

## WHY MUST YOU BE MEAN TO ME? CRIME AND THE ONLINE PERSONA

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*The development of online social spaces such as YouTube, MySpace, and Second Life has created new opportunities for their users to behave toward others in a way that would amount to offenses such as harassment if conducted offline. It has also enabled users to create online personae that are distinct from, and not obviously connected to, their real-world personalities. This article explores the question whether, and if so on what basis, criminal law should be extended to cover attacks on online personae where it cannot be proved either that the attacker intended to damage the director or that such damage was an expected consequence.*

“You love to see me crying”<sup>1</sup>

### I. A NEW ME TO BE HURT

In April 2007, Felicity Lowde was convicted of harassment by means of blog postings, and was sentenced to six months imprisonment by Thames Magistrates’ Court in June of that year.<sup>2</sup> This is the first widely reported U.K. example of criminal harassment conducted purely online.<sup>3</sup>

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1. From the song “Mean to Me” (Fred E. Ahlert music, Roy Turk lyrics, 1929). A number of other references to popular songs seem to have crept in, for which apologies are given but no citations.

2. London Times, June 29, 2007.

3. R v. Debnath [2005] EWCA (Crim) 3472 was an appeal relating to a conviction of harassment by a combination of website pages, abusive emails, and hacking of the victim’s

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Communication via a victim's Facebook page recently led to a charge of harassment, though on the evidence the defendant was acquitted.<sup>4</sup> Numerous criminal convictions for online psychological attacks have been recorded in the United States.<sup>5</sup>

Attacks of this kind are likely to become more common.<sup>6</sup> It is notorious that Internet users often lose many of the inhibitions that constrain their offline actions:

The Internet allows an individual to create an on-line persona with little relationship to his or her real-life identity. The facelessness of cyberspace lends itself to extreme forms of expression and allows people to say things that they might never say face-to-face.<sup>7</sup>

Physical injury caused directly by online means has not so far been reported,<sup>8</sup> but online disputes have already led to offline violence.<sup>9</sup>

Much of this aggressive behavior is already criminal. In many instances the content of a communication will constitute a criminal offense irrespective of the medium used to communicate; for example, the various forms of hate speech or the offenses created by the Malicious Communications

computer, but a substantial element of the harassment occurred offline as a result of loss of use of the hacked computer. Walden notes an unreported prosecution for psychiatric harm caused to the victim by abusive postings on friendsreunited.co.uk that predates Lowde. Ian Walden, *Computer Crimes and Digital Investigations*, at ¶ 3.197 (2007).

4. Birmingham Mail, Mar. 27, 2008.

5. Sally Greenberg, *Threats, Harassment, and Hate On-Line: Recent Developments* 6 B.U. Pub. Int. L.J. 67 (1997), recounts a number of early examples.

6. Anirban Sengupta & Anoshua Chaudhuri, *Are Social Networking Sites a Source of Online Harassment for Teens?: Evidence from Survey Data*, NET Institute Working Paper #08-17 (Sept. 2008), [www.NETinst.org](http://www.NETinst.org). See also Tanya Byron, *Safer Children in a Digital World: Report of the Byron Review*, ¶ 3.63, <http://www.dcsf.gov.uk/byronreview/>; Danielle Keats Citron, *Cyber Civil Rights* 89 B.U. L. Rev. 61, at 64–66, 68–81 (2009).

7. Greenberg, *supra* note 5, at 675.

8. Though devices are already being produced that allow users to communicate physical sensations remotely—see, for example, the Hug Shirt (<http://70.32.91.33/products/thehugshirt/>) and the KissPhone (reviewed at <http://gizmodo.com/320801/kiss-phone-opens-up-new-frontier-of-teledildonic-possibilities>, though this appears to be more a concept than a real product)—and such devices will no doubt be used for malicious as well as their intended purposes.

9. In *Jewish Defense Organization Inc. v. Superior Court of Los Angeles County*, 85 Cal. Rptr. 2d 611, 614 (Cal. Ct. App. 1999), the online war of words escalated into an assault by one party on another with a bowl of soup followed by a shooting in which an innocent bystander was injured.

Act 1988 and the Communications Act 2003.<sup>10</sup> By contrast, some communications will amount to offenses because of their effect on the recipient, even if their content is not indecent, offensive, or threatening per se. In England and Wales these are dealt with under section 2(1) of the Prevention of Harassment Act 1997.

However, the basis of these existing offenses is either the misuse of communications technology or the infliction of harm on a real-world, offline human person. This article examines a new phenomenon, attacks made on a virtual entity in its own right, without overt intent to injure any human person.

The Internet has enabled the creation of new online social spaces, of which MySpace, Facebook, YouTube, and Second Life are among the best-known. Online social spaces allow users to express themselves in ways not available to them offline. YouTube is more than merely a mechanism through which users can post videos of their frolics or clips from their favorite television series; it can also be used to communicate performance art, creative video works, and other expressions of personality. Some MySpace users do no more than tell the world about themselves and chat with their friends, but others create a persona that is not recognizably the same as the personality shown to offline friends and acquaintances. Second Life “residents” adopt an avatar that may be physically very different to their real-life selves, not necessarily of the same sex or even in human shape, and may undertake activities that they do not or cannot undertake in the offline world.<sup>11</sup>

The most sophisticated avatars can become a sort of visual and cognitive prosthesis, representing an extension of self in the virtual world, or what the virtual environment visitor would like to be, or appear to be, in the virtual world. Virtual avatars may also represent the actions of a user, different aspects of a user’s persona, or the user’s social status in the virtual environment.<sup>12</sup>

The investment in developing these new selves, both in time and emotion, can be substantial. In a survey of online role-playing game participants, Yee has discovered that users spend, on average, 22.72 hours per week in the game environment, and that about one quarter of users disclosed that their most satisfying and most negative recent experiences had occurred online,

10. See further Walden, *supra* note 3, at ¶¶ 3.187–3.212.

11. Unassisted flying is a universal method of travel, for example.

12. Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, Akron L. Rev. 649, 651 (2006).

rather than in the real world.<sup>13</sup> The online existence of some users may be more vivid than their real-world lives.<sup>14</sup>

To illustrate these new types of online activity, three fictional examples are set out below. It would clearly be invidious to single out real examples, but these fictions are based on the kinds of new persona encountered in these online spaces and the types of reaction they can engender.

1. Gloria has registered a MySpace account under the name Cute Voice, to which she uploads her poetry, audio of her performances of songs that she has written, and video of her dancing in a veil. Gloria never sings or dances in public offline, and is not identifiable from her MySpace page. Cute Voice has recently become somewhat of a celebrity online, and numerous visitors to her pages have left comments on her work; the commonest, and kindest, comment is “talentless.”
2. George and Gilbert work in the accounts department of an insurance company, play football on the weekends and lead apparently sedate lives. Online, however, they have registered a YouTube account as ToonPolitico, and they spend their leisure time making mashups<sup>15</sup> of children’s cartoon footage with audio of extremist

13. Nicholas Yee, *The Psychology of Massively Multi-User Online Role-Playing Games: Motivations, Emotional Investment, Relationships and Problematic Usage*, in *Avatars at Work and Play: Collaboration and Interaction in Shared Virtual Environments* 187–207 (Ralph Schroeder and Ann-Sofie Axelson eds., 2006).

14. Most notably a Mr. Boyd from Northern Ireland, whose defense to a charge of robbery of a lingerie shop was that he was acting as his role-playing game character, an elf named Beho, rather than as himself; BBC web news 6 March 2007, [http://news.bbc.co.uk/1/hi/northern\\_ireland/6425333.stm](http://news.bbc.co.uk/1/hi/northern_ireland/6425333.stm). The report of his conviction and two-year sentence—BBC web news 18 May 2007, [http://news.bbc.co.uk/1/hi/northern\\_ireland/6669641.stm](http://news.bbc.co.uk/1/hi/northern_ireland/6669641.stm)—does not indicate whether his defense was disbelieved or whether it was found not to be a defense as a matter of law.

