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## Sex Play in Virtual Worlds

Robin Fretwell Wilson

Washington and Lee University School of Law, [wilsonrf@wlu.edu](mailto:wilsonrf@wlu.edu)

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# Sex Play in Virtual Worlds

Robin Fretwell Wilson\*

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## *I. Introduction*

When children play in proximity to adults, many of us naturally worry about less-than desirable results. This fear has existed since children began

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\* Professor of Law and Law Alumni Faculty Fellow, Washington and Lee University School of Law. Many thanks to Ann Bartow, Deven Desai, Josh Fairfield, Llewellyn Gibbons, Brian Klebba, J.D. King, Garrett Ledgerwood, Erik Luna, Pamela Melton, Joan Shaughnessy, and the participants of this Symposium and of the World Congress on Family and Children’s Rights in Halifax, Nova Scotia, for their thoughtful comments and advice. I am indebted to George Davis, Stephanie Hager, Joe Mercer, Anna-Katherine Moody, and Meghan Monaghan for their diligent research assistance.

playing stickball on urban streets or kickball on suburban playgrounds.<sup>1</sup> It now animates discussions of children playing in virtual worlds.<sup>2</sup> The FBI's "Parent's Guide to Internet Safety," for example, focuses on preventing sexual predators from approaching children online and explains how parents can recognize when their children have been contacted by a sexual predator.<sup>3</sup> International authorities also have focused on sexual predators.<sup>4</sup>

These fears have precipitated concrete responses. In April 2008, a Congressional subcommittee met with virtual world creators to discuss the risks to children.<sup>5</sup> In February 2009, MySpace banned over 90,000 registered sex

1. See Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 259–62 (2001) (noting the stereotypical image of child molesters as "strangers in trench coats" loitering near school yards despite the fact that such men could not account for the 1 to 3 million cases of child sexual abuse that occur each year). Two recent examples illustrate the visceral concern that arises when adults gravitate to children's play areas. In 2007, a California court ordered Jack McClellan, a self-described pedophile, not to come within ten yards of any place where children congregate. Robert Jablon, *Order Targets Self-Described Pedophile*, ASSOCIATED PRESS, Aug. 24, 2007. McClellan raised suspicion after authorities discovered his website discussing his interest in young girls, replete with photos of children in public places. *Id.* In the second case, a twenty-nine-year-old convicted pedophile posed as a twelve-year-old and enrolled at a local middle school. Amanda Lee Myers, *Sex Offender Pleads to 7 Criminal Charges*, ASSOCIATED PRESS, Sep. 11, 2008. Authorities eventually arrested him for fraud and possession of child pornography. *Id.*

2. See Megan Twohey, *Kirk: Second Life Dangerous to Kids, Says Online Network is Vulnerable to Predators*, CHI. TRIB., May 6, 2008, at 2, available at <http://archives.chicagotribune.com/2008/may/06/news/chi-online-predator-alert-06-may06> (noting that the rapidly expanding virtual world of *Second Life* poses a risk for children). Before the advent of social networking sites, concerns about the risks to children playing online focused on chat rooms and pornography. See Sean Alfano, *Study: Children Bombarded with Online Porn*, CBSNEWS.COM, Feb. 5, 2007, <http://www.cbsnews.com/stories/2007/02/05/tech/main2431433.shtml> (last visited Sept. 29, 2009) ("Forty-two percent of Internet users aged ten to seventeen surveyed said they had seen online pornography in a recent twelve-month span.") (on file with the Washington and Lee Law Review).

3. See FEDERAL BUREAU OF INVESTIGATION, A PARENT'S GUIDE TO INTERNET SAFETY, available at <http://www.fbi.gov/publications/pguide/parentsguide.pdf> (noting that children, especially adolescents, sometimes use the Internet to seek out sexual material or relationships, a behavior that sex offenders often exploit).

4. For example, the United Kingdom's House of Commons Committee on Culture, Media, and Sport published a report in 2008 regarding child safety online, which described the UK's Child Exploitation and Online Protection Centre. HOUSE OF COMMONS, CULTURE, MEDIA AND SPORT—TENTH REPORT, July 31, 2008, available at <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcmds/353/35302.htm>. The Centre seeks "to identify, locate, and protect children from sexual exploitation and online abuse," and to improve the management of high risk offenders. *Id.* The report suggested increasing user awareness of sexual predators, making it easier to report solicitation or harassment to sites and civil authorities, and mandating human moderation in interactive sites, especially those designed for children. *Id.*

5. See generally *Online Virtual Worlds: Applications and Avatars in a User Generated*

offenders from its site and turned over their names after receiving a subpoena from the Attorneys General of Connecticut and North Carolina.<sup>6</sup> MySpace could take this protective stance because the KIDS Act of 2008<sup>7</sup> immunizes internet service providers from suits for banning persons registered with the national sex offender database.<sup>8</sup>

As these examples illustrate, to date, concerns for child safety in virtual worlds and social networking sites have focused almost exclusively on the risks posed by adults in children's spaces.<sup>9</sup> Little attention has been given to the risks to children who play in adult spaces not intended for them.<sup>10</sup> This Article

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*Medium, Hearing of the Subcomm. on Telecomm. and the Internet, 110th Cong. (2008) [hereinafter Online Virtual Worlds], available at [http://energycommerce.edgeboss.net/wmedia/energycommerce/040108.ti.hrg.virtual\\_worlds.wv](http://energycommerce.edgeboss.net/wmedia/energycommerce/040108.ti.hrg.virtual_worlds.wv).*

6. Jenna Wortham, *MySpace Turns Over 90,000 Names of Registered Sex Offenders*, N.Y. TIMES, Feb. 4, 2009, at B4. Facebook received a similar subpoena and is still working with officials to comply. *Id.* A year earlier, forty-nine state Attorneys General commissioned a prestigious task force of experts to examine the risks posed by sex offenders. See, e.g., Brad Stone, *New Scrutiny for Facebook Over Predators*, N.Y. TIMES, July 30, 2007, at C1; Anne Barnard, *MySpace Agrees to Lead Fight to Stop Sex Predators*, N.Y. TIMES, Jan. 15, 2008, at B3. The task force was led by Harvard University's Berkman Center for Internet & Society and included executives from Facebook, MySpace, and Linden Lab. INTERNET SAFETY TECHNICAL TASK FORCE, ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES 2 (2008), available at <http://cyber.law.harvard.edu/pubrelease/isttf/>. When that task force concluded that online bullying and peer-to-peer harassment presented much greater threats to children than online solicitation by sexual predators, Connecticut Attorney General Richard Blumenthal criticized it for downplaying the threat posed by online predators and for relying on outdated research. Brad Stone, *Despite News Reports, Task Force Finds Online Threat to Children Overblown*, N.Y. TIMES, Jan. 14, 2009, at A16.

7. See 42 U.S.C. §§ 16915a–16915b (2008) (requiring convicted sex offenders to register all internet identifiers).

8. See *id.* § 16915b(c)(5)(A) ("A civil claim against a social networking website, including any director, officer, employee, parent, contractor, or agent of that social networking website, arising from the use by such website of the National Sex Offender Registry, may not be brought in any Federal or State court.").

9. See Jessica S. Groppe, Comment, *A Child's Playground or a Predator's Hunting Ground?—How to Protect Children on Internet Social Networking Sites*, 16 COMMLAW CONSPICUOUS 215, 216–17 (2007) (arguing that the danger posed by sexual predators on the Internet can be combated best with a comprehensive national campaign—combining the efforts of parents, children, site administrators, and law enforcement—to keep predators off social networking sites and to report solicitation).

10. The exception would be a recent note, Caroline Meek-Prieto, Note, *Just Age Playing Around? How Second Life Aids and Abets Child Pornography*, 9 N.C. J. L. & TECH. 88 (2008), which argues that *Second Life* facilitates virtual child pornography and child abuse due to the difficulty in investigating and apprehending perpetrators in virtual worlds. While these are interesting observations, this Article focuses on the act of virtual sex and whether, and when, it would constitute a real-world crime against a child.

On the eve of publication of this Article, the Federal Trade Commission (FTC) issued a Consumer Alert directed at parents, warning that some virtual worlds provide the "online

explores those risks. In particular, it examines sex play in virtual worlds, a burgeoning phenomenon, and asks whether adults who engage in sex play with children may be prosecuted under state law crimes designed to protect children from sexual exploitation.

For all its virtues outlined in this volume,<sup>11</sup> *Second Life* is "awash in sex and porn."<sup>12</sup> In *Second Life*, with the help of "pose balls,"<sup>13</sup> an avatar can freely engage in sex in "private spaces and online sex clubs," selecting from among dozens of different sexual positions.<sup>14</sup> A player can equip her avatar with genitalia, purchased for as little as \$150 Linden dollars or less than \$1 US dollar.<sup>15</sup> For extra pizzazz, a player can purchase provocative clothing and even "torture devices" like those used in real-world dominatrix games.<sup>16</sup> Avatars may chat during sex play via the keyboard or, if both players have the requisite technology, talk to one another through their avatars, making it possible to combine racy "pillow talk" with the virtual sex.<sup>17</sup> For purposes of

equivalent of a red-light district" and that the "anonymity that avatars provide can encourage people to 'act out' behaviors that may be considered inappropriate, particularly for tweens and teens." Consumer Alert, Federal Trade Commission, *Virtual Worlds and Kids: Mapping Risks* (Jan. 2009), <http://www.ftc.gov/bcp/edu/pubs/consumer/alerts/alt038.shtm> (last visited Aug. 31, 2009) (on file with the Washington and Lee Law Review). The FTC plans to publish a larger report on the subject in the upcoming year. *Id.*

11. See Joshua A.T. Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215, 1221–22 (2009) (listing the benefits of virtual worlds); Robert Bloomfield & Benjamin Duranske, *Protecting Children in Virtual Worlds Without Undermining Their Economic, Educational, and Social Benefits*, 66 WASH. & LEE L. REV. 1175, 1178–83 (2009) (same).

