Digital constitutionalism and the role of the rule of law in the governance of virtual communities

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The work contained in this thesis has not been previously submitted to meet requirements for an award at this or any other higher education institution. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made.

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Chapter 1. Introduction

1. Structure

This thesis considers one main question: how should we regulate the exercise of private governance power in virtual communities? This question centres on the legitimacy of governance in the way that community norms are created and enforced. This is the project of digital constitutionalism, which seeks to articulate a set of limits on private power that will best encourage innovation and autonomy and simultaneously protect the legitimate interests of participants in these increasingly important spaces. In answering this question, I provide a normative framework based upon the broad ideals of the rule of law through which to conceptualise the tensions about governance that arise in virtual communities.

One of the most exciting and promising features of a global communications network is the ability for people to form communities with real personal relationships without the limits of distance.¹ Beyond merely providing a forum for interaction, however, this is the promise of the potential for individuals to come together to create communities with their own consensual norms that reflect their particular needs and desires. Through participation in these spaces, these communities construct their own meanings to the actions and relationships that take place within the community.

Much of the current legal scholarship about regulation of the internet makes one of two deterministic assumptions that fail to adequately conceptualise tensions around governance in virtual communities. The first is the cyber-libertarian fallacy, which recognises the great potential of virtual communities to develop their own consensual norms, but assumes that communities will always be best governed without the intervention of the territorial state.² The familiar reply asserts that cyberspace is always

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regulated and regulable, that there is no separate sovereign jurisdiction. This approach leads to a second deterministic assumption, that the territorial state can best encourage the development of virtual communities by creating enforceable property rights and allowing the market to resolve any disputes.

These deterministic assumptions are flawed firstly because they do not ascribe sufficient weight to the value-laden support that the territorial state always provides to private governance regimes through property and contract, the inefficiencies that will tend to limit the development of utopian communities, and the continued role of the territorial state in limiting autonomy in accordance with communal values. On a more fundamental conceptual level, these approaches are flawed because they delegitimate community governance either to a wholly external other space or to a wholly private space of passive consumption.

In Julie Cohen's words, current cyberlaw discourse has been largely “predicated on a teleology of disembodiment” that isolates participation in cyberspace from the remainder of lived experience. This disembodiment generally leads to attempts to draw borders around and create dichotomies between public and private spaces and real and virtual actions. The result is typically the delegitimisation of state intervention in the regulation of virtual communities.

As virtual communities continue to become more central to the lives of individuals, the way that we conceptualise power relations within these spaces becomes more important; “[t]he emergent geographies of power within networked space shape the conditions of possibility, the conditions of participation, and the conditions of material existence.” In order to address the emerging tensions around the governance of virtual communities, we need to take a more subtle approach that avoids reducing the

9 Ibid 255.
complexities of governance to the drawing of borders\textsuperscript{10} and instead engages directly with the tensions at play.

These emergent geographies of power in networked space need a different approach than the liberal framework through which the law typically views power relations. The core problem with the traditional legal liberal approach is that it tends to ignore the existence and flow of power in the private sphere. The theory around the regulation of cyberspace could benefit from analysis from the point of view of constitutional discourse that assists us in considering appropriate limits on the exercise of private power – what Fitzgerald calls 'digital constitutionalism'\textsuperscript{11} and Berman terms 'constitutive constitutionalism'.\textsuperscript{12}

In this thesis, I propose a rule of law framework to assist in conceptualising and evaluating the tensions at play in virtual community governance. The rule of law discourse is a particularly important strand of legal and political theory that highlights the potential for abuse of power and the legitimacy of governance – issues that are central to the exercise of private power in virtual communities. A rule of law framework highlights the lack of legitimacy in virtual community governance and allows us to make a normative argument about whether or not we should impose more restraints on the exercise of power in these spaces.

The rule of law framework provides a constitutional discourse through which to examine the structure and practice of power relations in virtual communities. The standard model for conceptualising disputes between participants and providers of virtual communities has so far generally been based upon a classical model of contractual relations, and this has been supported by normative claims for a hands-off regulatory approach. This contractual governance model slowly replaces the law of the state with the private rules of the providers of virtual communities which mostly do not carry the same expectations of legitimacy.\textsuperscript{13} As this process continues over an increasingly wide range of human activity, there is a very real threat that the constitutional principles that we value begin to fade in relevance, to our collective detriment.

\textsuperscript{10} Ibid 251.
Rule of law values provide a framework through which to analyse the exercise of private power, highlighting three key themes. The first is that of governance limited by law – a suggestion that participants ought not be subject to arbitrary punishment, and that there are substantive limits that territorial states may be justified in imposing on the autonomy of communities. The second is the liberal emphasis on formal legality in legitimate governance, which requires that laws are “general, equal, and certain.” From this perspective, we see criticisms of virtual community governance where the rules are not clear, are constantly changing, and are inconsistently enforced. A secondary emphasis on procedural fairness also highlights significant tensions about the way that rules are enforced and punishments meted out in communities where there is no accountability in the broad discretion of the provider.

The third theme is the most important, because it highlights the importance of consent in determining the relevance and applicability of all other rule of law values. Consent, as a rule of law value, means that legitimacy comes from self-determination. Much of cyberlaw discourse revolves around the benefits that autonomy can bring to allow individuals to form their own consensual norms, creating communities more suited to their preferences than larger communities that have to cater for more diverse groups. The role of consent, properly understood, explains why many of the more restrictive formal or substantive rule of law values are not necessary in many communities. If real consent exists, there is often no recognisable harm where participants agree to governance that is arbitrary or harsh. This is a key point to remember, and provides us with an important tool to distinguish when certain values will be important and when they will not. The importance of consent, however, also highlights tensions in virtual communities where rules are created or enforced without the consent of those to whom they apply, and leads to an argument that contractual rules

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that conflict with consensual practice ought not to be enforceable.

The contours of private law — and particularly contract law — provide the limits of permissible and legitimate private governance in these communities. Although the greatest proportion of quotidian governance occurs without explicitly referencing the law (governance is an ongoing communal negotiation process, rather than a strictly legal one), the legal framework provides constant support and shapes the boundaries of internal governance. The rule of law legitimises governance in two senses here — it provides justification for the exercise of private power, but it also restrains the exercise of that power to make it more transparent, impartial, and fair.\(^{20}\) It is for these reasons that the bounds of the legal framework are critically important for the practise of governance; internal governance proceeds entirely in the shadow of the law, and the shape of the law changes the shape of the legitimate, permissible, and conceivable exercise of private power.

The rule of law framework does not and cannot provide prescriptive answers to questions of regulation of virtual communities. It can only serve to highlight tensions, and each of these tensions needs to be evaluated in light of the particular community norms and the norms of the territorial states whose citizens they concern. Where we deem certain rule of law values to be important in disputes that arise in and around virtual communities, the ability of the law to come to appropriate conclusions will depend on the ability of courts to take these tensions into account in applying the private law doctrines that are currently used to regulate virtual communities. As a primary measure, this means being able to recognise the limits of strict literal contractual interpretation where the result would conflict with rule of law values. Contrary to the classical understanding, there is sufficient flexibility in modern Australian contract law to address governance tensions at various levels of interpretation – from the incorporation of terms at common law, to unconscionable conduct at equity and unfair terms legislation, to doctrines of good faith, estoppel, and election.

While the classical contractual model, informed as it is by conceptions evolved from freedom to contract, is not appropriate to address these tensions, I argue that modern contractual doctrine, if it is informed by the values of the rule of law, is able to provide a suitable regulatory framework. If governance tensions can be conceptual-
ised by Australian courts, there is sufficient flexibility in doctrine to allow contract law to address these tensions. The core argument of this thesis is that if a contractual framework is to be used to regulate the relationships of governance in virtual communities, it should be informed by the theory of governance and particularly by the ideals of the rule of law. The contractual framework will only prove effective in addressing the particular tensions that arise around the legitimacy of governance to the extent that it is possible to read contractual doctrine by the light of rule of law values.

This thesis provides a normative argument for the development of contractual doctrine and the exercise of judicial discretion in the resolution of disputes between participants and providers in a way that more accurately addresses the tensions of ongoing community governance. These disputes arise predominantly when either a participant or the provider seeks to enforce the rules of the community against the other; I focus, accordingly, on the way in which territorial states ought to support and limit the enforcement of community norms. I argue that the flexibility in the contractual framework should be exercised in a manner informed by the values of the rule of law. As a primary principle, this suggests that we should introduce appropriate limits on the contractual discretion of a provider to impose penalties and suspend or terminate a participant's access to the community in line with the norms of the community. Additionally, I argue that providers should, in certain cases, be prevented from relying on contractual clauses that prevent participants from enforcing the rules.

In order to allow a contractual framework to be used to regulate governance in virtual communities, it must develop to more adequately conceptualise the role of punishment in the enforcement of community norms. Rule of law values suggest that these internal wrongs lack the requisite legitimacy to be directly enforceable and punishable by territorial law. This thesis accordingly argues that acts that are not recognisable as wrongs by the state but are only wrongs when viewed through the interpretative framework of community norms ought not to be punishable in territorial courts. It follows that criminal penalties are inappropriate for breach of internal norms, and also that civil remedies that have the practical effect of imposing penalties, like those available under copyright law and computer trespass torts and statutes, should not be available to fulfil a punitive function for breach of internal rules.

Rule of law values, however, also suggest that many virtual communities need the
ability to impose punishments to maintain order within the community. I argue, accordingly, that the contractual framework must support the imposition of internal penalties where participants are able to avoid internal punishment, in addition to providing compensatory remedies to recover losses sustained through breaches of the rules. If the contractual framework is to be effective in fulfilling this role, I argue that we must further develop equitable remedies under contract law — specific performance and injunctive relief — to empower communities to enforce their own rules where they would otherwise be unable to. In providing the support that community governance requires, however, we must be extremely careful to differentiate between legitimate rules and enforcement mechanisms and illegitimate ones; both equitable and contractual remedies should accordingly only be available where the rules are clear, well promulgated, accepted and understood by the community, and applied in a fair and just manner.

This thesis concludes by examining the limits of the contractual governance framework, particularly the lack of privity between between participants and other participants, and between participants or providers and external actors. The ability of courts to properly address disputes that arise outside of the contractual relationship between a participant and the provider depends predominantly on the evolution of other private law doctrines and the intersection of those doctrines with contract. For wrongs that are recognisable by territorial states, the contract provides an indicia of community norms, which delineate the scope of consent. Participants are accordingly able to enforce their rights in tort or other civil law actions against other participants with reference to the community norms, without necessarily relying on contractual remedies.21 Rule of law values also suggest that a provider may be liable, in some circumstances, for failing to enforce the rules of the community and, in addition, third party beneficiary doctrine will allow contractual enforcement in a limited but important set of circumstances. Nevertheless, some gaps exist, and participants within virtual communities may need assistance in order to enforce community norms within these gaps.

To the extent that territorial courts are not able to address governance concerns in the application of private law rules, I argue that we may need to investigate separate sui

generis regulatory approaches. The more alienating that the private law doctrines are to the real values that participants and proprietors seek to protect in virtual communities, the more likely we are to need a new legal framework. At this early stage, however, it appears that private law will be able to provide adequate approximations of the tensions that permeate public law, and allow us to construct a regulatory approach that both encourages and limits autonomy in order to allow communities to flourish.

This thesis concludes that classical contractual doctrines provide an alienating and ill-fitting regulatory framework for virtual community governance, but that it can be significantly ameliorated through a conceptual framework provided by the values of the rule of law. The core problem is largely that community governance involves a set of constitutional tensions that are not able to be recognised in the standard contractual framework. If a contractual framework is to be used to regulate virtual communities, then, it follows that constitutional principles, and particularly rule of law values, ought to be used to inform the application and development of doctrine. If governance tensions can be assessed and addressed through a rule of law framework, then these private law forms may be able to provide a satisfactory approach to the regulation of private governance.

2. Theoretical approach

This research takes a critical approach to the existing cyberlaw and virtual worlds literature in order to expose the deterministic trends that underpin much of the scholarship. In this research I draw heavily upon the work of Julie Cohen in taking an experiential approach to situating cyberspace in order to better examine the tensions that exist between the borders of the real and the virtual and the public and the private.22 In making explicit these tensions, this work builds upon the pathbreaking work of those who have changed the way we conceptualise virtual communities – particularly

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The key theoretical principle in this work has been to critically examine the structures of power relationships in virtual spaces in a way that contextualises the experience of participants, rather than rely on the deterministic assumptions and false dichotomies that permeate cyberlaw and virtual worlds scholarship.30

After exposing the tensions in cyberlaw theory, I adopt an approach developed by Fitzgerald31 and Berman32 that argues for the consideration of constitutional values in the private law doctrines that regulate cyberspace. The constitutional framework that I adopt is the that of the rule of law, which, although contested, provides a relatively comprehensive discourse on the legal restraint of power in governance. The rule of law consists of a number of different strands, none of which can be universally or directly applied to the governance of virtual communities, but each of which serve to highlight potential shortcomings in private governance. These include restraints on discretionary power,33 substantive limits based upon individual rights,34 formal limits on the creation and implementation of laws,35 procedural safeguards and due pro-

30 Two main false dichotomies are tackled in this work: the virtual / real distinction, that sets apart participation in virtual spaces from the rest of lived experience; and the public / private dichotomy, which delegitimises the role of the territorial state in regulating virtual community governance.
33 See, for example, A. V Dicey, Introduction to the Study of the Law of the Constitution (10th ed. 1959) 188.
cess, and an emphasis on consensual governance. Ultimately, this research makes two sometimes conflicting fundamental normative claims: that the development of autonomous consensual governance in virtual communities ought to be encouraged, and that territorial states should limit autonomy where it offends against the values of the territorial community.

In this research, I reject the argument advanced by Post that these two goals are necessarily conflicting because any interference with internal governance will deligitimise internal governance. Post's argument assumes a hierarchical model of governance and ignores the potential for territorial states to encourage the development of virtual communities and empower communities to create and enforce rules for themselves whilst simultaneously constraining and curtailing autonomy along some limiting principles. In order to overcome these limits, this research draws upon Bonnici's conception of the interrelation of public and private governance schemes as a mesh, rather than a hierarchy. Through this framework, I attempt to show how territorial states can support legitimate community governance by taking a consensual rule of law model to inform the interpretation of territorial legal rules and empowering communities where internal governance is not effective on its own.

3. Methodology

This thesis proceeds primarily as a theoretical examination of the way in which conceptions of legitimacy can and should inform private law doctrine in the regulation of virtual communities. The first stage of this project involved critical theoretical examination of the literature that has emerged over the last twenty years on the regulation of networked technologies. Much of this literature emerges from the United States of America, although significant portions were developed in Australia, the UK, Canada, and continental Europe. This stage of research focused predominantly on secondary legal sources from these countries. The critical examination of this literature was informed by the legal discourse on the rule of law, predominantly western liberal con-
ceptions of the rule of law developed over the 20th century.

The second stage of this project conducted critical doctrinal analysis of the private law that is typically applied to regulate virtual communities in light of the theoretical framework that was developed. This analysis required in-depth examination of the primary materials – predominantly case law – and academic commentary drawn primarily from Australian law. This Australian legal focus was supplemented by developments in the US, Canada, and the UK in order to provide a more comprehensive examination of the past and future development of Australian doctrine.

In this research, I am greatly indebted to the hard work of those who have studied virtual communities and made explicit the governance tensions that permeate them. While I am familiar as a participant in many of these communities, I owe much to the rigorous examination of cultural anthropologists that have made much of this research possible, particularly the work of Sal Humphreys40 and T L Taylor.41 These examinations provide a large component of the basis for my normative argument about how governance should develop in these new communities.

4. Structure of thesis

Chapter Two is designed to provide an overview of some of the tensions that permeate governance of virtual communities. It sets the scene for the argument that follows by describing a small set of case studies that are used to draw out particular contests about appropriate limits on the exercise of power in private governance. These examples are used throughout the thesis to contextualise the argument and test the normative framework that will be developed. The second half of Chapter Two shows why this thesis is necessary by making explicit the flaws with the standard legal approach to governance disputes in virtual communities. Here I set out the deterministic pressures of a model based upon cyberproperty and freedom of contract, and outline a vision to avoid the consequent marginalisation of participant interests.

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In Chapter Three, I set out the normative framework that forms the basis of this thesis. I argue that cyberlaw theory has generally failed to adequately conceptualise governance tensions in virtual communities, and propose a new approach based upon the rule of law and a critical examination of the way in which we experience life in these new communities. The argument proceeds that constitutional discourse, as a discourse that regulates the exercise of power, can and should inform the regulation of virtual communities, and that the values of the rule of law provide the most useful framework for conceptualising governance tensions in these spaces. The remainder of the third chapter sketches such a framework by explaining three strands of rule of law theory and constructing a normative structure through which to analyse the exercise of private power in virtual communities.

Having set a normative framework, Chapter Four then examines the standard model of contractual governance in order to challenge the dominant assertion that disputes about governance can be easily resolved through literal contractual interpretation. This chapter shows that there is considerable flexibility in Australian contractual law, and that in any dispute, courts are necessarily asked to choose between available alternative interpretations. There are several important doctrines that are available to limit contractual governance, and this chapter argues that whether desirable outcomes can be produced is heavily dependent upon the conceptual framework that courts will use in framing the disputes that will arise.

Chapter Five undertakes the challenge of applying the normative framework of the rule of law to the practical question of how community norms ought to be enforced. This chapter draws the thesis together in an attempt to articulate a normative basis for resolving the difficult questions that arise in disputes about the enforcement of internal community norms. In particular, this chapter examines the difficult position of punishment and deterrence in the contractual governance framework, and considers how, given the theoretical framework adopted, internal norms should be enforceable in territorial courts and how legitimate internal governance can be supported and encouraged.

Chapter Six examines a number of tensions that are not easily addressed through a contractual governance framework. Specifically, this chapter examines how norms can be enforced between participants, and how providers and participants can pre-
vent external actors from disrupting the community. As both of these tasks are not easily performed within a contractual governance regime, this chapter considers how other private law regimes may develop to address these tensions in the future. Finally, this chapter considers whether a sui generis legislative proposal may be required to address some of the gaps in the common law contractual framework, and what such a proposal may look like.

The final chapter, Chapter Seven, posits some conclusions from the preceding argument, and seeks to identify whether the dual challenge of encouraging the development of autonomous virtual communities and limiting illegitimacy in private governance has been met. This thesis concludes by setting out an outline of required future work.
Chapter 2. Governance tensions: inadequacies in the current regime

1. Case studies

Online social media is becoming increasingly central to the lives of an increasingly growing portion of the global population. From the largest sites like Facebook\(^4^2\) and MySpace, to the violently growing upstart Twitter, to the virtual worlds dominated by World of Warcraft, to the mass of forums, chat rooms, and community websites, users around the world are finding endless ways to connect and engage with each other in meaningful relationships. The networks are virtual, but the bonds between people who come together and form communities in these spaces are very much real.

As the significance of virtual communities grow, so too does the importance of governance. To the extent that a community is 'just a game' or a place for idle conversation, we may not mind whether the rules are fair or whether they are justly created, clear, and uniformly enforced. But as these communities become increasingly important to the participants within them, we ought to be concerned by the potential for real harm to real people that can result from poor governance. As these spaces become spaces for political discussion, for rich social relationships, for commerce, for entertainment, education, self expression and for personal and private communication, the potential for harm increases and our responsibility to the participants ought to increase with it.

A large part of the problem with legal regulation of virtual communities stems from our liberal assumptions that there is a separate 'public space', a realm of limitless pos-

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sibility where politics and commerce and personal relationships can all occur. We distinguish this realm from private spaces, which are owned by individuals and within government intervention is greatly delegitimised. Unfortunately, this fictitious paradigm is even less true in the virtual world than it is in the corporeal world.

The boundaries between public and private spheres in virtual communities are fuzzy at best. The greatest majority of virtual communities are privately run, often commercially. However, these same virtual communities are often commercial hubs, political discussion fora, and classrooms. They provide a platform for an incredible range of personal and social activities. If governments can not legitimately regulate in these spaces, the rules that we have developed to protect discourse, commerce, and autonomy in the public sphere will substantially lose their significance as more and more people utilise online spaces to interact with others.

In this thesis, I make use of a number of hypothetical and actual disputes that arise in virtual communities. These scenarios assist in contextualising and conceptualising the tensions that revolve around governance and the private exercise of power in these spaces. I will extract a small number of these here in order to provide an introduction to the issues and tensions that are present, rather than an exhaustive survey.

a. Property interests: Bragg v Linden Lab

Second Life is a three-dimensional free-form virtual world constructed primarily by its participants. Unlike some other virtual worlds, Second Life is not a 'game' – it has no central narrative or defined goals. Participants have the relative freedom to own land, customise their avatars' appearance, build objects and create clothing, socialise and express themselves as they wish (within limits). Importantly, Second Life is backed by a fully integrated economy – participants can trade goods and services between themselves for virtual currency, and that virtual currency can be easily bought and sold for US dollars. Second Life is free to join, but extracts monthly subscription fees from residents who wish to own their own virtual land.

Because of the way that Second Life is structured, land is highly desirable to participants. Owning land allows participants a place of their own to build objects or buildings and design as they wish. Land also grows in importance as one's participation in Second Life increases, as the total number of objects that a participant can build is limited by the amount of land that she owns. So whilst ownership of land is not necessary to participate in Second Life, in a very real way, land ownership is closely linked to the economy, and land sales and taxes are the predominant income streams for Linden Lab.44

The importance of land in Second Life has resulted in a substantial secondary market. Some real estate speculators purchase land at low values with the hope of selling it for a profit in the future. Others buy large blocks of land directly from Linden Lab and subdivide them, leasing them to participants who do not own their own land. Still more act as property developers, creating housing or commercial estates that they are able to sell or rent to others. A number of participants have achieved considerable success buying, selling, and renting virtual land in Second Life – including some self-proclaimed Second Life millionaires.45

This convergence between real and virtual economies contributes significantly to Second Life's appeal. It is also the cause of substantial tension within the community. The 'virtual' economy in Second Life is fluidly convertible to 'real' currencies, like the US dollar, and participants clearly feel a sense of entitlement to their virtual property and currency. Linden Lab clearly encourages this behaviour – its slogan is “Your world. Your imagination.”; their promotional material refers to the possibilities of 'owning' virtual land and generally stresses the fluidity of the market.46 The Terms of Service for Second Life, however, explicitly deny that participants have any right over the in-world currency and that it is in fact a currency at all. Instead, Linden Dollars are purported to be a 'limited licence right' granted by Linden Lab – and revocable at any time.47 Similarly, Linden Lab asserts that participants never 'own' 'land' –

46 At least until 22 August 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: Linden Lab, Own Virtual Land Second Life <http://web.archive.org/web/20080822144829/http://secondlife.com/whatis/land.php> at 6 January 2010.
rather, they merely lease the right to use certain computing resources that generate
the virtual environment.\footnote{This contradiction between the internal norms of Second
Life and the literal interpretation of the contract results in significant uncertainty and
tension in the community.}

The best example of this tension is the case of \textit{Bragg v Linden Lab}.\footnote{Marc Bragg
was a US attorney who invested in Second Life, purchasing land for resale.\footnote{Bragg
discovered a loophole in Linden Lab's official land auction system that enabled him
to purchase land that was not advertised for sale, at significantly under market prices.
When Linden Lab discovered this, they immediately suspended Bragg's account, pre-
venting him from accessing Second Life and effectively confiscating what he
claimed amounted to approximately USD$8000\footnote{of his in-world virtual property –
not only the land at the centre of the dispute, but also the land that he had previously
bought and any objects and currency in his possession. Bragg complained, alleging
that he had been wrongfully disconnected and that Linden had unlawfully confisc-
cated his virtual property. Linden responded that it was acting within its power to en-
force its rules – having caught Bragg cheating, they suspended his account and ter-
minated his right to access and hold their property.}

Bragg filed suit against Linden Lab, alleging that Linden had unlawfully confiscated
his property and denied him access to Second Life. Linden responded with a motion
to compel arbitration, as per their dispute resolution policies in the Second Life
Terms of Service. The US District Court for the Eastern District of Pennsylvania held
that the dispute resolution policies were procedurally and substantively unconscion-
able, and refused to grant the motion to compel arbitration.\footnote{At this point, Linden
Lab settled with Bragg on undisclosed terms. Bragg has now had his Second Life ac-
count restored and his virtual property returned.}

This case, for the relatively short period in which it was active, generated significant

\footnote{See Defendants' Answer to Complaint and Cross Complaints, filed 28 June 2007, \textit{Bragg v Linden
Research, Inc.} 487 F. Supp. 2d 593, [8] (E.D. Pa., 2007): ""virtual land" is not property to which one may
take "title," but instead a license of access to Linden’s proprietary servers, storage space, bandwidth,
memory allocation and computational resources of the server, which enables the experience of "land" and
the things that one can do with "land" on the Second Life platform.".}
\footnote{\textit{Bragg v Linden Research, Inc.} 487 F. Supp. 2d 593 (E.D. Pa., 2007).}
\footnote{See Kathleen Craig, "Second Life Land Deal Goes Sour," \textit{Wired}, 18 May 2006
<http://www.wired.com/gaming/virtualworlds/news/2006/05/70909> at 14 January 2010.}
\footnote{\textit{Ibid.}}
\footnote{\textit{Bragg v Linden Research, Inc.} 487 F. Supp. 2d 593, 605-610, 611 (E.D. Pa., 2007).}
\footnote{See Adam Reuters, "Linden Lab settles Bragg lawsuit," \textit{Reuters/Second Life}, 4 October 2007
interest both within Second Life and from external commentators. Importantly, it promised to deliver a judicial opinion on whether participants in Second Life were entitled to own virtual property. As Robreno J held in dismissing Linden's application to compel arbitration,

[t]his case is about virtual property maintained on a virtual world on the Internet. Plaintiff, [Marc] Bragg, Esq., claims an ownership interest in such virtual property. Bragg contends that Defendants, the operators of the virtual world, unlawfully confiscated his virtual property and denied him access to their virtual world. Ultimately at issue in this case are the novel questions of what rights and obligations grow out of the relationship between the owner and creator of a virtual world and its resident-customers. While the property and the world where it is found are “virtual,” the dispute is real.54

The rejection of the motion to compel arbitration signalled that the US District Court was prepared to examine the Second Life terms of service and to rule on the complicated issue of property rights within the virtual world.55 Unfortunately for our purposes, the case settled before such a precedent could be handed down.

Despite the case settling, it still provides a very interesting factual scenario through which we can evaluate potential regulatory regimes. It poses an interesting question, and represents a legitimately hard case: if Linden was right, and Bragg cheated by exploiting a bug in the auction code, are there limits to how Linden can enforce the rules and impose sanctions on Bragg? On the other hand, if Bragg is to be believed and he did not break any rules, are Linden Lab obliged to maintain his access to Second Life and his interests in what he asserts is his property? Does the case suggest that there is something to be done about the process of enforcing the rules in order to encourage trust and legitimacy in the community?

b. Punitive measures: MDY v Blizzard

Blizzard makes and operates the hugely popular World of Warcraft (WoW) virtual world. Blizzard has structured the game in a way that rewards long periods of repetitive behaviour, popularly dubbed 'grinding'. MDY made and sold a program, 'Glider', that automates this repetitive behaviour, allowing players to advance in the game with only minimal human interaction. Blizzard prohibits the use of bots like Glider,

and routinely bans the accounts of users it suspects of using such techniques. There is a suggestion in the community that people who use bots are cheaters or gold farmers – the latter generally believed to be responsible for high rates of inflation in the virtual economy. On the other hand, this suggestion is contested by a smaller group of players who argue that the use of bots merely lessens the boring, repetitive, and continuous labour that is required in order to enjoy the WoW endgame.

The WoW Terms of Service contain a broad clause that prohibits users from using bots or intercepting, emulating, or redirecting the WoW software.\(^{56}\) Blizzard contended that by using Glider, users were exceeding the scope of their licence to play the game and thus infringing copyright when the game was copied into RAM. Blizzard therefore contended that by enabling and encouraging users to use WoW in breach of the Terms of Service, MDY was liable for secondary copyright infringement. Blizzard threatened to sue MDY for copyright infringement if it did not cease selling the software. MDY filed suit in response, seeking (amongst other things) a declaratory judgment that the use of Glider did not infringe the copyright in WoW, and that MDY was therefore not liable in copyright for any acts of Glider users.

The US District court found that the End User Licence Agreement that granted permission to play WoW had to be read in conjunction with the Terms of Service,\(^{57}\) and that certain requirements of the ToS were to be read as limitations on the licence grant, whereas others would be mere contractual provisions.\(^{58}\) Because the limitation on emulation was part of the licence grant, users who used emulators were therefore outside the scope of the licence and infringed copyright in the game when they played it.\(^{59}\) It followed, then, that MDY was liable for inducing or encouraging their users to infringe Blizzard's copyrights.\(^{60}\)

Blizzard was also successful, at a later trial, on one of its DMCA circumvention claims. Judge Campbell found that Warden, a subroutine that checks the RAM of WoW clients, “controls access to the dynamic nonliteral elements of the WoW game environment”\(^{61}\) within the meaning of 17 USC 1201(a)(2). The District Court found

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58 Ibid 18.
59 Ibid 19, 21, 32.
60 Ibid 32.
that while *Warden* did not control access to either the computer code that made up *WoW* or the individual sound and media files that made up the environment, it controlled access to the dynamic experience of the sounds and graphics – the “real-time experience of traveling through different worlds, hearing their sounds, viewing their structures, encountering their inhabitants and monsters, and encountering other players”. This was sufficient for *Warden* to qualify for protection under the DMCA. Because Glider circumvented the security measures in *Warden* and MDY knowingly marketed Glider to do so, MDY was liable under 1201(a)(2).

The role of Glider in the WoW world certainly seemed to influence the District Court's decision. At trial, Judge Campbell began his judgment by holding that Glider has substantial damaging impact:

> 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 acquire game assets. Glider upsets this balance by enabling some payers to advance more quickly, diminishing the game experience for other players. Glider also enables its users to acquire an inordinate number of game assets -- sometimes referred to as "mining" or "farming" the game. The acquisition of these assets upsets the game's economy, diminishing the value of assets acquired by regular game users.

The MDY case is interesting because it sets up significant penalties for breach of the rules contained in the terms of service. Were damages only available in contract, Blizzard would only be able to claim actual losses that it could demonstrate, and only against the users of Glider. Suing under copyright and anti-circumvention law allows Blizzard to reach over to third parties with whom they are not in a contractual relationship. Additionally, suing under US copyright law also allows Blizzard to avoid the need to show actual loss and makes it easier for Blizzard to obtain a permanent injunction.

Fundamentally, this precedent means that breaking the terms of service or encouraging others to break the terms of service can potentially result in severe damages and a court order to cease the infringing behaviour, without the proprietor needing to

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64 Ibid 966.
65 Ibid 963.
66 Restatement (Second) of Contracts 1981 §§ 344, 347.
67 17 U.S.C § 504(c)(1) .
68 17 U.S.C § 502; damages under contract are only available where damages are not an adequate remedy; *Restatement (Second) of Contracts 1981 §§ 359.*
show any actual losses. Essentially, this backs certain rules of participation by the punitive and deterrent effect of binding law, as opposed to contractual rules which only give rise to a right to compensation.\textsuperscript{69} The US District Court distinguished the rules on interception and emulation, which it held to be sufficiently related to the exclusive rights under copyright to be limitations on a licence grant, from other rules on player interaction and naming policies, which were mere contractual terms. The mechanism through which it did so, however, is not exactly clear. This leaves substantial uncertainty for future cases; if a contract can be written where the internal rules are expressed as conditions to the copyright licence grant, it may well be that these rules will be enforceable by the full weight of copyright law.

\textit{MDY v Blizzard} raises questions far beyond its facts. On one level, it is about a proprietor's ability to enforce its rules against not only its users, but those who enable and profit from cheating users. On another level, however, it raises questions about the legitimacy of using copyright law as a means of enforcing internal rules – essentially giving the internal rules the force of law without any of the accompanying requirements of due process or democratic discourse. This is a genuinely hard case – to the extent that internal rules that are important to the integrity of a virtual community are not able to be effectively policed within the community, how ought the law and the state aid in their enforcement? If the law does aid in their enforcement, what limitations should we impose on the ability of the proprietor to set the rules?

c. \textbf{Rights and responsibilities: Facebook TOS}

In early 2009, Facebook decided to change its terms of service to ensure that it could continue to make use of content uploaded by its users after those users quit the service. Uncharacteristically for a change in legal terms of service, this move generated significant public protest, leading Facebook to roll back its changes.\textsuperscript{70} What makes this example so interesting is not only the huge numbers of people who care passionately about their relationship with Facebook, but the explicit governance rhetoric that Facebook adopted following the change. Mark Zuckerberg, CEO and founder of Facebook, announced that they would be opening up their terms of use to participant input, calling the terms of service “the governing document for how the service is

\textsuperscript{69} Robinson v Harman (1848) 1 Exch 850, 855.
used by everyone across the world.”

By explicitly shifting the rhetoric to a governance relationship, Zuckerberg is exposing the tensions that permeate Facebook that do not fit the idea of a traditional consumer service relationship. Zuckerberg understands here that the terms of service have a constitutive role in shaping the development of the community, and promises to allow Facebook users to participate in the governance discourse. The great tension that goes unmentioned by Zuckerberg, of course, is that Facebook is also a business and is ultimately motivated primarily by profit. Facebook's move towards relative autonomy of governance from market forces raises the suggestion that good governance exists in order to maintain the stability required for Facebook to continue to grow.

This example highlights the fundamental point that virtual community governance exists somewhere between the public and the private. The operators of virtual communities – at least the large, expensive to run communities – are usually private entities who are concerned with the ongoing profitability of the enterprise. It will sometimes be in their best interest to promote legitimacy in governance, but at times we can expect rational providers to treat some participants poorly in certain circumstances where it is profitable to do so. The corollary to this is of course that regulation can adversely affect the viability of communities and the incentives for providers to invest. It follows that a desirable regulatory environment will be one that encourages both legitimacy and investment, and that any regulatory approach will ultimately be constrained by the limits of commercial viability.

d. Discrimination – Sara Andrews and Mr Gaywood

Another interesting case study involves Sara Andrews, a World of Warcraft player...
who wanted to start an in-game guild that was friendly to queer players.\textsuperscript{76} The move was prompted by the visible lack of tolerance of some World of Warcraft players to people with differing sexual orientations or gender identifications. Andrews began to seek members by advertising her guild in-game, announcing:

\begin{quote}
OZ is recruiting all levels, but especially 50-60s! [...] We are not "glbt only", but we are "glbt friendly"! http://guilduniverse.com/oz
\end{quote}

Following this announcement, Blizzard issued a warning to Andrews, threatening her with suspension of her account. Upon complaining about this treatment, a representative from Blizzard replied:

GBLT is a known abbreviation for Gay Bi Lesbian Transsexual.

With regards to the above account action, please review the World of Warcraft Harassment Policy [...]. As you can see from the above information, using such language falls into the Sexual Orientation category. You will also notice that the suggested penalty for such actions is to "Be temporarily suspended from the game"; however, you were given a warning.\textsuperscript{78}

In a further email, after Andrews had threatened to contact the American Civil Liberties Union, another Blizzard representative said:

\begin{quote}
Thank you for taking the time to write in. While I respect your position and understand your perspective in this matter, please keep in mind, that according to our Terms of Use, you may not:

(i) Transmit or post any content or language which, in the sole and absolute discretion of Blizzard Entertainment, is deemed to be offensive, including without limitation content or language that is unlawful, harmful, threatening, abusive, harassing, defamatory, vulgar, obscene, hateful, sexually explicit, or racially, ethnically or otherwise objectionable, nor may you use a misspelling or an alternative spelling to circumvent the content and language restrictions listed above;

Please remember that it is up to our sole and absolute discretion whether or not to allow certain types of language in the game. While some language in and of itself may not be offensive, it may incite certain responses in other players that will allow for discussion that we feel has no place in our game. As such, I am afraid that I am unable to reduce, reverse or otherwise amend our previous decision.
\end{quote}

Following widespread reporting of the incident, Blizzard issued an official apology to Andrews, saying that her actions should not have produced a warning.\textsuperscript{79} Blizzard


\textsuperscript{78} Ibid; The Harassment Policy referred to is available at <http://www.blizzard.com/support/wowgm/?id=agm01719p>.
also promised to update their in-game policies to help prevent future incidents.\footnote{lsmith, Blizzard Does Not Hate Gay People (2006) Kotaku <http://kotaku.com/gaming/world-of-warcraft/blizzard-does-not-hate-gay-people-151656.php> at 16 January 2010.} The result, in this case, was a favourable outcome after public outrage. We must not assume, however, that all such cases will provoke the requisite level of public outrage or a sympathetic response from the proprietor. Had Blizzard not responded by apologising to Andrews and changing their policy, it is interesting to consider whether they ought to be legally compellable to do so.


> We want the Xbox LIVE community to have the freedom to express themselves, but we also have a responsibility to create an inclusive, safe environment […] While it may be clear to some that Gaywood is a legitimate surname, it may not be obvious to other Xbox LIVE members. In this case, a complaint was filed by a member of the community, requiring the Xbox LIVE team to examine the gamertag within the context of the Xbox LIVE Terms of Use. Based on these guidelines, it was necessary for the gamertag to change.\footnote{Jay Slatkin, “‘Gay’ Player Name Banned By Xbox Live,” The Consumerist, 14 May 2008 <http://consumerist.com/5008908/gay-player-name-banned-by-xbox-live> at 27 August 2009.}

Microsoft's stance on such usernames has caused substantial controversy,\footnote{See, for example, Lesbian Gamers, “MS XBL Gay equals sex?,” Lesbian Gamers, 23 May 2008 <http://lesbiangamers.typepad.com/lesbian_gamers/2008/05/ms-xbl-gay-equ.html> at 30 January 2010; PixelPoet, “Xbox Live Gaywood Drama Update,” Gay Gamer, 21 May 2008 <http://gaygamer.net/2008/05/xbox_live_gaywood_drama_update.html> at 30 January 2010.} but does not appear to have softened as a result. This controversy gives rise to another important question – to what extent should providers have the discretion to treat subscribers differently on the basis of their characteristics, including their sexuality, age, race, religion, or gender?

e. Speech interests

Another set of examples stems from the conflict between participants' interests in free expression and the interests of proprietors in shaping that expression to create an environment that is appealing to its target audience or to express its own vision. These conflicts pose questions that are difficult to answer. Clearly, platform owners
have some interest in creating a certain type of environment, and must have some ability to regulate speech in order to do so.\textsuperscript{85} On the other hand, it seems equally intuitive that where a virtual world is used for generally free communication, there will be some cases where it would seem undesirable to allow a platform to prevent certain forms of free expression.

Second Life, for example, has become an attractive arena for political speech. The possible political tensions were highlighted In December 2006, when French far-right presidential candidate Le Pen's Front National (FN) created a Second Life headquarters. Almost immediately, protesters arrived, holding placards and erecting billboards condemning the Front National on neighbouring land.\textsuperscript{86} The protest eventually degenerated into simulated violence, with both sides launching virtual attacks. One of the groups responsible for the protest, the Second Life Left Unity group, explained the necessity to protest in Second Life, noting that the group

\begin{quote}
will be manning a protest [...] until FN go or are ejected. Wherever fascists are we will ensure they get no peace to corrupt and lie to decent people.\textsuperscript{87}
\end{quote}

The response from the Front National representatives, was that the protesters

\begin{quote}
were a bunch of losers [...] We're gonna tighten security and come back.\textsuperscript{88}
\end{quote}

Similar protests are commonplace in Second Life and other virtual worlds.\textsuperscript{89} A notorious example was the naked gnome warrior protest in World of Warcraft in January 2005.\textsuperscript{90} In response to changes made by Blizzard to the warrior class game mechanics, upset players organised a rally in which participants would create low level naked gnome avatars at a set time on a particular server. The protesters marched upon a key city in World of Warcraft, at which point they were warned that their actions were considered ‘griefing’, and threatened with suspension of their accounts if they did not disperse. Given the time invested by players in their avatars, this is a threat

\textsuperscript{87} Ibid.
\textsuperscript{88} Ibid.
\textsuperscript{89} See Bridget M. Blodgett, “And the ringleaders were banned: an examination of protest in virtual worlds” in Proceedings of the fourth international conference on Communities and technologies (2009) 135-144, 143 <http://portal.acm.org/citation.cfm?id=1556460.1556481> at 27 August 2009.
that carries very significant weight with experienced players.

The size of in-world protests can be staggering. On the one hand, the increased ease with which participants can appear in a virtual protest may be seen to limit the persuasive value of each participant. On the other hand, the sheer numbers of people that can gather together at the same time can command significant respect for their opinions. In July 2006, almost 10,000 protesters gathered in the Chinese virtual world Fantasy Westward Journey, voicing their dissatisfaction with a representation of an official building in which there was a mural which shared some similarity with the Japanese Rising Sun flag. The operator of the virtual environment, Netease, responded by effectively banning the avatar of one of the organisers of the protest, stating that politics has no place within the game world:

People come here to experience joy, and we therefore emphasize health, relaxation and happiness and we should not bring in politically sensitive topics.

The player in question was asked to change his avatar's name from “Kill the little Japs”; when he refused, his avatar was permanently incarcerated. Despite what may seem as a reasonable approach by Netease, the player was understandably upset:

I began playing this game two years ago. When I first applied to Netease, you did not say that my alias was unacceptable! But now you come and lock up my ID. This is obviously depriving me of my private assets. Over these two years, I have spent more than 30,000 RMB on game point cards, and I have also spent more than 10,000 RMB on equipment trading.

These examples reflect a set of questions that revolve around freedom of expression and civil disobedience in virtual communities. When participants of virtual communities wish to express their dissatisfaction, they will often do so both within the community and outside of it. Providers, just like states, have an interest in minimising dissent, but unlike states, providers are under no general compulsion to refrain from using their force to silence criticism, at least within the community, where it can be most disrupting. Could providers ever be compelled to tolerate dissent, to what extent, and in which circumstances?

93 Ibid.
2. The flaws with the standard legal approach

The examples above, and the many more that will follow, all raise difficult questions about how the governance of virtual communities ought to be regulated and limited. There is an easy standard answer to these questions, but like many easy answers, it is deceptive in its simplicity and conceals hidden biases that may not be desirable. The standard answer mirrors, to an extent, the liberal doctrine of freedom of contract; it suggests that virtual communities are purely private arrangements, that participants willingly enter into contractual agreements with providers, and that the terms of those agreements ought to be enforced as written. This approach provides certainty and avoids any difficult consideration of 'rights' of participants – each party is entitled to its 'rights' under the contract and no more.

This standard legal answer is somewhat unsatisfactory. There are deterministic themes that plague the question of how we ought to regulate virtual communities, and this appears to result in a legal discourse that generally frames the issues in a way that supports the marginalisation of participant interests. When a participant is banned from a social networking site like Facebook, or a virtual world like World of Warcraft or Second Life, she loses more than a mere right of access to a commercial service. She has her virtual property confiscated, her connections with her social network severed, and her expression within the community silenced. These interests, however, are usually ignored in the strict legal sense, where the legally relevant question is generally whether the proprietor has an absolute right to exclude under the combination of property and contract law.

In each of the examples above, the first question in the conventional legal approach will be whether the proprietors have an absolute discretion to deny access to whomever they wish. The tendency, when faced with a novel question like this, is usually to analogue to private property metaphors. The use of a private property metaphor tends to tilt the balance in favour of the proprietor, who is assumed to begin with an almost absolute right to exclude.

The next question is reduced to a straightforward interpretation of the literal terms of the contract. If the proprietor does not, in fact, have an absolute right to exclude un-
der property, is that right granted by the terms of service? In any case, do the terms of service impose any limitations on the exercise of the right to terminate? This question too is generally skewed in the proprietor's favour – it is the proprietor, after all, who writes the contract. The standard legal approach usually ignores this fact, as contracts are assumed to express the will of the parties. The traditional liberal paradigm expects that contracts form efficient bargains between proprietors and participants, and that public interference in this private balance is generally ill-advised. Even one-sided standard form contracts are often understood to represent a desirable bargain, as there is an assumption that whatever the participant loses in terms of substantive rights she often gains in cost savings.

In practice, the form contracts drafted by providers bear almost no resemblance to the will of the parties. The contracts are not read, and not designed to be read. The powers they provide are only rarely exercised – they provide discretionary safeguards to the provider to be used in extreme cases, not as a routine tool in day to day governance. Prohibitions and powers are drafted broadly in favour of the provider to ensure that, at all times, the provider retains the power to determine the terms of participation and the discretion to punish and eject particular participants it deems to be undesirable. The actual bargain, as understood by the participants and the provider's customer service and community management team, is mediated through the continual contestation of internal norms, not the literal terms drafted by the provider's risk-averse legal team in a way that is almost completely divorced from the evolving internal consensus. There is a significant schism evident between the contractual terms of service and the way that day to day governance plays out, which is something that is almost completely ignored by the standard model, which can only assume that the contractual terms define the relationship, and expects them to reflect the bargain that has been entered into.

A large part of the difficulty that the standard approach has with addressing virtual community tensions lies in the lack of recognition of participant interests. There remains a tendency to delegitimise participation in 'virtual' communities; personal and communal bonds in the virtual are treated as less real, and thus less important, than

'real world' bonds. Participation in virtual spaces retains some of the stigma that it acquired as the domain of geeks and escapist, delusional, anti-social teen males, although the demographic description is even less true now than it was in the past. Slowly, attitudes are changing; as familiarity increases, people begin to grasp that the fictional game setting of MMOGs and the 'virtualness' of platforms like Facebook and Twitter are often only backdrops to the real social interaction that is taking place. Nevertheless, it remains difficult for the legal profession and the legal academy to recognise the value of relationships within virtual communities. Rather than attempt to understand the complex nature of participation, the standard model characterises participation as the consumption of entertainment, the next iteration of an exchange of value that we have grown accustomed to. The harm that one suffers as a result of bad governance in these spaces is seen as trivial – the cost of a movie ticket or a box of software, and not the loss of connections and affect.

Because the traditional legal discourse does not adequately recognise the interests of participants, there is a substantial danger that the answers provided by property and contract law will be somewhat skewed towards the interests of the proprietors. In a large part, this is due to the impact of the necessitarian and absolutist trends that are present in property and contract theory and application. If we are to arrive at satisfactory answers to questions of the appropriate legal regulation of cyberspace, it is desirable to take a more critical approach, beyond these deterministic trends towards a more subtle understanding.

### a. Cyberproperty

Much of the disagreement about regulating internet resources amongst cyberlaw scholars has focused on the desirability of using property law metaphors for internet resources. The classic cyberproperty debate considers whether access to internet resources ought to be governed by property rules or liability rules. In the regulatory model developed by Calabresi and Melamed, property rules provide an absolute

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100 See, for example, Andrew Zaffron et al., “Current Legal Issues for Virtual Worlds” (State of Play VI, New York, 20 June 2009) <http://nyls.mediasite.com/mediasite/Viewer/?peid=d74f5d6301c2445dbb96d5ad13611b0> at 16 October 2009.
102 See Guido Calabresi & A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One
right to exclude, whereas interests covered by liability rules may be appropriated by others against the wishes of the holder on the condition that they pay a price set by a third party such as a judge. Applying this distinction to the internet, the classic cyberproperty question is whether the owner of an internet resource ought to have an absolute right to exclude (property rule protection) or only a right to reasonable damages for misuse (liability rule protection).

This debate has a significant effect on regulation, at least conceptually. Absent contractual rights to the contrary, we generally assume that if the owners of internet servers are granted an absolute right to exclude, they are able to set the conditions upon which access may be granted and revoked. With the aid of property rights, proprietors can exercise almost complete control over the behaviour of the participants who choose to connect.

This focus on whether an absolute right to exclude exists tends to lead to a false dichotomy and encourages a necessitarian or deterministic approach. It is a false dichotomy because it is argued in such a way that it is assumed that the proprietor must either have the right to exclude or not, and must either have the right to determine the rules of access or not. This conception does not account for the middle ground, that a proprietor may well have a right to exclude that is limited either in its scope or the way it is exercised. It is necessitarian in that even if we recognise that the dichotomy is false, the use of the private property metaphor tends to lead towards absolutist outcomes. The argument for the application of property rules stems from the assumption that doing so will facilitate private bargains and hence increase total social welfare. In this conception, an absolute right to prevent access to internet resources is necessary in order to be able to offer innovative and responsive terms of access to customers, and a competitive environment will ensure that there is a healthy marketplace of norms, where consumers are able to efficiently bargain for the level of access they desire at the price they are willing to pay.\(^\text{103}\) In this way, access to resources will be efficiently allocated to the highest value users, and governments will not have to face the difficult task of allocating entitlements. Flexibility and innovation are the guiding principles here, and the argument is made that allowing providers more control will

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benefit everyone in the end through the development of new business models and a plurality of norms.104

This argument is quite powerful. It draws upon the sanctity of private property and our hesitation to interfere in the private sphere. It is also somewhat deterministic, as the assumptions that are made drive the underlying theme that most regulatory problems can be solved by clearly defining property interests and reducing transaction costs. Critics of cyberproperty tend to frame their critique internally, attacking these assumptions and attacking the method in which physical property law is transplanted and made to fit incorporeal entitlements in internet servers or bandwidth.105

A significant problem with this framing of the regulatory debate as one of private property is that it ignores the extent to which we rely upon 'private' online spaces to fulfil what we have generally thought of as 'public' functions.106 The sharp distinction between private and public spaces hinders our conceptualisation of the way people interact with each other. Privately owned internet resources are becoming increasingly central to almost every facet of our lives, as we rely on gaming platforms and social networking sites to remain in contact with our friends, family, and business associates; on private search engines to locate businesses and information providers; on corporate email systems to pass on our important communications; on private auction sites to buy and sell our goods; and on online service providers to host our documents, calendars, photos, and even health information. In this context, the

106 T. L Taylor, Play Between Worlds: Exploring Online Games Culture (2006) 126:
"the move to commercialized virtual environments is presenting some unique challenges for users negotiating between their private lives and corporate interests. Indeed, this designation of private versus corporate becomes problematized with the everyday experience players have in commercialized systems. The boundary between these categories, and ultimately between that of consumer and producer, is increasingly messy. Rather than simply waiting to see how the matter sorts itself out, we must engage in critical inquiry about what is happening in game worlds. The struggles, discussions, and debates taking place in game communities about the status of player and company ownership, as well as questions of responsibility and accountability, go to the heart of contemporary concerns not only around intellectual property, but about the nature of citizenship in commercial society and the status of culture and technology in our everyday lives. The decisions being formulated now are particularly powerful because they set precedents for the networked future in which spaces and experience come to be mediated primarily through commercialized systems of authorship and exchange."
The flaws with the standard legal approach seems less applicable than ever before.

In line with the public / private distinction, constitutional law applies only to 'public' actions. The limits that we impose on the state generally do not apply to the actions of the 'private' actors who provide the networks and platforms of cyberspace. We instead tend to delegitimate government intervention in the 'private' sphere, even while the 'public' services we rely on are increasingly being provided by 'private' actors.

This tendency is somewhat understandable. Hunter explains that our conception of 'cyberspace' as a 'place' tends to push us to accept property metaphors where they may not be justified. Private property, in turn, holds a certain exalted place in our legal system. Its protection forms the basis of much of classical natural law and liberal theory. Blackstone's characterisation of property as “that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe” continues to reflect the absolutist trends which underpin property discourse. Despite warnings not to rely on Blackstone's exaggerated necessitarian construction, the rhetoric of property continues to weigh heavily on the way in which we approach questions of regulation, far beyond mere utilitarian balancing can account for. The 'natural' sanctity of property tends to lead us towards absolutist constructions of property interests.

The absolutist trend also continues in the law and economics discourse, which, following Coasean logic, tends to assume that regulatory problems are typically caused by failures in defining property rights or creating an efficient market. This absolut-
ism is reinforced in the case of intangible resources, because access can be almost-perfectly denied, without regard to the limitations which both physical properties and law impose on the right of exclusion from physical property – such as easements and rights of passage, the doctrine of necessity, or the lack of the ability to control airspace or prevent communication to and from adjoining properties. As these limitations are not generally carried into cyberproperty rights, the result is that the form of property which is created to govern access to internet resources becomes “a caricature of absolute rights”.

The private property discourse suffers from a fundamental limitation in that, on its own, it tells us very little about regulation. The fact that the operator of a virtual community has a right to exclude does not necessarily determine whether that operator can terminate access, once granted, in any given circumstance. It says nothing of the ability of the operator to impose sanctions on a participant, to confiscate the participant's resources, or to listen in on the participant's conversations. It is certainly not the case that we are bound to accept that the right to exclude is absolute in all its forms, and that that right entitles the proprietor to exercise complete control over participants it allows to enter the community.

This way of thinking about regulation is dangerous in that it tends to lead us into the trap of thinking of property rights as an all-or-nothing approach. In reality, no conception of property is complete without considering the limitations imposed by contract law, by tort law, by anti-discrimination law, by competition law, and innumerable other sources. There is, however, an unfortunate tendency within the cyberproperty discourse to brush aside and marginalise these exceptions. By adopting a conceptual model based upon cyberproperty, questions of regulation are reduced primarily to an examination of the terms on which access has been granted under a contractual agreement. Since the assumption is that the provider has some property

116 Ibid 1510.
right in the service (and an absolute discretion to exclude), the exact terms upon which it deigns to allow members of the public to access it become much less conceptually important.

Complex questions of governance require more subtle conceptions of rights and limitations. The cyberproperty model, which tends towards absolute property rights and non-interference in 'private' contractual agreements, obscures more than it illuminates these subtleties. In 1987, Sir Anthony Mason and Stephen Gagelar re-made the realist argument that decisions about contract (and property) are important policy decisions:

A court order for the enforcement of a contract does not simply allow the parties to pursue their own freely chosen course of conduct. It brings the full power of the state to bear against one party in the service of another. When and how this should be done are necessarily important questions of public policy.120

This fundamental point, articulated and restated many times,121 should not be forgotten. When we are considering what power the providers of social networks and virtual worlds will be able to exercise over the participants in these spaces, we must remember that there are decisions to be made and that we are able to shape regulatory policy in ways that further our goals. We are no more bound to impose a certain regulatory system through the search for a particular model of economic efficiency than we are through the requirements of 'natural' private property rights. All of these decisions involve difficult choices that require careful attention to the world that we want to create.

A reconstituted regulatory framework may allow us to be more sensitive to the way in which personal interaction and expression takes place within communities that are created as commercial ventures. Take, for example, a common term in a virtual community contract that states that a participant can be removed at any time for any or no reason. We can consider whether a participant ought to have an entitlement not to be


removed from a community without due process. The analogous real-world right, as against the government, is inalienable (as evidenced by the writ of habeas corpus or its modern day descendants\textsuperscript{122}). The analogous right as against the owner of private property is generally trumped by the owner's property entitlement to exclude access to his or her land. In a cyberproperty model, the owner of an internet resource will have a similar property entitlement to exclude, and the presumption will be that participants remain in the environment by the consent of the owners of the environment which, while subject to agreement, is revocable.

The cyberproperty model, far from being value neutral, is inherently contestable. We may say that a participant's interest in not being unjustifiably removed from one's social network, virtual possessions and digital identity are so important that we do not want to expose them to a market model. We may say that a situation where only the affluent are able to pay to ensure fair treatment is undesirable, or even that the market is likely to be so inefficient – because people consistently discount the risk that they will be treated unfairly, or because they undervalue the harm that they may suffer as a result – that we will isolate such interests from the market framework. On the other hand, we would do well to remember that there are any number of reasons that a person may wish to play a game or join a community with entirely arbitrary rules, where one's access may be terminated at any time.\textsuperscript{123}

In evaluating these interests, we may want to investigate a model which rests upon real consent. We could develop a stronger set of contractual rules, for example, that would presume that an agreement that allowed arbitrary termination is coercive, unless the proprietor can show real consent on the part of the participant. Alternatively, we could impose some restrictions on the right of a proprietor to exclude or terminate an agreement that grants access, requiring that if it is to be exercised in certain circumstances, it must be exercised honestly, or even with a degree of reasonableness having regard to the interests of the person being excluded.\textsuperscript{124} Properly structured, such a rule could allow the protection of 'public' type interests in 'private' spaces, while still allowing a participant to waive the protection in appropriate circumstances. The important point to remember is that there are important choices to be

\textsuperscript{122} Magna Carta 1215 (Eng) cl 36, 38, 39, and 40.
made as to how we should structure the social relations that constitute the exercise of power in virtual communities,\textsuperscript{125} and that we are not bound to accept the deterministic conception of absolutist property entitlements. The boundaries that we determine are appropriate to impose on the exercise of private power will greatly shape the development of these social relations and the consequent interests of participants in these spaces.