15. In this context, a mashup is the combination of video from one source with sound from another, edited together to convey a new message. One of the best-known mashups of this kind is “Scary Mary,” a reediting of the trailer to the film *Mary Poppins* in the style of a horror movie trailer, with appropriate additional sound. Numerous copies can be found posted on YouTube. Wikipedia defines four categories of mashup (<http://en.wikipedia.org/wiki/Mashup>):

- **Mashup (digital)**, a digital media file containing any or all of text, graphics, audio, video, and animation, which recombines and modifies existing digital works to create a derivative work.
- **Mashup (music)**, the musical genre encompassing songs which consist entirely of parts of other songs.

political and religious speeches. ToonPolitico's latest offerings are widely viewed and generate fierce online discussion in blogs and message boards, much of which describes these mashups and/or their creators as "sick," "disgusting," and "perverted."

3. Professor Graham Graham of the University of Loamshire has a female avatar in Second Life called Echo Allen,<sup>16</sup> through which for over a year he has participated in discussions of feminist theory with other residents. Hackers have taken over control of his avatar, reclothed it in bondage gear, equipped it with virtual sex organs, and made it engage in sado-masochistic sex acts in a "mature" area of Second Life.

In each of these example the attacks are made on a victim who (or which) has a purely online existence, what this article terms an "online persona." This raises the question whether the law should treat such attacks as crimes.

## II. ME AND MY SHADOW

The connection between an online persona and its real-world counterpart largely determines whether an attack on the persona is an offense under the law as it stands. If the intention of the attacker is to harass the real-world person, this is clearly just an instance of the sort of behavior found to be criminal in *Lowde*. The fact that the direct attack was made on the online persona, rather than the real-world person, is not relevant. If, in our examples above, the real-world identity of those behind ToonPolitico, Cute Voice, and Echo Allen were known to the critics or hackers, or if there was intention to attack those persons without knowing their precise identity, it seems obvious that the law would impose liability for the most egregious attacks. This would be on the basis that they were intended or calculated to cause harm to the real-world people behind those online personae, or at the least that such harm was foreseeable.

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- **Mashup (video)**, a video that is edited from more than one source to appear as one.
  - **Mashup (web application hybrid)**, a web application that combines data and/or functionality from more than one source.

16. At the time of writing, Echo is the seventh most popular avatar first name, and Allen the most popular surname; it is hoped that no "real" avatar is thereby identified with this fictional example; <http://www.vintfalken.com/second-lifes-top-10-most-popular-avatar-names/>.

The same principle ought to apply to attacks where the intention is purely to damage an online persona, but in circumstances where the perpetrator knows or ought to suspect that the attack will harass the offline person who stands behind the persona. The crime of harassment is committed if the maker of the attack knows or ought to have realized that his conduct will harass the victim.<sup>17</sup> This must certainly be the case for our Cute Voice example. Even if the attacker has no knowledge of Gloria's identity,<sup>18</sup> and no feelings either way about her as a real-world person, it is obvious that she exists and may suffer distress if Cute Voice is denigrated.

It might be thought that an attacker ought always to realize that a real-world person might suffer as a consequence, and thus that the current harassment law will apply if such a victim does indeed suffer. This is not necessarily true. Professor Graham operates the Echo Allen avatar, but there is no way for its attackers to know that any such person as the Professor exists. Although most Second Life avatars are operated by human individuals, some may be operated by teams<sup>19</sup> and others are automats, controlled by software alone.<sup>20</sup>

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17. Protection from Harassment Act 1997 § 1(1) & (2). Harassment is not defined fully, but includes alarming the victim or causing the victim distress; § 7(2).

18. This is a normal situation for users of online spaces, who at best can rely on only self-identification to establish the real-world identity of those they encounter, and in most instances do not care about real-world identity. As the example of PA Consulting shows, it may not even be necessary for an employer to know the real-world identity of its staff:

[PA Consulting] has since hired more greeters, all of whom it found through references and advertising in Second Life, and complements its automated communications presentations with around-the-clock avatar coverage. . . . "We don't know who they are in real life," Nehmzow reports. "We think that one greeter is a Dutch housewife, another is a Japanese student, and a third is from the Philippines—but we don't know for sure. We are essentially sourcing our first-level support from the global labor market. In some ways, this is the ultimate nondiscriminatory medium because you don't need to know who these people are."

Eric Krell, *Leading a Second Life*, Consulting Magazine, Mar. 1, 2007.

19. For a detailed description of a Second Life avatar controlled by a consortium, see Tim Guest, *Second Lives*, chs. 1 & 3 (2008). Tom Boellstorff, *Coming of Age in Second Life*, at 27–28 (2008), notes that the possibility of an avatar being operated by more than one individual is widely recognized by residents of virtual worlds. It has been suggested that the Mr. Bungle character described in Julian Dibbell's remarkable *A Rape in CyberSpace* (Village Voice, Dec. 23, 1993) was not an individual but a group of students; Anita L. Allen, *Cyberspace and Privacy: A New Legal Paradigm?* 52 *Stan. L. Rev.* 1175, 1198 (2000).

20. See, for example, RPI Creating AI in Second Life, *Virtual Worlds News*, Mar. 10, 2008, <http://www.virtualworldsnews.com/2008/03/rpi-creating-ai.html>.

In this case, and in the ToonPolitico example as well, it might be entirely plausible for the attackers to assert that they intended no harm to any real person but were simply focusing their attacks on an unreal or fictional character. If this assertion were believed, or at least not disproved, would their behavior be a crime?

The answer would be yes if the court made an assumption that an online persona always has some relation to a real person, and thus that an intentional attack on the online persona should be treated as an intentional, though indirect, attack on the persona's "director."<sup>21</sup> If this assumption were made, the application of existing criminal laws would be unproblematic. For example, section 1(1) of the Protection from Harassment Act provides that "the person whose course of conduct is in question ought to know that it amounts to harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other." If it is presumed that an online persona always represents an underlying "other," the offense will have been committed if the content of the attack amounts to harassment.

However, making this assumption is hard to justify on the facts. Although it should be obvious to any YouTube viewer that Cute Voice is merely a pseudonym for a real person, this decision could be made on the evidence. It would not require any general assumption that online personalities are necessarily linked to real people. By contrast, the example of George and Gilbert illustrates quite clearly the difficulty in justifying the assumption. Is the law to assume that both are intended to be attacked? If so, could the assumption be sustained if ToonPolitico were a collective of twenty people, not two? Could it be justified if George and Gilbert had formed a corporation to hold the ToonPolitico account?

Of course, in every case the attacker could be deemed to have known that there *might* be a real human person behind the online persona. The analogy here would be with crimes of physical violence where, for example, a defendant will have the necessary mens rea for the offense of inflicting grievous bodily harm under section 20 of the Offences Against the Person

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21. Terminology is particularly difficult in this discussion, but we need a term for the person who creates, modifies, and/or operates an online persona. Obvious terms such as "creator", "owner," or "proprietor" must be rejected because they introduce connotations of property that might confuse the discussion, particularly in part V below. It is hoped that "director" is sufficiently value-free to avoid this danger. Either this term or "victim" will be used as is appropriate in the context.

Act 1861 if he or she foresaw the risk that such actions might cause harm and unreasonably took that risk.<sup>22</sup> The difficulty is that this appears not to be the mens rea required for harassment. The test under section 1(1) of the Prevention from Harassment Act is that “a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other”; it is not that the reasonable person should anticipate that an unidentified other *might* be harassed, in the event that the other existed.

This discussion demonstrates that, as the apparent connection between an online persona and any real-world director diminishes, so does the likelihood that an attack on the persona amounts to an offense, other than purely fortuitously.<sup>23</sup> Is this the right legal answer?

