By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed. Rather, the existence of effective penal machinery serves as men's security to one another."); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 74 (Alan Sheridan trans., 1977).

64. DICEY, *supra* note 29, at 188.

65. See FULLER, *supra* note 62, at 63-64; FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 74-75 (1944); Joseph Raz, *The Rule of Law and Its Virtue*, 93 *LAW Q. REV.* 195, 198-200 (1977); RAWLS, *supra* note 63.

66. Raz, *supra* note 65, at 200-02; RAWLS, *supra* note 63, at 235; ALLAN, *supra* note 30, at 121; RONALD DWORKIN, *LAW'S EMPIRE* 243 (1986).

67. See DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 159-60 (2004); Dieter Grimm, *Proportionality in Canadian and German Constitutional Jurisprudence*, 57 *U. TORONTO L.J.* 383, 385, 396 (2007); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 *COLUM. J. TRANSNAT'L L.* 72, 75, 125-27, 129 (2008); see also FOUCAULT, *supra* note 63, at 73 (discussing pressure to ensure that penalties are "regulated and proportioned to the offences").

68. See Sweet & Mathews, *supra* note 67, at 73-74.

69. See John Rawls, *Two Concepts of Rules*, 64 *PHIL. REV.* 3, 12-13 & n. 14 (1955) (citing BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION*, ch. XIII-XV (rev. ed. 1823)) ("if utilitarian considerations are followed penalties will be proportional to offenses in this sense: the order of offenses according to seriousness can be paired off with the order of penalties according to severity. Also the absolute level of penalties will be as low as possible. This follows from the assumption that people are rational (i.e., that they are able to take into account the 'prices' the state puts on actions), the utilitarian rule that a penal system should provide a motive for preferring the less serious offense, and the principle that punishment as such is an evil.").

punishment be suited to the crime and that similar cases be treated alike.⁷⁰

What, then, can we make of Bragg's claim? There appears to be two alternatives—either we accept that governance in Second Life does not and should not live up to the ideals of the rule of law, or we attempt to investigate whether Linden's treatment of Bragg was legitimate in the circumstances. The first option is the classic liberal option under freedom of contract: the parties, Bragg and Linden, are private entities, and the law is not concerned with any question of the rule of law between them. In this conception, the rule of law is an issue between the state and its citizens, and while Bragg may have a valid complaint about his treatment within Second Life, there is no legally recognizable claim unless he can point to a breach of contract. Since the contract effectively allocates absolute discretion to Linden, Bragg will have little, if any, recourse in territorial courts.

I have argued previously that this approach is too simplistic in its delegitimization of the role of the territorial state in ensuring that the interests of its citizens are adequately protected.⁷¹ There are obviously circumstances and communities where certain aspects of the rule of law are not important (particularly in play spaces where game rules are irrational and arbitrary),⁷² but the extent to which these values are important or unimportant is highly dependent upon the scope of consent in any given environment.

The analysis needed here is accordingly much more complicated and rests on an analysis of consent within the community. Looking at the factual circumstances, Linden may be able to mount a strong argument that exploiting a loophole in the auction system in order to purchase land that is not listed for sale at a price significantly under market value is known and understood to be wrongful. The Terms of Service require that participants agree not to "disobey any requirements, procedures, policies or regulations of networks" connected to Second Life,⁷³ and it is likely that participants understand that Linden would be likely to punish those who exploit vulnerabilities in the auction system. The prohibition against exploiting in this manner is so sufficiently clear and well-known that, even if it is not explicitly stated

70. See ALLAN, *supra* note 30, at 23, 121; RAWLS, *supra* note 63, at 237.

71. See Suzor, *supra* note 8.

72. See Lastowka, *supra* note 31, at 389-90.

73. *Linden Lab Official: Terms of Service Archive*, SECOND LIFE, cl. 4.1(viii) (Apr. 29, 2010), http://wiki.secondlife.com/wiki/Linden_Lab_Official:Terms_of_Service_Archive/Through_29_April_2010 [hereinafter *Linden Lab Terms of Service*]. Current terms of service for Second Life are available at <http://secondlife.com/corporate/tos.php>.

in relation to the specific exploit,⁷⁴ it is probably valid and legitimate in the circumstances. The conclusion that Bragg is likely in breach of his contractual obligations to Linden, accordingly, seems legitimate. The situation would change if the rule in question had not been properly made. For example, if the rule had changed recently without sufficient notice, we would be much less comfortable with a finding that it had been validly incorporated into the contract.⁷⁵ Similarly, if the rule was technically in place but only rarely enforced, we might expect that Linden should be estopped or otherwise restrained from enforcing it.⁷⁶

If the rule is a valid one, is the penalty imposed just? In contractual terms, should Linden be entitled to repudiate the contract and terminate Bragg's account for the breach, and if so, should it be entitled to destroy Bragg's virtual property? This question is much more difficult to answer. Assuming that Bragg's exploitation was sufficient to warrant termination, we have not yet been able to articulate an answer about what should happen to his virtual property. Do participants, by joining and participating in Second Life, consent to the principle that, if they break the rules, Linden can punish them by confiscating their assets and terminating their accounts? The Terms of Service, written by Linden, assert that they do:

Linden Lab has the right at any time for any reason or no reason to suspend or terminate your Account, terminate this Agreement, and/or refuse any and all current or future use of the Service without notice or liability to you. In the event that Linden Lab suspends or termi-

74. See Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 815 (1989) (arguing that retrospective prohibitions on behavior that was socially but not legally proscribed may not offend values of the rule of law).

75. David R. Collins, *Shrinkwrap, Clickwrap, and Other Software License Agreements: Litigating a Digital Pig in a Poke in West Virginia*, 111 W. VA. L. REV. 531, 563 (2009); Peter J. Quinn, *A Click Too Far: The Difficulty in Using Adhesive American Law License Agreements to Govern Global Virtual Worlds*, 27 WIS. INT'L L.J. 757, 779-80 (2010) (explaining that in the *Bragg* case "[t]he unilateral modification right in particular made the agreement severely one-sided and effectively determined that the agreement was unconscionable"); *Douglas v. U.S. Dist. Court*, 495 F.3d 1062, 1066-67 (9th Cir. 2007) (holding that a party could not unilaterally vary terms of a contract merely by changing the terms on their website), *cert. denied*, 552 U.S. 1242 (2008).

76. Whether an estoppel can be successfully raised will be highly dependent on how explicit the representation of security in virtual items was and whether the participant reasonably relied upon it. See David P. Sheldon, *Claiming Ownership, But Getting Owned: Contractual Limitations on Asserting Property Interests in Virtual Goods*, 54 UCLA L. REV. 751, 779-82 (2007) (explaining the potential for a participant to raise an estoppel argument where the virtual world owner encourages commodification); see also Kurt Hunt, *This Land Is Not Your Land: Second Life, CopyBot, and the Looming Question of Virtual Property Rights*, 9 TEX. REV. ENT. & SPORTS L. 141, 155-56 (2007).

nates your Account or this Agreement, you understand and agree that you shall receive no refund or exchange for any unused time on a subscription, any license or subscription fees, any content or data associated with your Account, or for anything else.⁷⁷

These Terms of Service, however, may be at odds with community norms. Linden Lab promotes Second Life as a place where participants can “own virtual land,”⁷⁸ and there is a plausible argument to be made that participants generally feel a sense of entitlement to their assets and currency within Second Life—a sense of entitlement that has been actively encouraged by Linden.⁷⁹ Some sort of punishment is likely warranted in order to deter wrongful behavior, but there may be a valid argument that punishment should be limited to expulsion from the community—that, if Linden chose to exercise its right to terminate Bragg’s account, it would then owe him compensation for the value of his assets that are destroyed as a result, perhaps under an estoppel or a claim that falls back to property rights in the virtual assets.⁸⁰

Even if we were to determine that both the rule and punishment are legitimate, we still need to consider whether the method for imposing the punishment is legitimate. This too is a highly contextually sensitive inquiry. The level of due process that is required to legitimately eject a participant from a virtual community will vary greatly according to the norms of the community and the level of investment that participants have in that community.⁸¹ In Second Life, the provider, Linden Lab, has made a significant effort to cast the community as a place where participants can invest and flourish, which, in turn, tends to engender a sense of stability and security in access to the community. Participants are likely to expect a certain level of due process in the determination of allegations made against them, and it would seem desirable to examine whether Bragg was given a fair opportunity to respond to the claims and whether the decision to eject him was made on proper grounds.

77. *Linden Lab Terms of Service*, *supra* note 73, at cl. 2.6.

78. At least until August 22, 2008, Linden Lab proudly proclaimed that residents could “own virtual land” as part of their marketing material on their website. The page has since been removed but is available on the Internet Archive. *See Own Virtual Land*, SECOND LIFE (Aug. 22, 2008), <http://web.archive.org/web/20080822144829/http://secondlife.com/whatis/land.php>.

79. *See* BENJAMIN DURANSKE, *VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS* 109-12 (2008).

80. *See, e.g.*, Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005); Lim, *supra* note 58.

81. *See* Michael Risch, *Virtual Rule of Law*, 112 W. VA. L. REV. 1 (2009).

All of this should lead us to a tentative normative conclusion about whether Linden legitimately ejected Bragg and legitimately confiscated his virtual assets. It does not, however, help us to determine what Bragg can do to address any perceived wrongs. His options, like those of most participants dealing with a provider who holds a great deal of power, are rather limited. He can do nothing and quit Second Life. He can accept the ban but attempt to create a new character, starting fresh under a new identity. He can petition Linden Lab to reconsider his punishment and attempt to garner support from the community in doing so. If none of these options are desirable or fruitful, he may well turn to a state that has some power over Linden and ask for its aid in resolving the injustice he alleges he has suffered. Bragg did, in fact, bring suit, although the high costs of legal action and the difficulty of challenging the terms of the contract make this a prohibitively difficult option for most aggrieved participants.⁸²

We may well prefer to settle disputes at a community level rather than involve the legal systems of various territorial states, for a variety of reasons. The smallest, most intimate level is likely to have the best understanding of the community needs and the dispute.⁸³ Those outside the community are likely to incur significant costs in understanding and enforcing the community needs and norms. There is an ever-present risk that decisions made from outside the community will result in bad rules that threaten the further development of the community.⁸⁴ For play spaces, the unique nature of gameplay rules, in tension with the logic of the legal system, means that legal rules are unlikely to properly recognize the needs of the community.⁸⁵ Difficulties are likely to arise with conflicting decisions from different jurisdictions.⁸⁶ External enforcement is alienating in the sense that it requires participants and providers to step outside of familiar and tailored

82. The ability of players to seek redress against providers is somewhat enlarged through the possibility of bringing a class action suit on behalf of a larger number of aggrieved participants. One such suit has recently been filed against Linden Lab concerning rights to virtual property in Second Life. See Complaint, *Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735 (E.D. Pa. Apr. 15, 2010) (No. 2:10-cv-01679-ER), available at <http://virtuallanddispute.com>.

83. See David G. Post & David R. Johnson, *Chaos Prevailing on Every Continent: Towards a New Theory of Decentralized Decision-Making in Complex Systems*, 73 CHI-KENT L. REV. 1055 (1998).

84. See Bartle, *supra* note 30, at 27; Castronova, *supra* note 30; James Grimmelmann, *Virtual Borders: The Interdependence of Real and Virtual Worlds*, 11 FIRST MONDAY, NO. 2 (2006), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1312/1232>; Lastowka & Hunter, *supra* note 27.

85. Lastowka, *supra* note 31, at 393.

86. See David G. Post, *Governing Cyberspace*, 43 WAYNE L. REV. 155 (1996).

internal governance mechanisms and frame their dispute in a way that is recognizable by the territorial legal system. Importantly, the prospect of external intervention may cause instability within the community, as it calls into question the authority of the provider and the strength and legitimacy of community rules and enforcement mechanisms; the threat, as David Post points out, is that if community decisions are subject to continual external oversight, real legitimate internal governance may not emerge.⁸⁷

For all of these reasons, we may prefer for the community to resolve disputes, rather than have them adjudicated in territorial courts. Nevertheless, at some point, perceived injustice is likely to warrant legal intervention.⁸⁸ If territorial courts are able to provide a legal remedy for these limited cases, they may be able to condition internal governance in general to be somewhat more legitimate. Very few cases will ever reach final judgment in court; the mere existence of a potential remedy, however, is likely to encourage settlements and discourage the most egregious illegitimate governance practices. Over time, the setting of limits in territorial courts is then likely to loosely constrain autonomous community governance to acceptable standards.⁸⁹ Rule of law theory suggests that, within these loose acceptable standards, courts generally should not interfere with the discretion of providers; the lesson to be learned from administrative law is that discretion is necessary to allow fair application of the rules but that the exercise of discretion must be constrained to ensure that it is legitimate.⁹⁰ By developing these constraints around abuses of power, courts would likely be able to encourage the development of internal dispute resolution and safeguard the autonomy of the community.⁹¹

The *Bragg* case may well be an example of such a limiting case. The core issue was whether termination of the contract was appropriate in the circumstances, and whether, as a result, Linden was entitled to

87. See David G. Post, *Governing Cyberspace: Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 883 (2008).

88. Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2044-45 (2004) ("[P]eople have simply invested too much time, energy, and money in virtual worlds to imagine that the law will leave these worlds alone, and allow them to develop their own norms and resolve their own disputes unhindered.").

89. See Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 465 (2008).

90. ALLAN, *supra* note 30.

91. Cf. Post, *supra* note 87, at 913 (arguing that participants in virtual communities desire to design their own legal institutions and would be more likely to do so without outside interference); see also Grimmelmann, *supra* note 84.

confiscate and destroy the value of Bragg's virtual assets.⁹² This issue, while novel, presents a question that today's courts are able to deal with. There is a real and nontrivial monetary loss claim, which alleviates the first hurdle common to virtual community disputes—that any losses are virtual losses and not serious enough to consider in a territorial court.⁹³ Importantly, these losses highlight the legitimate legal questions to be raised regarding contractual interpretation, unfair or unconscionable contractual terms, estoppel, good faith, and the intersection of contract and property rights.⁹⁴ Each of these questions provides an opportunity to examine the legitimacy of the rule, the punishment, and the manner in which the punishment was imposed.

The settlement of *Bragg* means that these particular questions of fact and law remain largely unanswered. In similar cases in the future,⁹⁵ much will depend upon the expectations of participants. The applicability and rigor of standards of legitimacy in setting and enforcing rules is highly dependent on the contextual norms of the community and the consent of participants within the community. Where the community is built upon, and is understood to be built upon, the arbitrary creation and enforcement of rules, an offended participant is not likely to have a very strong argument based in legitimacy. On the other hand, where participants are encouraged and accustomed to expect some level of stability in their virtual identity and assets, it will be open for a territorial court to require a higher standard of legitimacy in the exercise of contractual rights. The greatest challenges in this process come from the difficulty in identifying harm to the participant and the difficulty in evaluating consent within the community.

92. See *Bragg*, 487 F. Supp. 2d at 595.

93. Dan E. Lawrence, *It Really is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property*, 47 WASHBURN L.J. 505, 530 (2008) (arguing that the *Bragg* case "recognized that virtual property has value," and that this recognition "creates much-needed protection. If virtual property has value in the eyes of the law, then virtual property holders can prove damages, an essential element of almost any claim.").

94. Fairfield, *supra* note 89, at 455-56 (arguing that vertical relationships can be resolved by contract); Lawrence, *supra* note 93, at 529 (arguing that "*Bragg* demonstrates that contract law, even in the absence of independent property rights in virtual property, can provide a remedy for an end-user wrongfully deprived of virtual property").

95. See, e.g., *Evans v. Linden Research, Inc.*, 763 F. Supp. 2d 735 (E.D. Pa. 2011) (class action suit alleging that, by changing the Second Life Terms of Service after the *Bragg* case, Linden effectively purported to unilaterally destroy existing interests in participants' virtual property).

C. Identifying Harm and the Role of Consent

It is relatively easy to identify the harm in Bragg's case: he can easily point to the loss of several thousand dollars worth of virtual property that Linden confiscated when it suspended his account.⁹⁶ This monetary loss may, however, obscure more than it reveals underlying tensions about due process and the imposition of penalties in virtual communities. For example, a participant in World of Warcraft (WoW), who has been playing for a number of years and accumulated not only significant virtual assets but substantial social connections, may suffer very serious harm upon the termination of her account—even ignoring the monetary value of the items in any grey market.⁹⁷ There is a significant open question as to how to evaluate this loss, and significant pressure from providers to characterize the loss as a mere loss of consumptive entertainment.⁹⁸ If we return to the example of Mr. Bungle, could he ever complain that he was unjustly banned by a rogue administrator, acting in direct conflict with the explicit requirement that there be community consensus in proscribing behavior and imposing punishments?