In the main, the public/private distinction tends to operate to obfuscate the possibilities of government intervention. This is, of course, a criticism that has been made many times before, but it bears repeating here. It is a mistake to conceive of private property and contractual rules as value neutral, and to decry government intervention as the external imposition of subjective ideals. The institutions of private property and contract are social institutions, and their boundaries are set through public means. Perhaps the most significant danger in this discourse of regulation is the danger that we will tie our own hands and refuse to act for fear of interfering with so-called 'private' property.\textsuperscript{126}

Examining virtual communities through a purely private property and contract model leads to conceptual difficulties. The private model does establish the framework for providers to invest in the creation and maintenance of these communities, and it does reinforce the need to avoid regulatory outcomes that would remove these commercial incentives. The dominance of the private model, however, conceals the marginalisation of the interests of participants and obscures the choices embedded in regulatory approaches. The most immediate danger to the legitimacy of virtual communities is the determinism inherent in the standard model. At this stage, the regulatory landscape is still very much contested, and any answer that reduces the competing tensions to the existence of a property right or simple contractual term necessarily ignores the competing tensions and obscures the contest.

3. Avoiding the necessary marginalisation of participant interests

The search for the proper allocation of property rights in internet resources tends to

\textsuperscript{125} Yochai Benkler, “There is no spoon” in Jack M Balkin & Beth Noveck (eds) \textit{The State of Play: Law, Games, and Virtual Worlds} (2006) 180, 186-7.

marginalise the value provided by those who are not awarded the label of 'owner'. In virtual worlds and social networking sites, for example, while the technology to create the platform is often the result of significant expenditure on behalf of the developer, a very significant (arguably, the most significant) part of the value of the platform comes from the social network provided by the participants.\textsuperscript{127} The network effects that distinguish successful communities from virtual ghost towns are the result of social interactions, but these are often disregarded in the allocation of property interests. One of the significant advantages of property is that it provides a single owner with whom others can transact to make welfare-maximising deals.\textsuperscript{128} This same advantage, however, becomes a source of marginalisation and alienation for those whose contributions, though valuable, cannot be expressed as proprietary entitlements.

This marginalisation exacerbates the power imbalance that is generally present in virtual communities. The corporate provider is in a much stronger position than any single individual or even group of individuals, even though in aggregate, the participants might provide more value. The difficulties of coordinating such a disparate mass of individuals, each with their own personal preferences, means that in practice, the proprietor is often able to exercise significant control. When it comes, for example, to terminating access to a particular individual, the provider's discretion will only be checked in cases where the action is so outrageous as to sufficiently unify and motivate a large number of participants. In many cases, the provider's discretion will be much less fettered (and largely unnoticed).

Under the standard paradigm, we start from the proposition that access is prohibited without permission, and that, in cases of legitimate access, the 'owner' has 'consented' to 'allow' the participant to access the system. Immediately, the relationship between owner and participant is structured in a way that embeds and reflects the power asymmetry. The value that the participant brings to the system is not easily recognised within this framework.\textsuperscript{129}

Rather than assume that a private property and freedom of contract model will


provide the most desirable outcomes, a more critical and subtle approach is almost certainly warranted. A more nuanced vocabulary is required in a world that situates 'privately' 'owned' communities as the sites for a significant proportion of our 'personal' interaction – our teaching and learning, our communication with friends and family, our expression and individuality, our loves and our passions.

By recognising some of the absolutist trends in the current debate, we may be able to craft legal rules that respect the social bonds between participants whilst simultaneously protecting the interests of developers in creating innovative new platforms and, of course, being remunerated for their efforts. By allowing some recognition to participant interests that are otherwise marginalised by the property discourse, we may be able to craft rules that allow these communities to flourish without subjecting the interests of the participants who are personally invested in the community to the harsh treatment of an unregulated commercial market.

Fundamentally, the regulatory problems we face require careful consideration. We should avoid over-regulation that stifles development and differentiation of new communities. However, we should also avoid reducing the personal and social bonds between participants to mere commodities. The standard property and contract model that we are mapping onto cyberspace prioritises some interests above others. It entrenches the power of those who own the servers and the intellectual property in the platforms that we use for communication. It tends to marginalise the interests of participants in the process. It may turn out that this is the best model for the regulation of cyberspace, but we have not arrived here in any considered fashion. As Hunter points out, we are not bound to accept a property model of regulation.\textsuperscript{130} We would be much better served if we were to “determine first what sort of online environment that we want, and then, and only then, choose a legal regime to achieve it.”\textsuperscript{131}


\begin{quote}
A view of the institutional and imaginative contexts of social life, of how these contexts stick together, come apart, and get remade, lies at the center of the explanatory theory of Politics. From such a view we can hope to get critical distance on our societies. We can disrupt the implicit, often involuntary alliance between the apotheosis of established order and the explanation of past or present societies. We can find an explanatory practice that, by providing us with a credible account of discontinuous change and social novelty, inspires rather than subverts the advancement of the radical project; the effort, shared by liberals and socialists, to lift the burden of rigid hierarchy and division that weighs on our practical and passionate relations with one another.
\end{quote}
The remainder of this thesis attempts to rise to this challenge by providing a normative framework through which to conceptualise power relations in virtual communities. Instead of accepting the assumption that property and contract law will satisfactorily – and in a manner free of subjectivity – resolve the tensions discussed above, we should critically examine the interests at stake and engage in the difficult task of determining how virtual communities ought to be regulated. Obviously there will be no easy answer here – no approach in this contested arena will be universally acceptable or evident. This should not mean, however, that we ought to abandon the discussion in favour of an illusory value-free solution – like the 'impartial' doctrines of contract and property.

The values that we wish to encourage in virtual communities should reflect our excitement about the possibilities that these spaces offer. As communications media, virtual communities provide a way for individuals to connect without spatial barriers in a way that has never been seen before. They allow for new, global, decentralised conversations that are accessible to an ever-growing proportion of the population. As communities, they provide a potentially diverse and enriching experience for individuals to come together and exchange experiences and ideas. And apart from their inherent value, these spaces promise radical changes to the limitations imposed by distance and physicality in domains of entertainment, education, commerce, and politics.

We ought to encourage the development of new and innovative communities. To this end, we should ensure that any legal regulation does not unduly discourage investment or stifle the ability of a provider to shape an interesting, useful, or expressive community. We should also, however, be aware of the real harms that participants may be exposed to within virtual communities, and particularly the risks associated with the large imbalance of power between proprietors and participants. The task of this thesis will be to attempt to provide a framework that analyses and addresses the difficult tensions that arise out of private governance in virtual communities in order to allow us to encourage investment, development, and innovation in these communities and simultaneously protect participants from the adverse effects of illegitimate governance.
Chapter 3. The role of the rule of law

There is a severe tendency in cyberlaw theory to delegitimise state intervention in the governance of virtual communities. In the mid-nineties, this was accomplished predominantly by cyberspace exceptionalists, who argued that the internet was so different to physical space that state laws should not apply there. Gradually this exceptionalism has given way to a recognition that while the internet is regulable, the best mode of regulation is generally to create and enforce strong property rights in internet resources in order to enable self-regulation. The first part of this chapter argues that while autonomy is critical in virtual communities, both of these types of deterministic reasoning about governance are dangerous. By creating a false dichotomy between regulation and liberty, much of the current cyberlaw discourse risks misunderstanding the tensions that revolve around the legitimacy of governance in virtual communities.

In this chapter, I propose a framework based upon rule of law theory through which to analyse potential tensions in virtual community governance and suggest appropriate regulatory responses. The rule of law discourse is a particularly important strand of legal theory that highlights the potential for abuse of power and the legitimacy of governance – issues that are central to the exercise of private power in virtual communities. This project follows somewhat from A V Dicey’s argument that in the absence of a substantive written constitution, rule of law principles in the United Kingdom were protected by the evolution of private law doctrines that secured the substantive rights of citizens.132 This work also builds upon the recognitions of Paul Berman and Brian Fitzgerald that public constitutional values are threatened by unres-

trained private governance. Essentially, I argue that if private law rules are to be used to regulate the governance of virtual communities, then those private rules should be influenced by public governance principles — specifically, those of the rule of law, which provide the most appropriate discourse on the regulation of governance power.

The second part of this chapter examines substantive conceptions of the rule of law as they relate to the governance of virtual communities. As a first step, I argue that the ideals of the rule of law suggest that we ought to be wary of claims that providers require absolute control and absolute discretion over a community. One of the oldest strands of the rule of law requires that the exercise of power be authorised by law. Taking this insight to cyberspace self-governance implies that the contracts that underpin participation in virtual communities ought to be enforceable against the providers of those communities as well as the participants. This proposition highlights some shortcomings in the ways that these contracts are drafted overwhelmingly in favour of the providers, granting wide discretionary powers and greatly limiting any potential liability to the providers. If a restraint on the arbitrary exercise of power is warranted, it follows that we may be legitimately concerned about the enforcement of such agreements as written.

Part II also considers the role of substantive external values in limiting the scope of cyberspace self-rule. I argue that the private law that is used to regulate private governance should be informed by public governance principles and that we should directly confront these substantive values in order to determine appropriate limits to self-rule. In this analysis, I canvass a small number of substantive values: equality, freedom of speech, freedom of peaceful assembly, the right to privacy, protection of property, and rights of legal enforcement. While not all public governance principles should be directly applicable to virtual communities, I argue that rule of law ideals suggest that these principles should at least be taken into account when attempting to resolve tensions between participants and providers.

In Part III, I invoke the modern liberal conceptions of the rule of law that revolve around formal legality to contrast with the uncertainties of governance in virtual

communities. These modern ideals of the rule of law require that laws be clear, consistent, general, equal, and certain – characteristics that private contractual governance in virtual communities do not generally possess. Accordingly, I argue that in communities where we deem predictability to be important, it may be desirable – at least in some circumstances – for territorial courts not to defer to rules that fail to live up to these ideals. This Part also considers the role of due process and procedural fairness in the administration of virtual communities, and I suggest that states may be able to encourage more legitimate internal governance mechanisms by examining the exercise of discretion in exceptional circumstances.

Part IV of this chapter considers the role of consent in the governance of virtual communities. I argue that since the theory supporting self-governance relies upon the consent of the participants in virtual communities to create better rules, it follows that we should be suspicious of contractual interpretations that conflict with internal norms. Where there is no conflict with substantive or formal values of the broader society, this suggests that we ought to defer to the internal norms of the community in evaluating regulatory disputes. In cases where there is a conflict between internal consensual norms and a strict literal interpretation of the contractual terms of service, it may sometimes be appropriate for courts to refuse to uphold the contractual terms as written. This part argues that if we aim to encourage self-governance to allow the creation of consensual rule sets, then providers may find themselves bound by the norms of the community they help to create, notwithstanding contractual provisions to the contrary.

This chapter concludes that the rule of law discourse highlights important tensions in virtual communities that standard legal liberal contractual doctrine is unable to adequately address. As the role of private virtual community governance becomes greater in the lives of an increasing number of participants, we therefore risk undesirably marginalising public governance values by relying on standard contractual doctrine. In evaluating responses to disputes between participants and providers of virtual communities, then, it is desirable to read governance principles into the private law that bounds cyberspace self-rule. In doing so, significant care must be taken to ensure that no harm is unduly done to the autonomy of virtual communities. Any legal framework must be sensitive to the real needs of the participants and providers of virtual communities and should avoid regulatory solutions that diminish the value
and potential of the community. As these governance issues are highly contextually sensitive, a significant degree of flexibility is required in determining appropriate legal responses. States should not, however, allow private governance to override core governance values in ways that are detrimental to the interests of their citizens.

1. The deterministic trend in cyberlaw theory

Much of cyberlaw theory tends to delegitimise state interference in the governance of virtual communities. The early cyberlibertarians argued that cyberspace was a new, different space, one devoid of scarcity whose boundless possibility would provide better rules than could any state-made law.\textsuperscript{134} This utopian vision delegitimised the role of state law in regulating cyberspace, and asserted that self-rule of autonomous virtual communities was both more legitimate and better (more free) than any law imposed by the territorial state. This is best understood as a recognition of the malleability of cyberspace – the seductive opportunity to shape these brave new worlds into ideal communities.\textsuperscript{135} In 1996, John Perry Barlow famously declared the independence of cyberspace – “the new home of Mind”.\textsuperscript{136} David Johnson and David Post followed in the legal literature, making the argument in their 1996 article Law and Borders that “the fundamental principle” of internet governance should be that

\begin{quote}
[i]f the sysops and users who collectively inhabit and control a particular area of the Net want to establish special rules to govern conduct there, and if that rule set does not fundamentally impinge upon the vital interests of others who never visit this new space, then the law of sovereigns in the physical world should defer to this new form of self-government.\textsuperscript{137}
\end{quote}

In this ideal world, whenever the rules that govern participation in any given community become undesirable, a user has a practically unfettered ability to move to another community with a different rule set, or to create and grow a new community.\textsuperscript{138} The ability to easily move in and out of virtual communities will create a market for rule sets, resulting in rules that are more responsive to the demands of participants,


\textsuperscript{138} Ibid 1383, 1398-9.
and allowing participants to self-select into communities whose rule sets more closely reflect their needs and desires. The lack of scarcity and ease of exit of virtual communities provides “a more legitimate 'selection mechanism' by which differing rule sets will evolve over time.”

This exceptionalist treatment of cyberspace as completely separate from physical space gave way, largely, to the recognition that cyberspace was subject to the same regulatory forces as physical space, indeed was no different to physical space. Importantly, Radin and Wagner showed that the utopian libertarian dream was premised not on self-governance and the deligitimisation of the state, but upon the creation and maintenance of state-granted property rights. Lessig showed that the architecture of cyberspace had a regulatory function, and Reidenberg and Greenleaf showed how code could and should be bent to the will of the state. These recognitions — that cyberspace was always already regulated and regulable — struck a blow to the utopian vision, severely damaging the project to isolate cyberspace from the interference of the territorial state.

In the place of a utopian technological determinism, however, rose a determinism of market rule – a suggestion that cyberspace could best be regulated through the creation and enforcement of strong and clear property rights. The exceptionalist nature of cyberspace had disappeared, but the end result was very similar – state interference in the governance of cyberspace was delegitimised in the name of autonomy and innovation. Judge Frank Easterbrook signalled the beginnings of this change,
in a famous exhortation to cyberlaw scholars in 1996, when he argued that the risk of legal error in regulating cyberspace meant that the best regulatory approach would be to create new property rights, allowing for efficient bargaining between users.\footnote{146} For Easterbrook, if rules are clear, strong property rights exist, and institutions can be created to facilitate bargaining, then Coasean determinism will prevail: bargaining will produce an efficient result regardless of the initial allocation of entitlements.\footnote{147} If we could just let “the world of cyberspace evolve as it will”, we could all simply “enjoy the benefits.”\footnote{148}

Allowing virtual communities to determine their own rules is intuitively appealing to the liberal ideal of autonomy and self-determination. As Netanel describes it, the claim is that

\begin{quote}
   cyberspace self-governance more fully embodies the liberal democratic goals of individual liberty, popular sovereignty, and the consent of the governed than does the top-down administration of even the most democratic nation states.\footnote{149}
\end{quote}

In an ideal world, individuals will be able to self-select into communities that reflect their needs and desires, allowing a range of diverse communities to cater to each individual taste.\footnote{150} In this ideal world, the norms that develop in virtual communities are generally better than any law that could be imposed from the state, because they can be tailored for and by the participants themselves.\footnote{151} Johnson and Post argued that individuals are “more likely to be in possession of the relevant information regarding [...] their own welfare” than will elected officials, and that therefore individuals can use their ability to enter and exit virtual communities to reflect their needs and desires, potentially resulting in rule sets that can react faster and more

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flexibly to changing environments and externalities imposed by other communi-
ties.¹⁵²

Lastowka and Hunter, in a 2004 article, broadly agreed with Johnson and Post's
premise, at least as it relates to virtual worlds.¹⁵³ Lastowka and Hunter express the
concern that “the complexity of ascertaining a virtual world's emerging legal rules
and balancing them” with participant and provider interests will result in bad de-
cisions by real-world courts on virtual disputes.¹⁵⁴ As virtual communities develop
their own rules, Lastowka and Hunter echoed Johnson and Post's argument, asserting
that '[c]ourts will need to recognize that virtual worlds are jurisdictions separate from
our own, with their own distinctive community norms, laws, and rights.'¹⁵⁵ For
Lastowka and Hunter, as these communities ('cyborg communities') develop, the role
of territorial law will fade:

If these attempts by cyborg communities to formulate the laws of virtual worlds go well, there
may be no need for real-world courts to participate in this process. Instead, the residents of virtual
worlds will live and love and law for themselves.¹⁵⁶

Other academics have noted that substantial autonomy to determine internal norms is
required to allow providers to create expressive or entertaining spaces.¹⁵⁷ This ap-
proach has also found favour in the law and economics discourse. Richard Epstein
makes the argument that an absolute right to exclude, which centralises the power in
the hands of the provider, forms the basis for the development of private rules, and
that “private voluntary arrangements will outperform forced interactions in the long
run.”¹⁵⁸

Each of these arguments share a common thread – that governance by the local virtu-

¹⁵² David G Post & David R Johnson, “Chaos Prevailing on Every Continent: Towards a New Theory of
8.
¹⁵³ Lastowka and Hunter were careful to distinguish Johnson and Post's “pre-cyberskeptic ambitious thinking
about 'cyberspaces' as a separate jurisdiction” on the basis that the internet, more broadly, “never became
an independent community.” For Lastowka and Hunter, law and self-rule would only evolve where there
was a real community, and the best example of new communities forming was in virtual worlds, which
meant that “the emergence of virtual law within those worlds [was] much more likely.” (F. Gregory
¹⁵⁴ Ibid 71.
¹⁵⁵ Ibid 73.
¹⁵⁶ Ibid 73.
Virginia Law Review 2043, 2043 (discussing the right to design).
Journal 803, 819; see also Richard A Epstein, “Intel v. Hamidi: The Role of Self-Help in Cyberspace”
The role of the rule of law

A community is likely to be better than rules imposed from external sources. Many of these arguments for self-governance are based upon ideal world assumptions – a hypothetical situation where there is little to no scarcity, where participants can come and go frictionlessly, where new communities can quickly and cheaply be established when existing rule sets are no longer appropriate, and where participants are empowered to choose communities whose rules suit their needs and desires. In a non-ideal world, these assumptions are all suspect. Critics have noted that there are significant limits to self-governance that must be addressed in any regulatory framework.159

First, the problem of exit. As most commentators appear to realise, the assumption that a marketplace for norms will emerge is severely limited if participants are not able to easily leave one community for another. Providers of virtual communities, however, have an incentive to make the community difficult to leave.160 Subscription and advertising supported communities earn more revenue for each participant, and most communities benefit from the network effects of having more participants – the total utility increases exponentially with the number of connected individuals.

We can see that exit is nowhere near frictionless.161 A participant's ability to leave a community is constrained by the social connections she has developed or strengthened with other people, with whom she would lose an important point of contact, context, and common interest.162 It is hindered by any investment she has made in social capital, reputation, or virtual property within the community – none of which is easily transferable to other communities. Finally, and this hints at the second big problem, exit is constrained by the availability of other communities that offer reasonably substitutable experiences.


160 See Sal Humphreys, “‘You’re In Our World Now’: ownership and access in the proprietary community of an MMOG” in Shenja Van Der Graaf & Yuichi Washida (eds) Information communication technologies and emerging business strategies (2007) 76, 85 (arguing that “[t]he stronger the ties, the longer the engagement, and the longer the monthly subscription rolls in for the publisher”).


The deterministic trend in cyberlaw theory

The second problem is that there are considerable barriers to the creation of new communities. When Johnson and Post were first writing in the mid-nineties, barriers to the establishment of new communities were reasonably low – it was relatively trivial to create a new channel or new server for Internet Relay Chat, a new Usenet newsgroup, or a new text based virtual world. The ease with which new services of the type on offer at the time could be created certainly seemed to suggest that scarcity was very limited in cyberspace. Many of the virtual communities we see now, however, are much less readily created. Millions of dollars of investment in coding, artwork, testing, and marketing go into the creation of large scale virtual worlds. Even where communities can be built on relatively simple technology, they will often fail to reach or maintain the critical mass that is required to sustain a large scale community. Small scale communities may still be created relatively trivially, but network effects generally ensure that these communities remain at the fringes, rarely attracting enough participants to seriously compete with larger communities.163

The third major problem with the ideal of a marketplace of norms is that it does not, in fact, exist. Firms that provide virtual communities tend to draft contracts that are not designed to be easily read or understood by subscribers.164 These contracts are typically dense, long, full of legalese, and often presented in a way that discourages them actually being read.165 Individual subscribers are at a significant disadvantage compared to the providers, who have the ability to amortise the high costs of understanding, drafting, and changing these agreements over a very large number of transactions.166 Finally, perhaps because subscribers are discouraged from reading and understanding the terms of service, there is very little competition in the market – there is a high degree of homogeneity in the terms of service available from the various providers of virtual communities.167

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163 T. L Taylor, *Play Between Worlds: Exploring Online Games Culture* (2006) 135 (“We might also consider the ways participating in particular forms or places always are tied up with questions of power. Separate does not mean equal, and sometimes we can see quite clearly the benefits that come from being in particular spaces.”).


These factors illustrate that the assumption that cyberspace self-governance will always provide better results than externally imposed regulation is deeply flawed. Neither the technological determinism of the exceptionalists nor the Cosean market determinism of the law and economics scholars is able to provide a satisfactory answer to the regulatory question. Left to determine their own rules, it is possible that providers, with some input from participants, will develop rules and systems that are fair and just. It may be, as Johnson and Post said in 1996, that providers and subscribers

have begun explicitly to recognize that formulating and enforcing such rules should be a matter for principled discussion, not an act of will by whoever has control of the power switch.\(^\text{168}\)

There is no guarantee, however, that this will be the case. Lastowka and Hunter predicted that virtual communities would "live, love, and law for themselves"\(^\text{169}\) if let alone. Yet Lastowka and Hunter's conclusion – endorsing Johnson and Post's position – is based upon the premise that attempts at self-regulation 'go well'.\(^\text{170}\) Implicit in this is a recognition that to the extent that law within virtual worlds do not develop in line with some real-world community standard – where there is no 'principled discussion' – then the law and real-world courts will have an obligation to 'participate in the process'.\(^\text{171}\)

Neil Netanel squarely confronts Johnson and Post's claim that a policy of non-interference in cyberspace regulation will lead to better rules and laws from the perspective of liberal democratic theory. Netanel voices many concerns about the likelihood of illiberal oppression if virtual communities are left to govern themselves, criticising the deterministic analysis that self-governance will necessarily result in more desirable outcomes.\(^\text{172}\) Netanel concludes that

we need to take a cold, hard look at some of the incongruities and limitations of private ordering. An untrammeled cyberspace would ultimately be inimical to liberal democratic principles. It would free majorities to trample upon minorities and would serve as a breeding ground for invidious status discrimination, narrowcasting and mainstreaming content selection, systematic invasions of privacy, and gross inequalities in the distribution of basic requisites for netizenship and


\(^{170}\) Ibid 73.

\(^{171}\) Ibid 73.

citizenship in the information age.\textsuperscript{173}

There are certainly compelling arguments that we should encourage self-rule in virtual communities. Castronova and Balkin each argue that there is a fundamental right to design communities and to immerse oneself in spaces where the normal rules of the corporeal world do not apply.\textsuperscript{174} Epstein powerfully reiterates the liberal attraction of allowing individuals with similar interests to bargain for their own rules of association, rather than being bound by a set of inefficient rules that apply more generally.\textsuperscript{175} Lastowka and Hunter argue that vibrant communities need regulatory freedom to create their own interesting norms.\textsuperscript{176} Wagner argues that flexibility to determine rules is of paramount necessity for “maintaining and improving the environment for innovation, experimentation, and entrepreneurship.”\textsuperscript{177} And Johnson and Post, of course, argue that cyberspace self-governance will be much more liberating, democratic, and empowering than territorial rule.\textsuperscript{178}

On the other hand, Netanel’s argument is persuasive, and it seems reasonable to suggest that while cyberspace self-governance is desirable, there ought to be some limits to self-rule.\textsuperscript{179} Castronova and Balkin accept limits at least where the borders (particularly the economic borders) between actions in the community and the real world are porous.\textsuperscript{180} Epstein recognises that at the least there is a role for antitrust rules where “certain contractual provisions inhibit the operation of a competitive market”.\textsuperscript{181} Fairfield suggests that contractual governance requires “protection of

\begin{footnotes}
\item[173] Ibid 498.
\end{footnotes}
The role of the rule of law

private property and protection against force and fraud”, which generally should come from outside of the contractual framework.\textsuperscript{182}

The broader concerns around private governance highlight that unlimited and unres- trained self-governance risks displacing the careful balancing that the law achieves with rules designed solely to benefit the provider.\textsuperscript{183} These concerns illustrate that while the argument for some degree of autonomy is strong, it would be dangerous to fall into the seductive trap of 'solving' the regulatory problem through a policy of non-interference. In Lessig's four-way typology of regulation, encompassing code, law, the market, and norms,\textsuperscript{184} none of these forces can be relied upon as they currently are to provide the utopian future that Barlow had so eloquently proclaimed.\textsuperscript{185}

Lessig famously pointed out that the architecture of cyberspace, the code and technical standards that construct virtual communities and the communications channels upon which they rely, was not value neutral.\textsuperscript{186} Radin and Wagner pointed out that the legal property rights that underpinned self-governance claims were not value neutral either, but entrenched particular decisions that were made about the definition and allocation of entitlements.\textsuperscript{187} Netanel identified that the market could not be relied upon to provide neutral outcomes either, given the inescapable inefficiencies and the substantial imbalances of power.\textsuperscript{188} Lemley expressed concern about the legitimacy and lack of restraint on those enforcing non-legal norms\textsuperscript{189} and Froomkin demonstrated that the effort required to create a legitimate consensual governance regime was substantial,\textsuperscript{190} leading to an inference that not all communities will invest in the normative discourse required to create a workable and fair system. It seems clear that something further is required, but much of current legal doctrine and theory continues to

\textsuperscript{185} See Julie E Cohen, “Cyberspace as/and Space” (2007) 107 Columbia Law Review 210, 255: “[m]any important questions have tended to slip between the cracks in an analytical universe that seeks to unpack “code” while taking “law,” “norms,” and “the market” for granted”.
\textsuperscript{186} See generally Lawrence Lessig, Code and Other Laws of Cyberspace (1999).
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delegitimise state intervention.

a. Situating cyberspace

Julie Cohen argues that a key flaw with the current cyberlaw governance discourse is that it has been largely “predicated on a teleology of disembodiment”\(^\text{191}\) that isolates participation in cyberspace from the remainder of lived experience. Cohen seems to be correct in that much of current cyberlaw discourse positions law and the market as bounding forces that structure isolated zones of liberal self-governance. This discourse tends to focus on the existence and operation of rights to exclude based in property or contract law as the borders of acceptable regulation, particularly between public regulation and private governance.

This is particularly true in the debates that centre around cyberproperty and cyber-trespass, where the analysis generally focuses on whether an enforceable right to exclude exists, but rarely considers the effect of such a right on community governance. There appears to be a tendency to characterise such rights as absolutes, notwithstanding that their offline analogues are highly contextually sensitive and contain numerous complicated exceptions.\(^\text{192}\) As Carrier and Lastowka point out, the mere existence of a right to exclude tells us very little about any limitations we may impose on the exercise of such a right.\(^\text{193}\)

The cyberproperty debate is not, however, the only part of cyberlaw theory that maintains a relatively sharp dichotomy between regulated and unregulated zones of self-governance. These distinctions are also quite popular in the virtual worlds discourse, where theorists often try to separate games and expressive spaces from more quotidian platforms.\(^\text{194}\) In these conceptions, social spaces that allow property or cross-border real-money trades are typically treated as regulable, whereas ‘play’


\(^{192}\) Michael A Carrier & Greg Lastowka, “Against Cyberproperty” (2007) 22 Berkeley Technology Law Journal 1485, 1498 (arguing that “Conventional property’s exclusionary rights thus are cabined by an expansive array of limits. There is no such thing as absolute property. This reality, though undisputed in the realm of property, has been forgotten in the formulation of cyberproperty.”); see also F. Gregory Lastowka, “Decoding Cyberproperty” (2007) 40 Indiana Law Review 23, 46-7.

\(^{193}\) Michael A Carrier & Greg Lastowka, “Against Cyberproperty” (2007) 22 Berkeley Technology Law Journal 1485, 1508-9 (arguing that limits are fundamentally important to property, but conceptions of cyberproperty tend not to include limits).

spaces are held to remain free from state interference. The desire to protect the integrity of play or expressive spaces is understandable – there is a clearly a threat that an overly limited capacity to mould the community experience will greatly jeopardise the enjoyability or expressiveness of the spaces.195 While these concerns are significant, however, it does not necessarily follow that the providers of all such spaces require absolute power over the community. Some tensions will obviously be less relevant in play and expressive spaces, but we may still have legitimate concerns about other potential abuses of private power.196

Perhaps the most pronounced example of this disembodied dichotomy is the way in which we tend to resort to contractual doctrine as a model for evaluating disputes in virtual communities.197 While recognising that contractual limits do exist and apply, this model obviates the need to evaluate internal governance within those boundaries. So long as the contractual documents that purport to govern participation stand, then regulating governance becomes a simple matter of contractual interpretation. Unfortunately, a predominantly private contractual model of governance imports all the familiar baggage of liberal contract theory and does a poor job of structuring the potentially conflicting interests of providers and participants in virtual communities. This model makes problematic assumptions about the way that individual participants bargain and contract to enter communities, rationally evaluating risk and retaining at all times the consumer sovereignty of being able to simply leave a community whose governance structure becomes objectionable. It imposes an assumption of market determinism, that participants will express their demand for certain rule sets and this demand will be satisfied through standard economic forces, as long as property and contract rights are sufficiently well defined and easily transferable.198 Most import-

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196 T. L Taylor, Play Between Worlds: Exploring Online Games Culture (2006) 19 (“In much the same way we now see the relationship between on- and offline life as not a bounded one, in many ways a game/not-game dichotomy does not hold.”).
197 Joshua A. T Fairfield, “Anti-Social Contracts: The Contractual Governance of Virtual Worlds” (2008) 53 McGill Law Journal 427, 435 (noting that in virtual worlds, “questions of property law, tort law, and even criminal law are uniformly construed by the courts as contract disputes”). Fairfield hints at the inadequacy of reducing governance to a contractual framework, arguing that private contract law is unable to provide the stable default rules that societies need to govern interaction between participants. Fairfield’s analysis, however, focuses on the horizontal relationships between participants, and does not consider the relationship between participants and providers in any great detail. Fairfield does consider vertical relationships, but mainly notes that contractual law makes it much more difficult to define clear ownership rights in virtual property than does property law itself: at 454-7.
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...antly, perhaps, it reduces community participation to simple consumer transactions, which tends to downplay or ignore the set of tensions that revolve around the legitimacy of governance.199

The critical insight here is that the dichotomy between absolute self-rule and a complete lack of autonomy is false, and the borders of regulation are much more complex and interesting than is typically recognised.200 As Cohen notes, “[t]o admit only dreams of total freedom or total control seems too limiting.”201 By continuing to conceptualise cyberspace governance as isolated zones of liberal self-rule, simply bounded by contractual doctrine, we risk misunderstanding the tensions that revolve around private governance. Cohen, drawing from science and technology studies, argues that the processes that construct power in networked space are social and emergent, and have consequences both spatial and material. They operate in what Saskia Sassen terms “analytic borderlands”: between public and private, between technical and social, and between network and body. Mapping these borderlands requires descriptive and analytical tools that do not simply reduce them to borders.202

Cohen appears to be fundamentally correct here. The relationships of power within virtual communities are important because the people within those communities “are real people, not simply disembodied virtual users.”203 The contested interplay between the various forces at work – the borderlands of regulation – is of primary importance to the construction of power in cyberspace.204 These borderlands are the sites of the power struggles that directly affect the interests of the real people who participate in these communities. As Cohen concludes,

204 cf Richard A Epstein, “Intellectual Property: Old Boundaries and New Frontiers” (2001) 76 Indiana Law Journal 803, 827 (arguing that we should address ‘the […] basic outlines’ of property rules first, rather than the details: “The success and the glory of any legal system is not how it resolves hard marginal cases, but rather how it sets out the rules that allow most routine transactions to go from cradle to grave without so much as a hint of litigation. […] All the while, we must remember that even if sound legal principles do not eliminate every anomaly or answer every single question of system design, they can help us avoid major errors that could carry with them disastrous social consequences. We can live with gray areas, so long as we have black and white, but we cannot live with fundamental flaws in system design.”); Frank H Easterbrook, “Cyberspace and the Law of the Horse” (1996) 1996 University of Chicago Legal Forum 207, 211 (arguing that the risk of legal error justifies the granting of property rights that are easy to reverse in private transactions, rather than attempting to determine the optimal allocation of entitlements).
These emergent geographies of power in networked space need a different approach than the liberal framework through which the law typically views power relations. The core problem with the traditional legal liberal approach is that it tends to ignore the existence and flow of power in the private sphere. Brian Fitzgerald explains that

traditionally, constitutionalism (which means the regulation of power) has focused on regulating or limiting the vertical exercise of government or public power over the citizen. On the other hand, the horizontal exercise of power between citizens has occurred in the private sphere and has been rarely analyzed in terms of power or constitutionality, although the (largely common) law has played a mediating role.

Fitzgerald concludes that “[p]ower relations in the private sphere [...] are fundamental constitutional issues that should be informed by fundamental constitutional principles”. Paul Berman makes this same point, arguing for a 'constitutive constitutionalism' that would allow us to grapple with constitutional values that are otherwise marginalised by the public / private divide. Berman argues that these public community values are sometimes threatened by the private exercise of power in cyberspace (and elsewhere), and that we should make explicit these concerns:

If it is true that we already think of the Constitution as embodying such constitutive values of our society, it may seem quite natural to use the Constitution as a touchstone for evaluating a broader range of social interaction. Moreover, an argument based on constitutive constitutionalism may also be particularly persuasive in the context of debating online regulation, because in cyberspace it is perhaps easier to see how private entities can threaten cherished constitutional norms.

The point made by Fitzgerald and Berman is not to directly extend constitutional regulation to the governance of virtual communities – there are of course many important respects in which a virtual community is not like a real state and should not be regulated as one. What is important is that we directly confront constitutional values and consider how they can inform the current regulatory discourse. It is these public values that are most under threat by private governance, and it certainly seems desir-

207 Ibid 384.
209 Ibid 1270.
able that we should examine much more closely what effect marginalising these values has on the people who participate in these spaces.

The attractiveness of cyberspace, its seductive appeal, is largely based upon the explicit promise of malleability – the largely unbounded choices that we have to shape the world we wish to inhabit. For Cohen, just as for Hunter, Barlow, and Johnson and Post, the important question has been “what kinds of alternate social orderings do we imagine and seek to enable?”  Cohen, however, makes explicit the second part of this question, “[w]hich attributes of real space do we seek to perfect and harness in the service of utopian ambitions?”  Cohen points out that cyberspace is neither wholly distinct nor wholly similar to regular space.  This recognition leads us to directly consider the constitutive limits that shape power relations in cyberspace, with the explicit goal of determining whether they are appropriate for the spaces we are trying to construct. As Fitzgerald and Berman point out, one glaring omission in the cyberlaw discourse is the regulation of power – indeed, the fear expressed by Netanel, Radin, Lessig, and others is the potential for the rampant abuse of 'private' power in a system that predicates legitimacy on a sharp distinction between public and private spheres.

The constitutional discourse serves to highlight some of what may be lacking in virtual governance. By contrasting the values that we believe to be important in corporal states with the way in which virtual communities are governed, we may be able to identify some desirable regulatory approaches.  If we look at virtual communities experientially, to see both how they are different to real spaces and how they are the same, one of the striking realisations is that limitations on the exercise of power are

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212 Ibid 219-21.


214 See Jonathan Zittrain, The Future of the Internet and How to Stop It (2008) 174 (arguing that we need discussion and “lawyers who can help translate the principles of fairness and due process that have been the subject of analysis for liberal democracies into a new space where private parties and groups come together with varying degrees of hierarchy to try to solve the problems they find in the digital space.”); see also Jonathan F. Fanton, “Rights and Responsibilities Online: A Paradox for Our Times” (2008) 13(8) First Monday <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/2196>. 
The role of the rule of law conspicuously absent. This is particularly so as the use of virtual communities grows in importance in all aspects of a citizen's life, meaning that slowly, the public law of the state is replaced by the private 'law' of the provider. Radin paints a picture of a world in which the contractual regimes promulgated by firms are enforced as written by the courts and largely accepted as effective by both participants and providers:

If we continue assuming [...] that the mass-market contractual regime is efficacious, then it is obvious that for a large subset of the social order [...] the law of the state [...] has been superseded by the promulgated contractual regime, the “law” of the firm. In the limiting case, [...] the official constitutional/legislative/judicial regime is completely irrelevant. In situations short of the limiting case, but in which large numbers of people are subject to these superseding regimes, the official constitutional/legislative/judicial regime is severely eroded or marginalized.

As this process continues, we may find that the constitutional principles that we value begin to fade in relevance, to our collective detriment. In these cases, it may be more desirable, where appropriate, to attempt to read these values into the regulatory framework that bounds self governance in virtual communities.

b. The rule of law

One of the most concerning characteristics of private governance in virtual communities is that it is very seldom transparent, clear, or predictable, and providers often purport to have absolute discretion on the exercise of their power to eject under both contract and property law. If the absolute discretion of the provider tends to be upheld, participants are likely to be exposed to a lack of certainty and stability in their communities and will be potentially vulnerable to the arbitrary and malicious exercise of power by the providers. Private governance, understood in this absolutist sense, offers none of the safeguards that we expect from corporeal public gov-

215 See Margaret Jane Radin, “Regulation by Contract, Regulation by Machine” (2004) 160(1) Journal of Institutional and Theoretical Economics 142; Julie E Cohen, “Cyberspace as/and Space” (2007) 107 Columbia Law Review 210, 221 (arguing that as cyberspaces “increasingly replace (or displace) their real-space analogues, the rules governing them become increasingly important.”); Sal Humphreys, “Ruling the virtual world: Governance in massively multiplayer online games” (2008) 11(2) European Journal of Cultural Studies 149-171, 166 (arguing that “[a]s people with access to these technologies come to live more of their social lives (and work lives) in online environments, and to construct both their identities and communities in proprietary spaces, the terms under which they do so will become increasingly important.”).


217 Andrew Jankowich, “EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds” (2006) 8 Tulane Journal of Technology and Intellectual Property 1, 20 (arguing that the interpretation of contractual rules by proprietors “is more likely to be and appear arbitrary” than under the common law); 45 (Noting that three-quarters of virtual world contracts surveyed “allowed the proprietor to delete a player account at the proprietor's discretion”).
In order to conceptualise these issues, it is useful to analyse the power of providers through the constitutional lens of the ideals of the rule of law. If we view contractual governance as a purely private and autonomous enterprise and defer the creation and enforcement of internal norms to providers, we necessarily marginalise the role of law in shaping the lives of those within virtual communities. If we accept that the role of law is not merely restrictive or wholly subject to the interests of the powerful, but can and does play a useful role in restraining the raw exercise of power, then reducing the role of law poses a risk in that power within virtual communities is not subject to the rule of law. The concepts of the rule of law provide a framework through which it is possible to contrast the ideals that we aspire to in governance in a liberal democracy with the reality of everyday private governance in virtual communities.

As virtual communities grow in importance and become more central to the lives of a rapidly increasing number of users, the idea that governance is unimportant in these spaces because they are private seems not just archaic but dangerous. While the rule of law is often thought of as solely relevant to public law, this is not necessarily the case. A V Dicey argued that the rule of law 'pervades' the English common law, as the “general principles of the constitution […] are […] the result of judicial decisions determining the rights of private persons in particular cases before the courts”.

This point has been taken up most prominently by TRS Allan, who argues that

the division between public and private law, though important, can never be safely invoked without reference to the specific context. […] there can be no clear-cut distinction between the state and other 'quasi-public' bodies, or even private associations that exercise significant power over their own members. As the problems of abuse of power by non-governmental bodies becomes more clearly recognized, the common law is capable of generating appropriate requirements of fairness and rationality in private law.

The point made by Dicey and Allan here is that the values of the rule of law do have important ramifications for private law and private relationships, although we must
be simultaneously cognisant of the “countervailing public interest in protecting people's constitutional freedom to define the terms of their own association as they see fit.” While rule of law values cannot provide a wholly determinative answer, they do provide an important normative framework through which to conceptualise and evaluate tensions about private governance in virtual communities. By exposing the underlying tensions and presenting a framework that is sensitive to both legitimacy and autonomy, rule of law values can guide us to more desirable outcomes when disputes arise around governance in virtual communities.

Because they provide an established discourse about the legitimate exercise of governance power, rule of law values form the most important component of the constitutional discourse that Fitzgerald and Berman argue ought to inform the continued development of cyberspace governance and regulation. Rule of law values are particularly useful in that they provide a framework that is much more familiar with the tensions of legitimate governance than is the contractual doctrine that we generally turn to in order to evaluate private governance disputes. Balkin explains why a governance framework is required to evaluate tensions in virtual worlds:

In virtual worlds, the relationship between platform owners and players is not simply one between producers and consumers. Rather, it is often a relationship of governors to citizens. Virtual worlds form communities that grow and develop in ways that the platform owners do not foresee and cannot fully control. Virtual worlds quickly become joint projects between platform owners and players. The correct model is thus not the protection of the players’ interests solely as consumers, but a model of joint governance.

Mark Zuckerberg, founder of Facebook, expressed a similar point of view in early 2009 when Facebook decided to seek user input on its terms of use. Zuckerberg explicitly recognises the tension between contractual and governance discourses where the terms of use are used in a way that governs participation:

Our terms aren't just a document that protect our rights; it's the governing document for how the service is used by everyone across the world. Given its importance, we need to make sure the terms reflect the principles and values of the people using the service. Our next version will be a

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substantial revision from where we are now. It will reflect […] how people share and control their
information, and it will be written clearly in language everyone can understand. Since this will be
the governing document that we'll all live by, Facebook users will have a lot of input in crafting
these terms.226

Historically, the ideals of the rule of law pervasively shape how we evaluate territorial
governments – at least in western liberal democracies, these ideals form a large
part of what it means to have good governance.227 The vocabulary of the rule of law
seems to fit reasonably comfortably with the tensions I have outlined with regards to
governance of virtual communities. When Radin says that the law of the firm is su-
perseding the law of the state, her concern is not only that the new regime “is not
subject to democratic input and debate”,228 but also that the exercise of power is not
“subject to continuing rebalancing and checking by the courts”.229 As the importance
of private rules increases in all aspects of social life, the lack of restraint on the abuse
of private power threatens the practical ideals of the rule of law.230 By using a rule of
law framework, we are able to highlight these tensions and directly confront the is-
sues that arise from private governance. In the remainder of this chapter, I will can-
vas three main themes that emerge from rule of law discourse: the proposition that
governance ought to be limited by law; the liberal emphasis on predictability and
formal legality; and the importance placed upon consent and democracy as a source
for legitimacy in pluralistic communities. Each of these themes draws out different
concerns and tensions about private governance that are somewhat difficult to recog-
nise under a classical contractual framework.

In a recent paper, Michael Risch provided a framework to evaluate the existence of

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229 Ibid 6.
230 Nikolas Rose explains that the dichotomy between public and private exercises of power is false and
highlights the lack of legal and constitutional restraints on the exercise of power: see Nikolas S Rose,
“Government, authority and expertise in advanced liberalism” (1993) 22(3) Economy and Society 283–
299, 286-7:

The strategies of regulation that have made up our modern experience of 'power'
formulate complex dependencies between the forces and institutions deemed
'political' and instances, sites and apparatuses which shape and manage individual
and collective conduct in relation to norms and objectives, but yet are constituted
as 'non-political'. They do not have law and constitutionality as their governing
principle, but entail diverse ways in which legal mechanisms, agents, codes and
sanctions are called upon and activated in different contexts. The lines between
public and private, compulsory and voluntary, law and norm operate as internal
elements within each of these complexes, as each links the regulation of public
conduct with the subjective emotional and intellectual capacities and techniques
of individuals, and the ethical regimes through which they govern their lives.
the rule of law within virtual worlds, and concluded that virtual worlds exhibit few of
the indicators of the rule of law. Risch's model focuses on predictability and formal
legality – rule by law – as key drivers for business investment in virtual worlds,
rather than tackling substantive conceptions. Risch explains that the normative as-
pects of the rule of law are more difficult to apply to virtual worlds for four main
reasons: that games do not lend themselves to freedoms; that requirements of demo-
cracy and legitimacy are difficult to reconcile with provider rule by fiat; that liberty
is limited by technical constraints as participants are not able to easily leave the com-

dunity; and that “to the extent that the rule of law fosters investment by setting ex-
pectations, liberal ideals are less important.”

Risch's concerns about the applicability of substantive rule of law values reflect the

concerns that virtual communities ought to be able to consensually develop in ways
that do not reflect liberal values and that, from a business perspective, liberal values
are less important than a stable framework for the enforcement of known rules. Risch
is correct in that it is difficult to map substantive rule of law values to virtual com-

munities, but these issues are nonetheless worth examining. As an issue for the territ-

orial regulation of virtual communities, we may not be concerned that a particular

virtual community does not embrace certain rule of law values – whether values of
formality, liberal rights, or democratic ideals – but, as we will see, the key issue is
one of legitimacy. The values of the rule of law are not universal within virtual com-
munities – the promise of diverse communities includes the ability to participate by
rule sets that are arbitrary, unpredictable, oppressive, or not reflective of liberal
democratic values. This promise, however, is conditioned upon the consent of those
who participate within these spaces. Where rule of law values are derogated from,
then, territorial states may usefully use consent and legitimacy as a primary indicator
of whether or not that derogation is harmful and, and if so, whether it ought to be
constrained.

In this rule of law analysis, it is not always necessary to identify the sovereign source
of law with precision. As Lessig points out, regulation comes in a number of different

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232 Ibid 12.
233 Ibid 20-22.
234 Ibid 22 (noting that ”subscribers democratically choose to have their avatars be subject to dictatorial
laws”).
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forms, each of which affect participants. Regulation also comes from a number of different sources – the moral force of the community, the imposed rule of the provider, and the laws of territorial states. Some tensions are best illustrated from a position internal to the rules and norms of the virtual community, while others are clearer from an external position. Risch is correct when he notes that there are overlapping constraints from multiple sources, but that “[w]hat matters is the cumulative effect of the law on its subjects.” The interplay between internal and external perspectives and sources of regulation is crucial to understand as constructing the experience of participants, who are subject to all these forces at once. This article will proceed on the basis that rule of law values highlight tensions that can be located in different sources of regulation in virtual communities and provide insights that may be relevant to a number of different forms of governance.

A final caution is necessary before I embark on a normative account of the rule of law and the applicability of these values to virtual communities. It is important to remember that the ideals of the rule of law are deeply contested, and are certainly not universal. This is particularly so for those rule of law values that exist primarily as western liberal ideals, such as the emphasis on formality or the set of substantive rights familiar to western constitutionalism. Much of the argument that follows will proceed from the basis of western liberal understandings of the rule of law and deal with the impact that these understandings ought to have on the regulation of virtual communities by western states. In setting this frame, I am unfortunately excluding the rapidly developing jurisprudence of many countries that are struggling with similar issues — particularly South Korea, whose familiarity with tensions arising out of virtual communities in many cases far surpasses that of western countries.

239 There is an argument that the more basic form of the rule of law, as a constraint on the exercise of government power, is universal: see E. P Thompson, Whigs and Hunters: The Origin of the Black Act (1990) 266; Brian Z Tamanaha, On the Rule of Law: History, Politics, Theory (2004) 137. Nevertheless, as we will see, even this basic limitation cannot be universal in the context of virtual communities, where we must protect those communities – like some games – for which arbitrary governance is part of the appeal: see Richard Bartle, “Building Virtual Worlds” (State of Play IV: Building the Global Metaverse, Singapore, 2007).
for whom the western liberal ideals of the rule of law do not have the same resonance. While the constitutional discourse and set of fundamental values may be different, however, I expect that future comparative work will show very similar struggles around legitimacy and the concerns I raise that extend beyond the western frame.241

2. Governance limited by law
A primary cluster of meanings of the rule of law requires that governance operates within the limiting framework of the law. This means that those in positions of power must abide by the law, and that the law should only be changed by appropriate procedures within appropriate limits.242 Tamanaha argues that this sense of the rule of law is a “universal human good” – that all societies benefit from restraints on the arbitrary or malicious exercise of power.243

When we measure governance within virtual communities against the principles of this conception of the rule of law, we identify some interesting shortcomings in cyberspace self-governance. Most notably, we see that the power of providers in virtual communities is not often restrained to acting in accordance with the rules. Additionally, however, we can canvass some substantive limits that may be appropriate to impose on virtual governance in order to safeguard the interests of participants.

a. No arbitrary punishment
The first sense of this conception of the rule of law is a prohibition on arbitrary governance – a requirement that power is exercised according to the law. This was famously set out by A V Dicey, whose “first and main articulation”244 of the rule of law was 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. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.245

This proposition immediately raises questions about the power of providers in virtual

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communities. Essentially, providers have control over the code that creates the platform, allowing them to exercise absolute power within the community itself.\footnote{See Richard A Bartle, “Virtual Worldliness: What the Imaginary Asks of the Real” (2004) 49 New York Law School Law Review 19, 27.} Any feature of the community can be changed at will by altering the code in some way. A provider accordingly has an unlimited technical ability to alter the virtual landscape – changing entitlements to virtual property, limiting the ability of participants to express themselves or communicate with others, or imposing punishments and excluding participants from the community altogether. These abilities can be exercised programmatically upon certain defined triggering conditions, or ad-hoc by direct intervention by a representative of the provider.

These technical abilities are bound from a number of sources – in Lessig's typology, by the market, by norms, and by the law.\footnote{Lawrence Lessig, “The New Chicago School” (1998) 27 Journal of Legal Studies 661, 662-3.} If Post is correct, we will have no need for legal restraints, because internal norms will develop to respond to the needs of the community.\footnote{David G Post, “Governing Cyberspace: Law” (2007) 24 Santa Clara Computer & High Technology Law Journal 883, 911.} Alternatively, should internal norms fail, participants may vote with their feet – or wallets – and move to another community, allowing the market to efficiently regulate.\footnote{See David G Post, “Governing Cyberspace: Law” (2007) 24 Santa Clara Computer & High Technology Law Journal 883, 170; Richard A Epstein, “Intellectual Property: Old Boundaries and New Frontiers” (2001) 76 Indiana Law Journal 803; Niva Elkin-Koren, “Copyrights in Cyberspace - Rights without Laws” (1997) 73 Chicago-Kent Law Review 1155, 1180.} Assuming, however, that neither of these forces provide a satisfactory guarantee, we may expect the law to impose some limits on the absolute discretion of a provider where appropriate.

The most immediate legal limits on a provider's discretion usually lie in the contractual terms of service that purport to govern most communities. As a first step, we may recognise that providers are expected to act in accordance with the terms of service – that is, that these contractual documents ought to be enforceable against providers and not merely for the benefit of providers.\footnote{See Michael Risch, “Virtual Rule of Law” (2009) 112(1) West Virginia Law Review 1, 27-8.} This leads to some serious problems – particularly as most terms of service are drafted in a manner that greatly favours the interests of the provider.

Most importantly, terms of service generally include clauses that reserve a wide discretion to the provider.\footnote{Andrew Jankowich, “EULAw: The Complex Web Of Corporate Rule-Making In Virtual Worlds” (2006) 8 Tulane Journal Of Technology And Intellectual Property 1, 20.} In communities where we accept that the value of the rule
of law against arbitrary power is significant, we may be deeply suspicious of clauses that allow absolute discretion. Take, for example, the Facebook Terms of Service, as they were before they were updated due to user protest in May 2009, which provided that Facebook

may terminate your membership, delete your profile and any content or information that you have posted on the Site […] and/or prohibit you from using or accessing the Service or the Site […] for any reason, or no reason, at any time in its sole discretion, with or without notice.\(^{253}\)

Facebook is an interesting example, as it eventually decided to create less harsh terms of use in response to user protest.\(^{254}\) Assuming Facebook had not modified its terms, however, this conception of the rule of law may suggest that we ought to refuse to uphold the broad discretionary power in an appropriate case. If a Facebook subscriber had her account terminated for no apparent reason, or for expressing criticism of Facebook, for example, could Facebook rely on the broad discretionary clause in the terms of service to avoid any potential liability?

The answer, of course, must be ‘it depends’. There are competing tensions at stake, and we must at least allow for the possibility that some communities rely on the ability to act arbitrarily and that participants in those communities may not always be harmed (at least in a way that ought to be legally recognisable) by the exercise of broad discretionary powers.\(^{255}\) This conception of the rule of law accordingly does not seem to be universal, at least not with regard to the exercise of private virtual governance. However, it is still open to suggest that there are communities where the existence of such a broad discretionary power is harmful to the point where we may wish to restrict it.


\(^{254}\) It is important to note, however, that under the new terms of use, while absolute discretionary power is not explicitly claimed, any award for damages for breach is limited so tightly as to effectively close off the threat of contractual breach as a limit on discretion: see Statement of Rights and Responsibilities (2009) Facebook, cl 14(3) <http://www.facebook.com/terms.php> at 27 August 2009 (limiting damages to the greater of $100 or the amount the subscriber has paid facebook in the last twelve months - which is generally zero).

Throughout history, this conception of the rule of law has been seen as important to help ward off tyrannical governance, a project that Tamanaha argues “will never be obsolete.”\footnote{Brian Z Tamanaha, \textit{On the Rule of Law: History, Politics, Theory} (2004) 138-9.} This concern, if it is accurate, is not likely to dissipate simply because the loci of certain governance tensions move online to private virtual communities. This reasoning suggests that at least for some communities we ought to be concerned about the arbitrary or malicious exercise of power by the providers and their delegates. In an appropriate case, then, we would expect firstly that the discretion of a provider be limited to that provided under the contract, and second, that a contractual clause that claims absolute discretionary power may not be enforceable. To the extent that contractual documents are used to govern behaviour in virtual communities, it seems reasonable to suggest that providers ought to be bound by the contractual terms in the exercise of their discretion.

\section{b. Substantive limits}

A requirement that governance be limited by law is somewhat empty if there are no substantive limits on the ability to create and modify the law.\footnote{John Austin, \textit{The province of jurisprudence determined} (2nd ed. 1861) 225 <http://books.google.com/books?id=k4YDAAAIQAAJ&pg=PR1#v=onepage&q=&f=false> \text{("the power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of legal limitation.")}; See further Brian Tierney, \text{""The Prince is Not Bound by the Laws." Accursius and the Origins of the Modern State"} (1963) 5(4) \textit{Comparative Studies in Society and History} 378.} It follows for some rule of law theorists that if the exercise of power ought to be authorised by law, then the lawmaking power of the government should be limited over certain subject matter. These substantive limits historically come from a variety of sources – natural law, divine law, custom, human rights, civil and political rights, or positive instruments like bills of rights.\footnote{Brian Z Tamanaha, \textit{On the Rule of Law: History, Politics, Theory} (2004) 118-9 (explaining that the applicable limits on legislative power come from a number of sources, but that “[t]he key […] is simply a pervasive belief, on the part of the populace and individuals,” that such limits exist).} In Allan's words, “the legality of a person's treatment, at the hands of the state, depends on its being shown to serve a defensible view of the common good”\footnote{T. R. S Allan, \textit{Constitutional Justice: A Liberal Theory of the Rule of Law} (2001) 2.}. The limits on the ability to create rules in virtual communities also come from a variety of sources, both legal and non-legal. If we focus our attention on legal limits, the constitutive limits are drawn not only from contract and property law but from the sum of all law that can potentially structure the relationship between participants and providers.
Dicey, writing at the turn of the twentieth century, was particularly concerned to show how the constitutional values and rights of English citizens were protected by the general law without the need or existence of a written constitution. While Dicey recognised that whether substantive rights were protected under a written constitution or by the common law was “a merely formal difference”, he argued that the English approach was often more practically useful (than that of the French Constitution) because it focused on remedies available to enforce rights rather than what he saw as potentially empty declarations of the existence of rights. Accordingly, for Dicey, values such as individual liberty, property, and freedom of speech are all protected by the general law, and are therefore not subject to legislative grant or revocation. Dicey gives an example that “the right to express one's opinion on all matters”, is protected by the common law, “subject to the liability to pay compensation for libellous or to suffer punishment for seditious or blasphemous statements”.

Dicey's approach is interesting. Like in Dicey's England, there is no written constitution that governs virtual communities (although Raph Koster did propose a hypothetical one in 2000). If we continue to assume that Radin is right in that public values are being displaced by private governance regimes, then it may be desirable to address these concerns by ensuring that public values are read, as Dicey suggests, into the private law doctrines that regulate private governance.

Reading governance principles into the regulatory framework of virtual communities may help to reduce the alienating effect of using private law rules to govern those communities. Private contract and property doctrine does not currently reflect the needs or desires of participants in virtual communities, evolved as it has in the paradigm of freedom to contract and the sovereignty of private property. The result is generally that participants in virtual communities are unable to frame their interests in a manner that is recognisable in the legal system.