To define the question more precisely, our starting point is an emerging class of online personae whose creation involves substantial investment of creative energy, time, and emotion. Those personae are being attacked by others in ways that would constitute the commission of an offense if the attack were on a real-world human.<sup>24</sup> However, it is not possible to say in all cases that such attacks are also made on the human director of the online persona. The question is thus whether, and if so on what basis, criminal law

22. David Ormerod, Smith and Hogan, *Criminal Law* 553–56 (11th ed., 2005).

23. In the case of Professor Graham, for hackers to take over control of his avatar, they must have secured access either to his own computer or to the Second Life servers, and that access will have been unauthorized. This is an offense under § 1 of the Computer Misuse Act 1990 (if a relevant element of the offense was committed in the United Kingdom; the cross-border and jurisdictional issues raised by online activities are too complex to be dealt with in a short article, and readers are directed to Walden, *supra* note 3, at ch. 5). Changing the attributes of the Professor’s avatar can only be achieved by unauthorized modification of data on one or both computers, which is an offense under § 3 of the 1990 Act.

However, we need to recognize that the same offenses would have been committed if the hackers had made the avatar’s appearance more attractive, dressed it in higher quality virtual clothing, and returned control to its owner. The Computer Misuse Act does not address the mischief with which we are concerned, the attack on the online persona. In the other two examples, there is clearly no unauthorized access to computers or modification of data, and so the Act would have no application to these situations.

24. A distinction must of course be made between attacks that would, in the physical world, be justifiable as the exercise of free expression, such as robust criticism, or those not sufficiently aggressive or persistent to go beyond the level of robust insult, which is beneath the attention of the criminal law, and those that are outside the bounds of tolerated behavior. It is not suggested here that online personae should receive any greater degree of legal protection than human victims.

should be extended to cover such attacks where it cannot be proved either that the attacker intended to damage the director or that such damage was an expected consequence.

### III. BEING CRUEL

To explore this we need to understand whether attacks on online personae result in the kind of harm that justifies the criminalization of that conduct. The harm falls into four categories.

First, if the online persona has a human director, the attack is likely to cause distress to that director. The intentional infliction of distress is recognized as potentially criminal conduct, most obviously by the Protection from Harassment Act. However, we have posited a situation where the attacker intends only to harass the persona, and where we cannot prove that he or she ought to have anticipated distressing its human director. This distress cannot, therefore, justify imposing criminal liability.

Second, an attack or series of attacks may damage the reputation of the online persona among the online community with which that persona interacts. Again, this is probably insufficient to justify the attention of the criminal law. English law protects reputation by civil means—the offense of criminal libel has its basis in the potential breach of the peace resulting from publication, not in reputational damage. In countries with criminal defamation laws, those laws apply almost exclusively to defamation of living individuals. In some instances they also extend to defamation of public institutions but not to defamation of corporations or other juristic persons.<sup>25</sup> Online personae fall outside these protected classes.

Third, a consequence of the attack may be the impairment of the director's ability to use the online persona. The Echo Allen example shows this most clearly: Professor Graham will be unable to continue to use his avatar to discuss feminist theory until, assuming this is possible, he has persuaded the operators of Second Life to return control to him. Even then he will need to expend time and effort to reclothe his avatar before he will be able to use it in the same way as before. English criminal law has recognized impairment

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25. For a detailed analysis, see Elena Yanchukova, *Criminal Defamation and Insult Laws: An Infringement on the Freedom of Expression in European and Post-Communist Jurisdictions*, 41 *Colum. J. Transnat'l. L.* 861 (2003).

of use of property as a justification for the creation of offenses; for example, the “taking and driving away” provisions of section 12 of the Theft Act 1968 or the offense under section 1 of the Criminal Damage Act 1971. Although an online persona is hard to conceptualize as “property” (see part V.A. below for more detailed discussion), there is no fundamental reason why the criminal law should not recognize impairment of the ability to use intangible information assets as a kind of harm that justifies criminal liability—for example, taking trade secrets constitutes a U.S. Federal crime.<sup>26</sup>

Finally and perhaps most importantly, attacks of this kind cause harm to society at large by driving their victims out of social spaces and chilling their free expression. If Gloria is sufficiently distressed by the unkind comments, CuteVoice may simply disappear from YouTube. Professor Graham may feel that his Echo Allen avatar’s reputation is now so sullied that he cannot continue in Second Life and will instead be forced to explore feminism in discussions in the Senior Common Room, where his obvious maleness will change the conversational dynamic. This type of societal damage presents the strongest justification for involving the criminal law:

because online attacks harm not only vulnerable individuals like women and minorities but also individuals from dominant groups . . . one can expect widespread support for the application of general tort and criminal law remedies for online assaults.<sup>27</sup>

#### IV. WILL SOMEONE KISS ME BETTER?

Even if the intervention of the criminal law can be justified, we should first discover whether there are alternative redress mechanisms that might deal with the mischief. If these provide adequate remedies, there may be no need to treat the conduct as criminal.

##### A. Civil Remedies

A detailed discussion of the civil remedies potentially available in these situations would double the length of this article and be out of place in a

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26. Economic Espionage Act 1996, 18 USC § 1832. See however *infra* note 80 on the position under English law.

27. Citron, *supra* note 6, at 85.

specialist criminal law journal.<sup>28</sup> At this point it is sufficient to note that the civil law provides remedies for damage to reputation,<sup>29</sup> which as explained above is not a harm that justifies the imposition of criminal liability, but little or no redress for impairment of use. By its nature, civil law provides no remedy for the wider social harm described in the fourth category above.

It is worth examining the potential civil remedies for distress in a little more detail, as distress is a major component of the harm that the crime of harassment seeks to control. Such remedies are unusual in the civil law. If a contracting party has been promised enjoyment, then breach of that promise may allow a successful claim for compensation for the resulting disappointment or distress.<sup>30</sup> Outside contract, remedies for distress short of psychological injury<sup>31</sup> are practically unknown.

This does not mean that that directors of online personae have no potential remedy. As we will see in part IV.B. below, online worlds normally have terms of use that prohibit harassment and other antisocial activity. A victim might well be able to bring an action for breach of contract against an attacker, either on the basis that the terms of the contract between the attacker and the world operator are intended to benefit third parties, and are thus enforceable by them,<sup>32</sup> or alternatively that the terms of use constitute a contract between each user and every other user.<sup>33</sup> Distress is a foreseeable consequence of breach of the terms of use, and thus some remedy should be available.

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28. Useful starting points for those interested in this problem are Joshua Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 *McGill L.J.* 427 (2008); Bettina Chin, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 *Brook. L. Rev.* 1303 (2007); Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 *Harv. J.L. & Gender* 383 (2009); Joshua Fairfield, *The God Paradox*, 89 *B.U. L. Rev.* 1017 (2009).

29. Though normally only for defamation of living individuals; see *supra* text accompanying note 25.

30. *Jarvis v. Swan Tours* [1973] Q.B. 233.

31. The intentional infliction of psychological damage, severe enough to amount to physical injury, was recognized as a tort by *Wilkinson v. Downton* [1897] 2 Q.B. 57, and liability in negligence for the same type of damage was definitively established in 1982 in *McLoughlin v. O'Brian* [1983] A.C. 410, ending the debate that began with *Dulieu v. White* [1901] 2 K.B. 669.

32. For example, in the United Kingdom under the *Contracts (Rights of Third Parties) Act 1999*. For the United States, see *Garrett Ledgerwood, Virtually Liable*, 66 *Wash. & Lee L. Rev.* 811 (2009).

33. *Clarke v. Earl of Dunraven* [1897] A.C. 59.

However, in practice a claim for breach of contract is unlikely to be of much use to the average victim. The cost of commencing proceedings will be prohibitive unless the victim has sufficient expertise to conduct the action in person. Even then there is the almost insurmountable barrier that online attackers are generally anonymous or pseudonymous, and a contract claim cannot be filed without the name and address of a human defendant. In theory the world operator could be forced to reveal this information by means of *Norwich Pharmacal* proceedings,<sup>34</sup> but these are costly and the claimant is required to meet all the reasonable expenses incurred in disclosing the information.

As the civil law seems to provide little or no redress for these harms, we must turn our attention to the extralegal remedies available in the online world in which the attack took place.