At the 2009 State of Play conference in New York, Andrew Zaffron dismissed any issue of harm to the participant in such circumstances:

You've got to know going into it, that you're playing a game. That's what you're paying for—to play a game and even though you play for two years, that's fifteen bucks a month, you play for two thousand hours over that three year period—or three thousand hours—you got a heck of a deal. Even if at the end of the day, you can't take your character and sell it to somebody else for a thousand dollars, you still got a great deal. Where else can you get entertainment that cheap?⁹⁹

Zaffron's argument, while somewhat objectionably casting the community relationship as mere passive consumption in order to delegitimize any claim of harm by participants, contains an important insight. A large part of the relationship between a provider and its participants will be determined by what the participants come to expect—what they know

96. See *Bragg*, 487 F. Supp. 2d at 609 n. 19.

97. See TAYLOR, *supra* note 1, at 135; Sal Humphreys, *Commodifying Culture-It's not just About the Virtual Sword*, in *OTHER PLAYERS* (Jonas Heide Smith & Miguel Sicart eds., 2004).

98. See Grimmelmann, *supra* note 84 (explaining that providers are very hesitant to allow states to interfere in the exercise of their discretionary powers).

99. Andrew Zaffron et al., Panel at the State of Play VI Conference: Current Legal Issues for Virtual Worlds at New York Law School (June 19, 2009), 44m, video available at <http://nyls.mediasite.com/mediasite/Viewer/?peid=d74f5d6301c2445dbb96d5ad13f611b0>.

before joining the community and what they learn through participation. Zaffron draws a distinction between communities that he asserts are successful in structuring participant expectations and those, like Second Life, that take on risks and obligations because of the way in which they create expectations.¹⁰⁰

Zaffron may well be correct that, in a particular game environment, a participant will have no reason to expect that she would be entitled to any proprietary rights in her avatar or virtual assets. The important recognition, however, is that this will be contextually dependent upon the norms of the community and the expectations of participants and cannot be answered by a simple literal examination of the applicable contractual documents. If disputes are to be satisfactorily resolved, we should be more attuned to the expectations of participants, both before they join and as they become more deeply immersed in the community.

In Mr. Bungle's case, then, we would need a lot more information. It may be that, in spite of the explicit decree that community governance in LambdaMOO would be wholly consensual, LambdaMOO participants still understood that, fundamentally, those in charge could still exercise their powers to punish outside of the consensual process. Perhaps participants did not come to expect much more than arbitrary treatment at the hands of the administrators; in either case, Mr. Bungle's punishment could not be said to be illegitimate from the perspective of internal community norms. Less anachronistically, even if Mr. Bungle's toading was illegitimate, maybe exclusion from LambdaMOO mattered little more than exclusion from any community discussion board or IRC chat channel; while disappointing and perhaps somewhat hurtful, this is not necessarily a wrong we would want to address within the legal system.

On the other hand, we may well come to a different conclusion in modern virtual worlds. In the massively multiplayer game spaces that Zaffron is concerned with, we must be careful not to be overly dismissive of the harm that participants may suffer when they are ejected from a community and cut off from their social relations.¹⁰¹ World of Warcraft may be the most prominent example; with twelve million players, many of whom have been playing for two or three years or more, the idea that losing access to the community would be unimportant because it is

100. *Id.* at 45m.

101. See TAYLOR, *supra* note 1, at 135 ("The common framing of games as 'simply entertainment' often obscures the ways they act as key cultural sites in which forgoing participation may have real costs. . . . As people find their friends, family, colleagues, and the broader culture engaging in some sphere, the desire to participate can be quite strong and even can form a social imperative.").

merely consumptive entertainment can seem quite disingenuous. Clearly, players in WoW invest a good deal of time and energy in their virtual character and feel a sense of entitlement to both the avatar and its assets. Just as clearly, the social bonds formed within the environment are real, important bonds that can have a deep personal value to the participants. Banning a participant and severing these bonds has a real punitive effect; ignoring this punitive effect in favor of a consumption model is likely to lead to serious error in our evaluation of the impact of the exercise of private governance power. If WoW players in fact have a shared understanding that they will not be banned arbitrarily or unfairly, and I think they do, then we should be concerned if and when such punishments are illegitimately imposed.

Essentially, the suitability of contractual doctrine to address these tensions will turn on the willingness of the courts to consider the social norms within the community in the face of clear contractual language. If such an inquiry is possible, contract law may yet prove to be a suitable vehicle for understanding disputes about legitimate governance and shaping the acceptable contours of the exercise of private power. An analysis of the community norms would provide the vital information that a court would require in order to determine whether a particular exercise of power was legitimate. In some communities, cheating may be so abhorrent and routinely punished that the community as a whole expects that those found to have broken the rules will be summarily ejected without compensation. In other communities, the provider's encouragement of the secondary market and exhortations to invest in the community may mean that some semblance of due process and proportionality is required in enforcing the rules. If community norms can be examined, courts will be able to determine some reasonably accurate approximation of consent and legitimacy in governance. If the determination of contractual principle can be made to depend upon that elusive degree of legitimacy, then we can be reasonably assured that courts will be able to adequately address the governance tensions that permeate these disputes.

It is important to stress that this process of examining the legitimacy of governance does not necessarily mean that providers should be stripped of the power to create and manage a desirable community.¹⁰² Community norms would normally have to reflect the need for the

102. This is the fear expressed by Bartle and Castronova, that virtual world providers will have their hands tied by law to the collective detriment of all. See Bartle, *supra* note 30; Castronova, *supra* note 30; see also Grimmelmann, *supra* note 84.

provider to maintain order within the community.¹⁰³ In some communities, the importance of social cohesion may largely outweigh any individual interests that participants may have in not being treated unfairly. So, for example, members of a community support group forum could legitimately expect the relatively harsh treatment of those participants who broke rules of privacy or respect in order to protect the integrity and common purpose of the community. For example, a less cohesive and more heterogeneous community, like Second Life, may expect more in the way of due process, particularly where participants are encouraged to become heavily invested in the community. This determination will always be a question of fact and will likely involve a difficult, critical examination of the community norms in question. It is a task, however, that territorial courts are well-suited to addressing, at least in cases where the harm suffered is great enough to justify the expense required to bring the issue to trial.

We can contrast the example from *Bragg* with the threatened suspension of Sara Andrews from WoW for advertising an in-game guild that was friendly to gay, lesbian, bisexual, and transgendered participants.¹⁰⁴ Blizzard alleged that Andrews's communications breached the code of conduct, which prohibits "any content or language which, in the sole and absolute discretion of Blizzard, is deemed to be offensive, . . . sexually explicit, . . . or otherwise objectionable."¹⁰⁵ In this example, Blizzard eventually backed down on its policy and apologized to Andrews after significant public outcry.¹⁰⁶ Nevertheless, if Blizzard had not overturned its initial decision, we may have come to the conclusion that its exercise of discretion in determining that Andrews's communications were prohibited offensive speech was illegitimate. Blizzard's finding seems to directly conflict with the social norms of the WoW community, which is, like many online games, notoriously homophobic in parts.¹⁰⁷ In an open letter to Blizzard, a group of

103. ALLAN, *supra* note 30, at 90 ("The good citizen will acknowledge the necessity for legal authority, as a means of facilitating the reasonable coordination of the myriad plans and purposes of individuals, according to some generally acceptable, if imperfect, scheme of justice; and he [sic] will therefore acknowledge as binding many rules whose justice he doubts or even denies, in deference to the overriding needs of the common good of his community (as opposed to the utopian community he would ideally prefer).").

104. 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>.

105. Blizzard, *Terms of Use*, WORLD OF WARCRAFT, cl. 9(B)(i) (July 29, 2008), <http://www.worldofwarcraft.com/legal/termsofuse.html>.

106. Ward, *supra* note 104.

107. See Gordon Calleja et al., *Open Letter to Blizzard Entertainment*, TERRA NOVA (Feb. 8, 2006), http://terranova.blogs.com/terra_nova/2006/02/open_letter_to_.html (arguing

authors from the TerraNova and Many-to-Many blogs articulated the core conflict in values at play: "Blizzard does not [punish] the routine use of homophobic and misogynistic insults, nor does it [punish] all manner of vulgar and abusive trash talk. They should not [punish] the mention of the existence of a GLBT-friendly guild."¹⁰⁸

The overwhelmingly and somewhat aggressively straight male nature of the WoW social environment is a large source of tension for queer gamers, and openly queer-friendly guilds can provide much needed support and respite from the rest of the community.¹⁰⁹ There are really two arguments about legitimacy here. The first is a substantive rights issue, that queer players need some protection from a hostile majority; the second is an inconsistency in application, where hostile homophobic speech is not deemed to be offensive, but the mere public mention of a queer-friendly guild is.

Dealing first with the inconsistency issue, it seems to be one of consent at its core. Joshua Fairfield, in particular, has emphasized the role of consent in determining the relationship between participants in virtual communities.¹¹⁰ While Fairfield uses consent as a means to determine the horizontal relationships between participants who are not in contractual relationships, this approach also seems to provide an attractive normative basis for evaluating and enforcing the rules of virtual communities in the vertical relationships between participants and providers.¹¹¹ Fairfield argues that contractual agreements have a dual mode, in that they create binding obligations between partici-

that "the general chat channel of WoW is an extremely open communication environment that is routinely threatening, abusive, and vulgar, not to mention misogynistic and homophobic"); Jenny Sundén, *Play as Transgression: An Ethnographic Approach to Queer Game Cultures*, in *BREAKING NEW GROUND: INNOVATION IN GAMES, PLAY, PRACTICE AND THEORY: PROCEEDINGS OF THE 2009 DIGITAL GAMES RESEARCH ASS'N CONFERENCE 3* (2009), <http://digra.org/d1/d6/09287.40551.pdf> (arguing that for queer players "to 'come out' in the game, or simply express an inclusive attitude in terms of sexual orientations, has proved to be enough for exclusion").

108. Calleja et al., *supra* note 107 (the original letter uses the word "sanction" which I have replaced with "punish," which appears to be more correct when considering the context and intention of the letter as a whole).

109. Sundén, *supra* note 107, at 4 (describing the experience of joining a queer-friendly guild as "coming home The feeling of entering the guild was one of relief and happiness. It was a feeling of relief related to no longer having to worry about covering up bits of your life that would not fit in, or would even be regarded as 'inappropriate' in the game environment. It was a sense of happiness in experiencing the warmest of welcomes imaginable."); see also Humphreys, *supra* note 45, at 155-56.

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

111. *But see id.* at 834 (arguing that the vertical and horizontal components of the contractual relationships need to be separated, and that consensus only really has application horizontally).

pants and providers, but that they merely inform social norms between participants.¹¹² For Fairfield, while the contract may be enforceable as written between participants and proprietors, a court must look to the entirety of the community norms in order to determine the relationships between participants themselves because no general contract exists between participants.¹¹³ Fairfield raises a good point here but does not go far enough. The ability to create communities with diverse consensual norms is one of the fundamental values that underpins contractual governance in cyberlaw theory, that consent essentially provides the core justification for the ongoing support of the state for contractual terms of service in private community governance.¹¹⁴ Where the contractual rules in fact diverge from broad conceptions of consensual community norms, we should be concerned about the legitimacy of private governance. There is accordingly a strong argument that community norms should be evaluated in enforcing the contract vertically between participants and providers; in cases of direct conflict, if legitimacy is to be encouraged, the contract should not always be enforceable in its strict literal sense.

The sensitivity of a contractual governance framework to these questions of legitimacy is not yet clear, but there does appear to be sufficient theoretical flexibility in contractual doctrine to allow courts to come to conclusions that support both autonomy and legitimacy. At least in theory, where there is some uncertainty, the social norms of the community can be relied upon to inform the interpretation of the contract, just as business practices and past performance can sometimes inform the interpretation of contracts.¹¹⁵ In the case of explicit conflict, there is significant scope for the doctrines of unconscionabili-

112. *Id.*

113. *See id.*

114. Suzor, *supra* note 8, at 1881.

115. *See* U.C.C. § 1-303(e) (2006) (providing that "the express terms of an agreement and any applicable course of performance, course of dealing, or usage of trade must be construed whenever reasonable as consistent with each other"); Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533 (1998) (examining the admissibility of extrinsic evidence in the interpretation of contracts); *see also* Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506 (2006) (arguing for a more dynamic, contextual contractual interpretation where necessary to determine the intent of the parties or to promote a policy or legislative objective).

ty,¹¹⁶ waiver,¹¹⁷ good faith,¹¹⁸ and estoppel¹¹⁹ to be used to avoid a result that invalidates community norms in favor of a strict literal interpretation. It remains to be seen whether courts will be willing to exercise this flexibility in a way that addresses the tensions that permeate private governance in virtual communities.

It is important to note that communities are rarely, if ever, homogeneous. It will often be difficult to identify a particular social norm in any given community. The governance process is an ongoing struggle between all participants and the provider. There is often conflict between different opinions on social norms held by different portions of the community, and these lines are continually being redrawn. Even the provider will often show multiple conflicting views on community rules—particularly visible in the tension between different divisions, such as those between the legal team, the development team, the customer service team, and the producers,¹²⁰ but also between different individual representatives on each of those teams. The result is that it will be difficult to identify a particular conception of a norm that holds universally for a particular community at a particular point in time. Courts seeking to discover such a norm will only be able to make rough approximations of an overall community standard, rather than a wholly determinative finding. The judicial system is well-suited, however, to deal with complex questions of fact and should be reasonably well-suited

116. See, e.g., *Bragg*, 487 F. Supp. 2d at 611 (holding that Linden Lab's binding arbitration clause was procedurally and substantively unconscionable).

117. Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261, 299-300 (2007) (arguing that waiver at common law may be applicable to virtual world contracts where developers do not consistently or uniformly enforce contractual terms).

118. See U.C.C. § 1-304 (2006) (obligation of good faith); see also Michael Meehan, *Virtual Property: Protecting Bits in Context*, 13 RICH. J.L. & TECH., No. 2, art. 7, at 33-37 (2006). (discussing the potential applicability of good faith to restrain providers from devaluing virtual property).

119. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); see, e.g., Horowitz, *supra* note 58, at 236 (arguing that *Bragg* could potentially rely on an argument in estoppel to prevent Linden Lab from reneging on its assertion that Second Life residents own their virtual land); Hunt, *supra* note 76, at 155-56 (arguing that inducing participants to treat in-world currency as real money may lead to an enforceable modification to the EULA by promissory estoppel in communities like Project Entropia and Second Life); Sheldon, *supra* note 76, at 779-82 (discussing the possibility of a successful promissory estoppel claim in virtual worlds).

120. See, e.g., John Banks, *Co-Creative Expertise: Auran Games and Fury – A Case Study*, 130 MEDIA INT'L AUSTRAL. 77, 80 (2009) (explaining tensions between customer service and development teams contributing to the failure of Fury, a \$15 million three-year project, in 2007).

to find a workable approximation of community norms—as long as courts are careful not to oversimplify and essentialize one particular person or group's view of the community norms. It is, accordingly, likely to be reasonable to require the person who seeks to assert that a literal contractual interpretation of the rules is inconsistent with the community's understanding to bear the burden of proving that assertion.

Applying a consent-based framework to the examples above, we can see that it appears to produce an appealing distinction. If we seriously evaluate consent within the community, Second Life's Terms of Service seem to reflect a norm that clearly prohibits Bragg from exploiting the auction system. As a first step, if Bragg has broken the rules, he can legitimately be punished, although the exact nature of that punishment and the way in which it is imposed has not yet been resolved. WoW's terms, on the other hand, do not reflect a general norm prohibiting Sara Andrews's advertising of a queer-friendly guild. Discussion of sexuality is so common in WoW that it seems wrong for Blizzard to determine that Andrews had made "offensive . . . sexually explicit" communications.¹²¹ Indeed, in comparison to the homophobic language that permeates WoW culture, Andrews's advertisement: "OZ is recruiting all levels, but especially 50-60s! [. . .] We are not 'glbt only,' but we are 'glbt friendly!'"¹²² does not seem to fall anywhere within acceptable understandings of offensive or objectionable conduct. The limits on discretionary power sourced from rule of law values, particularly of equality and predictability, immediately suggest that Blizzard's determination is outside the realm of justifiable discretion. It follows that, from the perspective of evaluating community consent, the contract ought to be enforceable against Bragg, but not Andrews. If a participant like Andrews ever came before a territorial court, in enforcing the contractual agreement, we could then say that the court should restrain the provider from enforcing the rules to terminate Andrews's access to the community. That action would be incompatible with community understandings of the construction of the prohibition and the scope of the provider's discretion.