12. See Tom Rawstorne, *Living a Second Life, a Fantasy World Awash with Sex and Porn*, MAIL ONLINE, Nov. 13, 2008, <http://www.dailymail.co.uk/news/article-1085536/TOM-RAWSTORNE-Living-Second-Life-fantasy-world-awash-sex-porn.html> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

13. Pose balls permit avatars to engage in a range of activities, such as dancing and walking. Caliandris Pendragon, *Animations for Beginners*, SECOND LIFE INSIDER, Oct. 25, 2006, <http://www.secondlifeinsider.com/2006/10/25/animations-for-beginners/> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

14. See Jonathan Richards, *Second Life Sex Bed Spawns Virtual Copyright Action*, TIMES ONLINE, July 4, 2007, [http://technology.timesonline.co.uk/tol/news/tech\\_and\\_web/article2025713.ece](http://technology.timesonline.co.uk/tol/news/tech_and_web/article2025713.ece) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

15. As one Gawker blog explains, *Second Life's* "cock shoppe" stocks a variety of different penises. Chris Mohny, *Genitals, Guns and Merchandise in Second Life*, GAWKER, Mar. 1, 2007, <http://gawker.com/tech/hypewatch/genitals-guns-and-merchandise-in-second-life-240820.php> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). Options include a "solid gold penis with flames dancing around the head," to one blogger's ultimate choice, a penis that performs "autofellatio." *Id.*

16. See Mitch Wagner, *Sex in Second Life*, INFORMATIONWEEKINFO, May 26, 2007, <http://www.informationweek.com/news/software/hosted/showArticle.jhtml?articleID=199701944> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

17. See *Second Life*, <http://secondlife.com> (last visited Sept. 29, 2009) (advertising

this Article, "virtual sex" occurs when two (or more) avatars engage in a sexual act that graphically unfolds onscreen. While virtual sex does not occur in every virtual world,<sup>18</sup> it can emerge whenever the world's software enables graphic sexual animations and users choose to create those animations.<sup>19</sup>

In addition to *Second Life*, sites providing occasions and places to engage in virtual sex are spreading fast. *RedLightCenter.com* and *Sociolotron* are just a few of the sites making money on virtual sex.<sup>20</sup> *RedLightCenter.com* helps participants meet in the real world by allowing players to state a preference to do so.<sup>21</sup> This bridging of the virtual and real worlds raises the question, how often will virtual sex lead to hook-ups in the real world?<sup>22</sup>

Even when sex between players stays wholly "on world," the boundary between the virtual and real worlds may be more porous than many realize. Bloomfield and Duranske, for example, predict that players in virtual worlds will soon be able to feel "thumps" on their torso when hit by a weapon, compliments of a vest originally developed for the medical industry.<sup>23</sup> Castronova reports that teledildonic devices, connected to a computer by a USB port, now provide direct stimulation so that "many elements of the sexual encounter are already entirely virtualized and robotized."<sup>24</sup> These "augmented

*Second Life's* instant message and voice capabilities); see also Bonnie Ruberg, *Getting Started with Sex in Second Life*, VILLAGE VOICE, June 19, 2007, at 1 ("*Second Life* sex is a combination of the visual and the verbal.").

18. Other virtual worlds shared by adults and children, like *World of Warcraft* and *Lord of the Rings Online*, do not enable avatars to act out the kind of explicit sexual acts focused on in this Article.

19. See Mallory Simon, *Video Game's User Content Spawns Naughty Web "Sporn"*, CNN.COM, July 31, 2008, <http://www.cnn.com/2008/TECH/07/30/spore.sporn/index.html> (last visited Sept. 29, 2009) (discussing the development in programs that allow user-generated content, such as Spore, of sexually-themed creations, like "Sporn") (on file with the Washington and Lee Law Review).

20. While *RedLightCenter.com* charges nothing to sign-up and download the software, "participating in its more lurid pleasures requires paying \$20 a month." Patrick Day, *Red Light? Green Light*, L.A. TIMES, Feb. 4, 2007, at 18. *Sociolotron* costs \$4 for the first month and \$9.95 per month after that. *Sociolotron*, <http://www.sociolotron.com/website3/signup.htm> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

21. *RedLightCenter.com*, <http://www.redlightcenter.com> (last visited Sept. 29, 2008).

22. For a discussion of the criminal and policy implications of real-world contact between adults and children, see Part III.B.

23. Bloomfield & Duranske, *supra* note 11, at 1198–99.

24. Edward Castronova, *Fertility and Virtual Reality*, 66 WASH. & LEE L. REV. 1085, 1091 (2009); see also Llewellyn Joseph Gibbons, *Law and the Emotive Avatar*, 11 VAND. J. ENT. & TECH. L. 899, 906–07 (2009) (discussing the use of haptics, or "the science of simulating sensory perceptions like pressure, . . . [that] permit users to physically interact with virtual worlds," and arguing that haptics "create a clear physical connection between the avatar and the individual").

reality" technologies push virtual experiences and objects down into real space, erasing the boundary between the virtual world and the real world.

Despite the fantasy element, players do not view their avatars as separate from their real-world identities.<sup>25</sup> Yee illustrates that the way users "behave and interact with others in these environments is very close to how they behave and interact with others in the material world. . . . In other words, most users are simply being themselves rather than experimenting with new identities or personalities."<sup>26</sup> Just as a player's real identity impacts her virtual one, a player's virtual identity impacts her real one. Summarizing two empirical studies of an actual online community, *World of Warcraft*, Yee and coauthors conclude that "self-representations have a significant and instantaneous impact on [the players'] behavior. . . . While avatars are usually construed as something of our own choosing—a one-way process—the fact is that our avatars come to change how we behave."<sup>27</sup> Players "take these environments very seriously."<sup>28</sup> Consider just one example. In October of 2008, Japanese authorities jailed a woman "on suspicion of illegally accessing a computer and manipulating electronic data" because she killed her "online husband's" avatar

25. See 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, 203 (R. Schroeder & A.S. Axelsson eds., 2006) ("[O]ur virtual identities and experiences are not separate from our identities and experiences in the material world."); Gibbons, *supra* note 24, at 905 ("[T]he avatar's virtual experiences have an emotional effect on the individual, and the individual's social and cultural norms affect the avatar's behavior. Thus, the avatar is more than merely an arbitrary symbolic representation of the individual, but rather an extension of that individual.").

26. Yee, *supra* note 25, at 196.

27. Nicholas Yee, *The Proteus Effect: Behavioral Modification Via Transformations of Digital Self-Representation* 103–04 (June 2007) (unpublished Ph.D. dissertation, Stanford University), available at [http://www.nickye.com/pubs/Dissertation\\_Nick\\_Yee.pdf](http://www.nickye.com/pubs/Dissertation_Nick_Yee.pdf). Using a sample of 76,843 individual characters on *World of Warcraft* over a period of seven days, the authors found that avatar height and attractiveness were significant predictors of performance, defined as the characters' level in the game. *Id.* at 43. In a second study of forty undergraduates in which participants randomly received an avatar that was shorter or taller than an opposite-gender confederate, the authors found that participants who received taller avatars "negotiated more aggressively in subsequent face-to-face interactions than participants given shorter avatars." *Id.* at iv–v.

28. Yee, *supra* note 25, at 196; see also *id.* at 197 (noting that "romantic relationships seem to occur with significant frequency" in virtual worlds, "which may be more intimate, more intense, [and] more salient than real-world relationships"). Yee further notes that because players may "optimize their self-presentation," form impressions "of the sender by inflating the few pieces of information that the sender has optimized," and "reallocate cognitive resources typically used to maintain socially acceptable nonverbal gestures in face-to-face interactions," this creates a "cumulative effect . . . that the interaction becomes more intimate and positive." *Id.*

after he abruptly divorced her avatar.<sup>29</sup> Noting that relationships and experiences in virtual worlds "can rival those of the physical world," Yee argues that "[w]hatever [virtual worlds] are, or will become, one thing is clear. They are not just games."<sup>30</sup> If Yee is correct, virtual sex between two players is anything but make believe.

Virtual sex between adults happens about as often as real sex between adults—that is to say, all the time.<sup>31</sup> And why wouldn't it? It's fun, it's kinky, the players get off on it<sup>32</sup>—and it's no one's business. Just as the State does, and should, generally stay out of the sex lives of consenting adults in the real world, the same principle applies in virtual worlds.<sup>33</sup> But virtual sex involving an actual child—that is, when a child controls one of the avatars engaged in a virtual sex act—is another matter entirely. It implicates the State's interest in preventing the exploitation and sexualization of children, just as other forms of child sexual abuse do.

This Article asks whether an adult who engages in virtual sex with a child may be subject to prosecution under existing laws prohibiting sexual exploitation of children and concludes that in many states the adult would be.<sup>34</sup> The application of existing criminal statutes to virtual sex with a child follows the gradual expansion of the classic definition of sexual abuse—namely, sexual intercourse with a known minor—to include noncontact offenses, offenses in which the adult honestly did not know the child's true age, offenses perpetrated over electronic media, like the telephone, and offenses to which the child consented. While this application of existing crimes pushes the envelope in

29. *Japanese Woman Arrested for 'Virtual-World' Murder*, ASSOCIATED PRESS, Oct. 24, 2008, <http://www.foxnews.com/story/0,2933,443767,00.html> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). Online affairs have also ended real-life marriages. *Virtual Affair Leads to Real Divorce for UK Couple*, CHINA DAILY, Nov. 15, 2008, [http://www.chinadaily.com.cn/world/2008-11/15/content\\_7208199.htm](http://www.chinadaily.com.cn/world/2008-11/15/content_7208199.htm) (last visited Sept. 29, 2009) (reporting that an English woman filed for divorce from her real-life husband after she discovered his virtual relationship with another woman on *Second Life*) (on file with the Washington and Lee Law Review).

30. Nick Yee, *The Demographics, Motivations, and Derived Experiences of Users of Massively Multi-User Online Graphical Environments*, 15 PRESENCE: TELEOPERATORS AND VIRTUAL ENVIRONMENTS 309, 325 (2006).

31. See Bloomfield & Duranske, *supra* note 11, at 1192 (noting that virtual worlds "with unfettered content creation . . . appeal to otherwise marginalized groups, including groups of people who use the spaces to role-play non-mainstream sexual practices with other users").

32. See, for example, the sex swing on *RedLightCenter.com*.

33. See *infra* Part IV (discussing the First Amendment implications of prosecuting adults for engaging in virtual sex with children).

34. It is possible that children who engage in virtual sex are also committing a crime. See *infra* note 197 and accompanying text (discussing the prosecution of teens for "sexting").



new and radical ways, it is consistent with the underlying rationale of these statutes: To protect children from premature sexual stimulation by adults for the adults' gratification.

Part II illustrates that children sneak into sites meant for adults with relative ease. It then teases out various scenarios in which virtual sex may occur and describes the graphic, interactive sexual exchanges in which children may participate. Part III then examines a number of state law offenses, including child molestation, taking indecent liberties with a minor, statutory rape, and other offenses against children. This Part charts how the application of existing crimes to virtual sex with a child builds on already broadened notions of child sexual abuse but serves the child protection rationales underpinning these statutes. Part IV briefly considers a number of challenges to the application of existing crimes to virtual sex with a child, including challenges under the First Amendment of the United States Constitution. It argues that while the First Amendment protects nonobscene virtual sex between adults, the same may not be true of virtual sex involving an actual child. This is so because this sex act, albeit virtual, involves an actual child, and because a number of core questions remain unresolved—such as whether virtual sex is conduct or mere words, whether sanctioning adults for virtual sex with people who turn out to be children would be too chilling of speech, and whether real-world law can penetrate the "magic circle" surrounding virtual worlds. Part V concludes that while adults cannot be prohibited from engaging in nonobscene virtual sex with one another—even if one or both adults uses a child-like avatar—adults playing sex games with an actual child may face prosecution under existing criminal statutes. The take away message for adults interested in virtual sex: Know whom you are diddling virtually.

## *II. Protecting Children in Virtual Worlds from Sexual Exploitation*

An estimated 8.2 million American children spend time in virtual worlds.<sup>35</sup> The emergence and widespread popularity with children of virtual worlds like *Second Life* have caused authorities to ask whether children could be exploited in these spaces. On April 1, 2008, members of the Congressional House Subcommittee on Telecommunications and the Internet met with leaders of the online community to discuss the advantages and dangers of virtual

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35. See *Online Virtual Worlds*, *supra* note 5 (testimony by Congressman Engels) (citing findings by the Subcommittee on Oversight and Investigations based on study of thirteen- to seventeen-year-olds).

worlds.<sup>36</sup> Philip Rosedale, founder and CEO of Linden Lab, the company behind *Second Life*, explained that "to date, we have had very little to no activity of concern and in those cases we have been very proactive as a company about bringing these things to the attention of the authorities. Again, we view child protection as paramount . . ."<sup>37</sup>

This Part first discusses the failure of mechanisms used by individual sites to keep children out. It then sketches in bawdy detail the sex play available to children in virtual worlds, including *Second Life* (despite Rosedale's rosy portrayal). Finally, it describes the inadequacy of filters and tort liability to screen out adult content.