## B. Remedies in the Online World

The online spaces already mentioned all have internal rules, technologies, decision-making structures, and control mechanisms that might provide means of controlling undesirable behavior. If they do so effectively, criminal law might have no role to play. Indeed, some argue that the resolution of disputes between virtual world users is as a matter of principle better dealt with in-world, and is not appropriate subject matter for real-world criminal law.<sup>35</sup>

### 1. An Appeal to the Gods

Most online spaces have an owner,<sup>36</sup> such as Linden Lab in the case of *Second Life*, and most uses of those spaces require the creation of a user account,<sup>37</sup> in the course of which a contract is entered into between the

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34. *Norwich Pharmacal Co. v. Commissioners of Customs and Excise* [1974] A.C. 133.

35. The starting points for this line of argument are John Perry Barlow, *A Declaration of the Independence of Cyberspace* (1996, <http://homes.eff.org/~barlow/Declaration-Final.html>) and David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 *Stan. L. Rev.* 1367 (1996).

36. Below we will examine a famous early text-based virtual world, *LambdaMOO* (see [www.lambdamoo.info](http://www.lambdamoo.info) as a starting point) which, although hosted by Xerox Palo Alto Research Center, is controlled by “wizards” who may change from time to time, and has no real “owner” in this sense.

37. For some, such as YouTube and MySpace, passive use in the form of viewing does not require the creation of an account. An attempt is usually made to apply the account

user and the owner. The terms of those contracts universally contain clauses prohibiting undesirable behavior.

Second Life's Terms of Service<sup>38</sup> require residents to comply with the Community Standards<sup>39</sup> (clause 4.1), and an obligation not to engage in harassment is the second of the six Community Standards. The Second Life guidelines on Online Harassment<sup>40</sup> explain how Linden Lab deals with abuse complaints:

Once you have submitted your abuse report, the report goes to Customer Service, and you are emailed an automated response. If you have more information to add, you can reply to that email and add anything else that you think may be of use.

After reviewing the abuse report and any other relevant information, Customer Service takes appropriate action, which may range from an official warning to a suspension or permanent termination of the abuser's access to the Second Life world. When your abuse report has been resolved, you will be sent an automated email informing you that the issue has been closed.

Similar provisions are found in the Terms of Use for World of Warcraft<sup>41</sup> and the User Agreement for EverQuest II.<sup>42</sup> Because these games contain a large element of intraplayer conflict, a distinction is made between aggressive acts that fall within the spirit and rules of the game and those that fall outside.<sup>43</sup> Each game has specific rules relating to the general conduct of players and in particular Player versus Player (PvP) activities.<sup>44</sup>

The main object of these terms is to protect the interests of the owner of the online space, though as those interests include the reputation of the

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terms to viewers who have not registered for an account—see, for example, YouTube Terms of Use clause 1A, [www.youtube.com/t/terms](http://www.youtube.com/t/terms)—but it seems unlikely that the average viewer has sufficient notice of these terms to make them contractually binding.

38. <http://secondlife.com/corporate/tos.php>.

39. <http://secondlife.com/corporate/cs.php>.

40. <http://secondlife.com/policy/security/harassment.php>.

41. [www.worldofwarcraft.com/legal/eula.html](http://www.worldofwarcraft.com/legal/eula.html); see clauses 4C and 5.

42. Available via <http://help.station.sony.com/>; see clause 6(iv) & (v).

43. The law of criminal assault makes a similar distinction in relation to violence inflicted in games such as football, established in *R v. Bradshaw*, 14 Cox CC 83 (1878). For a discussion of the more recent elaboration of this distinction, see Jack Anderson, *No Licence for Thuggery: Violence, Sport and the Criminal Law*, 10 Crim. L. Rev. 751–63 (2008).

44. See the World of Warcraft Harassment Policy (<http://us.blizzard.com/support/article.xml?articleId=20455>) and the EverQuest II Rules of Conduct and Player Versus Player Ruleset Policy (both available via <http://help.station.sony.com/>).

space and its continued attraction to users, the owner may be prepared to take action where the activities of one user cause distress to another. It is unsurprising that damage to the interests of users can receive a lower level of attention than damage to the owner's interests.<sup>45</sup>

In some cases, owners have introduced a level of user involvement in resolving allegations of a breach of the terms of service. Second Life has a system of referring some cases where suspension is being considered to an advisory panel composed of randomly chosen residents, but Linden Lab is not bound by the panel's recommendation.<sup>46</sup> YouTube has a system for reporting videos believed by a viewer to infringe its published community standards<sup>47</sup> by means of a link from each video, but the consequence of such a report is a review by YouTube staff, which may or may not lead to any action with respect to that video. A search of the YouTube site found no reports of what actions had been taken,<sup>48</sup> nor statistics about how often a video is taken down for violation of the Terms of Use.

The discretionary nature of even this low level of user participation demonstrates that owned online spaces operate very much under a sovereign form of governance, in which the owner as world God enforces its will for its own ends. Redress against attacks on an online persona depends entirely on whether providing redress advances the interests of the world owner.

## 2. Home-Brew Legal Systems

Where an online space has no clear owner, or the reasons for participation by users are primarily their social interactions rather than as consumers of what

45. Guest reports that in Second Life, Linden Lab took strong action against residents whose actions disrupted the servers that make the virtual world available (Guest, *supra* note 19, at 134–36), whereas Boellstorff notes complaints from residents that action by Linden Lab staff on Abuse Reports might take days or even weeks, and that enforcement of the Second Life Terms of Service could be selective (Boellstorff, *supra* note 19, at 222–23).

46. [http://secondlife.com/newsletter/2006\\_02\\_15/blotter.php](http://secondlife.com/newsletter/2006_02_15/blotter.php) (archived at [http://web.archive.org/web/20060328100225/http://secondlife.com/newsletter/2006\\_02\\_15/blotter.php](http://web.archive.org/web/20060328100225/http://secondlife.com/newsletter/2006_02_15/blotter.php)).

47. [www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines).

48. With the exception of a blog posting by YouTube staff explaining its response to Senator Joe Liebermann's call to take down all videos bearing the Al-Qaeda logo; U.S. Senate Committee on Homeland Security and Government Affairs press release of May 19, 2008, available from <http://hsgac.senate.gov/>; YouTube staff blog, May 19, 2008, <http://www.youtube.com/blog?month=5&year=2008>.

is offered by the owner, pressure may arise to move from a sovereignty model of governance to one of governmentality,<sup>49</sup> in which institutions and norms developed by the population of the online space play an important role.

One of the earliest indications that online communities might develop indigenous legal systems is found in Dibbell's "A Rape in CyberSpace."<sup>50</sup> He describes the reactions of the LambdaMOO<sup>51</sup> community to a virtual sexual assault by a character called Mr. Bungle, which led to a call for Mr. Bungle to be "toaded" (evicted from the world). Just prior to the incident, the "wizards," who controlled the virtual world and previously resolved interplayer disputes, had announced that "the wizards from that day forth were pure technicians . . . [and] would make no decisions affecting the social life of the MOO, but only implement whatever decisions the community as a whole directed them to."<sup>52</sup> The consequences were surprising to the community:

Faced with the task of inventing its own self-governance from scratch, the LambdaMOO population had so far done what any other loose, amorphous agglomeration of individuals would have done: they'd let it slide. But now the task took on new urgency. Since getting the wizards to toad Mr. Bungle (or to toad the likes of him in the future) required a convincing case that the cry for his head came from the community at large, then the community itself would have to be defined; and if the community was to be convincingly defined, then some form of social organization, no matter how rudimentary, would have to be settled on. And thus, as if against its will, the question of what to do about Mr. Bungle began to shape itself into a sort of referendum on the political future of the MOO. Arguments broke out on *\*social* and elsewhere that had only superficially to do with Bungle (since everyone agreed he was a cad) and everything to do with where the participants stood on LambdaMOO's crazy-quilt political map.