As an aside, if WoW were more overtly repressive of queer groups, a factual evaluation may lead to a conclusion that there is a clear social norm that queer players should not identify as such and should not advertise queer-friendly guilds. If this were the case, a wholly consen-

121. Blizzard, *supra* note 105.

122. See *World of Warcraft not Gaymer Friendly*, GAMERS EXPERIMENTATIONS (Jan. 16, 2006, 6:12 PM), <http://web.archive.org/web/20070807071722/http://gamers.experimentations.org/forums/index.php?showtopic=6852> (accessed by entering Gamers Experimentations URL in the Internet Archive index).

sus-based model would require that territorial states help to enforce the rules against a participant like Andrews who clearly contravenes the community norms. This result seems repugnant, which suggests that a wholly consensus-based model is inappropriate. It is at this point that substantive external values are important; there are some rules that territorial states do not allow communities to consent to, or, if consent is possible, then the standard required is raised or the potential scope of consent limited.¹²³ In these cases, as Fairfield puts it, “a more important real-world norm may well trump the in-world community norm.”¹²⁴ It follows that where we do not recognize consent, territorial courts will be justified in refusing to uphold what would otherwise appear to be consensual community norms. Accordingly, in Andrews’s case, if we did not come to a conclusion that Blizzard’s exercise of discretion was formally inconsistent with community norms, we may still come to the conclusion that internal rules that discriminate against queer players in that way are illegitimate.¹²⁵ If existing anti-discrimination law does not prohibit such conduct, we should then conclude that legislation should be introduced to bar this form of discrimination in these types of contractual agreements.

This analysis still leaves us somewhat uncertain about what the appropriate result would have been if the *Bragg* case had proceeded to trial. Assuming that Linden’s allegations were correct, Bragg almost certainly broke accepted community norms by purchasing land that was not listed for sale, at a price significantly under market value. The bigger question, however, is whether such a breach is legitimately punishable by termination of Bragg’s account and seizure of his virtual assets. There are valid arguments in favor of both parties and there is no easy answer. An internal perspective suggests that some measure of punishment may be appropriate in order to provide a disincentive for participants to break the rules. If Linden, instead of terminating Bragg’s account, had merely confiscated the disputed land, there would be little reason for future participants to refrain from exploiting future bugs. In order to encourage social cohesion, then, some punishment may

123. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (discussing inalienable and partially-inalienable entitlements).

124. Fairfield, *supra* note 110, at 837.

125. Under current law, discrimination on the basis of sexuality is not consistently prohibited. See Suzanne B. Goldberg, *Sticky Intuitions and the Future of Sexual Orientation Discrimination*, 57 UCLA L. REV. 1375 (2010); Nan D. Hunter, *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565 (2000).

be legitimate, and the confiscation of Bragg's assets and termination of his account may be an appropriate (if severe) punishment.

On the other hand, given that Linden clearly encourages Second Life participants to invest in the community and own virtual land, there is a strong suggestion that such an extreme punishment ought not be meted out lightly. Second Life residents clearly feel very attached to their in-world assets and appear to have come to expect some degree of certainty in their possession, notwithstanding the Terms of Service.¹²⁶ Rule of law theory helps to conceptualize the tension here. While the interests of social cohesion may permit the imposition of punishments on those who break the rules, there is an equally strong requirement that punishments ought to be imposed justly. Harsh penalties may be permissible, but they must be proportionate to the wrong,¹²⁷ clear and unambiguous,¹²⁸ and imposed in a fair and accountable manner.¹²⁹ Whether Linden legitimately exercised its discretion will depend on the extent to which the hypothetical reasonable community member would understand that her property was subject to removal for a similar breach of the rules and the extent to which it acted properly—following proper procedures and imposing the penalty for proper purposes. These are the questions that should inform the flexibility in contractual doctrine about whether terms are validly incorporated and whether the exercise of the provider's discretion should be restrained by limiting doctrines such as waiver, estoppel, or good faith.

Ultimately, these are difficult questions of fact, but, again, ones which territorial courts are relatively well-suited to deal with. What is important in this analysis is what, precisely, Second Life participants can be assumed to have consented to by joining and remaining in the community. It is likely that a thorough examination of community norms and practice would reveal that Linden has tacitly and explicitly encouraged participants to feel a sense of entitlement and ownership to their virtual assets. If this is the case, then it is also likely that the

126. See DURANSKE, *supra* note 79, at 113 ("If a company wishes to profit by selling currency and land, and outright encourages users to make their real-life living in the virtual space, it cannot reasonably protest that the fine print says it is 'only a game' when faced with users who expect to extract that stored value or expect policies that genuinely protect the assets they have purchased.").

127. ALLAN, *supra* note 30, at 121 (arguing that "[c]onformity to [p]recepts of due process and equal justice ensures a genuine—substantive—equality of all before a law that serves a coherent (if capacious and adaptable) conception of the common good").

128. FULLER, *supra* note 62, at 63-65.

129. DICEY, *supra* note 29, at 188; FULLER, *supra* note 62, at 63-64; HAYEK, *supra* note 65, at 74-75; Raz, *supra* note 65, at 198-202; RAWLS, *supra* note 63, at 238; DWORKIN, *supra* note 66, at 243.

community norms of Second Life, the social contract, require Linden to refrain from unilaterally terminating Bragg's access and confiscating his assets without compensation. Accordingly, Linden may have to set in place more just procedures for the termination of accounts, or perhaps introduce more appropriate punishments for those who break the rules.¹³⁰ If this factual determination holds, we should expect a court to determine either that Linden was estopped from exercising its rights in a manner inconsistent with the community norms it encouraged to develop, that it had varied the contractual arrangement by its conduct, or that it could not, in good faith, exercise its contractual powers in the way in which it did.

Linden's alternative, of course, is to work to change the community norms that instill participants with a sense of entitlement to the assets that they buy and create within Second Life; if participants clearly understand that Linden may arbitrarily remove any of their property at any time, then people like Bragg would have little claim against Linden. This approach would undoubtedly reduce investment in Second Life. One can imagine that both individual participants like Bragg and corporate participants like IBM¹³¹ would hesitate to purchase and develop land within Second Life if they had no reassurance in the stability of those assets. Nevertheless, this seems appropriate—if Linden, as provider of Second Life, wishes to encourage investment, it ought to provide real security; it should not be entitled to create a false sense of security in order to encourage investment and simultaneously avoid accruing any real responsibility.¹³²

Evaluating legitimacy and consent provides a generalizable normative principle to guide the interpretation and resolution of contractual disputes in virtual communities. It is the possibility of establishing new consensual norms that underpins much of the potential that virtual communities promise, and consent forms the most important measure of legitimacy in governance in these spaces. When determining whether a particular norm should be enforceable, courts should undertake a

130. For example, Yee Fen Lim suggests that perhaps Bragg should be given an opportunity to divest himself of his legitimately acquired virtual property even if his account were terminated. See Lim, *supra* note 58, at 325.

131. See, e.g., Martin LaMonica, *IBM Breaks Ground in Second Life*, CNET NEWS BLOG (Oct. 19, 2006, 8:11 AM), http://news.cnet.com/8301-10784_3-6127448-7.htm (discussing IBM's virtual presence in Second Life).

132. DURANSKE, *supra* note 79, at 113 (arguing that "[i]f a company wishes to profit by selling currency and land, and outright encourages users to make their real-life living in the virtual space, it cannot reasonably protest that the fine print says it is 'only a game' when faced with users who expect to extract that stored value or expect policies that genuinely protect the assets they have purchased").

critical examination of actual community consent in order to avoid enforcing illegitimate rules. Whether a contractual framework will be suited to addressing governance concerns in virtual communities in the long-term will depend largely on the extent that courts are able to use the flexibility in contractual doctrine to draw such a distinction between legitimate and illegitimate community rules.

Evaluating legitimacy in this manner works alongside the substantive limits that societies impose on the autonomy of individuals to enter into private arrangements that limit fundamental rights of equality, access to justice, speech, privacy, or property.¹³³ Various jurisdictions will determine the appropriate levels of consent and other restraints that are required before their citizens can waive or alienate these (and other) substantive interests. Consent, therefore, becomes crucial to both formal and substantive conceptions of legitimacy. A consent-based model allows the contract to be interpreted in light of community standards and should be able to encourage legitimacy without unjustifiably sacrificing autonomy. This means, largely, that for communities that develop to expect due process and proportionality in the enforcement of community rules, participants should potentially be able to sue in territorial courts when providers fail to uphold those standards, but it also means that communities that have no use for such standards should not be hindered by their imposition. It may turn out that very few communities, if any, develop such reliance. Nevertheless, for those that do, territorial states ought to ensure that consensual standards are respected in the face of conflicting formal contractual language.

III. ENFORCEMENT OF INTERNAL RULES IN TERRITORIAL COURTS

Beyond the imposition of penalties within a community, a serious question remains about how providers can enforce the rules against participants in territorial legal systems. When a rule-breaking participant flees or is not sufficiently invested in the community, internal sanctions present little deterrent or punitive effect. If participants are to be punished for breaking internal rules in these circumstances, providers will need the assistance of the territorial state. Whether the territorial state should lend its support to internal rules is a question that has been considered predominantly from the point of view of criminal law, and various commentators have espoused relatively bright-line answers to the proper role of criminal law in virtual worlds. There is something of a consensus that criminal sanctions are not appropriate for punishing breaches of the community rules, but that

133. See Suzor, *supra* note 8.

those who commit traditional territorial crimes ought not, and do not, escape responsibility merely by making use of a virtual community.¹³⁴ In coming to this conclusion, theorists have created a dichotomy between real crimes and virtual crimes that may be appropriate for the blunt instrument of territorial criminal law,¹³⁵ but this method does not wholly address the underlying issue of punishment for wrongdoings in virtual communities.

This dichotomy is predominantly expressed as the difference between wrongs that are only felt within a virtual community and wrongs that “leak” or “extend” outside the community.¹³⁶ Much of this dichotomy can be explained by the need to separate crimes from virtual representations of crimes; Greg Lastowka and Dan Hunter evoked Rene Magritte’s famous statement, “ceci n’est pas une pipe,”¹³⁷ to illustrate that the representations of crime in virtual worlds are not crimes when they fall within the consensual realm of internal norms.¹³⁸ Among theorists who care about the development of virtual spaces, there is a strong desire to differentiate the virtualness of these spaces—particularly game spaces—in order to avoid the gaze of the law, which can threaten to destroy the consensual fiction.¹³⁹

Though it is somewhat problematic, there is an important distinction to be made here. It will certainly be important to avoid criminalizing behavior that is a mere fictional depiction of illegal behavior, avataricide being the most prominent example. The nonconsensual killing of

134. Kerr, *supra* note 27, at 418; Lastowka & Hunter, *supra* note 27, at 303-07; Susan W. Brenner, *Fantasy Crime: The Role of Criminal Law in Virtual Worlds*, 11 VAND. J. ENT. & TECH. L. 1, 51-53 (2008).

135. Kerr, *supra* note 27, at 425.

136. See Brenner, *supra* note 134, at 60 (arguing that only where the harm leaks out “to cause substantial harm in the victim’s ‘real life’” could territorial criminal charges be appropriate); Kerr, *supra* 27, at 417 (“It is only when harms extend outside the game that the criminal law should be potentially available to remedy wrongs not redressable elsewhere.”); Lastowka & Hunter, *supra* note 27, at 315 (arguing that future criminal prosecutions will depend on being able to point to “real economic harms”).

137. RENÉ MAGRITTE, *THE TREACHERY OF IMAGES* (1929).

138. Lastowka & Hunter, *supra* note 27, at 302, 307.

139. See Bartle, *supra* note 30, at 27 (arguing that “[v]irtual world administrators have absolute control over their world vested in the mechanics of that world. As long as this design principle is respected, administrators can protect the game conceit. If they were denied absolute control, then the game conceit must be protected some other way; otherwise, the virtual world would be just another extension of the real world.”); Castronova, *supra* note 30, at 196 (“As meaning seeps into these play spaces, their status as play spaces will erode. As their status as play spaces erodes, the laws, expectations, and norms of contemporary Earth society will increasingly dominate the atmosphere. When Earth’s culture dominates, the game will be over, the fantasy will be punctured and the illusion will be ended for good.”).

another participant's avatar is simply not murder,¹⁴⁰ and the need to avoid this type of category mistake has informed much of the scholarship around virtual crimes.¹⁴¹ Conversely, the use of virtual environments to commit traditional crimes poses no legal difficulty for territorial states (although such crimes may be much more difficult to detect and police).¹⁴² Money laundering through Second Life is still money laundering; fraud through Facebook is still fraud.

This distinction becomes more problematic when we are also required to consider the interpretative framework of social norms. For example, when a participant in EVE intentionally deceives another participant and cheats her out of her hard-earned virtual currency (Isk), there is no fraud—participants in EVE have consented to the social norm that fraud is part of the game.¹⁴³ The tension here is evident when theorists attempt to map this dichotomy between real and virtual harms. Writing of the theft of a jacket in Second Life, Susan Brenner suggests that the answer lies in whether the loss of virtual assets “can be construed as the infliction of a real world harm”—essentially, whether or not the assets were paid for with real-world money.¹⁴⁴ Brenner characterizes the in-world theft of assets that have real-world value as real-world cyber-crimes and argues that the theft should be punishable by territorial courts if the primary aspect of the harm can be thought of as bleeding into the victim's real life.¹⁴⁵ Brenner then suggests a dichotomous two-tiered approach, whereby acts that cause harm that is “limited to the virtual experiential context” ought to be dealt with within the community by the provider, but acts whose effects “leak out of the virtual world to cause substantial harm in the victim's ‘real’ life” are appropriately dealt with by territorial criminal laws.¹⁴⁶ Orin Kerr draws a very similar dichotomy, arguing that “[t]raditional governments can continue to deal with non-virtual harms arising out of virtual worlds But misconduct arising only in a virtual sense should remain the domain of game administrators.”¹⁴⁷

140. James Grimmelman, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147, 167 (2004).

141. Lastowka & Hunter, *supra* note 27, at 316.

142. Brenner, *supra* note 134, at 59; Fairfield, *supra* note 110, at 829-30; Kerr, *supra* note 27, at 418-19; Lastowka & Hunter, *supra* note 27, at 314-15.

143. Fairfield, *supra* note 89, at 460-61 (citing Faith Kahn, et al., Panel Presentation at State of Play, New York Law School: Stock Markets in Virtual Worlds (Oct. 7, 2005)) (Kjartan Pierre Emilsson, lead designer at CCP Games, stating that “fraud is fun”).

144. Brenner, *supra* note 134, at 56.

145. *Id.* at 60-61.

146. *Id.* at 60.

147. Kerr, *supra* note 27, at 425.

This distinction seems superficially attractive, but is both normatively difficult and descriptively unworkable, particularly where a potential offender would have no way of discerning, at the time of the theft, whether her actions would be criminal or not. The response to Brenner must be that the theft of assets within Second Life will be a crime if the assets have value and the manner of taking is outside the scope of consent of participants in general.¹⁴⁸ This is the point made by Kerr when he draws the analogy to gambling in card games, where cheating—moving outside of the scope of consent—renders the acquisition of money winnings fraudulent.¹⁴⁹ Accordingly, thefts and other depictions of wrongs that form part of a game cannot be criminal because they are consensual, but nonconsensual takings should raise both civil and criminal liability.

Beyond this, however, the dichotomy begins to break down. When we rely on such a strong distinction between real and virtual acts, we lose some nuance in our ability to determine the meanings and wrongfulness of actions. Kerr, for example, argues that criminal law ought only be concerned with an external perspective, not the internal meanings of acts in virtual communities; Mr. Bungle's acts were "a story (or an image) of a rape and no more."¹⁵⁰ Kerr's argument suggests that it cannot be rape to depict a person's avatar as engaging in nonconsensual sexual intercourse because it is not real.¹⁵¹ There is a tension here between the harm that we apprehend if we, like Dibbell, examine the meaning of Mr. Bungle's actions through the interpretative lens of community norms, and the inability of a wholly external perspective to recognize harm that happens only virtually. There can be no such hard distinction between the real and the virtual.¹⁵² Fairfield is correct in criticizing this dichotomy and its resultant effect on legal classification of acts and harms: "There is no 'real' world as distinguished from 'virtual' worlds. Rather, all supposedly 'virtual' actions originate with real people, and impact real people, albeit through a computer-mediated environment. As a result, the distinction between a 'virtual' act and a 'real' one is not helpful."¹⁵³

As an aside, territorial states may, nevertheless, wish to criminalize some acts carried out within virtual communities that currently do not

148. See Fairfield, *supra* note 110 (arguing that consent should be used to delimit the scope of potential legal action in virtual worlds).

149. Kerr, *supra* note 27, at 420-21.

150. *Id.* at 418.

151. *Id.* at 418-19.

152. See Cohen, *supra* note 14; Fairfield, *supra* note 110.

153. Fairfield, *supra* note 110, at 825.

fit within the definition of their physical analogues. In the case of Mr. Bungle's textual rape, we may be quite comfortable in saying that while the depiction of rape is not criminal rape, it does have a serious negative impact on the victim and should be criminalized. Perhaps it already does fit within broader prohibitions on harassment, or perhaps a new crime ought to be recognized.¹⁵⁴ If it turns out that a society also wishes to criminalize consensual depictions of rape, based upon the intangible harm to morality or the threat posed by romanticizing rape, then that too can be accomplished. It may or may not be desirable, but it is certainly possible for territorial states to criminalize consensual acts such as age-play or rape-play.¹⁵⁵

Assuming that the act is not criminalized, the dichotomy between real and virtual harm is misleading because it ignores the category of acts that are neither consensual or harmless, on the one hand, nor clearly criminal, on the other. The theoretical preoccupation with criminal law has left a relatively large gap in the category of acts that are considered to be wrongful and harmful through the interpretative lens of community norms but whose impact is not recognized as wrongful by the territorial state.¹⁵⁶ This category is assumed, without much discussion, to be better dealt with within the community than by the state—largely because of the great hesitancy to impose public criminal penalties for the breach of private rules.