Take, for example, the case of Peter Ludlow, who wrote a virtual newspaper called

261 Ibid 198.
263 Ibid 201-2.
264 Ibid 201.
The Alphaville Herald about events in Electronic Arts' ('EA') virtual world The Sims Online. Ludlow wrote some scathing commentary about EA's management of the community, and was subsequently ejected from The Sims for a technical breach of the rules. Ludlow eventually moved to Second Life and created the successful Second Life Herald, but it is interesting to consider how a hypothetical legal dispute may have been framed.

Ludlow's concerns are free speech concerns. He believes that he was punished for writing articles on his personal website (outside of the virtual world itself) that were critical of EA. In particular, the articles reflected poorly on EA as they exposed 'cyber-prostitution' in The Sims, and criticised EA's lack of appropriate response to such behaviour in the community. Electronic Arts, on the other hand, relied upon a clause in the ToS that prohibits linking to external sites and terminated Ludlow's account for posting a link to The Alphaville Herald on his in-world profile. Viewed as a purely contractual dispute, the core issue here, the free speech argument, is not legally recognisable. The abstract way in which the legal system construes contractual disputes provides a simple answer, that Ludlow had breached the ToS, and EA had absolute discretion in determining whether to accept the breach or terminate Ludlow's account.

This abstraction requires that Ludlow frame his concern in terms of a contractual argument, rather than being able to express his true concerns, that participants in a community ought to be able to express their dissatisfaction about how the community is governed. As critical legal scholars recognised, the imposition of reified legal categories alienates the real needs and desires of citizens – we would come to better decisions if we could understand the underlying tensions rather than the legal abstraction. If we are able to recognise that contractual doctrine has a constitutive effect, that the limits we impose on the exercise of a technical right to terminate shape the boundaries of acceptable governance within the virtual community, we may reach a better answer.

This is not to say that the process is in any way determinative. We may well come to

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the conclusion that EA’s interest in protecting the image and reputation of the community (and the value of its subscription fees) outweighs any interest that Ludlow has in expressing his concerns about the in-world governance structures. At least, however, we will have reached this conclusion in full knowledge of the values that are at stake, rather than ignoring the underlying tensions through the rote application of abstract doctrine. By expanding our frame of reference and considering the effects, by explicitly reading substantive values into legal doctrine, we may provide a means through which more appropriate decisions can be reached.

The task of confronting and evaluating substantive governance values is a fundamentally pragmatic exercise. Having jettisoned universal natural law principles and embraced the subjectivity of value systems, we are left with the familiar liberal autonomy problem – the great difficulty of determining appropriate substantive normative limits in a pluralistic society. Several theorists have attempted to suggest some appropriate starting points, each addressing the particular tensions that they perceive in cyberspace self rule. Radin proposes an approach that introduces “blanket non-waivability for certain well-defined exceptional categories of entitlements”, in order to allow a general regime of private bargaining to operate. As a 'preliminary pass' to identifying some potential exceptions, Radin suggests “three categories for our attention: (1) rights related to legal enforcement; (2) human rights; (3) rights that are politically weak.”

Other theorists suggest different sets of substantive limits. Balkin is concerned with the free speech rights of developers and players. Netanel is primarily concerned with limits that encourage the ideals of liberal democratic association. Fairfield is concerned with property rights, personal and dignitary interests, and limiting fraud. Epstein is worried about anti-competitive barriers that would hinder the development of a marketplace of norms.

These are some of the governance values that form the substantive constitutional limits on the exercise of government power in western democracies. As I alluded to

270 Ibid 9.
earlier, Raph Koster drew many of these together as a thought experiment in 2000, when he proposed a hypothetical Declaration of the Rights of Avatars, modeled on the French Declaration of the Rights of Man and the Citizen, and the US Bill of Rights. Several substantive rights are claimed for participants in virtual communities, including equality, "liberty, property, security, and resistance to oppression", the right to contribute to the shaping of the internal rules, freedom of speech, freedom of assembly, and privacy. While certainly not exhaustive or authoritative, Koster's list hints at the range of substantive issues that, for various reasons, certain societies prohibit their citizens from opting out of, or at least enforce higher than normal thresholds of consent for their modification.

It is important to avoid a substantive construction of the rule of law that is so broad that it loses its potency. While many of these constitutional values fit within a rule of law framework because they are said to be pre-requisites for legitimate governance, there is no easy claim to universality that can be made. These are some of the values that limit abuse of power in western liberal democracies but, working through the list provided by Koster and the concerns raised by other theorists, it seems evident that the application of any substantive values as limits to autonomy is heavily contextually dependent. The type and extent of desirable substantive limits is accordingly likely to differ by territorial state, by community, and over time.

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276 *Declaration of the Rights of Man and the Citizen* (1789, France).

277 *The Constitution of the United States* (US), amendments I-X.


279 Ibid 2.

280 Ibid 6.

281 Ibid 11.

282 Ibid 17.

283 Ibid 18.


285 Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 113 ("The rule of law cannot be about everything good that people desire from government. The persistent temptation to read it this way is a testament to the symbolic power of the rule of law, but it should not be indulged.").
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limits canvassed below are examples of the types of limits that states may choose to impose on the private abuse of power in virtual communities, particularly focusing on those that have attracted substantial academic interest. This list represents some of the core values that are important to western liberal conceptions of the rule of law; it cannot be in any way either universal or exhaustive, but it is useful in providing an overview of how such interests can be thought of as constitutive limits to cyberspace self-governance and how any such approach must be sufficiently flexible in order to take into account conflicting social interests.

i. Discrimination, speech, and protest

Anti-discrimination law provides a useful example in highlighting the way in which a legislated protection of certain interests can shape the internal rules of a community, as well as an example of the tailoring that occurs in trading off potential harm against the benefits of allowing communities some degree of autonomy. Take two examples of sexual discrimination in virtual communities: Blizzard threatening Sara Andrews with disconnection from World of Warcraft for advertising a LGBT-friendly guild, and Microsoft banning Xbox Live players whose names included the word ‘gay’. Both of these examples highlight reactions by some participants to communities that they find somewhat threatening – particularly prominent homophobia from other participants. In order to minimise perceived conflict, the provider has in each case threatened to ban the minority group participant for overtly expressing their sexuality in a way that could trigger negative reactions from other participants.

Under the terms of service, both Blizzard and Microsoft reserve a broad right to ter-
minate access to participants. This contractual clause may, however, come into conflict with anti-discrimination laws. Many territorial states already provide limits on discrimination on the basis of sexual orientation within private groups. Public accommodation rules, if extended, could see some virtual communities prevented from discriminating as to who can join and remain in a community. To the extent that these rules are effective, they become constitutive limits, limiting the ways in which communities and groups can choose to discriminate.

The law in this area continues to develop; as participation in virtual communities becomes increasingly important to the lives of citizens, the significance of being excluded on an unacceptable basis similarly becomes greater. It seems likely that some form of rights to non-discriminatory access will be recognised in the future, at least for some subset of communities (particularly those that have a more public character). In developing these rules, courts and legislatures should be particularly mindful about when certain forms of discrimination are tolerable for specific purposes and when such behaviour crosses the line into impermissible discrimination or even vilification. As Netanel argues, some level of discrimination is often beneficial where that discrimination goes to the heart of the purpose of the community. The proper evaluation of whether discrimination is desirable or not must of course be made given a thorough examination of the circumstances and social structure of the particular community.

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292 Ibid 77-8.


294 Netanel argues that discrimination should be acceptable in circumstances where it is necessary in order to conduce meaningful and effective expression: “some conversations lose their essential purpose and meaning unless limited to persons of a particular group. In such instances, the participants’ interest in discriminating (and the allied public interest in promoting discursive expression and association) should prevail over the interest in preventing invidious status discrimination.” (Neil Weinstock Netanel, “Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory” (2000) 88 California Law Review 395, 459-60.)
A. Speech limits

This principle holds for other potential substantive limits – the relative importance of social values is contingent on the purpose and use of the community. Balkin points out, for example, that the importance placed on freedom of speech of participants needs to be weighed against the speech interests of the providers in virtual communities – interests Balkin casts as the freedom to play, the freedom to design, and the freedom to design together.295 These freedoms can conflict at times, and Balkin is careful to stress that the developer’s free speech rights to create an expressive game or other platform may outweigh any concerns we may have about the legitimate interests of participants. Balkin notes, however, that some of these tensions “should be taken seriously, but others should not”: “because platform owners are both speakers in their own right and conduits for the speech of others, we can imagine game spaces where regulation of the space to protect the free speech interests of the players might be constitutional.”296

The private nature of virtual communities, by placing the power to regulate speech in the hands of private property owners, has the capacity to significantly interfere with the liberty of individual citizens, particularly as online fora become more important to expression.297 Dawn Nunziato makes the argument that the private nature of virtual communities significantly undercuts the protection afforded to speech by a purely negative reading of the First Amendment – as there are few spaces analogous to protected corporeal public forums exist to provide a platform for citizens to speak or be heard freely.298 Nunziato and Balkin both recognise the harm that can occur where a provider has absolute discretion over the content of communications within a virtual community – leading to a suggestion that at least for the more ‘public’ types of communities, territorial states may have a legitimate interest in limiting the ability of the provider refrain to regulate participant speech.299

While it certainly seems desirable to protect participant speech, there is a significant difficulty in determining when private restraints on speech ought to be acceptable

296 Ibid 2094.
298 Ibid 1117-8.
and when they should not. For Nunziato, limits on private restraints are justified in “Internet forums that are generally open to the public for free speech purposes”\(^{300}\) – but this standard would seem to exclude the majority of virtual communities, which generally do not explicitly hold themselves out as free speech zones. Balkin, on the other hand, draws some boundaries of regulation along the distinction between commodified and non-commodified communities, and the distinction between communities that encourage the free exchange of ideas and those that are developed to “realize the artistic or ideological vision of the platform owner.”\(^{301}\) Balkin sets up a tension between state regulation and the free speech interests of providers of virtual communities, arguing that

\[\text{[r]egulating the platform owner’s right to design in order to protect the participants’ right to play is most justifiable when the virtual world serves as a public space for commerce, and when it is held open as a public space for the exchange of ideas. These two distinctions may not be perfectly clear in all cases; but they point the way to the boundaries of permissible state regulation on the one hand, and the free speech rights of platform owners on the other.}^{302}\]

Accordingly, for Balkin, free speech interests of participants will be most important to recognise in virtual communities that act like a marketplace, and secondly (like Nunziato) in communities that are “offered as a space for the free exchange of ideas”.\(^{303}\)

Returning to the example of Peter Ludlow’s exile from *The Sims Online*, Balkin does not propose a resolution, but highlights that any claim must be evaluated on the purposes for which the community was created and the way it was used.\(^{304}\) This seems to be fundamentally correct; no two communities can be treated alike,\(^{305}\) and the free speech interests of participants need to be weighed against the free speech interests of the providers.\(^{306}\) Nevertheless, in appropriate cases, we could certainly envisage that providers may accrue some responsibilities to not silence dissenting voices, a claim that may be somewhat stronger in more general use platforms.

In weighing the competing speech interests of providers and participants, it seems


\(^{302}\) Ibid 2090.

\(^{303}\) Ibid 2090.

\(^{304}\) Ibid 2093.

\(^{305}\) Ibid 2084.

\(^{306}\) Ibid 2080.
desirable to avoid a strict dichotomy between communities that are (or are held out to be) free speech zones and those that are not. Such a distinction is likely to allow the majority of providers to exclude themselves from potential responsibility by simply disclaiming any participant interests. It is much more desirable to examine whether particular limits are appropriate for particular communities than to attempt a blanket determination of whether or not a particular community is exempt from all speech responsibilities. So, for example, it would be conceivable that Electronic Arts would be required to tolerate an external link to a news article that is critical of their governance procedures but not an external link that exposes their users to unsolicited commercial communications. The purpose and use of a community will always be relevant to the types of speech restrictions that territorial states may consider appropriate for the provider to impose. If such speech concerns are serious enough to warrant territorial intervention, it would certainly seem desirable to adopt a more subtle and critical method of evaluation than attempting to rely on a binary classification of a community as either allowing free communication or not.

B. Disruptive protests

The analysis becomes somewhat more complicated if we consider not only competing speech interests, but also the interests of the provider in the stability of the servers or network. The interests of participants to peaceful assembly and protest, for example, can sometimes directly conflict with the ability of other participants to enjoy the community and the interests of the provider in maintaining order and community uptime. The task of managing participants is a very complicated exercise for a provider, on which the fate of the entire community often rests. Participants have a very large range of different motivations and interests in the community, and contribute in a wide range of different ways. Passionate participants will often seek to manifest their displeasure and, just as displeased citizens of territorial states do, will seek to make their voices heard within the community. Virtual worlds have provided fertile platforms for protests over at least the last decade, some about issues specific to the community, and others that reflect external political struggles.

309 See Bridget M. Blodgett, “And the ringleaders were banned: an examination of protest in virtual worlds” in Proceedings of the fourth international conference on Communities and technologies (2009) 135-144, 135-6 <http://portal.acm.org/citation.cfm?id=1556460.1556481> at 27 August 2009.
Individual or small scale manifestations of dissent are speech concerns, but larger scale virtual protests raise some interesting new tensions. Protests are often disruptive by their nature and design, and this is no different in virtual communities. The presence of a large number of people protesting in a virtual world, for example, can potentially prevent others from enjoying the world as normal, and can even strain the platform and cause the server to crash, disabling the world for a few hours. Providers, then, often have a technical incentive to disband protests in-world, in addition to any other reasons they may wish to suppress dissent.

Providers may respond to protests by threatening to disconnect, suspend, or ban users if they do not disband, conceivably relying on a clause in the terms of service that prohibits disruptive behaviour. If a provider could be required to tolerate dissenting speech from individual subscribers, could it also be required to permit disruptive dissent that threatens the stability of the servers and the enjoyment of other members of the community? The tensions at play here are not only those involving speech, but also the provider's interest in the functioning of the platform and in maintaining a harmonious community.

ii. Property

Many of the speech tensions above are also reflected in the continuing debate about the ownership of virtual objects. In communities where participants are able to create or acquire virtual objects, participants may feel a sense of entitlement to those virtual objects. Lastowka and Hunter argued in 2004 that there was no descriptive or normative impediment to recognising such virtual objects as legal property – not only are virtual objects indistinguishable from real world property interests, but the theoretical justifications for recognising excludable property rights can be extended to virtual environments.

Fairfield has further developed a model of virtual property, and argues that one of the most significant sources of substantive limits on self-governance ought to come from property law. Where participants create or acquire virtual property, Fairfield argues

310 See Ibid 143.
312 Ibid 50.
that the law should generally recognise their interests as the owner of that property. Property rights recognised in this manner would impose limits on the ability of providers to unilaterally exercise power over participants. Fairfield uses the Bragg case as an example, where Marc Bragg sued Linden Lab for terminating his Second Life account and confiscating his virtual property. Linden alleged that Bragg cheated by purchasing land that was not technically for sale, at significantly under market value. Bragg maintained that he did not and that, at any rate, the punishment was excessive – extending as it did beyond the contested land to the remainder of his virtual assets.

Setting aside the circumstances of the dispute for the moment, Farfield argues that “[b]ecause courts have not defined the relationship between EULAs and virtual property, the parties were not able to clearly articulate the deal they wished to make.” If Bragg's property rights in his virtual land, objects, and Linden Dollars were recognised, Linden Lab would be unable to unilaterally terminate his account without being required to pay compensation – or at least, the parties would be able to negotiate on appropriate rule sets.

Fairfield is almost certainly correct that some version of property rights ought to be recognised within Second Life. The 'virtual' economy in Second Life is fluidly convertible to 'real' currencies, like the US dollar, and participants evidently feel a sense of entitlement to their virtual property and currency. Linden Lab clearly encourage this behaviour – its slogan is “Your world. Your imagination.”; its promotional material refers to the possibilities of 'owning' virtual land and generally stresses the fluidity of the market. Linden Lab encourages investment into virtual resources and substantially profits from that investment. In a press release announcing changes to the terms of service that vested intellectual property rights of in-world creations in subscribers, Linden claimed that

our new policy recognizes the fact that persistent world users are making significant contributions to building these worlds and should be able to both own the content they create and share in the

314 Fairfield limits his argument to virtual assets that are rivalrous, persistent, and interconnected: see Ibid 1053.
315 Bragg v Linden Lab, 487 F. Supp. 2D 593 (E.D. Pa. 2007).
317 Ibid 468.
318 At least until 22 August 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: Linden Lab, Own Virtual Land Second Life <http://web.archive.org/web/20080822144829/http://secondlife.com/whatis/land.php> at 6 January 2010.
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value that is created. The preservation of users’ property rights is a necessary step toward the emergence of genuinely real online worlds.\textsuperscript{319}

Judge Robreno, in the \textit{Bragg} case, noted this press release and other hype about the ownership of virtual property and land in Second Life, quoting the CEO of Linden Lab as boasting

\begin{quote}
[the idea of land ownership and the ease with which you can own land and do something with it . . . is intoxicating. . . . Land ownership feels important and tangible. It's a real piece of the future.]\textsuperscript{320}
\end{quote}

Given these and other comments, it is hardly surprising that a participant such as Bragg would feel aggrieved if Linden were to confiscate his virtual property and wealth. In an appropriate case,\textsuperscript{321} it would not be difficult for a court to recognise that Linden Lab has created an environment where it is bound not to destroy the property – or at least, the value of the virtual property – that it has encouraged to be created within the environment.\textsuperscript{322}

This principle, however, is not necessarily extendible to other environments. We must at least account for the possibility that a fantasy environment can be created where virtual objects exist and are possessed by participants but no legal property rights should be enforceable.\textsuperscript{323} The community context is important. Because virtual communities are diverse, we must be wary of creating property rights where none are justified. We should remember that not every instance of virtual property should be recognised as legal property, and that there may be many valid reasons why both participants and providers would not benefit from the recognition of property rights.\textsuperscript{324}

Richard Bartle in particular makes the argument that the unfettered ability of the pro-


\textsuperscript{320} \textit{Bragg v Linden Lab}, 487 F. Supp. 2D 593 (E.D. Pa. 2007), quoting Philip Rosedale in Michael Learmonth, ‘Virtual Real Estate Boom Draws Real Dollars’ (03 June 2004) USA Today.

\textsuperscript{321} The \textit{Bragg} case settled on undisclosed terms after the decision in \textit{Bragg v Linden Lab}, 487 F. Supp. 2D 593 (E.D. Pa. 2007).


\textsuperscript{323} cf Fairfield, who argues that we should recognise property rights first, and that communal ownership schemes can be created on top of these rights: “an overarching system of private property does permit communal property groups to continue to exist, if the community is able to make its social controls stick. The contrary is not true: the elimination of private property leaves, by definition, no room for private property.” (Joshua A. T Fairfield, “Virtual Property” (2005) \textit{85 Boston University Law Review} 1047, 1101).

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to control the community – including the ability to expel a participant and destroy her property – can be fundamentally necessary in order to create a community that is interesting, fun, or useful to its participants.325 There is accordingly a fundamental tension between the interests of participants in having a protected entitlement to what they see as their property, and the ability of providers to be able to regulate and develop the community.

Here, too, Balkin's distinctions may be useful.326 We could argue, perhaps, that the more commodified a virtual community is and the more the provider encourages the creation and trade in virtual property, then the more likely it is that property rights in the virtual property ought to be enforceable. On the other hand, the more the provider is successful in genuine efforts to avoid commodification, the less porous the borders are to allow real money trades, then the more likely that we would be to accept the provider's argument that the virtual property and virtual currency should not create real world entitlements. This approach allows for a more subtle and tailored examination of property interests. For the types of communities where the developer requires absolute control, and the participants understand that the developer requires absolute control, then enforceable property rights may have little relevance. Where participants have come to expect a sense of stability in their virtual possessions, however, the absolute ability of the provider to destroy those possessions may legitimately need to be curtailed.

One objection to Balkin's distinctions is that it predicates property interests primarily on corporeal exchange value – ignoring, to an extent, the personal attachment that participants may develop to their virtual possessions and creations. The rise of user generated content provides a prime example: there is an increasing trend in software development to create a bare platform and encourage the participants to create the assets – the objects and landscape that define the virtual environment.327 Even where this content is not commodified, we would expect that participants attach particular value to their creations and possessions, and may accordingly be entitled to some form of legal recognition to that attachment, either as the objects of their labour328 or

as manifestations of their selves.\textsuperscript{329}

Recognising the interests of participants in virtual goods or expression may not necessarily require recognising fully excludable property rights – there may be other approaches that are more suitable to dealing with the complex relationship between participants and providers. Judge Unggi Yoon, for example, suggests recognising participants' property interests in virtual items as analogous to goodwill, which avoids the problem of preventing providers from being able to modify the environment while giving some level of security to participants.\textsuperscript{330} In other circumstances, particularly where participants are contributing heavily to the value of the platform by creating content, we may be able to recognise that there is real harm done when participants are directly brought into the value chain and are thereafter unfairly treated by the provider. This could lead us to consider the role of unjust enrichment as an appropriate remedy, or may prompt us to enforce moral rights of attribution and integrity on virtual creations, for example. If these remedies prove unsuitable or inappropriate, it may be possible to recognise new interests that prevent a participant from being alienated from her creations – as would happen when a provider terminates a participant's access to a community but continues to use her in-world assets, for example. We could even imagine situations where it would be desirable to allow a participant-author to enforce a right akin to the French moral right of withdrawal, allowing her to prohibit further uses of the material she creates after she has left a community.\textsuperscript{331}

The fundamental point here is that there is unlikely to be a single solution that addresses property-type interests in virtual communities. The level of protection that a participant ought to be entitled to, if any, will be highly dependent on the particular circumstances of the community. Territorial states will, however, have a legitimate interest in articulating a set of entitlements that participants in appropriate virtual


\textsuperscript{330} In this conception, a trade does not transfer title to the virtual object itself, but to the value of the participant's labour in obtaining the object. See Ung-Gi Yoon, “Real Money Trading in MMORPG Items From a Legal and Policy Perspective” (2008) \textit{1 Journal of Korean Judicature} 418.

\textsuperscript{331} The French right of withdrawal is subject to payment of compensation to the user of the work for any harm caused by its exercise: \textit{Code de la propriété intellectuelle} (French Intellectual Property Code), Copyright (Part I), Code (Consolidation), 01/07/1992 (27/03/1997), No. 92-597 (No. 97-283), Art. L121-4 (English translation courtesy of WIPO available at \texttt{http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=1610}).
communities have in their virtual items or creations, and limiting the corresponding ability of providers to destroy or modify those entitlements. The extent to which any given property-type regime will provide desirable outcomes will depend on its sensitivity to the norms and requirements of the different communities to which it is applied. Enforceable interests in virtual property, seen in this way, act as substantive constitutive restrictions on the scope of cyberspace self-governance.

iii. Right to privacy

The potential threats that the use of networked technologies pose to the privacy of participants has been the subject of much discussion in recent decades. The growing importance of participation and the increasing computational power and storage capacity of computer networks highlights immediate concerns about the collection, use, and distribution of personal information. Because all actions that occur 'within' a virtual community are essentially reduced to information flows, they are all easily recorded and stored. Actions that are ephemeral in the corporeal world perversely take on a more tangible form when mediated through virtual information networks. Information that is not displayed or carried out synchronously must necessarily be processed and stored for later use – personal messages left on bulletin boards and profile pages are kept indefinitely on the provider's server, for example. Even information that is used synchronously, however, is vulnerable to capture – all actions, searches, information and products browsed, real-time chat, and exchanges between participants are potentially logged and stored.332

The data collected presents a treasure chest of potentially valuable information if it can be analysed and repurposed in sufficiently innovative ways. Amazon, for example, has built a very successful business model by collating the browsing and purchasing habits of its customers in order to deliver targeted advertising and product recommendations. When Facebook decided to implement a similar system, called Beacon, that would advertise a user's purchases on certain partner sites to other people in the user's social network, it was quickly met with outrage from Facebook

332 For example, Sony Online Entertainment has recently granted researchers access to several terrabytes of data, representing the entire collected actions of 400,000 players in Everquest 2 over a four year period: John Timmer, “Science gleans 60TB of behavior data from Everquest 2 logs,” Ars Technica, 15 February 2009 <http://arstechnica.com/science/news/2009/02/aaas-60tb-of-behavioral-data-the-everquest-2-server-logs.ars> at 27 August 2009; see further Sal Humphreys, “Ruling the virtual world: Governance in massively multiplayer online games” (2008) 11(2) European Journal of Cultural Studies 149-171, 156-7 (discussing the use of spyware to monitor the activities of participants in massively multiplayer online games).
users. The system was later changed to an opt-in system in response to user feedback. Social networks are potentially rich sources of revenue for advertisers, but they also raise difficult questions about the juxtaposition of commercial and personal social relationships.

Tensions over the use of personal information are likely to continue playing out in and around virtual communities for the foreseeable future. Many states have some form of privacy legislation or general law rules on the collection, use, and disclosure of personal information which may be used to restrain or limit the ability of a provider to unilaterally deal with participant data. More difficult considerations arise when participants are asked to trade consent to control their data for some internal or external benefits. In some cases, these trade-offs are benign and desirable; others, of course, may be exploitative. Regulating the disclosure of personal information from virtual communities into other contexts is accordingly a difficult process, but a familiar one.

Using a rule of law framework, however, highlights that regulating collection and disclosure of information may not be sufficient to address the privacy interests of participants. There are difficult issues that arise when we turn to consider the use of private information within a virtual community, not merely its leakage out of the community. Because consenting to some level of collection is usually required in order to participate in the community, limits on disclosure typically mean that monitoring and use of information collected within the community by the provider itself is largely unregulated. Under such a regime, providers have an unfettered ability to monitor the communications and the actions of their participants – a proposition that seems to conflict with the limitations on governance that we expect of territorial states.

As participants become more involved in virtual communities over an increasing

335 Radin argues that even where the trade-off is fully informed, we may determine that individual waiver deleteriously alters the character of society for those who do not waive their rights, and accordingly prohibit all such waivers: Margaret Jane Radin, “Regulation by Contract, Regulation by Machine” (2004) 160(1) Journal of Institutional and Theoretical Economics 142, 10.
range of activities, limits on the storage and use of information collected within the community itself are likely to grow in importance. The potential for harmful use of the personal information that passes through a social network is not limited to linking internal profiles to external shopping or browsing information. A Facebook member may well have a legitimate expectation that her private messages and photos will not be viewed and distributed by people within the organisation, for example, even if they are not distributed to third parties. Tal Zarsky argues that participants in other communities (particularly virtual worlds) may have an interest in preventing the provider from building and utilising a comprehensive behavioural profile in order to increase retention rates or to deliver highly targeted and influential marketing campaigns. Still further tensions exist around the powerlessness of participants in controlling the information that is collected about themselves and the internalisation of external norms under the perpetual potentiality of surveillance.

It may be that we need a different way of conceptualising privacy in order to address these types of problems – as a model that focuses on leakage of information outside of the initial area of collection is unlikely to be able to address tensions around the use, within the community, of information that is necessarily divulged through participation. It is likely that these types of concerns will become more important in the future as the personal information that is collected within virtual communities continues to grow. There are, however, difficult issues to resolve in any conception of privacy that attempts to address these tensions. Most importantly, any such concerns must be carefully balanced against the benefit that participants obtain through enjoying an experience within the community that is tailored to their tastes and needs.

iv. Rights of legal enforcement

The rule of law discourse suggests another substantive limit on the abuse of power

337 Ibid 255-6, 259-264.
that is derived from the ideal of access to justice – a requirement that citizens ought to be able to enforce their rights in the legal system.\textsuperscript{341} This is essentially a corollary to the principle that governance should be limited by law – an idea that would have little significance if the citizen is practically prevented from challenging the actions of the government. Applying this principle to online contracts, Radin, in particular, suggests that we should be wary of contractual terms that purport to exclude legal enforcement.\textsuperscript{342} In this category, Radin includes terms that provide “that the recipient would have no right of legal action or remedy under any circumstances”, and other 'gray area' terms such as requirements to submit to binding arbitration, exclusion of class actions, undertakings to pay attorney's fees, and “severe curtailment of remedies” — such as “clauses limiting the remedy for a victorious plaintiff to whatever the recipient paid for a service”.\textsuperscript{343}

Clauses in this broad category are relatively common in virtual community contracts. The Second Life terms of service, for example, previously required that any plaintiffs submit to binding arbitration in Linden Lab's home state.\textsuperscript{344} Such a clause can be very effective at limiting legal redress for participants who allege that they have been wronged – arbitration is often expensive, travel to the provider's jurisdiction may be prohibitive, and in any case arbitrators may often tend to determine cases in favour of the large corporate actors.\textsuperscript{345} The District Court in \textit{Bragg} refused to uphold the binding arbitration clause in Linden's favour, holding that it was procedurally and substantively unconscionable.\textsuperscript{346} In coming to this conclusion, Judge Robreno held that “[i]n effect, the TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden.”\textsuperscript{347}

The decision in \textit{Bragg} follows that of the US District Court in \textit{Paypal v Comb}, which held that a compulsory arbitration clause in the Paypal terms of service was unconscionable because of “a lack of mutuality in the User Agreement and the practical ef-

\begin{thebibliography}{9}
\bibitem{343} Ibid 9-10.
\bibitem{344} See \textit{Bragg v Linden Lab}, 487 F. Supp. 2D 593 (E. Pa. 2007).
\bibitem{346} \textit{Bragg v Linden Lab}, 487 F. Supp. 2d 593, 611 (E. D. Pa. 2007).
\bibitem{347} \textit{Bragg v Linden Lab}, 487 F. Supp. 2d 593, 608 (E. D. Pa. 2007).
\end{thebibliography}
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fects of the arbitration clause with respect to consolidation of claims, the costs of arbitration, and venue.348 We may increasingly find that courts are more willing to refuse to uphold terms that limit participants' rights of legal enforcement, or that new legislative measures are introduced to combat such clauses.349

v. Summary – substantive values

The stronger forms of the arguments for cyberspace self-governance suggest that the role of the state in imposing substantive limits on the abuse of private power should be minimal to non-existent. These arguments are generally premised on the fact that individuals who disagree with the norms within a given virtual community have the ability to leave the community – a power which is much more difficult to exercise in the corporeal world. It follows, on this logic, that since values are subjective, it makes little sense for the territorial state to limit the scope of autonomy and consensual participation in virtual communities.

This logic is faulty for a number of reasons. Primarily, as I argued above, the deterministic assumptions that suggest that norms of virtual communities will necessarily be better than those of territorial states are fundamentally flawed. Irrespective of those assumptions, however, the territorial state continues to have some responsibility to protect its citizens and limit their autonomy – whether they are interacting with other citizens or with foreigners, online or off. The substantive values that a territorial state believes are important are accordingly likely to influence the boundaries of acceptable self-governance – at least for citizens of that state and to the extent that any such limits are effective.

It is not possible to provide any definitive answers as to which values should be read into virtual community governance structures. The answer will always depend upon the community context, the level of harm that participants are exposed to, and the beneficial effects, if any, of allowing the community to determine its own substantive values. The exact content and bounds of any such limits will always be highly contextual – the values they represent shift in importance with time and space.

The rule of law analysis helps here to highlight some of the more pressing tensions

349 Australian consumer law, for example, is developing in a manner that more closely mirrors the approach of the European Union to disallow some clauses that limit the ability of a contracting party to enforce the contract: see Trade Practices Amendment (Australian Consumer Law) Act 2009 (Cth).
that surround private governance in virtual communities. The sets of values that I have canvassed here, however – discrimination, speech, property, privacy, and rights of legal enforcement – are merely indicative of a much larger set of the issues that societies are continuously debating as new technologies bring changing social practices. It would be a mistake to treat any of these values as having any universal application, but this set provides at least a first pass that may give courts cause to pause and more closely consider the legitimacy of a contractual framework that purports to disclaim them. The effectiveness of substantive limits on abuses of power is of course widely varied, but it certainly no longer seems plausible to claim that cyberspace is in any way immune from the exercise of power by territorial states. This rule of law analysis supports the conclusion that states have a legitimate interest in restraining the autonomy of their citizens, whether that autonomy is mediated through cyberspace or not.

3. Formal legality

Another set of meanings of the rule of law is an emphasis on formal legality in legitimate governance.350 This liberal conception of the rule of law focuses on the ability of the individual to plan his or her affairs – the requirement “that laws be declared publicly in clear terms in advance, be applied equally, and be interpreted and applied with certainty and reliability.”351 Hayek expressed this as a requirement that “the laws must be general, equal and certain”.352 For Raz, the emphasis was that the law “must be capable of guiding the behaviour of its subjects.”353 It followed, for Raz, that “[a]ll laws should be prospective, open, and clear”354 and that “[l]aws should be relatively stable”.355 These principles, stated in a number of different ways, form the standard liberal understanding of the rule of law.356 The emphasis on the law's ability to guide the behaviour of its subjects leads to two somewhat separable themes in this conception of the rule of law: an aspiration towards clarity and predictability in legal rules and, to a lesser extent, a set of requirements of due process in the application of those rules.

351 Ibid 34.(discussing 'legal liberty').
352 Friedrich August Hayek, The political ideal of the rule of law (1955) 34.
354 Ibid 198.
355 Ibid 199.
a. **Predictability**

An important component of formal legality is the ideal that laws ought to be sufficiently predictable to allow citizens to structure their lives with some degree of certainty. Hayek emphasised that the rule of law “makes it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances to plan one's individual affairs on the basis of this knowledge.” To enhance predictability and the liberty of legal subjects, scholars who advocate formal legality emphasise the importance of a system that provides clear, prospective rules that are well promulgated, reasonably constant, and consistently enforced.

When we analyse the practice of governance within virtual communities against the requirements of formal legality in the rule of law, it becomes clear that private governance does not currently live up to the ideals of encouraging predictability and guiding behaviour. This may, of course, be perfectly desirable – one can imagine that some games, for example, may be much more interesting if the rules are not completely predictable. Alternatively, we could accept a lack of predictability in the interests of community solidarity in relatively homogeneous communities. In some communities, however, particularly those that foster a more diverse population and are relatively open-ended, a perceived lack of predictability may be harmful to the interests of participants and we may be justified in imposing limits on private governance.

i. **Clear rules**

The requirement that rules be clearly expressed and promulgated is familiar in the liberal rule of law discourse, where the emphasis is on the ability of law to guide behaviour, and the ability of citizens to plan their lives. The issue that this discourse immediately highlights is that the rules in virtual communities are often unclear, obscure, and difficult to understand. The contractual terms of service and EULA documents are usually written in dense legalese and usually presented in a form that discourages reading.

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357 Friedrich A. von Hayek, *The Road to Serfdom* (1944) 74-5.
To the extent that Montesquieu is correct in saying that “[l]iberty is the right to do everything the law permits”, virtual communities do not rate highly on an imaginary scale of liberty. Some communities may create additional terms of conduct to govern internal behaviour which are often more clearly enumerated than the purely contractual terms of service – but even these are often unclear and indeterminate. Where these codes are sufficiently clear and effective, they may be more useful in structuring a participant’s behaviour within the community than the contractual terms, so may more adequately satisfy the ideals of the rule of law and Montesquieu’s conception of liberty.

This leaves the question, however, of what to make of the obscure terms that form part of the formal contract but are not clearly understood by the community. There is at least an argument that the more onerous or surprising of these should not be upheld, which would force providers to make an effort to ensure that participants are aware of and understand the key rules. This type of contractual approach may not address any problems with the substantive content of EULAs and Terms of Service, but it is likely to at least enhance the rule of law ideal that rules be sufficiently clear and promulgated.

ii. Changing rules

Another problematic component of virtual community governance is the rate at which rules can change, and the lack of responsibility that providers have to compensate any participants who may be adversely affected by rule changes. Many providers purport to have the right to modify the rules at any time, often without notice to the participants. Changes in these legal rules are rarely highlighted to the participant, who may have substantial difficulty in identifying the changes and their legal effect. This suggests that the mechanism of changing rules could be investigated –


365 Andrew Jankowich, in a study of the license agreements of virtual communities, found that “[o]f the agreements surveyed in this study, 75.00% reserved to proprietors the right to modify the agreements at their discretion 262 and 39.58% allowed proprietors to modify documents without notice to the participants who are the other less powerful party.”: Andrew Jankowich, “EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds” (2006) 8 Tulane Journal of Technology and Intellectual Property 1, 46.

366 See Ibid 47. (arguing that the lack of clarity in rule changes “seems designed to encourage participants to be responsible for their role under EULAw while discouraging them from being aware of the extent of those responsibilities.”).
requiring, for example, that providers make clear statements about the effects of any changes and highlight modified sections in the dense legal agreements in order to enable participants to identify and understand rule changes.\textsuperscript{367}

Apart from the difficulty in identifying changes, rule changes can have significant effects on the entitlements of participants within the virtual community. An interesting example comes from the ban on gambling within Second Life in July 2007.\textsuperscript{368} For some time, a number of participants in Second Life were able to profit from establishing in-world casinos, where players could gamble Linden Dollars in unregulated gaming machines. Linden Dollars, as mentioned earlier, are fluidly convertible with US Dollars, but are stated by Linden Lab to be a 'limited licence right', not a currency.\textsuperscript{369} After some interest by the US Federal Bureau of Investigation on the practice of gambling in Second Life,\textsuperscript{370} Linden introduced a rule change that prohibited any gambling outright.\textsuperscript{371}

The immediate effect of the ban was that participants who had invested in the creation of casinos were forced to close down, losing future revenues upon which they may have been relying.\textsuperscript{372} Many participants complained at the rule change, arguing that while unregulated online gambling was not permissible in the US, there were casino operators and players who were not situated in the US.\textsuperscript{373} Linden responded to this claim by stating that:

This policy applies to all use of Second Life. It isn’t intended to describe what is or isn’t legal for any particular resident or in any particular place. It describes what Linden Lab believes is appro-
The longer term effects of the ban were more widely felt. Unregulated banks had become popular in Second Life as a result of the growing virtual economy, some of which were offering returns of between 30 and 60 per cent. When Linden banned gambling, the casino operators who were making thousands of USD equivalent Linden Dollars in profit every month quickly sought to redeem their stored Linden Dollars, and a run on the virtual banks ensued. The biggest bank, Ginko Financial, collapsed, taking with it several thousands of US Dollars worth of investment. This eventually prompted Linden Lab to introduce another rule change, banning virtual banks by prohibiting the payment of interest in-world by anyone not registered as a regulated bank by a territorial government.

This example shows that rule changes can have significant effects. Certainly, gambling within Second Life was likely to be illegal under US law and that of several other jurisdictions. Further, the unregulated banking industry within Second Life appeared to be completely unsustainable and more resembled Ponzi schemes than legitimate banking institutes. Both of these rule changes were likely justified in order to protect Linden Lab and Second Life participants. The changes, however, did create real financial losses for real people who were encouraged to invest in Second Life by...
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the high potential returns and the lack of prohibitions on gambling or financial markets.

In this case, it is likely that the ban on gambling was not an illegitimate evolution of Second Life norms – Risch certainly argues that it was not:

The ban was not a frequent change; it was not as if Second Life banned entire lines of business and then reinstated them on a regular basis. The contract amendment was not arbitrary; gambling is illegal in many jurisdictions. The rule had no ex post facto effect; no one was penalized for past gambling. Additionally, the change was not targeted; it was a general rule with general application. So long as Second Life made no affirmative promises that gambling would be legal, the contractual law against gambling was no different from any legislative ban on real-world gambling, in accordance with the rule of law. 381

This analysis highlights, however, that where a change is not legitimate, it is not inconceivable that we could impose a requirement on the providers of virtual communities that just compensation be paid when entitlements are destroyed, particularly where virtual currency is as fluidly convertible with real currencies as that of Second Life. The competing tensions here are the requirement for the provider to be able to make and change internal rules to evolve over time and to suit new circumstances or to comply with external requirements, 382 against the interests of participants in having some measure of security in their virtual assets.

iii. Emergent behaviour and uncertain rules

As part of the emphasis on predictability, liberal rule of law theorists strongly disfavour retroactive laws. 383 A law that is not clearly expressed at a time before a citizen takes an action is unable to guide that person's behaviour – as Raz argues, “[o]ne cannot be guided by a retroactive law.” 384 This raises some immediate concerns in virtual communities, where apart from being subject to change, the rules are often enforced on an ad-hoc or retroactive basis, particularly when a new exploit is discovered, for example. 385 When unanticipated emergent behaviour results in undesirable consequences, providers may attempt to punish the participants who disclose or make use of a bug or exploit in the platform. This is done in a way that lessens cer-

tainty – participants may have difficulty differentiating between behaviour that is rewarded with material advantage or fame within the community and behaviour that will be deemed against the rules and punished after the fact.  

Some examples may be useful here. In the Bragg case, Bragg allegedly took advantage of a bug in Linden's auction management software to purchase land that had not been advertised for sale – the lack of competition allowing him to purchase the land significantly under market value. Linden responded by terminating his account, alleging that he had taken advantage of an exploit. Alternatively, take the case of a guild in World of Warcraft who were accidentally given a developer item which gave them unparalleled power in the virtual world. When they used the item to beat the hardest challenges in the game, they were swiftly punished for exploitation, permanently cancelling the offenders' accounts.

It may be that the participants in these examples should have known that their behaviour would be likely to be punished. On the other hand, however, it is not always simple to identify wrongdoing. Significant gains are often achieved by members of virtual communities who are able to push the boundaries and find innovative new ways of doing things. There is clearly room for disagreement as to whether certain forms of emergent behaviour are or ought to be prohibited; a participant who is punished for behaviour that she believed to be within the scope of the rules may legitimately feel aggrieved by a provider's determination that it was not.

The prevalence of unanticipated consequences to technical changes and the propensity of participants to exploit them suggests that providers may need a certain degree of flexibility in the application and enforcement of rules in order to maintain a cohesive community. The ability to punish retroactively may be necessary in the in-

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386 Sal Humphreys, “"You're In Our World Now": ownership and access in the proprietary community of an MMOG” in Shenja Van Der Graaf & Yuichi Washida (eds) Information communication technologies and emerging business strategies (2007) 76, 91 (reporting that “[t]rouble seemed to arise around the finer points of when play is actually cheating and when it is just clever, expert play from someone who knows the game inside out.”); T. L Taylor, Play Between Worlds: Exploring Online Games Culture (2006) 51 ("many actions deemed 'griefing' or 'exploiting' exist on the boundary lines of the game -- often in spaces in which the rule set is not clearly defined or the system itself is ambiguous.").
390 For a similar account of developers punishing participants who were mistakenly given powers, see Sal Humphreys, Massively Multiplayer Online Games Productive players and their disruptions to conventional media practices (PhD Thesis, QUT, 2005) 153.
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...of maintaining order, particularly where the exploitative behaviour clearly contravenes community expectations if not explicit rules. Radin argues that enforcing retrospective rules would not necessarily contravene the ideals of the rule of law in such situations:

[i]n the pragmatic view, a rule will be public whenever strong social agreement exists in practice, regardless of whether a legislature or a court has spoken. Similarly, if a rule exists normatively even without specific legislative enactment (as, for example, would a rule against intentional homicide), then later legislative confirmation would not necessarily mean that it would be unfair retroactive application to punish earlier transgressions. Moreover, where the line of evolution of legal interpretation is clearly foreseeable, it would not be unfair to hold people to what they can see is the emerging interpretation. 392

This reasoning suggests that some leeway is required in order to allow providers to react to emergent behaviour. In other cases, however, where participants are acting in accordance with both the stated rules and community standards, retroactive changes to the rules that significantly impact their interests could conceivably give rise to an obligation of compensation. The grey areas, where behaviour is neither clearly within or outside of community standards, are, as always, much more difficult to satisfactorily determine. In some communities, it will be best to defer to the findings of the provider in order to maintain social cohesion; in others, it may be best to take the more liberal view and allow all behaviour that is not explicitly prohibited. There is, however, a real tension between a need for flexibility and the serious threat posed by inconsistent application of the rules.

iv. Inconsistent application and discretionary enforcement

Perhaps the most troubling aspect of virtual community governance is that the rules on the books – the EULAs and Terms of Service – at times bear almost no resemblance to the rules in force in the community itself. Virtual community contracts are typically drafted in a very risk averse manner, reserving to the provider almost total power to deal with members of the community. This often includes broad prohibitions on behaviour that is commonplace within the community. 393 In many cases, the provider is not interested in enforcing these contracts as written in general, but will

use them as a tool against particular participants as it sees fit.\footnote{Michael Risch, “Virtual Rule of Law” (2009) 112(1) West Virginia Law Review 1, 45 (“[w]hat providers generally want is a strict set of rules that they can enforce at will against a few users — a position directly contrary to the rule of law.”).} Essentially, these contracts appear to be designed to reserve a wide range of discretionary powers to the provider – a concept that directly contradicts the values of formal legality in the rule of law, which is generally understood to require that “similar cases be treated similarly.”\footnote{John Rawls, \textit{A Theory of Justice} (9th ed. 1972) 237.}

Resolving the tension between the need for flexibility and the need to avoid the worst effects of inconsistent application of discretionary rules is a difficult task that speaks to the core of the tension between formal and substantive conceptions of justice.\footnote{Hayek, for example, strongly argued against the exercise of discretion in pursuit of substantive equality as threatening the impartiality and generality requirements of the rule of law: see Friedrich A. von Hayek, \textit{Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy} (1982) 62-4; cf T. R. S Allan, \textit{Constitutional Justice: A Liberal Theory of the Rule of Law} (2001) 15 (“Hayek's account of the rule of law may justly be criticized for adopting an interpretation of equality -- in the sense of generality or impartiality -- that leaves no scope for legitimate political debate and action. By excluding redistributive economic aims and outlawing governmental powers of economic management, Hayek's theory of constitutional freedom strips politics of the role it must play if the citizen is to be in any real sense an architect (together with others) of the scheme of justice he is expected to serve and endorse.”).}

In moving away from purely positive accounts of law and responding to the need to allow but simultaneously constrain the discretionary exercise of governance powers, the next set of values of the rule of law embrace requirements of fairness, equality, and transparency as measures of legitimacy in decision making.

\subsection*{b. Procedural fairness}

This next set of formal rule of law values include requirements of procedural fairness and “the availability of a fair hearing within the judicial process.”\footnote{Brian Z Tamanaha, \textit{On the Rule of Law: History, Politics, Theory} (2004) 119.} Raz argued that the rule of law requires an independent judiciary, the observation of principles of natural justice, judicial review over legislative and administrative power, easy access to courts, and limits on the discretion of the police.\footnote{Joseph Raz, “The Rule of Law and Its Virtue” (1977) 93 The Law Quarterly Review 195, 200-2.} Similarly, for Rawls the rule of law encompasses “the regular, impartial, and in this sense fair administration of law”.\footnote{John Rawls, \textit{A Theory of Justice} (9th ed. 1972) 235.} One component of Rawls' conception of the rule of law “requires some form of due process: that is, a process reasonably designed to ascertain the truth, in ways consistent with the other ends of the legal system, as to whether a violation has taken place and under what circumstances.”\footnote{Ibid 239.} Only through conducting orderly trials and
hearings with defined rules of evidence could the legal system “preserve the integrity of the judicial process.”

Procedural fairness, as a second part of the ideal of formal legality, focuses on the procedure through which legal norms are enforced. A key component of this aspect of the rule of law requires that laws are enforced fairly and that there are guarantees of fair hearings and due process available to those who are adversely affected. Here again we see that private governance in virtual communities is potentially problematic – providers have generally become used to wielding absolute power, and determination of when participants have broken the rules and what punishments are to be inflicted are only very rarely subject to accountable procedural safeguards.

The *Bragg v Linden* case once again provides a good case study of potential procedural limits on a provider's exercise of power. Essentially, Bragg was alleged to have broken the rules – by exploiting a loophole and purchasing virtual land significantly under market value – and Linden Lab took action by cancelling his account and confiscating not only the contested land, but all his other in-world assets. Bragg disputed both the allegation that he had broken the rules and the penalty that was applied. Linden's position, as the creator, enforcer, and adjudicator of the rules, makes it somewhat difficult for Bragg to trust that Linden's decision was arrived at fairly and altogether impossible to appeal within the system for review of either the finding of guilt or the penalty imposed.

Another example comes from World of Warcraft in 2006, when Blizzard banned a large number of players who were running the game under a GNU/Linux operating system. Blizzard's anti-cheating software mistakenly identified these players as cheaters, and they were accordingly banned for using unauthorised third party software. Sal Humphreys notes the harmful effects that the lack of due process had on affected players:

> These players found the process involved in getting their accounts reinstated very opaque. They were sent form letter responses to their appeals to customer service. No indication was given that

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401 Ibid 238.
403 *Bragg v Linden Lab*, 487 F. Supp. 2D 593 (E.D. Pa. 2007).
an investigation was underway and there was no way to know whether any of the complaints from players were being addressed. The lack of transparency and the realisation that there would not necessarily be any ‘justice’ was a source of great concern.405

The accounts of the affected players were eventually reinstated, along with an apology and a compensatory credit.406 We can see this as an example of a desirable resolution and a satisfactory review policy. The tensions that Humphreys highlights with this example, however, are the damaging effects on players of a lack of due process – not just the result of being banned, but the uncertainty of not knowing, the frustration of not being able to appeal the decision, and the damage to the participant's reputation and integrity that accompanies a false accusation.407

These examples raise an interesting set of questions. In order to provide a useful platform and create a harmonious community, the provider generally requires some discretion in the ability to create and enforce internal rules. In order for the exercise of discretion to be considered legitimate, however, we must address the lack of procedural fairness, perceived equality, and transparency that often characterises the private exercise of power.

Conceivably, virtual communities could evolve governance and oversight mechanisms that ensure, as far as practical, that decisions to enforce the rules and punish participants are justly enforced. There will likely still be problems, however, where either these procedures do not exist, or where they do not instil sufficient confidence to reassure participants that the result is just. The question raised by the Bragg example, remains – to what extent should the provider's discretion in enforcing the rules be externally reviewable?

A blanket rule that all administrative decisions are judicially reviewable would be likely to introduce much more overhead than is warranted – resulting in a system where the development and operation of innovative virtual communities is unduly disincentivised.408 At every point here, we must be aware that every additional meas-

The role of public oversight adds some overhead to the process, some drag to community governance. It is important that we achieve a sensible balance between the desire to protect participants and the desire to encourage the development and growth of virtual communities.

It may not be necessary or desirable to bring in the whole of public administrative review processes into virtual governance decisions. Perhaps, however, some of the ideals of administrative review could be brought to bear in the adjudication of contract law in these circumstances. It may be possible to read down broad discretionary powers in virtual community contracts, or to impose restrictions on the exercise of those powers. Conceivably, if courts are able to find that virtual community contracts have been improperly terminated due to a lack of procedural fairness, then virtual communities will be prompted to implement internal procedures that engender the trust of the community. Obviously there are communities that will have no such need for procedural fairness – for example, games where arbitrary action forms part of the entertainment value – but for other communities, a court may be able to evaluate with some sensitivity whether the procedures for imposing punishments or terminating subscriptions are carried out within the reasonable expectations of participants in all the circumstances. In communities where both legitimacy and flexibility is important, it is only through introducing requirements of fairness and equality that we can be confident in the legitimate exercise of discretion.

If the load on courts proves too great, we may even eventually investigate establishing specialised tribunals to review these types of contractual governance issues. It seems likely, however, that only exceptional cases will continue to make it to the legal system. Accordingly, where there is significant procedural integrity in the exercise of a discretionary power in a virtual community contract, courts should probably defer to the provider's judgment. In cases where a significant lack of procedural fairness can be shown, however, courts may be justified in holding that the contractual power was not properly exercised. If these exceptional cases are decided in a way

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410 See James Grimmelmann, “Virtual World Feudalism” (2009) 118 Yale Law Journal Pocket Part 126 (arguing that “Although plaintiff Marc Bragg’s allegations that Linden expropriated his land were explosive, Linden answered them with credible evidence that Bragg had taken unfair advantage of a bug in the land transaction system. That fact alone makes Linden’s suspension of his account sensible. The case settled, but had it reached a decision on the merits, the law should have treated Linden’s response as presumptively legitimate.”); See also T. R. S Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (2001) 16 (arguing that courts, in practice, generally give substantial deference to the discretionary exercise of reviewable powers "in recognition of their specialist knowledge and expertise.").
that encourages providers to adopt reasonable safeguards on internal governance, we may achieve a significant positive effect on the bulk of internal decision making by establishing meaningful external bounds to providers’ executive discretion.

4. The role of consent and democracy

Some conceptions of the rule of law predicate legitimacy on the consent of the governed, expressed primarily through the democratic process. In this way, consent takes the legitimising role of substantive limits in a pluralistic system where universal values can no longer be explicitly justified.\textsuperscript{411} Habermas, in particular, argues that “the modern legal order can draw its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves also as authors of the law to which they are subject as addressees.”\textsuperscript{412}

Consent may be the single most important aspect of legitimacy in the governance of virtual communities. Cyberlaw theory suggests that the main benefit of autonomy of virtual communities is the ability for participants to come together in spaces whose norms differ from those of other communities.\textsuperscript{413} At its libertarian extreme, this ideal holds that through consensual participation in a boundless array of potential communities, each community’s rules will more closely match the preferences of its participants than any default set of rules could. In less strong conceptions, there is still a clear recognition that the promising potential of cyberspaces are their malleability, through which individuals and communities can consensually determine their own norms and create their own meaning.

The forms through which consent can be expressed differ for any given community. Some communities, like Wikipedia for example, explicitly integrate democratic processes, complete with the massive bureaucratic overhead that such processes entail.\textsuperscript{414} Others, like the Internet Engineering Task Force, rely on “rough consensus” and active participation.\textsuperscript{415} Other communities, like A Tale in the Desert, Facebook, and

\textsuperscript{414} See Malte Ziewitz, “Order without law” (Games Convention Online Conference, Leipzig, 1 August 2009).
EVE Online have attempted to involve their participants in the generation of constitutional rules and ongoing community governance. For many other communities, maintaining ongoing consent is an intricate exercise in customer relations. For still more, consent can be deemed to be expressed by ongoing participation in the community upon the rules dictated by the provider – a hard line 'take it or leave it' approach.

Whatever the form consent takes, its existence will almost always change the evaluation of legitimacy of community governance. Where consent does not exist, there is little theoretical reason to allow the default rules of society to be suspended or modified. Where real consent does exist, then concerns about predictability or substantive fairness are likely to be greatly alleviated. As Bartle argues, we must leave room for participants who consensually choose to participate in communities whose rules we may find strange or arbitrary. A good example can be found in EVE Online, whose internal norms include the concept that 'fraud is fun'. EVE's participants understand, if not at the point of creating an account, then certainly before they become heavily invested in the game, that they may be defrauded by other participants at any time. This consensual understanding is the primary reason that the large-scale frauds perpetrated by EVE's participants should not be understood as either theft or fraud – the loss of thousands of hours of invested time through the deceit of another is fully understood to be within the rules of participation. Fraud cannot exist because consent nullifies the action.

Some difficulties are apparent when consensual internal norms conflict with external social values – particularly those which are expressed to be partially or completely

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417 See, for example, John Banks, “Co-Creative Expertise: Auran Games and Fury – A Case Study” (2009) 130 Media International Australia 77.

418 See, for example, the Something Awful community forums, whose moderators "pride [themselves] on running one of the most entertaining and troll-free forums on the internet" by "charging a $10 fee to filter out folks not serious about adhering to the rules, and banning those who manage to slip through and break them.": “Forum Rules,” *Something Awful*, 1 January 2006 <http://www.somethingawful.com/d/forum-rules/forum-rules.php?page=1> at 27 August 2009. The rules of participation in the forum are vigorously but subjectively enforced, and continued participation seems to be generally understood to be at the discretion of the administrators.


420 Joshua A. T Fairfield, “Anti-Social Contracts: The Contractual Governance of Virtual Worlds” (2008) 53 McGill Law Journal 427, 460-1 (arguing that "the scope of acceptable behaviour is not ultimately determined by the EULA. Whether "fraud is fun" in a community ultimately depends on the views of a particular community. That, in turn, depends on the norms worked out between community members.").

421 Ibid 461.
The role of consent and democracy

Where consensual rules conflict with external values, territorial states continue to have an interest in limiting autonomy. Internal norms that are socially repugnant or that have deleterious effects on people outside of the community will often be limited by territorial states. Territorial states routinely limit the scope of consent in issues of discrimination, for example, or in content matters such as the sexualised depiction of underage persons. In this context, we have begun to see police and policy makers grapple with the apparently consensual practice of teenagers sharing sexual photos of themselves to other teens – a trend that is reportedly increasing due to increasingly ubiquitous digital cameras and network access, and devices that combine the two, like webcams and mobile phones. Concerns about sexual play and the exposure and exploitation of children in virtual worlds are also increasingly prominent as states begin to consider what type of behaviour is permissible and when regulation is necessary.

The emphasis on consent in this conception of the rule of law also illustrates a key tension between the internal norms of a community and the contractual terms of service. The contractual documents that purport to govern virtual communities appear to be somewhat problematic in that they are only rarely drafted in a manner that is designed to encourage readability and understanding. Moreover, they often conflict with the social norms within the community – usually through discretionary enforcement, but also because norms within the community are continuously being mediated through participation, whereas the written terms are unilaterally set in advance by the provider. As the community cultivates a separate understanding of the norms to that which is set out in the contractual documents, real questions of consent arise when the provider then attempts to enforce the conflicting contractual provisions.