### A. The Failure of Internal Screens to Exclude Children from Adult Spaces

Virtual world creators have responded to the possibility of child exploitation with a variety of approaches: segmenting players by age; providing age restrictions on admission; and restricting sexual acts involving a child-like avatar, known as "age play."<sup>38</sup> Not all virtual worlds use all or even any of these approaches, but most use one or more.<sup>39</sup> For example, Linden Lab, the creator of *Second Life*, responds to the risks to children by using all three approaches.<sup>40</sup>

A number of virtual worlds segment participants into adult-only and child-only spaces. Linden Lab offers a separate world for teens aged thirteen to seventeen, *Teen Second Life*.<sup>41</sup> The only adults given access are employees of

36. *Id.*

37. *Id.*

38. See *infra* notes 41–52 and accompanying text (discussing the efforts of virtual worlds like *Second Life* and *The Sims Online* to restrict access to minors).

39. See Fairfield, *supra* note 11, at 1233–39 (discussing the various filtering technologies employed by virtual world designers). Some virtual worlds screen for illicit content. For example, *Dotsoul* provides a PG-rated world that prohibits anything sexual on-world, as does their *There*, which minors can access if their parents register them. *Dotsoul*, <http://www.dotsoul.net> (last visited Sept. 29, 2009); *There*, <http://www.there.com> (last visited Sept. 29, 2009). Because this Article addresses the risks to children playing in spaces not intended for them, it does not consider this method of protection.

40. See *infra* notes 41–52 and accompanying text (discussing the methods used by Linden Lab to protect minors in *Second Life*).

41. In the initial sign-up process for *Second Life*, a user who enters a birth date that places her age between thirteen and seventeen automatically receives a new account in *Teen Second Life*. *Second Life*, <http://join.secondlife.com> (last visited Sept. 29, 2009). A warning then appears at the bottom of the sign-up screen: "Warning to adults: *Teen Second Life* is a service offered to minors only. If you provide false date-of-birth information in order to access *Teen Second Life*, Linden Lab may provide your personal information to any law enforcement

Linden Lab and educators who pass a background check.<sup>42</sup> Virtual worlds that cater to sexual desires also permit "adults only." *RedLightCenter.com*, for instance, uses a birth date to determine a player's admission.<sup>43</sup>

Segmenting players by age would seem sufficient to shield children from virtual sex *if* age restrictions worked. But they do not. Any kid who can do basic math can easily enter sites that facilitate virtual sex. To sign up for a *Second Life* account, a person must enter their birth date. If a person gives an age under thirteen, he or she is barred from the site. A person who gives an age between thirteen and seventeen is admitted to *Teen Second Life*.<sup>44</sup> A birth date equating to adulthood gets the user into *Second Life*.<sup>45</sup>

*RedLightCenter.com* also asks for a potential user's birth date to join, but adds the additional requirement that users "certify" that they are at least eighteen years old to enter the site.<sup>46</sup> By contrast, other virtual worlds specializing in virtual sex, like *Sociolotron*, a virtual world that permits players to engage in medieval warfare interspersed with virtual sex, requires not only certification that a user is twenty-one-years-old or older, but also a credit card.<sup>47</sup>

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organization or private litigant investigating your activities." *Id.* *Teen Second Life* is largely a ghost town. Adults are excluded by policy and few teens care to spend time here. Personal communication from Joshua Fairfield, June 1, 2009.

42. See *Online Virtual Worlds*, *supra* note 5 (testimony of Philip Rosedale, founder and CEO of Linden Lab) (describing the internal security features used to keep adults out of *Teen Second Life*).

43. *RedLightCenter.com*, <http://www.redlightcenter.com> (last visited Sept. 29, 2009).

44. *Second Life*, <http://secondlife.com> (last visited Sept. 29, 2009). Fraud with respect to age may subject the player to criminal liability. Orin S. Kerr, *Criminal Law in Virtual Worlds*, 2008 U. CHI. LEGAL F. 415, 422–23 (2008) (discussing the possibility that violating the contractual terms of the website could violate criminal law).

Although this Article is concerned with children sneaking into adult spaces, unverified age requirements work no better to bar adults from sneaking into children's spaces. In November 2008, a jury convicted Lori Drew of three misdemeanors under the Computer Fraud and Abuse Act (CFAA) (codified at 18 U.S.C. § 1030) for violating MySpace's terms of service. Jennifer Steinhauer, *Woman Found Guilty in Web Fraud Tied to Suicide*, N.Y. TIMES, Nov. 27, 2008, at A25. Drew, an adult woman, set up an account purporting to be a thirteen-year-old boy. *Id.* She used the account to interact with a thirteen-year-old girl, who eventually committed suicide. *Id.* Drew was charged with misdemeanor and felony violations of the CFAA and conspiracy, but was convicted only of the misdemeanor violations. *Id.* In July 2009, a federal judge "tentatively threw out" Drew's conviction. Tom McCarthy & Scott Michels, *Lori Drew MySpace Suicide Hoax Conviction Thrown Out*, ABCNEWS, July 2, 2009, <http://abcnews.go.com/TheLaw/Story?id=7977226&page=1> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

45. *Second Life*, <http://secondlife.com> (last visited Sept. 29, 2009).

46. *RedLightCenter.com*, <http://www.redlightcenter.com> (last visited Sept. 29, 2009).

47. *Sociolotron*, <http://sociolotron.amerabyte.com/website2/intro.htm> (last visited Sept. 29, 2009).

Because the credit card is charged, a child intent on fighting (virtually) in the nude cannot simply supply a parent's or other person's credit card number without risking discovery.

Although *Second Life* caters to adults, it forbids age play.<sup>48</sup> Specifically, *Second Life* forbids residents from: (1) engaging in lewd or sexual acts in which any avatar appears to represent a minor; (2) promoting such behavior, such as by placing child-like avatars in proximity to "sex beds" or other sexualized graphics, objects, or scripts, or by placing in children's spaces sexualized "pose balls" that allow *Second Life* characters to have sex; or (3) graphically depicting children in a sexual or lewd manner.<sup>49</sup> The sanction for age play is exclusion from the world, with the attendant loss of any investment the player may have made in *Second Life*.<sup>50</sup> *Second Life* also forbids nudity in public spaces,<sup>51</sup> although nudity is not readily policed. Two Washington and Lee students, Anna-Katherine Moody and Richard Bruno, created *Second Life* avatars, Moisha and Luc, who cavorted in the nude on a couch in a public place without disturbance.<sup>52</sup>

In October 2008, a crime correspondent for British TV's *Five News*, Jason Farrell, tested how well *Second Life*'s policy forbidding age play works in practice.<sup>53</sup> Presenting as a virtual version of himself, a middle-aged man, Farrell visited a playground designed, presumably, to attract children. No one approached him. He then returned to the area in the guise of a ten-year old girl and was inundated with messages from other users. One adult male avatar told Farrell's avatar that he had a family of girls and offered to take Farrell's avatar somewhere. He brought her to his private virtual home and, like a child molester in the real world, he put cartoons on the virtual TV. Later, the male avatar took Farrell's avatar into the bedroom, where another adult female avatar

48. See Robin Linden, *Accusations Regarding Child Pornography in Second Life*, <http://blogs.secondlife.com/community/features/blog/2007/05/10/accusations-regarding-child-pornography-in-second-life> (last visited Sept. 29, 2009) (reporting that *Second Life* has a "zero tolerance policy" for age play and promptly removes avatars who engage in such behavior from its site) (on file with the Washington and Lee Law Review).

49. *Second Life*, Community Standards, <http://secondlife.com/corporate/cs.php> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

50. Kend Linden, *Clarification of Policy Disallowing "Ageplay"*, <http://blog.secondlife.com/2007/11/13/clarification-of-policy-disallowing-ageplay/> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

51. *Second Life*, Community Standards, <http://secondlife.com/corporate/cs.php> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

52. May 29, 2009.

53. *Return to the Dark Side of Second Life*, FIVE NEWS, Oct. 6, 2008, <http://news.five.tv/news.php?news=176> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

was present. Pose balls hovered above the bed. The male avatar asked Farrell's avatar to undress. The man said that he liked young girls in real life, but when Farrell pressed him further, the man ejected Farrell's avatar from his virtual home.<sup>54</sup>

The inadequacy of internal screens to keep children out of adult spaces brings us to the central question, explored in the next subpart: What precisely occurs in virtual worlds from which children may need protection?

### B. Virtual Sex—Who's Diddling Whom?

To the extent that children play in virtual worlds like *Second Life*, or enter spaces dedicated to virtual sex, like *RedLightCenter.com*, they may be engaging in virtual sex.<sup>55</sup> As the *Five News* exposé illustrated, it is possible to stumble on sexually-charged interactions in *Second Life* in unexpected locations or in places a short teleport away. A 2005 study found that one in three youth internet users saw sexual material they did not want to see.<sup>56</sup>

Whole sections of *Second Life* are devoted to sex play. Many users become highly invested in their avatars, purchasing genitalia, sex toys, and skimpy outfits with money that has real-world exchange rates.<sup>57</sup> Avatars can get their "freak on" in places like Club Sin, Nude Beach, and Nera Naughty,<sup>58</sup> sometimes designated "mature areas."<sup>59</sup> One blogger reports that "the sex clubs

54. *Id.*

55. Children may also witness a number of kinky things. See, e.g., Mohny, *supra* note 15 (describing a "giant vagina" resembling a "big pink kidney bean" into which a user may insert his virtual penis). This Article focuses on the impact on children of participating in graphic, interactive virtual sex acts. It takes no position on whether the state should regulate the possibility that children will merely see such bizarre sexual depictions.

56. See JANIS WOLAK ET AL., NATIONAL CENTER FOR MISSING & EXPLOITED CHILDREN, ONLINE VICTIMIZATION OF YOUTH: FIVE YEARS LATER I (2006), available at <http://www.unh.edu/ccrc/pdf/CV138.pdf> (noting the rise in online exposure of youth to unwanted sexual material). Findings from earlier surveys indicate that "large numbers of youth who used the Internet were encountering sexual solicitations they did not want . . . [and] sexual material they did not seek . . . ." *Id.* at xi.

57. Mohny, *supra* note 15.

58. See Rawstorne, *supra* note 12 (recounting Rawstorne's visit to clubs that promote orgies, simulated rape, and pedophilia).

59. See Tateru Nino, *Linden Lab Changes Course for Second Life's Mature Content*, Mar. 12, 2009, <http://www.massively.com/2009/03/12/linden-lab-changes-course-for-second-lifes-mature-content/> (last visited Sept. 29, 2009) (stating that there are two sections of *Second Life*, one for G-rated content and one for "everything else," both of which are accessible to all avatars) (on file with the Washington and Lee Law Review).

were the most consistently populated area" he entered in *Second Life*.<sup>60</sup> While the avatars engaging in sexual acts retain a "cartoonish" character, they are increasingly becoming realistic and lifelike.<sup>61</sup>

The menu of sexual activities available to players would test even Dr. Ruth's knowledge base. A single piece of furniture available for sale in *Second Life* for \$45, the SexGen bed, "enables more than 150 sex animations."<sup>62</sup> Any child smart enough to slip into a virtual world with a fake birth date can enter these spaces.