Kerr argues that criminal law ought not apply to virtual worlds primarily because providers can better address harms in virtual worlds than the blunt instrument of criminal law.¹⁵⁷ Brenner suggests that the “appropriate default approach” for dealing with harm within virtual worlds is that it should be dealt with by the provider, at least where “its primary effect is likely limited to the virtual experiential context.”¹⁵⁸

154. Brenner, *supra* note 134, at 86.

155. See, e.g., *McEwen v Simmons*, [2008] 73 NSWLR 10 (Austl.) (an Australian case holding that a cartoon drawing of Bart and Lisa Simpson engaging in sexual activity constituted possessing and accessing criminal child pornography under the NSW and Commonwealth legislation respectively); Farnaz Alemi, *An Avatar's Day in Court: A Proposal for Obtaining Relief and Resolving Disputes in Virtual World Games*, 2007 UCLA J.L. & TECH., No. 2, art. 6, at 37 (discussing a German criminal investigation into Second Life residents who were “reportedly buying sex with other players posing as children, as well as offering child pornography for sale”); Meek-Prieto, *supra* note 27 (arguing that age-play should be criminalized in the United States).

156. Lastowka and Hunter recognize this tension and suggest that there is a category of “real” virtual crimes, where the provider and the community-at-large may be harmed by a participant's actions – such as gold duping. See Lastowka & Hunter, *supra* note 27, at 315.

157. Kerr, *supra* note 27, at 425.

158. Brenner, *supra* note 134, at 60.

While Kerr argues strongly against creating new crimes to deal with virtual wrongs,¹⁵⁹ Brenner leaves open the question as to how territorial legal systems may react in the future to harms that exist only in the virtual world but threaten the territorial social order.¹⁶⁰ At present, however, Brenner argues that the primary indication of whether harm in a virtual world should be dealt with by territorial criminal law is whether the harm is felt primarily in the physical world or the virtual—whether the harm leaks into the real world.¹⁶¹

Recognizing this dichotomy leads to a more interesting question in determining how states should deal with behavior that is not criminal but is prohibited within virtual communities. For example, assume that Mr. Bungle's textual rape does not amount to harassment but clearly contravenes the acceptable social standards of the community. In Brenner's taxonomy, this behavior fits rather uncomfortably between her definition of a real cybercrime and a fantasy crime. The harm felt by the victim may or may not leak enough into real life to warrant the attention of territorial criminal law; if it does not, it is a fantasy crime, not a real cybercrime.¹⁶² This fantasy crime category, however, Brenner predominantly reserves for consensual depictions of territorial crimes—age-play, avataricide, or rape.¹⁶³ Accordingly, Brenner's focus is on determining whether the territorial state should prohibit consensual behavior based upon an assumption of systemic harm, rather than direct harm to the persons involved or the systemic harm to the community itself.¹⁶⁴

This is somewhat symptomatic of the difficulty that we have drawing boundaries around behavior in virtual communities. Generally, the punishment of harm within a community is understood as a criminal issue, but as the theorists above point out, territorial criminal law is a poor fit for acts whose meaning is determined largely by the context of the virtual community in which they occur. The focus in the legal discourse, accordingly, has largely been on whether territorial criminal law should address acts that are analogous to territorial crimes, rather than the ways in which community rules are enforced and community wrongs punished. When we begin to look at the enforcement of community rules, we enter a difficult territory that exists, once again,

159. See Kerr, *supra* note 27, at 416-17.

160. Brenner, *supra* note 134, at 96.

161. *Id.* at 60-61, 70-71.

162. *Id.* at 86.

163. *Id.*

164. *Id.* at 70-75.

between the private and the public, and between the virtual and the physical.

In these borderlands,¹⁶⁵ there is a significant theoretical gap in our conceptions of punishment and deterrence in virtual communities. Punishment does not form part of a traditional contractual governance regime, and if criminal law is inapplicable, a tension emerges between the need of the community to enforce its rules and the private governance model that delegitimizes punishment. As community governance is still regarded as a private contractual bargain, the punishment of community wrongs is considered to be a private issue; and yet, from an internal perspective, and from the perspective of legal theory, punishment is the domain of public criminal law.

As long as communities can deal with wrongs without explicit state intervention, this conceptual gap is relatively unimportant. If internal punishments can be imposed for wrongs that are only understandable through internal community norms, it should not matter that state law does not recognize any wrongdoing. If, however, communities are unable to impose punishment and uphold community rules without the further assistance of territorial states, then this conceptual gap poses a significant problem. As enforcement and punishment move from wholly internal to a community to territorial legal systems, there is a logical disconnect, and it is not at all clear to what extent territorial states ought to support providers in their attempts to maintain order within a community.

A. *The Need for Punishment Beyond the Internal Community*

Sometimes, internal punishments will not be sufficient to uphold community rules. Returning to the examples above, of Mr. Bungle's textual rape and the exploits of dupers in virtual worlds, it is apparent that, if community rules are to be enforced against participants who have either fled or are able to continuously re-enter the community, providers will need assistance from territorial states. This may be, as in Mr. Bungle's case, because the participant does not have significant in-world capital or is not particularly attached to his or her in-world identity. In such circumstances, the provider's response, to terminate the offender's account, would have very little effect, either as a punishment or as a deterrent. A participant who is not invested in his or her avatar or account can trivially create a new account and start anew every time he or she is caught breaking the rules. In virtual communities, there is a continual risk of recidivism with even the most severe punishments.

165. See Cohen, *supra* note 14, at 251.

The pseudonymous nature of participation in virtual communities makes it almost impossible to determine whether a punished offender has reincarnated into a new avatar in order to escape punishment or continue her malignant behavior.¹⁶⁶ While certain structural and design choices can limit pseudonymity, doing so is not always desirable.¹⁶⁷ Because purely internal methods cannot be wholly effective, at some point, providers are likely to turn to territorial legal systems for assistance.

Additionally, as in the case of the exploiters and dupers, a wholly internal enforcement regime provides no prospect for enforcement once a rule-breaking participant has fled the community. Faced with an opportunity to break the rules for short-term gain, participants can act quickly, offloading illicit gains and cashing out windfall profits before they are caught. In territorial states, an offender's physical body is subjected to the criminal law, and escape is both difficult and costly. Where a participant can profit enough from rule-breaking to make the loss of social connections and identity worthwhile, leaving a virtual community is comparatively much easier, even where she is not able or willing to re-enter under a new identity.

It is important to reiterate that I am not concerned here with the real cybercrimes—the categories of acts that are already proscribed by territorial states but are mediated through online communities. These wrongs pose little conceptual difficulty for territorial enforcement. Thus, the important question here is not whether Mr. Bungle's conduct should be prohibited by the state, or whether new laws should be created criminalizing virtual world exploits. The salient questions here are whether and how territorial legal systems should impose punishments for acts that are only wrongful because they breach a virtual community's shared understanding of the rules. Where communities are unable to enforce their rules on their own, this question becomes more

166. See DIBELL, *supra* note 11, at 24-25.

167. For example, one option is to require identification on subscription, usually based upon a credit card system. This limits the access of minors, who often do not have credit cards, and of those who cannot afford credit cards or the prospect of recurring bills and who accordingly benefit from being able to use anonymous prepurchased game cards. See Gyuhan Oh & Taiyoung Ryu, *Game Design on Item-selling Based Payment Model in Korean Online Games*, in SITUATED PLAY: PROCEEDINGS OF THE 2007 DIGITAL GAMES RESEARCH ASS'N CONFERENCE 650, 652-53 (2007), <http://www.digra.org/d1/db/07312.20080.pdf> (arguing that limiting pseudonymous participation may also prove harmful for communities where potential participants are hesitant to provide verifiable identifying information in order to join, like communities that explore sensitive political values, sexuality, or health topics).

important: should territorial states lend their support to maintain the integrity of consensual rules?

As virtual communities strive to address these tensions, providers have turned to other legal doctrines, such as copyright law, to punish and deter the breach of community rules. While it may be preferable to deal with rule breakers internally within the community,¹⁶⁸ that approach does not provide a satisfactory answer where internal punishment and deterrence prove to be insufficient or ineffective. Territorial states must consider to what extent internal punishments will be supported, and to what extent the state will intervene where internal punishments are not effective. This suggests that territorial states must also consider what to do when the internal rules lack legitimacy, whether external enforcement should be available, and whether internal enforcement should be restrained. The following sections consider the applicability of a number of different areas of law in fulfilling a punitive and deterrent role for virtual community rules.

B. Criminal Sanctions for Breach of Community Rules

The first point that must be dealt with is the possibility of criminalizing breaches of community rules. Criminal law is a good place to start, as it is obviously the most concerned with imposing punishments for wrongful behavior. Without the guarantees of process and accountability that come with the full structure of territorial governance, however, the rules created by virtual communities do not have the requisite legitimacy for the imposition of criminal sanctions by the state. The brief and saddening example of the death of Megan Meier in the case of *United States v. Drew*¹⁶⁹ illustrates the theoretical and practical difficulties of such a move.

Lori Drew, her daughter, and her employee created a fake MySpace account, presented themselves as a teenage boy, Josh, and befriended a thirteen-year-old girl, Megan Meier. Megan was a friend of Drew's daughter, and Drew created the account to gain Megan's confidence and find out how Megan felt about her daughter. After flirting with Megan for over a month, Josh abruptly turned against Megan, eventually telling

168. Lastowka & Hunter, *supra* note 27, at 316 (arguing that "the best avenue for the preservation of the benefits of virtual worlds may be in policing virtual crimes without outside assistance"); see also Brenner, *supra* note 134, at 60; Kerr, *supra* note 27, at 425.

169. 259 F.R.D. 449 (C.D. Cal. 2009).

her “[t]he world would be a better place without you.”¹⁷⁰ Megan committed suicide shortly after receiving that final message.¹⁷¹

The case sparked public outrage and launched a widespread debate about whether new cyberbullying laws should be introduced.¹⁷² Drew was eventually charged under the Federal Computer Fraud and Abuse Act (CFAA),¹⁷³ which prohibits intentionally accessing a computer without authorization and obtaining information from a “protected computer.”¹⁷⁴ The prosecution alleged Drew was guilty of a misdemeanor under that provision,¹⁷⁵ and also of the aggravated felony offense,¹⁷⁶ because she intended to use the information to further the tort of intentional infliction of emotional distress.¹⁷⁷ The prosecution relied on the fact that the MySpace Terms of Service prohibited harassment and abusive behavior, false registrations, soliciting personal information from minors, and promoting information known to be false and misleading to show that Drew’s access was unauthorized.¹⁷⁸ In November 2008, a jury found Drew guilty of the misdemeanor charge, but acquitted her of the felony aggravated offense.¹⁷⁹

In August 2009, the United States District Court for the Central District of California acquitted Drew because intentional breach of a site’s terms of service, without more, could not amount to a misdemeanor violation of the CFAA.¹⁸⁰ The court held that the contrary interpretation would render the criminal statute constitutionally void for being vague.¹⁸¹ The void-for-vagueness doctrine is a rule of law based constitutional doctrine that requires criminal laws to be adequately particularized.¹⁸² The district court held that if the Terms of Service alone were the basis of a criminal act under the CFAA, the provider

170. See Christopher Maag, *A Hoax Turned Fatal Draws Anger but No Charges*, N.Y. TIMES (Nov. 28, 2007), available at <http://nytimes.com/2007/11/28/us/28hoax>.

171. *Id.*

172. See, e.g., Matthew C. Ruedy, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & TECH. 323, 327-28 (2008).

173. 18 U.S.C. § 1030 (2006 & Supp. III 2010).

174. 18 U.S.C. § 1030(a)(2)(C) (Supp. III 2010).

175. *Id.*

176. 18 U.S.C. § 1030(c)(2)(B)(2) (2006).

177. *Drew*, 259 F.R.D. at 454.

178. *Id.*

179. *Id.* at 451.

180. *Id.* at 467.

181. *Id.*

182. See *United States v. Lanier*, 520 U.S. 259, 266-67 (1997); *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

would be, essentially, "the party who ultimately defines the criminal conduct."¹⁸³

Drew highlights significant tensions between the validity and enforceability of contractual terms of service and rules of virtual communities. The case itself can be fairly characterized as a struggle to find any punishment that could fit the perceived—but not criminal—wrongdoing, but the method of bringing the criminal charge threatened to support a new and undefined set of wrongs with the harsh penalties of criminal law.¹⁸⁴ The district court's decision makes sense from a rule of law perspective; the principle that a breach of the contractual terms of use could amount to serious criminal conduct directly conflicts with rule of law values of avoiding arbitrary punishment¹⁸⁵ and requiring a certain degree of predictability in the creation and imposition of penalties.¹⁸⁶ While the principle that breach of contractual terms should not generally lead to criminal prosecution seems correct, it highlights a significant outstanding question as to whether and how internal wrongdoing ought to be punishable.

C. *The Role of Compensatory Damages*

The contractual governance framework provides only limited remedies that are not always appropriate for governance purposes. The primary remedy for breach of contract is compensatory damages,¹⁸⁷ and punitive or exemplary damages are not generally available.¹⁸⁸ Breaches of community rules either result in specific harm against specific individuals, in general or assumed harm to the society at large, or, where the rules are mere technicalities, no real harm at all.¹⁸⁹ Where there has been actual, specific harm, contract law can provide a simple and effective compensatory remedy. For example, where a participant uploads content to Facebook that causes extreme loss or damage to Facebook's servers or its users' computers,¹⁹⁰ Facebook has a right, in

183. *Drew*, 259 F.R.D. at 465.

184. See Kerr, *supra* note 27, at 423-24.

185. DICEY, *supra* note 29, at 188.

186. See FULLER, *supra* note 62, at 63-64; HAYEK, *supra* note 65, at 74-75; RAWLS, *supra* note 63, at 239; Raz, *supra* note 65, at 198.

187. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, at ch. 16, intro. note; CORBIN ON CONTRACTS § 55.3 (Joseph M. Perillo ed., 2005).

188. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 355.

189. See Brenner, *supra* note 134, at 8.

190. The Facebook terms of use prohibit uploading disruptive code. See FACEBOOK, *supra* note 37, at cl. 3(4), (11) ("You will not upload viruses or other malicious code You will not do anything that could disable, overburden, or impair the proper working of Facebook, such as a denial of service attack.").

contract, to recover damages caused to its platform and any liabilities it may incur to third parties as a result.¹⁹¹ A punitive remedy is not available to Facebook, but Facebook may impose internal punishments (up to and including terminating the participant's account).¹⁹² An external punishment is only available if the participant's actions were criminal,¹⁹³ which will not necessarily be the case for many breaches that may cause damage. Contractual damages accordingly fulfill an important role in enforcement, but where compensatory damages are not sufficient, contract law cannot adequately address all the issues that arise out of breach of internal rules.

In cases where the harm is caused by profiting from breach of community rules, such as the dupers discussed earlier, restitution may provide a more appropriate remedy than compensatory damages, although its application is not always straightforward. For example, exploiting a bug to duplicate currency or items may look like criminal counterfeiting,¹⁹⁴ but assuming that it is not, it is difficult to identify the harm under compensatory contractual damages. Apart from any costs incurred in tracking down the resulting inflation, the provider has not really suffered a loss, because currency is merely a series of entries in its database that can be increased or decreased at any time. The argument that the duper not be allowed to keep the extra currency stems not from harm, but from two main claims: that if she were permitted to keep it, there would be an incentive for future participants to break the rules in a similar fashion and that it would be unjust to allow her to keep her ill-gotten gains. In such a case, it may be possible for a court to order disgorgement of profits made opportunistically through exploiting a bug and selling the proceeds on the grey mar-

191. Provided that the loss is not too remote; the loss must be identifiable as a probable result. See *Hadley v. Baxendale*, 9 Exch. 341 (1854); see also RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 351.

192. See FACEBOOK, *supra* note 37, at cl. 14.

193. See, e.g., 18 U.S.C. § 1030(a)(5)(A) (Supp. III 2010) (creating an offense for "intentionally [causing] damage without authorization, to a protected computer" by knowingly transmitting harmful code or information).

194. Lastowka & Hunter, *supra* note 27, at 315.

ket.¹⁹⁵ If that is possible, then the appropriate remedy would not be compensatory but restitutive.