We can contrast the EVE example with other cases in which consent is clearly not

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423 See, for example, Nancy Rommelmann, “Anatomy of a Child Pornographer,” 41 Reason, 2009, at 30 (discussing the ramifications of ‘sexting’ - the exchange of explicit images or videos amongst teens).


manifested to a purported change to default social rules. The *Bragg* case once again provides a useful example here: there is a clear social norm within Second Life that participants own their virtual property and currency – one clearly cultivated and encouraged by Linden Lab in its advertising materials and public statements.\(^{426}\) The fine print in the ToS, however, purports to disclaim any enforceable interests participants may have in virtual goods or currency.\(^{427}\) If the contractual terms are literally enforced, they will override the consensual social practices within the community. A proposition that Linden Lab were able to modify the default rules of property ownership unilaterally, in direct opposition to the understanding of the community, would seem to violate the ideal of governance limited by law. It would seem instead to resemble governance by fiat – where the technical rules that govern interaction are determined solely by the provider, in its almost-absolute discretion, and bear almost no resemblance to those understood and accepted by the community.

David Post argues strongly that rules imposed by external states are less legitimate than the rules developed by virtual communities themselves. Post argues that state-imposed rules 'completely abandon' “any notion that governments derive […] their just power from the consent of the governed, or that the individuals to whom law is applied have the right to participate in formulating those laws".\(^{428}\) For Post, the imposition of rules by the territorial state stifles the ability for virtual communities to develop “as true communities, with shared norms and customs and expectations characteristic of each and continually being created and re-created by the members within each.”\(^{429}\) Post is concerned that if the sovereignty of virtual communities is not recognised, then “no matter what steps they take to set up a fair and reasonable system for resolving virtual world disputes in accordance with newly-created virtual world law, their efforts will come to nothing because they can't create 'real law'”, and we will “be stuck with the chaotic nonsense” of law imposed by various territorial jurisdictions.\(^{430}\) For Post, being able to fall back on enforceable state law risks making virtual law 'play-law' — “[i]f everyone believes that "real law" from "real sovereigns" is the only law that matters (or can ever matter)”, \(^{431}\) Post argues, then “who

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\(^{426}\) See *Bragg v Linden Lab*, 487 F. Supp. 2D 593 (E.D. Pa. 2007).


\(^{429}\) Ibid 912.

\(^{430}\) Ibid 913.

\(^{431}\) Ibid 913.
will undertake the hard work required to set up a legal system if it's just play-law?"  

There are two main readings of Post's argument. The strongest is a proposition that the rules of a virtual community can be the only legitimate source of law for participants in that community. This proposition is not particularly helpful – to suggest that internal norms will not adequately develop in the shadow of the state seems to be a somewhat suspect assumption. After all, as Radin and Wagner pointed out very early on in these discussions, all virtual communities rely upon the enforcement of territorial contract and property law, and that “property and contract presuppose limits and enforcement shaped by a sovereign authority.” More recently, Jeanne Bonnici has convincingly argued that cyberspace self-governance and state rules “form a mesh of rules”, where state rules support, maintain, and oversee self-regulation practices. This suspect assumption is unnecessary – as Cohen points out, there seems to be no reason why we must accept either full self-rule or total state control.

A less forceful reading of Post's argument, however, certainly seems to agree with our conception of the role of consent in legitimate governance. Post may well be correct that if the internal norms that a community develops are not respected, then we risk doing harm to the ability of the community to govern itself. In cases where the internal rules conflict with external values, we may be prepared to accept such harm as a necessary limit to self-governance. In other cases, however, we may be particularly suspicious of legal results that conflict with internal norms for no justifiable reason. The example from Second Life seems to reflect this concern – while the community organises itself around principles of ownership interests in land and currency, the spectre of immanent revocation by Linden is likely to seriously limit any consensual governance processes.

A further example may be found in the enforcement of bans on real money trades.

432 Ibid 913.
435 Ibid 213. (arguing that “[t]he advantages of the customised regulation of self-regulation cannot be achieved however without the constant support of states and state legislation. […] [T]here is a continuing relevance of national legal orders. States are especially indispensable in providing a general framework of legislation and legal mechanisms that ground self-regulation. It is also important that states continue acting as 'watchdog' on the regulatory actions of the groups. Oversight by states is indispensable for the fair running of the customised rules. States should continue to assist in the development and maintenance of the self-regulation rules, including by continuing financial assistance.”).
Many virtual worlds ban the sale of virtual property for corporeal profit. Many such worlds, however, simultaneously introduce game mechanics that encourage RMT. In cases where a ban on RMT is not actually enforced within the community, it may make sense not to allow its enforcement in territorial courts. For example, Sony Online Entertainment prohibits RMT between participants and explicitly disclaims any liability for destruction of the value of in-world property, but provides some servers with an officially sanctioned trading hub (where it is able to tax trades). An argument that subscribers own no value in their virtual property, based upon a technical reading of the EULA, may be suspect if there turns out to be a general community expectation that both avatars and property are able to be fluidly exchanged for real world currency.

One of the key features of rule of law limits on governance seems to be that they exist because people believe they exist. This circular recognition may actually prove quite useful in evaluating appropriate regulatory responses to governance issues. In the Second Life example, the primary justification for enforcing the property rights of Second Life residents seems to be that they believe themselves to have them. The provider, by supporting and encouraging the belief that its power is limited, can then be expected or compelled to uphold those expectations. In another environment, where the participants do not believe that property rights exist, then no obligations may attach to either the provider or to other participants to respect the possessive rights of participants to their virtual assets. Essentially, this approach prioritises the role of real consent in substantive governance, which allows us to distinguish internal norms that ought to be upheld from those that should not.

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439 Sony Online Entertainment, Terms Of Service Station.com, cl VII(f)(2).
441 Brian Z Tamanaha, On the Rule of Law: History, Politics, Theory (2004) 119; HLA Hart, The concept of law (1961) (arguing that rules become binding either because the community as a whole generally accepts them, or because they are legitimately made by those who have the authority to make rules); cf Ronald Dworkin, “The model of rules” [1967] The University of Chicago Law Review 14, 20-21 (discussing and critiquing HLA Hart's positivism).
Post suggests that recourse to external courts to enforce disputes in digital communities is potentially damaging to the development of internal dispute resolution mechanisms and internal governance. At least to the extent that internal norms do not conflict with external values, then, it may be desirable to avoid overriding consensual internal governance with a strict literal interpretation of the contractual documents. Staying with a property-based example, this would mean that we should be reluctant to uphold a contractual term that purported to remove any claim that participants may have to their virtual assets in a community where the internal norms support an entitlement to assets and the provider has not effectively negated that sense of entitlement. This approach seems to accord well with rule of law ideals of legitimacy in governance, as well as the dominant justification for encouraging cyberspace self-rule in the first place – the proposition that better rules can be generated through consensual participation in virtual communities. Essentially, the principle here is that if a provider wishes to enforce certain contractual rules, it must ensure that those rules are understood and accepted by the community. The single largest difficulty with a consent model of virtual community governance remains in evaluating consent in fact. It seems clear that communities are not all homogeneous – determining whether 'a community' has consented to any given norm is an impossible task. Any such evaluation is most likely to proceed on an assumption of consent – a factual determination of whether or not the hypothetical reasonable person, joining and participating in the community, could be deemed to consent to the rule in question. Whilst clearly not a perfect model of consensual governance, this type of approximation at least provides an avenue for territorial courts to examine the internal social norms of the community in relation to both external values and contractual terms. Consent provides a useful indication of the internal legitimacy of community rules that can then be used as a normative guide as to whether the state ought to support a particular contractual interpretation or not.

444 See Benjamin Duranske, Virtual Law: Navigating the Legal Landscape of Virtual Worlds (2008) 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.”).
5. Conclusion

Governance within virtual communities occurs at the intersection of constraints from the market, the law, technology, internal community standards, and external social values. There is a trend in the cyberlaw theory, however, that attempts to reduce legitimacy of private governance to the drawing of borders. From the act of crossing over into cyberspace to the emphasis on private contract and property rights, these borders tend to deligitimise government intervention in the practice of governance in virtual communities. These conceptions of self-governance rely on assumptions about the technology, the market, and the communities in a way that isolates participation from the remainder of society.

Regulatory approaches that rely on deterministic projections of any of these forces are unlikely to provide satisfactory outcomes. The importance placed upon autonomy in much of cyberlaw theory risks overlooking the importance of restraints on the exercise of power within virtual communities. The tensions that permeate these communities are governance tensions and should be addressed as governance tensions. If governance in virtual communities is to be regulated through private law, then it is desirable to analyse the continued suitability of private law through constitutional discourses – discourses that are receptive to the potential threats posed by private governance.

As Dicey argued, the values of the rule of law and the rights of citizens are continuously protected by the evolution of the private common law.\(^{445}\) The myriad legal determinations of how power can be exercised by members of society substantially construct the rights and interests of all citizens. So too, in virtual communities, the boundaries of private law doctrines mediate the relationships between participants and providers (as they do in disputes between participants and other participants). The rule of law, as a discourse that emphasises the legitimacy of governance and appropriate limits on the exercise of power, provides a useful framework as a first step to reconceptualising and evaluating these tensions in communities at the intersection of the real and the virtual, the social and the economic, and the public and the private.

The remainder of this thesis builds off this framework to examine how the private

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law can restrain the abuse of power in virtual communities. In the next chapter, I examine the ability of contractual doctrine to respond to the governance tensions highlighted by rule of law theory. I will argue that there is sufficient flexibility in contractual doctrine that courts are able to consider rule of law values in determining difficult questions of interpretation and enforcement of virtual community contracts. In Chapter Five, I will then provide a normative model for how these values should inform contractual doctrine and the resolution of governance disputes. I conclude that many of the tensions canvassed here will be able to be adequately addressed if rule of law values are able to be taken into account within the contractual governance framework.
Chapter 4. Flexibility in the contractual governance model

In a system where governance is controlled by contract, then the limits of contract are essentially constitutional principles. The limits at which territorial courts will refuse to enforce the contractual terms represent the legal limits on the exercise of power within a community. This chapter examines whether a normative framework that is based upon the values of the rule of law is compatible with contractual governance. The key question here is whether the standard model — with its ideological roots in freedom of contract — is correct in that disputes in virtual communities will, in the greatest majority, be resolved according to a literal interpretation of the contractual terms of service. This chapter argues that there is sufficient flexibility in Australian contract law that many disputes arising out of virtual communities will be genuinely hard cases in which judges will be required to choose between enforcing contractual terms as written and reading them down or holding them invalid in light of community norms and the legitimate expectations of individual participants. If this is correct, a normative framework that allows us to better conceptualise the tensions in these cases will result in legal rules and decisions that are more likely to simultaneously encourage innovation, autonomy, and good governance practices.

When a dispute arises in a virtual community, the logical starting point of legal analysis is usually the terms of service that purport to condition participation in the community. In keeping with the private property rhetoric, access to online services is said to be granted upon acceptance of the contractual Terms of Service. Similarly, for communities where extra software is required, downloading or installing that software – an otherwise copyright infringing act – is usually said to be conditioned upon acceptance of an End User Licence Agreement. These documents are typically dense standard form contracts created by the platform owner. They tend to be one-sided,

Contract law is generally based upon a presumption that contracts express the legal intention of the parties. We assume, in most cases, that contracts are voluntarily entered into, and accordingly, we are extremely hesitant to scrutinise the value of the contract and its substantive content. Our legal system, based upon this assumption, generally assesses a contract's validity by its form rather than its substance. This is the model of freedom of contract, a cornerstone of liberal legal and political theory.\footnote{See generally P. S Atiyah, The Rise and Fall of Freedom of Contract (1979).}

As we have seen, the freedom of contract model has led to contractual terms in virtual community agreements that are overwhelmingly one-sided. If courts interpret and enforce these terms as they are written, we will be leaving the question of governance entirely to an inefficient market that suffers from severe power asymmetries. If we are to examine how virtual communities can best be regulated, then, we should examine how much leeway courts have and are prepared to exercise in interpreting the terms that purport to underpin participation in those communities. While many terms in standard form agreements will be upheld as a matter of course, courts may be prepared to refuse to uphold or narrowly construe the meaning of terms that they deem to be unfair, unjust, surprising, oppressive, or unduly onerous.

of the contract in order to correct some of the more repugnant results of literal contractual interpretation. In addition to common law doctrine, judges today have a number of legislative tools at their disposal through which they can refuse to enforce or narrowly construe contractual provisions. This chapter examines some of those methods and attempts to show that there is substantial flexibility in contractual doctrine to disprove the common assumption that the literal contractual terms will govern disputes in virtual communities.

1. The assent problem

One of the larger conceptual difficulties with standard form contracts stems from the lack of assent on the behalf of the participant. Modern contractual doctrine has some difficulty reconciling the proposition that a contract is morally binding because it represents the will of the parties with the quest for certainty that imposes a requirement of objectivity in contractual interpretation. This conflict is mirrored in the rule of law model (at least a western liberal rule of law model), which prizes certainty and predictability but also emphasises consent in accordance with liberal political theory, where legitimate community governance is said to require the consent of the governed. In virtual community contracts, however, consent is often difficult to identify. The contracts that purport to govern participation are rarely read and must be even more rarely understood. Rather than representing the will of the parties, contractual terms of service generally reserve the greatest possible discretionary power to the provider, which is only used in extreme cases. In the greatest majority of cases, the actual bargain that is struck is reflected in the ongoing consensual development of community norms and acceptable practices, not the terms written as a legal safeguard almost completely removed from community practice. It is interesting to consider whether participants can be said to assent to those terms, and, if not, what effect that will have on their validity.


Faced with this abuse of power - by the strong against the weak - by the use of the small print of the conditions - the judges did what they could to put a curb upon it. They still had before them the idol, "freedom of contract." They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called "the true construction of the contract." They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction.


Karl Llewellyn, in 1960, suggested that individuals could never really be said to assent to terms buried in standard form contracts:

Instead of thinking about "assent" to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms. The fine print which has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.

Llewellyn's reasoning seems to be an accurate description of the use of standard form electronic contracting. As electronic contracts become almost ubiquitous in everyday transactions, the landscape of consensual bargaining has dramatically shifted. It has become clear that consumers do not read contracts, and nobody, realistically, wants them to. Indeed, if consumers were to stop and consider the terms and conditions that increasingly attach to every online transaction, trade would likely grind to a halt.

The rise of electronic contracting has led some commentators to suggest that assent is illusory, and has been for some time now. However, it is also said that the imposition of standard terms often serve a very useful purpose, in that they allow the supplier to structure the very large number of transactions it enters into in a way that is effi-

454 Margaret Jane Radin, “Humans, Computers, and Binding Commitment” (2000) 75 Indiana Law Journal 1125, 1127-8, discussing the implication of electronic contracting for the contract-as-consent model: "In short, I believe that there exists something of a puzzle about how to justify changes of position imposed on one private party by another, and that the advent of contract in cyberspace may make the puzzle more urgent. The problem, in a nutshell, is that our ordinary-discourse commitment to a consent-based system will come into clearer conflict with practices that do not seem consensual.", For a good overview of the Australian consumer protection implications, see Dale Clapperton & Stephen Corones, “Unfair terms in ‘clickwrap’ and other electronic contracts” (2007) 35(3) Australian Business Law Review 152.
455 In some cases, apart from presenting contractual terms in small print in small windows which are difficult to read, sellers actively discourage the purchaser from reading the terms by imposing strict time limits on the transaction; for example, in eBay International AG v Creative Festival Entertainment Pty Ltd (2006) 170 FCR 450, 463, [44] the Ticketmaster website informed the user that he or she only had five minutes to select seating locations, read and accept the terms and conditions, enter payment and shipping details, and conclude the transaction.
456 See, for example, Michael Meyerson, “The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts” (1993) 47(5) University of Miami Law Review 1263, 1268; Margaret Jane Radin, “Humans, Computers, and Binding Commitment” (2000) 75 Indiana Law Journal 1125, 1161 “Even if purveyors of products-plus-terms tell the truth about them, even if all the fine print is on the website for all to peruse and download if they wish, it is not efficient or even possible for buyers to take the time to understand all this information.”.
cient and certain. If this is true, it would seem to follow that there is a requirement that individuals must be able to contract without reading the terms and conditions. If we are to accept that people must be able to conduct business without real assent, it would seem desirable to provide some protection to individuals from those more powerful parties who seek to unscrupulously insert or bury unusual or onerous terms into the contract.

This part considers whether Llewellyn's approach is workable in relation to virtual community contracts under Australian law. Can it be said that a participant who voluntarily joins a virtual community has assented to “the broad type of the transaction” and “to any not unreasonable or indecent terms” that are included in the contract? If so, when will a court have the ability to refuse to enforce an unreasonable or indecent term?

In the nineteenth and twentieth centuries, the lack of assent in unsigned standard form contracts troubled English courts and led to the development of a requirement that the drafting party take reasonable steps to bring terms to attention of the other contracting party. This provides a useful starting point for our analysis of unusual terms in electronic contracts, although, as we will see, the same lack of real assent in signed contracts has not led to a similar enunciation of common law principle.

a. Incorporation by notice

Most EULA and ToU documents now require the participant to 'accept' the document by checking a box or clicking a button before continuing. This is a direct consequence of the common law distinction between incorporation of terms by signature and incorporation by notice. The standard reasoning holds that if electronic 'acceptance' is equivalent to signing the contract, then the terms of the documents will

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459 See Michael Meyerson, “The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts” (1993) 47(5) University of Miami Law Review 1263, 1271: "If it is both unreasonable and undesirable to have consumers read these terms, courts should not fashion legal rules in a futile attempt to force consumers to read these terms or to punish those who do not."


461 See Parker v South Eastern Railway Co (1877) 2 CPD 416; Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163.

462 The Electronic Transactions Acts provide that a reliable electronic method “used to identify the person and to indicate the person’s approval” will count as a signature: see Electronic Transactions Act 1999 (Cth) s 10; Electronic Transactions Act 2000 (NSW) s 9; Electronic Transactions (Victoria) Act 2000 (Vic) s 9; Electronic Transactions (Queensland) Act 2001 (Qld) s 14; Electronic Transactions Act 2000 (Tas) s 7; Electronic Transactions Act 2003 (WA) s 9; Electronic Transactions Act 2000 (SA) s 9;
generally be incorporated regardless of whether the participant has actually read them or not (absent any misleading conduct). However, if clicking an 'I agree' button is not treated as equivalent to signing a contract, or the agreement is not signed at all, terms will only be incorporated where the drafting party can show that he or she has taken reasonable steps to bring the clause to the attention of the other party. What is reasonable will depend on the circumstances and on the clause itself.

This distinction in contractual interpretation was developed last century in the 'ticket cases', which mainly concern the incorporation of exclusion clauses. It appears likely, however, that it is the unusualness, severity, or unreasonableness of the clause which is important, rather than the strict type of clause. Lord Justice Denning, in *J Spurling Ltd v Bradshaw*, noted, obiter, that

the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient.

Lord Denning MR had an opportunity to develop this reasoning in *Thornton v Shoe Lane Parking Ltd*, where the Queen's Bench was asked to determine whether an exclusion provision referenced on a pillar upon entering a car park and again in small print on a ticket dispensed by an automatic parking machine was validly incorporated in the contract. His Lordship held that it was not, because the ticket was issued after the contract was formed; however, he noted, obiter, that if this were not the case, then the customer would only be “bound by the exempting condition if he knows that the ticket is issued subject to it; or, if the company did what was reasonably sufficient to give him notice of it.” Lord Denning appeared to recognise that the more onerous the provision, the greater the requisite notice must be – in the instant case, the limitation was

so wide and so destructive of rights that the court should not hold any man bound by it unless it is
drawn to his attention in the most explicit way.\(^{470}\)

In the same case, Megaw LJ applied a test of whether or not unusual terms had been “fairly brought before the notice of the accepting party”.\(^{471}\) His Lordship held that at least where the particular condition relied on involves a sort of restriction that is not shown to be usual in that class of contract, a defendant must show that his intention to attach an unusual condition of that particular nature was fairly brought to the notice of the other party. How much is required as being, in the words of Mellish LJ, “reasonably sufficient to give the plaintiff notice of the condition,” depends upon the nature of the restrictive condition.\(^{472}\)

This principle was explicitly considered by Brennan J in the High Court in *Oceanic Sun Line Special Shipping Co Inc v Fay*,\(^{473}\) where His Honour said that where an exemption clause is contained in a ticket or other document intended by the carrier to contain the terms of carriage, yet the other party is not in fact aware when the contract is made that an exemption clause is intended to be a term of the contract, the carrier cannot rely on that clause unless, at the time of the contract, the carrier had done all that was reasonably necessary to bring the exemption clause to the passenger's notice.\(^{474}\)

In *Baltic Shipping Co v Dillon (The Mikhail Lermontov)*,\(^{475}\) Kirby P considered that there was a “responsibility to bring unusual conditions at least to the notice” of passengers of a cruise ship — it was the unusualness of the limitation clauses, combined with the failure to alert passengers that they ought to make their own arrangements for insurance, which meant that simply stating that the contract was subject to terms and conditions was not sufficient notice.\(^{476}\) Similarly, it was the “subject matter and content of the relevant limitation clauses”\(^{477}\) which “significantly limit[ed] the appellants common law liability”\(^{478}\) that determined the requisite level of notice for Gleeson CJ in the same case. Chief Justice Gleeson concluded that “it is the fact, and extent, rather than the precise mechanics, of the limitation that are of primary importance.”\(^{479}\)

\(^{470}\) Ibid 170.
\(^{471}\) *Thornton v Shoe Lane Parking Ltd* (1971) 2 QB 163, 172 (Megaw LJ); quoting *Hood v Anchor Line (Henderson Brothers) Ltd* [1918] AC 837, 846-7.
\(^{472}\) *Thornton v Shoe Lane Parking Ltd* (1971) 2 QB 163, 172-3 (Megaw LJ, citations removed).
\(^{473}\) *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197.
\(^{474}\) Ibid 228-9 (Brennan J; Wilson, Deane, Tooley and Gaudron JJ not deciding).
\(^{475}\) *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1991) 22 NSWLR 1; subsequent appeal at *Baltic Shipping Co v Dillon (The Mikhail Lermontov)* (1993) 176 CLR 344.
\(^{476}\) Ibid 8.
\(^{477}\) Ibid 8-9.
\(^{478}\) Ibid 9.
In *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd*, the Queen's Bench did not accept that the reasoning of *Shoe Lane Parking* was limited to exclusion clauses, Dillon LJ holding that

> what their Lordships said was said by way of interpretation and application of the general statement of the law by Mellish L.J. in *Parker v South Eastern Railway Co*, [...] and the logic of it is applicable to any particularly onerous clause in a printed set of conditions of the one contracting party which would not be generally known to the other party.

Lord Justice Dillon extended the decision in *Shoe Lane Parking* to the general principle that

> where a condition is particularly onerous or unusual the party seeking to enforce it must show that that condition, or an unusual condition of that particular nature, was fairly brought to the notice of the other party.

Lord Justice Bingham reached the same conclusion, holding that

> what would be good notice of one condition would not be notice of another. The reason is that the more outlandish the clause the greater the notice which the other party, if he is to be bound must in all fairness be given.

In *Interfoto*, a fee clause was held to be a “very onerous clause”, at “a very high and exorbitant rate”, which resulted in “an inordinate liability.” Indeed, both judges in this case apparently would have held that the offending clause was void as a penalty clause, but the argument was not raised at first instance or upon appeal.

In the circumstances, the Queen's Bench had no difficulty substituting a quantum meruit for the subject matter of the contract. *Interfoto* has not, however, been greatly extended in the two decades since it was decided.

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481 Ibid 438 (Dillon LJ).
482 Ibid 427 (Dillon LJ).
483 Ibid 443.
484 Ibid 438 (Dillon LJ).
485 Ibid 438.
486 Ibid 445 Bingham LJ.
487 Ibid 436 (Dillon LJ), 446 (Bingham LJ).
488 Ibid 439 (Dillon LJ), 445 (Bingham LJ).
489 See, for example, *Maxitherm Boilers Pty Ltd v Pacific Dunlop Ltd* [1998] 4 VR 559, 569, where Buchanan JA (with whom Ormiston JA and Callaway JA agreed), relying on *Interfoto*, noted (obiter) that “the inclusion of an unusual term, at least in an unsigned document, may require its proponent to take special steps to bring it to the attention of the other party, for otherwise it may not be reasonable to assume consent to the term” but it was not pleaded at first instance that the warranty clause at hand required special notice to be incorporated, and Buchanan JA appeared sceptical that the term would be so unusual. See further *D-G of Fair trading v First National Bank* [2002] 1 AC 481, where the House of Lords treated *Interfoto* as relevant to a finding of good faith (Lord Steyn); *Nutting v Baldwin* [1995] 1 WLR 201, 211, where Rattee J held that a term which was designed to “deprive a member who failed to pay his share of the financing of the litigation brought on behalf of all the members of the right to share in the fruits of that litigation” could not be characterised as an unusual term in the context of *Interfoto* as it
The ticket cases are interesting for our purposes. They show a line of authority which suggests that where a person does not read a contract (and is not reasonably required to read the contract) then any surprising terms must be reasonably brought to their attention before they will be bound. These cases suggest that it must be possible to contract without reading the whole terms, and that it is the responsibility of the drafter to make surprising or unusual terms stand out. Intuitively, this line of authority is attractive when one considers that drafters of electronic contracts are not generally concerned with ensuring that the other party has read or understood the effects of the terms. At present it appears settled, however, that these authorities do not apply where the contract has been signed.\(^490\)

b. **Incorporation by signature**

In *L'Estrange v F Graucob Ltd* (*L'Estrange*), the King's Bench held that the rule from the ticket cases had no application to signed contracts.\(^491\) A signed order form contained small print excluding all implied conditions and warranties, and when L'Estrange found that her slot machine was faulty, she had no remedy against the seller. Lord Scrutton enunciated the famous principle that

\[
\text{[w]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.} \quad \text{\cite{L'Estrange v F Graucob Ltd [1934] 2 KB 394, 403}}
\]

In the same case, Maugham LJ also held that it was “an irrelevant circumstance that the plaintiff did not read, or hear of, the parts of the sales document which are in small print, and that document should have effect according to its terms.”\(^492\) This was a conclusion that Maugham LJ came to with regret; his Lordship added that

\[
\text{I could wish that the contract had been in a simpler and more usual form. It is unfortunate that the important clause excluding conditions and warranties is in such small print. I also think that the order confirmation form should have contained an express statement to the effect that it was exclusive of all conditions and warranties.} \quad \text{\cite{Ibid, 407}}
\]

\(^{490}\) *L'Estrange v F Graucob Ltd* [1934] 2 KB 394; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; see also *Bankway Properties Ltd v Pensfold-Dunsford* [2001] 1 WLR 1369, 1380 [41] (Arden LJ, obiter suggestion that the rule in *Interfoto* would not apply to signed contracts.\(^491\)

\(^{491}\) *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 403.

\(^{492}\) *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, 403.

\(^{493}\) Ibid, 407.

\(^{494}\) Ibid.
However, despite his regret, Maugham LJ felt that he was bound to uphold the contract as written.\(^{495}\)

While there has been some criticism of the decision in *L'Estrange*,\(^ {496}\) it has been judicially accepted and widely cited as authority that signatures are binding absent misrepresentation or mistake. This led former Chief Justice Mason and Stephen Gageler to note, in a 1987 essay, that “[r]igid adherence to objectivity and the authority of *L'Estrange v F Graucob Ltd* have made it difficult to deny that there is assent to the terms of a signed document.”\(^ {497}\) Noting the arguments propounded by Llewellyn, and the dicta of Jacobs J in *MacRobertson Miller*,\(^ {498}\) the authors expressed doubt as to the soundness of such a rigid adherence in the face of “disadvantageous or unfair”\(^ {499}\) terms “imposed by the party with greater bargaining power”.\(^ {500}\)

[the principle in *L'Estrange*] seems to be based on the importance of a formal signature and the need to exclude an inquiry into the reality of assent. The requirements of fairness and justice may well call for its re-examination.\(^ {501}\)

In the 2004 case *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*,\(^ {502}\) however, the High Court unanimously and emphatically stated its support for the principle in *L'Estrange* that the rule from the ticket cases should not be extended to cases where the contract has been signed. In doing so, the High Court held that there existed a general proposition that “a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document”.\(^ {503}\) The High Court expressly noted two exceptions to this general rule – where there are vitiating

\(^{495}\) Ibid, 405.

\(^{496}\) See particularly J. R. Spencer, “Signature, Consent, and the Rule in L'Estrange v. Graucob” (2009) 32(01) *The Cambridge Law Journal* 104–122; See also *Le Mans Grand Prix Circuits Pty Ltd v Iliadis* (1998) 4 VR 661, 667, where Tadgell JA (with whom Winneke P agreed), considered, obiter, a concession made by one of the parties that “contractual documents containing an onerous exemptive provision must be brought to the notice of the party against whom they are to be enforced”; cf Batt JA (dissenting) at 673.; See further Bruce Clarke & Stephen Kapnoullas, “When Is a Signed Document Contractual - Taking the Fun out of the Funfair” (2001) 1 *Queensland University of Technology Law and Justice Journal* 39 (noting that there was some uncertainty in the application of the rule in L'Estrange following the majority decision in Le Mans).


\(^{498}\) In *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125, 142, Jacobs J suggested, obiter, that a person would not be bound by terms which are not read and not likely to be read.


\(^{500}\) Ibid.

\(^{501}\) Ibid, 12.


\(^{503}\) Ibid 185.
elements, and claims for equitable or statutory relief. The High Court gave some
elements of these types of exceptions:

If there is a claim of misrepresentation, or non est factum, or if there is an issue as to whether a
document was intended to affect legal relations or whether, on the other hand, it was tendered as a
mere memorandum of a pre-existing contract, or a receipt, or if there is a claim for equitable or
statutory relief [...] 505

This case provides clear authority that contractual terms do not generally need to be
brought to the attention of the signing party. However, despite the strong terms in
which it is stated, the High Court makes clear that the rule that a signature is binding
is a presumption, and not conclusive in all circumstances:

There may be cases where the circumstances in which a document is presented for signature, or
the presence in it of unusual terms, could involve a misrepresentation. No such problem exists in
the present case. There could also be circumstances in which one party would not reasonably un-
derstand another party’s signature to a document as a manifestation of intent to enter into legal re-
lations, or of assent to its terms. 506

The context of Toll was unambiguous. It was a commercial transaction between well
positioned parties where one of those parties simply neglected to read the contract,
the terms of which were not unusual or surprising. 507 In justifying the “importance
which, for a very long time, the common law has assigned to the act of signing”, 508
the High Court quoted P S Atiyah’s observation that

[...]the usual explanation for holding a signature to be conclusively binding is that it must be taken
to show that the party signing has agreed to the contents of the document; but another possible ex-
planation is that the other party can be treated as having relied upon the signature. 509

Their Honours continued, noting the strong policy argument for accepting signatures:

Legal instruments of various kinds take their efficacy from signature or execution. Such instru-
ments are often signed by people who have not read and understood all their terms, but who are
nevertheless committed to those terms by the act of signature or execution. It is that commitment
which enables third parties to assume the legal efficacy of the instrument. To undermine that as-
sumption would cause serious mischief. 510

504 Ibid.
505 Ibid.
506 Ibid, 187.
508 Ibid, 182.
Ch 2, 19, 35.
This dual argument appears to provide a very strong justification for relying on the signing of a document to presume incorporation of all of its terms. Firstly, it avoids a difficult subjective enquiry into the states of minds of the parties at the time the document was signed. Secondly, it creates certainty by enabling the other party and any third parties to rely on the signature. Through this justification, the High Court does not appear to be supporting a reliance model of contract, but rather reaffirming its preference of the objective view of contract. In doing so, the High Court held that

[i]t is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

This extract raises a key question of law on the incorporation of particular terms in a signed document. In circumstances where it would be unreasonable for a party to assume that the other party had assented to a particular term, should the first party be entitled to rely on a signature as conclusive evidence that the other party had in fact assented? If, as their Honours suggest, “[w]hat matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe”, then it follows that the term would not be incorporated in the contract. Australian contract law seems settled on this point, but this question raises some nagging doubts. If what matters is that the relying party “reasonably understand[s]” that the other party's signature is binding, there must be some sort of factual inquiry. What happens in those situations where there can be no reasonable understanding

511 Ibid 179.
512 Ibid.
513 Ibid.
514 J. R. Spencer, “Signature, Consent, and the Rule in L'Estrange v. Graucob” (2009) 32(01) The Cambridge Law Journal 104–122, 114-5, where Spencer argues that the objective theory, taken from the view of the contract party, would require that the apparent consent by signature of one party is binding except “where the other party knew that his mind did not go with his apparent consent, or where the other party is responsible for the mistake which has been made.”; As the High Court noted in Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, 189, Professor Atiyah dismissed the arguments raised by Spencer; however, read in context, Atiyah's response deals with the subjective arguments raised by Spencer, and not with the objective argument quoted; P. S Atiyah, Essays on Contract (1990) 109. The criticism made by Spencer of the decision in L'Estrange on the basis of an objective interpretation was not addressed either by Professor Atiyah or the High Court in Toll.
515 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165, 187;
that assent has been given?

This question is often lost in the strong statement of the rule. Historically, this question has been of limited importance, because ever since *L'Estrange*, there has been a presumption that reliance on a signature on a written contractual document will be reasonable. However, at least in the case of click-wrap contracts, this assumption can be doubted. In a situation where contractual terms are placed in a small window of densely packed multi-page jargon-filled screen of legalese and presented as an obstacle to overcome before access will be granted, would a reasonable person, in the position of the drafter, really assume that the user had assented to *all* of the fine print that has been displayed? Is the court’s conception of the reasonable person as someone who carefully and meticulously reads all terms and conditions before signing out of touch with the way these transactions occur in practice? In short, in these circumstances, is it unreasonable to expect individual consumers to read and understand the contract?

This assumption has rarely been successfully challenged in Commonwealth courts. In Canada, the Ontario Court of Appeal in *Tilden Rent-A-Car Co v Clendenning* (*Tilden*)\(^516\) followed this line of reasoning and drew a further exception to the rule in *L'Estrange*. The case concerned a hurriedly signed car rental agreement at an airport, where the customer sought a waiver of liability but did not notice that on the back of the contract, “in particularly small type and so faint in the customer's copy as to be hardly legible”,\(^517\) there was a condition that the driver would not consume any alcohol, “whatever be the quantity”.\(^518\) When, after consuming some alcohol but still being able to control the vehicle, the customer crashed the vehicle into a pole, Tilden, the car rental company, sought to rely on the fine print to avoid the waiver of liability.

Importantly in this case, Dubin JA (with whom Zuber JA agreed) noted that the clause appeared to be unusual and “completely inconsistent with the express terms which purport to provide complete coverage for damage to the vehicle in exchange for the additional premium”.\(^519\) His Honour also noted that car rental transactions

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517 Ibid, 402.
518 Ibid.
519 Ibid, 403.
were “invariably carried out in a hurried, informal manner”, and that Tilden's established policy was that “unless inquiries were made, nothing was to be said by its clerks to the customer with respect to the exclusionary conditions.” On this basis, Clendenning had assumed “that he would not be responsible for any damage to the vehicle on payment of the extra premium unless such damage was caused by reason of his being so intoxicated as to be incapable of the proper control of the vehicle, a provision with which he was familiar as being a statutory provision in his own insurance contract.”

Justice Dubin considered *L'Estrange*, noting that it relied on the objective theory of contract. His Honour did not accept, however, that on an objective approach, Tilden could rely upon the fine print clauses:

> Even accepting the objective theory to determine whether Mr. Clendenning had entered into a contract which included all the terms of the written instrument, it is to be observed that an essential part of that test is whether the other party entered into the contract in the belief that Mr. Clendenning was assenting to all such terms. In the instant case, it was apparent to the employee of Tilden-Rent-A-Car that Mr. Clendenning had not in fact read the document in its entirety before he signed it. It follows under such circumstances that Tilden-Rent-A-Car cannot rely on provisions of the contract which it had no reason to believe were being assented to by the other contracting party. (emphasis added)

In this case, Dubin JA considered that actual knowledge that the term had not been read meant that Tilden could not rely on the clause, but His Honour did not limit the principle to actual knowledge. His Honour quoted from Waddams, “The Law of Contracts” with apparent approval:

> One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words he uses their reasonable meaning. But the other side of the same coin is that only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced.

In this case, His Honour continued,

> A transaction, such as this one, is invariably carried out in a hurried, informal manner. The speed with which the transaction is completed is said to be one of the attractive features of the services

520 Ibid, 405.
521 Ibid, 402.
523 Ibid, 405.
provided. The clauses relied on in this case, as I have already stated, are inconsistent with the over-all purpose for which the contract is entered into by the hirer. Under such circumstances, something more should be done by the party submitting the contract for signature than merely handing it over to be signed.\textsuperscript{525}

After considering the English and Canadian authorities, Dubin JA noted that he saw “no real distinction in contracts such as these, where the signature by itself does not truly represent an acquiescence of unusual and onerous terms which are inconsistent with the true object of the contract, and the ticket cases.” His Honour then held that it was not necessary to establish fraud, misrepresentation or non est factum:

In modern commercial practice, many standard form printed documents are signed without being read or understood. In many cases the parties seeking to rely on the terms of the contract know or ought to know that the signature of a party to the contract does not represent the true intention of the signer, and that the party signing is unaware of the stringent and onerous provisions which the standard form contains. Under such circumstances, I am of the opinion that the party seeking to rely on such terms should not be able to do so in the absence of first having taken reasonable measures to draw such terms to the attention of the other party, and, in the absence of such reasonable measures, it is not necessary for the party denying knowledge of such terms to prove either fraud, misrepresentation or non est factum.

Accordingly, Dubin JA found that Tilden

took no steps to alert Mr. Clendenning to the onerous provisions in the standard form of contract presented by it. The clerk could not help but have known that Mr. Clendenning had not in fact read the contract before signing it. Indeed the form of the contract itself with the important provisions on the reverse side and in very small type would discourage even the most cautious customer from endeavouring to read and understand it. Mr. Clendenning was in fact unaware of the exempting provisions. Under such circumstances, it was not open to Tilden Rent-A-Car to rely on those clauses, and it was not incumbent on Mr. Clendenning to establish fraud, misrepresentation or non est factum. Having paid the premium, he was not liable for any damage to the vehicle while being driven by him.\textsuperscript{526}

In the same case, Lacourciere JA dissented, immediately disagreeing with Dubin JA's factual construction of the contract:

In my view the printing is not difficult to read, and the presence of conditions on the reverse side of the signed contract is brought to the signatory's attention in a very clear way.\textsuperscript{527}

His Honour accepted the literal rule in \textit{L'Estrange}, noting that “the common law has traditionally refused to strike down contractual “standard form” conditions unless the

\textsuperscript{525} Tilden Rent-A-Car Co v Clendenning (1978) 83 DLR (3d) 400, 8-9.

\textsuperscript{526} Tilden Rent-A-Car Co v Clendenning (1978) 83 DLR (3d) 400, 409.

\textsuperscript{527} Ibid, 410.
Flexibility in the contractual governance model

terms are 'so unreasonable as to amount to fraud, or manifestly irrelevant to the
object of the contract'\textsuperscript{528} His Honour took the view that any ill-effects which arose
from relying on this strict interpretation would be best addressed by the legislature,\textsuperscript{529}
and concluded that

\textit{[t]he traditional attitude, with which I respectfully agree, has been for Judges to avoid the difficult
task of deciding the issue of “reasonableness” of clauses in businesses which compete freely in
the market place for consumer support.}}\textsuperscript{530}

In the intervening thirty years, the majority decision in \textit{Tilden} has not been greatly
extended beyond its facts.\textsuperscript{531} Some courts have followed the reasoning and held that
similar clauses did not form part of the contract,\textsuperscript{532} but other courts have doubted the
conclusion in \textit{Tilden} or distinguished the case on its facts.\textsuperscript{533}

The lukewarm reception that \textit{Tilden} has received may be indicative of a general re-
luctance of courts to rewrite private bargains. In many cases, this reluctance is well
founded.\textsuperscript{534} In some circumstances, however, an Australian court may be faced with a
signed standard form contract which contains terms, not designed to be read, that are
not unconscionable, not fraudulent, and not misrepresented, but which are onerous or
unexpected to the extent that no reasonable person would assume that by signing the
contract the signatory had assented to them. In these circumstances, it appears that it
may be open to an Australian court to recognise, as the court in \textit{Tilden} did, that the
rule in \textit{Toll v Alphapharm} should be subject to a similar requirement that it must be
reasonable to assume that a signature conveys assent to certain contractual terms.

\begin{itemize}
\item \textsuperscript{528} Ibid, 413, quoting \textit{Gibaud v. Great Eastern R Co} (1921) 125 LT 76, 78 (Bray J).
\item \textsuperscript{529} \textit{Tilden Rent-A-Car Co v Clendenning} (1978) 83 DLR (3d) 400, 413.
\item \textsuperscript{530} Ibid.
\item \textsuperscript{531} See Andrew Robertson, "The Limits of Voluntariness in Contract" (2005) 29 \textit{Melbourne University Law
Review} 179, 196.
\item \textsuperscript{532} See, for example: \textit{Rancan Fertilizer Systems Inc. v. Bank of Montreal} [1999] MJ No 65; \textit{Royal Bank of
Canada v Mancuso} [1999] OJ No 5055; \textit{Richardson-Watson v 443496 Ontario Inc (cob Discount Car
\item \textsuperscript{533} See particularly \textit{Karroll v Silver Star Mountain Resorts Ltd} (1998) 33 BCLR (2d) 160, 164-5, where
McLachlin CJSC considered that the rule in \textit{Tilden} was “a limited principle, applicable only in special
circumstances” which meant that “[w]here a party has reason to believe that the signing party is mistaken
as to a term, then the signing party cannot reasonably have been taken to have consented to that term,
with the result that the signature which purportedly binds him to it is not his consensual act. Similarly, to
allow someone to sign a document where one has reason to believe he is mistaken as to its contents, is not
far distant from active misrepresentation.” See also \textit{Budget Rent A Car of Edmonton Ltd v University of
Toronto} [1995] AJ No 126, [3] where the Alberta Court of Appeal noted that it had “some doubts as to
whether or not that majority judgment is correct”.
\item \textsuperscript{534} See Randy E Barnett, “Consenting to Form Contracts” (2002) 71 \textit{Fordham Law Review} 627, 633-4; but cf
P S Atiyah, “Essays on Contract” (1986), 110: “it is perfectly natural, indeed commonplace, for the court
to hold that the contract imposes obligations on the parties which are not exactly what either of them
intended.”
\end{itemize}
c. Synthesis in Australia

The rule expressed in *Toll* appears straightforward – “a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document.”535 This reduction of the principles, however, glosses over the important qualification, also set out in *Toll*, that “[t]here could also be circumstances in which one party would not reasonably understand another party’s signature to a document as a manifestation of intent to enter into legal relations, or of assent to its terms.”536

If Llewellyn is right, there may still be some room in Australian contract law to deal with the lack of assent in standard form contracts. Although at odds with the forceful statement of the general rule in *Toll*, this conclusion is consistent with the objective theory of contract that a signature will be binding notwithstanding subjective intent if – and only if – it is objectively deemed that it signifies assent to the terms.537 In cases where a reasonable person would not assume that a signature signifies assent to certain terms, then the objective model demands that the term cannot be treated as part of the contract.

It is highly likely that a reasonable person would regard the signing of a contractual document as incorporating terms which are neither unusual nor onerous – as the High Court in *Toll* said,

> the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents [...] whatever they might be.538

Despite this statement, however, it would seem open to suggest that at least in some cases, at least for some onerous or unusual terms, we would not be able to regard a person who signs as taking the chance of being bound by those terms. It would be a very harsh view indeed if it is unequivocally true that the reasonable person accepts the risk that the drafter of a standard contract may have inserted terms which are unduly onerous or unusual in contracts of that type. More likely, as Llewellyn suggested, by signing a form contract that is not read (where the failure to read is not reck-

536 Ibid, 187.
537 One US commentator has noted that the misreading of the objective theory occurred “when the perfectly logical assumption that a merchant’s signature implied assent to negotiated terms was mistakenly applied to consumer form contracts. The courts abandoned the objective theory in search of a seductive consistency.” (Michael Meyerson, “The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts” (1993) 47 University of Miami Law Review 1263, 1271).
less), the reasonable person is accepting the core terms and any term which isn't unreasonably unusual or onerous.  

What is reasonable will depend on the circumstances, but it may be possible to reunify the divergent principles in the ticket cases with the rule in *L'Estrange*. The more onerous or unusual a term is, the less likely it is that reliance on a signature in a standard form electronic contract will be reasonable. However, the greater notice that is given of the contents of the term, the more reasonable it will be to rely on that same signature. This is essentially the 'red hand rule' enunciated by Lord Denning in *J Spurling Ltd v Bradshaw*:  

By treating this enquiry as a question of fact, however, we are able to maintain some flexibility in contract law without causing irreparable mischief to the basic assumptions that businesses require in order to minimise costs in repeated transactions.

Considering the High Court's decision in *Toll*, Elisabeth Peden and JW Carter object to this suggestion that reasonableness should have any bearing on the incorporation of terms:

> [...] there has never before been a general consideration of reasonableness when holding another bound to a signed contract. In fact, this seems to go against the proposition in *L'Estrange v Graucob*, which the High Court affirmed, that only in situations of vitiating factors, such as misrepresentation, would a person not be bound to their signature on a contract, it being immaterial whether they read the document or not. For example, it would be unthinkable to argue that if a party knew that the other had not read the document, then it would not be 'reasonable' to hold that ignorant party bound by the document. This loose use of the word 'reasonableness' is becoming familiar in the courts and is regrettable. The only logical relevance of 'reasonableness' in the present context is in relation to the nature of the document. In other words, if no reasonable person standing in the position of the signatory would understand the document to be contractual, the other party may not rely on it as a contractual document, having regard to the surrounding circumstances.  

Peden and Carter acknowledge that the High Court in *Toll* did not need to consider the situation in *Tilden*, as “there was no particularly onerous clause, and the transaction did not involve a consumer, but rather commercial parties.” The authors suggest, however, that *Tilden* does not apply in Australia:

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540 [1956] 1 WLR 461, 466.


542 Ibid, 103.
Steve Kapnoullas and Bruce Clarke note that the High Court's dictum in *Toll* “is equivocal, and with respect, somewhat confusing.”544 However, Kapnoullas and Clarke appear to agree with Peden and Carter, concluding that the High Court “has signalled that, apart from statute law, the exceptions to *L'Estrange v Graucob* are to be narrowly confined to areas such as misrepresentation, mistake, non est factum and unconscionability”.545

The High Court flagged its reluctance to modify the principle that a signature was binding in the face of consumer protection legislation:

> In most common law jurisdictions, and throughout Australia, legislation has been enacted in recent years to confer on courts a capacity to ameliorate in individual cases hardship caused by the strict application of legal principle to contractual relations. As a result, there is no reason to depart from principle, and every reason to adhere to it, in cases where such legislation does not apply, or is not invoked.546

Similarly, Peden and Carter argue that the injustices raised by “consumers being taken advantage of in situations where they sign standard form contracts in a hurry” are better dealt with not as “an exception to the rule in *L'Estrange v Graucob*, but rather within the operation of consumer protection legislation such as the *Contracts Review Act 1980* (NSW); the fair trading legislation and the *Trade Practices Act 1974* (Cth).”547

It is somewhat difficult to reconcile the High Court's reluctance to review *L'Estrange v Graucob* in the face of its continued reliance of an objective theory of contract. Given the state of electronic contracting, a true objective assessment would almost certainly suggest that Llewellyn is correct in that the reasonable person can only be taken to agree to the unread terms that are not manifestly unreasonable or surpris-

543 Ibid.
545 Ibid, 113.
ing. Participants in Second Life, for example, would be unlikely to expect that they had agreed that the Second Life currency they expect to have value is in fact “a limited licence right” in which they have no enforceable interests, when the currency is fluidly convertible against US Dollars.

It may be that continued judicial emphasis on the binding nature of unread terms in signed agreements has so wearied citizens that the hypothetical reasonable person is resigned to expect that unexpected and onerous clauses could be binding, in which case the High Court's reasoning seems more understandable. This may be the reason that Peden and Carter conclude, circularly, that “it seems accepted in society that a signature binds.” If this is the case, however, it would seem to be an unfortunate conclusion.

The standard form contracts that underpin participation in virtual communities – and many other online transactions – seem much more similar to the contracts in the ticket cases than the consensual commercial arrangements in Toll. The checking of a box as part of registration simply does not seem to really signify assent to terms that are non-negotiable and, in the most cases, unread. The 'red hand' rule articulated by Lord Denning seems to much more appropriately address the issue of assent to terms in electronic contracting than does the blanket statement of the High Court in Toll. It seems more desirable to place the burden of ensuring that standard terms are visible and understandable on the drafting party who stands to benefit from their incorporation, rather than upon each consumer who will otherwise be forced either to hire a lawyer or to “take the chance of being bound by [the terms,] whatever they might be.”

The objections to this approach typically come from a fear that certainty would be di-

551 In this respect, see eBay International AG v Creative Festival Entertainment Pty Ltd (2006) 170 FCR 450, 465, [53-55]. where Rares J held that a restriction on resale printed on the back of a ticket issued six weeks after an electronic transaction was completed “in circumstances where there was no suggestion on [the website] that there would be any contractual restriction on the capacity of a purchaser to sell the ticket”;

Creative intends to sell over 220,000 tickets at $120 each, thereby generating revenue in the order of about $26 million. It is not unreasonable to expect it to get its contractual documents (including those online) right if it wants to rely on terms that have strict and perhaps drastic consequences for freedom of contract of purchasers from it. ([55])

The assent problem

minished in commercial transactions. The High Court in *Toll* noted that both parties to the contract and third parties rely on signatures to assume incorporation of the contractual terms, and suggested that “[t]o undermine that assumption would cause serious mischief.”\(^{553}\) It is not clear, however, whether this threat of mischief out-weighs the mischief of allowing a contracting party to rely on a term that it could not reasonably believe the other party had assented to. In all likeliness, if the authority of the ticket cases were extended to standard form electronic contracts, a jurisprudence would emerge that would provide contracting parties with some guidance as to how to ensure that their terms will be upheld.

It may be that consumer protection legislation and common law contractual principles provide some measure of relief for participants who are affected by harsh terms in virtual community contracts.\(^{554}\) The terms with which we are predominantly concerned with here, however, are not those that are strictly unconscionable or unfair, but those which may be legitimate, if only their existence were brought to the attention of the other party instead of buried in the contract.\(^{555}\)

Similarly, the class of contracts which would be effected is different from the class of contracts in which non est factum can be pleaded. Non est factum will only apply where the contract is “radically different” from what the signer believed it to be,\(^{556}\) and will only have application in the most extreme cases. A finding of non est factum would mean that the contract is void ab initio, which does not accord well with Llewellyn's assertion that there is real assent to the core terms of a standard form contract, just not with any unexpected unusual or onerous terms. If this is correct, the better approach would be to uphold the core bargain and only set aside those terms which it would not be reasonable to believe had been incorporated (assuming, of course, that the contract can survive without those terms, which is likely to be the

\(^{553}\) *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 182.

\(^{554}\) It must be noted that Australian consumer protection legislation is not currently well equipped to deal with the unusual or excessively onerous terms in standard form contracts; see generally Clapperton and Corones, “Unfair Terms in 'Clickwrap' and Other Electronic Contracts” (2007) 35 *Australian Business Law Review* 152; Steve Kapnoullas, Bruce Clarke, “Incorporation of Unusual or Unreasonable Terms into Contracts: The Red Hand Rule and Signed Documents” (2006) 11 *Deakin Law Review* 95.

\(^{555}\) See Randy E Barnett, “Consenting to Form Contracts” (2002) 71 *Fordham Law Review* 627, 639-40. It is possible that consumers benefit from some unusual or onerous terms – see, for example, Productivity Commission, “Review of Australia’s Consumer Policy Framework : Draft Report” (Volume 2) (12 December 2007), 118 <http://www.pc.gov.au/inquiry/consumer/docs/draftreport> (14 April 2008). It is hard to see, however, that consumers would benefit more from unusual or onerous terms which are not visible than they would if they knew about the terms. For this reason, the benefits can easily be realised if contracting parties are required to make unusual or onerous terms visible before they are able to rely on them.

\(^{556}\) *Petelin v Cullen* (1975) 132 CLR 355, 360.
Finally, consideration of contractual misrepresentation may have considerable overlap with cases where a term would not reasonably be assumed to have been incorporated. In *Le Mans Grand Prix Circuits Pty Ltd v Iliadis*[^557] (*Le Mans*), for example, the signing party was under the impression that the form he signed was for marketing purposes, rather than the disclaimer of liability it turned out to be.[^558] That case proceeded on the concession that unusual terms had to be brought to the attention of the signing party,[^559] and the Victorian Court of Appeal held, by majority, that the exclusion clause was not incorporated.[^560] The High Court in *Toll*, however, doubted the conclusion in *Le Mans*, and suggested instead that it “may be supported on the basis of a misrepresentation as to the nature of the document signed.”[^561]

The High Court warned against setting aside “the strict application of legal principle” in favour of judicial concerns of hardship.[^562] Yet, extensive standard form electronic contracting is still relatively new, and there is at least an argument that the strict application of legal principle requires, rather than prohibits, an enquiry into the adequacy of a check-box 'signature' to bind a party to unusual terms. With respect, it would seem on the whole undesirable for courts to extend the rule in *L'Estrange* to this new form of contracting and expect a legislative solution (in the form of unfair terms legislation) to rectify the mischief that the common law has created.

It may be that there is some flexibility to reconsider *L'Estrange* when a court is faced with an electronic contract that, unlike the contract in *Toll*, is not a commercial relationship and contains some unusually onerous terms of the type that Llewellyn suggested blanket assent could not be reasonably expected. A serious critical examination of the objective theory of contract may lead to a different conclusion in such circumstances. The emphatic statement of the High Court, however, makes this a difficult proposition, and, at least in the immediate future, it would seem that unfair terms legislation is more likely to provide the needed flexibility. Although it still seems as though Lord Denning's approach sits more comfortably with a conception of real assent, Australian law is currently moving towards addressing unduly onerous terms in

[^558]: Ibid, 663.
[^559]: Ibid, 667.
[^562]: Ibid 182-3.
legislation, and a common law reconsideration of incorporation seems unlikely at this stage.

2. Unconscionability and unfair terms

The rule of law framework developed in the last chapter highlighted that the contractual documents that are used to govern virtual communities are often drafted in an extremely one-sided manner. These contracts often contain terms that provide a very broad discretion to the provider, limit the ability of participants to enforce the contract, and disclaim any interests participants may have in their virtual assets and identity. When faced with similar terms that are unduly onerous, courts will at times refuse to give effect to the literal meaning of a contract, either under equitable principles of unconscionability or statutory unfair terms provisions. There is a broad distinction between the operation of the equitable principles (and legislative recognitions of equitable principles), which require procedural unconscionability, and specific statutory regimes, which address the substance and effect of the terms. Substantive unfair terms legislation currently exists in Victoria563 and has recently been introduced by the Commonwealth564 with other Australian jurisdictions to follow.565

In equity, relief is only available for procedural unconscionability: transactions where one party is at a special disadvantage with regards to the other party, and that other party exploits the first party's disadvantage.566 In these circumstances, a court at equity is able to assume that the party under the special disadvantage is not capable of acting in his or her best interests and consenting to the transaction.567 The court is then able not only to set aside the entire transaction, but to impose terms and mould relief to “to prevent, nullify, or provide compensation for, wrongful injury.”568 Because relief will only be granted where there is a special disadvantage, equitable re-

563 Fair Trading Act 1999 (Vic) Part 2B.
564 Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth). As at the time of writing, the Bill has been passed by both Houses of the Federal Parliament but has not yet received the Royal Assent. The unfair terms component of the Bill is scheduled to commence on a date fixed by proclamation within six months of receiving the Royal Assent.
566 Louth v Diprose (1992) 175 CLR 621; Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447
Flexibility in the contractual governance model

Relief is unlikely to be particularly helpful for the greatest majority of participants in virtual communities – simple lack of bargaining power is not considered to be a sufficient disadvantage.\(^{569}\)

There are a number of legislative provisions which modify or extend the equitable proscription of unconscionable conduct. Section 51AA(1) of the *Trade Practices Act 1974* (Cth) (TPA) legislatively adopts the equitable doctrine, providing that “[a] corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.” Section 51AB provides a broad prohibition on corporations from engaging in conduct which is unconscionable in all the circumstances in relation to the supply of goods or services to consumers.