Insufficient consensus could be achieved to resolve the Mr. Bungle case, which in the end was dealt with by the wizards, but a system of law-making,

49. Michel Foucault, Governmentality in *The Foucault Effect: Studies in Governmentality* 87 (Graham Burchell, Colin Gordon, & Peter Miller eds., 1991).

50. Dibbell, *supra* note 19.

51. An online virtual world, built up from objects created by users and from interactions between users. MOO stands for MUD, object oriented, and a MUD is a multi-user dungeon.

52. LambdaMOO Takes a New Direction, Dec. 9, 1992 (LambdaMOO internal posting), reproduced in Elizabeth Hess, *Yib's Guide to MOOing* 303 ff (2003).

dispute resolution, and sanctions was developed by the community over the next two years. This has been analyzed at length by Mnookin.<sup>53</sup> One of her most interesting findings is an unresolved tension between those who saw their activities as a game and those who believed they were participating in a new world:

For those who view the MOO as a diversion, a virtual playground, LambdaLaw seems unnecessary and frustrating, an absurd bureaucratic impediment to enjoying the MOO. These participants think that the formalizers take themselves and LambdaMOO far more seriously than they ought to. The resisters believe that LambdaMOO is, in the end, a game, a virtual reality that ought not to be mistaken for a real one. For the second group, those who take LambdaMOO seriously as a society, law has a double function, both pragmatic and symbolic. On the one hand, a legal system is a practical necessity, because the society requires workable mechanisms for adjudicating disputes, enacting legislation and establishing its standards of conduct. However, law simultaneously serves a symbolic function as well: If LambdaMOO has a well-defined legal system, then it is a society. . . . Law provides dispute-resolution mechanisms and legislative procedures, but it also provides something more: legitimacy.

The main characteristics of LambdaMoo's new governance were a system of petitions that the wizards undertook to implement following a two-thirds majority ballot<sup>54</sup> and a formal arbitration mechanism for resolving disputes between residents. After only three years the wizards took back control,<sup>55</sup> and the arbitration process was abandoned in 1999.<sup>56</sup>

The emergence of an in-world legal system is likely to face different obstacles where the online space has an owner. Here there is potential conflict between the interests of the owner and those of players or residents, particularly as there will be pressure for the new laws to apply to the owner as well as to the general "populace." Additionally, the most severe sanctions

53. Jennifer L. Mnookin, *Virtual(ly) Law: The Emergence of Law in LambdaMOO 2(t) J. Computer-Mediated Comm.*, <http://jcmc.indiana.edu/vol2/issue1/lambda.html>.

54. The majority of ballots during this period concentrated on constitutional matters rather than what might be described as "substantive" internal law. A full list (with brief description) of ballots voted on from 1993–2002 is set out in Hess, *supra* note 52, at 311–84.

55. *LambdaMOO Takes Another Direction*, May 16, 1996 (LambdaMOO internal posting), reproduced in Hess, *supra* note 52, at 307 ff.

56. February 1999 ballot entitled "One More Time!" followed five previous unsuccessful attempts at abolition by ballot.

(suspension or termination of accounts) can only be imposed by the owner, and thus his or her cooperation is necessary for the in-world legal system to work.

Within a few years of the opening of Second Life in 2003, pressure began to build to clarify the rights of residents. In 2005, users made a proposal to establish an in-world Bill of Rights for avatars that was rejected by Linden Lab.<sup>57</sup> A few days later two U.S. law students, Mason and Churchill, attempted to establish the Second Life Superior Court. According to their press release<sup>58</sup>:

The goal of the SLSC is to evolve a body of law that improves the world of Second Life. The SLSC exists not to create its own law, but interpret the Community Standards already set forth in Second Life. The law of the real world poses no precedent on its decisions. However, real world principles of law and international dispute resolution may serve as guidance.

In fact, the Second Life Superior Court was no more than an in-world arbitral tribunal to which residents could voluntarily submit disputes for resolution. “If any party does not follow the judgment, a report and sentencing recommendation will be filed with Linden Labs” stated the press release, but without offering any assurance that Linden Lab would take any action as a consequence. Linden Lab’s initial reaction was far from supportive: it demanded a name change to make it clear that the Court was not an official Second Life organ. Mason and Churchill adopted the name Metaverse Superior Court,<sup>59</sup> but appear to have ceased its activities by January 2006.<sup>60</sup>

Just over a year later, the residents of a “gated” community in Second Life, Dreamland, voted to ban certain public relations agents from their virtual land.<sup>61</sup> This local legislation was enforced by means of the self-help

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57. Kremlinden Lab Rejects User Bill of Rights, *Second Life Herald*, Sept. 13, 2005, <http://alphavilleherald.com/> (Second Life Herald is now called Alphaville Herald).

58. Here Come da Judges: Second Life Superior Court is Now in Session, *Second Life Herald*, Sept. 22, 2005, <http://alphavilleherald.com/>.

59. Kremlinden Lab to Second Life Superior Court: Change Your Name!, *Second Life Herald*, Sept. 24, 2005, <http://alphavilleherald.com/>.

60. There Ought to be a Law, *Second Life Herald*, Dec. 14, 2006, <http://alphavilleherald.com/>.

61. Residents of 400 Dreamland Sims vote to Ban PR and Marketing Flacks!!!!, *Second Life Herald*, Nov. 11, 2006, <http://alphavilleherald.com/>.

tools<sup>62</sup> available to residents, in this case the ability to label avatars as trespassers and thus forbid them future access to a particular plot of virtual land.

Recently, Linden Lab has recognized the demand from Second Life residents for independent resolution of their disputes with Linden Lab as world owner, and has established an arbitration process (optional for the resident but binding on Linden Lab) for disputes of less than US\$10,000 in value.<sup>63</sup> However, it has not yet established any formal mechanisms for resolving disputes between residents, relying instead on the community to regulate itself:

Some people are very unhappy that we haven't put a system of governance in place. And we keep saying governance will come when it's ready. There's one small community . . . that does have a system of self-governing. I'd say you will probably start to see more of these local jurisdictions in Second Life.<sup>64</sup>

It is clear from this discussion that online communities tend to generate pressure for community self-governance.<sup>65</sup> The difficulty, as demonstrated by the LambdaMOO example, is in turning that pressure into a functioning in-world legal system. The difficulty is compounded by the fact that disputes with real-world effects are likely to be taken before real-world courts, which by definition trump any decisions of the in-world system.<sup>66</sup>

62. See further part IV.B.3 below.

63. Second Life Terms of Service, <http://secondlife.com/corporate/tos.php>, clause 7.3. See also A Change to the Terms of Service, Sept. 18, 2007, <http://blog.secondlife.com/2007/09/18/a-change-to-the-terms-of-service/>, and New TOS: LL Has "Small Claims Court" Type Process, Second Life Insider, Sept. 18, 2007, [www.secondlifeinsider.com/2007/09/18/new-tos-ll-has-small-claims-court-type-process/](http://www.secondlifeinsider.com/2007/09/18/new-tos-ll-has-small-claims-court-type-process/).

64. Robin Harper, Vice President of Community Development at Linden Lab, quoted in Guest, *supra* note 19, at 150.

65. A further example might be the internal rules of guilds in World of Warcraft: "What is different in the larger guilds is the sudden need for formal organization, both for political and practical purposes. . . . Rules, probationary periods, and attendance policies become more common, as do formal sign-ups for activities." Dmitri Williams, Nicolas Ducheneaut, Li Xiong, Yuanyuan Zhang, Nick Yee, & Eric Nickell, From Tree House to Barracks: The Social Life of Guilds in World of Warcraft, 1 *Games and Culture* 338, 347 (2006).

66. See, for example, the dispute between March Bragg and Linden Lab over Second Life land, in which the plaintiff's losses were valued by the court as in excess of US\$75,000. The dispute was settled following a judgment that rejected Linden's Motion to Dismiss for Lack of Personal Jurisdiction and Motion to Compel Arbitration; *Bragg v. Linden Research Inc.* 487 F. Supp. 2d 593 (E.D. Pa. 2007).