Significantly, contractual damages are not generally well-suited for punishing breaches, and clauses that attempt to impose penalties are generally unenforceable.¹⁹⁶ Compensatory damages are especially inappropriate to proscribe social wrongs—what Brenner calls “soft” harms, as distinct from direct, “hard” harms to identifiable individuals.¹⁹⁷ As these wrongs are often based on a presumption of harm, they do not necessarily require actual harm to be wrongful.¹⁹⁸ If a participant breaches a contractual rule that only prohibits a soft harm, it will be difficult to evaluate the harm caused and only nominal damages may be available. For example, where a participant breaks a rule that exists to protect the community at large, like a prohibition against Real Money Trade (RMT), calculating damages is much more difficult. The RMT may place upward pressure on inflation, which causes harm to subscribers in unmeasurable amounts, but it also makes the game more accessible to time-poor players, which benefits both the provider and potentially the community. It may cause some players to enjoy the game less, but it may cause others to enjoy the game more. Quantifying the effect of the breach in these circumstances is likely to

195. See, e.g., *EarthInfo, Inc. v. Hydrosphere Res. Consultants, Inc.*, 900 P.2d 113 (Colo. 1995); see also Hanoch Dagan, *Restitutionary Damages for Breach of Contract: An Exercise in Private Law Theory*, 1 THEORETICAL INQUIRIES IN LAW 115 (2000); Melvin A. Eisenberg, *The Disgorgement Interest in Contract Law*, 105 MICH. L. REV. 559 (2006); John D. McCamus, *Disgorgement for Breach of Contract: A Comparative Perspective*, 36 LOY. L.A. L. REV. 943 (2002); Lionel D. Smith, *Disgorgement of the Profits of Breach of Contract: Property, Contract and “Efficient Breach,”* 24 CAN. BUS. L.J. 121 (1994). But see E. Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339 (1985) (arguing against disgorgement as a remedy in all but a small set of limited circumstances). It is important to note that such a remedy should properly be based in disgorgement damages under contract, rather than unjust enrichment. See Peter Birks, *Unjust Enrichment and Wrongful Enrichment*, 79 TEX. L. REV. 1767, 1788 (2001) (explaining that culpability is an important factor in determining whether disgorgement damages under contract should be available); James J. Edelman, *Unjust Enrichment, Restitution, and Wrongs*, 79 TEX. L. REV. 1869, 1878 (2001) (arguing for a stronger distinction between unjust enrichment and disgorgement damages); Andrew Kull, *Disgorgement for Breach, the “Restitution Interest,” and the Restatement of Contracts*, 79 TEX. L. REV. 2021 (2000) (discussing disgorgement as a contractual remedy where the breach is both profitable and opportunistic).

196. Contractual clauses that purport to impose a penalty for breach are generally unenforceable unless they reflect a reasonable estimate of probable or actual loss. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 356.

197. Brenner, *supra* note 134, at 8.

198. *Id.* at 17.

be prohibitively difficult, or at least extremely costly and time-consuming.

Take, for example, the claim made in *Hernandez v. Internet Gaming Entertainment, Ltd.*¹⁹⁹ In *Hernandez*, Internet Gaming Entertainment, Ltd. (IGE) was engaged in commercial gold farming²⁰⁰ in World of Warcraft, and Hernandez sought to initiate a class action suit to obtain both injunctive relief and monetary compensation.²⁰¹ Hernandez sought compensation for the lost time of WoW players who were forced to farm more as a result of the devaluation of the virtual currency and the increased competition for scarce resources.²⁰² The monetary value of the claim was calculated in United States Dollars at the rates of exchange reflected on IGE's own website.²⁰³ It seems very strange to consider a claim in monetary damages circularly stated by a suit that alleges that the primary wrong committed by IGE was its support of the grey market that gives WoW gold its monetary value. Properly characterized, the harm suffered by Hernandez and other players, if it is made out, cannot be the diminution of the value of in-world assets because their fundamental argument is that in-world assets ought not to be monetized. Contractual damages seem to provide a wholly inappropriate remedy in these circumstances. If Hernandez's claim is accurate, in that participants suffer through the long-term effects that commercial gold farmers have on the community, the most appropriate remedy would be injunctive relief, in order to require IGE to abide by the community rules in future, or punitive, in order to deter future similar breaches.

This reasoning holds for other cases where both the harm caused and the benefit received are not easily quantifiable. In such cases, neither contractual nor restitutive damages are likely to be appropriate. For example, where people are harmed by the actions of griefers (participants who break community rules primarily to inflict suffering on others), assessing damages is likely to be exceedingly difficult. Griefers can cause tremendous harm to the community as a whole, even if the specific harm they inflict on individuals never rises to the standards of

199. Amended Class Action Complaint, *Hernandez v. Internet Gaming Entm't, Ltd.*, No. 07-21403-Civ-COHN/SNOW (S.D. Fla. Aug. 17, 2007), available at <http://dockets.justia.com/docket/florida/flsdce/1:2007cv21403/296927/>.

200. Gold farming, as a subset of Real Money Trading (RMT), refers to the practice of carrying out repetitive tasks within a virtual world in order to earn virtual currency, usually (pejoratively) with the goal of selling the currency on the grey market. See generally DIBBELL, *supra* note 22.

201. See Amended Class Action Complaint, *supra* note 199, at 1-2.

202. *Id.* at 10.

203. *Id.* at 7-8.

emotional disturbance necessary to sustain damages in contract²⁰⁴ or found an action in tort.²⁰⁵ In such circumstances, if the provider is unable to sufficiently police the community through technological means and direct supervision, the enjoyment of participants and the value of the community may be seriously damaged, but no real compensation would be available against any one participant.

Even where quantifiable harm or benefit is identifiable, however, there will be cases where neither compensatory nor restitutive damages are likely to provide a sufficient deterrent to breach of community rules. If the threat of termination of a subscriber's account does not provide enough of a deterrent to prevent rulebreaking, presumably damages on their own will not always be a sufficient deterrent either, considering the low risk of a suit being filed and maturing to trial and the nonpunitive nature of any potential award.²⁰⁶ There is accordingly a serious tension where the standard contractual governance framework is not always well-suited to addressing wrongdoing in virtual communities. Where internal sanctions prove ineffective to punish and deter wrongdoers, communities may need external support, and a purely compensatory legal model will be inappropriate.

D. Punishment in Private Law

In order to circumvent the lack of punitive remedies and the difficulty of showing harm in contract law, providers may prefer to sue under a different theory of liability—often either copyright or tort. In virtual communities that require the participant to install a software client to access the platform, the right to install the software is usually made conditional upon accepting the rules in an End User License Agreement (EULA). This means that a proprietor may argue that accessing the virtual community in breach of the contractual rules constitutes

204. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 353; CORBIN ON CONTRACTS, *supra* note 187, § 59.1.

205. An action for emotional distress in tort requires both “extreme and outrageous conduct” and “severe emotional distress.” See RESTATEMENT (SECOND) OF TORTS § 46(1) (1965); PERSONAL INJURY: ACTIONS, DEFENSES, DAMAGES § 55A.02 (Louis R. Frumer & Melvin I. Friedman eds., 2011).

206. Fred von Lohman warns that the risk of an adverse costs order pursuant to attorney-fee clauses common to many virtual community contracts do provide an inequitable deterrent to breach of contractual rules where no quantifiable harm is able to be shown. See Fred von Lohmann, Keynote Address at the Queensland University of Technology Computer Games, Law, Regulation, Policy Symposium: Machinima: New Creativity, Old Laws (Feb. 15, 2008), video available at <http://blip.tv/testpattern/fred-von-lohmann-at-the-computer-games-law-regulation-policy-symposium-2008-678271>.

copyright infringement.²⁰⁷ Suing under copyright law has a number of advantages over suing under contract. As a preliminary matter, copyright law does not require privity of contract and simplifies the issuance of injunctive relief, two points we will return to later. The primary advantage of copyright law for providers, however, is that it decouples the damages award from the harm caused, allowing it to be used as a punitive remedy.

If, for example, a participant breached the WoW Terms of Use that prohibit participants from causing “distress, unwanted attention or discomfort to any user,”²⁰⁸ a contractual assessment may determine that damages are not available for discomfort, short of any actual loss from victims who terminate their subscription. If, however, the prohibition can be tied to copyright infringement, the harm assessed is not the harm of the abusive behavior, but the harm of infringing Blizzard’s intellectual property. The same principle holds for prohibitions against RMT, as seen in *Black Snow Interactive v. Mythic Entertainment, Inc.*,²⁰⁹ where Black Snow attempted to assert that its commercial gold farming operation in Dark Age of Camelot did not infringe Mythic’s copyrights.²¹⁰ Julian Dibbell notes that the core issue had nothing to do with copyright: “What mattered here wasn’t whether Black Snow had or had not violated Mythic’s copyrights. What mattered, rather—and mattered indeed—was whether Black Snow had or had not done harm to the community to which they belonged by virtue of their subscriptions to *Dark Age of Camelot*.”²¹¹

Dibbell argues that the contractual Terms of Service are much less alienating than any claim based in copyright.²¹² While he acknowledges that there are serious problems with the way that the contractual terms are written and enforced, he points out that at least in some ideal form, the terms represent a continuously negotiated social contract that

207. 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, 5 (2009) (noting that the use of copyright to back the contractual terms is an “extremely powerful mechanism”).

208. Blizzard, *supra* note 105, at cl. 9(b)(vi).

209. SA CV02-112GLT (ANx) (C.D. Ca. 2002).

210. The case never matured to trial, as Black Snow was dissolved before the case could be heard. The district court did, however, grant Mythic’s application to compel arbitration on the terms of service, which would likely have ended in Mythic’s favor. See *Black Snow Interactive*, CV02-112GLT.

211. Julian Dibbell, *Owned!: Intellectual Property in the Age of Dupers, Gold Farmers, eBayers, and Other Enemies of the Virtual State*, in *THE STATE OF PLAY: LAW, GAMES, AND VIRTUAL WORLDS* 137, 142 (Jack M. Balkin & Beth Noveck eds., 2006) (emphasis omitted).

212. *Id.* at 143-44.

reflects the (admittedly flawed) bargaining process between the provider and its participant subjects:

Weighing the case purely as a matter of intellectual property law, a judge could certainly have determined the legality of eBaying once and for all, but because the actual reasons Mythic and many of its customers wanted the practice stopped had nothing ultimately to do with intellectual property, any such ruling would have addressed those reasons no more adequately than a coin toss. Ruling the EULA to be a valid contract, on the other hand, would have sent the question back where it belonged—into the much more finely tuned evaluative process that is the ceaseless, grinding struggle between players and designers over the shape of the game.²¹³

This method of casting the actions of rulebreakers as copyright infringement is not just alienating, but it also provides a means for the provider to avoid the compensatory function of contractual damages and impose punishments for breaches of internal rules. Indeed, the provider need not even show harm of copyright infringement, as damage awards can be calculated on a presumption of harm.²¹⁴ The result is that, if a remedy under copyright is available, it is likely to be much easier for a provider to obtain a significant monetary award for breach of community rules than under contract. Because the award of damages is assessed in a way that is decoupled from the actual harm caused by the breach and because copyright damages will, *ex hypothesi*, be significantly higher than the nominal or compensatory damages that would be available under contract, then the award will often perform a punitive, rather than compensatory, function.

Punitive awards are also available as exemplary damages in tort if a claim can be made out.²¹⁵ For example, a participant who, in breach of the rules of the community and without consent, takes another participant's virtual asset could be liable for conversion or trespass to chattels²¹⁶ if property in the asset can be established.²¹⁷ Tort law

213. *Id.*

214. 17 U.S.C. § 504(c) (2006) (providing for the imposition of statutory damages for copyright infringement, ranging from \$750 to more than \$30,000 per work infringed).

215. RESTATEMENT (SECOND) OF TORTS, *supra* note 205, § 908(2) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.").

216. See John William Nelson, Recent Development, *The Virtual Property Problem: What Property Rights in Virtual Resources Might Look Like, How They Might Work, and Why They Are a Bad Idea*, 41 MCGEORGE L. REV. 281 (2010) (considering the application of conversion to virtual property disputes and arguing against the recognition of virtual property rights); see also Allen Chein, Note, *A Practical Look at Virtual Property*, 80 ST. JOHN'S L. REV. 1059 (2006); Garrett Ledgerwood, Note, *Virtually Liable*, 66 WASH. & LEE.

has not yet been used as a significant theory of liability to enforce the rules of virtual communities, and it would need to develop significantly to cover intangible assets, but it could conceivably provide a similar punitive element to enforcement of community rules in the future.²¹⁸

There is a significant problem with relying on copyright or tort to punish the breach of virtual community rules. In general, punishment and deterrence form an important part of Western law. Where someone willfully injures another,²¹⁹ or commits a crime, we often expect not only compensatory remedies, but punitive ones. It is likely that participants in virtual communities also expect that those who break community rules should be punished. Nevertheless, the external imposition of penalties is highly problematic. The need to regulate punishment and avoid arbitrary or unpredictable sanctions underpins much rule of law theory.²²⁰ The rule of law imposes high standards for the way in which criminal laws are created and enforced; it seems clear enough that a person should not be prosecuted for breach of community terms of service in the way in which prosecutors decided to charge Drew

L. REV. 811, 847-49 (2009) (examining the application of trespass to chattels to virtual property).

217. There are some academic suggestions that there is no theoretical basis that property rights should not be recognized in virtual assets. See Fairfield, *supra* note 80; F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CALIF. L. REV. 1 (2004). But see Steven J. Horowitz, Note, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443 (2007) (arguing that Lockean theory does not provide a strong justification for virtual property rights); Nelson, *supra* note 216 (arguing against the recognition of virtual property).

218. A number of cases involving disputes in virtual communities have alleged tortious causes of action. See, e.g., MDY Indus., LLC v. Blizzard Entm't, Inc., 629 F.3d 928, 1021 (2010), *amended and superseded on denial of reh'g*, No. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011) (finding a triable issue of fact as to whether MDY was liable for tortious interference with contract by creating and marketing Glider, a program which helps World of Warcraft users cheat by automating their actions); *In Game Dollar*, SACV07-0589 JVS (where a consent order was issued in settlement of a suit brought by Blizzard against real money traders alleging, amongst other grounds, trespass to chattels and tortious interference with contract); *Bragg*, 487 F. Supp. 2d at 595 (where plaintiff Marc Bragg sued Linden Lab for destroying the value of his in-world property alleging conversion, amongst other grounds; the suit settled before the substantive issues could be decided).

219. See DAMAGES IN TORT ACTIONS § 40.02 (Matthew Bender 2011) (stating that punitive damages in tort are available for punitive and deterrent purposes where the wrongdoing is "sufficiently outrageous to warrant being characterized as malicious, oppressive, fraudulent, willful, reckless or with conscious disregard, wanton or opprobrious").

220. See DICEY, *supra* note 29, at 188; FULLER, *supra* note 62, at 39; RAWLS, *supra* note 63, at 241; ALLAN, *supra* note 30, at 237-38; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 11 (1977); Raz, *supra* note 65, at 198.

under the CFAA. This would risk a dangerous assertion—that otherwise noncriminal acts, if done in violation of the terms of service, could warrant criminal sanctions. The immediate rule of law problems are obvious—the definition of what actions are criminally proscribed is created by the provider in a contractual document, which is not subject to legislative debate or process, can be modified by a private party almost at will, and is not a rule of general application.²²¹ There is also a fundamental issue of proportionality, as the punishment (which was designed for computer fraud) bears almost no relation to the act's seriousness, which varies greatly depending upon context.²²²

These rule of law limitations should also apply, with slightly lesser force, to civil law actions that are essentially punitive in effect. Although these actions do not result in incarceration, where the cost to the participant is significantly higher than the damage caused, there is still a very real punitive effect. Attorney-fee clauses,²²³ statutory damages in copyright, and punitive damages in tort all have significant punitive and deterrent effects on participants. Even without an explicit punitive aspect, these private law remedies, by decoupling the calculation of damages from the actual harm in question, implicitly impose punishments because the awards are likely to be much higher than those that would be available under a compensatory contract evaluation. Rule of law values of predictability and proportionality suggest that punitive, as opposed to compensatory, damages ought not be available in actions where wrongdoing reflects a breach of internal rules rather than a specific tort or statutory wrong. For example, there is a clear difference between a person who infringes copyright in a game by creating and selling copies of the software and a person who technically infringes copyright by continuing to play a legitimately acquired game in breach of the gameplay rules embedded in the terms of service. The wrong in the first case is copyright infringement; the wrong in the second is breaking community rules. Damages for copyright infringement may legitimately be available in the first, but should not be available in the second. This distinction is not one of real harm versus virtual harm, but rather a recognition that citizens ought not be punished for breaking rules that are not legitimately created.

Viewing a wrong as copyright infringement, rather than as the wrong it clearly is as seen through the interpretative framework of community norms, places the full support of state copyright law behind the relatively arbitrary rules created by the provider. From a rule of law

221. FULLER, *supra* note 62, at 48-51, 63-65.

222. See ALLAN, *supra* note 30, at 138.

223. See von Lohmann, *supra* note 206.

perspective, it seems clear that the rules of virtual communities do not have the legitimacy to justify punishing participants for their breach. Unless and until we develop more comprehensive guarantees of legitimacy to make and enforce rules in virtual communities, breaches of those rules that do not amount to a distinct, clear, and promulgated wrong should not be punishable by the territorial state.