These two legislative provisions do not appear to provide much assistance to virtual community participants above what is available at common law. Section 51AA(1) is limited on its face to unconscionability under the common law, but it is not clear whether it will be limited to the equitable doctrine of procedural unconscionability.\(^{570}\)

Section 51AB is not, on its face, limited to procedural unconscionability, but Dale Clapperton and Professor Stephen Corones point out that to date s 51AB has also been limited in practice to procedural unconscionability, and that “[t]he terms of a contract cannot, on their own, form the basis of an action under s 51AB.”\(^{571}\)

The law in New South Wales is more favourable to consumers than the Commonwealth provisions. The *Contracts Review Act 1980* (NSW) provides a mechanism by which NSW courts are able to refuse to enforce, void, or vary a consumer contract\(^{572}\) that it finds to be unjust. The term 'unjust' is defined to include “unconscionable, harsh or oppressive”.\(^{573}\) The contract must be “unjust in the circumstances relating to

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569 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (Mason J); but cf *Lloyds Bank Ltd v Bundy* [1975] QB 326, 339 (Denning MR): “English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”


the contract at the time it was made” in order for relief to be available. In determining whether a contract is unjust, a court must take into account 'the public interest' and all the relevant circumstances. The court must also take into account a non-exhaustive list of matters in s 9(2), including inequality in bargaining power, whether the contract was negotiated, whether the contract could reasonably have been negotiated, whether the contract imposes conditions that are unreasonably difficult to comply with or 'not reasonably necessary for the protection of the legitimate interests of any party to the contract', and the form of the contract and the intelligibility of the language in which it is expressed.

The *Contracts Review Act 1980* (NSW) on its face provides a wide discretion for courts to deal with substantively unfair contractual terms. Nevertheless, it appears that this discretion is rarely exercised. Frank Zumbo points out that “while the courts are able to consider substantive unconscionability under the Contracts Review Act, they rarely do so without also considering the impact of procedural unconscionability.” In a 2001 review of the *Contracts Review Act*, Carlin found that only one of 18 mortgage or guarantee cases surveyed considered the “harshness or oppressiveness of the terms of the contract itself.” In a separate 2001 survey of cases under the *Contracts Review Act*, Zipser found “no instances where a contract involving only substantive injustice has been declared unjust.” Quoting McHugh JA in an 1986 case in the NSW Court of Appeal, Zipser concludes that “McHugh JA’s observation that ‘[m]ost unjust contracts will be the product of both procedural and substantive injustice’ has been proven correct by the test of time.”

Victoria was the first Australian jurisdiction to adopt substantive unfair terms legislation in a similar manner to the European approach. In Victoria, Part 2B of the *Fair Trading Act 1999* (‘FTA’) (Vic) directly tackles the issue of unfair terms in consumer

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574 *Contracts Review Act 1980* (NSW) s 7.
575 *Contracts Review Act 1980* (NSW) s 9(1).
contracts. Section 32W provides that

A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.

When a term is deemed to be unfair under the Victorian FTA, it is void, but the remainder of the contract continues in effect if it is capable of existing without the unfair term. 581


In its 2008 *Review of Australia’s Consumer Policy Framework*, the Productivity Commission recommended that Australia adopt a new provision that would allow consumers to void terms in standard form agreements that are unfair in all the circumstances, similar to the Victorian model. 582 The Council of Australian Governments (COAG) agreed with this recommendation (with some modifications), 583 and the Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) has passed through the House of Representatives and is currently before the Commonwealth Senate. The unfair terms regulation is expressed to apply only to standard form consumer contracts for the supply of goods, services, or interests in land to individuals “whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.” 584 There is accordingly a significant threshold question about the applicability of the law to virtual communities – while nearly all community contracts are standard form contracts, participants are not always individuals acting in a personal capacity. This threshold may exclude participants like Bragg, for example, who engage in speculative business in Second Life, and will certainly exclude corporate participants like IBM. The underlying assumption is that the unfair terms legislation should not interfere with business contracts because businesses can generally look after themselves. 585 This is

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581 *Fair Trading Act 1999* (Vic) s 32Y.
585 See Frank Zumbo, “Unfair Terms in Business to Business Contracts Involving Small Business:
an important issue, particularly as virtual communities are often used for both recreation and business, and individuals conducting small businesses are usually unable to obtain different terms to individuals not engaging in business.

Assuming that the legislation does apply, it will act to void a term in a standard form consumer contract that is deemed to be unfair. The Bill provides that a term is unfair if “it would cause a significant imbalance in the parties’ rights and obligations arising under the contract” and “it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.” In determining whether a term is unfair, a court may look to all the circumstances, but must consider the extent to which the term would cause detriment to the consumer, the extent to which it is clear and readily understandable, and the contract as a whole.

The introduction of unfair terms regulation into Australian law will presumably address many of the more egregious terms commonly found in virtual community contracts. At present, it would appear that such terms may be susceptible to challenge under the legislative regimes in Victoria and New South Wales. As discussed above, they are unlikely to be challenged under either equitable doctrine or the Commonwealth Trade Practices Act, which both focus on procedural unconscionability. Once the Commonwealth Bill passes, we can expect that some of the terms of the type commonly found in virtual community contracts will be voidable by consumers, although it will be several years before the extent to which courts will be willing to interfere with consumer transactions is made clear.

b. Application of unfair terms legislation

The EU Unfair Terms Directive, the UK Unfair Terms Regulations, the Victorian

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586 Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) Schedule 2, cl 2(1).
587 Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) Schedule 2, cl 3(1).
588 Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) Schedule 2, cl 3(2).
590 Unfair Terms in Consumer Contracts Regulations 1999 (UK) Sch 2.
Fair Trading Act,\textsuperscript{591} and the proposed Commonwealth Bill\textsuperscript{592} each provide a non-exhaustive and non-prescriptive list of terms that may be unfair in the circumstances. Relevantly for virtual community contracts, these include terms that provide a broad discretion on the provider to interpret the terms of the contract or to determine whether or not to perform, terms that inappropriately limit the consumer's remedies, and terms that allow the provider to unilaterally vary the terms of the contract.\textsuperscript{593}

Many of these types of terms are commonly found in virtual community contracts. In a survey of virtual world terms, Jankowich found that in a high proportion of contracts, proprietors: reserved the right to terminate a subscriber's account at will (75\%); reserved the right to modify the contract at any time (75\%); limited liability arising out of use of the virtual world (91.67\%); and specified that disputes were to be resolved in the provider's home jurisdiction in choice of law and forum selection clauses (87.50\%).

A common term is the purported right of the proprietor to terminate a subscriber's account at any time for any (or no) reason.\textsuperscript{594} These terms, which Jankowich found in three-quarters of virtual world contracts, typically provide an almost unlimited discretion to the proprietor to terminate the contract, either completely at will, or by “predicating termination on the violation of a governing agreement but making the proprietor the sole arbiter of whether such a violation has occurred.”\textsuperscript{595} Take, for example, Blizzard's threat to suspend Sara Andrews' World of Warcraft account for advertising a queer-friendly guild, on the basis that she “[transmitted] language which, in the sole and absolute discretion of Blizzard, is deemed to be offensive”.\textsuperscript{596} If interpreted literally, the discretionary nature of this prohibitory clause would mean that no participant would ever be able to contest termination under it. Under consumer protection legislation, such a term may be struck from the contract if a court finds that it is unfair. While the examples provided by unfair terms legislation are neither prescriptive nor exhaustive, the various schemes list terms that reserve such a broad dis-
Unconscionability and unfair terms

cretion to the supplier as being potentially unfair: the Commonwealth Bill, for example, lists “a term that permits, or has the effect of permitting, one party unilaterally to determine whether the contract has been breached or to interpret its meaning”. A rule of law approach suggests that this type of broad discretion should be read down in virtual community contracts, and this legislation appears to provide a suitable vehicle to do so.

Other common terms that may attract criticism by the courts are terms that purport to allow the proprietor to modify the contract at any time. Jankowich's study found that three quarters of virtual world contracts contained such terms, and nearly forty per cent purported to allow changes to the contract without notice to the participants. Clapperton and Corones argue that such terms are often dealt with suspiciously by courts, noting that they give “the supplier the ability to, inter alia, avoid or limit the performance of the contract, terminate the contract, or change the price or characteristics of goods or services to be supplied.” The Commonwealth Bill lists “a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract” as another example of a potentially unfair term. Again, the values of formal legality in liberal conceptions of the rule of law suggest that the ability of providers to unilaterally change the rules of participation should be limited — particularly when changes are abrupt and are not clearly promulgated — and that such terms should be held to be unfair unless they provide a valid, transparent, and legitimate method for the evolution of community rules.

Exclusive jurisdiction clauses are another set of terms that may be objectionable in virtual community contracts. It is common practice for proprietors to insert jurisdiction and choice of law clauses that favour their interests – Jankowich found that 87.5% of virtual world contracts surveyed included such clauses. Considering the law under the Victorian scheme, Clapperton and Corones note that “[t]here is yet no clear authority on whether a choice of law or choice of venue clause has the effect of limiting the consumer’s right to sue the supplier” within the meaning of s 32X(k) of the Fair Trading Act 1999 (Vic), but given the willingness of courts […] to apply

597 Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) Schedule 1, cl 4(h).
600 Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) Sch 1, cl 4(d).
local consumer protection laws in the face of these types of clauses, this may not be a
significant issue.”\endnote{601}{Dale Clapperton & Stephen Corones, “Unfair terms in 'clickwrap' and other electronic contracts” (2007) 35(3) Australian Business Law Review 152, 173.} We will see in the \textit{Bragg} case below that a US court has already held a choice of forum and mandatory arbitration clause invalid in a virtual community contract because of the limiting effect it would have on the participant's right to enforce the terms against the provider; a similar approach seems possible and desirable in Australia, particularly given the importance of the concept from the rule of law that the sovereign be bound by the rules and accountable to the community.

The introduction of a national unfair terms legislation is likely to have a significant effect on the types of terms that can be incorporated into consumer contracts. It is unclear, at this stage, how willing courts will be to strike out terms that are potentially unfair, but it is likely that the new consumer law will provide a great deal of flexibility for courts to be able to refuse to enforce unduly harsh terms in appropriate circumstances. Some of the terms that seem oppressive from a rule of law perspective that are common in virtual community contracts appear to be good examples of the unfair terms that the legislation is designed to nullify; providers in future years may find that they are accordingly unable to rely on such terms to authorise their conduct.

c. The US approach – \textit{Bragg v Linden}

The approach of US courts to unconscionability and unfair terms in virtual community contracts may assist in conceptualising how Australian courts may approach the issue in the future. In \textit{Bragg v Linden}, the US District Court for the Eastern District of Pennsylvania held that a binding arbitration clause in the Second Life Terms of Service was not enforceable.\endnote{602}{Bragg v. Linden Research, Inc. 487 F. Supp. 2d 593 (E.D. Pa., 2007).} Judge Robreno held that the terms of service was a contract of adhesion and that the arbitration clause was surprising, noting that “Linden buried the TOS's arbitration provision in a lengthy paragraph under the benign heading 'GENERAL PROVISIONS.'”\endnote{603}{Ibid 606-7.} This finding satisfied the Californian test for procedural unconscionability, opening the question of substantive unconscionability. Judge Robreno then found that Linden's Terms of Service were substantively unenforceable for lack of mutuality, holding that

\begin{quote}

The TOS proclaim that "Linden has the right at any time for any reason or no reason to suspend or
\end{quote}
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." Whether or not a customer has breached the Agreement is "determined in Linden's sole discretion." Linden also reserves the right to return no money at all based on mere "suspicions of fraud" or other violations of law. Finally, the TOS state that "Linden may amend this Agreement . . . at any time in its sole discretion by posting the amended Agreement [on its website]."

In effect, the TOS provide Linden with a variety of one-sided remedies to resolve disputes, while forcing its customers to arbitrate any disputes with Linden. This is precisely what occurred here. When a dispute arose, Linden exercised its option to use self-help by freezing Bragg's account, retaining funds that Linden alone determined were subject to dispute, and then telling Bragg that he could resolve the dispute by initiating a costly arbitration process. The TOS expressly authorized Linden to engage in such unilateral conduct.604

The decision closely followed the earlier reasoning of Comb v Paypal, where Paypal's binding arbitration clauses were held to be unenforceable.605 Judge Robreno held that the costs of arbitration were excessive,606 the required venue in San Francisco was unreasonable,607 the requirement of confidentiality places the subscriber under a significant disadvantage,608 and there were no "'business realities' [that] justify the one-sidedness of the dispute resolution scheme that the TOS constructs in Linden's favor."609 These factors together meant that the binding arbitration clause was not just procedurally but substantively unconscionable, and therefore unenforceable:

When a dispute arises in Second Life, Linden is not obligated to initiate arbitration. Rather, the TOS expressly allow Linden, at its "sole discretion" and based on mere "suspicion," to unilaterally freeze a participant's account, refuse access to the virtual and real currency contained within that account, and then confiscate the participant's virtual property and real estate. A participant wishing to resolve any dispute, on the other hand, after having forfeited its interest in Second Life, must then initiate arbitration in Linden's place of business. To initiate arbitration involves advancing fees to pay for no less than three arbitrators at a cost far greater than would be involved in litigating in the state or federal court system. Moreover, under these circumstances, the confidentiality of the proceedings helps ensure that arbitration itself is fought on an uneven field by ensuring that, through the accumulation of experience, Linden becomes an expert in litigating the terms of the TOS, while plaintiffs remain novices without the benefit of learning from past precedent.

Taken together, the lack of mutuality, the costs of arbitration, the forum selection clause, and the confidentiality provision that Linden unilaterally imposes through the TOS demonstrate that the

604 Ibid 608 (citations removed).
605 Comb v Paypal Inc 218 F. Supp. 2d 1165 (N.D. Cal., 2002).
607 Ibid 610.
608 Ibid 610.
609 Ibid 611.
The decision in *Bragg* serves as a warning to providers of virtual communities that courts will be willing to review and strike out one-sided contractual terms. The District Court in *Bragg* reached this conclusion even though it was required to first find procedural unconscionability, which would likely to be much harder to show in Australia. As Australia moves towards a federal approach on unfair terms which does not require consumers to show any procedural unconscionability in order to review the substantive terms of standard form contracts, however, there will be increased potential for virtual community contracts to be read down or modified where the court deems their terms to be unfair. While the decision in *Bragg* was confined to terms that made it difficult for Bragg to enforce the contract and the case settled before the more substantive terms could be contested, it certainly provides an indication that courts will be more willing to investigate the substantive terms of virtual community contracts in the future.

### 3. Estoppel, election, and good faith

In some circumstances, although a term is validly incorporated into a standard form contract, reliance on that term may be prohibited by the courts. In respect of contracts which purport to govern virtual communities, the most concerning examples are terms which conflict with the internal norms of the community. It is common practice for the drafters of these documents to attempt to reserve discretionary rights as broadly as possible on behalf of the proprietor or developer of the platform. These rights are usually not enforced as written, but are available as a discretionary tool to take action against participants. The largest concern is that these discretionary powers are used arbitrarily or in order to harm or punish specific individuals, and

610 Ibid 611.


are not enforced against favoured individuals.

For example, Blizzard's EULA and Terms of Service for World of Warcraft state that:

- “Blizzard may terminate this Agreement at any time for any reason or no reason”;
- Participants may not “[t]ransmit or post any content or language which, in the sole and absolute discretion of Blizzard, is deemed to be offensive”; and
- “Blizzard reserves the right to determine which conduct it considers to be outside the spirit of the Game and to take such disciplinary measures as it sees fit up to and including termination and deletion of the Account.”

These broad discretionary powers are not administered in any consistent manner. Returning to the example of Sara Andrews, it is common in World of Warcraft, as in many other online games, to see players using homophobic terms to derogatorily refer to features of the game or other players. While these uses generally escape punishment, Blizzard was quick to threaten suspension and termination against Sara Andrews when she advertised a guild which was “glbt friendly”. Blizzard representatives relied on cl 5(b)(1) of the Terms of Use, on the basis that Andrews' advertisements “may incite certain responses in other players that will allow for discussion that we feel has no place in our game”. Following widespread reporting of the incident, Blizzard issued an official apology to Andrews, saying that her actions should not have produced a warning. Blizzard also promised to update their in-game policies to help prevent future incidents. The result, in this case, was a favourable outcome after public outrage. Had public outrage not been as strong, it is interesting

618 Ibid cl 9.
to question whether there would be any contractual limit to Blizzard's ability to exercise its discretionary powers (leaving aside potential claims under anti-discrimination legislation).

The Bragg case again provides a relevant example. Linden Lab encourages its residents to invest in virtual land, with the expectation that they will be able to earn money in Second Life's fluid economy.\footnote{At least until 22 August 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: Linden Lab, Own Virtual Land Second Life <http://web.archive.org/web/20080822144829/http://secondlife.com/whatis/land.php> at 6 January 2010.} Linden's advertising and the community norms that have evolved within Second Life, however, come into direct conflict with the Terms of Use, which assert that the Linden is not a currency but a 'limited licence right'\footnote{Ibid cl 2.6 "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 terminates 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.".} and that residents have no enforceable interests in their virtual assets.\footnote{See, for example, the email archive available at “GLBT - Friendly Guilds Advertising” (28 January 2006) WorldofWar.net <http://www.worldofwar.net/articles/glbtp.php>, removed, mirror available via Internet Archive <http://web.archive.org/web/20070515225844/http://www.worldofwar.net/articles/glbtp.php> (08 April 2008), attributing the following quote to Blizzard: “it is up to our sole and absolute discretion whether or not to allow certain types of language in the game”} If for some reason the contract is not reviewable under equitable unconscionability doctrine (because of a lack of procedural unconscionability) or statutory unfair terms legislation (either because Bragg is not a consumer or because the unfairness is in the exercise of the contractual power, not the terms themselves), there is an interesting question about whether reliance on the term can be prevented under estoppel or common law election.

Fundamentally, the question here is whether Blizzard and other virtual community providers are correct that they have absolute discretion as to whether or not to exercise their contractual rights to terminate a participant's account.\footnote{See White and Carter (Councils) Ltd v McGregor [1962] AC 413.} The standard answer, based upon assumptions of freedom of contract, has always been that participants have no remedy, as exercises of contractual rights do not need to be reasonable.\footnote{Ibid cl 1.4 "Linden Dollars represent a limited license right governed solely under the terms of this Agreement, and are not redeemable for any sum of money or monetary value from Linden Lab at any time. You agree that Linden Lab has the absolute right to manage, regulate, control, modify and/or eliminate such Currency as it sees fit in its sole discretion, in any general or specific case, and that Linden Lab will have no liability to you based on its exercise of such right.".} The three main caveats to the standard answer are estoppel, election, and...
good faith. This part examines each of these doctrines in order to determine when limits may be imposed on the exercise of discretionary powers under the contract.

Before I continue, a quick note on ‘waiver’ is warranted, in order to distinguish the various doctrines. The definition and application of waiver is notoriously convoluted — “‘waiver’ is a vague term used in many senses”.629 As Mason J recognised in 1974,

[any discussion of the principles governing the circumstances in which a party's words or conduct may preclude him from exercising a legal right which he possesses is beset with difficulties. They have their origin in the differences to be found in the various doctrines (election, waiver and estoppel) which may come into operation and in the differing concepts which each doctrine has at times been thought to embrace.630

The High Court in Commonwealth v Verwayen was divided as to whether waiver existed independently of estoppel and election.631 J W Carter notes the uncertainty in contractual doctrine and concludes that “in essence, to say that something has been waived is merely to state a conclusion or result, based on words or conduct.”632 Carter argues that

'waiver' is a general term used to describe the operation of a number of principles or concepts. In the context of contractual rights the chief concepts are election and estoppel. Thus, where it is said that a contractual right has been waived it is usually meant that the right is not available to the party who waived it because that person has elected not to exercise the right or is in the circumstances estopped from exercising the right.633

On this basis, I will examine both election and estoppel in turn, and then turn to the doctrine of good faith.

a. Common law election – affirmation of contract

In prohibiting certain conduct, a contract will usually provide a right of termination to the platform owner. In certain circumstances, where the right of termination has not been consistently exercised, the platform owner may be treated as having affirmed the breach and elected to continue the contract. Election, in this sense, refers to a choice between inconsistent rights – the right to receive performance of the con-
tract and the right to terminate. If faced with a threatened or purported termination, the onus of proving that the platform owner has elected to affirm is on the participant. The participant must be able to show that the platform owner knew of the breach, and unequivocally, by words or conduct, indicated a choice not to terminate. The requisite knowledge is at least knowledge of the existence of the right to terminate. In most cases where the provider is alleged to have affirmed the contract, given the fact that the provider is used to dealing with such cases and is usually legally advised, it would generally be possible to presume that it knew of its right to terminate if it knew of the circumstances of the breach. The more important question will be whether knowledge can be implied from the fact that many different people are acting in breach of their respective agreements, or whether actual knowledge of the specific breach is required before an election can be effective. As a question of fact, this will always depend on the circumstances, but it is likely that in many cases, knowledge only of general non-compliance with a EULA will not be sufficient to give rise to an election in a particular instance.

If knowledge can be found or imputed, the participant must still be able to show an unequivocal choice. Subjective intent is not required; instead, the provider must be shown to have objectively conducted itself in a manner “which would be justifiable only if an election had been made one way or the other”. Because express commu-

634 See United Australia Ltd v Barclays Bank Ltd [1940] AC 1, 30, where Lord Atkin (with whom Lord Thankerton and Lord Romer agreed) said: “if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an unequivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency, no longer his to choose.”


636 Elder’s Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd (1941) 65 CLR 603, 617-8.

637 Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) (1993) 182 CLR 26, 39-40 (Deane, Toohey, Gaudron and McHugh JJ); 30 (Brennan J).


639 See Peyman v Lanjani [1985] Ch 457, 487 (Stephenson LJ, May J and Slade LJ agreeing): “common sense prevents landlords from saying that when they demanded rent from a tenant in breach of covenant they did not know they had a right to retake possession, which they were waiving […] When a party has legal advice, he will be more easily presumed to know the law and evidence or special circumstances may be required to rebut the presumption, as in this case.”

640 See Wright v Union Fidelity Trustee Co of Aust Ltd (unreported BC8500504, NSWSC, Hodgson J, 01 October 1985); Hodgson J, considering whether there could be a binding affirmation where the affirming party did not know but had been put on enquiry of the relevant facts, considered that “when a person is put on enquiry, he is not in the same position as having actual knowledge until after the lapse of a reasonable time for making the appropriate enquiry.” (BC8500504, 21).
nication of a choice is unlikely in the circumstances we are concerned with, the participant will be required to show conduct which is inconsistent with the exercise of the right to terminate. Mere failure to immediately terminate is not sufficient, as long as the provider does nothing to affirm the contract and so long as the participant is not prejudiced by the delay.\textsuperscript{642} However, voluntary receipt of the participant’s performance (commonly used in terms of rent received\textsuperscript{643}) could be treated as unequivocal conduct.\textsuperscript{644}

The difficulty of showing actual knowledge means that the discretion of a provider is not likely to be restrained by election in the majority of virtual community cases. One exception may be the practice that some providers have of storing up breaches for mass banning at a later date; Blizzard, for example, appears to ban the accounts of some of those it considers to have engaged in prohibited real money trades in bulk,\textsuperscript{645} probably in order to maximise deterrence and inflict the greatest costs on the businesses of those involved in RMT. Banning the majority of a business' accounts at the same time can make it extremely difficult for the business to recover, while regular banning may only encourage the business to spread their assets over a number of diversified accounts.\textsuperscript{646} It is possible that, like the rental cases, continuing to accept monthly subscription payments in knowledge of a particular breach in these circumstances will amount to an election to affirm the contract.

The doctrine of election potentially provides an interesting limit on the ability of providers to terminate a subscription for breach where they are aware of the breach and continue to receive subscription fees. It will almost certainly be effective where the

\begin{itemize}
\item \textsuperscript{642} Ibid 55.
\item \textsuperscript{643} Historically, accepting rent falling due after a breach had occurred, where the lessor had knowledge of the lessee's breach, amounted to an implied waiver of the right of forfeiture: Matthews v Smallwood [1910] 1 Ch 777; Davenport v Smith [1921] 2 Ch 270; Segal Securities Ltd v Toshoby [1963] 1 QB 887; see also MacDonald, McCrimmon, Wallace & Weir, \textit{Real Property Law in Queensland} (2nd ed) (2005) 609; Wilkinson, "Acceptance of Rent as a Waiver" (1988) 138 NLJ 95. C.f. \textit{Residential Tenancies and Rooming Accommodation Act 2008} (Qld) s278, which provides that acceptance of rent payable under a residential tenancies agreement does not operate as a waiver of a tenant's breach of that agreement.
\item \textsuperscript{644} See, for example, \textit{Central Estates v Woolgar (No. 2)} [1972] 1 WLR 1048, where a lessor intended to exercise a right of forfeiture, but a clerical error caused an invoice to be sent for the rent payable, rent was paid, and a receipt was issued. Each member of the Court of Appeal (Lord Denning MR, Buckley LJ, and Cairns LJ) held that the demand and acceptance of rent effected a waiver by election. See also \textit{Expert Clothing Service & Sales Ltd v Hillgate House Ltd} [1986] Ch 340, 359 (Slade LJ, with whom O'Connor LJ and Bristow J agreed).
\item \textsuperscript{646} See, for example, Julian Dibbell, \textit{Play Money, or, How I Quit My Day Job and Made Millions Trading Virtual Loot} (2007) 123-34 (telling of the disruptive effects of a mass banning of the accounts of commercial operators in Ultima Online).
\end{itemize}
provider has actual knowledge of the breach and neglects to terminate before the next subscription fee is collected. It is less likely to be effective where there is only actual knowledge of general non-compliance and constructive knowledge of a particular participant's breach, but it is not unimaginable that a court could find that an election had been carried out in these circumstances. In most cases, however, unless actual knowledge can be shown, a participant may have a better chance at imposing a limit on termination by estoppel rather than election.

b. Estoppel

Despite a clear contractual right to terminate, a provider may be estopped from terminating in circumstances where it would be unconscionable to do so. In order to prevent the provider from terminating, a participant would have to show that the provider had represented that it would not terminate, that the participant relied on that representation to his or her detriment, and that it would be unjust or inequitable for the provider to terminate in those circumstances. The Bragg case may provide an apt example; there certainly seems to be ample evidence that Linden Lab and their CEO at the time, Philip Rosedale, created a sense of ownership in Linden Dollars and virtual assets amongst Second Life residents. If they did, and residents relied on those representations, then Linden may be estopped from enforcing their contractual rights in a way that denies that residents have any interests in their currency and assets.

Gold farming and the real money trade (RMT) may provide another example. If a virtual world provider turns a blind eye to RMT, it could create an expectation within the community that a technical prohibition on RMT would not be enforced. It is in fact often in the interests of providers not to enforce a ban on RMT; allowing players to buy their way into the game allows a broader section of the population to experience end-game content, which may translate into more subscriptions. This subscription boost is on top of any accounts owned by commercial gold farmers. One of the primary causes of gold farming are game mechanics that require mindless grinding in

647 In some cases, merely issuing an invoice or demand for payment may be treated as an unequivocal act of affirmation; see discussion in Trustees of Henry Smith’s Charity v Wilson [1983] QB 316, 330-1 (Slade LJ): “the despatch by the landlord and receipt by the tenant of an unambiguous and unqualified demand for future rent will, in the case of a contractual tenancy, ordinarily constitute an affirmation of its continuance.” Cf Ormrod LJ at 334: “A mere demand for rent, therefore, is not an act consistent only with an election to treat the subletting as lawful. At most in this context it is equivocal.”


649 See the discussion at Bragg v. Linden Research, Inc. 487 F. Supp. 2d 593, 596 (E.D. Pa., 2007) (the District Court did not rule on this point).
order to advance – a technique that draws out the game but also creates demand for the gold trade. As long as its presence does not annoy other users to the extent that they cancel their subscriptions in large numbers, commercial gold farming allows a provider to increase revenue by dragging out the game but not risk losing those customers who would prefer to pay to avoid the grind. In some cases, then, it will be beneficial for the provider to substantially underenforce a ban on RMT; the prohibition should be enforced enough to provide validity to those who do undertake to grind, but not enough to actually discourage those subscribers who benefit from the trade. If a virtual world provider underenforced an RMT ban to such an extent that it created a positive representation that the ban would not be enforced, then it is at least possible that the provider would be estopped from imposing sanctions for RMT in particular circumstances.

The representation that the provider would not rely on its contractual rights does not need to be explicit, but it must be unequivocal. The representation does not need to be made to a particular person, but can be made to a class of people. Where breaches of a particular rule are widespread, a long-standing failure to enforce the rule could conceivably be construed as a representation that the provider will not enforce the rule in future. However, such non-enforcement could also be construed as not making any representation as to the future. The requirement that the representation be unambiguous does not mean that “it cannot possibly be open to different constructions, but that it must be such as will be reasonably understood in a particular sense by the person to whom it is addressed.” Whether a representation has been made is a question of fact, and its existence “must be decided on ordinary common law principles of construction and of what is reasonable, without fine distinctions or technicalities.” In practice, while possible, it may be quite difficult for a participant to establish that the provider represented that it would not enforce a rule in future or against any particular person.

If a representation can be shown, the participant must also be able to show that he or

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652 See, for example, Olga Investments Pty Ltd v Citipower Ltd [1998] 3 VR 485, 499, where the Victorian Supreme Court of Appeal (Charles JA, Ormiston JA and Callaway JA agreeing) held that the failure to issue a bill for electricity supplied for a twelve year period did not give rise to a representation that no bills would be issued.
653 Low v Bouvierie [1891] 3 Ch 82, 106.
654 Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd [1947] AC 46, 55.
she reasonably relied on that representation. While showing reliance may be straightforward – in that the participant would not have engaged in conduct that technically broke the rules if he or she did not believe that the rule would not be enforced – showing that the reliance was reasonable may be more difficult. In *Galaxidis v Galaxidis*, Tobias JA (with whom the other members of the NSW Court of Appeal agreed) held that

> the representation is sufficiently clear and unambiguous if it is reasonable for the representee to have interpreted the representation in a particular way being a meaning which it is clearly capable of bearing and upon which it is reasonable for the representee to rely.\(^{655}\)

Justice Brennan, in *Walton Stores v Maher*, held that it was “essential to the existence of an equity created by estoppel that the party who induces the adoption of the assumption or expectation knows or intends that the party who adopts it will act or abstain from acting in reliance on the assumption or expectation”.\(^{656}\) Again, whether it is reasonable for a participant to rely on a representation that the provider will not enforce a strict contractual right will depend heavily on the circumstances.

It may be difficult to establish in many cases, but it would certainly be open for a judge to find that a platform owner is estopped from terminating a particular participant's access to the virtual community where it takes no action against others who have habitually broken the same rule. It would be much more difficult to find a clear and unambiguous representation where the rule is merely under-enforced, as opposed to not enforced. In cases similar to *Bragg*, where the provider has made explicit representations that participants have certain entitlements,\(^{657}\) it would seem to be relatively straightforward to say that the provider is likely to be estopped from relying on the contractual terms of service to deny those entitlements.

If an estoppel can be established, it is important to consider that estoppel does not require that the representation or promise be fulfilled, but instead only provides a remedy for the detriment suffered as a result of reliance upon the representation.\(^{658}\)

For this reason, an estoppel, unlike an election, is not permanent – if the detriment to the relying party can be cured, the provider will once again be entitled to exercise its rights. For practical purposes, this means that given sufficient warning, a provider

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\(^{655}\) *Galaxidis v Galaxidis* [2004] NSWCA 111, [55] (Tobias JA, Giles JA and Hodgson JA agreeing).


\(^{657}\) *Bragg v Linden Research, Inc.* 487 F. Supp. 2d 593, 596 (E.D. Pa., 2007).

\(^{658}\) *Commonwealth v Verwayen* (1990) 170 CLR 394.
may be able to begin to enforce rules which it had largely ignored in the past. This seems to be desirable in that it accords with the recognition that the rules of virtual communities must be able to evolve over time, as long as that evolution is sufficiently legitimate.

There is a lot of flexibility in the doctrine of estoppel, and a significant normative question arises as to whether it ought to apply in any given case. In the most extreme cases, it will almost certainly be effective as a brake on the ability of providers to rely on strict contractual rights that it has encouraged participants to believe would not be enforced. Its application in other circumstances, however, will depend in a large part on the discretion of the court as to how the alleged representation is interpreted and how reasonable the court believes the reliance on that representation to be.

c. Good faith

In recent years, there has been a great deal of discussion about the development of an implied duty of good faith in Australian law. The application and scope of such a duty, however, remains unclear at present. If a duty of good faith exists in the performance of virtual community contracts, it may restrain the arbitrary and capricious exercise of the broad powers that are typically reserved to providers. The exact nature of the duty, if it does exist, could take a number of forms, ranging from an overriding requirement of reasonableness to a requirement that the provider take into account the interests of the participant and the internal norms of the community before it exercises its powers.

In an important judgment that marks the genesis of a modern Australian doctrine of good faith, Renard Constructions Pty Ltd v Minister for Public Works (Renard), Priestley JA discussed, obiter, the 'community expectations' giving rise to good faith performance of contracts. His Honour considered

that people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent

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661 Renard Constructions Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234.
with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.\footnote{Ibid 268.}

In \textit{Renard}, a building contract contained a clause which provided that upon default, the contractor could be required to show cause as to why the contract should not be terminated. The New South Wales Court of Appeal held that there was a requirement of reasonableness implied in the power to terminate the contract, which acted to prevent the principal from terminating the contract when it was partly at fault for the breach, and the contractor was ready, willing, and able to complete. Priestly JA held that the requirement of reasonableness was implied in fact in this particular contract,\footnote{Ibid 257.} but noted that such a requirement would also be implied in other contracts of the same type, drawing a considerable overlap between implication by fact and implication at law.\footnote{Ibid, 260-1.} Handley JA also considered that there was a requirement of reasonableness implied in the contract, despite the fact that the power was very broad on its face.\footnote{Ibid, 279.} The implication of reasonableness was supported by the existence of a show cause clause,\footnote{Ibid, 280.} the fact that the power was worded to require “the satisfaction of the principal”,\footnote{Ibid, 280.} and the fact that since the decision was subject to arbitration, there was an inference that there must be something for the arbitrator to review, and this tended to prove that the arbitrator ought to look at the reasonableness of the decision, not just whether it had been made honestly.\footnote{Ibid, 281-3.} Meagher JA, on the other hand, did not imply a term of reasonableness, but decided the case on the basis of interpretation of the words of the contract, holding that it was impossible for the principal to be 'satisfied' where his mind “was so distorted by prejudice and misinformation that he was unable to comprehend the facts in respect to which he had to pass judgment.”\footnote{\textit{Renard Constructions Pty Ltd v Minister for Public Works} (1992) 26 NSWLR 234, 276; See further Elisabeth Peden, “When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability” (2005) 21 \textit{Journal of Contract Law} 226, 228-9 arguing that the approach taken by Meagher JA was more "attractive as it recognises that the show cause procedure embodied good faith requirements", reading good faith as a matter of interpretation rather than an implied requirement of reasonableness.}
Priestley JA's decision in *Renard* has, with some criticism, been picked up to the extent that, to varying degrees in varying jurisdictions, there now appears to be some element of good faith that is required in the performance of commercial contracts. What this means, however, remains unclear. Many virtual community contracts are more readily classed as consumer contracts, rather than commercial contracts, although, as discussed above, participants like Bragg and other commercial actors shows that some virtual community contracts will be commercial in nature. To the extent that a duty of good faith is limited to commercial contracts, perhaps it will only be useful to fill the void formed by the proposed national consumer law, which will not apply to commercial contracts.

Leaving aside the difficult distinction between consumer and commercial contracts, there is a strong argument that virtual community contracts are appropriate subjects for the duty of good faith because of their relational nature. The contracts that govern virtual communities are relational, rather than discrete, in that they are intended to govern the ongoing relationship between the provider and a participant, rather than a single acquisition of a marketable commodity. Bill Dixon makes the argument that a duty of good faith is more appropriate in commercial relational contracts than discrete contracts, primarily on the basis that parties to long term relationships have reasonable expectations that each party will act in their long-term self-interest, rather than sacrificing the relationship for short-term gains. If, as Dixon argues, it is de-
sirable to anchor good faith in reasonable expectations, then drawing a distinction between virtual community contracts that apply to individuals as consumers and those contracts that can be characterised as commercial in nature may prove to be quite difficult. Presumably, a large part of the reluctance to extend good faith to consumer transactions stems from the need to provide certainty and reduce transaction costs for consumer contracts where risk can be easily allocated at the outset in a way that is visible to the consumer at the time of purchase. Virtual community contracts, however, are much more involved than these paradigmatic commodity transactions, and it is not possible for a participant to know, before joining a community, exactly how the provider ought to behave as she becomes more invested and the community evolves over a long period of time. In these circumstances, a participant may well expect that a provider will act in good faith, just as providers currently mandate that participants act in the 'spirit' of the rules. Given the likely expectations of the parties, it is certainly conceivable that a duty of good faith could be implied, either by fact or as a matter of law, in virtual community contracts of the type we are concerned with.

If such a term is implied, it is still unclear what would be required in order to satisfy a requirement of good faith. It may require nothing more than mere subjective truthfulness, which could preclude arbitrary terminations. While there is some authority that good faith involves objective reasonableness, it is unlikely that the standard will be set that high. At this stage, although more guidance is clearly required, it

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676 See, for example, Blizzard, Terms of Use (2008) World of Warcraft, cl 9 <http://www.worldofwarcraft.com/legal/termsofuse.html> at 19 October 2009 ("The following rules are not meant to be exhaustive, and Blizzard reserves the right to determine which conduct it considers to be outside the spirit of the Game and to take such disciplinary measures as it sees fit to and including termination and deletion of the Account."); See, for example, Facebook, Statement of Rights and Responsibilities (2009) Facebook, cl 4 <http://www.facebook.com/terms.php> at 16 October 2009 ("If you violate the letter or spirit of this Statement, or otherwise create possible legal exposure for us, we can stop providing all or part of Facebook to you.").


seems fair to suggest that good faith requires contracting parties to consider the other party's legitimate interests in exercising discretionary powers and to act honestly, in that they are not motivated by malice or ill will.\textsuperscript{681} JW Carter and Dr Peden argue that honesty is at the core of good faith, and that the concept “will necessarily include”:

(1) not acting arbitrarily or capriciously;

(2) not acting with an intention to cause harm; and

(3) acting with due respect for the intent of bargain as a matter of substance not form.\textsuperscript{682}

Carter and Peden go on to argue that, as a fluid concept, good faith may include other considerations that are appropriate in the circumstances – including “acting for a proper purpose; consistency of conduct; communication of decisions; cooperation with the other party; or consideration of the interests of the other party.”\textsuperscript{683}

There appears to be enough scope in the doctrine to allow a future court to prevent a virtual community provider from exercising its contractual rights arbitrarily or capriciously in appropriate circumstances. An implied duty of good faith could potentially prevent, for example, a provider like EA from relying on a technical rule (like one against linking to external sites) in order to terminate the accounts and silence participants like Peter Ludlow who criticise aspects of community governance.\textsuperscript{684} Depending on how the doctrine develops, it could have relatively far reaching application to a variety of circumstances where a provider exercises its discretionary contractual powers in a way that maliciously or recklessly disregards the legitimate interests of a participant.

While good faith has developed primarily as a term that is implied into commercial contracts, either by law or by fact, Carter and Peden strongly argue against that approach, favouring an understanding that good faith is inherent in all of contractual doctrine.\textsuperscript{685} The distinction that Peden draws is that recognising that good faith is im-


\textsuperscript{683} (numbering removed).

plicit in contractual doctrine is a more elegant approach that does not require contorting the contract but still imposes some (somewhat weaker) restrictions on the exercise of discretion under the contract:

If the courts accepted that implicit good faith underlies contract law and is seen in principles of construction requiring honest adherence to the bargain, then the discretions or powers could be construed as requiring an exercise of good faith, which would be given meaning in the particular context. The standard of behaviour required by good faith would only be honesty, loyalty to the contract and, perhaps, a requirement to consider the interests of the other party. This would place contractual exercise of discretions in the same position as the general exercise of powers: they must be exercised for a ‘proper purpose’, within the context of the contract. This would remove the artificial reasoning concerning implied terms. This approach uses construction of the contract and the particular power or discretion to determine the appropriate meaning, without drawing on implied terms and concepts of objective reasonableness. This furthers the argument that an implied obligation of good faith and reasonableness is unnecessary. Implicit good faith is enough.686

Peden and Carter's argument is particularly normatively attractive in the context of virtual community contracts. It accords with the argument that the community context ought to inform the interpretation of contractual terms in order to more adequately address the particular tensions that arise out of contractual community governance. An implicit doctrine seems more likely to be able to adapt to the particular requirements of particular communities than would an implied term, which may not be fluid enough to distinguish communities in which arbitrary governance is desirable and beneficial and those in which it is not.687 Nevertheless, Peden and Carter's approach is not the approach currently favoured by the judiciary, and, doctrinal differences aside, the end result may be quite similar regardless of whether a term of good faith is implied or an implicit requirement of honesty and good faith is explicitly recognised as underpinning contractual doctrine.

It remains to be seen just how Australian courts will develop the doctrine of good faith. As it currently stands, good faith has so far been limited to apply only in commercial contexts. It is not necessarily clear, however, that good faith should never apply in the virtual community contracts with which we are concerned. If Dixon is correct and good faith ought to be anchored in legitimate expectations, then there is at

687 Such a hypothetical distinction is often made between games and other communities, but this dichotomy tends to be somewhat stricter than is warranted, both because of the difficulty of separating the two and because certain types of arbitrary or malicious treatment may be harmful even in games, just as some arbitrariness can be desirable in more open communities. See T. L Taylor, Play Between Worlds: Exploring Online Games Culture (2006) 19.
least an argument that non-commercial participants reasonably expect providers to act in good faith in line with the spirit of the contract. Alternatively, if Carter and Peden are correct, it would seem strange to suggest that good faith, as a principle that underpins all aspects of contract law, applies only in a commercial context. So long as good faith remains implied by law or fact in only commercial contexts, however, its applicability to virtual communities will be limited.

It cannot be said how the doctrine of good faith will develop over the next few years, or how it will interact with the national legislation on unfair terms. The increasing acceptance of good faith in contractual doctrine, however, certainly suggests that the manner in which discretionary contractual powers are exercised can legitimately be scrutinised by the courts, and this may provide some important flexibility for the regulation of abuses of power in virtual community contracts. Cast as a prohibition against acting arbitrarily or dishonestly, good faith accords quite well with the emphasis of the rule of law that powers be exercised properly.688 While it is still too early to say for certain, there certainly appears to be scope for courts, in appropriate circumstances, to scrutinise the motives of virtual community proprietors and restrain their stated ability to unilaterally and arbitrarily terminate the accounts of their subscribers.

4. Conclusion

Despite a strong rhetorical reliance on freedom to contract and literal interpretation of contractual terms, there appears to be substantial flexibility in Australian contract law, and more to come in future. Australian courts have a number of tools that can be used to set aside or read down terms that are surprising or unfair, to impose restrictions on the exercise of a contractual power where to do so would be unconscionable or inconsistent, and even to impose a requirement that a contracting party act in good faith. This flexibility leads to the conclusion that although virtual community contracts are overwhelmingly one-sided, courts may, in appropriate cases, act to protect the interests of participants and refuse to enforce or read down the literal meaning of certain contractual terms.

The national consumer law promises to provide substantial relief from the worst

terms present in one-sided contracts. The current practice of creating overwhelm-
ingly one-sided contracts in order to provide maximum control and discretion to the
providers of virtual communities is likely to conflict with unfair terms legislation,
and particular terms are liable to be removed from the agreements. The extent to
which such legislation will make a positive contribution to legitimacy in virtual com-
munity governance will depend largely on the willingness of courts to find terms un-
fair and the ability of providers to draft around the statutory requirements.

While there does not seem to be a lot of flexibility in the incorporation of surprising
terms in the click-wrap contracts that purport to govern virtual communities, doc-
trines of common law election and equitable estoppel provide a ready check on the
ability of providers to rely on their strict contractual rights where to do so would be
inconsistent with community norms. In appropriate circumstances, these doctrines
may prevent a provider from selectively enforcing its discretionary powers in a way
that maximises its control over the community and particular participants.

The evolving doctrine of good faith may prove to be particularly relevant to contrac-
tual governance. If it is able to restrain the exercise of discretionary powers, good
faith may provide a more subtle and appropriate check on a provider's power than
merely striking out the most egregious contractual terms. One of the largest risks to
participants, as we saw in the previous chapter, is the lack of certainty that a propri-
eter's unfettered right to terminate imposes. As the concept of good faith continues to
develop in Australian law, either as an implied term or as a concept that informs all
of contractual doctrine, then we may begin to see courts requiring proprietors to re-
frain from acting arbitrarily or capriciously. In effect, these are the seeds of due pro-
cess – that a proprietor's actions are rational, not motivated by a desire to cause harm,
having respect for the intent of the bargain. If good faith in virtual communities de-
velops further, to a requirement that proprietors exercise their rights for proper pur-
poses, consistently with internal norms, in a manner that is well communicated and
considers the interests of the participants, then contractual governance of virtual
communities may become much more legitimate.

This chapter set out to examine the degree of flexibility in contractual interpretation
that is present now and could conceivably develop in the future. It is apparent that
the basic premise of the liberal formalist argument, that governance in virtual com-
munities will simply be determined by literal interpretation of the contract, is not sustainable. It is clear that there are choices to be made when interpreting and enforcing these contracts, and these choices will affect the relative power balance between participants and proprietors. The flexibility that exists in Australian contractual doctrine suggests that whether or not contractual governance of virtual communities can lead to desirable outcomes is highly dependent on the way in which we conceptualise these contractual relationships. The next chapter will attempt to provide a normative basis for how courts ought to exercise their discretion in interpreting virtual community contracts, and what principles they will have to guide their decisions.
Chapter 5. The enforcement of internal norms

Having identified that there is a significant degree of flexibility in contractual governance in the previous chapter, this chapter seeks to apply the rule of law framework developed in Chapter Three to the question of how the territorial states should limit and support the enforcement of community norms. This is the question at the core of our search for legitimacy: how are the rules enforced and punishments imposed in virtual communities, and how should the law support legitimate governance but protect participants from the illegitimate exercise of power? The goal of this chapter is to provide a way in which the contractual framework can be used to regulate the relationship between participants and providers in a way that more adequately addresses the tensions of ongoing community governance.

In addressing this question, this chapter examines the way that punishment for breach of community norms exists in a theoretical gap between the public and private characteristics of virtual communities. 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, such that we find it difficult to recognise the harm that can be caused to participants. At the same time, because the contractual framework does not adequately conceptualise punishment, providers are struggling to twist various private law doctrines to achieve punitive ends when internal sanctions prove ineffective. This chapter addresses this conceptual gap and attempts to provide a normative framework for enforcing community rules and imposing punishments for their breach based upon the values of the rule of law.

This chapter 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 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 norms poses some problems – 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 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 internal rules and the need for virtual communities to be able to maintain order in situations where participants can avoid punishments for their wrongdoing. I argue that this tension ought to be addressed by empowering communities to enforce their rules against participants, but not by directly punishing breaches of internal rules.

1. Internal enforcement: the complex nature of internal norms

In A Rape in Cyberspace, Julian Dibbell famously retells an early story of community justice in a text-based virtual world called LambdaMOO. The offender, Mr Bungle, exploited an item in the virtual world that allowed him to depict other participants performing violent and sexually explicit acts without their consent. The victims, powerless, could only watch as their avatars were publicly assaulted. The bond that forms between participants and their online identities is a complex one, and the reactions of the victims was equally complex; Dibbell explains that the victims' reactions were at the same time 'ludicrously excessive' if one considered only the symbolic nature of the events, but 'woefully understated' when one considered the seriousness of corporeal sexual assault. As Dibbell recognises, 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. Only through an experiential perspective that conceptualises this dual space can we hope to understand the meanings of acts and wrongs in virtual communities.
In response to Mr Bungle's actions, discussion on one of the LambdaMOO mailing lists turned to punishment, with widespread support for terminating Bungle's account – 'toading' him, stripping his character of all power to interact with the virtual world. The explicit governance structure of LambdaMoo at the time 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, determined to punish Bungle and destroyed his account.694

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,695 Baudrillard,696 Descartes,697 and Plato,698 to name but a few.699 They are questions we are still grappling with as we spend more time in virtual spaces and try to understand what these communities mean to us. More directly relevant to this work, however, are the other questions raised by Dibbell's retelling, which provide an important context through which to examine the creation and enforcement of community norms. 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 Dibbel describes, almost a decade later, in another world. Two players identify a bug in Ultima Online, allowing them to purchase items from a

695 See Michel Foucault, “Ceci n'est pas une pipe” (1976) 1 October 7.
696 See Jean Baudrillard, Simulacra and simulation (Sheila Faria Glaser tran., 1994) 1.
697 Rene Descartes, Descartes: Meditations on First Philosophy (2008) 21-22; see further Patrick Malcolmson, “The Matrix, Liberal Education, and Other Splinters in the Mind” 17(1/2) Humanitas 139, 149-80.
699 See further Jane Evelyn Mcgonigal, This might be a game: ubiquitous play and performance at the turn of the twenty-first century (PhD Thesis, University of California at Berkeley, 2006) 1-8 at 16 January 2010 (discussing ubiquitous computing and "how we might digitally reproduce not just the image, but also the interactive features, or phenomena, of their original referents.").
vendor and immediately sell them back for a quick profit.\textsuperscript{700} During the week between the exploit being discovered and the exploiters themselves reporting it to the provider, they managed to extract over $150,000 worth of gold from the UO economy, gradually cashing it out undetected over an eight month period.\textsuperscript{701} A much less subtle example comes from 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 per cent overnight.\textsuperscript{702} 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 economy.\textsuperscript{703} Regardless of whether exploiters can be caught or not, however, 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, fetching a princely sum in windfall profits.\textsuperscript{704} At this point, internal enforcement is largely moot; the damage has been done and those responsible have either been banned or have fled. Does the provider have any remedy in a territorial court? Could the actions of exploiters be criminal?

This question has not been satisfactorily answered to date.\textsuperscript{705} As a starting point, I take 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


\textsuperscript{701} Ibid 242.


\textsuperscript{703} Ibid.


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I take this argument in a stronger form as it relates to the law of territorial states as a warning that states should not impose punishments for breaches of rules that are created, alleged, and proved by providers of virtual communities whose legitimacy cannot be established. Within virtual communities, I temper this argument with the recognition of later rule of law theorists and some cyber-law theorists that discretion in enforcement of the rules is important for substantive justice and to protect the autonomy of the community. From these principles, I develop a normative framework for evaluating methods of enforcing community rules and guiding the application of contractual doctrine.

a. Internal enforcement of community norms

Norms in virtual communities are almost never enforced through legal channels, although internal norms “invariably operate against a background of state rules.” Robert Ellickson points out that communities usually turn to the law for enforcement only when a breakdown occurs in community governance. 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 the community. Rules are enforced in a large 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. Direct intervention by providers or their agents within the community is the most obvious – the platform code gives selected individuals powers within the community that vastly exceed those of other participants. Punishments in such cases can take any form, 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 varying

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sanctions on those participants who they find to be breaching the rules – ranging from a simple reprimand to suspension and eventually cancellation of the subscriber's account. World of Warcraft, for example, explicitly sets out a tiered penalty policy, going so far as to quote Abraham Lincoln: “Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it.” In the policy, Blizzard explains that punishment is required to maintain the integrity of the servers and to protect the experience of other participants:

sometimes 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.\footnote{712}

Blizzard sets out a 'pyramid' of penalties – starting at warnings for minor infractions, and moving up to suspensions of various lengths, from three hours to three days, to a final warning and account closure, based upon the severity of the infraction and the participant's prior violations.\footnote{713}

Most other providers do not go to such lengths to explain their enforcement policies. Facebook, for example, merely states that if a participant “[violates] the letter or spirit of this Statement, or otherwise create possible legal exposure for us, [Facebook] can stop providing all or part of Facebook” to that participant.\footnote{714} 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.

In addition to direct intervention, community norms are enforced through automated means, which are also extremely varied. Some rules are hard-coded into the community platform, directly restraining participant behaviour. The ability to communicate is an important example; the design choices that are made will directly influence the structure of conversations that participants will have within the community.\footnote{715}

\footnote{711} Blizzard, “Account Penalties” Blizzard support (accessed 16 October 2009) quoting Abraham Lincoln, “Cooper Union Address” (1860).
\footnote{713} Ibid.
These types of restraints are variously effective – some, like word filtering, prevent participants from using a list of words that are deemed offensive in conversation with other participants, but are relatively trivial to bypass by changing spellings or using an evolving language and dialog. Other approaches are much more effective but also much 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.\(^{716}\) Where more free-form communication is permitted, participants are often made to understand that all communications occur under the watchful gaze of omnipresent surveillance.\(^{717}\) 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 behaviour. These code based regulations are pervasive and often go unnoticed — seemingly innocent design decisions can seriously shape the conceivable possibilities of behaviour within the environment.\(^{718}\)

Enforcement of social norms and rules does not necessarily need to involve the direct agency of the provider. Social norms are continuously enforced through participation in the community by the participants themselves reinforcing understandings of acceptable behaviour.\(^{719}\) 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 of participating within the community itself. Wikipedia provides an example of a community that predominantly utilises this mode of governance, where the rules for editing are generated through an ongoing discourse between par-

\(^{716}\) See, for just two examples, Mario Kart and Club Penguin: Matt Casamassina, “Update: Mario Kart Wii Text Chat Details - Wii story - at IGN,” IGN, 27 February 2008 <http://au.wii.ign.com/articles/855/855033p1.html> at 6 January 2010 (all chat limited to pre-set menu options); Club Penguin, Club Penguin - Parents: Parent's Guide <http://www.clubpenguin.com/parents/club_penguin_guide.htm> at 6 January 2010 (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 pre-approved words and phrases, and block attempts to communicate a phone number or other personally identifiable information.").


\(^{718}\) See Lawrence Lessig, Code and Other Laws of Cyberspace (1999).

\(^{719}\) T. L Taylor, Play Between Worlds: Exploring Online Games Culture (2006) 36; Sal Humphreys, Massively Multiplayer Online Games Productive players and their disruptions to conventional media practices (PhD Thesis, QUT, 2005) 156 ("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 others' behaviour.")).
The enforcement of internal norms

ticipants, rather than routinely enforced by an overseeing entity. 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. Wikipedia has a particularly formal and visible community governance framework – one which requires considerable effort on behalf of community participants to create and maintain. Froomkin sketched a similar model of participant-led governance in his analysis of the Internet Engineering Task Force – noting, in doing so, the extreme difficulty faced with generating and maintaining real consensus in a disparate community. Participatory governance is not always such a formal and acknowledged endeavor, however. In all communities, governance occurs at the point of every interaction between participants, as the boundaries of what is acceptable behaviour are continuously and fluidly redefined and enforced. These forms of governance take on more or less formality depending on the environments — inter- and intra-guild relations set relatively rigid governance structures in MMORPGs, for example, and player-led councils in EVE Online and lawmaking structures in A Tale in the Desert create a hybrid governance regime between the developers and the participants. On the other end of an imaginary scale of formality, understandings of social conventions are created and reinforced through continuous conversations between


723 Nikolas S Rose, “Government, authority and expertise in advanced liberalism” (1993) 22(3) Economy and Society 283–299, 286: 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.


participants in any community. Conceptions of netiquette in discussion fora and mailing lists,\footnote{See Joel R Reidenberg, “Governing networks and rule-making in cyberspace” (1996) 45 Emory LJ 911, 920.} for example, or the complex understandings of what is appropriate behaviour and what is considered griefing in virtual worlds are all generated not solely by the dissemination of rules from the provider, but from participation in the community itself.