It may be that we will in future see the development of functioning in-world legal systems, driven at least in part by the need to control undesirable activities such as online attacks that are not adequately addressed by real-world law, but in the present state of development victims are unlikely to receive much protection from such systems.

### 3. Self-Help

Online harassment is very different from harassment in the physical world in that the online victim may have access to mechanisms to prevent further attacks. The extent to which those mechanisms are effective may help in deciding how far the criminal law needs to intervene.

Lessig has pointed out compellingly that law is not the only means by which behavior is regulated. Markets and norms also play important roles, and in online spaces a great deal of the regulation of behavior is accomplished by the architecture of systems and operations, expressed in the form of computer code.<sup>67</sup> This is as true of the online social spaces considered in this article as it is of the other parts of cyberspace.

The owners of these spaces recognize that enforcement of the contractual obligations to avoid engaging in harassing conduct, discussed above, is likely to be a slow process<sup>68</sup> and often ineffective. A user whose account is terminated for this reason can often open a new account immediately and continue the objectionable behavior under a different online identity. For this reason, the owners normally provide users with tools that can be used to mitigate the worst excesses of other users.

YouTube allows its users to control comments posted about their own videos in two ways: particular users can be blocked from leaving comments, or the account owner can restrict commenting to “friends.”<sup>69</sup> These tools only work in respect of a user’s own account; if abusive messages are posted as comments to some other user’s video, the only remedy is a formal harassment complaint to YouTube.

For attacks that are made via postings on external spaces where the victim has no account, the only action that normally can be taken is to complain to

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67. Lawrence Lessig, *Code and Other Laws of Cyberspace*, ch. 7 (1999).

68. If for no other reason than because there is a need to give an accused user notice of the allegation and a chance to dispute it.

69. <http://help.youtube.com/support/youtube/bin/topic.py?topic=13044>.

the owner of that space; for example, a complaint to the ISP which hosts the blog in which the comments appear. Newsgroups have no “owner,” as they are distributed, automatically replicating databases,<sup>70</sup> though a complaint to an intermediary that provides a Web interface to newsgroups<sup>71</sup> might result in the poster being blocked from visibility via that interface. The victim can, if using a news reader client, block postings from named posters, but that will not prevent third parties from reading those postings.

Second Life’s online harassment policy explains the self-help actions that are available to residents. Because all the interaction between residents takes place in the Second Life environment, and is thus controlled by the computer code that operates the virtual world, residents have a wide range of tools to prevent undesired interaction with other residents. Most interactions between avatars, other than them “speaking” to each other, require the avatar owner to change a setting for the avatar to permit the action; for example, virtual “rape” is in theory impossible without hacking the code. Residents can “mute” others, so that their comments are invisible or inaudible to the resident doing the muting (though not to others). If the resident owns land, he or she has the tools to freeze other avatars on that land and to eject them, and can ban them from entering the land in future. The use of these tools is explained in the Second Life policies and procedures.<sup>72</sup>

The existence of self-help tools potentially changes the nature of online harassment, in that it is possible for the victim to avoid some of the direct consequences of the attacker’s activities, although the knowledge that these activities are still going on may be psychologically damaging in itself. This should not, of course, be seen as an argument against creating a new criminal offense. In the case of physical assault, for example, it is no defense that the victim could easily have run away. Nor, more pertinently perhaps, can a computer hacker argue that the offense was only committed because the victim failed to take technical security precautions.<sup>73</sup> Nonetheless, the fact that a victim can to some extent reduce the impact of online attacks

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70. For a description of the workings of newsgroups, see Chris Reed, *Internet Law* 28–30 (2nd ed., 2004).

71. E.g. Google, via [groups.google.com](http://groups.google.com).

72. See in particular the Online Harassment policy, <http://secondlife.com/policy/security/harassment.php>.

73. More accurately, this argument cannot be sustained under the U.K. Computer Misuse Act. The Council of Europe Convention on Cybercrime 2001, Article 2, permits states to limit the unauthorized access offense to cases where the defendant overcame security precautions to secure access.

will be a relevant factor in deciding how the criminal law should respond to such behavior.

## V. I, ROBOT?

From the discussion so far two main conclusions can be drawn. First, attacks on online personae cause the kinds of harm that would attract criminal liability if those attacks had been made on a human individual. Second, neither the civil law nor the internal remedies available in online worlds offer sufficient redress to victims of attacks. The inevitable conclusion is that the criminal law should consider intervention, in particular to attempt to control the wider social harm that results from such behavior.

The most direct route to this end would be for the criminal law to protect an online persona in its own right, rather than as a surrogate for its human director. This could be achieved either through recognizing an online persona as a species of property or by recognizing that it exhibits sufficient aspects of *personhood* to merit the law's protection. A property-based approach would see the online persona as a mere automaton or robot, released into the online world by its creator but behaving purely mechanistically. A personhood approach would invest the online persona with at least some of the attributes normally allowed to humans alone, perhaps as the logical culmination of the decades-long debate conducted in the literature of science fiction.<sup>74</sup>

### A. Owning the Other Me

Most theories of property would assign some form of property right in respect of the manifestations of an online persona. A Lockean analysis would base those rights on the labor invested in the online persona by its creator,<sup>75</sup> whereas a Hegelian approach would assign rights because the director has invested his internal will into the external online persona and by doing so has appropriated it as property.<sup>76</sup>

However, neither of these approaches determines the type of property right to be assigned. Given that an online persona manifests itself as words,

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74. See, for example, Isaac Asimov, *I Robot* (1950).

75. John Locke, *The Second Treatise of Civil Government*, ch. 5 (1690).

76. For a more detailed discussion, see Steven Chermansky, *A Penny for Their Thoughts: Employee-Inventors, Preinvention Assignment Agreements, Property, and Personhood*, Cal. L. Rev. 597, 643 ff (1993).

sounds, and images, and is recorded in the form of digital information, it seems most likely that the closest system of rights is that of intellectual property rights.<sup>77</sup> So far, there has been a clear reluctance to treat information as any type of personal property under English law.<sup>78</sup>

A further difficulty is that the criminal protections for property tend to be limited to protection against either taking or damage. The attack on the avatar in our Echo Allen example is both of these, and it is perhaps significant that in this example the existing criminal law would apply.<sup>79</sup> In most cases, however, the damage to the online persona would be purely reputational, and as discussed above this is not a kind of damage that normally amounts to an offense. Disparaging my car is not a crime.

Intellectual property rights are focused almost entirely on the exploitation of the property, rather than damage caused to it. Apart from the small number of laws creating offenses of misuse of confidential information,<sup>80</sup> most criminal offenses relating to the appropriation of intellectual property tend to be limited in their application to those who misappropriate intellectual property for commercial purposes<sup>81</sup> or overcome technical protection measures.<sup>82</sup>

77. For discussion of the potential intellectual property rights in avatars, see Barfield, *supra* note 12, at 672–80.

78. *Oxford v. Moss* (1979) 68 Cr. App. R. 183. Note however that a number of U.S. states have modified their criminal laws to include data within the definition of property; see Meiring de Villiers, *Virus ex Machina Res Ipsa Loquitur*, ¶ 201, 1 *Stanford Tech. L. Rev.* (2003). See also the Irish Criminal Damage Act 1991, § 1, which defines property to include data for the purpose of the offense of criminal damage under § 2(1).

79. It is worth noting here that the offense under § 3 of the Computer Misuse Act is a form of property damage crime, replacing the rather metaphysical extension of the Criminal Damage Act 1971 to such conduct in *Cox v. Riley* (1986) 83 Cr. App. R. 54 and *R v. Whitley* (1991) 93 Cr. App. R. 25.

80. English law does not generally treat this as an offense, although the Law Commission has consulted on the creation of an offense of the unauthorized use or disclosure of a trade secret; Consultation Paper 15, *Legislating the Criminal Code: Misuse of Trade Secrets* (1997). For a detailed discussion of offenses relating to confidential information, see Walden, *supra* note 3, at ¶¶ 3.37–3.49. In any event, offenses of this type are unlikely to apply in relation to online personae because, almost by definition, an online persona cannot come into being until it is disclosed to and interacts with other online users, and thus lacks any confidential nature.