Children are not always innocent bystanders when it comes to virtual sex. In *The Sims Online* (TSO), a now defunct virtual world,<sup>63</sup> minors ran a cyber-prostitution ring for money.<sup>64</sup> According to a news blog by a University of Michigan professor, an under-age user, Evangeline, acted as a cyber-madam for several cyber-brothels in TSO.<sup>65</sup> Evangeline interviewed girls virtually to see how they would behave with cyber-johns, then prostituted the girls out to male users for roughly the real-world equivalent of \$50 an encounter. TSO ultimately bounced the whistle-blowing professor and shut down his news blog,<sup>66</sup> raising questions as to whether informal restraints will suffice to regulate virtual sex with minors.

60. Mohney, *supra* note 15.

61. See Castronova, *supra* note 24, at 1089 ("[Virtual Reality] makes visual and auditory sensations better, both in the sense of realism and fantasy."); see also Peter Plantec, *The Promise of Digital Doubles*, Nov. 13, 2008, <http://www.studiodaily.com/main/work/10208.html> (last visited Sept. 29, 2009) (reporting that a computer-generated image wrapped onto an anatomically correct female form, Image Metric's Emily Project, was so realistic that one could be fooled into believing Emily was real) (on file with the Washington and Lee Law Review).

62. Richards, *supra* note 14; see also Destiny Welles, *The Ins and Outs of a Second Sex Life*, REGISTER, Jan. 9, 2007, [http://www.theregister.co.uk/2007/01/09/good\\_sex\\_in\\_second\\_life/](http://www.theregister.co.uk/2007/01/09/good_sex_in_second_life/) (last visited Sept. 29, 2009) ("You can buy [pose balls] at many of the shops; in fact, you can buy whole kits, like a bed with an entire menu of animations.") (on file with the Washington and Lee Law Review).

63. Electronic Arts, the developer of TSO, rebranded TSO as "EA Land" early in 2008, with no success. It closed shortly thereafter. Daniel Terdiman, 'EA Land' Closing Just Weeks After Debut, CNET NEWS, Apr. 29, 2008, [http://news.cnet.com/8301-17938\\_105-9931757-1.html](http://news.cnet.com/8301-17938_105-9931757-1.html) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

64. Dan Hunter, *Evangeline: Interview with a Child Cyber-Prostitute in TSO*, ALPHAVILLE HERALD, Dec. 8, 2003, [http://www.secondlifeherald.com/slh/2003/12/evangeline\\_inte.html](http://www.secondlifeherald.com/slh/2003/12/evangeline_inte.html) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). While the brothels existed only online, cyber-johns paid in virtual world currency. *Id.* Currency in virtual worlds is often converted into real-world currency by sale on eBay. *Id.* Evangeline did not try to convert her virtual gains, electing instead to use it to purchase things in TSO. *Id.*

65. *Id.*

66. Dan Hunter, *Censorship in TSO*, [http://terranova.blogs.com/terra\\_nova/2003/12/](http://terranova.blogs.com/terra_nova/2003/12/)

Some virtual sex may lead to off-line conduct. Across all internet contexts, not just virtual worlds, one in seven children report being solicited for sex online.<sup>67</sup> Some worlds specializing in virtual sex assist participants to meet in the real world. *RedLightCenter.com*, for instance, allows players to state a preference to "meet in the real world."<sup>68</sup>

Even without the explicit invitation to real-world hook-ups, the boundary between the real world and the virtual world is fading and likely to disappear soon. Bloomfield and Duranske believe that in the near term, players will be able to feel what their avatars experience.<sup>69</sup> Other technology now allows players to project a holographic image of an avatar in the real world.<sup>70</sup> As Part III explains, the spill-over of the virtual world into the real world may be significant for whether a crime occurs, either as a form of physical touching or as constructive presence. This Article, however, also posits the harder case: virtual sex with a child that stays wholly online.

Because virtual worlds permit players to engage in fantasy, it is difficult to know who is playing sex games with whom. As Figure 1 shows, both children and adults may play sex games (top axis showing true identity). Players can take on avatars that may or may not be realistic representations of themselves. Thus, as Figure 1 shows, both may present as adults or as children (vertical axis showing virtual identity).<sup>71</sup> Finally, both may play with another party, who may be either an adult or a child (bottom axis showing partner). This combination of possibilities yields eight distinct outcomes, as shown.

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censorship\_in\_t.html (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review).

67. WOLAK ET AL., *supra* note 56.

68. *RedLightCenter.com*, <http://www.redlightcenter.com> (last visited Sept. 29, 2009). By contrast, *Second Life* discourages players from talking about the player's "first" or real life and from going "off world" or meeting in real life. Online Safety Tips for Teens, <http://teen.secondlife.com/parents/safety> (last visited Sept. 29, 2009) ("Don't ever tell anyone online your real full name, your parents' names, your home address, your school name or location, your phone/mobile numbers, social security & credit card numbers, and anything that shows what you look like such as a photo, video, or webcam link.") (on file with the Washington and Lee Law Review).

69. See Bloomfield & Duranske, *supra* note 11, at 1182 ("Integration can go both ways, of course, allowing the synthesized physical experience of an avatar to be transmitted through a force-feedback device to create a sensation in the real world.")

70. See *id.* at 1198 ("One can even surmise that the existence of holographic projection technology will allow the father's avatar to be present in the real world, projected on to the couch next to his children. In fact, although in rudimentary form and priced well above consumer items, this technology does already exist.")

71. When a child-like avatar engages in sex, it is age play and banned on some worlds, like *Second Life*. Linden, *supra* note 48.

As Parts III and IV will suggest, these scenarios may have very different implications for the legality of the virtual sex and whether it will receive First Amendment protection.

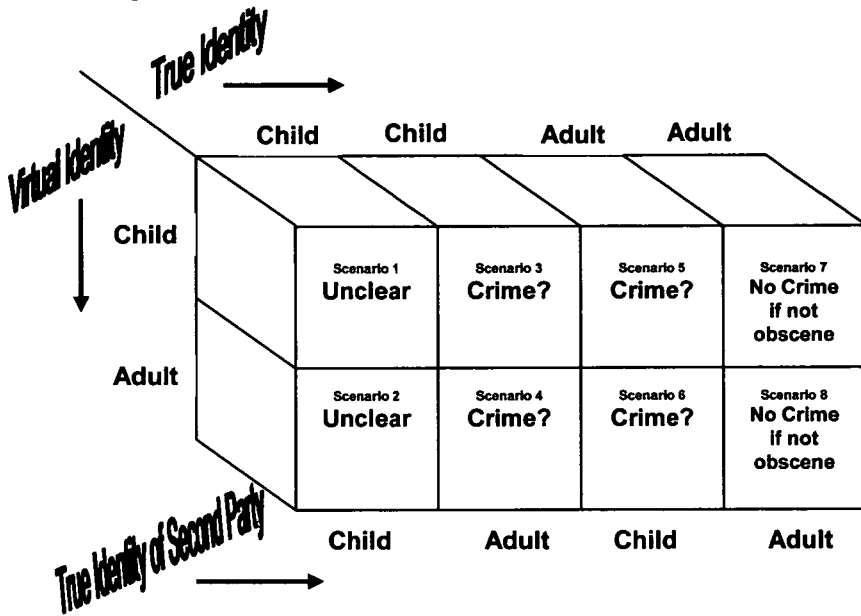


Figure 1. Possible Participants in Virtual Sex

In Scenarios 1 through 6, an actual child participates in virtual sex, implicating the State’s interest in preventing child sexual exploitation, as Part III will discuss. In Scenario 7, age play occurs with one adult masquerading as a virtual child. In Scenario 8, both adult players appear as adults. As kinky and bizarre as both Scenarios 7 and 8 are, nonobscene sex play between two actual adults is likely beyond the reach of the government, as Part IV explains.

Virtual sex goes well beyond a stream of typed words describing sex acts, known as emoting.<sup>72</sup> With emoting, a player might type, "I’m now penetrating you," but no visual depiction ever occurs of one avatar penetrating another.<sup>73</sup> Not so with virtual sex, which combines graphic depictions of the avatar’s acts

72. See *World of Warcraft Online*, <http://www.worldofwarcraft.com/content/guides-emotes.php> (last visited Sept. 29, 2009) ("Emotes are commands that you type in which make your character perform certain actions depending on the emote that you typed. Emotes can be done individually or with another character if you type the emote while another player is selected on your screen.") (on file with the Washington and Lee Law Review).

73. Emotes can direct avatars to take actions that include elements of sex acts like laying down, but not full-blown sex acts, like sodomy. *World of Warcraft Online*, *supra* note 72. The majority of emotes direct avatars to do mundane things, like burping or applauding. *Id.*



with the opportunity to guide the avatar through explicit sexual escapades. Far from being a passive recipient of pornographic ideas and words, the players in virtual sex games guide the nature of the exchange, which unfolds graphically on their screens as they play. A player's avatar can seduce her partner, undressing provocatively or pole dancing if she prefers.<sup>74</sup> Or she can get down to business without the foreplay, selecting a sexual position which then continuously loops until the avatar is directed to do something further. Players can manipulate avatars through multiple sexual exchanges, unlimited by physical stamina or exhaustion as in the real world. By touching an avatar, players can enhance the avatar's arousal level and even cause it to orgasm.<sup>75</sup>

The interactivity of virtual sex cannot be overstated. One player chooses a desired sex act, which the other player must then agree to by placing her pose ball next to the first's.<sup>76</sup> Players choose how to respond to the other player's actions—by clicking out of the game, by stopping the act, by agreeing to proposed acts or countering with another preferred sex act, and by choosing to engage in further sex acts beyond the first.<sup>77</sup> Players can choose whether to make their avatar climax or to make the other avatar climax.<sup>78</sup> All the while, the other player immediately responds to these choices with her own choices. Laid over all of this is communication between the players by voice or Instant Messenger (IM). This back and forth requires the two players to make numerous choices, which visually unfold before them.

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74. See Virtual Sex in *Second Life*, Early Show, <http://www.youtube.com/watch?v=ruMi3MAGkvc> (last visited Sept. 29, 2009) (presenting video clips of different cyberbrothels on *Second Life*) (on file with the Washington and Lee Law Review).

75. See Ruberg, *supra* note 17 ("The [avatars'] nipples, clits, penises, etc. can be 'touched' just by clicking on them. Since the parts monitor the avatar's 'arousal,' avatars can even orgasm in this way.").

76. See Caliandris Pendragon, *Animations for Beginners*, SECOND LIFE INSIDER, <http://www.seconddlifeinsider.com/2006/10/25/animations-for-beginners> (last visited Sept. 29, 2009) [hereinafter Pendragon, *Animations*] (explaining that for sex pose balls to work, they must synchronize, meaning that when one player selects a pose ball the other must select a corresponding pose ball) (on file with the Washington and Lee Law Review).

None of this requires resources or Linden Dollars, since many sex clubs have "beds and pose balls all over the place." Welles, *supra* note 62.

77. See Pendragon, *Animations*, *supra* note 76 ("Most of the animation overrides allow you to turn them off. . . . You may also find yourself stuck in an animation you can't get out of, from any source.").