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 in order to encourage effective ordering over a loose-knit network while minimising the costs of direct regulation.\footnote{Malte Ziewitz, “Order without law” (Games Convention Online Conference, Leipzig, 1 August 2009).} In this way, eBay is able to influence ‘community values' as to what it means to be a positive participant in 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 governmentality\footnote{Michel Foucault, “The Subject and Power” in Hubert L Dreyfus & Paul Rabinow (eds)\textit{ Michel Foucault: Beyond Structuralism and Hermeneutics} (1982) 208, 219-223 (discussing the nature of power and the power relationship in governance).} – 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, employers, investors”.\footnote{Nikolas S Rose, “Government, authority and expertise in advanced liberalism” (1993) 22(3) Economy and Society 283–299, 293.} This non-obvious form of governance regulates by influencing and shaping behaviour, and is generally effective precisely because it is non-obvious.

b. **Limits on internal punishment**

The first issue to analyse 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 example of \textit{Bragg}, 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.\footnote{Bragg v. Linden Research, Inc. 487 F. Supp. 2d 593 (E.D. Pa., 2007).} Bragg, on the other hand, argued firstly that he had done nothing wrong, and secondly 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.\textsuperscript{732}

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 community.\textsuperscript{733} 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.\textsuperscript{734} Rule of law theory also, however, suggests limits on punishment — that it not be arbitrary,\textsuperscript{735} that rules of behaviour are clear, understood, and predictable,\textsuperscript{736} and that it is imposed in a way that is equal and fair.\textsuperscript{737} Apart from procedural safeguards, rule of law theory also highlights a requirement of proportionality in punishment.\textsuperscript{738} Proportionality is used as an analytical method of evaluating the conflict between the needs of the society in maintaining order and the interests of the citizen to be free from excessive interference or punishment.\textsuperscript{739} Under both utilitarian and retributive conceptions of punishment, there is an assumption that the punishment ought to be proportional to the wrongdoing.\textsuperscript{740}

\begin{thebibliography}{99}
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\item[732] Ib\textsuperscript{id} 597.
\item[733] One of Fuller's eight routes to failure for legal systems is a divergence between the rules as posited and as practically enforced: Lon L. Fuller, \textit{The Morality of Law} (2nd ed. 1969) 39.
\item[734] John Rawls, \textit{A Theory of Justice} (9th ed. 1972) 240 ("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."); citing Thomas Hobbes, \textit{Leviathan} (1950) chs 13-18; See also Michel Foucault, \textit{Discipline and Punish: The Birth of the Prison} (Alan Sheridan tran., 2nd ed. 1995) 74.
\item[740] See John Rawls, “Two Concepts of Rules” (1955) 64(1) \textit{The Philosophical Review} 3-32, 12-13(citing Bentham, \textit{The Principles Morals and Legislation}, chs. xiii-xv).: “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.”
\end{thebibliography}
rule of law is seen to require that the punishment is suited to the crime, and that like cases should be treated alike.\textsuperscript{741}

What, then, can we make of Bragg’s claim? There appear 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 could attempt to investigate whether or not 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 to Linden, there is no legally recognisable 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 that this approach is too simplistic in its deligitimisation of the role of the territorial state in ensuring that the interests of its citizens are adequately protected. 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\textsuperscript{742}), 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. Looking at the factual circumstances of the community, 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,\textsuperscript{743} 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 sufficiently clear and well known that,


even if it is not explicitly stated in relation to the specific exploit, it is probably valid and legitimate in the circumstances. In contractual terms, Bragg is likely in breach of his obligations to Linden. The situation would change if the rule in question had not been legitimately made. For example, if it had changed recently without sufficient notice, the new rule may not be validly incorporated into the contract; or if the rule was technically in place but only rarely enforced, Linden may be estopped from enforcing it.

If the rule is a valid one, is the penalty imposed a just one? In contractual terms, was Linden entitled to repudiate the contract and terminate Bragg's account for the breach, and, if so, was it 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 a 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 terminates 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.

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', and there is a plausible argument to be made that participants generally feel a sense of entitlement to their assets and money within Second Life, a sense of entitlement that

744 See Margaret Jane Radin, “Reconsidering the Rule of Law” (1989) 69 Boston University Law Review 781, 815 (arguing that retrospective prohibitions on behaviour that was socially but not legally proscribed may not offend values of the rule of law).

745 Variations to contracts are subject to the same rules governing offer and acceptance as new contractual arrangements. Unilateral variations will often not be binding, either because no consideration has been given for the change (Wigan v Edwards (1973) 1 ALR 497, 512) or because a material alteration would be prejudicial to the other party (Raiffeisen Zentralbank Oesterreich AG v Crossseas Shipping Ltd [2000] 1 WLR 1135, 1143). Additionally, clauses purporting to allow unilateral variation may be voidable under unfair terms legislation (see Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth.).)


747 At least until 22 August 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: Linden Lab, Own Virtual Land Second Life <http://web.archive.org/web/20080822144829/http://secondlife.com/whatiss/land.php> at 6 January 2010.
has been actively encouraged by Linden. Some sort of punishment is likely warranted in order to deter wrongful behaviour, 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 a claim about his property rights in the virtual assets.

Even if we determine that both the rule and punishments are legitimate, it is still open to consider whether the method for imposing the punishment was legitimate. Again, this 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 the community. In Second Life, the provider, Linden Lab, has gone to 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 be possible to argue that Bragg was not given a fair opportunity to respond to the claims, or that the decision to eject him was made on irrelevant grounds. The contractual language that best fits such an examination is that of good faith in the exercise of contractual rights, although the provider may also be estopped from denying a sense of security that it had engendered.

All of this can lead us to a tentative normative conclusion about whether or not Bragg was legitimately ejected, and whether the confiscation of his virtual assets was also legitimate. 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 afresh 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 – which, in this example, Bragg did, although very few other participants would ever be likely to do the same, given the high costs of legal action and the difficulty of challenging the terms of the contract.

We may well prefer that disputes are settled at a community level rather than involving the legal systems of various territorial states. The smallest, most intimate level is likely to have the best understanding of the community needs and the dispute. 750 Those outside the community are likely to incur significant costs in understanding and enforcing the community needs and community 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. 751 The unique nature of rules in play spaces, in tension with the logic of the legal system, means that legal rules are unlikely to properly recognise the needs of the community. 752 Difficulties are likely to arise with conflicting decisions from conflicting jurisdictions. 753 External enforcement is alienating in the sense that it requires participants and providers to step outside of familiar and tailored internal governance mechanisms and frame their dispute in a way that is recognisable 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 Post points out, is that if community decisions are subject to continual external oversight, no real legitimate governance may emerge. 754

For all of these reasons, we may prefer that disputes are resolved within the community, rather than adjudicated in territorial courts. Nevertheless, at some point, perceived injustice is likely to warrant legal intervention. 755 If territorial courts are able

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755 Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Virginia Law Review 2043, 2044-5 (“people 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.”).
to provide a legal remedy for these limit cases, they may be able to condition internal governance to be somewhat more legitimate. Very few cases will ever reach final judgment in a court; the mere existence of a potential remedy, however, is likely to encourage settlements and discourage the most egregiously illegitimate governance practices. Over time, the setting of limits in territorial courts is then likely to loosely constrain autonomous community governance to acceptable standards.756 Rule of law theory suggests that within these loose acceptable standards, courts ought generally not interfere with the discretion of providers; the lesson to be learnt 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.757 By developing these constraints around abuses of power, courts are likely to be able to encourage the development of internal dispute resolution and safeguard the autonomy of the community.758

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 confiscate and destroy the value of Bragg's virtual assets. This issue, while novel, presents a question that today's courts are able to deal with. There is a real and non-trivial 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.759 Importantly, these losses highlight the legitimate legal questions to be raised – of contractual interpretation, unfair or unconscionable contractual terms, equitable estoppel, good faith, and the intersection of contract and property rights.760 Each of these questions provides an opportunity to examine the legitimacy of the rule, the punishment, and the manner in

759 Dan E Lawrence, “It Really is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property” (2007) 47 Washburn Law Journal 505, 530 (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.").
760 Joshua A. T Fairfield, “Anti-Social Contracts: The Contractual Governance of Virtual Worlds” (2008) 53 McGill Law Journal 427, 455-6 (arguing that vertical relationships can be resolved by contract); Dan E Lawrence, “It Really is Just a Game: The Impracticability of Common Law Property Rights in Virtual Property” (2007) 47 Washburn Law Journal 505, 529-30 (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.").
which the punishment was imposed.

The settlement of Bragg means that these questions of fact and law remain largely unanswered. In similar cases in the future, much will depend upon the expectations of participants; the applicability and rigour 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, a contractual enquiry based upon legitimacy is unlikely to be particularly fruitful for an offended participant. 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 challenge in this process comes from the difficulty in identifying harm to the participant and the difficulty in evaluating consent within the community.

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 approximately USD$8000 worth of virtual property that Linden confiscated when it suspended his account. This monetary loss may, however, obscure more than it reveals underlying tensions about due process and the imposition of penalties in virtual communities. A participant in World of Warcraft who has been playing for a number of years and accumulated not only significant assets but substantial social connections, for example, may suffer very serious harm upon the termination of her account – even ignoring the monetary value of the items in any grey market.761 There is a significant open question as to how to evaluate this loss – and significant pressure from providers to characterise the loss as a mere loss of consumptive entertainment.762

At the State of Play conference in New York in 2009, Andrew Zaffron, general counsel for Sony Online Entertainment, dismissed any issue of harm to the participant in

762 See James Grimmelmann, “Virtual borders: The interdependence of real and virtual worlds” (2006) 11(2-6) First Monday (explaining that providers are very hesitant to allow states to interfere in the exercise of their discretionary powers).
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 the game. Even though you play for two years, that's $15 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 dol-
lars, you still got a great deal. Where else can you get entertainment that cheap?\(^\text{763}\)

Zaffron's argument, while somewhat deceptively casting the community relationship
as mere passive consumption and monetary gain in order to delegitimise any claim of
harm by participants, does contain a grain of truth. 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 before joining the community, and what they learn
through participation. Zaffron draws a distinction between communities that he as-
serts are successful in structuring participant expectations and those, like Second
Life, that take on obligations because of the way in which they create expectations.\(^\text{764}\)

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 proprietorial rights in her
avatar or virtual assets. The important recognition, however, is that this will be con-
textually dependent upon the norms of the community and the expectations of partic-
ipants, and cannot be answered by a simple literal examination of the applicable
contractual documents. If disputes are to be satisfactorily resolved, we must be more
attuned to the expectations of participants both before they join and as they become
more deeply immersed in the community. We must also be much more attuned to the
harm that participants may suffer when they are ejected from a community and cut
off from their social relations.\(^\text{765}\) That harm does have a real punitive effect; ignoring
that punitive effect in favour of a consumption model is likely to lead to serious error
in our evaluation of the impact of the exercise of private governance power.

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

\(^{763}\) Andrew Zaffron et al., “Current Legal Issues for Virtual Worlds” (2009), 44m
<http://nyls.mediasite.com/mediasite/Viewer/?peid=d74f56301c2445dbb96d5ad13f611b0> at 16
October 2009.
\(^{764}\) Ibid 45m.
framing of games as "simply entertainment" often obscures the way 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.”).
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 address the governance tensions that permeate these disputes.

This process of examining the legitimacy of governance does not necessarily mean that providers will be stripped of the power to create and manage a desirable community.\textsuperscript{766} Community norms would normally have to reflect the need for the provider to maintain order within the community.\textsuperscript{767} In some communities, the importance of social cohesion may largely outweigh any individual interests that participants may have in not being unfairly treated. 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. A less cohesive community 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 com-


\textsuperscript{767} T. R. S Allan, Constitutional Justice: A Liberal Theory of the Rule of Law (2001) 89 ("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)."
munity norms in question. It is a task, however, that territorial courts are well-suited to, 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 World of Warcraft for advertising an in-game guild that was friendly to gay, lesbian, bisexual, and transgendered participants.768 Blizzard alleged that Andrews' 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, including [...] sexually explicit [...] or otherwise objectionable".769 In this example, Blizzard eventually backed down on its policy and apologised to Andrews after significant public outcry.770 Nevertheless, if Blizzard had not overturned its initial decision, we may well have come to the conclusion that its exercise of discretion in determining that Andrews' 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.771 In an open letter to Blizzard, a group of 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.772

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

771 Jenny Sundén, “Play as Transgression: An Ethnographic Approach to Queer Game Cultures” in Atkins Barry, Kennedy Helen, & Krzywinska Tanya (eds) Breaking New Ground: Innovation in Games, Play, Practice and Theory: Proceedings of the 2009 Digital Games Research Association Conference (2009), 3 <http://www.digra.org/dl/display_html?chid=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."); Gorden Calleja et al., Terra Nova: Open Letter to Blizzard Entertainment <http://terranova.blogs.com/terra_nova/2006/02/open_letter_to_blizzard.html> at 5 November 2009 (arguing 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.").
772 Gorden Calleja et al., Terra Nova: Open Letter to Blizzard Entertainment <http://terranova.blogs.com/terra_nova/2006/02/open_letter_to_blizzard.html> at 5 November 2009. (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.)
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 majoritarian 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. Fairfield in particular has emphasised the role of consent in determining the relationship between participants in virtual communities. 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. Fairfield argues that contractual agreements have a dual mode, in that they create binding obligations between participants and providers, but that they merely inform social norms between participants. For Fairfield, then, 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. Fairfield raises a good point here, but does not go far enough. In cases where the contractual agreement directly conflicts with community norms, there is a strong argument from legitimacy that the contracts ought not be enforceable in their 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

773 Jenny Sundén, “Play as Transgression: An Ethnographic Approach to Queer Game Cultures” in Atkins Barry, Kennedy Helen, & Krywinska Tanya (eds) Breaking New Ground: Innovation in Games, Play, Practice and Theory: Proceedings of the 2009 Digital Games Research Association Conference (2009), 4 <http://www.digra.org/dl/display_html?chid=09287.40551.pdf> (describing the experience of joining a queer-friendly guild as like ‘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.”; Sal Humphreys, Massively Multiplayer Online Games Productive players and their disruptions to conventional media practices (PhD Thesis, QUT, 2005) 155-6.


775 cf Ibid 834 (arguing that the vertical and horizontal components of the contractual relationships need to be separated, and that consensus only really has application horizontally).

autonomy and legitimacy. At least in theory, where there is some uncertainty, the social norms of the community can be relied upon to modify the interpretation of the contract, just as business practices and commercial construction informs the interpretation of business contracts. In the case of explicit conflict, there is significant scope for doctrines of unconscionability, waiver, good faith, and estoppel to be used to avoid a result that invalidates community norms in favour 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, homogenous. 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 continuously being redrawn. Even the provider will often show multiple conflicting view 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; 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 dealing with complex questions of fact, and should be reasonably well suited to finding a workable approximation of community norms — as long as courts are careful enough not to oversimplify and essentialise one particular person or group's view of the community norms.

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 punish-

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777 See Boves v Chalder (1923) 32 CLR 159, 193.
778 See Chapter 4, above.
ment and the way in which it is imposed has not yet been resolved. World of Warcraft's terms, on the other hand, do not reflect a general norm prohibiting Sara Andrews' 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. Indeed, in comparison to the homophobic language that permeates WoW culture, Andrews' advertisement,

OZ is recruiting all levels, but especially 50-60s! [...] We are not "glbt only", but we are "glbt friendly!" http://guilduniverse.com/oz

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 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 consensus-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. In these cases, as Fairfield puts it, “a more important real-world norm may well trump the in-world community norm.”

It follows that where we do not recognise consent, territorial courts will be justified in refusing to uphold what would otherwise appear to be consensual community norms. Accordingly, in Andrews' case, if we do not come to a conclusion that Blizzard's exercise of discretion

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was formally inconsistent with community norms, we may still come to the conclusion that internal norms that discriminate against queer players in that way are illegitimate.\textsuperscript{783} If a participant like Andrews ever came before a territorial court, then, in enforcing the contractual agreement, we would expect the court to restrain the provider from relying on its discretion to enforce the rules to terminate Andrews' access to the community.

This analysis still leaves us somewhat uncertain about what the appropriate result would have been if the \textit{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 favour 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 breaking the rules. In order to encourage social cohesion, then, some punishment may 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 encourage Second Life participants to invest in the community and 'own virtual land', there is a strong suggestion that such an extreme punishment ought not to 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.\textsuperscript{784} Rule of law theory helps to conceptualise 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


\textsuperscript{784} See Benjamin Duranske, \textit{Virtual Law: Navigating the Legal Landscape of Virtual Worlds} (2008) 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."
The enforcement of internal norms justly. Harsh penalties may be permissible, but they must be somewhat proportional to the wrong,785 must be clear and unambiguous,786 and must be imposed in a fair and accountable manner.787 Whether Linden legitimately exercised its discretion, then, 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 as to whether terms are validly incorporated or are unfair, and whether exercise of the provider's discretion should be restrained by election, 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 community norms of Second Life – the social contract – requires 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. If this factual determination holds, we would expect a court to determine either that Linden were estopped from exercising its rights in a manner inconsistent with the community norms it had 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 instil participants with a sense of entitlement to the assets that they buy and create within

785 T. R. S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) 121 (arguing that "Conformity to [precepts of due process and equal justice] ensure as genuine — substantive — equality of all before a law that serves a coherent (if capacious and adaptable) conception of the common good.").
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 the investment in Second Life – one can imagine that both individual participants like Bragg and corporate participants like IBM and other Fortune 500 companies 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 but simultaneously avoid accruing any real responsibilities. Such an underhand approach would seem to directly conflict with what we expect of legitimacy in governance.

Evaluating legitimacy and consent provides a generalisable 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, then, courts should make a critical examination of actual community consent in order to avoid enforcing illegitimate norms. Whether or not 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 norms.

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. Various states 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.

788 Benjamin Duranske, Virtual Law: Navigating the Legal Landscape of Virtual Worlds (2008) 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.").
without unjustifiably sacrificing autonomy. This means, largely, that for communities that develop to expect due process and proportionality in the enforcement of community norms, participants can potentially sue in territorial courts when providers fail to uphold those standards; but it also means that communities that have no use for such standards are not 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 literal contractual interpretation does not preclude the validity of consensual standards.

2. Enforcement of internal norms 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 impose little deterrent or punitive effect. If participants are to be punished for breaking internal norms in these circumstances, then, providers will need the assistance of the territorial state. Whether or not the territorial state should lend its support to internal norms 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 those who commit traditional territorial crimes ought not and do not escape responsibility merely by making use of a virtual community.789 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,790 but 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.791 Much of this dichotomy can be explained by the need to separate


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Crimes from virtual representations of crimes; Lastowka and Hunter evoked Rene Magritte's famous painting and statement, “ceci n'est pas une pipe”, to illustrate the issue that the representations of crime in virtual worlds are not crimes because they fall within the consensual realm of internal norms. 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 they believe threatens to destroy the consensual fiction.

Though it is somewhat problematic, there is an important distinction to be made here. It will certainly be important to avoid criminalising behaviour that is a mere fictional depiction of illegal behaviour; avataracide being the most prominent example. The non-consensual 'killing' of another participant's avatar is simply not 'murder', and the need to avoid this type of category mistake has informed much of the scholarship around virtual crimes. 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). 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 Isk, there is no fraud – participants in EVE have consented to the social norm that 'fraud' is part of the game. The tension here is evident when theorists attempt to map this

792 René Magritte, The Treachery of Images (1928-29).
794 See particularly Richard A Bartle, “Virtual Worldliness: What the Imaginary Asks of the Real” (2004) 49 New York Law School Law Review 19, 27 (arguing that “Virtual 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.”); Edward Castronova, “The Right to Play” (2004) 49 New York Law School Law Review 185, 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.”).
dichotomy between 'real' and 'virtual' harms. Writing of the theft of a jacket in Second Life, Brenner suggests that the answer lies in whether or not 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.799 Brenner characterises the in-world theft of assets that have real-world value as real-world cybercrimes, 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.800 Brenner then suggests a dichotomous two-tiered approach, whereby acts that cause harm that is “limited to the virtual experiential context”801 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”802 are appropriately dealt with by territorial criminal laws. Kerr draws a very similar dichotomy, arguing that “[t]raditional governments can continue to deal with non-virtual harms arising out of virtual worlds, [...] [b]ut misconduct arising only in a virtual sense should remain the domain of game administrators.”803

This distinction seems superficially attractive, but is 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. 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.804 Accordingly, thefts and murders that form part of a game cannot be criminal because they are consensual, but non-consensual takings 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

800 Ibid 60-1.
801 Ibid 60.
802 Ibid 60.
804 Ibid 420-1.
that criminal law ought only be concerned with an external perspective, not the internal meanings of acts in virtual communities; Bungle's acts were “a story (or an image) of a rape and no more.”\textsuperscript{805} 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'. There is a tension here between the harm that we apprehend if we, like Dibbell, examine the meaning of Bungle's actions through the interpretative lens of community norms, and the inability of a wholly external perspective to recognise harm that happens only 'virtually'. As Cohen, Fairfield, and others have pointed out, there is no such hard distinction between the real and the virtual.\textsuperscript{806} Fairfield is correct in criticising this dichotomy and its resultant effect on legal classification of acts and harms:

\begin{quote}
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 en-
vironment. As a result, the distinction between a "virtual" act and a "real" one is not helpful.\textsuperscript{807}
\end{quote}

As an aside, territorial states may nevertheless wish to criminalise some acts carried out within virtual communities that currently do not 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 criminalised. Perhaps it already does fit within broader prohibitions on harassment, or perhaps a new crime ought to be recognised.\textsuperscript{808} If it turns out that a society also wishes to criminalise consensual depictions of rape, based upon the intangible harm to morality or the threat posed by romanticising rape, then that too can be accomplished. It may or may not be desirable, but it is certainly possible for territorial states to criminalise consensual acts such as age play or rape play.\textsuperscript{809}

Assuming that the act is not criminalised, the dichotomy between real and virtual harm is misleading because it ignores the category of acts that are neither consensual

\begin{footnote}
\textsuperscript{805} Ibid 418.
\textsuperscript{809} Australia, for example, criminalises not only child pornography, but the depiction of children in sexual acts: see McEwen v Simmons 73 NSWLR 10, where it was held 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).
\end{footnote}
or harmless, on the one hand, or clearly criminal, on the other. The 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 recognised as wrongful by the territorial state.810 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 harms in virtual worlds can be better addressed by providers than by the blunt instrument of criminal law.811 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.”812 While Kerr argues strongly against creating new crimes to deal with virtual wrongs,813 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.814 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.815

Recognising this dichotomy leads to a more interesting question in the determination of how states should deal with behaviour that is not criminal but is prohibited within virtual communities. So, 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 behaviour 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

810 Lastowka and Hunter recognise 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: F. Gregory Lastowka & Dan Hunter, “Virtual Crimes” (2004) 49 New York Law School Law Review 293, 315.
815 Ibid 60-1, 70-1.
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criminal law; if it does not, it is a 'fantasy crime', not a real 'cybercrime'.

This 'fantasy crime' category, however, Brenner predominantly reserves for consensual depictions of territorial crimes – age-play, avataracide, or rape. Accordingly, Brenner's focus is on determining whether the territorial state should prohibit consensual behaviour based upon an assumption of systemic harm, rather than direct harm to the persons involved, or the systemic harm to the community itself.

This is somewhat symptomatic of the difficulty that we have drawing boundaries around behaviour 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 norms are enforced and community wrongs punished. When we begin to look at the enforcement of community norms, we enter a difficult territory that exists, once again, between the private and the public, and between the virtual and the physical.

In these borderlands, 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 de-legitimises 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. When we deal, then, with the issue of enforcement and punishment as it moves 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 the community.

816 Ibid 86.
817 Ibid 70-5.
3. The need for punishment beyond the internal community

Returning to the examples above, of Mr Bungel's textual rape and of the exploits of dupers in virtual worlds, leads us to the conclusion that sometimes, virtual communities will need assistance from territorial states in order to enforce their rules. This may be, as in Bungel's case, because the participant does not have significant in-world capital or is not particularly attached to their in-world identity. In this case, 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 their avatar or account can relatively trivially create a new account and start afresh every time they are caught breaking the rules. In virtual communities, there is a continual risk of recidivism with even the most severe punishments. As Dibbell pointed out in recounting the tale of Mr Bungel, 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 behaviour.\footnote{Julian Dibbell, \textit{My tiny life} (1998) 25.} There are certain structural and design choices that can limit pseudonymity, but doing so is not always desirable.\footnote{For example, one option is 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 pre-purchased game cards. See: Gyuhwan Oh & Taiyoung Ryu, “Game design on item-selling based payment model in korean online games” in \textit{Situated Play} (2007) 650, 652-3. 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.} Since 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 means that there is 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, from which there is little practical escape. Where a participant can profit enough from rule-breaking to make the loss of social connections and identity worthwhile, leaving the community is comparatively much easier, even where she is not able or willing to re-enter under a new identity.
As virtual communities strive to address these tensions, providers have turned to other legal doctrines – such as copyright law – to fulfil a punitive and deterrent function for breach of the community rules. While it may be preferable to deal with rule breakers internally within the community,\textsuperscript{821} 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. The corollary is 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. This section considers the applicability of a number of different areas of law in fulfilling a punitive and deterrence role for virtual community norms.

\textbf{a. Criminal sanctions for breach of community norms – the story of Megan Meier}

The first point that must be dealt with is the possibility of criminalising breaches of community norms as such. Criminal law is a good place to start, as it is obviously the most concerned with imposing punitive sanctions for wrongful behaviour.\textsuperscript{822} Without the guarantees of process and accountability that come with the full structure of territorial governance, however, the norms created by virtual communities do not have the requisite character of legitimacy for the imposition of criminal sanctions by the state. The brief and saddening case study of the death of Megan Meier in the case of \textit{United States v Lori Drew}\textsuperscript{823} illustrates the theoretical and practical difficulties of such a move.

Lori Drew, her daughter, and her employee created a fake MySpace account, presenting as a teenage boy, 'Josh', and befriending a thirteen year old girl, Megan Meier. Megan was a friend of Drew's daughter, and Drew created the account apparently in order to gain Megan's confidence and find out how Megan felt about Drew's daugh-


\textsuperscript{822} \textit{R v Porter} (1933) 55 CLR 182, 186 (Dixon J) (the “prime purpose [of punishment in criminal law] is to deter people from committing offences. It may be that there is an element of retribution in the criminal law, so that when people have committed offences the law considers that they merit punishment, but its prime purpose is to preserve society from the depredations of dangerous and vicious people.”)

\textsuperscript{823} \textit{United States v. Lori Drew} 259 F.R.D 449 (C.D. Cal., 2009).
ter. After flirting with Megan for over a month, 'Josh' abruptly turned against Megan, eventually telling Megan that “the world would be a better place without you.”

Megan committed suicide shortly after receiving that final message.

The case sparked public outrage in the US, and launched a widespread debate about whether new cyberbullying laws should be introduced. Drew was eventually charged under the Federal *Computer Fraud and Abuse Act* ('CFAA'), which prohibits intentionally accessing a computer without authorisation and obtaining information from a 'protected computer'. The prosecution alleged that Drew was guilty of a misdemeanour under that provision, and also of the aggravated felony offence because she intended to use the information to further the tort of intentional infliction of emotional distress. The prosecution relied on the fact that the MySpace Terms of Service prohibited harassment and abusive behaviour, false registrations, soliciting personal information from minors, and promoting information known to be false and misleading to show that Drew's access was unauthorised. In November 2008, a jury found Drew guilty of the misdemeanour charge, but acquitted her of the felony aggravated offence.

In August of 2009, the District Court acquitted Drew on the basis that intentional breach of a site's terms of service, without more, could not amount to a misdemeanour violation of the CFAA. In coming to this conclusion, the Court held that the contrary interpretation would render the criminal statute constitutionally void for being vague. The void-for-vagueness doctrine is a rule of law based constitutional doctrine that requires criminal laws to be adequately particularised. The District Court held that if the terms of service alone were conditioned as the basis of a criminal act under the CFAA, the provider would be, essentially, “the party who ultimately defines the criminal conduct.”

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826 18 USC 1030(a)(2)(C)
829 Ibid 467-8.
US v Drew highlights significant tensions in the validity and enforceability of contractual terms of service and rules of virtual communities. The case itself can probably be fairly characterised as a struggle to find any punishment that could fit the perceived – but not criminal – wrongdoing, but the method of bringing the charge threatened to support a new and undefined set of wrongs with the harsh penalties of criminal law. 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 arbitrariness in punishment and requiring a certain degree of predictability in the creation and imposition of penalties. The District Court, in acquitting Drew, recognised the dangers of criminalising the breach of internal norms, but there remains a significant question as to how internal breaches ought to be punishable.

b. 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, and punitive or exemplary damages are not available. Breaches of community rules either result in specific harm against specific individuals, or in general or assumed harm to the society at large (or, where the rules are mere technicalities, no real harm at all). Where there has been actual, specific harm, contract law is able to provide a simple and effective compensatory remedy. For example, where a participant uploads a virus or other malicious code in contravention of Facebook's rules, Facebook would have a right in contract to recover damages caused to its platform (and any liabilities it may incur to third parties as a result). A punitive remedy is not available to Facebook, but Facebook may impose internal punishments (up to and including terminating the participant's account). A

836 News Ltd v Australian Rugby Football League Ltd 64 FCR 410, 517 (FCAFC, 1996) (Lockhart, von Doussa and Sackville JJ, noting that “[t]he primary remedy for breach of contract and the tort of inducing breach of contract is damages.”).
837 Robinson v Harman (1848) 1 Exch 850, 855.
840 Provided that the loss is not too remote; the loss must be identifiable as a probable result: see Hadley v Baxendale (1854) 9 Exch 341, 354.
The enforcement of internal norms

Punitive remedy is only available if the participant's actions were criminal – which is likely in this hypothetical example, but is not necessarily applicable for many other breaches that may cause damage. Contractual compensatory damages accordingly fulfil an important role in enforcement, but cannot adequately address all the issues that arise out of breach of internal norms.

Significantly, contractual damages are not generally suited to punishing breaches – and clauses which attempt to impose penalties are generally unenforceable. Compensatory damages are especially inappropriate for the proscription of social wrongs – what Brenner calls 'soft' harms, as distinct from direct 'hard' harm to identifiable individuals. As these wrongs are often based on a presumption of harm, they do not necessarily require actual harm to be wrongful. If a participant breaches a contractual rule that prohibits only a 'soft' harm, it will be difficult to evaluate the harm caused and only nominal damages will be available. For example, where a participant breaks a rule that exists for the protection of the community at large, like a prohibition against RMT, calculating damages is much more difficult. The real money trade may place upwards 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 be prohibitively difficult, or at least extremely costly and time-consuming.

Take, for example, the claim made by Hernandez in *Hernandez v IGE*. IGE was engaged in commercial gold farming in World of Warcraft, and Hernandez sought to start a class action suit to obtain both injunctive relief and monetary compensation. Hernandez sought compensation for the lost time of WoW players who are forced to farm more as a result of the devaluation of the virtual currency and the increased

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841 See *Criminal Code 1995* (Cth) s 477.2, which prohibits unauthorised modification of data that causes harm.
842 *Legione v Hateley* 152 CLR 406, 445 (HCA, 1983) (Mason and Deane JJ, describing a penalty as "a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation").
844 Ibid 17.
845 See, for example, *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286, where only nominal damages were available for breach of a contractual term requiring advertising to be shown for a certain amount of time each day but there was no basis upon which to calculate any loss suffered.
competition for scarce resources. The monetary value of the claim was calculated in US Dollars at the rates of exchange reflected on IGE’s own website.\textsuperscript{847} It seems very strange to consider a claim in monetary damages circularly stated by a class action 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 characterised, the harm suffered by Hernandez and other players, if it is made out, cannot be the harm in 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, in order to require IGE to abide by the community rules in future, or punitive, in order to deter future similar breaches.

Contractual damages exist to put the innocent party in the same situation as if the contract had been performed.\textsuperscript{848} They will accordingly be inappropriate where the harm caused is not easily quantifiable. Even where quantifiable harm is identifiable, however, compensatory damages are unlikely 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 compensatory damages on their own are not likely to, considering the low risk of a suit being filed and maturing to trial and the non-punititive nature of any potential award.\textsuperscript{849} There is accordingly a serious tension where the standard contractual governance framework is not 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.

c. 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 head of liability –

\textsuperscript{847} Ibid amended complaint, [31].
\textsuperscript{848} Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [13], quoting with approval Parke B in Robinson v Harman [1848] EngR 135; (1848) 1 Exch 850, 855.
\textsuperscript{849} Fred von Lohmann worries 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, “Machinima: New Creativity, Old Laws” (Computer Games, Law, Regulation, Policy Symposium, Brisbane, 2008) <http://blip.tv/file/672264/> at 7 January 2010.
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often either copyright or tort. In virtual communities that require the participant to install a software client in order to access the platform, the right to install the software is usually made conditional upon acceptance of the rules in an End User Licence Agreement. This means that a proprietor may argue that accessing the virtual community in breach of the contractual rules constitutes copyright infringement.\(^\text{850}\) Suing under copyright law has a number of advantages over suing under contract. As a preliminary matter, copyright law also 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 prohibits participants from causing “distress, unwanted attention or discomfort to any user”,\(^\text{851}\) a contractual assessment may well determine that damages are not available for 'discomfort', short of any actual loss from victims who terminate their subscription.\(^\text{852}\) If, however, the prohibition can be tied to copyright infringement, the harm that will be assessed is not the harm of the abusive behaviour, but the harm of infringing Blizzard's intellectual property – and the well-known associated threat to the incentives of companies like Blizzard to invest in the creation of software and entertainment products. The same principle holds for prohibitions against RMT; Dibbell explains, of the case of Mythic v BlackSnow Interactive, where BlackSnow attempted to assert that its commercial gold farming operation in Dark Age of Camelot did not infringe Mythic's copyrights,\(^\text{853}\) that the core issue has 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 of which their subscriptions to Dark Age of Camelot made them members.\(^\text{854}\)

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850 Melissa de Zwart, “Piracy vs Control: Various Models of Virtual World Governance and their impact on Player Experience” (2009) 2(3) Journal of Virtual Worlds Research, 5 <https://journals.tdl.org/jvwr/article/viewArticle/663> at 20 October 2009 (noting that the use of copyright to back the contractual terms is an "extremely powerful mechanism").


852 Damages will not generally be available under contract law for discomfort, injured feelings, or disappointment: see Addis v Gramophone Co Ltd [1909] AC 488. Damages at contract will only generally cover financial losses: see Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1993) 176 CLR 344, 361-2 (Mason CJ); 380-4 (Deane and Dawson JJ).

853 The case never matured to trial, as Blacksnow 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 favour: see Blacksnow Interactive v. Mythic Entertainment, Inc. SA CV 02-112 GLT (ANx) (C.D. Cal., 2002).
Dibbell argues that the contractual terms of service are much less alienating than any claim based in copyright. 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 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.855

This method of casting the actions of rulebreakers as copyright infringement is not just alienating, but provides a means for the provider to avoid the compensatory function of contractual damages and impose punishments for breaches of internal norms. In jurisdictions that implement statutory damages, such as the US, the provider need not even show harm of copyright infringement, as damage awards can be calculated on a presumption of harm.856 In other jurisdictions, such as Australia, there are not likely to be significant barriers to showing that harm occurs where licensees of copyright material reproduce that material (by executing the code857) in breach of the licence conditions.858 Additionally, exemplary damages are available under copyright law where there is a need to either punish the “flagrancy of the infringement”859

855 Ibid 144.
856 17 U.S.C § 504(c).
857 Reproduction occurs when the client is installed, and every time the client is used, as the recent changes to the definition of material form mean that even temporary reproduction in RAM is an infringement of copyright if not licensed: see US Free Trade Agreement Implementation Act 2004 (Cth) Sch 9, cl 186.
858 When damages are not precisely calculable under copyright, they can be treated as being “at large”, and the award made on the Judge’s discretion of “what amount I think right as if I were a jury”: see Fenning Film Service Ltd v Wolverhampton, Walsall and District Cinemas [1914] 3 KB 1171, 1174; quoted with approval and applied in Autodesk Australia Pty Ltd v Cheung (1990) 17 IPR 69, 75 (Wilcox J). See further Brown v Mcaso Music Production Ltd [2006] FSR 24, [15], where the Court of Appeal held, in refusing grant of leave to appeal, that a figure ‘plucked out of the air’ was appropriate:

Looking at matters overall, it can be said that the judge ultimately plucked a figure out of the air, which is unsatisfactory. But in light of the conclusion the judge reached on the evidence, many judges might have been tempted to say that the claimant simply had not made out his case for any damages at all because the whole of the evidence was unsatisfactory on that issue. Tempting though it might have been for a judge to say that, that would not have been right in my view. The correct course for the judge to take was precisely that taken by [the trial judge], namely to do the best he could. In my judgment he was therefore entitled to arrive at the conclusion that he did and there is no real prospect of this court interfering[.]

859 Copyright Act 1968 (Cth) s 115(4)(b)(i).
or a need to “deter similar infringements”. 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 negligence, trespass, or nuisance claim can be made out. For example, a participant who, in breach of the rules of the community and without consent, takes another’s virtual asset could be liable for conversion or trespass to chattels, if property in the asset can be established (which is, at this stage, unlikely). Nuisance, if it could ever be extended to apply without such a close connection to real property, may similarly impose liability for exemplary damages where a person interferes with another’s enjoyment of or within a virtual community. We have not yet seen tort used as a significant head 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.

There is a significant problem with relying on copyright or tort to punish the breach of norms of virtual communities. In general, punishment and deterrence form an im-

860 Copyright Act 1968 (Cth) s 115(4)(b)(ia).
861 Whitfield v De Lauret & Co. Ltd 29 CLR 71, 81 (HCA, 1920) (Isaacs J) (“From a very early period exemplary damages have been considered by very eminent Judges to be punitive for reprehensible conduct and as a deterrent.”).
862 Constructive possession is sufficient to base an action for trespass to goods: see Hamps v Darby [1948] 2 KB 311, 322.
863 See, for example, OBG v Allan [2007] 2 WLR 920, where the House of Lords refused to extend the tort of conversion beyond chattels. Cf, however, academic suggestions that there is no theoretical basis that property rights should not be recognised in virtual assets: F. Gregory Lastowka & Dan Hunter, “The Laws of the Virtual Worlds” (2004) 92 California Law Review 1; Joshua A. T Fairfield, “Virtual Property” (2005) 85 Boston University Law Review 1047.
864 Hargrave v Goldman 110 CLR 40, 59 (HCA, 1963) (Windeyer J) quoting with approval; Percy Henry Winfield & Tom Ellis Lewis, Winfield on tort : a textbook of the law of tort (1954) 536 defining nuisance as an “unlawful interference with a person’s use or enjoyment of land, or of some right over, or in connexion with it”.
portant part of western law. Where someone wilfully injures another, infringes another's intellectual property or commits a crime, we often expect not only compensatory remedies, but punitive ones. It is no answer in any of these cases to say that the act was unimportant because it was mediated through a virtual community. It may be an answer, in some cases, to say that no wrong was committed because all participants involved consented, in a general way, to the possibility that such behaviour would occur, but where recognised wrongs are committed outside of the bounds of reasonable consent, we expect that the law will provide an adequate remedy.

Nevertheless, we are rightly wary about the imposition of penalties. We are hesitant to allow private parties to punish other private parties, and do not allow punitive damages at contract law. We have high standards for the way in which criminal laws are created and enforced. The need to regulate punishment and avoid arbitrary or unpredictable sanctions underpins much of rule of law theory. We have seen how this applies to criminal law, and 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 under the CFAA. This would risk a dangerous assertion – that otherwise non-criminal acts, if done in violation of the terms of service, could attract 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.

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867 Exemplary damages in tort are available where the defendant has acted in contumelious disregard of the plaintiff's right, partly as a punitive measure, and partly for the deterrent effect: see Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; see further Lamb v Cotogno (1987) 164 CLR 1.

868 Exemplary damages are available under copyright having regard to the flagrancy of the infringement, the need to deter similar infringements, the conduct of the defendant, the benefit the defendant has accrued, and any other relevant matters: Copyright Act 1968 (Cth) s 115(4).

869 See Butler v Fairclough (1917) 23 CLR 78, 89 (Griffith CJ):

A breach of contract may be innocent, even accidental or unconscious. Or it may arise from a wrong view of the obligations created by the contract. Or it may be wilful, and even malicious, and committed with the express intention of injuring the other party. But the measure of damages is not affected by any such considerations. A statement of claim which alleged that the defendant wilfully or maliciously or fraudulently committed a breach of contract would not gain any additional effect from the vituperative epithets, which would, indeed, be as irrelevant to the case as the ancient averment that a person accused of an offence acted at the instigation of the devil.


There is also a fundamental issue of proportionality as the punishment (which was designed for computer fraud) bears almost no relation to the act, whose seriousness obviously varies greatly depending upon context.\footnote{872}{See T. R. S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001) 138.}

These rule of law limitations also apply, with slightly lesser force, to civil law actions that are essentially punitive in effect. While these actions do not result in incarceration, where the cost on the participant is significantly higher than the damage caused, there is still a very real punitive effect. Attorney-fee clauses,\footnote{873}{See Fred von Lohmann, “Machinima: New Creativity, Old Laws” (Computer Games, Law, Regulation, Policy Symposium, Brisbane, 2008) <http://blip.tv/file/672264/> at 7 January 2010.} statutory damages in copyright, and exemplary damages in copyright or 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 on the basis that 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 to be available in these actions where the 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 the game in breach of 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 is rather that citizens ought not to be punishable 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 is not only alienating, but places the full support of state copyright law behind the relatively arbitrary rules created by the provider. From a rule of law 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 in the making and enforcement of 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.

d. The interplay between contract and property, tort, and copyright

The proposition that contractual clauses should be characterised in this way reflects the distinction that has arisen at common law between terms that are merely contractual in nature and terms that condition the exercise of the underlying property rights. Under trespass to real property, if a licence grant is limited in scope, an entry that is unrelated to the authority will amount to a trespass. The issue becomes more difficult where a person enters onto land for both a legitimate purpose and an illegitimate one, in which case no trespass will have been committed. After a somewhat confusing flirtation with trespass to real property, US Courts appear to have reached the conclusion that any trespass action to networked assets must be based in trespass to chattels, but the underlying distinction between contractual and property remedies remains valid. A contractual rule that establishes a norm for behaviour in a virtual community will not always limit the scope of authority to connect, and, if it does, in many cases participants who break the rule will also be connecting for legitimate purposes, which would seem to mean that the appropriate remedy in many cases will be one under contract rather than trespass.

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874 Barker v The Queen (1983) 153 CLR 338, 342 (Mason J): “If the right or authority to enter is limited in scope then an entry which is unrelated to the right or authority will amount to a trespass. Thus a person who has an invitation or permission to enter the land of another for a specific purpose commits a trespass if he enters for any other purpose, especially if that other purpose be an unlawful purpose. For good reason he stands in no better position than the person who enters without any permission at all.”.

875 Healing (Sales) Pty Ltd v Inglis Electrix Pty Ltd (1968) 121 CLR 584.

A similar principle is applied under copyright, and courts attempt to differentiate between contractual terms that condition the licence grant, and those that are purely contractual in nature. A key case is *Sun v Microsoft (No 1)*, where the Ninth Circuit held that

Generally, 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.\(^\text{877}\)

The Ninth Circuit explained that a breach of a contractual copyright licence would only be a copyright infringement if the relevant “terms are limitations on the scope of the license rather than independent contractual covenants”.\(^\text{878}\) Determining the tension between contract and copyright is to be resolved not only by characterising the contractual clause but by characterising the underlying rights and identifying copyright infringement; in essence, the copyright owner is required to show that “the rights it claims were violated are copyright, not contractual, rights.”\(^\text{879}\)

This issue was recently considered in *Jacobsen v Katzer*, where the Federal Circuit Court of Appeals held that copying of software in breach of the terms of the Artistic free software licence amounted to an infringement of copyright, not a contractual breach.\(^\text{880}\) In coming to this conclusion, the Court held that the restrictions in the Artistic licence were conditions on the grant of the copyright licence, rather than mere contractual covenants.\(^\text{881}\) A large part of the Federal Circuit's reasoning appeared to turn on how strongly the relevant limitations were related to the underlying copyright interests:

The clear language of the Artistic License creates conditions to protect the economic rights at issue in the granting of a public license. These conditions govern the rights to modify and distribute the computer programs and files included in the downloadable software package. The attribution and modification transparency requirements directly serve to drive traffic to the open source incubation page and to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce. Through this controlled spread of information, the copyright holder gains creative collaborators to the open source project; by requiring that changes made by downstream users be visible to the copyright holder and others, the copyright

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877  *Sun Microsystems, Inc. v. Microsoft Corp.* 188 F.3d 1115, 1121 (9th Cir., 1999).
878  Ibid 1122.
879  Ibid 1122.
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holder learns about the uses for his software and gains others' knowledge that can be used to advance future software releases.\textsuperscript{882}

This distinction is interesting because it seems to specifically tie copyright remedies to the protection of copyright interests. The copyright owner in this case sought to condition the copying and modification (both exclusive copyright rights) of the software by requiring attribution and transparency, which 'directly' contribute to the 'significant economic goal' of the copyright owner in gaining collaborators and advancing future software releases. This distinction seems to accord with our normative framework to the extent that it recognises that breaking internal norms will generally be treated as contractual breaches rather than copyright infringements, and that copyright remedies will only lie to protect copyright interests.

The authority in \textit{Sun v Microsoft} was considered specifically in relation to rules of virtual communities by the US District Court in \textit{Blizzard v MDY}.\textsuperscript{883} In that case, the Court had to consider whether the contractual rules that prohibited the use of Glider, an automation bot, were “limitations on the scope of the license, which would mean that [the users] had infringed the copyright by acting outside the scope of the license; or whether the terms [are] merely separate contractual covenants, which would make this a contract dispute[.]”\textsuperscript{884} Relying on \textit{Sun v Microsoft}, the court differentiated between terms in the ToS that were “designed to preserve and protect Blizzard's proprietary interests in its software and game, including its copyright interests”\textsuperscript{885} and those terms that were merely “Rules of Conduct”. Because the prohibition on intercepting, emulating, or modifying the game were related to the copyright in the game, they were more appropriately construed as limitations on the licence grant, which meant that players who used Glider infringed Blizzard's copyright.\textsuperscript{886} In coming to this conclusion, the Court found that the other rules relating to game play, chat, and character names, by contrast, set the “rules of the game as independent contract terms.”\textsuperscript{887}

While the ratio of this case seems to accord with our normative framework, the par-

\textsuperscript{882} Jacobsen v. Katzer 535 F.3d 1373, 1382 (Fed. Cir., 2009).
\textsuperscript{884} MDY Indus., LLC v. Blizzard Entm't, Inc. U.S. Dist. LEXIS 53988, 14-15 (D. Ariz., 2008); quoting Sun Microsystems, Inc. v. Microsoft Corp. 188 F.3d 1115, 1119 (9th Cir., 1999).
\textsuperscript{885} MDY Indus., LLC v. Blizzard Entm't, Inc. U.S. Dist. LEXIS 53988, 16 (D. Ariz., 2008).
\textsuperscript{886} Ibid 17.
\textsuperscript{887} MDY Indus., LLC v. Blizzard Entm't, Inc. U.S. Dist. LEXIS 53988, 18 (D. Ariz., 2008); following Sun Microsystems, Inc. v. Microsoft Corp. 188 F.3d 1115, 1121 (9th Cir., 1999).
ticular finding, that a prohibition against running a program like Glider was “de-
dsigned to preserve and protect Blizzard's proprietary interests”, 888 seems somewhat
more difficult to justify. The District Court's reasoning appears to have been based
primarily on the fact that botting was characterised as a copyright infringement, with
the judge holding that the clause that prohibits the use of “[cheats, bots, "mods",
and/or hacks, or any]” 889 third-party software designed to modify the [WoW] experi-
ence” 890 was of the same class of copyright limitations as rules that prohibit “copy-
ing, distributing, or modifying the work.” 891 This finding, however, conflates copy-
right issues with gameplay rules, and, with respect, seems incorrect to the extent that
modifying the gameplay 'experience' is not the same as modifying the software itself.
Unlike the facts in Jacobsen, the copyright interests here, if they exist, are only sub-
sidiary to the gameplay interests and their infringement is much less 'direct'. 892 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 norms
against automation and cheating. The arguments made 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 pay-
ers 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 as-
sets - sometimes referred to as "mining" or "farming" the game - with some users even selling
those assets for real money in online auction sites, an activity expressly prohibited by the TOU. 893

The harm that Blizzard are trying to address here is not the harm to copyright inter-
esths 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 pro-
grams, which Blizzard explicitly supports through an open interface. 894 The core

889 The full clause, as at 09 December 2007, can be seen at “Blizzard World Of Warcraft Terms Of Use
2010.
891 Ibid 17 (“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.”).
The need for punishment beyond the internal community

problem with Glider is that it helps people cheat and upsets the game balance. This is, properly construed, the harm of breaching internal norms, not the harm of copyright infringement.

Setting aside the particular findings of facts in Blizzard v MDY, the generalisable principle drawn from Sun v Microsoft\textsuperscript{895} seems sound. Copyright remedies ought to be reserved for actions that threaten copyright interests, and should not be available to circumvent the requirement to show harm under contract. Requiring harm to be shown and limiting remedies to compensatory damages under contract ensures that the state does not back potentially illegitimate internal norms with significant punishments.

e. The need for an alternative approach

While focusing on legitimacy requires us to avoid punishing breaches of internal norms, there remains a conceptual gap in contractual governance where wrongs are not able to be punished. If only compensatory remedies are available for breaches of virtual community rules, there will be little legal deterrent to their breach. If internal punishments prove ineffective, we could expect a breakdown in the social order as participants have an incentive to act opportunistically and break the rules where to do so would be profitable. 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.\textsuperscript{896}

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 or not it is efficient to do so.\textsuperscript{897} Hart in particular has argued that for law to be valid, it must be generally regarded as morally binding by the community;\textsuperscript{898} a model that encourages opportunist-

\textsuperscript{895} Sun Microsystems, Inc. v. Microsoft Corp. 188 F.3d 1115, 1121 (9th Cir., 1999).

\textsuperscript{896} See Oliver Wendell Holmes, The common law (2004) 301: "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." The High Court has recently rejected the suggestion that there is a principle of efficient breach in Australian contract law, holding that in cases which did not concern the sale of marketable commodities, "diminution in value damages will not restore the innocent party to the "same situation ... as if the contract had been performed"." (Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [13], quoting with approval Parke B in Robinson v Harman [1848] EngR 135; (1848) 1 Exch 850, 855.)

\textsuperscript{897} There may be a separate argument that societies ought not create inefficient rules in order to maximise total welfare, but efficiency is not the sole measure of desirability in any but the most extreme of libertarian ideal societies.
ic breach is unlikely to engender internal support for community norms. Even viewing the community from an external perspective and ignoring the morality of the rules suggests that punishments may be necessary in order to deter wrongdoing, and deterring wrongdoing is assumedly necessary in order 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. The resolution of this conflict seems inescapably difficult. This tension raises a significant question as to whether or not the territorial state ought to aide 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 norms 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 autonomy that makes these communities attractive in the first place.\textsuperscript{899} 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.

4. **Empowering community governance**

It seems clear that the contractual framework provides a more appropriate model for enforcing community norms vertically between participants and providers than does criminal law or other private law doctrines. It seems equally clear, however, that the compensatory remedies available under contract are not sufficient to properly address the difficulties enforcing the rules against participants for whom internal punishment is ineffective. If contractual doctrine is to be used to resolve these tensions, some further development will be required to enable it to do so.

Empowering community governance

Many of the scenarios in which external enforcement seems necessary can be thought of as cases of internal governance failure. Internal sanctions fail because there are participants who are technically subject to the rules of the community 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. The key to enforcing the rules in these circumstances is not for territorial states to directly punish breaches, but to empower communities to ensure that that legitimate internal governance mechanisms can be effective. By providing appropriate restitutive and equitable relief for breach of community norms, states can provide the support that internal governance procedures need to flourish without sacrificing the legitimacy of state law.

a. Restitutionary damages

I noted above that compensatory damages are unlikely to provide an adequate remedy in cases where participants are able to cash out of the community after breaching a rule that proscribes a soft harm, where loss is not easily quantifiable. In these circumstances, a claim based in restitution would seem to provide a much more appropriate remedy than damages because it focuses on the unjustness of the benefit received, rather than the loss sustained. For example, exploiting a bug to duplicate currency or items may look like criminal counterfeiting, but assuming that it is not, it is difficult to identify the harm under compensatory contractual damages. 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.

900 Hill v Von Erp (1997) 188 CLR 159, 226-7 (Gummow J) ("much restitutionary theory is concerned with restoration of benefits subtracted from the wealth of the plaintiff rather than with provision of a means of fulfilling expectations.")

This argument is even stronger when we consider its application to a legitimate ban against RMT. If a ban against RMT is to be enforced, compensatory damages cannot conceptually be used to do so — the strongest argument that can be made against RMT is that the community as a whole believes that the internal economy should not have monetary value, so a compensatory award must be counter-intuitive. Put simply, the trading of virtual assets for corporeal currency does not devalue the internal economy, because the argument is that the internal currency should have no external value. RMT may cause harm, but it is harm to the social fabric, and not harm that can be measured in any monetary terms. Again, here, to the extent that the Hernandez v IGE suit was based upon a monetary remedy, it can only really be understood as a claim that it would be unjust to allow IGE to profit from the breach of legitimate community rules.

In these circumstances, compensatory damages under contract are likely to be nominal only, as loss will not be able to be shown. As Peter Birks has argued, the inability of the law to properly address the benefit gained in the face of an explicit promise not to do so “raises some worrying questions about the capacity of our law of contract to deal with certain kinds of breach.” Birks argues that “[t]he real cause for concern in these cases is not the inadequacy of the remedy in the particular case but the general tendency of that inadequacy to encourage the kind of [opportunistic] calculation” by defendants. The rule of law framework supports Birks’ claim when transposed to virtual communities – not only should we expect that the legitimate rules of virtual communities are morally binding and that opportunistic profiting from their breach ought to be restrained, but such behaviour should also be restrained to promote the integrity of the rules and deter future breaches. In these situations, if the rule is to be enforced, a restitutionary remedy fits much better: the provider or the class of injured participants may be able to recover the profits made by the rulebreaker without showing quantifiable loss, if they can show that the rulebreaker was unjustly enriched at their expense.

Current contractual doctrine does not support restitution for a wrong committed under a contract. The actions of a rulebreaker in these situations would not fall within

903 Ibid 519.
904 While the enrichment must be at the expense of the plaintiff, there is no requirement to show any loss suffered: Commr of State Revenue (Vic) v Royal Insurance Australia Ltd (1994) 182 CLR 51, 75 (Mason CJ); 90 (Brennan J; Toohey and McHugh JJ agreeing); 101 (Dawson J)).
the primary sense of unjust enrichment which would give rise to an obligation of restitution;\(^{905}\) it can only give rise to a claim if it is wrongful for some reason, not because it is an unjust subtraction from the plaintiff.\(^{906}\) Restitution for wrongs, however, does not generally extend to breach of contract; to the extent that activity like duping is prohibited under the contractual terms of service, the usual remedy is compensatory damages, and restitutiorary damages are not available.\(^{907}\) There is authority in the UK that restitutionary damages may be available in exceptional cases if the benefit is obtained in breach of a promise not to do so,\(^{908}\) but this is not currently the law in Australia.\(^{909}\) The specific point raised by the House of Lords has not yet been considered by the High Court, although there have been tentative suggestions that restitutionary remedies may be available for breach of contract in certain narrow circumstances.\(^{910}\)

By contrast, restitution will be available in response to a tortious act not covered by the contract,\(^{911}\) if one can be identified, but courts may not yet be ready to accept that breach of internal community norms is sufficient to give rise to a restitutionary claim.

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906 In his final book, Birks notes that the 'wrong' sense of 'at the expense of' (restitution for wrongs) "is also the wrong sense in that it cannot be admitted to the law of unjust enrichment. [...] Where a claimant identifies himself as the victim of a wrong he is relying on that wrong and, albeit in the language of unjust enrichment, asking the court whether that wrong is one which yields a right to a gain-based award. The law of unjust enrichment cannot answer that question." See Peter Birks, *Unjust Enrichment* (2nd ed ed. 2005) 74.

907 Tito v Waddell [No 2] [1977] Ch 106, 332 (Megarry V-C) ("[I]t is fundamental to all questions of damages that they are to compensate the plaintiff for his loss or injury by putting him as nearly as possible in the same position as he would have been in had he not suffered the wrong. The question is not one of making the defendant disgorge what he has saved by committing the wrong, but one of compensating the plaintiff."); *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 118 (Deane J, dissenting) ("a constructive trust may be imposed as the appropriate form of equitable relief in circumstances where a person could not in good conscience retain for himself a benefit, or the proceeds of a benefit, which he has appropriated to himself in breach of his contractual or other legal or equitable obligations to another.").

908 *Attorney General v Blake* [1998] Ch 439, 458 (Lord Woolf MR for the Court, obiter); quoting Peter Birks, "Restitutionary Damages for Breach of Contract: Snepp and the Fusion of Law and Equity" (1987) 1987 Lloyd's Maritime and Commercial Law Quarterly 421, 434; see further *Attorney-General v Blake* (2001) 1 AC 268, 284-5 (Lord Nicholls) ("When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract. In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract.").


910 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 124-5 (Deane J); *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 146-7 (Deane J); 174-6 (Gaudron J).

911 See, for example, *Bilambil-Terranora Pty Ltd v Tweed SC* [1980] 1 NSWR 465 (restitutionary conversion damages, calculated at market value less the costs of sale, were available to recover proceeds of the sale of gravel from land, even where the plaintiffs had no intention of mining the gravel themselves.)
for unjust enrichment. Such a move would likely require recognition of some form of property interest in virtual assets in order to found a claim of conversion; because conversion is currently limited to corporeal property,\textsuperscript{912} this is an unlikely avenue, at least for the near future. Restitution could always develop to cover losses in its autonomous unjust enrichment sense, but in this case, a subtraction of value from the plaintiff will need to be shown.\textsuperscript{913} This may prove useful for the ability of participants to recover the theft of virtual assets if neither trespass nor conversion will recognise them as personal property, but is not likely to be useful in the cases described here, where no subtractive harm can be identified.

It appears that courts at this stage will be unlikely to remove the benefit received by a participant in breach of the rules of the community unless the benefit can be categorised as a loss to either the provider or a participant. If criminal law is inapplicable and compensatory contractual damages are only nominal, there will be little scope for a provider to legally prevent or deter a participant from profiting in breach of the rules of the community and quickly cashing out. While this has not yet proven to be a significant issue, our rule of law analysis suggests that the demands of integrity in community rules may be more important in the future. As these cases become more prominent, a restitutionary remedy for breach of community norms (and express contractual terms) may have to be further developed to address this gap.