81. E.g. Copyright, Designs and Patents Act 1988, § 107(1), though note that recent amendments to deal with online copying have resulted in the creation of an offense of noncommercial communication to the public to such an extent as to affect prejudicially the owner of the copyright (§ 107(2A)(b)).

82. Copyright, Designs and Patents Act 1988, § 296ZB.

This does not mean that a new offense cannot be created with the aim of protecting the intellectual property elements of the online persona. Infringing copyright by copying a work was not originally a crime, but the general offense of knowingly dealing in infringing copies for commercial purposes was introduced by section 11 of the Copyright Act 1911<sup>83</sup> because of the social mischief caused by copyright piracy. The harassment of an online persona has conceptual similarities to the concept of trade mark dilution,<sup>84</sup> which does not require the infringer to be acting for commercial purposes. However, extending this protection to unregistered, noncommercial property reputation would be problematic, without the additional difficulties involved in defining when it should be a crime. Much work would need to be done if this route were taken.

## B. Me, Myself, and I

Accepting that an online persona has personhood could potentially grant it the protections that the criminal law currently provides to humans. At present human beings are the only entities recognized by law as being fully persons, though it may not be long before we are required to recognize some other species and potentially even nonorganic entities as being persons.<sup>85</sup> However, it is common for the law to grant limited rights to purely legal persons; corporations are the most obvious, but not the only, example.<sup>86</sup>

Jessica Berg suggests<sup>87</sup> that the test for whether the law should recognize an entity as a person has two elements: whether the entity has interests that are deserving of protection, and whether the entity requires personhood status to protect the interests of other recognized persons.<sup>88</sup> In the case of

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83. A specific offense in relation to pirated copies of (printed or written) musical works was introduced by the Musical Copyright Act 1906, § 1.

84. Trade Marks Act 1994, § 10(3).

85. See, for example, Philippe Ducor, *The Legal Status of Human Materials*, 44 *Drake L. Rev.* 195, 202 (1996); Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 *N.C. L. Rev.* 1231 (1992).

86. See further Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 *S. Cal. L. Rev.* 1 (1985).

87. Jessica Berg, *Of Elephants And Embryos: A Proposed Framework for Legal Personhood*, *Hastings L.J.* 369 (2007).

88. As an example, Berg cites anencephalic infants, who are born without a brain cortex and thus have no cognitive abilities at all and no interests to be protected, but are treated

natural persons the first element predominates, but in deciding whether to recognize legal persons the second is more important.<sup>89</sup>

There are two related arguments for according juridical personhood based on the interests of others. First, categorization as a juridical person may be necessary for practical reasons, since the law requires an object upon which to act. In other words, currently recognized natural persons may have an interest in identifying entities as legal actors who can have rights or obligations, who can sue or be sued. Alternatively, one might recognize entities as juridical persons (and give them some of the same rights as natural persons) because the failure to do so would undermine the rights of currently recognized natural persons.<sup>90</sup>

In the case of an online persona, it is clear that conferring a degree of legal personhood could protect the interests of its director. Whether the director's interests merit protection in this way is of course a separate question,<sup>91</sup> and

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as human persons by the law to protect the interests of their relatives and the wider interests of human society; *id.* at 377–79.

89. There are clear conceptual difficulties in applying the first element to an online persona. As Solum (*supra* note 85; references omitted), has pointed out:

The key question here is whether an artificial intelligence could experience its life as a good to itself. If AIs are not self-conscious, then they cannot experience their own life as good or evil; and if they cannot have such an experience, then there seems to be no reason why they should be given the rights of constitutional personhood. Such rights presume the right-holder has ends, and self-consciousness is a precondition for having ends. [*Id.* at 1264]

...

[A] variation of the missing-something argument is that AIs could not have interests. A related formulation is that they would lack a good—or more technically, a conception of a good life. The interests variation has something in common with the argument that AIs would lack feelings, but it is different in one important respect. Interests or goods can be conceived as objective and public—as opposed to feelings, to which there is (at least arguably) privileged first-person access. The force of this objection will depend on one's conception of the good. For example, if the good is maximizing pleasures and minimizing pains, then the question whether AIs have interests is the same as the question whether AIs have certain feelings. [*Id.* at 1271]

90. Berg, *supra* note 87, at 382 (references omitted). See also Solum, *supra* note 85, at 1259 (references omitted):

In the case of corporations, the artificial legal person may be no more than a placeholder for the rights of natural persons. The property of the corporation is ultimately the property of the shareholders. A taking from the corporation would directly injure natural persons.

91. Though for some it would be the fundamental question; see, for example, Edward Castronova, *Theory of the Avatar*, CESifo Working Paper no. 863, 35 (Feb. 2003):

First and foremost, it needs to be recognized that the rights in question adhere to [human] agents, not avatars. The agent is where the conscious mind resides, and it is the mind, and not the body, that is the ultimate possessor of human dignity.

it seems likely in the United Kingdom at least that a decision on this point ought to be made as a matter of policy through legislation, rather than by judicial extension of criminal laws protecting natural persons.

It is instructive to examine the recent jurisprudence of the European Court of Human Rights, which has considered how far corporations and other juristic persons should benefit from the law's protection<sup>92</sup> and has ascribed to them some (though not all) of the human rights normally granted to natural persons. This jurisprudence is continually evolving, but the current position appears to be as follows.

Corporations are entitled to lay claim to at least some of the rights embodied in the European Convention on Human Rights, and this claim can normally be made only in the corporation's own right as a person rather than as a proxy for the underlying rights of its shareholders.<sup>93</sup> Initially, successful claims by corporations were based on rights that are clearly possessed by juristic as well as natural persons under national law, such as the protection of property or the right to due process, so that the only question was whether those rights received additional protection under the Convention.<sup>94</sup>

However, more recent decisions of the Court have extended the Convention's protections to encompass rights that might be seen as designed solely to protect natural persons. Thus corporations have the Convention right to free speech, though only in relation to speech that is not purely commercial in nature,<sup>95</sup> and to protection for their corporate "home" against unlawful invasion.<sup>96</sup> Corporations may also claim damages for nonpecuniary losses, which are in essence compensation for damage to reputation and hurt feelings, and in *Comingersoll SA v. Portugal* the Court specifically rejected the argument that "such feelings are peculiar to

92. For a detailed examination of this jurisprudence, see Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (2006).

93. *Agrotexim Hellas SA and Others v. Greece* 14807/89 [1995] EHRR 42 (Oct. 24, 1995). Only in exceptional circumstances, where the corporation is clearly no more than a vehicle through which a sole or overwhelming majority shareholder conducts his or her activities, has the court treated an infringement of the company's rights as also infringing the rights of that controlling individual; Emberland, *supra* note 92, at 99 ff.

94. Emberland, *supra* note 92, at 3–4.

95. *Autronic AG v. Switzerland* 12726/87 [1990] EHRR 12 (May 22, 1990) and subsequent cases; see further Emberland, *supra* note 92, at 129–30.

96. *Colas Est SA and Others v. France* 37971/97 [2002] EHRR 421 (April 16, 2002); see further Emberland, *supra* note 92, at 132–35.

natural persons and could under no circumstances entitle a juristic person to compensation.”<sup>97</sup>

This jurisprudence establishes the principle that human rights can be enjoyed by juristic persons as well as natural persons, but it does not necessarily define the rights that would be appropriate for the very different type of juristic person constituted by an online persona or the ways in which those rights should be secured.<sup>98</sup> Additionally, the rights set out in the European Convention on Human Rights seem largely inapplicable to online personae, with the exception of the rights to respect for private life, home, and correspondence under Article 8 and the right to freedom of expression under Article 10. This takes us no further though, as even in the case of natural persons, these rights are not protected directly<sup>99</sup> by the criminal law.