78. See Ruberg, *supra* note 17 (describing the ways an avatar can "stimulate" his or her sex partner).

### C. *The Inadequacy of External Filters*

It almost goes without saying that there is little that parents can do about this.<sup>79</sup> The United States Supreme Court repeatedly has struck down on First Amendment grounds Congressional attempts to limit provocative materials online.<sup>80</sup> Filters are clunky and prone to over-blocking or under-blocking sites so that inappropriate sites may be allowed through while relatively unobjectionable sites are blocked.<sup>81</sup> One free filter, We-Blocker, blocked access to such sites as *RedLightCenter.com*, *Sociolotron*, and Facebook,<sup>82</sup> but permitted access to *Second Life*, where children may have sexual encounters, as *Five News* demonstrated.<sup>83</sup>

The prospect of tort liability is unlikely to motivate site creators to police children in adult spaces. In 2007, a man sued Sexsearch.com, an online service permitting users to meet and engage in sexual encounters,<sup>84</sup> after he was

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79. Of course, parents can restrict computers to public spaces in the home.

80. See Catherine J. Ross, *Constitutional Obstacles to Regulating Violence in the Media*, in HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 291, 296–97 (Nancy E. Dowd, Dorothy G. Singer, Robin Fretwell Wilson eds., 2006) [hereinafter CHILDREN, CULTURE, AND VIOLENCE] (reviewing Congress's failed attempts to limit online pornography)

81. An internet filter is hardware or software that prevents access to certain areas of the Internet. Internet Filters Frequently Asked Questions, Internet-filters.net, <http://www.internet-filters.net/info.html> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). Different filters function differently. Some block URLs that appear on a predetermined list, while others scan incoming data and block undesirable keywords or file types. *Id.* With some filters, parents can create the list of keywords or sites to be blocked. *Id.* In addition, parentally-controlled children's browsers enable parents to create a list of known "good" sites that can be accessed. *Id.* While filters can be useful to block unwanted materials, a number of limitations reduce their effectiveness. *Id.* Not everyone utilizes filters. They can be expensive and make browsing more burdensome for users, including parents. *Id.*

82. When a blocked web address was entered, an "Error 404: File Not Found" message appeared in the browser.

83. See *supra* note 64 and accompanying text (discussing *Five News* exposé). Some commentators urge the commercial development of internet services that match "the real, geographical world's decency standards." Cheryl B. Preston, *Zoning the Internet: A New Approach to Protecting Children Online*, 2007 BYU L. REV. 1417, 1426 (2007). Similar to blocking certain cable TV stations, this approach seeks to enable parents to shield children from objectionable content, while respecting the First Amendment rights of those who want to access the entire Internet. If prior experience is any guide, market-based solutions likely will require Congressional pressure. Dale Kunkel & Lara Zwarun, *How Real is the Problem of TV Violence? Research and Policy Perspectives*, in CHILDREN, CULTURE, AND VIOLENCE, *supra* note 80, at 203, 212–13. Even if this approach gets traction, it has limited utility here. A "decency filter" shares the general problem of filters—it may block inherently obscene sites, such as *RedLightCenter.com*, but leave nonobscene sites like *Second Life* within reach.

84. Sexsearch.com claims to have 15 million members. Sexsearch.com, [http://www.sexsearch.com/upgrade/p:20261341/svl:member\\_home\\_50.htm](http://www.sexsearch.com/upgrade/p:20261341/svl:member_home_50.htm) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). While the initial sign-up is free, Sexsearch.com

sentenced to fifteen years in prison for engaging in sexual relations with a "woman" he met on the site who turned out to be fourteen years old.<sup>85</sup> The girl accessed the site by providing a birth date showing she was eighteen.<sup>86</sup> The man sued SexSearch.com for breach of contract, negligent misrepresentation, and negligent infliction of emotional distress for allowing a minor to join.<sup>87</sup> The court dismissed the suit on summary judgment, concluding that the Communications Decency Act<sup>88</sup> (CDA) provided immunity to SexSearch.com.<sup>89</sup> The CDA states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,"<sup>90</sup> and that "no cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."<sup>91</sup>

In 2006, a mother and daughter sued MySpace for negligence and gross negligence, claiming that MySpace should have adopted procedures to verify users' ages.<sup>92</sup> The claim originated when Julie Doe, thirteen at the time, lied about her age in her MySpace profile.<sup>93</sup> She later began to interact with a nineteen-year-old man, who sexually assaulted her when they met in the real world.<sup>94</sup> A federal district court in Texas dismissed the Does' claims with prejudice, concluding that the CDA and Texas common law barred them.<sup>95</sup> The Court of Appeals agreed, concluding that the claims merely sought to hold

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offers two membership upgrade options. Silver Membership costs \$19.98 for three months and allows the user to view and contact all members, reply to all emails, and engage in instant message chats. Gold Membership costs \$12.50 a month for 12 months and gives the user top listings in all searches, features the user in all search results, and gives users access to hardcore pornography and member webcams. *Id.*

85. *See Doe v. Sexsearch.com*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007) (granting defendant's motion to dismiss claim).

86. *Id.*

87. *Id.* at 723.

88. 47 U.S.C. § 230 (2000).

89. *Sexsearch.com*, 502 F. Supp. 2d at 728.

90. 47 U.S.C. § 230(c)(1) (2000).

91. *Id.* § 230(e)(3).

92. *See Doe v. MySpace*, 528 F.3d 413, 416–17 (5th Cir. 2008) (describing the procedural history of the case).

93. *Id.* at 416. Other girls have been fatally harmed when they met their online partners in the real world. *See Girl Killed by "Lover" She Met on Internet*, CHINA DAILY, June 24, 2009, [http://www.chinadaily.com.cn/china/2009-06/24/content\\_8317265\\_2.htm](http://www.chinadaily.com.cn/china/2009-06/24/content_8317265_2.htm) (last visited Sept. 29, 2009) (describing a Chinese man who stabbed his "Internet lover" to death in a cake shop after she broke off their relationship) (on file with the Washington and Lee Law Review).

94. *MySpace*, 528 F.3d at 417.

95. *Id.*

MySpace liable for publishing "online third-party-generated content."<sup>96</sup> The court refused to address the Does' claim that MySpace partially created the content by providing a template for user profiles because the Does raised the question for the first time on appeal.<sup>97</sup> Negligence actions have been barred in other suits as well.<sup>98</sup>

The failure of private tort suits and parental controls to police the sexual exploitation of children by adults places a premium on the application of criminal law.

### *III. Is Virtual Sex with a Child a Crime?*

If children play in spaces in which virtual sex is occurring and some take part in these virtual acts, are adults likely to get in trouble for this?<sup>99</sup> Assuming that the First Amendment does not insulate the adults from sanction, as Part IV will explore, this Part suggests that a number of existing state law crimes would encompass the mere act of virtual sex with a child. Subpart A examines a number of state law crimes including crimes against children—such as indecent liberties with a minor—as well as crimes that may be committed against any person, such as using indecent language. Subpart B describes how the application of existing statutes to virtual sex with a child pushes those definitions in new and radical ways, but ultimately concludes that virtual sex with a child implicates the child protection rationales that led society to place sexual conduct with children off-limits.

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96. *Id.* at 420.

97. *Id.* at 422. While the CDA protection is very strong, state Attorneys General have forced settlements from MySpace and Facebook that require them to undertake substantial policing duties to stop predators. Anne Barnard, *MySpace Agrees to Lead Fight to Stop Sex Predators*, N.Y. TIMES, Jan. 15, 2008, at B3.

98. In *Zeran v. America Online, Inc.*, 129 F.3d 327, 335 (4th Cir. 1997) the Fourth Circuit held that the CDA barred a negligence action against a commercial interactive computer service provider that was sued for delays in removing defamatory messages posted by a third party. The court stated that Section 230 of the CDA "precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred." *Id.* at 330.

99. One implication of the application of state law crimes here is that children may be prosecuted for their own behavior. See *infra* note 197 (discussing the prosecutions of children for "sexting"); Part III.A.2 (describing certain crimes that may be committed by an individual of any age, like indecent acts with another); *cf. infra* notes 151–77 and accompanying text (discussing the age requirements for statutory rape and other crimes against children).

### A. *Ballooning Definitions of Child Sexual Abuse*

As this subpart demonstrates, understandings and definitions of child sexual abuse have undergone a remarkable change in the last several decades. Modern definitions of child sexual abuse already encompass conduct that does not involve actual physical touching, such as exhibitionism and other noncontact offenses.<sup>100</sup> Modern definitions jettison physical proximity between the offender and victim to encompass conduct over the phone and other electronic media.<sup>101</sup> In many states, modern definitions do not require knowledge of the victim's status *as a child* and provide no defense based on the child's willingness or consent to the sexual activity.<sup>102</sup>

#### 1. *Noncontact Offenses*

Widely accepted definitions of child sexual abuse encompass noncontact abuse, like exhibitionism, sharing pornography with a child, and voyeurism.<sup>103</sup> The expansion of child sexual abuse to include noncontact offenses rests on two discrete rationales. First, there is the predictive judgment that a person generally does not show sexually explicit materials or, for that matter, his genitals to a child and have it end there.<sup>104</sup> In fact, many noncontact offenses "groom" the child to accept physical touching, lowering the child's inhibitions to later sexual contact.<sup>105</sup> In this way, noncontact offenses often act as a precursor to actual physical intercourse or other sexual contact.

100. See *infra* Part III.A.1 (discussing the expanding definitions of child sexual abuse).

101. See *infra* Part III.A.2 (discussing criminal prohibitions against indecent exposure).

102. See *infra* Part III.A.3 (discussing prohibitions against statutory rape).

103. See, e.g., 43 C.J.S. *Infants* § 121 ("A statute may provide punishment for . . . being involved in various sexual activities with, or in the presence of, infants. . . . Indecent exposure to children may constitute molesting within the statute, and a physical act of touching the child is not required."); Robin Fretwell Wilson, *The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim's Siblings*, 51 EMORY L.J. 241, 256 n.56 (2002) (noting that most researchers now agree that the definition of incest includes noncontact interactions between the parent and child); ROBERT D. GOLDSTEIN, *CHILD ABUSE AND NEGLECT: CASES AND MATERIALS* 178 (1999) (noting that many jurisdictions retain the power to prosecute noncontact acts by means of such provisions as "taking indecent liberties with a minor").

104. Diana E.H. Russell & Natalie J. Purcell, *Exposure to Pornography as a Cause of Child Sexual Victimization*, in *CHILDREN, CULTURE, AND VIOLENCE*, *supra* note 80, at 59, 78–79; Robin Fretwell Wilson, *Undeserved Trust: Reflections on the American Law Institute's Treatment of De Facto Parents*, in *RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 90, 95 (Robin Fretwell Wilson ed., 2006).