\section*{b. Specific performance and injunctive relief}
In many cases where either a participant or a provider is seeking to enforce the internal rules of a virtual community, the appropriate remedy will not be compensatory damages but equitable relief. Empowering a community to enforce its rules against participants who are not deterred by internal punishments is likely best achieved not by providing ex post external sanctions for breach, but by imposing limits on the ability of participants to avoid internal punishments. So, for example, where a provider is unable to effectively terminate access to a particular person or group of people because they continue to create pseudonymous new accounts, a territorial state may grant an injunction to prevent the rule-breakers from doing so. Alternat-
ively, where a provider has wrongfully terminated the account of a participant, a
court may order the provider to perform its obligations under the contract by restor-
ing the participant's account and virtual assets.\footnote{Specific performance here is used in the broad sense of an order requirement performance of a party's obligations under an executed contract, rather than the strict sense of an order "to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended" (\textit{J C Williamson Ltd v Lukey} (1931) 45 CLR 282, 297 (Dixon J); see also \textit{Australian Hardwoods Pty Ltd v Comr for Railways} [1961] 1 WLR 425, 434 (Privy Council)).} We saw above that purely compens-
atory approaches would be likely to be ineffective in these circumstances, and that
punitive measures would be inappropriate. Equitable remedies accordingly provide
an attractive means to empower community governance and avoid situations of gov-
ernance failure whilst remaining within the contractual framework.

The equitable remedies of specific performance and injunctive relief are available
under contract law when damages are not an appropriate remedy.\footnote{\textit{Wilson v Northampton & Banbury Junction Railway Co} (1874) LR 9 Ch App 279, 284 (Lord Selborne LC).} As we have seen, in many cases, unless some specific harm has been caused, breach of the community rules will often not be able to be adequately compensated by a monetary award. Ob-
viously, where a participant causes actual loss, for example by harming the servers or
network infrastructure, compensatory damages will be appropriate. In many other
cases, however, where the provider would bring an action, the real goal is to maintain
the integrity of the community and enforce the rules against a participant for whom
internal sanctions are ineffective. These are the soft harms that Brenner identifies\footnote{Susan W Brenner, “Fantasy Crime: The Role of Criminal Law in Virtual Worlds” (2008) 11 \textit{Vanderbilt Journal of Entertainment and Technology Law} 1, 17.} –
where rule-breakers cause damage to the fabric of the community in general, but not
specific losses to identifiable people. In these situations, damages are not really an
appropriate remedy; some form of deterrence is required, but external sanctions are
undesirable, so the imposition of internal sanctions ought to be supported.

i. **Specific performance and compensation to participants**

The equitable remedy of specific performance is likely to be much more appropriate
than damages in enforcing community norms against providers. Fairfield proposes a
hypothetical example, where a corporate participant like IBM has their access to
propriate 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 loss of goodwill and future marketing potential in addition to the lost investment in developing the virtual space.

This argument does not apply only to corporate participants; whenever a participant seeks to enforce the community rules against the provider, she will often seek to require compliance, rather than 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. 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 – approximately $15 per month. 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. The High Court recently reaffirmed that the ruling principle of damages at contract law is that "where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." The High Court emphasised and approved the clarification "that the words "the same situation, with respect to damages, as if the contract had been performed" do not mean "as good a financial position as if the contract had been performed".

Accordingly, the High Court held that while in some circumstances (particularly in cases concerning the sale of fungible goods) "putting the innocent party into "the same situation ... as if the contract had been performed" will coincide with placing

918 Andrew Jankowich, “EULAw: The Complex Web of Corporate Rule-Making in Virtual Worlds” (2006) 8 Tulane Journal of Technology and Intellectual Property 1, 51-2, Annex A 59 and 73 (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.).
920 T. L Taylor, Play Between Worlds: Exploring Online Games Culture (2006) 135 ("The common framing of games as "simply entertainment" often obscures the way they act as key cultural sites in which forgoing participation may have real costs.").
921 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [13], quoting with approval Parke B in Robinson v Harman [1848] EngR 135; (1848) 1 Exch 850, 855.
922 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [13], quoting Oliver J in Radford v De Froberville [1977] 1 WLR 1262, 1273 (emphasis added by the High Court).
the party into the same financial situation”, in other cases, damages calculated by the difference in value will not adequately compensate the innocent party. The High Court concluded that the appropriate measure of damages was the cost of rectification, not the loss in market value. In coming to this conclusion, the High Court stressed the importance of the plaintiff's shock and dismay at the defendant's breach, the “disappointment of the plaintiff's hopes and expectations from the contract”, and the inappropriateness of mere compensation for diminution of value to place the plaintiff in the same position as if the contract had been performed.

The High Court's reasoning highlights the difficulty of attempting to award compensatory damages for the termination of a participant's account. If a participant's access to a virtual community has been wrongfully terminated, a pro rata refund of the unused portion of her subscription fees is unlikely to return her to “the same situation, with respect to damages, as if the contract had been performed.” This poses some difficulty for the contractual framework, because a participant's loss of community and personal connection to her virtual assets is not easily recognised or quantified (though the market value of the assets may be). In the case above, the High Court was able to award significantly higher rectification damages rather than loss of value damages. In a virtual community example, however, rectification can only ever really be at the hands of the provider, so any damages award is likely to prove inappropriate; it will be difficult for any monetary sum to restore to the plaintiff the value of her social connections and personal identification with her avatar and virtual assets.

Even assuming that an adequate valuation can be reached and monetary compensation paid, a damages award seems largely inappropriate for the type of loss suffered. An award of damages in these circumstances would attempt to compensate personal losses with a purely financial remedy, allowing the provider to terminate a parti-

923 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [13].
924 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [15].
925 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [2].
926 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [14] (rejecting the suggestion that in this case, “the disappointment of the plaintiff's hopes and expectations from the contract becomes a relevant consideration only so far as it is measurable either by some deterioration of the plaintiff's financial situation or by some failure to obtain an amelioration of his financial situation.” (quoting Oliver J in Radford v De Froberville [1977] 1 WLR 1262, 1273).
927 Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8, [20].
928 Robinson v Harman (1848) 1 Exch 850, 855 (Parke B).
929 The difficulty of assessing damages in itself does not prevent recovery; Fink v Fink (1946) 74 CLR 127, 143. Whether damages can be recovered will depend on the remoteness of damage — whether the loss suffered was such that could be contemplated as a probable result (Hadley v Baxendale (1854) 9 Exch 341, 354); and whether the extent of the injury is of a type that the parties contemplate may occur (H Parsons (Livestock) Ltd v Uttley Ingham & Co [1978] QB 791).
cipient's account at will if only it is willing to pay monetary compensation. The argument here is that participation in a virtual community is sufficiently important to warrant property rule protection, rather than being subject to a type of private eminent domain supported by compensatory liability rule protection. Given that I have argued that participation in virtual communities is often much more important to the participant than a purely fungible consumer transaction, an award of specific performance will be likely to be much more appropriate than an award of damages in such situations.

The major doctrinal stumbling block to the award of specific performance lies in the limited conception of specific performance “in the proper sense”, which requires the “execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties rights are settled and defined in the manner intended.” Traditionally, courts have been reluctant to order specific performance in the broader sense of enforcing the obligations under a contract, particularly where it would require the defendant to carry on a business or would otherwise require indefinite supervision by the court. Under modern doctrine, however, the scope of the jurisdiction to order specific performance has been somewhat enlarged, and there is no longer such a restriction against issuing specific performance in ongoing agreements.

Specific performance will only be awarded where damages are an inadequate remedy. The issuance of the remedy remains discretionary, however, and courts will take into account a range of factors before making any order for specific performance. Particularly for our discussion, 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

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931 J C Williamson Ltd v Lukey and Mulholland (1931) 45 CLR 282, 297 (Dixon J).

932 Ibid 298 (Dixon J).

933 Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1, 12-14 (Hoffmann LJ, Browne-Wilkinson and Slynn LJ agreeing); Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (1998) 195 CLR 1, 46-7 (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ); See further J W Carter, Carter on Contract [45-020].

934 Trident General Insurance Co Ltd v McNiece Bros Pty Ltd (1988) 165 CLR 107, 119-20 (Mason CJ and Wilson J); 138 (Brennan J); 173 (Gaudron J).
look to the seriousness of the breach and whether the plaintiff's conduct would render specific performance inequitable. If the contract has been legitimately terminated, specific performance will generally not be available, so any claim must first proceed on the basis that the purported termination ought to be ineffective. More problematically, specific performance may not be available where there is no guarantee of the plaintiff's performance, as it would be unfair to bind the defendant but leave it only a remedy in damages should the plaintiff not complete the transaction.

While there may be a perceived lack of mutuality because a court could never force a participant to remain active in a virtual community, the loss to the provider if the participant breaches the agreement after it has been specifically enforced would probably not be significant enough on its own to warrant a refusal to grant the remedy.

The remedy of specific performance has traditionally been used predominantly in contracts for the sale of land, but it would certainly seem possible to enforce a provider's obligations under a virtual community contract, particularly 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. Specific performance is accordingly unlikely to be available to prevent a provider from terminating a virtual community in its entirety, but may be available to require a provider to reinstate access to a particular participant. Whether the remedy is likely to be available will depend greatly upon whether the court is willing to accept an argument that monetary damages alone cannot put the participant “in the same situation […] as if the contract had been performed.” If damages can be shown to be inadequate — primarily, because of the personal relationship that a participant has to her social relations, virtual identity, and assets within the community — then specific performance may be available, as long as there are no discretionary factors that weigh against the grant of relief. 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 much more appropriate remedy

937 Australian Hardwoods Pty Ltd v Comr for Railways (1961) 1 WLR 425.
938 J C Williamson Ltd v Lukey and Mulholland (1931) 45 CLR 282, 298 (Dixon J).
939 cf Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Virginia Law Review 2043, 2071 (discussing the idea of a bankruptcy trustee taking over a game as "direct result of designing the game to allow real-world commodification and propertization.").
940 Robinson v Harman (1848) 1 Exch 850, 855 (Parke B).
than damages in many situations where a participant's access has been unlawfully terminated.

ii. **Injunctive relief**

Where supporting community governance requires an order not that the contractual obligations be performed but that either a participant or provider be restrained from breaching her obligations, injunctive relief may be appropriate. A useful example can be found in the case of *Blizzard v In Game Dollar*, which concerned 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, the operator of peons4hire.com, for advertising gold sales and power-leveling services.\(^{941}\) Blizzard regularly enforces a rule against advertising commercial services within the community, and routinely suspends and bans those advertisers that it identifies. Blizzard alleged that In Game Dollar, however, would apparently continuously create new accounts and evade Blizzard's attempts to prevent them from advertising.\(^{942}\) Frustrated, Blizzard filed suit in California, where both it and IGD are based, and asked the District Court to grant an injunction to prevent IGD from accessing the community. 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 are disrupted by spam, and the “performance of the game is degraded because of the vast quantities of messages” sent by the defendants.\(^{943}\) Blizzard then alleged that 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.”\(^{944}\) 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 Defendant's onslaught of spam messages.”\(^{945}\)

Blizzard alleged that in sending spam messages, In Game Dollar violated computer

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942 Ibid [29].

943 Ibid [30].

944 Complaint, Ibid [31].

945 Ibid [29].
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fraud statutes,\footnote{Computer Fraud and Abuse Act 18 USC §§ 1030(a)(5)(A)(i) and (ii); and the California Computer Data Access and Fraud Act, Cal Penal Code § 502} committed the torts of intentional interference with contract and trespass to chattels, were unjustly enriched, and engaged in unfair competition.\footnote{Cal Bus & Prof Code §§ 17200 et seq.} 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. The suit settled before it proceeded to trial. In a consent order, Blizzard was granted a permanent injunction that would prevent In Game Dollar from advertising any business in WoW and selling virtual assets or power levelling services.\footnote{Consent order, Blizzard Entm't, Inc. v. In Game Dollar, LLC (2008) No. SACV07-0589 <http://virtuallyblind.com/files/Peons_Injunction.pdf> at 18 October 2009.}

Under contract law, an injunction is sometimes available to restrain a breach of contract where the contractual term in question is negative in character.\footnote{Dalgety Wine Estates Pty Ltd v Rizzon (1979) 141 CLR 552, 573 (Mason J).} As an equitable remedy, an injunction will only be issued where it is equitable in all the circumstances to do so.\footnote{Blomley v Ryan (1956) 99 CLR 362, 401–402 (Fullagar J) (“Equity traditionally looked at the matter […] from the point of view of the party seeking to enforce the contract and was minded to enquire whether, having regard to all the circumstances, it was consistent with equity and good conscience that he should be allowed to enforce it.”).} Unlike specific performance, the grant of an injunction is not as strongly linked to the inadequacy of damages, but the question remains important. An injunction will accordingly usually be available where it is not “just, in all the circumstances, that a plaintiff should be confined to [a] remedy in damages”.\footnote{Evans Marshall & Co Ltd v Bertola SA (1973) 1 All ER 992, 1005; adopted in Sanderson Motors (Sales) Pty Ltd v Yorkstar Motors Pty Ltd (1983) 1 NSWLR 513, 516.}

The suit in Blizzard v 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. This case appears to provide a good example of the difficulty of enforcing community rules when the participant can internalise the costs of having its accounts terminated when it is caught; properly conceptualised, the greatest harm is the threat to the integrity of the community rules, which a compensatory monetary award is unlikely to properly address. In such circumstances, it may be that the interests of
equity favour issuing an injunction to empower community governance practices.

Where a provider's self-help remedy is not sufficient to keep out unwanted participants, Epstein argues that a court should almost never deny an injunction to support the provider's control over its platform. In the context of the Intel v Hamidi 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.” In Epstein's construction, providers in Blizzard's position have one of three options: they can ignore the harm caused by the unwelcome user; they can seek to deal with the user themselves; or they can ask the state to help. The first option is unattractive, as it results in unwelcome intrusions on the provider's domain, potentially damaging the community. The second option is also unattractive, because it results in an “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. It follows, for Epstein, that the state ought to help the provider, and should enjoin the intruder from accessing the service.

Lastowka, on the other hand, is not convinced, and argues that a compensatory remedy only 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. Lastowka warns that asking territorial states to intervene involves a difficult determination:

if 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.

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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 these circumstances, Blizzard ought to be able to prevent IGD from repeatedly breaching its rules, and that the territorial state should support this by granting an injunction. There is a crucial danger, however, of extrapolating from this the proposition that providers ought always be able to obtain injunctive relief 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.”

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. Lastowka makes this argument in the context of the potential development of cyberproperty rights in *Intel v Hamidi*, where Intel operate a publicly available internet server to which Hamidi and any other member of the public may connect in order to send messages to Intel employees. 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 centre around openness of internet protocols and network neutrality. 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 obviously also reinforces the provider's position. It follows that the only desirable alternative is for territorial states to attempt to determine when self-help is legitimate and permissible, when it should

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959 Ibid 66.
960 Ibid 66.
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, 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. There is little direct harm to the infrastructure of the community, as the messages are likely to form only an insignificant proportion of the traffic that passes over the network. There are some 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 be direct revenue costs to the provider from lost subscriptions as frustrated participants terminate their own accounts. Finally, there may be costs to the community as a whole, as commercial communications are seen to deteriorate the purity of the community fiction and general respect for the community rules. Whether these costs, in 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. To use a different example, consider the communications made by Peter Ludlow criticising Electronic Arts' governance of *The Sims Online*. This is a case somewhat similar to that of *Intel v Hamidi*, where Hamidi was sending messages critical of Intel to Intel's employees, except that unlike in *Hamidi*, Ludlow's messages are directed not at employees but customers, parti-

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962 The decision in *Intel v Hamidi* found that the spam messages were only a tiny fraction of total network traffic, and thus no harm could be found. See: *Intel Corp. v. Hamidi* (2003) 30 Cal. 4th 1342, 1356.


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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 recognisable within a constitutional framework that predominantly privileges only public speech. If 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 (or a mandatory injunction requiring EA to reinstate his account), there are difficult questions of what the interests of justice will 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. Viewing the exercise of equitable discretion in terms of a rule of law framework is useful to help us conceptualise 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. Grimmelmann has pointed out that the best arguments for supporting community rules will be made from the perspective of legitimacy and community values, 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 norms of their choosing. In order to do so, the community must

965 See Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Virginia Law Review 2043, 2074-5 (“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.”).


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.  

We have seen that if states simply enforce the contractual rules as written, without regard to community norms, they will be unlikely to provide desirable outcomes. 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 benefit 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 cost 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.  

We should be very sensitive to the legitimising power of the state in making an injunctive remedy available, and ensure, as best as possible, that the external enforcement of internal norms does not support illegitimate governance. The argument here is not as strong as that against criminal sanctions or civil punishments as, although injunctive relief is backed by the court's criminal powers, they attach to future ac-

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969 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 deligitimised the role of the state in cyberspace self-governance, internal governance arrangements depend and structure themselves upon territorial regimes of property and contract. See Margaret Jane Radin & R. Polk Wagner, “The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace” (1997) 73 Chicago-Kent Law Review 1295, 1296-7; see also James Grimmelmann, “Virtual borders: The interdependence of real and virtual worlds” (2006) 11(2-6) First Monday (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).

tions, not past breaches. Because granting injunctive relief does not punish past behav-
ior, there are less concerns about the legitimacy of enforcing community rules in
general, although we ought nevertheless be careful to distinguish between legitimate
and illegitimate rules in particular cases in the exercise of the equitable jurisdiction.

The rule of law analysis suggests that legitimately created internal norms ought to be
enforceable. Where the rules are not enforceable within the community — in cases
where the rulebreaking 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 pro-
perly address these governance tensions, it seems as though injunctive relief should be
available to allow communities to enforce their norms where they otherwise would
not be able to. The great challenge, however, for a court exercising the equitable dis-
cretion to award injunctive relief, will be to differentiate legitimate rules and exer-
cises 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 preference
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 that we
ought not encourage or support bad rules by lending the weight of the state to enforce
them. The difficulty of differentiating acceptable from non-acceptable rules, how-
ever, is so great that this suggestion seems not only unworkable, but dangerous.

Much of liberal theory is justifiably wary of governments deciding which agreements
ought to be enforced and which ought not.971 The risk of error is great, particularly
dealing with novel issues arising out of virtual communities.972 This risk of error ap-
ppears to be the primary reason that both Epstein and Lastowka argue that the required
analysis is not worth attempting and that we may be better off either granting abso-

315-6 (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
lute property rights to providers or refusing to entertain virtual disputes respectively. 973

Both of these options, however, are less than appealing. There is also great risk in defining property rights where we are unsure that they are necessary, desirable, or effective, and 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 recognising the interdependence of the real and the virtual and attempting to craft rules that allow communities to flourish. 974 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 an argument there is that territorial states ought to help enforce that rule. 975 It is on this basis that the discretion inherent in equitable remedies should be exercised to provide injunctive support to communities 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

973 See Richard A Epstein, “Cybertrespass” (2003) 70 University of Chicago Law Review 73, 84 ("No compulsory license scheme, even with compensation, could hope to match the level of particularization and standardization achieved by contract."); F. Gregory Lastowka & Dan Hunter, “Virtual Crimes” (2004) 49 New York Law School Law Review 293, 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); Greg Lastowka, “Decoding Cyberproperty” (2007) 40 Indiana Law Review 23, 65-6 (arguing that the difficulty in determining conflicts suggests that law is not currently suited to resolving disputes); see also Frank H Easterbrook, “Cyberspace and the Law of the Horse” (1996) 1996 University of Chicago Legal Forum 207, 215-6 (arguing that "Error 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.").

974 James Grimmelmann, “Virtual borders: The interdependence of real and virtual worlds” (2006) 11(2-6) First Monday (arguing that "Ultimately, 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.").

975 Ibid (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.").
against RMT, and it would be fair to say that even if the majority of players do not internalise the prohibition on RMT, that they know and understand that they may be punished for buying or selling gold.\footnote{See Benjamin Duranske, \textit{Virtual Law: Navigating the Legal Landscape of Virtual Worlds} (2008) 37.} 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 have regularly suspended the accounts of those participants it finds advertising commercial services in the game.\footnote{See Blizzard Entertainment, \textit{Gold Buying World of Warcraft} <http://www.worldofwarcraft.com/info/basics/antigold.html> at 4 January 2010; Daniel Terdiman, “‘World of Warcraft’ bans raise players’ ire,” \textit{CNET News}, 22 March 2007 <http://news.cnet.com/World-of-Warcraft-bans-raise-players-ire/2100-1043_3-6169517.html?tag=mncol> at 4 January 2010.} 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 relatively minor contractual term that has only been sporadically enforced, or has changed quickly without sufficient notice to the participant.\footnote{Glasson v Fuller [1922] SASR 148 (Poole J) (“If one stands by while he sees the violation of his rights in progress, and takes no steps to interfere, he is said to acquiesce in the violation, and he may be thereby debarred from his remedy in respect of it. […] Acquiescence in the strict sense implies either that the party acquiescing has abandoned his right, or that he is estopped from alleging it. Acquiescence in this sense is no more than an instance of estoppel by words or conduct”); see further Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387.} If, for example, a court were to find that Blizzard were not very strict with policing RMT or commercial advertising, but had instead tacitly encouraged gold farming through their game mechanics, then it would not be appropriate to grant an injunction against a company like In Game Dollar. In that case, any claim would have to be based upon compensating actual damages under contract, if it could proceed at all.\footnote{It is important to note that unjust enrichment would not be likely to be useful if Blizzard had tacitly encouraged commercial gold farming.}

Very similar reasoning holds for the issuance of an order for specific performance. In the case of Ludlow, the determination of whether specific performance ought to be available would depend firstly upon whether EA unlawfully terminated the contract, whether on the basis that the broad discretionary power was unfair, that they were estopped from doing so, or that they did not exercise the discretion in good faith. If the termination was not warranted, an order for specific performance should be available if it is apparent that compensatory damages would be inadequate. A rule of law ana-
alysis shows that the interests of participants in accessing the community are not purely fungible and suggests that damages will only rarely be adequate in similar circumstances.

Conversely, because rule of law values do support the enforcement of community norms, we would expect that a participant like Bragg may not be able to sue for specific performance from Linden to return his virtual assets if the court considered that by exploiting a bug to illicitly obtain land he had violated a core term of the agreement and 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 would be compensatory in nature.

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 be likely to 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, which are largely inappropriate for securing ongoing compliance with community norms. 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 norms are legitimate or not; the rule of law framework I have provided, however, seems 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.

5. Conclusion

This chapter 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 norms. In doing so, I am aware of 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 by technological barriers, through social norms, and through the agency of the provider and its customer service team. The prospect of legal remedies are only explicitly invoked when these other, more direct, forms of governance break down or are rendered ineffective. Nevertheless, each of these forms of governance operate 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 enormous power of the provider, an understanding of the ways in which internal governance can be supported, and an outline of an argument for external enforcement of internal norms.

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 norms. In making this point, it is important to distinguish between 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.

In order 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. In order for it to do so, however, not only must contractual doctrine and contractual agreements be interpreted in a manner informed by rule of law values, but the remedies available for breach of community norms 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 norms are legitimate; and (b) the community is otherwise unable to satisfactorily address the wrong internally. Accordingly, the recommendations of this chapter are three-fold: (1) breach of internal community norms 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; (3) the grant of

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equitable relief should be limited to circumstances where the norm and punishment is legitimately created and 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.
Chapter 6. Unresolved questions: limits to a contractual governance framework

The preceding chapters have considered how the contractual framework that currently provides the most structure to governance in virtual communities can protect the autonomy of virtual communities and the interests of citizens by supporting legitimate governance. In doing so, the focus of this work has predominantly been on the vertical relationships of power between participants and providers. This chapter considers some horizontal tensions that may not be adequately addressed through the contractual framework, and explores whether other governance structures may be necessary in future. In many cases, it is too early to be able to provide a normative conceptual framework for the resolution of horizontal disputes between participants and the protection of communities from external actors. We do not yet have a sufficient understanding of the threats posed and the harms at stake, as we are still coming to grips with the importance of virtual communities in all aspects of social life. This chapter, then, seeks to map out some of the areas where a contractual framework may not be able to address the disputes that will arise, and sets out to provide some preliminary tools, based upon the values of the rule of law, to analyse these uncertain tensions.

At this stage, it is already apparent that there are limits to what can be achieved through a contractual governance framework, and these limits point to the possibility of new ways of structuring the regulation of virtual communities that may more effectively address the competing tensions. The main work of this thesis has not been to propose a radical new governance framework, but to see how the standard contractual framework can be used to address the governance tensions that are visible in virtual communities today. It may be, as we continue to refine and develop our understandings of relations in virtual communities, that we will need a more radical shift in the future. This chapter attempts to identify the gaps in the current contractual frame-
work and seeks to understand how those gaps could practically be filled.

One of the most significant shortcomings of a contractual governance framework is the constraint imposed by the doctrine of privity of contract, which prevents participants from enforcing community rules against other participants, and either participants or the provider from enforcing rules against third parties. This chapter examines a number of different models for the enforcement of community norms in these situations, but does not come to a definitive conclusion for the future development of doctrine. This is an area in which it is more useful, at this stage, to identify the gaps than to attempt to prognosticate and provide an answer about the best manner to resolve these tensions. More time and further study is required to allow community governance to develop and to more fully understand the needs of participants, providers, and communities as a whole.

This chapter concludes with an examination of 'statutes of interration', a model for the formal regulation of virtual communities proposed five years ago by Castronova and Balkin. If the contractual governance framework breaks down to a sufficient extent — if it turns out that the tensions of virtual community governance are not able to be addressed from within private contractual doctrine — then a sui generis legislative model may be necessary to authoritatively set out the principles under which participants in virtual communities can expect to be governed. In this brief analysis, I examine some of the shortcomings of the model presented by Castronova and Balkin, but conclude that the core idea that they express, that a formal model can provide a better tailored governance mechanism than an ad-hoc contractual framework, is fundamentally valid. I conclude that a sui generis approach bears investigating in the future, but only once we further develop our understanding of the limitations of a contractual approach informed by rule of law principles.

1. **Enforcement between participants**

When disputes arise between participants in a virtual community, they are often able to be resolved within the community – with the assistance of the provider, if necessary. Undoubtedly, however, disputes will arise that are serious enough that participants are not willing to rely on the provider to enforce the rules, or may seek extra compensation above what they are able to recover within the community. In these
cases, it seems inevitable that participants will petition territorial courts to provide a remedy for their perceived wrongs.\(^\text{981}\)

The contractual agreements between each participant and the provider in a virtual community provide little guidance as to how territorial courts ought to resolve disputes that arise between participants. The lack of privity in virtual community agreements is a topic that has been examined at length by Fairfield, who points out that a contractual framework is ill-suited to creating enforceable norms in communities.\(^\text{982}\) Contracts are not able to efficiently provide protection for the property and dignitary interests of individuals – the costs of negotiating with each other party and the risk of hold-outs grow prohibitively expensive in any moderate sized community.\(^\text{983}\) Fairfield argues that communities therefore need the default rules that are provided by property and tort law in order to function effectively.\(^\text{984}\)

Four examples should suffice to illustrate the main problems with horizontal enforcement of virtual community norms. The first is a story of a Japanese woman who, feeling jilted by her in-world partner, logged in to his account in the virtual world Maple Story and deleted his avatar.\(^\text{985}\) Her partner complained, and the woman was promptly detained by police. In this example, there was direct harm inflicted on her partner by using his account details without his consent. Variations on this example are common – including two Dutch boys who forced a Runescape player to hand over virtual assets at knife-point,\(^\text{986}\) and numerous examples of prosecutions in South Korea for crimes involving theft of virtual objects.\(^\text{987}\)

\(^{981}\) Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Virginia Law Review 2043, 2044-5 (“people 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”).


\(^{983}\) Ibid 448 (arguing that “even though the law of contract has a critical role to play in community life, it can only do its job because other areas of law – for example, property law – create a background of non-negotiated, one-to-many, community obligations that contract law cannot supply as efficiently.”).

\(^{984}\) Ibid 436.


The second example is the latest in a series of scams to rock EVE online. The chief executive of a virtual bank, a character called Ricdic, made off with 200bn of its customer's in-game credits, trading them for some $5000 in cash, apparently to pay some medical expenses and put down a deposit on a house.\footnote{Billions stolen in online robbery, BBC News, 3 July 2009 \texttt{<http://news.bbc.co.uk/2/hi/technology/8132547.stm>} at 11 November 2009.} This story is only the latest in a series of gut-wrenching frauds perpetuated in EVE – including recent accounts of a banker who made out with approximately 790bn credits (a sum that could fetch over USD$100,000)\footnote{Peter Pollack, Online "banker" runs off with cash, avatars cry foul - Ars Technica (2006) Ars Technica \texttt{<http://arstechnica.com/old/content/2006/08/7605.ars>} at 11 November 2009; Ethan E White, “Massively Multiplayer Online Fraud: Why the Introduction of Real World Law in a Virtual Context is Good for Everyone” (2007) 6 Northwestern Journal of Technology and Intellectual Property 228, 237.} and a defection that destroyed the largest alliance of players in EVE, allowing their rivals to make off with the fruits of uncountable hours of labour.\footnote{Andy Chalk, “GoonSwarm Ganks Band Of Brothers,” The Escapist, 6 February 2009 \texttt{<http://www.escapistmagazine.com/news/view/89219-More-EVE-Online-Shenanigans-GoonSwarm-Ganks-Band-Of-Brothers>} at 11 November 2009.}

As a third example, we can again use the textual rape described by Dibbell in LambdaMOO.\footnote{Julian Dibbell, My tiny life (1998) Chapter 1.} In this example, the victims suffered some real harm as a result of the direct actions of the person who controlled Mr Bungle, but the harm is difficult to fit within an existing legal category. It was not rape, as such, but the depiction of rape.\footnote{Orin S Kerr, “Criminal Law in Virtual Worlds” (2008) 2008 University of Chicago Legal Forum 415, 418.} It would not constitute unlawful stalking, which generally requires repeated conduct.\footnote{See Crimes Act 2000 (ACT) s 35; Crimes Act 1990 (NSW), s 545AB; Criminal Code (NT), s 189; Criminal Code (Qld), ss 359B, 359E; Criminal Law Consolidation Act 1935 (SA), s 19AA; Criminal Code (Tas), s 192; Crimes Act 1958 (Vic), s 21A; Criminal Code (WA), s 338D.} It may potentially amount to an action on the case of intentional infliction of injury, although the tort is underdeveloped in Australian law and the plaintiff would have to prove that she suffered nervous shock, as distinct from distress.\footnote{See Wilkinson v Downton [1897] 2 QB 57; Bunyan v Jordan (1937) 57 CLR 1.} Internally, Bungle's conduct was considered wrongful within the community, although its novelty meant that it had not previously been specifically proscribed.

For the final example, return to that of Hernandez v In Game Entertainment (IGE), where a WoW player sought to bring a class action suit against IGE, one of the largest actors in the secondary market for virtual goods and currency.\footnote{Hernandez v. Internet Gaming Entm’t, Ltd. No. 07-21403-Civ-COHN/SNOW (S.D. Fl., 2007).} Similar to the Glider case, at issue here was a third-party who was profiting by enabling community participants to break the community rules. Hernandez, fed up with what he
saw as the negative effects of the real money trade on the World of Warcraft game experience, filed suit to prevent IGE from breaching the terms of its agreements with Blizzard.

The easiest case to deal with is the odd one out, where there is no recognisable wrong. In the second example, the victim suffers harm due to the act of another that is wholly within the scope of consent. As Lastowka and Hunter point out, the 'theft' of a basketball in a game of basketball is not theft, because it is within the rules.\(^{996}\) Similarly, what may look like 'theft' or 'fraud' within a virtual community cannot be if it is within the rules of the community. Indeed, participants consent not only to conduct within the rules, but also to behaviour that is understood as falling outside of the technical rules but within the common expectation of participants.\(^ {997}\) Scams within EVE Online cause untold anguish to the participants who find themselves to have lost assets that represent enormous investments of labour (and carry a hefty grey-market price tag), but these losses are not recognisable by territorial courts precisely because of their prevalence: EVE participants must be deemed to have consented to the risk of being tricked out of their in-world assets. Fraud is simply part of the game.\(^ {998}\) The interesting epilogue to Ricdic's story is that he was banned from EVE Online by CCP, not for the fraud, but because he cashed out his winnings.\(^ {999}\)

This leads to an interesting question on a variation of this example. Suppose the fraud here occurred not in EVE, but in a community that does not embrace a culture of fraud and piracy. When Ginko Financial, a bank in Second Life offering over 40% returns, turned out to be a ponzi scheme and defaulted on 200M Lindens (worth something approximating USD$750,000, although much of that was in promised returns rather than invested cash), hundreds of Second Life residents lost a significant


chunk of virtual assets. In these circumstances, could Ginko's clients seek compensation at law?

Fairfield is correct that this issue turns on a question of consent. In these two 'fraud' examples, we have similar actions that may meet most of the criteria for tortious deceit: the victims have certainly been induced to invest in the 'bank' on the scammer's knowingly false representations. The crucial missing element is whether the victim has suffered damage as a result of relying on the false representation. In EVE Online, a victim cannot realistically show harm; the prevalence of fraud in the community suggests that at all times, she must be taken to have understood and consented to the possibility of being defrauded. In Second Life, by contrast, it is unclear whether community norms at the time rendered the risk of loss consensual or not; certainly now that non-regulated in-world banks have been prohibited, there is a strong argument that any such future event would not be consensual. The presence or lack of consent is what distinguishes representations of wrongs from actual tortious wrongs recognisable by the legal system.

This consent based model makes much more sense than attempting to maintain a distinction between real and virtual acts. There is no wrong when one player kills another player's avatar in World of Warcraft, because players consent to well-understood community norm that player-versus-player combat (PvP) is permissible. Yet there is a wrong when one person deletes another's Facebook profile or Maple Story character. Stealing a virtual item in a world where it is part of the game, just as in basketball, is not a recognisable wrong; removing a person's assets without their


1002 Smith v Chadwick (1884) 9 App Cas 187, 190 (Earl of Selbourne LC); Derry v Peek (1889) 14 App Cas 337, 374 (Lord Herschell); Magill v Magill 226 CLR 551, 587-8, [114] (HCA, 2006) (Gummow, Kirby and Crennan JJ).


1004 Also known as Player Killing (PK).

1005 There are code-based limits that determine when PvP is permissible in WoW that empower participants to determine whether or not to expose themselves to the risk of PvP combat with a relatively fine level of granularity.

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consent from Second Life or Habbo Hotel, on the other hand, almost certainly is.\textsuperscript{1007} The wrong exists not because one action is any more 'real' than another, but because the harms suffered were consensual in the first case, but non-consensual in the second.

Turn now to the first example, where one participant deleted another participant's account, using login details voluntarily provided. While consent was provided to access the account, assumedly deleting the victim's account was not within the scope of consent. Neither is there anything in the social norms of Maple Story that would suggest that participants give broad consent to the risk of their account being deleted by other persons. The lack of consent on its own, however, does not completely answer the question of whether a legal remedy ought to be available. There are many non-consensual acts that cause harm but do not bear legal enforcement. Critical speech, for example, can cause harm to a person's psyche and their business, but is only prohibited when it falls into a legally recognised category of wrong, such as defamation, injurious falsehood, assault, stalking,\textsuperscript{1008} or, in rare cases, the intentional infliction of nervous shock.\textsuperscript{1009} In this case, the wrong is the non-consensual access and modification to protected computer equipment – civilly under trespass to chattels or criminally under computer trespass statutes.\textsuperscript{1010}

In this example, the existence of a wrong means, for Kerr, that the act is an “actual theft, not a virtual representation of one”.\textsuperscript{1011} The existence of a recognisable wrong is important in an overlapping mesh governance model where wrongs of territorial states do not map directly to wrongs in various virtual communities.\textsuperscript{1012} In order for an act to be punishable by a territorial state, a clear wrong must be established and

\begin{itemize}
\item \textsuperscript{1008} See Crimes Act 2000 (ACT) s 35; Crimes Act 1900 (NSW), s 545AB; Criminal Code (NT), s 189; Criminal Code (Qld), ss 359B, 359E; Criminal Law Consolidation Act 1935 (SA), s 19AA; Criminal Code (Tas), s 192; Crimes Act 1938 (Vic), s 21A; Criminal Code (WA), s 338D.
\item \textsuperscript{1009} See Wilkinson v Downton [1897] 2 QB 57; Bunyan v Jordan (1937) 57 CLR 1.
\item \textsuperscript{1010} In Australia, Part 10.7 of the Criminal Code Act 1995 (Cth); in the US, the Computer Fraud and Access Act (US) (18 USC § 1030).
\item \textsuperscript{1011} Ibid 423.
\item \textsuperscript{1012} Jeanne Pia Mifsud Bonnici, Self-regulation in cyberspace (2008) 199 (“The function of self-regulation on the Internet is neither that of a subordinate to state regulation [...] nor that of a substitute for state regulation [...]. Neither is the function of self-regulation that of creating, together with state regulation, hybrid arrangements where self-regulation combines with state regulation becoming one. Instead, self-regulation and state regulation intertwine and reciprocally complement each other. Each source of rules retains its identity and regulatory strengths while complementing the rules and processes of the other. The relative importance and authority of each is greater or lesser according to the nature of the activity and the participants being regulated.”).
\end{itemize}
I have argued that it is inappropriate for states to punish acts or create liabilities based solely on the lack of consent – the establishment of rules for acceptable behaviour is a critical component of the rule of law, and virtual communities do not have the required legitimacy to create informal rules that are directly enforceable without explicit recognition by the state.

Even if these wrongs are recognisable wrongs, the normative question still remains: should territorial states provide a remedy? It would seem preferable that any dispute be dealt with within the community, if at all possible. Internal mechanisms for resolving disputes, however, will not always be appropriate. A participant who believes she has been wronged in a virtual community can petition the provider to investigate and punish the wrongdoer, or to compensate her for her loss. The provider may well do so with a minimum of fuss. Indeed, in the case of loss of assets, compensation is easier in a virtual community than with corporeal property, as a an immediate transfer can be effected, or a new copy of the virtual asset can be instantly instantiated from its archetype, or restored from a backup.

Three major problems arise with this conception of justice from the perspective of the rule of law. The first is that it relies on the discretion of the provider, who is by no means obliged to assist a complainant, whose decisions may be arbitrary or based on a motive other than to see justice done, and whose discretion is not able to be appealed. The second is that where internal compensation is not sufficient to redress the harm caused to the victim, the provider has no ability to compel compensation or impose punishment outside of the community. The final problem is that harms that the
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territorial state would recognise may not be recognised by the provider; a provider is unlikely to differentiate between the norms of the community and the rules that benefit the provider's vision of the community – for example where a participant alleges fraud in a real money trade transaction, a provider that prohibits real money trading is unlikely to provide a remedy.

If an appropriate remedy for a recognisable wrong is not available within a virtual community, for these reasons or any other, internal governance can be said to have failed. In these circumstances, territorial states have a legitimate interest in providing a remedy to protect their citizens.1018 There is no clear reason why established rules of law should not apply in these situations, as long as territorial courts are able to distinguish between wrongs and consensual depictions of wrongs.1019 The rules of tort and other private law doctrines will continue apply to actions in virtual communities just as they apply in other contexts – as others have recognised, there is no 'magic circle' that delineates areas where the law applies from those in which it does not;1020 there are only situations where apparent wrongs are not actual wrongs because participants have consented to the risks.1021

In addition to tort law, it seems increasingly likely that property law will apply in future to provide some legal structure to the flow of virtual assets. For communities where participants are able to acquire and maintain exclusive possession of excludable and rival virtual assets, and particularly where the economy is reasonably permeable and assets can be easily traded, it no longer seems unreasonable that some form of enforceable property rights could vest in participants.1022 Lamenting the mess that a contractual framework must create in an approximation of property rights, Fairfield argues strongly that property law is required in order to “ensure that high-
value resources move smoothly through the stream of commerce toward higher-value users.”\textsuperscript{1023} Structuring property rights through contract law, because it does not provide clear rules for ownership and transfer of title, greatly increases the search and transaction costs of each participant.\textsuperscript{1024} Without property law, Fairfield argues, participants in environments like Second Life “cannot buy and sell virtual land or objects with confidence, even though the creator of the virtual world desires that they do so.”\textsuperscript{1025}

In communities where the flow of commerce is important, then, Fairfield is likely correct that some form of property rights will be useful to assist participants to structure their relationships with other participants. The main theoretical question at this stage seems to be how far these types of rights should extend to other spaces, where commerce exists as a grey market activity prohibited by the provider, and how property interests will affect the relationships between providers and participants. The recognition of property rights and other private common law rights between participants, if it happens, will be only a first step in an ongoing process of mediation between groups representing different interests in virtual communities. Any satisfactory resolution must ultimately depend upon a critical and complex evaluation of the bargain that the particular social contract strikes. In the end, as Fairfield recognises, “a clear articulation of the relationship between the different areas of the common law is as — if not more — important than the development of those areas themselves.”\textsuperscript{1026}

There are certainly valid arguments against territorial states providing participants with private law remedies, predominantly concerns about the significant risk of error when territorial courts are attempting to understand the unfamiliar norms and contexts of virtual communities. To the extent that those making these arguments tend to prefer a policy of 'non-interference', they fall into the familiar mistake of assuming that relationships in virtual communities can ever exist without the mediating forces and value choices of territorial law.\textsuperscript{1027} These arguments raise valid concerns about the risks of failing to take into account the concerns and needs of virtual communit-

\textsuperscript{1024} Ibid 448, 456.
\textsuperscript{1025} Ibid 457.
\textsuperscript{1026} Ibid 465.
ies, but they do not provide a sufficient normative basis for states to refrain from applying existing legal principles to provide remedies for identifiable wrongs. The answer to these risks is not (cannot be) to refrain from acting, but for territorial courts to make a real effort to conceptualise the tensions at stake and examine the community norms in significant detail. Difficult questions of fact, like whether a particular action was within the scope of consent, are routinely dealt with in the judicial system, and there is no real reason to suspect that courts will continuously come to demonstrably incorrect determinations in these cases. As to the long term effects of regulation on communities, if there is some risk, it does not seem appropriate for a court to refuse a remedy for an identifiable wrong based upon the potential effect upon the community at large. If courts are careful in their identification of community norms, it would seem that the negative impact of external regulation should be minimised; nevertheless, if it turns out that enforcing certain actions has a long term negative effect on the survival of the communities that we ought to be encouraging, legislative action may be necessary in the future to address the issue.

Post argues that one of the more significant risks of intervention by the territorial state is that of invalidating or undermining the legitimacy of internal governance processes. Post's argument presupposes a hierarchical model of governance, wherein participants who are not satisfied with the internal governance procedures can shop around for a different result in territorial legal systems. If we view the overlapping jurisdiction of territorial states and virtual communities more as a mesh than a hierarchy, this concern loses some of its potency. Participants who are subject to the legal rules of certain jurisdictions do not escape those rules merely because they act through a virtual community, but at the same time, consensual norms developed within the community can inform the meaning of acts as seen through the interpretative lens of territorial legal systems. In this way, legitimate internal governance structures have the ability to shape legal expectations and rights, without unnecessarily limiting the ability of injured participants to seek a remedy in territorial states where

1028 Ronald Dworkin, *Law’s Empire* (1986) 221-4, 310-12 (discussing the role of principle over policy in adjudication). In some communities, the consensual norms will require setting aside objections to certain classes of acts that could otherwise be objectionable for the good of the community. In such circumstances, consent would be granted to the act, which means no wrong has been committed. This is different to refusing to provide a remedy for a recognisable wrong because of the potential negative effects on the community at large.


one is not available within the community.

Another argument against external enforcement lies in the costs of judicial proceedings. Many internal issues that may constitute a legal wrong are in fact relatively insignificant – nobody wants to see one participant suing another for the theft of a jacket in Second Life, for example. In these cases, courts would be justified in refusing to adjudicate trivial matters, and assumedly the potential liability for an adverse costs order would be sufficient to deter potential plaintiffs from bringing insignificant actions. A final issue lies in the difficulty of cross-border enforcement, which can be both expensive and pose difficult normative issues as to the subject of people to the laws of countries of which they are not resident. Much of the conceptual difficulty with jurisdictional issues in internet cases — which extends far beyond issues particular to virtual communities — seems to be, however, quietly working itself out in the routine enforcement of legal judgments worldwide.

On the whole, once the difficult conceptual real/virtual barrier is breached and we recognise that consent delineates the distinction between wrongs and depictions of wrongs, territorial enforcement of community norms turns out not to be as difficult as first imagined. Community norms represent the boundaries of assumed consent in actions that always already apply to those subject to the jurisdiction of territorial states, regardless of whether their actions occur 'in' virtual communities or not. With some care in the determination of difficult questions of fact and by acknowledging that community norms largely define the meaning of acts within the community, it seems that territorial laws can apply to validly provide remedies for perceived wrongs as appropriate for each particular jurisdiction.

### a. Enforcing the rules as they are

As with the previous chapter on the vertical enforcement of wrongs, the bigger issue is whether and how territorial courts ought to deal not with wrongs that are already existing, but new wrongs that exist only through the interpretative lens of the com-

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1032 De minimis non curat lex — “the law does not concern itself with trifles”: Herbert Broom, A Selection of Legal Maxims: Classified and Illustrated (10 ed. 1939) 88; See further Max L Veech & Charles R Moon, “De Minimis Non Curat Lex” (1946) 45 Michigan Law Review 537.
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In the third and fourth examples above, it is hard to identify whether a legal wrong has been committed. If, however, we accept that some harm has been caused to the participants, we must ask whether there could be an obligation on providers to enforce the rules or provide enforcement mechanisms, or even whether the rules ought to somehow be enforceable in territorial courts.

The example of Mr Bungle's textual rape sits uncomfortably somewhere between harassment and other speech offences and sexual assault. It does not have the force of rape, but it has more power and impact than mere speech; the high level of investment that participants may have in their avatars means that dismissing all virtual actions as mere speech misses, to a large extent, the real harm that can be inflicted. Harassment may approximate the tensions here, but would need to develop further in order to recognise harm caused by one-off acts.

The fourth example, of Hernandez v IGE, is certainly not recognisable as a generalisable territorial wrong. There are no torts or crimes that proscribe gold farming. While IGE may be in breach of its contractual relationship with Blizzard, there is no privity with Hernandez or the class of players he represents. This type of activity can only be wrongful if it is viewed through the interpretative framework of the community norms. In these two examples we can see the particular limits of a contractual governance framework – it is conceptually difficult for participants to enforce norms that are validly and consensually created by the community as a whole.

A community-focused perspective based upon the rule of law suggests that consensually developed community norms ought to be enforceable somehow. If virtual communities are to live up to the promise of being real communities with diverse rule sets and experiences, they must be able to create their own norms. Assumedly, in order to be effective, any functioning system of governance must have some way to enforce those norms. Preferably, the community will be able to enforce its own norms internally, rather than looking to assistance from territorial states. If the community is able to legitimately resolve disputes, then there is little reason to disrupt that process.

Territorial states should generally defer to the community governance systems in these circumstances, and should not allow participants to circumvent those systems by seeking review of legitimate but unfavourable outcomes.\textsuperscript{1039}

There is still, however, a significant question as to how territorial states ought to act where community norms are not enforceable within the community. Where the provider refuses to intervene and refuses to provide participants with an effective way to enforce the rules themselves, for example, should an aggrieved participant be able to ask an appropriate territorial state to either compel the provider to act or to enforce the rules on its behalf?

Examining the legitimacy of the norm once again provides some interesting answers. If a particular norm is unenforced or systematically under-enforced, it may not be able to be said to be a valid norm of the community.\textsuperscript{1040} If participants have no real expectation that a rule will be enforced, there would seem to be no good reason to enforce it; indeed, it would seem undesirable and unfair for a territorial state to enforce such a rule or to compel the provider to enforce it. If, on the other hand, a community norm is generally followed and generally enforced, then there is a much more legitimate basis for a claim that territorial states ought to intervene in particular instances where the rules are not being enforced.

In the last chapter, I argued that breach of internal community norms ought not be punishable by the state. This argument applies with no less force to exemplary damages potentially available under tort or other private law doctrines in horizontal disputes between participants. Unless tort law were to develop relatively radically to provide compensatory remedies for breaches of idiosyncratic community rules, it would seem that participants will have some difficulty using private law to address wrongs proscribed only by community norms. Nevertheless, there may be a role for the law to play in either compelling the private resolution of disputes or providing a compensatory contractual remedy to participants based on third party beneficiary doctrine.


\textsuperscript{1040} See Herbert Lionel Adolphus Hart, The concept of law (1961) 56.
b. **Compelling the provider**

Individual providers may or may not choose to introduce tools to allow participants to resolve disputes within the community. Providers who wish to maintain a stronger sense of social cohesion may choose to more directly involve themselves in community governance – game based virtual worlds or specific purpose communities, for example, are likely to retain the responsibility to oversee compliance with the community rules. Other communities that are more general purpose or open-ended may be more likely to devolve the power to enforce norms to the community participants. As noted in the previous chapter, many communities are experimenting with participant-led governance regimes, for various reasons – because governance can be an intriguing and entertaining part of the game; in order to save on customer service and administration costs; in order to achieve more accurate results by having participants rate other participants; or, as Fairfield recommends, in order to limit potential liability that may accrue when the provider assumes responsibility for enforcing the rules.  

Whether a provider can legitimately be compelled to enforce the rules depends largely upon the expectations of community participants. If a provider is successful in devolving responsibility for enforcing social norms to the community, then there is no reason to expect it to do more than that. If, on the other hand, a provider has held itself out as the guardian of social values, it would be appropriate for a territorial court to hold it to that representation. As Fairfield points out, providers who exercise control over the community are much more likely to be held liable for the actions of their users than those who do not.

A provider may attract some contractual liability for failing to uphold the rules as it has promised to do, although providers are likely to disclaim any such responsibility to the extent that they are permitted to do so. Providers may also attract some secondary liability for the actions of participants over whom they have the right and ability to exercise control. By failing to dissuade copyright infringement, for ex-

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1042 Ibid 1019.

1043 Note that in the US, the Communications Decency Act s 230 will immunise providers against claims arising out of the actions of a third party in most cases: see Ibid 1040.
ample, providers may be held liable to rightsholders for authorising,\(^{1044}\) inducing,\(^{1045}\) or contributing to any infringements, or vicariously liable for the acts of participants.\(^{1046}\) More generally, if a provider is seen to encourage the commission of torts or other wrongs, it may potentially be liable under the general law applicable to joint tortfeasors.\(^{1047}\)

The tort of negligence could potentially impose a duty on the provider of a community to uphold the rules of the community. Providers have not yet been recognised as being in a special relationship of control over participants, but it is certainly possible that providers may attract such a duty in the future. An interesting analogy comes from *Re Chordas v Bryant*, where the Full Federal Court held that a duty existed in the absence of a special relationship where an hotel owner has the power to supervise and eject patrons:

> In the case of an hotel...it is necessary to keep in mind that the licensee may have no control over his patrons save the power to eject them for good cause. As we have said, the manager of an hotel, like the manager of other facilities, must take reasonable care for his patrons and, if cause is shown which requires that a patron be closely supervised or ejected or that another patron be warned, the manager should take whatever may be the appropriate step in the interests of the safety of his patrons. However, what is the appropriate course in a particular case obviously depends upon the circumstances of the case.\(^{1048}\)

Where a provider generally enforces the rules of the community, it may come under a duty to do so with due care and skill; if it negligently fails to enforce the rules in a particular instance and a participant suffers as a result, it is certainly conceivable that a court will hold it liable for any loss caused.\(^{1049}\) For example, following Linden's move to require in-world banks to be regulated, a participant who finds herself defrauded by an unregistered bank may attempt to pin liability on Linden for failing to adequately enforce the rules.\(^{1050}\)

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1044 Copyright Act 1968 (Cth) (Cth) ss 36(1), 101(1).
1047 Liability for joint tortfeasors may be relatively difficult to establish, and requires showing that the provider and the primary tortfeasor were taking "concerted action to a common end": see *The Koursk* [1924] All ER Rep 168 (Scrutton LJ).
1050 This would have to develop as a novel case for negligence liability. Recovery is available for pure economic loss in circumstances where the class of potential plaintiffs is restricted or vulnerable: *Bryan v Maloney* (1995) 182 CLR 609; *Hawkins v Clayton* (1988) 164 CLR 539; *Hill v Van Erp* (1997) 71 ALJR
It would seem that Fairfield may be correct in asserting that in circumstances where a provider holds itself out as the enforcer of the community rules, it may attract liability where it fails to do so. Time will tell how willing courts are to hold providers responsible for the enforcement of community rules, but rule of law values suggest that good governance includes ensuring that the internal norms are adequately enforced or enforceable.\(^{1051}\) Returning to the examples above, a provider that promises, or is deemed to promise, a world free of depictions of rape or RMT may well be liable if it does not act to curb the acts of a Mr Bungle or commercial gold farmers. Providers who wish to avoid such liability may follow Fairfield's advice and attempt to devolve responsibility for enforcing the rules to participants within the community, providing participants with the tools to determine or avoid their own disputes.\(^{1052}\) If this happens, both common law principles and statutory schemes like copyright safe harbours,\(^{1053}\) Clause 91 of Schedule 5 of the Broadcasting Services Act 1995 (Cth)\(^{1054}\), and, in the US, Section 230 of the Communications Decency Act (in the US) may prove effective in shielding providers from liability for the acts of other participants. If the provider is not liable, either under the common law or because it is protected by a legislative shield, participants may instead attempt to enforce the rules directly against other rule-breaking participants.

c. 

**Enforcing the contract: third party beneficiary doctrine**

The lack of an easy ability for a participant to enforce community norms against another participant is largely the reason that Fairfield argues that contractual regimes provide an inappropriate framework for community governance.\(^{1055}\) The common understanding is that where community norms are set out in contractual documents, as is common practice, the lack of privity will generally prevent participants from enforcing those contractual rules against other participants.\(^{1056}\) Risch challenges this

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\(^{487}\) The establishment of a novel duty will depend on analogy from previous law. Some analogous duties include the hotel cases discussed above; see also Foti v Banque Nationale de Paris (1989) 54 SASR 354 (bankers liable for breach of a duty to control risks in currency fluctuations where they had represented to do so). Liability may also attach on the basis of negligent misstatements: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

\(^{1051}\) Lon L. Fuller, *The Morality of Law* (2nd ed. 1969) 81-91 (discussing congruence between official action and declared rules).


\(^{1053}\) 17 USC § 1201; *Copyright Act 1968* (Cth) ss 116AG.

\(^{1054}\) Clause 91 limits the liability of intermediaries under any State or Territory criminal or civil law for any content it carries of which it is not aware.


\(^{1056}\) Ibid 449-53.
“overly narrow doctrinal conception”\(^{1057}\) of third-party beneficiary doctrine as it applies in the United States, arguing that contractual enforcement between participants “is an important, and in some cases the only, way to vindicate user rights in the hub and spoke contractual relationships between a virtual world provider and its many users.”\(^{1058}\)

Risch argues that where rules in virtual community contracts are clearly expressed and intended to be for the benefit of the other participants, they may then be enforceable by other participants.\(^{1059}\) Current authority in Australia does not recognise any such exception to the doctrine of privity, although Mason CJ and Wilson J and Toohey J in *Trident General Insurance Co Ltd v McNiece* were prepared to create an exception to the doctrine where the intention to benefit a third party was clear and the third party would be likely to rely on the promised benefit.\(^{1060}\) While the doctrine of privity has not been relaxed at common law, there are statutory provisions in several Australian jurisdictions that allow a third party to enforce a promise made for her benefit.\(^{1061}\) It is certainly conceivable that, if rules of conduct in virtual community contracts are expressed as being for the benefit of all other participants, an Australian court could allow a participant to sue on the contract as a third party beneficiary.\(^{1062}\)

A third-party beneficiary based contractual remedy would only be useful where no recognisable territorial cause of action could be found in tort or otherwise.\(^{1063}\) In the first two of our four examples above, a contractual remedy is not warranted; cracking into another's account is actionable under civil trespass or punishable under computer crime statutes, and fraud within a community is either consensual and non-actionable or non-consensual and actionable as fraud. It is conceivable, however, that the contractual rules that prohibit textual depictions of rape exists for the benefit of other participants, and therefore may be enforced by other participants. In the final example, *Hernandez v IGE*, Hernandez explicitly argued that the contractual rule that

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1058 Ibid 416.
1059 Ibid 421.
1060 *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 123 (Mason CJ and Wilson J); 172 (Toohey J).
1062 This is most likely in Queensland, Western Australia, or the Northern Territory. In certain circumstances, however, the benefit may be held on trust on behalf of the third party at common law: see *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 146-8 (Deane J).
prohibits botting and RMT in World of Warcraft existed for the benefit of other participants.