Ohlin argues convincingly that personhood is not the appropriate test for granting human rights to an entity, but rather that the test should be based on the underlying elements used to justify ascribing personhood, such as biological humanity and rational agency:

We do not ascribe human rights because an entity is a person—it is a person because we ascribe human rights to it.<sup>100</sup>

This further suggests that deciding whether an online persona has the attributes of personhood might not help in deciding whether it should receive criminal law protection.

If an online persona were granted rights of personhood, this would not be sufficient on its own to address the mischief of online attacks. Merely

97. *Comingersoll SA v. Portugal* 35382/97 [2000] EHRR 160 (Apr. 6, 2000) § 28(2).

98. In the case of corporations, it is probably appropriate to limit the remedies for infringement of their human rights to damages and mandatory orders, as most if not all losses caused to corporations in this way can be measured in monetary terms. If online personalities are accepted as closer to people than corporations, that would acknowledge that monetary redress is not always adequate and thus justify criminal law protection for at least some of their new rights.

99. Indirect protection is provided for offenses such as burglary, kidnapping, unlawful interception of communications, etc. However, the primary purpose of those offenses is to deal with the mischief arising from the actions of the offenders, not to protect the human rights of the victims.

100. David Ohlin, *Is the Concept of the Person Necessary for Human Rights?*, 105 *Colum. L. Rev.* 209, 237 (2005).

applying those elements of criminal laws that protect the personalities of natural persons is not a solution. Juristic persons, into which category online personae would now fall, do not have an identical range of interests to natural persons, nor do they suffer the same losses.

As an example, corporations are legal persons but their personalities (in the form of reputation) are protected primarily by civil law, and only in respect of damage to their commercial activities.<sup>101</sup> *Comingersoll*<sup>102</sup> recognized for the first time that corporations might also suffer hurt feelings, and presumably therefore distress, but this recognition has not so far been accepted into the criminal law. In most jurisdictions only offenses that involve economic damage to the victim, such as theft, fraud, or criminal damage, can be perpetrated against corporations, though the question does not seem yet to have come before the courts in the context of criminal law.<sup>103</sup>

Categorizing online personae as persons would obviously be justifiable if they exhibited a level of autonomy of action that approached that of

101. Under English law, corporations may sue for defamation, but only for damage to their commercial reputation; Patrick Milmo, W.V.H. Rogers, Richard Parkes, Clive Walker, & Godwin Busuttill eds., *Gateley on Libel and Slander*, at 8.16 (10th ed., 2004). Similarly, the U.S. federal provisions on trade libel in the Lanham Act, § 43(a), apply only to false or misleading commercial statements that misrepresent “the nature, characteristics, qualities, or geographic origin of . . . another person’s goods, services, or commercial activities.”

One notable exception to this principle is found in the Indian Penal Code 1860, where Article 499 creates an offense of making or publishing “any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person.” The article specifically states that “[i]t may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.”

102. See *supra* text accompanying note 97 above.

103. For example, Ormerod (*supra* note 23, at 516) states:

The “person” who may be the victim of any of the [offenses against the person] is a human being. The context excludes associations, whether corporate or unincorporated as victims. . . . The meaning of “person” as a victim has been discussed almost exclusively in relation only to murder, but it seems that the same principles must apply to non-fatal offences.

The discussion of who can be murdered has to date been conducted solely in relation to unborn fetuses (Ormerod, *supra* note 23, at 430–33). However, it is worth noting that Coke’s definition of murder (Sir Edward Coke, 3 *Institutes of the Laws of England* 47 (1628–1644)) is that a person “unlawfully killeth . . . any reasonable creature in *rerum naturae* . . . with malice aforethought,” which suggests that even if an artificial intelligence passed the Turing test sufficiently well to be considered a reasonable creature in its own right, its online persona might still not receive the protection of the criminal law because the artificial intelligence would be a made thing, rather than *rerum naturae*.

humans, and such a level of autonomy may not be far away.<sup>104</sup> As we have seen, however, this does not solve the problem, but merely poses the further questions of what rights such a virtual person should be granted and what damage or loss it is capable of suffering.

A possible solution, and in the author's a view a plausible one, could be arrived at by moving the focus from the victim of the behavior to the behavior itself. After all, the criminal law is more concerned with influencing the behavior of potential criminals than in the harm suffered by victims. Whether or not online personae are persons, they are certainly manifestations of the humanity of their directors. Furthermore, attacks on those personae cause damage to humanity as a whole, by chilling expression and by driving online personae from virtual spaces.

This would lead us to create an offense analogous to that of harassment, but with some necessary differences. The essence of the offense would be engaging in behavior intended to cause harm of a defined kind to an online persona, or where it is a foreseeable consequence that that persona will suffer harm. Defining the level of harm is the most challenging issue; it is not possible to find a simple analogue for distress or alarm because an online persona is not capable of suffering these in the same way as a human. At bottom, the persona is merely an informational construct with no more feelings than any other database entry.

The closest analogue to the distress and alarm suffered by human victims of harassment seems to lie in the diminution of a victim's ability to engage in and interact with society. In the case of an online persona, the relevant harm would lie in the diminution of the persona's reputation, or the impairment of its ability to act, in its online social space. These are also accurate descriptions of the societal harm caused by offline harassment, even if the psychological effects on the victim are necessarily different.

If harassment were redefined in this way, and online personae that have achieved a measure of independence from their directors in the eyes of the community were accepted as juristic persons, then perhaps little more needs to be done. Nowhere does the Prevention of Harassment Act state that the victims of harassment must be natural persons. This would leave

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104. See, for example, Erik Weitnauer, Nick Thomas, Felix Rabe, & Stefan Kopp, *Intelligent Agents Living in Social Virtual Environments: Bringing Max into Second Life*, in *Intelligent Virtual Agents* 552 (2008).

space for the courts to extend the Act's protection to online personae if they, too, are persons who can be harassed.

## CONCLUSIONS

The existing state of English criminal law seems to provide scant protection against attacks on online personae. Where the means used to mount the attack are unlawful in themselves, for example under the Computer Misuse Act, an element of indirect protection will be provided, and where the attacker can be shown to have intended to attack the human owner of the online persona, the facts will fall clearly within the existing offense of harassment. In other cases, however, it is unlikely that the attacker commits a crime.

At the time of writing this may be no bad thing. Online personae are very new phenomena, and even if there is a justification for according them criminal law protection, it may yet be too early for us to understand how best to do so. It is not, though, too early to start thinking about the question. It has taken a mere fifteen years for the Internet to evolve from a playground for geeks into an integral part of everyday life. The place of online personae in our society will become clear in a far shorter space of time.

Some readers will no doubt take the view that those areas of cyberspace where online personae are created are merely new kinds of playground, and that rough play is too trivial a mischief for the criminal law to concern itself with. In the author's opinion, this attitude is likely to change very fast. Online social spaces are part of normal life for the vast majority of younger adults in developed countries, and for those who have invested more than trivial amounts of time and effort in building up an online persona, virtual violence may seem to merit the same attention from the criminal law as would a real-world psychological assault. As argued above, the harms that result from attacks on online personae are very similar to those on which the offense of harassment is based.

The most promising route for developing the criminal law appears to be through the granting of personhood to at least some online personae. However, this is not simply a matter of treating the online persona in the same way as a real-world human personality by redefining it as a new kind of person. The basis of criminal protection cannot be the infliction of distress,

as under the present harassment law, but instead ought to focus on the socially destructive behavior of perpetrators.

In the interim, directors of online personae will need to use the internal mechanisms of online worlds as a surrogate for the criminal law. They will need to press the owners of those spaces to use the rules in the interests of world members and to devote resources to investigation and enforcement. Users of these spaces potentially have the power to develop in-world legal systems to address the problem, though the obstacles to doing so on a sustained basis are substantial. They also have some of the tools to take remedial action themselves and, possibly, the power to demand that owners create more powerful tools.

Resolving in-world conflicts within the virtual world is a worthy aim. In the author's view, however, this will prove inadequate in the long term. The question is not whether the real-world law will become involved, but when.