105. Russell & Purcell, *supra* note 104, at 78.

Second, noncontact offenses directly harm the child.<sup>106</sup> They corrupt the minor's innocence, change her own mental views of sex and sexual relationships, and often change the range of sexual activities she is likely to engage in, even if nonabusive.<sup>107</sup> A child's own sexual identity may also be affected. As one recent report noted, "exposure to sexual material could negatively impact [a child's] sexual development and [cause] some people [to] develop compulsions about looking at sexual material."<sup>108</sup> Noncontact sexual encounters also often leave a child disillusioned and distressed.<sup>109</sup>

Consequently, it is no surprise that many sexual abuse offenses against a child require no physical touching. Jurisdictions reach "non-touching acts (along with touching acts) by means of such provisions as 'taking indecent liberties with a minor,' 'corrupting the morals of a minor,' 'molesting or annoying' a minor, and the like."<sup>110</sup> These laws cover a wide range of conduct. Indecent liberties, for example, encompass any act that the "common sense of society would regard as indecent and improper."<sup>111</sup> Examples include taking lewd photographs of a child, "voyeurism or being a peeping tom," and sharing pornography with a child.<sup>112</sup> Sexually charged exchanges between an adult and

106. Sexual abuse involving touching also causes harm. GOLDSTEIN, *supra* note 103, at 144. Other harms caused by child sexual abuse include the following: (a) "depriv[ing] minors of needed dependence on trusted adults" and "undermin[ing] the family's role in the protection and education of the child"; (b) violating the sense of self and autonomy of children, who lack "sufficient cognitive and emotional capacity to understand the nature of a sexual act or to withstand the influence of older persons, and thus cannot consent to sex"; and (c) "prematurely exciting a child's sexuality before he or she can tolerate, control, or integrate it," harming the child "because of its overwhelming nature." *Id.* Further, child sexual abuse, when combined with secrecy and threats, "lead[ing] to substantial inner splits, trauma and dissociation" can cause "violent bodily injury, constitut[ing] an assault and battery, and inflict[ing] trauma by virtue of the threat of physical safety, integrity and well-being." *Id.*

107. See *id.* at 144–45 (listing other harms including breach of trust, violation of personal autonomy, and family disruption).

108. WOLAK ET AL., *supra* note 56, at 60.

109. See, e.g., Roland Summit & JoAnn Kryso, *Sexual Abuse of Children: A Clinical Spectrum*, in *SEX AND CHILDREN: NEW FINDINGS, NEW PERSPECTIVES* 111, 115 (Larry L. Constantine & Floyd Mansfield Martinson eds., 1987) (reporting that girls who discovered that their fathers watched them undress through slightly open doors or mirrors usually experienced "a strong sense of disillusionment and distress").

110. GOLDSTEIN, *supra* note 103, at 178.

111. *State v. McClees*, 424 S.E.2d 687, 690 (N.C. Ct. App. 1993); see also *Wormley v. State*, 565 S.E.2d 530, 531 (Ga. App. Ct. 2002) (defining an immoral or indecent act as an act that is "generally viewed as morally indelicate or improper or offensive, . . . [and] which offend[s] against the public's sense of propriety"); 43 C.J.S. *Infants* § 113 (2008) ("The indecent liberties referred to by the statute are such as the common sense of society would regard as indecent and improper.").

112. See *U.S. v. Obren*, 28 M.J. 172, 174–75 (A.F. Ct. Crim. App. 1989) (upholding the

a child also count. Thus, asking vulgar and sexually explicit questions of a child while driving in a car next to her is indecent behavior, despite the lack of touching.<sup>113</sup> A person who masturbates in front of a child takes an indecent liberty with her, even if the child is sixty feet away,<sup>114</sup> as does a person who masturbates behind a glass window in his home in sight of children thirty-five feet away.<sup>115</sup> The defining characteristic of the behavior under many statutes is that one intends to arouse one's sexual passions or those of the child, not that a touching occurred.<sup>116</sup>

Some child molestation statutes also dispense with touching as an element. In Georgia, for example, physical contact between the victim and the perpetrator is not an element of the offense.<sup>117</sup> Thus, a couple could be convicted of child molestation for having sexual intercourse in the presence of five children.<sup>118</sup> In New Jersey, sexual assault requires the touching of an

conviction of a man for taking indecent liberties with a minor after he shared a Playboy magazine and other materials with four boys since the defendant's actions demonstrated his intent to "arouse his sexual passions and those of the children".

113. *State v. Smith*, 27 So.2d 359, 364 (La. 1946) (overturning the conviction of a man, based on reasonable doubt as to the perpetrator's identity, for taking indecent liberties with a child where he was alleged to have driven beside a child in a car and asked vulgar questions of her).

114. *See State v. Strickland*, 335 S.E.2d 74, 75 (N.C. Ct. App. 1985) (upholding the conviction of a man for taking an indecent liberty with a child under N.C. GEN. STAT. § 14-202.1 (2008) for masturbating in front of children approximately 60 feet away, and refusing "to hold that a defendant must be within a certain distance of or in close proximity to the child").

115. *See State v. Nesbitt*, 515 S.E.2d 503, 507 (N.C. Ct. App. 1999) (upholding the conviction of a man for taking indecent liberties with a minor under N.C. GEN. STAT. § 14-202.1 (2008) when he masturbated behind a glass window in front of children, despite his claim that he had no way of knowing that his conduct would place him "with" a child standing thirty-five feet away in his yard). As the court observed, "it is clear what conduct the statute seeks to prohibit and thus gives sufficient guidance to our citizens, our police, our prosecutors, our judges, and our juries." *Id.*

116. *See* 43 C.J.S. *Infants* § 113 ("Under particular statutes, the constituent elements of the offense include the taking of immoral, improper, or indecent liberties, with an infant under a specified age, with the intent of arousing, appealing to, or gratifying, the lust, passions, or sexual desires of the infant or the accused."); *see also* *United States v. Cook*, 61 M.J. 757, 759 (A.F. Ct. Crim. App. 2005) (noting that the crime of attempted indecent liberties with a minor requires that the accused act with the intent to arouse the sexual desires of the accused, the victim, or both).

117. *See* GA. CODE ANN. § 16-6-4 (West 2009) ("A person commits the offense of child molestation when such person does any immoral or indecent act to or in the presence of . . . [a minor].").

118. *See Grimsley v. State*, 505 S.E.2d 522, 527 (Ga. Ct. App. 1998) ("It is sufficient if a person utilizes or capitalizes on a child's mere *presence* as a witness to the person's intentional immoral or indecent act . . .").

intimate part. . . . [T]he actor may touch himself or herself, the actor may touch the victim, or the victim may touch the actor. Each such intentional touching must be for at least one of four purposes: either degrading or humiliating the victim, or sexually arousing or sexually gratifying the defendant-actor. Finally, if the touching is by the actor of himself or herself, the sexual touching must be in view of the victim whom the actor knows to be present.<sup>119</sup>

Thus, an adult's masturbation in front of eight- and ten-year-old children from seventy-five feet away satisfied the elements of sexual assault even though the defendant did not physically touch the victim.<sup>120</sup>

Like these examples, sex play in virtual worlds exposes the child-participant to sexual materials and sexual exchanges. The fact that the virtual sex act (absent an augmented reality device)<sup>121</sup> does not involve a touching does not negate the impact such activity can have on a child's sexual identity and sexual practices later in life—just as when a child sees an adult masturbating, she is not being touched or directly stimulated sexually but is being exposed to a sexual experience. In both instances, a child is engaging in a sexual experience that may warp her own understanding or perception of sex.<sup>122</sup> A growing body of empirical research shows that players experience these exchanges as real.<sup>123</sup> Moreover, in both instances, the adult presumably

119. *State v. Zeidell*, 713 A.2d 401, 407 (N.J. 1998).

120. *Id.* at 410.

121. The use by the child of an augmented reality device, like the vest described by Bloomfield and Duranske, makes this analysis even easier. It would satisfy the more rigorous requirement under some statutes of physical presence or contact with the child. *See* GA. CODE ANN. § 16-6-4(a) (West 2009) ("A person commits the offense of child molestation when he or she does any immoral or indecent act to or in the presence of or with any child under the age of sixteen years with the intent to arouse or satisfy the sexual desires of either the child or the person."); *Vines v. State*, 499 S.E.2d 630, 631–32 (Ga. 1998) (concluding that talking over the phone did not constitute physical presence). In the real world, the penetration of a child with an object, as opposed to directly with one's genitals or fingers, counts as a touching even though it is moderated by an inanimate object. *See, e.g.,* R.I. GEN. LAWS § 11-37-1(8) (2009) ("Sexual penetration" means sexual intercourse, cunnilingus, fellatio, and anal intercourse, or any other intrusion, however slight, by any part of a person's body or by any object into the genital or anal openings of another person's body . . ."). To the extent that the augmented reality device stimulates an "intimate part" of the child's body, the child would be sexually stimulated in the real world—an outcome that criminal prohibitions clearly seek to prevent. Such devices dispense with the need to decide how noncontact offenses should be treated. *See State v. Zeidell*, 713 A.2d 401, 407 (N.J. 1998) (discussing touching of an intimate part); *Cf. Gibbons, supra* note 24, at 907 ("If an avatar hits another and the individual behind the assaulted avatar 'feels' the effect through a mechanical device, then that blow should be treated as if the individual had struck the other individual in the real world.").

122. *See* GOLDSTEIN, *supra* note 103, at 144 (listing the detrimental impacts of child sexual abuse).

123. *See* Yee, *supra* note 27, at 104 ("While avatars are usually construed as something of



engages in virtual sex because it sexually excites the adult, the other player (the child), or both.

## 2. Proximity to the Child

Just as some sexual crimes against children do not require physical touching, some do not require presence either. For instance, under the Manual for Courts-Martial, indecent acts with another requires neither physical touching nor presence.<sup>124</sup> In *United States v. Miller*,<sup>125</sup> the defendant sent pictures of his exposed genitals by web camera to a detective whom he believed to be a fourteen-year-old girl, and subsequently was convicted of attempting to take indecent liberties with a child.<sup>126</sup> The defendant successfully rebuffed that charge, which requires physical presence, but not the lesser included offense of indecent acts with another.<sup>127</sup> The court remanded for consideration of the sufficiency of the evidence for that crime.<sup>128</sup>

The crime of communicating an indecent message also does not require presence in some jurisdictions. Thus, a man who calls a woman, posing as another woman in order to induce her to talk about breastfeeding, may be convicted of communicating an indecent message, even if he does not act with the intent to excite himself.<sup>129</sup>

Many state indecent liberty and solicitation statutes also dispense with physical presence. For instance, an individual who talks dirty with a child over the phone while masturbating may be convicted of taking indecent liberties with the minor if the conduct was intended to arouse the adult, the child, or

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our own choosing—a one-way process—the fact is that our avatars come to change how we behave.”).

124. See MANUAL FOR COURTS-MARTIAL UNITED STATES 45 Article 120(k) (2008) (defining the crime of an indecent act).

125. *United States v. Miller*, 67 M.J. 87 (A. Ct. Crim. App. 2008).

126. *Id.* at 91.

127. The government argued for the first time on appeal that Miller should be convicted of the lesser included offense of indecent acts with another. *Id.*

128. *Id.*

129. See *United States v. Webb*, 39 M.J. 575, 578 (N-M. Ct. Crim. App. 1993) (upholding the conviction of a defendant for using indecent language over the phone in violation of 10 U.S.C. § 934, which punishes “conduct of a nature to bring discredit upon the armed forces”). The 1984 Manual for Courts-Martial defines “indecent” language as “that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought”; it must also “violate community standards.” MANUAL FOR COURTS-MARTIAL UNITED STATES, 1984 (M.C.M.) ¶ 89c.

both.<sup>130</sup> Conduct over instant messaging systems, with webcams, and in chat rooms also satisfies the statutory requirements for a crime without involving actual physical presence.<sup>131</sup>

A number of sexual crimes against children do require physical presence.<sup>132</sup> Nonetheless, constructive presence may sometimes substitute for actual presence in satisfying the elements. In *Rabuck v. State*,<sup>133</sup> the defendant was charged with taking indecent liberties with a minor for secretly planting a video camera in a girl's bedroom.<sup>134</sup> In rejecting the defendant's argument that actual presence must be shown for a conviction, the court noted that through modern technology, such as the video camcorder, the defendant placed himself in the "constructive" presence of the victims.<sup>135</sup> Thus, under many state laws, if

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130. See *State v. Every*, 578 S.E.2d 642, 647 (N.C. Ct. App. 2003) (upholding the defendant's conviction for taking indecent liberties with a minor for engaging in sexually explicit phone conversations with a twelve-year-old under a statute requiring that the defendant willfully took an indecent liberty with the victim "for the purpose of arousing or gratifying sexual desire").