The implication of this reasoning is that, as long as virtual communities are governed by contractual principles, it makes little sense to also apply penalties drawn from other areas of private law. In this construction, breach of contract ought to be actionable in contract, not by triggering underlying property rights in either copyright or tort. Ensuring that only contractual remedies are available for breach of the contractual terms of service means that participants are not subject to the punitive effects of either criminal charges or civil damages disconnected from the wrongful act, whilst retaining the ability of providers and others to recover genuine compensatory damages.

E. The Interplay Between Contract and Authorization in Tort and Copyright

This reasoning suggests that contractual clauses that establish rules for behavior in a virtual community should not generally be read to limit the scope of authority to connect to the community. However, rules more directly related to the infrastructure and resources of the provider, such as requirements to pay a monthly subscription fee or only to connect through authorized software clients, should condition authorization and therefore enliven the underlying property rights on their breach.²²⁴ So, for example, a MySpace rule against creating a false identity is a community rule and should only be enforced contractually; its breach does not make access to the MySpace service a criminal trespass.²²⁵ Conversely, acts like breaking the authentication system to gain access to the community or gaining access to the servers in order to make changes within the community are clearly outside the scope of authorization and should result in potential liability under tortious and criminal trespass.²²⁶

A similar distinction is applied under copyright, and courts attempt to differentiate between contractual terms that condition the copyright

224. See Burk, *supra* note 3.

225. Drew, 259 F.R.D. at 467; see also Kristopher Accardi, *Is Violating an Internet Service Provider's Terms of Service an Example of Computer Fraud and Abuse?: An Analytical Look at the Computer Fraud and Abuse Act, Lori Drew's Conviction and Cyberbullying*, 37 W. ST. U.L. REV. 67 (2009).

226. Burk, *supra* note 3.

license grant, and those that are purely contractual in nature.²²⁷ The recent United States Court of Appeals for the Ninth Circuit decision in *MDY Industries, LLC v. Blizzard*²²⁸ directly addresses the difficulty inherent in distinguishing between acts that implicate copyright interests and those that only resonate in contract. MDY licenses Glider, an automation bot that is designed to play World of Warcraft (WoW) on behalf of its users. Glider has proved quite successful, allowing a small proportion of players to avoid some of the repetitive tasks built in to prolong the WoW experience. Like users who purchase virtual currency to advance within the game in less time, Glider users are able to advance their character and collect currency rewards with minimal repetitive grinding. Blizzard, on the other hand, considers automation to be cheating and actively attempts to seek out and ban participants who are using Glider. Blizzard argued that it spends a large amount of money responding to complaints and combating Glider and sought instead a finding that MDY was liable for secondary copyright infringement, technological circumvention, and tortious interference with the contracts between Blizzard and Glider users.²²⁹

Because a user must copy parts of the WoW program into memory in order to play it, and users only have a right to copy as granted by the software agreements,²³⁰ Blizzard argued that breach of the contractual prohibitions on botting made that copying an infringement. At the relevant time, Blizzard's Terms of Use prohibited the use of "cheats, bots, mods, and/or hacks, or any other third-party software designed to modify the [WoW] experience."²³¹ The United States District Court of

227. See, e.g., *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir. 1999). In *Sun Microsystems, Inc.*, the United States Court of Appeals for the Ninth Circuit held that

[g]enerally, a copyright owner who grants a nonexclusive license to use his copyrighted material waives his right to sue the licensee for copyright infringement and can sue only for breach of contract. If, however, a license is limited in scope and the licensee acts outside the scope, the licensor can bring an action for copyright infringement.

Id. (internal citations and quotation marks omitted).

228. 629 F.3d 928 (2010), *amended and superseded on denial of reh'g*, No. 09-15932, 09-16044, 2011 WL 538748 (9th Cir. Feb. 17, 2011).

229. *Id.* at 934-36.

230. MDY users could not rely on the essential step defense in 17 U.S.C. § 117(a)(1) (2006) because WoW players were licensees, not owners, of the WoW software. *MDY Indus.*, 629 F.3d at 938-39 (citing *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1108-09 (9th Cir. 2010)).

231. *Id.* at 938 (internal citation and quotation marks omitted). The full clause, as of December 9, 2007, can be seen at Blizzard, *World of Warcraft Terms of Use Agreement*, TOSBACK (Dec. 9, 2007), <http://www.tosback.org/version.php?vid=357>.

Arizona held that the clause was of the same class of copyright limitations as rules that prohibit “copying, distributing, or modifying the work,” and that using Glider was accordingly an infringement of copyright.²³² The Ninth Circuit reversed that decision, holding that breach of a contractual term would sound in copyright “only where the licensee’s action (1) exceeds the license’s scope (2) in a manner that implicates one of the licensor’s exclusive statutory rights.”²³³ Because using Glider does not involve one of the exclusive rights (no copies are made other than the copies ordinarily made in the course of playing WoW), the prohibition on botting can only be a contractual covenant, not conditioned on the copyright license grant.²³⁴

Importantly, the Ninth Circuit explained that “[w]ere we to hold otherwise, Blizzard—or any software copyright holder—could designate any disfavored conduct during software use as copyright infringement, by purporting to condition the license on the player’s abstention from the disfavored conduct.”²³⁵ This conclusion accords with our normative framework by recognizing that breaking internal rules will generally be treated as a contractual breach rather than copyright infringement, and that copyright remedies will only lie to protect copyright interests. This seems fundamentally correct; it would seem that the reason that Blizzard would want to prohibit Glider has little to do with its copyright interests and everything to do with enforcing internal rules against automation and cheating. The arguments made at first instance by Blizzard support such an inference:

Blizzard contends that Glider diminishes the value of WoW and causes Blizzard to lose customers and revenue. Blizzard asserts that WoW is a carefully balanced competitive environment where players compete against each other and the game to advance through the game’s various levels and to acquire game assets. Blizzard claims that Glider upsets this balance by enabling some payers to advance more quickly and unfairly, diminishing the game experience for other players. Blizzard also contends that Glider enables its users to acquire an inordinate number of game assets—sometimes referred to as “mining” or “farming” the game—with some users even selling those assets for

232. *MDY Indus., LLC v. Blizzard Entm’t, Inc.*, No. CV-06-2555-PHX-D6C, 2008 WL 2757357, at *5 (D. Ariz. July 14, 2008) (“The provisions of section 4 thus make clear that although users are licensed to play WoW and to use the game client software while playing, they are not licensed to exercise other rights belonging exclusively to Blizzard as the copyright holder - copying, distributing, or modifying the work. The provisions are limits on the scope of the license granted by Blizzard.”).

233. *MDY Indus.*, 629 F.3d at 940.

234. *Id.* at 940-41.

235. *Id.* at 941.

real money in online auction sites, an activity expressly prohibited by the TOU.²³⁶

The harm that Blizzard is trying to address here is not the harm to copyright interests that occurs when players who have already purchased the game copy it into the memory of their computer, nor is it really about the creation of interoperable programs, which Blizzard explicitly supports through an open interface.²³⁷ The core problem with Glider is that it helps people cheat and upsets the game balance. This is, if properly construed, the harm of breaching internal rules, not the harm of copyright infringement. It follows that the interests of proportionality require that the remedies available should be contractual remedies, not the disconnected remedies of copyright. The gameplay rules of WoW are, essentially, consensual contractual agreements; to expose rulebreaking participants to significant potential damages for copyright infringement instead of a compensatory award under contract would be extremely problematic in the way that the state would essentially be imposing punishments for breach of rules unilaterally determined by a private party.

The general principle here seems sound: copyright remedies ought to be reserved for actions that threaten copyright interests and should not be available to punish a breach of internal rules. The same general principle would seem to apply for actions based in trespass. Requiring harm to be shown and limiting remedies to compensatory damages under contract ensures that the state does not back potentially illegitimate internal rules with significant punishments.

F. The Need for an Alternative Approach

The conclusion that only compensatory damages should be available for breach of internal rules is, on its own, somewhat problematic where virtual communities cannot punish wrongs internally. As *MDY Industries* demonstrates, the contractual power to terminate the accounts of users will often not be sufficient to prevent widespread breach of community rules. If rulebreaking users have a sufficiently advanced means of attempting to avoid detection, those who find enough benefit in breaking the rules will continue to do so. In *MDY Industries* specifically, a remedy against MDY is still available under anti-

236. *MDY Indus.*, 2008 WL2757357, at *1.

237. See Fairfield, *supra* note 89, at 462 (noting that Glider does not operate through the official and regulated interface that Blizzard provides).

circumvention law²³⁸ and, potentially, tortious interference with contract.²³⁹ The tortious interference claim, in particular, may prove to be a reasonably well-tailored means of preventing third parties from creating tools designed to assist participants in breaching community rules, as long as it does not extend to prohibit general purpose tools that have other legitimate uses.

As against individual rulebreakers, however, the lack of an effective external sanction may continue to prove problematic. Generally speaking, if only compensatory remedies are available for breaches of virtual community rules, there will be little legal deterrent to their breach. Without effective internal sanctions, some communities are likely to suffer a breakdown in the social order as participants have an incentive to act opportunistically, breaking rules without fear of punishment. This is essentially the doctrine of efficient breach in contract: where a participant can benefit enough from breaching an agreement to compensate any other parties for their loss, breaching the agreement is Pareto optimal and ought to be encouraged.²⁴⁰ This doctrine makes little sense from a rule of law perspective, which expects that a community's rules ought to be upheld regardless of whether it is efficient to do so.²⁴¹ H.L.A. Hart, in particular, has argued that for law to be valid, it must be generally regarded as morally binding by the community.²⁴² A governance model that encourages opportunistic breach is unlikely to engender internal support for community rules. Even viewing the community from an external perspective and ignoring

238. The Ninth Circuit found that Glider's evasion of Blizzard's security and detection algorithms circumvented Blizzard's access control technical measures in contravention of 17 U.S.C. § 1201(a)(2) (2006). *MDY Indus.*, 629 F.3d at 953-54. Note that this finding relies on a problematic interpretation of a protected work, as the court found that the technical measure only controlled access to the dynamic, nonliteral audiovisual display of the game, not the fixed works that individually make up the game. See *id.* at 952-53.

239. In order to prevail on the tortious interference claim, Blizzard had to show that MDY's interference with the contractual relationship between Blizzard and its users was improper. Based in part on MDY's arguments that Glider was a useful program that brought value to its users and did not compete directly with Blizzard's service, the Ninth Circuit held that there were triable issues of material fact and vacated the district court's summary judgment, remanding the issues for trial. *Id.* at 955-56.

240. See OLIVER WENDELL HOLMES, *THE COMMON LAW* 301 (1923) ("The only universal consequence of a legally binding promise is, that the law makes the promisor pay damages if the promised event does not come to pass.").

241. There may be a separate argument that societies ought not create inefficient rules in order to maximize total welfare, but efficiency is not the sole measure of desirability in any but the most extreme of libertarian ideal societies.

242. HERBERT LIONEL ADOLPHUS HART, *THE CONCEPT OF LAW* 56 (1961) (discussing the internal point of view and arguing that a "critical reflective attitude" that forms the standard for acceptable behavior is necessary, at least for those enforcing the laws).

the morality of the rules suggests that punishments may be necessary in order to deter wrongdoing, and deterring wrongdoing is assumedly necessary to allow the community to thrive.

There is a fundamental tension here, where communities seem to need some external punitive powers in cases where participants can escape internal punishment, but the state cannot legitimately impose those punishments. This tension raises a significant question about whether the territorial state ought to aid the provider, or the members of the community, in enforcing the community rules. A wholly compensatory approach is likely to be ineffective in deterring wrongdoing where the wrongdoer is able to escape punishment within the community, but a punitive approach unjustifiably risks elevating community rules almost to the status of criminal law. Increasing the legitimacy of private governance may make the imposition of penalties appropriate, but doing so would likely remove a great deal of the autonomy that makes these communities attractive in the first place.²⁴³ If the contractual framework is to be retained, the best answer seems to be to reject the private internal/public external dichotomy and instead encourage legitimate internal governance procedures and empower communities to enforce their rules, rather than necessarily relying on the coercive power of the territorial state, at least at the first instance.

IV. EMPOWERING COMMUNITY GOVERNANCE THROUGH EQUITABLE RELIEF

There are two main scenarios under which neither internal governance nor compensatory contractual damages are likely to be effective. The first occurs where the provider has wrongfully terminated a participant's access and refuses to review the decision or reinstate her account. The second involves enforcement against participants for whom internal enforcement poses little deterrence. Primary examples are griefers or commercial actors who can create new accounts and internal identities as required, or individuals interested in short-term goals who have no intention of participating in a community after their wrongdoing has been discovered—such as exploiters and dupers who are able to make significant profits and cash out. In both scenarios, the equitable enforcement of the contractual rules is likely to provide better outcomes than merely compensatory damages, without requiring courts to seek punitive remedies under criminal law, copyright, or other private law.

243. See Balkin, *supra* note 88; Bartle, *supra* note 30; Castronova, *supra* note 30.

A. *Specific Performance to Reinstate a Participant's Access*

The equitable remedy of specific performance is likely to be much more appropriate than damages in enforcing community rules against providers. Fairfield proposes a hypothetical example, where a corporate participant like IBM has their access to Second Life wrongfully terminated, losing their virtual land and presence.²⁴⁴ The appropriate remedy in this case would be specific performance, an order requiring Linden to restore IBM's virtual property and access. This is a much more attractive option than compensatory damages, which would have to include calculations either for the loss of goodwill and future marketing potential or the lost investment in developing the virtual space.

This argument does not apply only to corporate participants; in many cases where a participant seeks to enforce the community rules against the provider, she will often prefer compliance over compensation for breach. For example, if a participant whose account has been wrongfully terminated brought suit to enforce the contract, a wholly compensatory award would be unlikely to provide an effective remedy. It is common in virtual community contracts to limit any amount recoverable to the amount paid under the contract.²⁴⁵ If viewed as a pure consumer transaction, compensation for loss of access to a virtual community can be valued at the relatively low price of the subscription fee—perhaps \$15 per month.²⁴⁶ Valuing access to the community at the market price for provision of access, however, ignores the social aspect of what makes virtual communities much more important than passive entertainment.²⁴⁷ The argument here is that participation in a virtual community is sufficiently important to warrant property rule protection, rather than being subject only to much more fragile compensatory liability rule protection.²⁴⁸ For many participants in many communities, the social

244. Fairfield, *supra* note 89, at 459.

245. Andrew Jankowich, *EULaw: The Complex Web of Corporate Rule-Making in Virtual Worlds*, 8 TUL. J. TECH. & INTELL. PROP. 1, 51-2, Annex A Nos. 59 and 73 (2006) (showing that 92% of virtual world contracts limit the liability of the provider, and 23% of contracts surveyed limit a participant's remedy to terminating the contract and quitting the virtual world).

246. See Zaffron et al., *supra* note 99.

247. TAYLOR, *supra* note 1, at 135 ("The common framing of games as 'simply entertainment' often obscures the ways they act as key cultural sites in which forgoing participation may have real costs.").

248. See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of The Cathedral*, 85 HARV. L. REV. 1089 (1972); Guido Calabresi, *Remarks: The Simple Virtues of The Cathedral*, 106 YALE L.J. 2201, 2203-04

connections they have forged and the identity they have constructed within the community makes access much more personally important than a purely fungible consumer transaction.²⁴⁹ In these circumstances, an award of specific performance will likely be more appropriate than an award of damages.

The willingness of courts to award specific performance will depend greatly upon the identification of this gap between a compensatory award and the value of access to the community to the subscriber. If compensatory damages are clearly not adequate to remedy the harm that the subscriber has suffered, specific performance may be available.²⁵⁰ In many such cases, since the harm suffered by the participant is exceedingly difficult to quantify, specific performance is likely to provide a much simpler and more certain remedy.²⁵¹ Importantly, virtual communities are rarely substitutable; we can draw an analogy to contracts for unique goods, where specific performance is generally much more appropriate than damages because the plaintiff cannot easily replace the good in question.²⁵² In much the same way, a participant whose friends all gather in one community cannot easily replicate her social network in another, even if there is a reasonably similar competitor.

Importantly, specific performance will often not be granted if the participant is in breach of the contract. Bragg, for example, may not qualify for specific performance if he did in fact break the rules, although the court will look to the seriousness of the breach and whether

(1997) (discussing the importance of social choice between property and liability rules for theft and breach of contract); Richard A. Epstein, *Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2098 (1997) (arguing that a remedy of specific performance is often more appropriate than damages under contract in circumstances other than purely financial transactions).

249. See Suzor, *supra* note 8.

250. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 359.

251. See *id.* § 360 cmt. b (damages are likely to be inadequate where it is too difficult to estimate loss with reasonable certainty); see also Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (arguing that specific performance should be routinely available); Melvin A. Eisenberg, *Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law*, 93 CALIF. L. REV. 975 (2005) (arguing that specific performance should be more available in certain situations). *Contra* Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349 (2009) (arguing against a general entitlement to specific performance where compensatory damages are available).

252. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 360 cmt. c (specific performance more appropriate where no suitable substitute is readily available).

the plaintiff's conduct would render specific performance inequitable.²⁵³ This seems desirable; because rule of law values support the enforcement of community rules, specific performance should be denied to participants like Bragg if the court found that, by exploiting a bug to illicitly obtain land, he had violated a core term of the agreement and that, as a result, his access to the community was validly terminated. Assuming the rule was valid and that Linden did not act inappropriately in terminating his access, Bragg's only remedy should be compensatory in nature.

One major doctrinal stumbling block to the award of specific performance of virtual community contracts lies in courts' reluctance to make orders requiring ongoing judicial supervision.²⁵⁴ While specific performance of personal service contracts is not generally available,²⁵⁵ it is unclear whether the same objections hold for virtual community contracts. Courts may be wary of ordering specific performance of such an ongoing contract because of the potential requirement of ongoing supervision and a general wariness against forced association. Nevertheless, at least in the larger communities, an order that the participant's account be reinstated may finally resolve the dispute between the parties. Still, there will always be a risk that the contract will be breached again in the future. This is particularly likely where the remedy can be framed as a requirement that the defendant achieve a specifiable result, such as an order requiring the provider to restore assets wrongfully confiscated.

More problematically, specific performance may not be available where there is no guarantee of the plaintiff's performance because it would be unfair to bind the defendant, but leave him or her only a remedy in damages should the plaintiff not complete the transaction. Historically, mutuality has required that the remedy of specific performance must be hypothetically available against the plaintiff before the court will order the defendant's performance.²⁵⁶ There have been so many exceptions

253. CORBIN ON CONTRACTS, *supra* note 187, § 1175 (explaining that "[a] plaintiff who has made a wilful and inexcusable repudiation of his own contractual duty should never be given a decree for specific performance against the other party unless he retracts the repudiation before any material change of position by the other party in reliance thereon").

254. *Id.* § 1171 ("[A] decree for specific performance should not be granted if the court is going to be unable to enforce it effectively or to pass an intelligent judgment on the question whether its order has been obeyed in good faith.").

255. RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 367.

256. See J.B. Ames, *Mutuality in Specific Performance*, 3 COLUM. L. REV. 1 (1903) (arguing for the reformulation of the requirement of mutuality).

drawn to this rule,²⁵⁷ however, that it may be more accurate to use the more general construction that "the defendant will not be compelled to perform specifically unless he is reasonably well secured with respect to the agreed exchange for his performance."²⁵⁸

Under the stronger form of the rule, because the court could not force a participant to remain active in a virtual community, specific performance of the provider's promise to allow access may be denied. This is the likely result under current doctrine, where courts have often denied specific performance of contracts where the plaintiff's consideration is the performance of some personal service.²⁵⁹ Two important considerations, however, tend to weigh against this conclusion. First, the provider's risk would have to be weighed against the past performance of the participant, who will usually have already invested significant time in the virtual community. To the extent that the requirement of mutuality is based upon ensuring appropriate security to the defendant in case of the plaintiff's future breach, it would seem that such past investment might provide substantial security.²⁶⁰ Second, and perhaps more importantly, there is a clear qualitative difference between the benefits that participants and (large) providers get from a monthly subscription contract. While damages are not likely to be adequate to compensate a participant for loss of access to the community, damages will usually be wholly adequate to compensate the provider for the loss of the participant's subscription fee.²⁶¹

While there is still a great deal of uncertainty, the availability of specific performance may accordingly turn on the characterization of the

257. See Edgar Noble Durfee, *Mutuality in Specific Performance*, 20 MICH. L. REV. 289, 291 (1922) (noting that "the exceptions literally ate up the rule").

258. CORBIN ON CONTRACTS, *supra* note 187, § 1181.

259. See, e.g., *Roller v. Weigle*, 261 F. 250, 252 (D.C. Cir. 1919) (denying a remedy for specific performance because the plaintiff could not be compelled to act as managing director of a corporation and therefore ordering the defendant's performance would not be mutual, despite the plaintiff's assurance that he was "ready and willing to perform every agreement and undertaking on his part to be performed").

260. See, e.g., *Newman v. French*, 116 N.W. 468, 469-70 (Iowa 1908) (injunction granted to prevent sale of property "so long as plaintiff continues to perform or to be ready and able to perform the contract on her part"); *Columbia Water Power Co. v. Columbia*, 5 S.C. 225, 246-47 (1873) (granting specific performance on a contract to supply water where the plaintiff had already invested significantly in the creation of infrastructure); see also CORBIN ON CONTRACTS, *supra* note 187, § 1189 ("There may have been such a part performance, or such an investment of funds or labor in preparation to perform, that the refusal of specific performance will leave the plaintiff a heavy loser.").

261. See CORBIN ON CONTRACTS, *supra* note 187, § 1186 (arguing that "[t]here are cases in which the security may be sufficient, even though no legal remedy other than damages may be available in case of a later breach by the plaintiff").

participant's performance. If the performance expected by the provider is merely the payment of a monthly fee, then no additional security is likely to be necessary. In fact, because subscription fees are generally paid in advance, the provider is not likely to suffer significant harm if the participant does not return to the community. If, on the other hand, the provider expects active participation in the community, the participant's assertion that she is ready, willing, and able to re-enter the community may not be sufficient. This construction, however, seems to be a distortion of the nature of virtual community contracts. Providers do not, generally speaking, contract with participants to add their personal skill and labor to the community; more commonly, the provider makes a service available to the participant regardless of the level of the participant's involvement within the community. Certainly, the provider derives some additional benefit from each participant who adds to the community, but given that there are often thousands, if not millions, of active users, the marginal value provided by any one participant is usually quite small. It would seem then, at least in the larger communities where the provider is unlikely to notice whether the participant is active or not, that specific performance should not be withheld for lack of mutuality. In such cases, sufficient security should be available if the court makes the order for specific performance conditional on the participant's concurrent performance of her obligation to pay the monthly subscription fee.²⁶²

Where a participant's access has been wrongfully terminated, specific performance would provide a remedy that is, in general, much more appropriate than damages. Damages for the loss of a participant's

262. See *Great Lakes & St. Lawrence Transp. Co. v. Scranton Coal Co.*, 239 F. 603, 609 (7th Cir. 1917) ("If specific performance be otherwise proper, equity is no longer deterred from granting its aid because of a so-called lack of mutuality in the remedy. It suffices that defendant's compulsory performance is conditioned upon plaintiff's continued readiness to carry out his obligation."); *Montgomery Traction Co. v. Montgomery Light & Power Co.*, 229 F. 672, 676 (5th Cir. 1916) ("[B]y the terms of the decree appealed from the defendant is left at liberty to cease performance whenever a default by the plaintiff occurs. Specific performance by it is required only so long as there shall be like performance by the plaintiff. It seems that where, as in the instant case, the reciprocal obligations of the parties to the contract in question are concurrent, the continuance of the obligation of each to perform his part being dependent upon continued performance by the other, any material injury which otherwise might be sustained by the defendant, of whom performance is required, in consequence of his not having an efficient remedy for coercing future performance by the plaintiff, is effectually avoided by making the defendant's obligation to continue performance dependent upon a continuance of performance by the plaintiff. The conclusion is that the circumstances of the instant case fairly negative the conclusion that the decree appealed from involved the inequitable result, the avoidance of which is the prime object of the rule as to mutuality of remedies.").

connection to her friends and family, to her personal expression in her virtual persona, and to the non-fungible virtual assets in her possession are highly uncertain and difficult to quantify. An order to reinstate her access, on the other hand, can be complied with quickly and with little difficulty. While specific performance is unlikely to be available to prevent a provider from terminating a virtual community in its entirety,²⁶³ it should, in appropriate circumstances, be available to require a provider to reinstate access to a particular participant. Such an approach is somewhat unfamiliar in contract law, but virtual community contracts do not fit within the traditional contractual paradigm, and courts may be willing to extend the remedy in certain circumstances. If it proves possible, specific performance would seem to provide a better remedy than damages in many situations where a participant's access has been unlawfully terminated.

B. Injunctive Relief

Equitable relief is also likely to keep participants out in situations where internal punishment is not sufficient to deter wrongdoing within the community. A useful example can be found in the case of *Blizzard v. In Game Dollar, LLC*,²⁶⁴ which involved prohibited RMT and spamming where the defendant had largely avoided the provider's bona fide efforts to enforce the rules. Blizzard brought suit against In Game Dollar (IGD), the operator of peons4hire.com, for advertising gold sales and power-leveling services.²⁶⁵ Blizzard regularly enforces a rule against advertising commercial services within the community and routinely suspends and bans those advertisers that it identifies.²⁶⁶ Blizzard alleged that IGD, however, would continuously create new accounts and evade Blizzard's attempts to prevent them from advertising.²⁶⁷ Frustrated, Blizzard filed suit in the United States District Court for the Central District of California and asked the district court to grant an injunction to prevent IGD from accessing the community.²⁶⁸ Blizzard alleged that the advertising spam "had a serious impact on the WoW game" because commercial advertisements detract from the immersive effect of the game, social interactions between participants

263. See Meehan, *supra* note 118, at 40-41; cf. Balkin, *supra* note 88, at 2071 (discussing the idea of a bankruptcy trustee taking over a game as a "direct result of designing the game to allow real-world commodification and propertization").

264. Complaint, *supra* note 5.

265. *Id.*

266. See *id.* at 4.

267. *Id.* at 5.

268. *Id.* at 2, 11-12.

are disrupted by spam, and the “performance of the game is degraded because [of] the vast quantities of messages” sent by the defendants.²⁶⁹ Blizzard then alleged it had suffered harm through “lost subscription revenue from players who leave in frustration,” “increased system costs due to higher bandwidth and server usage,” “costs of developing technological measures” in an attempt to stop spammers, and “increased customer service costs needed to respond to dissatisfied players.”²⁷⁰ The complaint specifically noted that Blizzard’s self-help efforts had failed: “[d]espite significant expenditures of time and money, Blizzard has been unable to stop Defendants’ onslaught of spam messages.”²⁷¹

Blizzard alleged that, by sending spam messages, IGD violated computer fraud statutes,²⁷² committed the torts of intentional interference with contract and trespass to chattels, was unjustly enriched, and engaged in unfair competition.²⁷³ Curiously, Blizzard did not allege breach of contract. Blizzard sought a permanent injunction restraining IGD from connecting to WoW servers and selling items or gold, as well as damages, an account of profits, and costs and attorneys’ fees.²⁷⁴ The suit settled before it proceeded to trial; in a consent order, Blizzard was granted a permanent injunction that would prevent IGD from advertising any business in WoW and selling virtual assets or power leveling services.²⁷⁵

In Game Dollar illustrates the difficulty that providers can face in enforcing the rules against determined participants for whom the threat of account termination holds no real deterrence. An award of damages in circumstances where the provider is unable to prevent a participant from accessing the community or breaching the rules is unlikely to be particularly useful from a governance perspective, and especially so where the compensatory damages are difficult to calculate. Consider, for example, what the operators of LambdaMOO could do to prevent a griefer like Mr. Bungle from continuously creating new characters and disrupting the community. Damages are unlikely to be available; the harm caused by griefing is unlikely to ever be taken seriously enough in the general community to justify identifying and quantifying it. Properly conceptualized, the greatest harm is the threat to the integrity

269. *Id.* at 5-6.

270. *Id.* at 6.

271. *Id.* at 5.

272. 18 U.S.C. §§ 1030(a)(5)(A)(i)-(ii) (2006); California Computer Data Access and Fraud Act, CAL. PENAL CODE § 502 (West 2010).

273. CAL. BUS. & PROF. CODE §§ 17200-17210 (West 2008 & Supp. 2011).

274. *See* Complaint, *supra* note 5.

275. *See* Consent Order, *supra* note 5.

of the community rules, which a compensatory monetary award is unlikely to properly address. In these circumstances, it may be that the interests of equity favor issuing an injunction to empower community governance practices.

Richard Epstein has argued that, where a provider's self-help remedy is not sufficient to keep out unwanted participants, a court should almost never deny an injunction to support the provider's control over its platform.²⁷⁶ In the context of the *Intel Corp. v. Hamidi*²⁷⁷ case, where Intel sought an injunction to prevent an ex-employee from sending email to its current employees, Epstein argues that the default rule ought to be that "whenever self-help is allowed, then the injunctive relief may follow to the same effect."²⁷⁸ In Epstein's construction, providers in Blizzard's position have one of three options: (1) they can ignore the harm caused by the unwelcome user, (2) they can seek to deal with the user themselves, or (3) they can ask the state to help. The first option is unattractive, as it could result in potentially significant harm to the community. The second option is also unattractive because it results in a "wasteful cat-and-mouse game"; the provider is forced to spend more resources in attempts to prevent the intruder from accessing the service and the intruder spends more resources evading those attempts, creating an arms race.²⁷⁹ It follows, for Epstein, that the state ought to help the provider and should enjoin the intruder from accessing the service.²⁸⁰

Lastowka, on the other hand, is not convinced and argues that only a compensatory remedy should be available—agreeing with the result in *Hamidi* that Hamidi's claim must fail because Intel could not show actual harm to their servers.²⁸¹ Lastowka warns that asking territorial states to intervene involves a difficult determination:

[I]f the law takes any given cat and mouse game seriously enough to intervene, it must ultimately choose between cats and mice—and the law is not always able to do this confidently. In such cases, we often leave new technologies alone, and the cats and mice are left to the survival of the fittest.²⁸²

276. See Richard A. Epstein, *Intel v. Hamidi: The Role of Self-Help in Cyberspace?*, 1 J.L. ECON. & POL'Y 147 (2005).

277. 71 P.3d 296 (2003).

278. Epstein, *supra* note 276, at 168.

279. *Intel Corp. v. Hamidi*, 114 Cal. Rptr. 2d 244, 249 (2001), *rev'd* 71 P.3d 296 (2003).

280. Epstein, *supra* note 276, at 151; see also David McGowan, *The Trespass Trouble and the Metaphor Muddle*, 1 J.L. ECON. & POL'Y 109, 123 (2005).

281. Greg Lastowka, *Decoding Cyberproperty*, 40 IND. L. REV. 23, 39-40, 64 (2007).

282. *Id.* at 64.

The problem with this scenario is not its resolution but the process by which we arrive at that resolution. We may be able to agree that in certain circumstances Blizzard ought to be able to prevent IGD from repeatedly breaching its rules, and that the territorial state should grant an injunction. There is a crucial danger, however, of extrapolating from this the proposition that providers should always be able to obtain injunctive relief in order to enforce community rules. This is the danger Lastowka is correct to warn about—that it is often very difficult to determine whether or not it is desirable to intervene in any given situation. If, in coming to this conclusion, we determine that injunctive relief should always be available, we will have determined not only that the cat and mouse game is wasteful, but that “the cats . . . should always win.”²⁸³

Lastowka argues that it is often too difficult for courts to determine whose interests should prevail in such a situation, and that it is preferable for the state to err on the side of inaction and decline to intervene.²⁸⁴ Lastowka makes this argument in the context of the potential development of cyberproperty rights in *Hamidi*, where Intel operated a publicly available email server to which Hamidi and any other member of the public could connect in order to send messages to Intel employees.²⁸⁵ The context of virtual communities is different, in that participants are usually in a contractual relationship with the provider, and the provider has a much stronger general power to exclude unwanted participants. Transposing this debate to virtual communities highlights a different set of concerns to those that center around openness of internet protocols and network neutrality.²⁸⁶ In virtual community disputes, a policy of inaction—not aiding either the participant or the provider in the enforcement of the contract—is likely to lead to unsatisfactory results where either the provider is able to wield disproportionately greater power and unfairly eject participants or where the participant is able to avoid the enforcement of the legitimate rules of the community. On the other hand, a policy that always supports the provider’s exercise of power with the full injunctive weight of the state risks over-strengthening the provider’s position. It seems to follow that the only desirable alternative is for territorial states to attempt to

283. *Id.* at 66.

284. *Id.*

285. *See id.* at 65-66.

286. *See* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Mark Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003); Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433 (2003).

determine when self-help is legitimate and permissible, when it should be restrained, and when it should be supported with injunctive relief.

Epstein's argument is too strong to the extent that it is not sensitive to the important instances where we may determine that self-help ought not to be available. Epstein bases his argument on efficiency, but a simple utilitarian analysis does not provide much help. Clearly, in *In Game Dollar*, there is some value to the spammer in sending the messages, and there is likely to be some value to those members of the community who purchase the goods or services in response to the advertisement—or, presumably, sending the messages would not be worth the spammer's time. As was the case in *Hamidi*, there is little direct harm to Blizzard's infrastructure, as the messages are likely to form only an insignificant proportion of the traffic that passes over the network.²⁸⁷ There are some negative externalities imposed by these communications, in that presumably the messages reach participants in the community who do not wish to be exposed to commercial messages. There will be some costs to the provider in terms of customer service, in enforcing the rules and in dealing with complaints from subscribers. There may also be direct revenue costs to the provider from lost subscriptions as frustrated participants terminate their own accounts.²⁸⁸ Finally, there may be costs to the community as a whole, as commercial communications diminish the purity of the community fiction and general respect for the community rules. Whether these costs, in the aggregate, outweigh the benefits that the spammer and her clients receive from the communications is an open question.