*Herndandez v IGE* never proceeded to trial, and the applicability of third party beneficiary doctrine to virtual community contracts remains largely untested. It is possible that a future court would be willing to find that contractual rules are enforceable by community participants, or, alternatively, that providers may, as Risch suggests, explicitly build third party beneficiary clauses into the agreements. The potential ambit of a third party beneficiary contractual remedy is accordingly relatively narrow, but important. In circumstances where participants of a community each separately agree to abide by a rule whose breach would create no territorial liability, it may make sense for states to provide an ability for participants to enforce that contractual promise. These types of promises are essentially social contractarian – they form part of the rights that participants give up in order to join and participate in the community. If they are generally accepted within the community, a rule of law analysis suggests that they ought to be enforceable. In cases where they are not enforced or are not able to be enforced within the community, and the provider refuses to enforce them and cannot legitimately be compelled to do so, there are few other options for participants to seek their enforcement.

Seen in this way, liability based upon a third party beneficiary doctrine alleviates the major problem that Fairfield highlights in contractual governance: that serial negotiation, transaction costs, and holdouts severely limit the efficiency of a contractual scheme. If it proves effective, the doctrine may remove the requirement that each and every participant contract with every other participant in order to create an enforceable social contract. This does not, of course, solve all problems of enforcing rules between participants. It seems that if virtual community contracts are to be enforceable between participants, providers will have to modify their agreements to explicitly say so. Many providers may be hesitant to draft language supporting a finding of a third-party benefit in their contracts – although some may see it as a simple way to minimise customer service costs relating to user disputes. Whether providers take up Risch's suggestion in the future is open to speculation, and, to a large extent, probably depends on the costs to the provider and the willingness of courts to

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find the provider liable for enforcing breaches of the rules if such a clause does not exist.

d. Hybrid enforcement models

This discussion highlights that one of the biggest threats to the legitimacy of consensually developed community norms is the uncertainty about their enforceability. Whether providers ought to be held responsible to enforce the rules and whether the rules ought to be directly enforceable against other participants in territorial courts are still open questions. Fairfield suggests that we endorse a consent based model to enforce community norms in territorial courts, essentially allowing participants to sue in tort for breach of community norms. Risch, on the other hand, suggests that providers ought to increase legitimacy by introducing explicit third party beneficiary clauses into community contracts, allowing participants to sue to enforce the rules against other participants. Both of these suggestions recognise that if internally developed rules are to provide legitimate limits to community behaviour, they must be enforceable, somehow. Post, on the other hand, agrees that community norms ought to be enforceable, but argues that the appropriate mechanisms for enforcing internal rules must come from internal governance structures in order to encourage and maintain the legitimacy of community rulemaking.

The reality is that none of these three approaches can be universally applicable, and they certainly do not cover the entire field of possible methods for the enforcement of community norms. The important point is that different communities will favour different approaches — or hybrid approaches — as appropriate for the particular community. Depending on the needs of the community, a provider could legitimately choose a method, or a combination of methods, for enforcing community rules: by taking on the task itself, by delegating the power to the community (either formally or informally), or by facilitating a contractual regime or third-party beneficiary scheme that encourages participants to look to territorial courts to adjudicate community disputes. From a rule of law perspective, the precise method of enforcing rules is less important than the fact of their enforcement and the legitimacy of the

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particular enforcement mechanism.

The most immediate threat to legitimacy is the threat posed if norms are unenforceable or routinely under-enforced. If it turns out that disputes between participants are not being satisfactorily resolved through internal mechanisms, we would expect territorial courts to either require providers to institute more legitimate internal procedures or provide direct external remedies to injured participants. At this point, we may see the growth of more sophisticated internal dispute resolution systems in order that virtual community providers can avoid liability and avoid the interference of territorial courts in internal governance. Gradually, as territorial states come to require more legitimacy in internal rulemaking and enforcement, providers are likely to either create the necessary governance mechanisms or devolve enforcement power to their participants in order to avoid interference by the state. This is likely to be a desirable development — a large part of the problem with internal governance today seems to be that there are no consequences for providers who fail to create legitimate governance structures, and accordingly there are no incentives for proprietors to either enforce or provide the community with the ability to enforce the rules.

2. Third party enforcement

A related limitation imposed by the doctrine of privity in the contractual governance framework is the difficulty of enforcing community norms against external actors who are not a party to the contractual agreements. Third parties are not at all subject to direct punishment within the community, so any real enforcement is limited to either hardening technical measures to prevent their interaction with the community or seeking external support. If providers or participants seek to enforce the rules against third parties, they will require the assistance of territorial states to a much greater degree than they would against participants.

An analogy from international law is useful here. There are said to be five legitimate bases for claiming extraterritorial jurisdiction: (1) the “objective territorial principle”, where the conduct has a substantial effect within the territory; (2) the “nationality principle”, where the acts are committed by a citizen of the state; (3) the “protective or security principle”, where external acts harm the state's interest; (4) the “passive

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personality principle”, where external acts harm a state’s citizens abroad; and (5) the “universality principle”, where all states can claim jurisdiction over acts that are universally proscribed.\footnote{See Ian Brownlie, \textit{Principles of public international law} (1990) 303-7.} The guiding rule of law principle is that individuals should not be subject to punishment for rules made by states to whom they owe no allegiance — such rules fail the requirement that punishments be imposed in the “ordinary legal manner before the ordinary courts of the land”,\footnote{A. V Dicey, \textit{Introduction to the Study of the Law of the Constitution} (10th ed. 1959) 188.} will often fail the requirements that rules be clear and sufficiently promulgated,\footnote{Joseph Raz, “The Rule of Law and Its Virtue” (1977) 93 \textit{The Law Quarterly Review} 195, 198; Lon L Fuller, \textit{The Morality of Law} (2nd ed. 1969) 49; Friedrich August Hayek, \textit{The political ideal of the rule of law} (1955) 34.} and certainly fail the requirement of consent of the governed.\footnote{Brian Z Tamanaha, \textit{On the Rule of Law: History, Politics, Theory} (2004) 99-100.} In applying this analogy to virtual communities, then, we can say that the strongest claims that a community may have to regulate the behaviour of external actors will be based upon the protection of the community from external harm, and perhaps on the basis that the actions are targeted and directed at the community.

To the extent that participants or providers in virtual communities will want to enforce the community rules against external actors, then, they will likely have to frame their concerns in terms either that the actions constitute a serious threat to the integrity of the community, or that the external actor, by explicitly targeting the community, must be treated as effectively consenting to the rules of the community. In the last chapter, I argued that community norms ought not be directly enforceable in territorial courts against participants. That reasoning applies a fortiori to non-participants, against whom we should be very careful to enforce internal norms that have not been legitimately made or voluntarily accepted. If there is an argument to be made from communitarian integrity for the protection of a community from external interference, it will only be justified to the extent that the interference is clearly wrong and harmful to the community.\footnote{James Grimmelmann, “Virtual borders: The interdependence of real and virtual worlds” (2006) 11(2-6) \textit{First Monday} (arguing that focusing on the role of community and the social contract provides a stronger and more legitimate argument for the external support of internal norms: “This legitimacy, if genuine, 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. Speaking of virtual worlds in this communitarian sense provides real–life governments with more compelling reasons to listen to their wishes.”).} It is likely that a further qualification is necessary, that the interference to the community is wilful and targeted — there is little scope for a community or its provider to complain of the availability of general pur-
pose tools that could be used by participants to break the rules but which are not marketed as such.

This part accordingly proceeds with the strongest claim for external enforcement of community norms at the intersection of both of these bases: I suggest that enforcement against third parties will be justified where the actions of the third party are (a) clearly harmful to the community; and (b) directed and targeted at the community. It may turn out in future that only one of these bases is required to legitimately enforce community norms; at this stage, however, given the reluctance that we must in enforcing the consensual norms of a community with the weight of the state against those who are not consensually bound, it is safest to proceed on the assumption that both principles will be required before enforcement can be considered legitimate.

There are certainly cases where malicious external actors can pose serious threats to the social fabric of communities if they are unable to be held to account. The most obvious examples are the 'real' cybercrimes: cracking into systems and damaging the network or servers, accessing private information, or breaking into accounts in order to steal virtual assets. These acts are typically prohibited by computer trespass statutes and the common law tort of trespass to chattels. Providers rely on territorial states to protect them from malicious attack – although it must be said that while cybercrime statutes must provide some deterrence from attack from those countries that enforce them, providers rely more heavily on technical network security than on prosecution of would-be attackers.

Apart from attackers, providers and participants may wish to enforce community norms against third parties who have an indirect effect on the community. The most

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1076 Stealing is obviously a potentially difficult metaphor here – certainly, from an internal perspective, the participant who previously possessed the item has been permanently deprived of its possession; but from an external perspective, only an entry in the virtual community's database has been changed. An unjust enrichment framework could fit better, especially since tortious liability for trespass to goods and conversion is still limited to chattels: see Brian F Fitzgerald & Leif Gamertsfelder, “A Conceptual Framework For Protecting the Value of Informational Products through Unjust Enrichment Law” (1997) 16 Australian Bar Review 257.

1077 For example, at a Federal level in Australia, Part 10.7 of the Criminal Code Act 1995 (Cth); in the US, the Computer Fraud and Access Act (US) (18 USC § 1030).

1078 As to trespass to chattels, see generally Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204; Lancashire Railway Co v MacNicol (1991) 88 LJR 601; Hollins v Fowler (1975) LR 7 HL 757; Oakley v Lyster [1931] 1 KB 148. The owner of the computer system would have a trespass claim, but the possessor of a virtual object within the community would not. The trespass claim would have to be made out on the basis that the attacker modified the database that the provider owns, not that the trespasser took a virtual asset.
common example is that of third parties who provide software that enables a participant to break the rules or enables a participant to bypass technical measures designed to enforce the rules. Other third parties that directly encourage and profit from internal breaches include auction sites or retailers who fence assets or facilitate illicit trades between participants. Unlike malicious attackers, these actions are often not illegal per se, but once again can be deemed wrongful only through the context of internal community norms. There is an apparent conflict, then, between the demands that communities may make for protection from external actors, and the reluctance that states have in limiting the liberty of individuals based upon contractual agreements to which they are not a party.

It is accordingly unclear to what extent a virtual community can legitimately restrain the actions of a third-party that are only indirectly felt within the community. A third party's actions may have a significant negative effect on the integrity of the community, and restraining those negative effects may be important to allow the community to flourish. On the other hand, some actions that impose negative externalities on the community are socially desirable and accordingly ought to be privileged – critical speech or competition provide important examples. This tension over whether or not the rules can be enforced against non-participants is likely to grow in importance in the future as the value that can be extracted from and traded around virtual communities also grows.

The primary example is that of *Blizzard v MDY*, where Blizzard sought to restrain MDY from selling Glider, an automation tool that allowed WoW players to escape the grind by automating repetitive tasks. The use of such programs, called 'botting', is prohibited in the Terms of Service, and Blizzard take actions to suspend or cancel the accounts of users found to be using bots. Blizzard also sought to prevent third parties from selling bots for World of Warcraft, and did so in part by having eBay cancel listings for Glider.

MDY sought a declaratory judgment that Glider did not infringe Blizzard's copyright

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1080 Blizzard, *Terms of Use* (2008) World of Warcraft, Cl 8
in World of Warcraft. MDY argued that Glider could not infringe copyright in WoW, because its participants were licensed to play the game (and make any incidental reproductions into memory in doing so).\textsuperscript{1081} Blizzard filed a counterclaim alleging that not only did Glider infringe Blizzard's copyright in WoW, but that it impermissibly circumvented protected technological measures, that MDY was liable for secondary copyright infringement of Glider users, and that MDY was liable for tortious interference with the contracts between WoW players and Blizzard.\textsuperscript{1082} While the suit was phrased in terms of copyright infringement and circumvention under the DMCA, the tortious interference claim came closest to the heart of the matter, without quite reaching it. For Blizzard, Glider is a tool that helps its users break the community rules, and Blizzard sought to prohibit it for that reason. The ease of unattended farming with Glider and other automations increases the rate of inflation within the game, causing Blizzard to raise internal prices or introduce new 'money sinks' in response,\textsuperscript{1083} which in turn increases the amount of time that players who do not use bots must spend farming, which in turn increases the demand for gold supplied by commercial farmers. This vicious cycle is best broken, in Blizzard's view, by enforcing bans on RMT and those, like Glider, who facilitate the trade.

On a deeper level, however, Glider is also more than a product that participants can use to more efficiently break the rules. It symbolizes, to an extent, the most negative aspects of the RMT industry on gameplay – by almost-completely removing the interactive playing element from WoW, Glider strips the artifice from the game, leaving only the strange production / consumption hybrid shell. Glider is damaging to Blizzard's vision because it makes explicit the monotony and essential baseness of the economic grind built into the game mechanics. The soulless automatons that Glider creates violates not just the letter of the EULA but the spirit and conceit of the game, at least for Blizzard and a significant proportion of players.

This negative conception is not universal, of course. There are sufficient numbers of players who resent having to spend their leisure time carrying out monotonous and repetitive tasks in order to be able to participate in the higher levels of the game. These players form the groups that either utilise bots like Glider for their own use, or

\textsuperscript{1082} Ibid 5-6.
rely on the services of those who do in order to purchase the gold the bots produce. It is hard to say how the community as a whole views RMT; there are particularly vehement participants on both sides of the debate, as well as a substantial portion of players who quietly and unceremoniously participate in the grey market without drawing attention to themselves.

Another example comes from *Kopp v Vivendi*, where Brian Kopp sued Blizzard and its parent company to prevent it from repeatedly asking eBay to remove auctions for Kopp's World of Warcraft strategy guides. Kopp's guide was a collection of tips he had compiled about how to play World of Warcraft and was illustrated by number of screenshots taken from the game.  

Blizzard alleged that the guide infringed Blizzard's copyright and trademarks, although the claim was unlikely to be very strong. More interestingly for our purposes, Blizzard also alleged that the guide was prohibited by the WoW EULA, which forbids using the game for “commercial purposes”. The claim was settled before proceeding to trial, and Blizzard agreed to drop its IP allegations and to refrain from asking eBay to delist Kopp's future auctions for the guide. While Kopp was a participant and was bound by the terms of service, we can treat this example as a hypothetical case of third party enforcement because the creation of his guide could have proceeded from an entirely external position by merely compiling publicly available information in a new form.

The contrast between these two examples is interesting. In the first, there is a clear argument (albeit not a straightforward one) that Glider damages the community and lessens the experience for participants. If it is damaging, then a legal remedy may alleviate the need for an expensive technological arms race, where Blizzard introduces new routines to detect Glider and MDY improves Glider's evasive capabilities. A legal remedy may also prove the only effective way to protect the community from a breakdown in order by limiting the ability of participants to access software tools that serve no other purpose but to break the rules. In Kopp's case, on the other hand, there

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1084 Complaint, *Kopp v Vivendi Universal Games Inc.*, [22]-[23] (No 06-01767, C.D Cal., 2006).
1085 Ibid [54]-[55].
1086 The guide was clearly marked as an unofficial guide and not endorsed by Blizzard in any way (see *Lanham (Trademark) Act* 15 U.S.C. § 1114) and the screenshots are likely to be excused as fair use – although they are commercial in nature, they were illustrative of the guide and used in a wholly different context to Blizzard's copyright works (see 17 USC §107).
1087 Ibid [61].
is no valid claim that Kopp's guide is damaging to the community; sharing of strategies and information is a fundamental part of participation in virtual worlds,\textsuperscript{1089} and, while Kopp's guide was sold rather than given away, many of the free resources available for WoW players are commercially supported by advertising revenue.\textsuperscript{1090} The argument that the community needs protection from external actors is much stronger against MDY than it is against Kopp, which suggests that a normative distinction exists between the two and that even if MDY’s actions ought to be restrained, Blizzard's agreement not to disturb Kopp's future auctions is most likely a desirable resolution.

Apart from civil and criminal computer trespass, there are three main legal mechanisms that are used against third party actors: tortious interference with contract, secondary copyright infringement, and anti-circumvention law. The suitability of each of these doctrines to addressing these tensions will depend upon the extent to which they are sensitive to the internal norms of the community, and whether they can distinguish real targeted harm from general purpose or non-harmful acts.

\textbf{a. Tortious interference with contract}

Tortious interference with contract is the action that most closely approximates the tensions around non-participant enforcement. The general conception of the tort is that a participant has been wrongfully and knowingly induced to breach the contractual rules of the virtual community by a third party. Direct interference can be shown in these cases merely by showing that the third party has induced a breach by offering a sufficiently high price;\textsuperscript{1091} although if the participant has already resolved to break the contractual rules, there is an argument that the third party cannot be said to have induced the breach.\textsuperscript{1092} It would seem that the tort could be established in most situations where a third party helps a participant to break the rules, but the provider


\textsuperscript{1090} See, for example, Allahkazam, which is owned by IGE, one of the largest commercial gold farmers: Mr Rasputin, “Allahkazam Sells Out to IGE. No, Really. And IGE Andraste is Savant.” The Corporation, 4 May 2006 <http://www.corpnews.com/node/133> at 31 January 2010.

\textsuperscript{1091} British Motor Trade Assn v Salvadori [1949] Ch 556 (purchasing motor vehicles with knowledge that they were sold in breach of contract constituted intentional interference with contractual relationships).

must show damage,\textsuperscript{1093} which, as discussed above, may be difficult to establish for rules that proscribe only soft community harms.

Blizzard was able to establish a claim for tortious interference under US law against MDY for its role in selling Glider to WoW participants.\textsuperscript{1094} Judge Campbell held that there was no genuine dispute whether MDY intentionally interfered with the contracts, because “MDY actively promotes the use of Glider even though it knows that using Glider breaches the TOU.”\textsuperscript{1095} It would appear that it would not be difficult to obtain a similar result under Australian law. Kopp, by contrast, would not to be liable under this tort, as the guide he produces contains tips, not exploits (readers of the guide break no community rules through the information they glean),\textsuperscript{1096} the situation may be different with regards to the many purveyors of exploits who claim to be able to teach participants how to cheat at the game. It seems as though the tort of intentional interference with a contract satisfies the second normative criterion in that it will only provide a remedy where the harm is direct and targeted – it is unlikely to be available to restrain the dissemination of general purpose tools that may be used to break the rules. It is less clear, however, how the tort scores on the first criterion, in that it does not necessarily take into account the type of contractual clause that a participant is breaking, and may not be sensitive enough to distinguish activity which is clearly against community norms and activity which forms a mere technical breach that is systemically under-enforced.

b. Secondary copyright infringement

In contrast to intentional interference with contract, secondary copyright infringement does not provide as appropriate an avenue for third party enforcement. Secondary liability has been argued on the basis that a third party induces or facilitates a participant's breach of contract, which, by invalidating the participant's licence to run client software, thereby causes the participant to infringe copyright in the software.\textsuperscript{1097} A claim for secondary copyright infringement proceeds in Australia on the

\textsuperscript{1093} Goldsoll v Goldman [1914] 2 Ch 603.
\textsuperscript{1095} Ibid 44-5.
basis that the third party has 'authorised'\textsuperscript{1098} the infringement – meaning “to sanction, approve, or countenance”.\textsuperscript{1099} In the US, three separate heads of liability exist – where the third party has knowingly contributed to the infringement, where it is vicariously responsible for the infringement;\textsuperscript{1100} and, more recently, where the third party has induced the infringement.\textsuperscript{1101}

MDY was held to be liable for the infringement that occurred when WoW participants ran Glider.\textsuperscript{1102} In the last chapter, I argued that the use of the WoW client in breach of the rules should be treated as a breach of contract, not an infringement of copyright. If this is correct, then secondary copyright liability will not accrue, or, at least, secondary liability will only accrue where the third party provides software that affects the provider's copyright interests – for example, emulator software that allows participants to join the community and enjoy the content without paying subscription fees.\textsuperscript{1103}

In terms of protecting the integrity of the community, secondary copyright infringement seems to add little over the doctrine of intentional interference with contract, except that damages are decoupled from the harm of the breach and instead assessed with reference to the copyright interest. The problem, as discussed previously, is that the damages recognisable by copyright are not really related to the harm that is being complained of, and that accordingly any remedy cannot be proportional to the wrong done.\textsuperscript{1104} If a real distinction does not emerge in copyright law between breaking internal rules and breaching essential licence conditions, it will be too insensitive of internal norms to be useful; if such a distinction does arise, copyright will be inapplicable to the breach of the broader set of internal norms.

It seems that secondary copyright liability does provide a useful method for addressing harm to the community that threatens the provider's incentive to create and maintain the platform and the community, but it is not useful for providing a remedy for breach of the broader category of internal rules. Whether such a distinction can be

\textsuperscript{1098} Copyright Act 1968 (Cth) s 36(1).
\textsuperscript{1099} University of New South Wales v Moorhouse (1975) 133 CLR 1, 12 (Gibbs J), 20 (Jacobs J, with whom McTiernan ACJ agreed).
\textsuperscript{1100} See Sony Corp. of America v. Universal City Studios, Inc. 464 U.S. 417 (US Sup Ct, 1984).
\textsuperscript{1101} See MGM Studios, Inc. v. Grokster, Ltd. 545 U.S. 913 (US Sup Ct., 2005).
\textsuperscript{1104} See Chapter 5, above.
drawn is heavily dependent on the continued development of the intersection of copyright and contractual doctrine. If such a distinction does not emerge, secondary copyright liability will be likely to be continued to be used to enforce community rules — as in *MDY* — but will do so in a way that does not appropriately take into account internal community norms. Primarily, the decoupling of harm in copyright law from the damage that is caused by breaking the rules means that secondary copyright infringement fails on the first criterion, which requires that third parties be restrained only where it is demonstrably required in order to protect the integrity of the community. If it turns out that there is a distinct need for territorial states to deter and punish third parties who induce participants to break the rules of virtual communities, regardless of harm caused, then an explicit sui generis remedy would seem to be a much better approach than attempting to resolve the tensions through a copyright framework.

c. **Anti-circumvention**

Anti-circumvention law provides an interesting prohibition on the ability of third parties to create or distribute tools designed to bypass the technological measures that are forming an increasingly important part of internal governance mechanisms. The unique software-based nature of virtual communities means that rules can be much more easily enforced through architectural design choices;\(^{1105}\) providers are able to police compliance by introducing technical measures that attempt to identify and prevent rulebreaking behaviour. The problem is that, like other modes of governance, technological measures can act both legitimately and illegitimately. These measures may inhibit cheating, but they may also, for example, restrict competition or limit the ability of a participant to lawfully access the community.\(^{1106}\)

Anti-circumvention law is currently at a cross-roads in its rapidly expanding trajectory; first introduced to protect copyright interests, there are tensions in anti-circumvention law as it struggles to deal with a broader ability of platform owners to control


Third party enforcement

access and use of technology. Courts in the US have read down anti-circumvention law to ensure that it does not restrict competition in items such as compatible garage door openers and the diagnosis and repair of computer equipment. The High Court of Australia in Stevens v Sony held that only technological measures that are legitimately concerned with inhibiting copyright infringement would be protected. Recent changes in law to protect measures that “control access” to copyright works, however, together with the continued coupling of breach of internal rules with copyright infringement, suggests that technical measures that enforce code-based community rules may be protected in future.

The court in Blizzard v MDY found that Blizzard's cheat protection routine, Warden, 'controlled access' to copyright material in World of Warcraft in a relatively tortured judgment. The District Court found that while Warden could not control access to the copyright material that comprised the WoW client (because the client was already installed on the user's computer, and each individual object could be viewed outside of the game), it did control access to the copyright material “in the dynamic context of the WoW game”. The Court accordingly found the requisite link to copyright protection and held that Glider therefore violated the DMCA prohibition on circumvention in 17 USC §1201(a)(2).

It is unclear, at this stage, whether an Australian court would follow the same reasoning. The emphatic statements of the High Court in Stevens v Sony suggest that Australian anti-circumvention law should be read down and closely coupled to copyright infringement. The Warden routine in WoW seems even less closely related to copyright than the device in the PlayStation

1109 Storage Technology Corp. v. Custom Hardware Eng'g & Consulting, Inc., 421 F.3d 1307 (Fed. Cir. 2005).
1110 Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58 (the High Court read down anti-circumvention law in Australia to require a strong link to the protection of copyright interests).
1111 Following the Australia United States Free Trade Agreement, the Copyright Amendment Act 2006 (Cth) introduced a new category of protected technical measures, 'access control technological protection measures', which are designed to "control access" in connection with the exercise of copyright (Copyright Act 1968 (Cth) s 10(1)).
1115 Ibid 967.
1116 See Stevens v Kabushiki Kaisha Sony Computer Entertainment [2005] HCA 58, [47].: “it is important to avoid an overbroad construction which would extend the copyright monopoly […] by including […] devices which prevent the carrying out of conduct which does not infringe copyright and is not otherwise unlawful” (Gleeson CJ, Gummow, Hayne and Heydon JJ); at [211]: “the wider view […] would have the result of affording [rights holders] a de facto control over access to copyrighted works or materials that would permit the achievement of economic ends additional to, but different from, those ordinarily protected by copyright law” (Kirby J).
that enforced both region coding and copy protection in *Stevens*. The Warden system is only tangentially related to copyright if we accept that botting in breach of the internal rules should constitute copyright infringement rather than contractual breach, which I have argued they should not. Nevertheless, there remains significant uncertainty in the current law and it is not clear whether the introduction of protection for devices that 'control access' in addition to devices that 'prevent or inhibit' infringement ought to be thought of as a legislative reversal of Stevens or should, like the previous legislation, be read strictly in order to “to protect the fundamental rights of the individual”.

The ongoing legitimacy of technical measures and legal regimes designed to support them is crucially dependent on the ability of the law to distinguish protected legitimate uses from illegitimate ones. If the law is able to be used to protect technical measures that enforce rules we consider to be illegitimate, we will lose a lot of nuance in determining which internal norms ought to be backed by the substantial weight of the territorial state. It would make little sense to hold some rules to be unenforceable at law but legally protect a provider's ability to enforce them technically. On the other hand, technological measures do aid significantly in the enforcement of legitimate community norms, and, if it is appropriately tailored, legislative prohibitions on circumvention and the distribution of circumvention devices could empower communities to enforce breaches of norms that are otherwise difficult to detect. Unfortunately, drawing a distinction between legitimate and illegitimate rules is not easily done with the relatively blunt instrument of anti-circumvention law as it currently stands, and the simple solution of requiring a closer link to copyright infringement is unlikely to adequately resolve the issue. While the case for anti-circumvention law was originally made to support copyright interests, the case that can be advanced for virtual communities relates to the internal rules that can be programmatically enforced, which is a much wider category. From the point of view of supporting community norms, limiting anti-circumvention law to cases where the technological measures protect

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1117 In addition to introducing Access Control Technological Protection Measures, the 2006 changes changed the definition of TPM from a device that “prevents or inhibits” copyright infringement to include a device that “prevents, inhibits or restricts” copyright infringement: *Copyright Amendment Act 2006 (Cth)* sch 12, cl 5.

copyright interests means that technical measures that enforce the broader category of social norms will be unprotected. Extending anti-circumvention law to decouple it from copyright infringement, however, is likely to lead to significant problems in other domains, unjustifiably allowing manufacturers to increase their control over devices and software.

It would seem that, again, it is too early to tell what level of protection is appropriate for technological routines that programatically enforce community norms. The case has already been made for anti-circumvention law to specifically protect copyright interests, and, on that reasoning, it is likely that providers ought to be able to prevent the manufacture and distribution of devices that allow individuals to bypass copy protection or community registration checks. The case that the new right to protect devices that 'control access' to copyright material should be read broadly such as to allow providers to protect routines that scan for rulebreakers, however, has not yet been made. If it turns out that communities do need such protection, a new sui gener-is scheme will almost certainly be a better option than twisting one that was designed to protect copyright interests because, once again, the justifications for copyright protection are far removed from those around internal rule enforcement. Anti-circumvention law fails the first evaluatory criterion because it is tailored for copyright interests, not the legitimate demands that communities may make to protect their internal norms. Importantly, however, anti-circumvention law does relatively well against the second criterion — requiring targeted harm — as general purpose devices that have other lawful uses are specifically excluded from the legislative scheme.\(^\text{1119}\)

d. **The future for third-party enforcement**

It is still premature to articulate a detailed expression of the point at which internal norms ought to be enforceable against non-participants. While there is some tension around a few issues – predominantly commercial gold farming – current virtual communities seem to be adequately dealing with external interference through technological and social means. In the future, if external interference turns out to be harmful and unmanageable, then perhaps more extensive legal measures could be investigated. In order to justify such a move, however, providers and communities will need

\(^{1119}\) *Copyright Act 1968* (Cth) s 10(1) (defining a 'circumvention device' as a device that "has only a limited commercially significant purpose or use, or no such purpose or use, other than the circumvention of the technological protection measure").
to articulate a case based upon the need to preserve the integrity of community autonomy.\footnote{1120} Short of certain established territorial norms – like a prohibition against non-consensually accessing or damaging networked systems – there does not appear to be any other normative basis upon which to hold non-participants to internally developed norms.

3. **Sui generis schemes – statutes of interration**

Writing in 2004 in a context of trying to isolate the uniqueness and fantasy of play spaces from the threat he perceived of territorial regulation, Castronova proposed a formal structure that states could use to retain the 'magic circle' and simultaneously protect participants in virtual spaces. In order to prevent 'meaning' from 'bleeding' into game spaces,\footnote{1121} Castronova proposed what he called 'Statutes of Interration' — modelled on statutes of incorporation — where the developer of a virtual world could ratify a charter and acquire a guarantee of a separate fictional play space, where “the acts and assets inside it are exempt from most laws of the Earth.”\footnote{1122} In return, the “chartered interration would be subject to strict rules”\footnote{1123} — such as conforming to 'standards' of 'construction' and 'policy'. After interration, “[t]he State intervenes in closed worlds only under conditions defined within interration law.”\footnote{1124}

Castronova was wrong in his project to isolate play spaces from the influences of territorial law, but his intentions are valid and important. Castronova noted the problems with contractual governance and the tensions that it creates and sought to provide a structure where societies could clearly articulate the legal consequences that acts in virtual worlds should have, and, importantly, what providers of games would have to do in order to maintain the game conceit.\footnote{1125} Balkin suggests a similar approach, but focuses primarily on protecting the free speech rights of players.\footnote{1126} The nature of the interration, then, is less a separate place removed from legal oversight, than an express articulation of the nature of the shared fiction – mainly, in

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\footnote{1122} Ibid 204.

\footnote{1123} Ibid 204.

\footnote{1124} Ibid 202.

\footnote{1125} Ibid 209 (“the rules by which such a place receives its charter will, and in fact must, impose restrictions on the decrees of owners; no one can legally interrate a world that is designed to immiserate people or violate their dignity.”).

Castronova's conception, a recognised declaration that property rights will not vest in participants.

Statutes of interration may not provide an impermeable boundary at law, but they may serve a very valid signifying purpose. In Castronova's construction, they allow developers to declare the terms of the shared fiction *a priori*, and here is their greatest strength and greatest weakness. Well executed, a charter for such 'closed' worlds would provide certainty for both developers and participants. Participants would be able to know and understand the rules before they invest themselves in the game, and developers will benefit from greater certainty in enforcing those rules. The rules, therefore, are much more legitimate, particularly when considered from a formal rule of law perspective – they are prospective, well-known, general, and certain. They are also substantively legitimate, because states that create statutes of interration will have the ability to determine what substantive rights of players need to be protected and what the permissible content of charters can be. The drawback of this gain in legitimacy, however, is likely to be a loss of flexibility. The more specific and predictable the rules set out in the charter are, the less they can be allowed to evolve as community understandings of norms continuously do.

Assumedly, unless we express a preference for unchanging rule-sets, the process of interration must have some scope to modify the charter once implemented. The vision of play-spaces Castronova has in mind, then, appears to be a vision of spaces which are tightly controlled by the developers, and in which any evolution is also strictly controlled. These spaces may well be worth protecting in the manner Castronova claims – but this does not mean that other spaces, which evolve much more organically from within, are not also deserving of protection as play spaces. The

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1127 Castronova uses the term 'closed' to refer to interrated worlds, where “[t]he border between the synthetic world and the real world is considered impermeable. The interests and conditions of users are regulated by the terms of the EULA. Earth courts and legislatures have no powers there. Conflicts among or between users and designers or owners are only actionable within the synthetic world, or only through institutions and processes that are at the sole discretion of the owners to devise and implement.” (Edward Castronova, “The Right to Play” (2004) 49 New York Law School Law Review 185, 201-2).


1130 See Andrew E Jankowich, “Property and Democracy in Virtual Worlds” (2005) 11 Boston University Journal of Science & Technology Law 173, 192; Balkin sees this as an advantage, because it would prevent “basic understandings about the virtual world from being changed by the platform owner after the players have invested considerable time and formed valuable social networks there.” (Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Virginia Law Review 2043, 2092).
sharp dichotomy drawn by Castronova between open and closed worlds, and the formal nature of the statute of interration does not properly account for these other possibilities.\textsuperscript{1131} As Jankowich notes, it “is unclear how statutes of interration [...] will manage this difficult middle ground [...] which may well account for the bulk of virtual worlds”.\textsuperscript{1132}

For the spaces Castronova has in mind, however, statutes of interration may provide the legitimacy we seek and the certainty that game developers are anxious to receive. If the internal practices of a community roughly match the description on the charter, and the norms which are developed are ones which the provider allows the community to develop, then the essential tension in this thesis, between the rules set out by the provider and the consensual norms of the community, simply will not arise. Enforcement of community norms by a court would be indistinguishable from enforcing the formal rules drawn up in the charter. Because these norms are legitimate, both formally and substantively, the resolution of disputes becomes a relatively simple matter, and avoids any difficult factual enquiries as to the actual norms of the community.

The great flaw in this reasoning comes from the way it attempts to define away the difficult questions that arise when the internal norms of a community do differ from the vision expressed in the charter. In these cases, the decision of whether to enforce the internal norms or enforce the charter becomes crucially important. Either the developer's vision or the expectations of the community must be sacrificed. Presumably, where the developer is at least partly responsible for deviating or allowing the world to deviate from its idealised expression in the charter, then the developer may not be able to rely on the charter as a complete defence to a participant's claim of damage.\textsuperscript{1133} Unfortunately, this proposition returns us to the original problem this thesis seeks to answer — how can the norms of virtual communities be enforced, and how do we resolve tensions between the vision of the developer and the consensual norms that evolve within a community?

\textsuperscript{1131} Balkin suggests a wider range of interration statutes, where developers with different purposes could choose different levels of protection and responsibility better suited to their worlds: see Jack M Balkin, “Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds” (2004) 90 Virginia Law Review 2043, 2091-2.


Seen in this light, statutes of interration can be thought of as a tool to do away with the factual questions, to the extent that the developer is successful at keeping the community in line with the a priori rules expressed by the charter. In these circumstances, for example, when presented with a claim of theft of virtual property, we do not have to ask whether the virtual object has the nature of property and whether its removal by another player or by the developer amounts to a non-consensual taking – both of these are answered (probably negatively) in the charter, and the charter accurately reflects the internal norms of the community. In the difficult cases, however, where the charter does not provide an answer or where the internal norms of the community differ, the statute of interration provides us with little assistance unless we choose to always side with the developer over the player – a blunt approach which remains unsatisfying.

Statutes of interration seek to provide a mechanism to overcome the uncertainties of contractual doctrine and the difficult questions of fact that accompany them, but, in order to do so, they rely on a static model of community that, if it exists, exists only in tightly controlled spaces. Castronova's proposal provides a superficially attractive mechanism for allocating risk and liability on certain issues at the outset, but it does not provide an easy solution to the normative problem at hand in hard cases. Where a question of liability or duty arises which does not fall squarely within the explicit wording of the charter, or where the internal norms of the community have shifted away from the vision expressed by the charter, then a choice to uncritically prefer the developer's vision over the interests of the participants merely obscures and assumes away the normative question. These are legitimately tough decisions, and, if we are to address the more interesting questions of governance of communities that evolve their own norms over time, we will require a normative framework that is more sensitive to the demands of legitimacy than merely enforcing a static positivist charter.

a. Potential approaches for constitutional structures

It is easy to criticise Castronova and Balkin's proposals with the benefit of half a decade of development of more subtle theoretical tools and more refined understandings of tensions in virtual communities. The core goal of Castronova and Balkin's projects, however, is worth reconsidering. The object of a proposal for statutes of inter-

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ration is, fundamentally, to increase legitimacy of virtual community governance by providing a workable sui generis framework that allows us to set appropriate constitutional limits for governance. To the extent that a contractual governance framework is not suitable — and not able to be made suitable — for addressing the issue of legitimacy in virtual communities, some sui generis model may be necessary in the future.

If the biggest drawback to Castronova's model is its assumption of a static community, it is possible to create a modified model that includes mechanisms for allowing and restraining change. The problem is actually quite a familiar one to constitutional discourse; the goal of written constitutions is to set out a vision for how societies can grow and evolve legitimately, how power can be constrained to ensure that the community can flourish. It would be possible, if necessary, to create a more dynamic framework for virtual community governance that sets out legitimate processes for the creation and amendment of rules, including the permissible subject matter of internal regulation and any applicable limits to the authority of the virtual sovereign. The main problem with Castronova's model, from a governance perspective, is not in its aims, but that it does not go far enough. Castronova presents a model based upon statutes of incorporation, but if it is to suitably address the tensions of ongoing community governance, it must instead be modelled more explicitly on a constitutional framework, not a corporate one. Some of the rigour of constitutional governance, of course, may be extraneous in the context of virtual communities, but the key recognition is that any such rigid framework must be not one that sets static rules, but one which provides the necessary support for the type of community the provider expects to grow.

A reinvigorated conception of statutes of interration, informed by concepts of the rule of law, would set out, firstly, the basic limits of jurisdiction — the pre-legal norms or inalienable rights that participants are deemed to have in the community — as the essential substantive limits on governance power. These choices are important, and would have to reflect external community expectations to some degree; as Castronova and Balkin suggest, we would expect some level of guaranteed freedom of speech commensurate with the nature of the community. We may require other guarantees against discrimination or safeguards for property, for example. The exact content is less important than the process of ensuring that governance is limited in a
manner that is appropriate for the particular community. We would next require a method through which rules can be legitimately made and promulgated, including a means of re-examining the constitutional document itself. There are important choices here as well; the more formal the structure we require, the more protected participants may be, but the less agile the community will be and the less readily it will be able to evolve as required. Additionally, at a minimum, procedural limits must then be articulated as to how rules will be enforced, how participants can be punished and how the provider can be held to account. Finally, consideration must be given to how the rules can be enforced between participants – whether the agency of the provider will be required (and whether the provider can be compelled to arbitrate), or whether participants can enforce the rules against other participants in a more direct manner.

Once these tasks are undertaken, the model that we have is markedly more like western constitutional governance than statutes of incorporation. None of this is to say that such a model must incorporate all of the elements of constitutional democracy; it would be entirely possible, as Grimmelmann has hypothesised, to adopt an explicit feudalist structure,1135 for example, or any other governance structure that provides an appropriate measure of legitimacy. It does mean, however, that in order to comply with our over-arching requirement of consent, as far as possible, these choices must be made explicit so that participants can understand their rights and responsibilities, and that the requirements of legitimacy imposed on the provider are appropriate to avoid abuses of power to the extent that is necessary for the particular community.

This model is nothing more than a thought experiment at this time; it is unlikely that anything quite so formal will be required in the immediate future. At the start of this thesis, I suggested that constitutional values — specifically rule of law values — should be read into the private law regimes that regulate private governance. In the last three chapters, I have set out a model for how rule of law values can inform the contractual governance framework in order to more properly address the tensions that arise in virtual communities. If it turns out that the private contractual framework is not able to adequately address the governance tensions with which we are concerned, however, then an explicit constitutional framework will be worth investigating. For the time being, however, such a project seems immature; our understand-

ing of the needs of virtual communities is not yet sufficient to allow us to create pro-
scriptive structures for their regulation, and it is not yet apparent that the contractual
framework will be wholly inadequate, or even in which precise areas it will need
supplementing.
Chapter 7. Conclusion
In this thesis, I set out to provide a normative account of how we ought to support and limit governance in virtual communities in order to encourage innovation, autonomy, and legitimacy. The construction of this framework has proceeded in three stages. In the first stage (Chapters Two and Three), I posited some tensions in the governance of virtual communities, and suggested that in order to properly address these tensions, the private law that typically structures relations in virtual communities should be informed by the discourse of the rule of law. In the second stage (Chapter Four), I examined the contractual governance framework and highlighted the areas of greatest flexibility where rule of law values could legitimately influence the resolution of disputes under contractual doctrine. In the final stage (Chapter Five), I attempted to synthesise the theoretical values of the rule of law with the doctrinal analysis of private law in order to articulate a basis upon which judicial discretion should be informed by rule of law governance values in addressing private governance disputes.

The final chapter (Chapter Six) attempts to situate and consider the limitations of a contractual governance framework for the future regulation of virtual communities. Here, I identify two main areas where a contractual framework will be likely to be inadequate: in the enforcement of rules between participants, and in the enforcement of community norms against external actors. While rule of law values do assist in conceptualising these tensions and adequate private law resolutions may emerge, it is too early in our collective understanding of the needs of communities and participants within communities to conclusively articulate a normative framework for their resolution. I conclude by providing some speculations on the benefits and limitations of a sui generis approach that may be useful for addressing these issues in the future.

In this final chapter, I will summarise the main argument of this thesis and re-articu-
late the normative framework that I propose to inform the resolution of governance tensions in virtual communities. I will then examine the adequacy of this framework in light of how effectively it answers the question of how to best regulate the exercise of private governance power, and explain the chief limitations of the framework. Finally, I conclude with a set of unanswered questions where future work will be required.

1. The contractual framework informed by rule of law values

The primary concern about governance in virtual communities is the lack of guarantees of legitimacy in the exercise of power by providers. Because governance is treated as a purely private exercise, the legal limitations that have developed to check and legitimate the exercise of public power are not seen to apply, and providers are not understood to be accountable for the exercise of their discretion. As virtual spaces become more important to more people, there is a real threat that our experience of governance becomes increasingly disconnected from the values of legitimacy that we have developed to protect ourselves from arbitrary subjugation – primarily expressed in the values of the rule of law.

By utilising a framework based upon the ideals of the rule of law, we are able to highlight certain tensions that revolve around the legitimacy of the exercise of power in virtual communities. The rule of law is particularly suited to this task – it is a discourse that examines legitimacy in governance and squarely confronts the tensions that arise from the unrestrained exercise of power. If the central threat of cyberspace self-governance is the threat that private power is not required to be exercised in a manner that is legitimate and consistent with the collective values of those over whom it is exercised, then a rule of law framework will be useful to conceptualise these tensions and help us identify the types of restrictions that we may choose to impose on autonomous communities.

Through the lens of the rule of law, a range of different issues raise separate concerns about the governance of virtual communities. As a threshold requirement, there is a suggestion that the exercise of power should be required to be authorised by the rules of the community. Control of the code generally implies absolute power within the
community, but we may expect that proprietors act in accordance with the rules rather than arbitrarily. In most cases, this involves a recognition that contractual terms of service ought to be enforceable against proprietors as well as against participants. We would expect, then, that contractual terms that have the effect of substantially excluding or limiting the ability of participants to enforce the contract would be unenforceable, most likely under consumer protection legislation or common law doctrines of unconscionability.

The recognition that community norms ought to be enforceable against the provider raises several issues with the substantive content of contractual terms of service. A requirement that a provider abide by the rules has little meaning if the proprietor is free to write the rules in any terms it sees fit. Some strands of rule of law theory accordingly consider substantive limits on the scope of governance – generally drawn from natural law or posited human rights. It follows that we may curtail private governance that is in conflict with substantive external values – the fact that these communities are 'private' does not necessarily absolve territorial states of the responsibility to protect the interests of their citizens. As a preliminary matter, I have briefly considered various restrictions on discrimination, protections of free speech and peaceful assembly, respect for privacy and property, and safeguards of rights of legal enforcement. To varying degrees, each of these (and perhaps more) will be relevant if and when rules within virtual communities begin to threaten public values for a growing proportion of the population or over increasingly important domains. As this occurs, we can expect territorial states to act to restrain private ordering that conflicts with these substantive values. While it is dangerous to read substantive conceptions of the rule of law as universal, territorial states should treat the apparent infringement of these values with suspicion, ensuring that where the contract purports to waive certain interests it does so in a way that is legitimate, consensual, and desirable. This is best achieved by carefully scrutinising the consent of participants and by further developing the law that governs the interaction of private rights and contract. For example, contractual arrangements that restrict participants' rights in their virtual assets or create a discriminatory community should only be enforceable where they are both clearly consensual and are desirable in that they do not offend against the legal values of the relevant territorial state.

Modern liberal conceptions of the rule of law emphasise the importance of predictab-
ility in governance. From these perspectives, we can see that the contractual rules that purport to underpin participation in virtual communities are rarely clear and consistent and accordingly lack the ability to provide certainty to participants within those communities. In communities where we view certainty as important, the implication is that we may legitimately refuse to uphold rules that are unclear or inconsistent. Special challenges arise in the case of communities that require more flexibility to deal with emergent behaviour, but we may nevertheless restrict retroactive punishment of behaviour that was generally acceptable within the community at the time. Contractual doctrines of election, estoppel, and good faith are likely to be most relevant here to prevent providers from relying on contractual rights in circumstances where to do so would conflict with the internal norms of the community.

Other strands of formal conceptions of the rule of law sometimes require procedural fairness in the way in which laws are administered. These types of tensions are reflected in virtual communities where a participant who has been punished is unable to contest or validate the accuracy of the allegations. Requirements of due process and transparency are particularly important in contexts where increased flexibility is required to allow providers to create and maintain a cohesive or just community. We would expect that territorial courts would be willing to engage in a type of review of internal decision making processes in order to establish whether a decision to punish or exclude has been properly made. This type of limitation on the exercise of contractual rights will most easily come from conceptions of good faith (to the extent that they are applicable in these types of contracts), and, to a lesser degree, election, estoppel, and statutory unfair terms protection.

The ideals of the rule of law are contested, and their applicability to virtual communities will be both contested and highly contextual. Some communities may benefit from restraints on the arbitrary exercise of power, but others certainly will not. The determination of whether any of these principles is applicable to the social relationships within any given virtual community is a difficult pragmatic exercise that necessarily involves a consideration of the competing tensions both internal and external to that community. Some substantive external values will be more important in some contexts than in others – we may, for example, tolerate or encourage discrimination or absolute restraints on speech where they are useful but not where they are harmful. Drawing the line is a difficult continuing exercise, but one which can be
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guided by the values of the rule of law.

The liberal emphasis on formality and predictability may be more important in heterogeneous societies whose borders are more fluid than in more unified societies where cohesion trumps liberty. In open-ended platforms that are commodified or form the basis of diverse communication and participation of all kinds – platforms like Facebook or Second Life, for example – we may expect that predictability and certainty are increasingly important. In more specific platforms like massively multiplayer online games, spaces for artistic expression, or close knit community forums, on the other hand, we may tolerate less certainty in exchange for greater social cohesion or freedom of expression. These determinations are always highly contextual – a high degree of flexibility is required in order to avoid destroying the value of autonomous and innovative communities.

A crucial component in determining whether the various values of the rule of law are important or not involves a critical examination of the role of consent in the legitimate governance of communities. Within rule of law theory, the consent of the governed or, more fully, democracy, is sometimes viewed as essential to the legitimate exercise of government power over any person. It is likely that democracy may be superfluous in many virtual communities – real consensual government is a difficult process which requires investment that may be lacking from both participants and proprietors. For many participants, the desire to participate is likely to significantly outweigh the desire to be directly involved in the meta-game of governance. The importance of direct participation is generally lessened because, in contrast to territorial states, participants in virtual communities do have a substantially easier method of expressing consent in that they hold a greater (but still quite limited) power to exit a community whose rules they no longer agree with.

A critical examination of consent provides the key to determining how important particular rule of law values are in the context of particular communities. Examining consent avoids the pitfalls of universalising values that are inherently contested and contextually sensitive. It is clear that some individuals may consensually choose to participate in a community whose rules are arbitrary and oppressive; as long as that consent is genuine and their participation does not offend the substantive values of the territorial state, their autonomy should not be unduly curtailed. In order for con-
sent to be meaningful, however, we should carefully examine what rules and norms in particular that participants consent to by remaining in a community. In some cases the consensual and understood internal norms will be in direct conflict with either external values or the contractual terms of service. Where there is a conflict with substantive external values, as discussed above, territorial states may refuse to recognise consent or significantly raise the thresholds required to exclude those values. In cases where there is a conflict between internal norms and the contractual terms of service, however, different tensions arise. Many of the arguments in favour of cyberspace self-governance revolve around the liberating effects of autonomous, consensual association. In the same way that these arguments suggest that territorial states should defer to consensual internal norms, they must also suggest that states should not enforce contractual rules which conflict with internal norms. The implication is that proprietors ought not be able to rely on contractual terms that purport to set different rules for participation than those that are understood through the community. To the extent that such conflicting rules are upheld, the argument from autonomy and liberty fails; private governance, in these circumstances, is merely the continued domination of the providers over the community. It follows that contractual doctrine should be sufficiently informed by community norms so that where there is a significant conflict between internal community norms and contractual terms, we would expect the strict terms to be unenforceable — again through election, estoppel, or requirements of good faith.

Turning from the validity of contractual rules to the question of enforcement raises a new tension over the role of punitive and deterrent sanctions for breach of community norms. Looking past the 'real' / 'virtual' dichotomy of harm in the application of criminal law, we see that the rules of virtual communities lack the legitimacy that territorial states demand for the imposition of punishments and that only compensatory awards ought to be available for breach of community norms. Particularly, this means not only that criminal law is inappropriate for punishing breaches, but that copyright and tort should not apply as a general substitute to meet demand for punitive measures. The resultant gap in punishment should, in most cases, be addressed by empowering communities to impose punishments internal to the community; primarily, this suggests that equitable remedies — injunctions and specific performance — be made available where appropriate to support the enforcement of legitimate com-
munity norms. In order to avoid supporting illegitimate rules, a careful and critical examination of community norms is necessary prior to providing either compensatory or injunctive relief.

2. Evaluation: the limitations of the framework
The private doctrine of contract law does not provide an ideal framework for the regulation of relations in virtual communities. The baggage of traditional contract theory, which values freedom to contract and posits a mutually beneficial bargain for a limited transaction between two equal parties, does not easily reflect the tensions that permeate the continued governance of communities. In these spaces, where social norms and the community itself are constantly evolving, participants are usually heavily invested and have little power against the will of the provider. The bargain struck at the time a participant enters the community, if it can be called that, is barely comprehensible and often meaningless at a time when the participant is not at all invested in the community, and sometimes bears little relation to the ongoing process of governance. The assumptions made by contractual doctrine are likely to overlook these tensions and lead to outcomes that undesirably detract from our social values of legitimacy, equality, and fairness in governance.

In articulating a normative framework based upon the rule of law, I have attempted to address these tensions within the contractual paradigm that is currently use for the regulation of virtual communities. If courts are able to undertake a critical examination of consent and community norms in resolving contractual disputes, I believe that there is sufficient flexibility in contractual doctrine to allow virtual communities to flourish within the constraints imposed by requirements of legitimacy. By making governance tensions explicit within contractual interpretation, courts will have the ability to consider the real consensual bargains that are made in virtual communities and better conceptualise the harms that participants can be exposed to by illegitimate governance. Once concepts of consent and harm are clearly visible in contractual disputes, questions of interpretation, of good faith, of fairness, unconscionability, election, and estoppel are more likely to directly address the fundamental tensions between participants and providers. The core goal of this project is to reduce the alienating effect of resorting to contract law to resolve a set of tensions that are not easily expressed within a contractual framework.
The efficacy of this project depends on four main issues. The first is the willingness of territorial courts to look past the deterministic assumptions embedded in private contract and property law to more critically conceptualise the relationships and conflicts in disputes that arise in virtual communities. The normative theoretical framework I have provided seeks to show not only that this is possible within the confines of contractual doctrine, but how this can be done by using rule of law values to evaluate private governance.

The second issue is the ability of doctrine to articulate a clear set of guiding principles that providers can rely on to structure their communities and minimise legal costs. It is critically important to avoid imposing requirements of legitimacy that result in unviable communities or in a regulatory environment in which providers are not willing to invest. Resolution of disputes in litigation is costly, slow, and likely damaging to the integrity of the community. Communities should be encouraged to develop legitimate internal governance processes; if this is successful, courts will have no reason to interfere in routine questions of autonomy and the exercise of discretion. The development of clear standards that we expect of virtual communities is critically important to allow communities to flourish and to provide the certainty that providers need to continue to invest in the creation and sustenance of communities.

A related issue is the appropriateness and costs of ongoing compliance for individual virtual communities. Each imposition of requirements for legitimacy increases drag in the community; extremely formal structural solutions have concomitantly high costs. Whether the costs of guaranteeing legitimacy are manageable will depend upon whether the standards of legitimacy that are expected are appropriate for the particular community. Far from being universal (at least in relation to virtual communities), the values of the rule of law are highly contextually sensitive. Imposing requirements of legitimacy that are not appropriate for the community will unduly limit autonomy and greatly disincentivise investment in virtual communities.

Whether courts are able to simultaneously provide clear guidance and remain con-

1136 See E. P Thompson, *Whigs and Hunters: The Origin of the Black Act* (1990) 266 (arguing that the rule of law is a universal human good); See Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004) 137 (arguing that the concept of the rule of law, as a restraint on the exercise of power by governments, is universal).


The efficacy of the system as a whole, balancing innovation and autonomy with legitimacy, requires that we only impose external limits on governance where they are justified. It requires a degree of certainty in application, and needs to be carried out in a way that does not impose too much load on the judicial process or too great an obligation on providers of virtual communities. The framework that I have proposed sets out an immediate plan for encouraging communities to develop more legitimate and fair internal governance and review procedures, and is designed to be
sufficiently flexible to avoid unduly limiting autonomy and innovation. The long
term goal is to create a regulatory system that allows virtual communities to flourish,
and developing legal regimes that support legitimate autonomy and curtail the illegit-
imate exercise of power is a fundamental component of that system. To flourish, in
this context, means not just to grow, but to grow in a way that affords communities
the freedom and possibility of developing truly consensual autonomous norms. Since
we cannot and should not do away with the influence of territorial law on these com-
munities, we should strive to, as best as possible, avoid a regulatory system that sup-
ports illegitimate governance.

Whether or not the particular project of this thesis is successful, one thing that is
clear is that a conceptual shift is required; a critical contextual analysis is much more
useful than a formal classical contractual analysis when evaluating governance in vir-
tual communities. The tensions that arise in communities are a different set to the
tensions that arise under consumer contractual doctrine, and we require a different
discourse in order to properly address them. As people begin to live more of their
lives within virtual communities and those communities develop their own social
norms and rules, a key concern arises as to the legitimacy of the internal governance
system. Territorial states ought to encourage autonomy and diversity, but those states
also have responsibilities to protect their citizens from the worst negative effects of
unrestrained private power.

3. Future work
The task of understanding how individuals experience life in a society that is increas-
ingly connected through computer mediated communication has only very recently
begun. The pace of technological development continues to far outstrip our under-
standing of its impact. Much hard work remains on the horizon for all of us in at-
ttempting to make sense of what it means to live in the society we are building, and,
hopefully, articulating a vision for the society that we want to build.

The challenge addressed by this thesis was to develop a theoretical framework to bet-
ter conceptualise the relations of power in virtual communities. Much work remains
to be done on the conceptual side as we continue to develop our understanding of the
experience of participants in these new spaces. The framework I have developed here
is open to an ongoing process critique and refinement from a conceptual point of view to better address the tensions present in different communities and different contexts. As an initial outline, much of this framework is in need of improvement in resolution and detail, an iterative process that can continue indefinitely.

In terms of turning this conceptual framework into practice, there is much doctrinal work that is outstanding. We need to further analyse and refine the ways in which contractual doctrine can be more sensitive — less alienating — to the interests of providers and participants in the communities it purports to regulate. Contractual doctrine is continuously evolving, and there is a great deal of uncertainty as to how we, as a society, ought to deal with the evolving ways that contracts are being used to govern communities. New unfair terms legislation and more in-depth articulation of the limits of contract are just the first steps in this ongoing challenge.

In addition to refining contract law for new contractual arrangements, we are tasked with developing other private law doctrines to adapt to the needs of participants in virtual communities. The proper operation of property, tort, and copyright law in these new contexts pose the most immediate challenges, but other private law forms will follow. Critically, it is not just the development of these doctrines but the development of the intersection of each of these doctrines with the contractual governance framework that is important. We need to provide the clarity and certainty that participants and providers require at these intersections in order to allow them to create norms that are legitimate and beneficial.

The most crucial element of this ongoing discourse is the continued refinement of our collective vision for what the future should look like. We are continuously at the crossroads where we must choose how our society should develop and how technology and the law will be used to support that development. In order to articulate this vision, we need to improve our understandings of these developing cultures and what it means to participate in these new communities. It is only through an ongoing process of critically examining the lives we lead and the societies we are building that we can hope to seize the opportunity to make the best choices we can for the future. To the extent that this thesis has been successful in aiding the reconceptualisation of life and governance in virtual communities, it is only one tiny step in a perpetual process.
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