131. See, e.g., *Podracky v. Commonwealth*, 662 S.E.2d 81, 88 (Va. Ct. App. 2008) (upholding the conviction of a defendant accused of soliciting a minor for sex over an internet instant messaging system under a statute that makes it unlawful for anyone over eighteen to use a communications system to solicit sexually any person he knows or has reason to believe is a minor); *Brooker v. Commonwealth*, 587 S.E.2d 732, 736 (Va. Ct. App. 2003) (upholding the conviction of a defendant accused of exposing himself to a minor via a webcam under the indecent liberty and solicitation statutes at issue in *Podracky*); *Hix v. Commonwealth*, 619 S.E.2d 80, 88 (Va. 2005) (affirming the conviction of a man for attempted indecent liberties with a minor and use of a computer to solicit a minor, the same statutes used in *Podracky*, for using an internet chat room to arrange a meeting with a person he believed to be a thirteen-year-old girl).

132. See *infra* notes 151–77 (discussing the crime of statutory rape).

133. See *Rabuck v. State*, 129 P.3d 861, 868 (Wyo. 2006) (upholding conviction for taking indecent liberties with a minor).

134. *Id.* at 863.

135. See *id.* at 867 (finding that constructive presence can place a defendant "with" a minor for the purposes of taking indecent liberties). Similarly, courts have found that constructive presence suffices for the crime of attempted indecent liberties. In *United States v. Cook*, 61 M.J. 757, 760 (A.F. Ct. Crim. App. 2005), the defendant sent nude photos of himself to minors via the Internet, resulting in a charge of attempted indecent liberties with a minor under Part IV, ¶ 87b of the Manual for Courts-Martial. This offense requires, among other things, that the accused commit an act amounting to the taking of indecent liberties in the presence of a person under sixteen years of age and not one's spouse. *Id.* at 759. The court concluded that had the trial judge made "an explicit finding that physical presence could be constructive or virtual for indecent liberties purposes . . . [this] would not have been plain error because the exact nature of the presence is not germane to the charge of attempted indecent liberties." *Id.* at 760. The court ultimately found that "the appellant's guilty pleas to the four attempted indecent liberty specifications were provident and conclude[d] [that] the findings of guilty to those specifications are factually and legally sufficient." *Id.*

the conduct would be illegal if it occurs in same room, it is illegal over the phone, webcam, or computer.

Of course, to the extent that the elements of a given crime *require* actual physical presence, constructive presence has not sufficed. For example, the Georgia Supreme Court held in 1998 that the crime of child molestation requires that the perpetrator be in the victim's actual physical presence.<sup>136</sup> Some military jurisdictions also require actual physical presence for the crime of attempted indecent liberties with a minor.<sup>137</sup>

Virtual worlds, like a number of modern technologies, are likely to chip away at the need for actual physical presence when the actions would constitute a crime if physically present. Dirty talk over the phone or sending photos of one's genitals to a child virtually from a distance exposes children to sexual content that society has chosen to shield them from. Like these experiences, a child engaging in virtual sex takes part in a sexual exchange when she sees and participates in the graphic sexual acts of two avatars, one manipulated by her and the other by an unwitting adult. Despite the lack of close physical proximity, for some players, virtual relationships are more real than real-world ones.<sup>138</sup>

Here, again, augmented reality devices simplify the analysis. Like video cameras placed in changing rooms, an adult whose actions are transmitted by an augmented reality device to the child's body "constructively place[s]

136. See *Vines v. State*, 499 S.E.2d 630, 631–32 (Ga. 1998) (overturning the conviction of a man accused of child molestation after engaging in a sexually explicit telephone conversation with a child on the grounds that the statute required actual presence). As the court observed, state law "must be construed strictly against criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted." *Id.* (quoting *Fleet Finance v. Jones*, 430 S.E.2d 352, 355 (Ga. 1993)).

137. See *United States v. Miller*, 67 M.J. 87, 91 (A. Ct. Crim. App. 2008) (concluding that "no reasonable fact-finder could conclude that the . . . [defendant] committed . . . [an attempted indecent liberty with a child] in the physical presence" of the undercover detective to whom he sent sexually explicit images of himself via a webcam, believing the detective to be a child, because of the act's online nature).

In jurisdictions that require intent to sexually gratify oneself to convict, acquittals and appellate reversals have occurred when the defendant's motivation was unclear. See, e.g., *State v. Brown*, 590 S.E.2d 433, 437 (N.C. Ct. App. 2004) (holding that there was insufficient evidence to satisfy the requirement that the defendant's conversations were intended to gratify or arouse sexual desire). Courts have also overturned convictions where the communication was not indecent. See, e.g., *U.S. v. Hullett*, 40 M.J. 189, 192 (C.M.A. 1994) ("In sum, there is no evidence that the remark was 'calculated to corrupt morals or excite libidinous thoughts.'").

138. See *Yee*, *supra* note 25, at 196–97 (noting that many virtual world users feel closer to their virtual acquaintances than their real-world friends).

himself" in the child's presence.<sup>139</sup> Directing his avatar to stroke the child's avatar accomplishes what the adult could do in the real world if he were in the same room as the child. The ease with which physical proximity may be shown in some scenarios raises what is arguably the strongest ground for resisting the application of criminal prohibitions to virtual sex with a child: The difficulty of knowing who is on the other end of that sexual contact, to which this Article now turns.

### 3. Ignorance of the Child's Age

Putting aside masturbation, virtual sex—like real sex—generally requires at least two people.<sup>140</sup> As Figure 1 illustrated,<sup>141</sup> players can cloak their real identity and, therefore, their age. A child can present as an adult, and many adults like to present as children.<sup>142</sup> Should it matter that adults playing sex games do not know that their virtual partner is a child?

Like many questions of substantive criminal law, for acts in the real world, the answer depends on where the act occurs. Consider the crime of taking indecent liberties with a minor. In some jurisdictions, the perpetrator's knowledge of the victim's age—or lack thereof—can be the difference between guilt and innocence;<sup>143</sup> in others, it is not.<sup>144</sup> Georgia and North Carolina, for example, do not require any knowledge of age on the part of the perpetrator.<sup>145</sup>

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139. See *State v. McClees*, 424 S.E.2d 687, 690 (N.C. Ct. App. 1993) ("Through the forces of modern electronic technology, namely the video camcorder, one can constructively place himself in the 'presence' of another.").

140. See *Mohney*, *supra* note 15 (discussing a conversation with a male figure who sat alone masturbating).

141. See *supra* Figure 1 (describing the identity of the real-world participants to virtual sex).

142. See *Return to the Dark Side of Second Life*, *supra* note 53 (reporting a news expose on adults who prey on "children" in *Second Life*).

143. See *infra* notes 145–48 and accompanying text (listing states where knowledge of the victim's age is immaterial). Virtual sex with a child may also constitute a federal crime under 18 U.S.C. § 2422(b) (2006), but only if the adult-player believes the other player is a child. Personal communication from Brian Klebba, Assistant United States Attorney for the Eastern District of Louisiana, Aug. 6, 2009. Under 18 U.S.C.A. § 2422(b) (2006), anyone who "knowingly persuades, induces, entices, or coerces any individual who has not attained the age of eighteen years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than ten years or for life."

144. See *infra* note 149 and accompanying text (noting that in Wyoming, the defendant's knowledge of the victim's age matters).

145. See GA. CODE ANN. § 16-6-4 (West 2009) ("A person commits the offense of child molestation when such person does any immoral or indecent act to or in the presence of . . . [a

As with the crime of statutory rape, the defendant's knowledge is immaterial.<sup>146</sup> Thus, in Georgia, the State convicted a man of child molestation after he pushed his genitalia through a hole in the wall between two adjoining bathroom stalls, one of which was occupied by a child.<sup>147</sup> He claimed, to no avail, that he did not know the occupant was in fact a minor.<sup>148</sup> A different result would obtain in Wyoming where a person is prohibited from "knowingly" taking indecent liberties with a minor.<sup>149</sup> If a man in Wyoming pushed his genitalia into the next bathroom stall, not knowing a child occupied it, he presumably would go scot-free.

The appropriate treatment of virtual sex with children is further complicated by the fact that the child player may want to get it on virtually, raising the age-old question of consent. A majority of states today retain the crime of statutory rape,<sup>150</sup> which in many jurisdictions imposes strict liability<sup>151</sup> on adults who engage in sexual relations with children, usually intercourse, under the age of (depending on the jurisdiction) fourteen, sixteen, or in one

minor]."); *Schultz v. State*, 599 S.E.2d 247, 248 (Ga. Ct. App. 2004) ("The legislature has carefully worded the child molestation statute so that the defendant's knowledge of the age of the victim is not an element of the crime . . ."); N.C. GEN. STAT. § 14-202.1 (2008) (prohibiting a person from "willfully" taking an indecent liberty with a child under 16). The statute requires that the State must prove the following five elements: (1) the defendant was at least sixteen years of age, and (2) five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, who was (4) under sixteen years of age at the time, and (5) the defendant's action was for the purposes of arousing or gratifying sexual desire. *State v. Rhodes*, 361 S.E.2d 578, 580 (N.C. 1987).

146. See GOLDSTEIN, *supra* note 103, at 170 (noting that the defense of mistake "is not usually relevant to issues of child abuse").

147. See *Bennett v. State*, 631 S.E.2d 402, 405 (Ga. Ct. App. 2006) (upholding the conviction of a man who was charged with child molestation after pushing his genitalia through a hole in a bathroom stall occupied by a child).

148. See *id.* at 404 (rejecting defendant's claim that knowledge of age is an element of the offense of child molestation).

149. WYO. STAT. ANN. § 6-2-316 (2007). In defining the term "immodest, immoral or indecent liberties," Wyoming courts have noted that the words "are accompanied in the statute by the words 'liberties' and 'child' which narrow down and designate with reasonable certainty the acts and conduct required or forbidden. 'Liberties' are such as common sense of society would regard as indecent or improper." *Sorenson v. State*, 604 P.2d 1031, 1034 (Wyo. 1979); see also VA. CODE ANN. § 18.2-370 (2009) (prohibiting a person from "knowingly and intentionally" exposing himself to a minor under the age of fourteen).

150. Ross E. Cheit & Laura Braslow, *Statutory Rape: An Empirical Examination of Claims of "Overreaction"*, in CHILDREN, CULTURE, AND VIOLENCE, *supra* note 80, at 85, 87-88 (reporting that "a total of 29 states used 16 as the age of consent, and only 3 states had ages of consent lower than 16").