This example may be somewhat skewed because we have elsewhere drawn the assumption that unsolicited commercial messaging is harmful, leading to the introduction of anti-spam legislation around the world.²⁸⁹ To use a different example, consider the communications

287. The court decision in *Hamidi* noted that the spam messages were only a tiny fraction of total network traffic, and thus no harm could be found. See *Hamidi*, 71 P.3d at 305-06.

288. There may, of course, also be direct gains to the provider from subscribers who are frustrated with "grinding" for advancement within the game and resolve to continue their subscription because they are able to pay a third party to avoid the time-consuming process. These gains, though difficult to quantify, would have to be accounted for in any utilitarian or compensatory evaluation.

289. See 15 U.S.C. §§ 7701-7713 (2006); Directive on Privacy and Electronic Communications 2002/58/EC, 2002 O.J. (L201) 31.7 (EU), available at <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002L0058:en:NOT>; see also Evangelos Moustakas, C. Ranganathan & Penny Duquenoy, *Combating Spam Through Legislation: a Comparative Analysis of US and European Approaches* (2005), <http://cite.seerx.ist.psu.edu/viewdoc/download?doi=10.1.1.84.4690&rep=rep1&type=pdf>; Guido Schryen, *Anti-spam Legislation: An Analysis of Laws and Their Effectiveness*, 16 INFO. & COMM. TECH. L. 1 (2007).

made by Peter Ludlow criticizing Electronic Arts' governance of The Sims Online.²⁹⁰ This is a case somewhat similar to that of *Hamidi*, where Hamidi was sending messages critical of Intel to Intel's employees, except that, unlike *Hamidi*, Ludlow's messages were directed not at employees but customers, participants, and community members. In fact, the content of Ludlow's messages were not made directly within the community; he merely linked to his online newspaper in his avatar's profile. Ludlow's free speech claims may be stronger than Hamidi's because of the community context, although neither is easily recognizable within a constitutional framework that predominantly privileges only public speech.²⁹¹ If Electronic Arts (EA) sought an injunction to prevent Ludlow from breaching a term that prohibits linking to external news sites, it is not clear whether it would be just, in all the circumstances, for a court to issue it. Similarly, if Ludlow were to seek specific performance of the contract, there are difficult questions of what the interests of justice would require that cannot be legitimately ignored and cannot be simply determined from a literal interpretation of the contract.

Lastowka is correct in that the task of actually mapping a distinction between legitimate and illegitimate exercises of power is dauntingly difficult. Nevertheless, some attempt is warranted as, at least in the context of virtual communities, a blanket policy of non-intervention is likely to harm communities and participants and will, at any rate, only reinforce the underlying power asymmetries of the contract and property model.²⁹² Viewing the exercise of equitable discretion in terms of a rule of law framework is useful to help us conceptualize the competing tensions; our regulatory policy ought to encourage the diversity and strength of virtual communities but should ensure that the governance of these communities is legitimate. James Grimmelmann has pointed out that the best arguments for supporting community rules will be made from the perspective of legitimacy and community values,²⁹³ rather than relying on a basic property rights or utilitarian economic analysis. We see, in this context, that it is important that providers and participants are able to create a relatively autonomous environment with

290. PETER LUDLOW & MARK WALLACE, *THE SECOND LIFE HERALD: THE VIRTUAL TABLOID THAT WITNESSED THE DAWN OF THE METAVERSE* 145-48 (2007).

291. See Balkin, *supra* note 88, at 2074-75 ("As presently interpreted, First Amendment law does not protect the interests of the game players against the actions of the platform owner or game designer because the platform owner is not a state actor. If anything, American free speech law will tend to reinforce the contractual and property rights of platform owners to control the structure of the game through the TOS or EULA.").

292. See Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295 (1998).

293. Grimmelmann, *supra* note 84.

norms of their choosing.²⁹⁴ In order to do so, the community must be able to enforce its rules. The argument for injunctive relief, then, comes most strongly from the proposition that without the assistance of the state, the community is unable to enforce its own (legitimately created) rules, predominantly because the lack of physical embodiment makes it difficult to punish and permanently exclude offenders.²⁹⁵

I have argued previously that if states simply enforce the contractual rules as written, without regard to community norms, they will be unlikely to provide desirable outcomes.²⁹⁶ Failing to enforce the rules, however, may lead to disastrous consequences for a community that is unable to police itself—at the limiting case, a complete breakdown of the social order may well cause the community to collapse entirely. Sustained lawlessness, if it is unable to be dealt with within the community, is likely to cause participants to leave; if enough quit and the costs of enforcing the rules and maintaining the community exceeds the benefits to the provider, it is likely to shut down the physical and software platform infrastructure and extinguish the community. In circumstances short of the limiting case, the community may continue to exist, but the provider may incur substantial additional costs in combating rule-breakers, or the community as a whole may suffer by either the increased lawlessness or the increased security measures that are initiated to combat it. If the development of virtual communities is to be encouraged, states may need to assist in enforcing the rules when required.

Importantly, however, empowering communities to enforce their rules can also result in the state providing legitimacy and authority to undesirable governance practices.²⁹⁷ We should be very sensitive to the legitimizing power of the state in making an injunctive remedy available, and ensure, as best as possible, that the external enforcement

294. See Balkin, *supra* note 88; Bartle, *supra* note 30; Castronova, *supra* note 30; David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996); Lastowka & Hunter, *supra* note 27.

295. This reasoning explains, to a large extent, the reliance of providers on contractual arrangements for setting out rules of participation. Although the rhetoric of the early cyberlibertarians delegitimized the role of the state in cyberspace self-governance, internal governance arrangements depend and structure themselves upon territorial regimes of property and contract. See Radin & Wagner, *supra* note 292, at 1296-97; see also Grimmelmann, *supra* note 84 (noting the tension between arguments that virtual spaces should be free from territorial regulation and calls for states to aid in enforcing the rules of virtual worlds).

296. See Suzor, *supra* note 8; see also Nicolas Suzor, *On the (Partially) Inalienable Rights of Participants in Virtual Communities*, 130 MEDIA INT'L AUSTL. 90 (2009).

297. Radin & Wagner, *supra* note 292, at 1296-97.

of internal rules does not support illegitimate governance. The risk here is not as great as with the imposition of criminal sanctions or civil damages awards as, although injunctive relief is backed by the court's criminal powers, it will attach to future actions, not past breaches. Because granting injunctive relief does not punish past behavior, there are less concerns about the legitimacy of enforcing community rules in general, although we should nevertheless be careful to distinguish between legitimate and illegitimate rules in particular cases in the exercise of equitable jurisdiction.

The rule of law analysis suggests that legitimately created internal rules ought to be enforceable. Where the rules are not enforceable within the community—in cases where the rule-breaking participant is otherwise immune from the deterrent effect of internal punishments—the state may need to intervene to assist in their enforcement in the interests of community integrity. Because punitive measures are inappropriate and compensatory damages are inadequate, if the contractual framework is to properly address these governance tensions, injunctive relief should be available to allow communities to enforce their rules where they otherwise would not be able to. The great challenge, however, for a court exercising the equitable discretion to award injunctive relief, will be to differentiate legitimate rules and exercises of discretion from illegitimate ones.

Epstein's position, that injunctive relief should always be available, is too severe and risks harming participants; but Lastowka's argument, that states ought not prefer either participants or providers, does not translate adequately to virtual communities, which may be severely damaged by inaction. Ideally, then, we may say that it would be desirable to enforce the rules where we deem them to be good rules, but we ought not encourage or support bad rules by lending the weight of the state to enforce them. The difficulty of differentiating acceptable from unacceptable rules, however, is significant; much of liberal theory is justifiably wary of governments deciding which agreements ought to be enforced and which ought not.²⁹⁸ The risk of error is great, particularly dealing with novel issues arising out of virtual communities.²⁹⁹ This risk of error appears to be the primary reason that both Epstein

298. See P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 389 (1979).

299. Lastowka & Hunter, *supra* note 27, at 315-16 (arguing that "[s]ome degree of confusion and category mistake seem inevitable if traditional criminal law is applied to behaviors in virtual worlds. Ironically, the best avenue for the preservation of the benefits of virtual worlds may be in policing virtual crimes without outside assistance"); *see also* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207; Johnson & Post, *supra* note 294.

and Lastowka argue that the required analysis is not worth attempting, and that we may be better off either granting absolute property rights to providers or refusing to entertain virtual disputes respectively.³⁰⁰

Both of these options are less than appealing. As I have argued, there is great risk in defining property rights where we are unsure that they are necessary, desirable, or effective. However, doing nothing risks condemning at least some virtual communities to a lawless purgatory where they are unable to develop into the vibrant and promising communities of our imagination. The answer must lie in recognizing the interdependence of the real and the virtual and attempting to craft rules that allow communities to flourish.³⁰¹ A normative framework that is based in legitimacy of community governance is able to help in this difficult evaluation by providing a basis from which to consider both the needs of providers and participants in forming autonomous communities and the tensions that revolve around restraint on the exercise of governance power. While we may not be able to easily distinguish good rules from bad rules, we can arrive at an approximation of legitimacy; the more legitimate a given rule is in a given community, the stronger the argument is that territorial states ought to help enforce that rule.³⁰² It is on this basis that the discretion inherent in equitable remedies should be exercised to provide injunctive support to communi-

300. See Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 84 (2003) ("No compulsory license scheme, even with compensation, could hope to match the level of particularization and standardization achieved by contract."); Lastowka & Hunter, *supra* note 27, at 316 (expressing concern that legal rules will not strike an appropriate balance, and that virtual worlds may best be served by dealing with disputes internally); Lastowka, *supra* note 281, at 65-66 (arguing that the difficulty in determining conflicts suggests that law is not currently suited to resolving disputes); see also Easterbrook, *supra* note 299, at 215-16 (arguing that "[e]rror in legislation is common, and never more so than when the technology is galloping forward. Let us not struggle to match an imperfect legal system to an evolving world that we understand poorly. Let us instead do what is essential to permit the participants in this evolving world to make their own decisions. That means three things: make rules clear; create property rights where now there are none; and facilitate the formation of bargaining institutions. Then let the world of cyberspace evolve as it will, and enjoy the benefits.").

301. Grimmelmann, *supra* note 84 (arguing that "[u]ltimately, what justifies maintaining independent virtual worlds is the same as what justifies intruding on their independence—some community somewhere would suffer if we didn't. These conflicts between communities will not always be easy to resolve, but the overall prospects for successful coexistence will be better if we start from a position of mutual respect.").

302. *Id.* (arguing that genuine legitimacy "has profound implications for the dignity of virtual world communities. If we feel comfortable saying that the internal perspective shows us a genuine community, that community's consensuses seem more just. Which is to say that when it comes time for that community to make requests of other communities, it stands on that much firmer a footing.").

ties, where appropriate, and prevent the granting of injunctive relief or specific performance for rules that are unfair in all the circumstances.

Accordingly, we see that Blizzard has a relatively strong claim against In Game Dollar. Blizzard has taken one of the strongest stances of all virtual world providers against RMT, and it would be fair to say that, even if the majority of players do not internalize the prohibition on RMT, they know and understand that they may be punished for buying or selling gold.³⁰³ The prohibition against spamming is likely to be even more accepted. This is not a case where the rule exists in the EULA but is not enforced in practice—Blizzard has regularly suspended the accounts of those participants it finds advertising commercial services in the game.³⁰⁴ While the restriction on spamming is a restriction on speech, it does not raise significant concerns, at least in this case—it is an effective rule that is imposed to protect the community, and seems to accord with community values. From a rule of law perspective, then, the prohibition appears legitimate—it is sufficiently well-known and accepted to be consensual, and it does not appear to offend any substantive rights of participants.

On the other hand, an injunction should not be available to prevent a participant from breaching a contractual term that has only been sporadically enforced.³⁰⁵ If, for example, a court were to find that Blizzard was not strict in policing RMT or commercial advertising, but had instead tacitly encouraged gold farming through their game mechanics, then it would not be equitable to grant an injunction against a company like In Game Dollar. Similarly, in cases like *Mr. Bungle's*, where the rules are ill-defined and no community consensus exists about what types of griefing are permissible, injunctive relief would probably not be justified. In these circumstances, any claim would have to be

303. See DURANSKE, *supra* note 79, at 37.

304. See Gold Buying, WORLD OF WARCRAFT, <http://www.worldofwarcraft.com/info/basics/antigold.html>; Daniel Terdiman, *World of Warcraft Bans Raise Players' Ire*, CNET NEWS (Mar. 22, 2007, 4:00 AM), http://news.cnet.com/World-of-Warcraft-bans-raise-players-ire/2100-1043_3-6169517.html.

305. If a contract term is not enforced by the provider against a particular participant in knowledge of breach, it may be waived against later breaches. See, e.g., *Burger King Corp. v. Family Dining, Inc.*, 426 F. Supp. 485 (E.D. Pa. 1977); see also CORBIN ON CONTRACTS, *supra* note 187, § 40.4. On the other hand, if the contract term is not enforced generally in the community to the extent that participants come to rely on its not being enforced, the provider may be estopped from terminating a subscriber's access for breach. See RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 119, § 90; see also Burk, *supra* note 3 ("If the proprietor appears to have acquiesced in the activity, and players have come to rely on the game proprietor's inaction as tacit acceptance of the practice, that may constitute a defense to legal claims against the user.").

based upon compensating actual damages under contract, if it could proceed at all.

If the equitable jurisdiction is exercisable in such a way that courts are able to support the enforcement of community rules where they would otherwise not be enforceable but to simultaneously distinguish between legitimate and illegitimate rules and processes, the contractual governance model will likely be, on the whole, suitable for the resolution of vertical disputes between participants and providers. The core limitation of the contractual model is that it mainly provides compensatory remedies that are largely inappropriate for securing ongoing compliance with community rules. With the support of equitable remedies in the small proportion of cases in which they are needed, we avoid the need to search within other (more alienating) criminal or private law doctrines for a punitive effect. The main limitation to this approach is that it may be difficult for courts to determine when rules are legitimate or not; the constitutive values of the rule of law framework, however, seem to provide a useful guide to this evaluation which should ensure both that community governance can be effective and that the state does not support abuses of power by providers.

V. CONCLUSION

This Article has sketched some of the normative implications of applying a rule of law based interpretative framework to the legal disputes that arise around the enforcement of community rules. In doing so, there is a significant disconnect, and a sense of artifice, in taking a predominantly legal approach to ongoing governance processes that only rarely result in legal action. The greatest majority of disputes about enforcing rules in virtual communities arise and are settled within the community through technological barriers, social norms, and the agency of the provider and its customer service team. The prospect of legal remedies is only explicitly invoked when these other, more direct, forms of governance break down or are rendered ineffective. Nevertheless, each of these forms of governance operates within a limiting framework created by territorial law, and the remedies that are available at law change the conditions for the exercise of power within the community. For this reason, a sound normative basis for understanding the competing tensions in legal disputes provides an important constraint on the power of the provider,³⁰⁶ an understanding of the ways in which internal governance can be supported, and an outline of an argument for external enforcement of internal rules.

306. TAYLOR, *supra* note 1, at 148-50.

The biggest conclusion to be drawn from this framework is that the lack of guarantees of legitimacy in private governance means that it is wholly inappropriate for territorial states to impose punishments for breach of community rules. In making this point, it is important to distinguish among wrongs committed that are already legitimately prohibited by the state, acts that represent wrongs but are merely fictional depictions of wrongs, and acts that are wrongful only when understood through the interpretative lens of community norms. It is this third category that presents the most theoretical difficulty for territorial enforcement, as it falls outside of the established dichotomy between virtual and real wrongs. For this third category of wrongs, we can see that the imposition of state-backed punitive sanctions is likely to be illegitimate because they have not been legitimately created by the state. Nevertheless, this category of wrongs must be enforceable in some way if communities are to develop with some autonomy, and states may need to assist in their enforcement without imposing punitive sanctions.

To allow virtual communities to flourish, we should retain the contractual framework, as it is more likely to be able to identify and take into account the social norms of the community than other existing private law doctrines. If it is to do so, however, not only should contractual doctrine and contractual agreements be interpreted in a manner informed by rule of law governance values, but the remedies available for breach of community rules must be sensitive to the needs of the community and legitimacy of the rules in question. The contractual framework should accordingly support internal community governance where (a) the rules are legitimate and (b) the community is otherwise unable to satisfactorily address the wrong internally. The recommendations of this article are threefold: (1) breach of internal community rules should not be directly punishable by territorial criminal law or by private law such as copyright; (2) equitable relief should be available where community governance is unable to adequately address wrongdoing; and (3) the grant of equitable relief should be limited to circumstances where the rule is legitimately created and the punishment legitimately imposed. The contractual framework will be able to satisfactorily address governance tensions to the extent that it is able to provide these remedies and distinguish between legitimate and illegitimate rules and punishments. If it cannot, we may need to search for other, more formalized, legal structures to regulate ongoing community governance, measures which may have a greater negative impact on community autonomy.