151. MODEL PENAL CODE § 213.6(1) (2001) (rejecting any defense of mistake as to age when the criminality of the conduct depends on the child being younger than ten).

state, eighteen.<sup>152</sup> For example, in Rhode Island, where the age of consent is 16, an adult can be charged with statutory rape if he has sex with a fifteen-year-old, regardless of whether the teenager consented.<sup>153</sup> In Idaho, the age of consent is eighteen.<sup>154</sup> The Model Penal Code adopts an age of consent of sixteen.<sup>155</sup> Most of these statutes reach only sexual conduct involving intercourse, but some jurisdictions' statutes reach other acts, like fellatio and cunnilingus.<sup>156</sup> The "special treatment of intercourse with children is warranted both to protect immature females from older males who would take advantage of them and to prevent outrage to parental and community sentiment."<sup>157</sup>

While strict liability prevails in many jurisdictions, other jurisdictions recognize the potential unfairness of such a rule. As of 1980, "sixteen state legislatures and four state supreme courts ha[d] adopted mistake as to age as a complete or partial defense to statutory rape."<sup>158</sup> Of the sixteen states, ten retain this defense today.<sup>159</sup> This defense operates when criminality of conduct "depends on the child's being below a critical age other than 10."<sup>160</sup> It does not

152. Cheit & Braslow, *supra* note 150, at 87–88.

153. *See id.* at 86 (describing Rhode Island's statutory rape laws).

154. *See* IDAHO CODE ANN. § 18-6101 (1997) (adopting age of consent of eighteen).

155. *See* MODEL PENAL CODE § 213.3 (2001) (defining the crime of statutory rape).

156. *See* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 285 (15th ed. 1995) (noting that early on, "the 'abuse' of a female child was deemed the equivalent of carnal knowledge, [which] occurred where the defendant injured the child's genital organs in an attempt to have intercourse with her"). Today "in some jurisdictions, the term 'sexual intercourse' means not only intercourse in the ordinary sense but also intercourse with the mouth or anus; it thereby encompasses the crimes 'commonly known as rape and sodomy.' Any penetration, however slight, is sufficient, and emission is not required. However, in the case of cunnilingus or fellatio, neither penetration nor emission is required." *Id.* § 277.

157. MODEL PENAL CODE § 213.1 cmt. 6, at 327–29.

158. *See* GOLDSTEIN, *supra* note 103, at 170; *cf.* MODEL PENAL CODE § 213.6(1) (reporting that sixteen state legislatures have statutes allowing defense of age).

159. Arizona, Indiana, Kentucky, Maine, Missouri, Montana, North Dakota, Oregon, Pennsylvania, and West Virginia have retained the mistake of age defense. *See* ARIZ. REV. STAT. ANN. § 13-1407(B) (2009) (providing mistake of age defense if defendant thought victim was 16 or older); IND. CODE § 35-42-4-9(c) (2004) (same); KY REV. STAT. ANN. § 510.030 (West 2008) (same); ME REV. STAT. ANN. tit. 17-A, § 254(2) (2006) (same); MO. REV. STAT. § 566.020(3) (1999) (providing mistake of age defense if defendant thought victim was 17 or older); MONT. CODE ANN. § 45-5-511(1) (2007) (providing mistake of age defense if defendant thought victim was 16 or older); N.D. CENT. CODE § 12.1-20-01(2) (2009) (providing mistake of age defense if defendant thought victim was 18 or older); OR. REV. STAT. § 163.325(2) (2003) (mistake of age defense if defendant thought victim was 16 or older); 18 PA. CONS. STAT. § 3102 (2000) (same); W. VA. CODE § 61-8B-12(a) (2008) (same). Alabama, Arkansas, Colorado, Delaware, Illinois, and Minnesota have repealed their laws.

160. MODEL PENAL CODE Commentary to § 213.6(1).

shield adults from criminal wrongdoing when a child is very young, below the "magic age" described next.

In addition to statutory rape laws, every state in the United States prohibits sexual contact with a child, variously defined as anyone under the "magic age" of ten,<sup>161</sup> thirteen,<sup>162</sup> or fourteen.<sup>163</sup> Thus, for example, in *State v. Ridgeway*,<sup>164</sup> the court upheld the conviction for sexual assault of an adult male for masturbating in front of an eleven-year-old under a New Jersey statute that defines sexual assault as sexual contact with a person who is less than thirteen-years-old.<sup>165</sup> Like other child molestation statutes,<sup>166</sup> New Jersey law did not permit the defendant to argue that the child consented or that he reasonably believed the child to be an adult.<sup>167</sup> As subpart III.A noted, some child molestation statutes encompass noncontact sexual abuse.

Statutory rape and child molestation laws have been justified variously as protecting against seduction, youthful poor judgment, teen pregnancy, the transmission of sexually transmitted diseases, and as preventing actions that permanently alter the life chances of a child.<sup>168</sup> Many statutory rape laws include age differentials to deter older men from exploiting young girls.<sup>169</sup> The Model Penal Code, for example, requires that the perpetrator be at least four years older than the victim.<sup>170</sup> States use a variety of differences in age, both for statutory rape and child molestation, ranging from two to six

161. MODEL PENAL CODE § 213.1(1)(d).

162. See N.J. STAT ANN. § 2C:14-2(b) (2005) ("An actor is guilty of sexual assault if he commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim.").

163. Cheit & Braslow, *supra* note 150, at 86.

164. See *State v. Ridgeway*, 606 A.2d 873, 875 (N.J. Super. Ct. App. Div. 1992) (noting that conviction for sexual assault does not require physical contact between perpetrator and victim).

165. *Id.*

166. See, e.g., *Bennett v. State*, 631 S.E.2d 402, 405 (Ga. Ct. App. 2006) (rejecting a mistake of age defense in a prosecution for child molestation).

167. *Id.*

168. See Sherry F. Colb, *The Pros and Cons of Statutory Rape Laws: A Ten-Year Sentence for Marcus Dwayne Dixon*, CNN.COM, Feb. 13, 2004, <http://www.cnn.com/2004/LAW/02/13/findlaw.analysis.colb.statutory.rape/index.html> (last visited Sept. 29, 2009) (noting also that these laws help protect young girls against sexual abuse) (on file with the Washington and Lee Law Review).

169. See GOLDSTEIN, *supra* note 103, at 156 (quoting the comments to Model Penal Code § 213.3); Cheit & Braslow, *supra* note 150, at 87–92 (reviewing the competing narratives about statutory rape: to protect young girls from "dirty old men" or to prevent consensual sex between teen lovers).

170. See MODEL PENAL CODE § 213.3 (2001) (defining the crime of statutory rape).

years.<sup>171</sup> But again, when a child is under the "magic age," the child's consent is wholly irrelevant.<sup>172</sup>

These laws long have been controversial and continue to be for a number of reasons. Statutes that lack an age differential permit the State to criminalize consensual sex between teen lovers, although at least one study suggests that prosecutors go after the "dirty old men" cases, rather than the "young love" cases involving peers.<sup>173</sup> More problematic is the potential for inequitable enforcement, a specter raised recently by the prosecution of black males accused of sex with white girls.<sup>174</sup> Others worry about the harshness of the penalties for statutory rape, which, like the underlying sexual conduct, can permanently alter the life chances of convicted teens and young adults.<sup>175</sup>

Despite persistent concerns about crimes to which a child consented, a majority of U.S. jurisdictions retain these laws on the books.<sup>176</sup> More importantly, every jurisdiction in the United States makes sexual conduct with small children a crime regardless of consent. The import of these statutes for virtual sex with a child seems to be this: It really will not matter whether the child cheerfully played along—to the extent that other elements of the crime, especially the nature of the sexual contact, are satisfied. Thus, if a man in North Carolina uses his *Second Life* avatar to engage in virtual sex with a child's avatar, he theoretically could be prosecuted for taking indecent liberties

171. See Cheit & Braslow, *supra* note 150, at 87 ("According to the American Bar Association, 16 states have specified a minimum age difference of greater than 2 years in their statutes: 6 use three years, 8 use four years, 1 uses five years, and 1 uses six.").

172. See *supra* notes 161–63 and accompanying text (comparing different jurisdictional definitions of the "magic age").

173. See Cheit & Braslow, *supra* note 150, at 107–08 (reviewing studies showing that the greater the age difference between the victim and the perpetrator, the more likely the case would be prosecuted).

174. See Colb, *supra* note 168 (suggesting that a black defendant's acquittal on rape charges was based partly on testimony that the white victim fabricated the rape claim because she was afraid of her "racist" father).

175. See *id.* (noting the harsh penalties for statutory rape and criticizing statutory rape as permitting "unscrupulous prosecutors and complainants to bring charges on the basis of what is truly victimless behavior"). One high-profile example involved Genarlow Wilson, a seventeen-year-old high school senior from Georgia who was convicted of aggravated child molestation after being caught on tape having consensual oral sex with a fifteen-year-old African-American girl. Brenda Goodman, *Man Convicted as a Teenager in Sex Case is Ordered Freed by Georgia Court*, N.Y. TIMES, Oct. 27, 2007, at A9. Wilson received a ten-year sentence, which was eventually overturned by the Georgia Supreme Court. See *Humphrey v. Wilson*, 652 S.E.2d 501, 509 (Ga. 2007) ("[Wilson's] crime does not rise to the level of culpability of adults who prey on children and that, for the law to punish Wilson as it would an adult . . . [would] be grossly disproportionate to his crime.").

176. See Cheit & Braslow, *supra* note 150, at 87–88 (listing jurisdictions that set the age of consent at 16).



with a minor even if he had no idea that a minor controlled the other avatar.<sup>177</sup> By contrast, if he did the same thing in Wyoming, his ignorance of the other actor's age insulates him from prosecution under that statute.<sup>178</sup> Obviously, very difficult jurisdictional questions arise as to where the act occurs and what jurisdictions may reach it, as they do with other technology that uses the Internet.<sup>179</sup> As Part IV notes, some commentators urge that because rules in one jurisdiction will dictate or "define down" all conduct in virtual worlds, which have no physical boundaries, real-world law should not penetrate virtual worlds.<sup>180</sup>

It certainly seems unfair to penalize the North Carolina man for unwittingly playing virtual sex games with a child. Yet, in the real world, ignorance of the age of one's sexual partner often provides no defense. For example, if a woman walks into a bar and buys a guy drinks and at some point strokes his crotch until he climaxes—all along believing he is twenty-one when in reality he is thirteen—it is a crime in many jurisdictions. It is likely to be child molestation, sexual assault, or rape because of his age. Even if no touching occurs, but rather she engages in graphic talk with him, the woman may be subject to prosecution for using indecent language, taking indecent liberties with a minor, corrupting the morals of minor, or other crimes. In other words, it does not matter whether she knew he was a child, she is charged with the responsibility to avoid any sexual interaction with a child.

In some jurisdictions, the woman can shield herself from criminal wrongdoing (if the child is sufficiently old) by asking for the "man's" driver's license; if he produces a fake ID showing that he is an adult, she could claim reasonable mistake.<sup>181</sup> Prosecutors may take the same stance when it comes to virtual sex with a child. In virtual worlds, players can always ask for age verification, which may be burdensome although not impossible.<sup>182</sup>

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177. See N.C. GEN. STAT. § 14-202.1 (2008) (prohibiting a person from "willfully" taking an indecent liberty with a child under sixteen).

178. See WYO. STAT. ANN. § 6-2-316 (2007) (prohibiting a person from "knowingly" taking an indecent liberty with a minor).

179. See *infra* notes 248–57 and accompanying text (discussing jurisdictional hurdles posed by internet crimes).

180. See *infra* Part IV (discussing potential challenges to enforcing real-world laws in the virtual context).

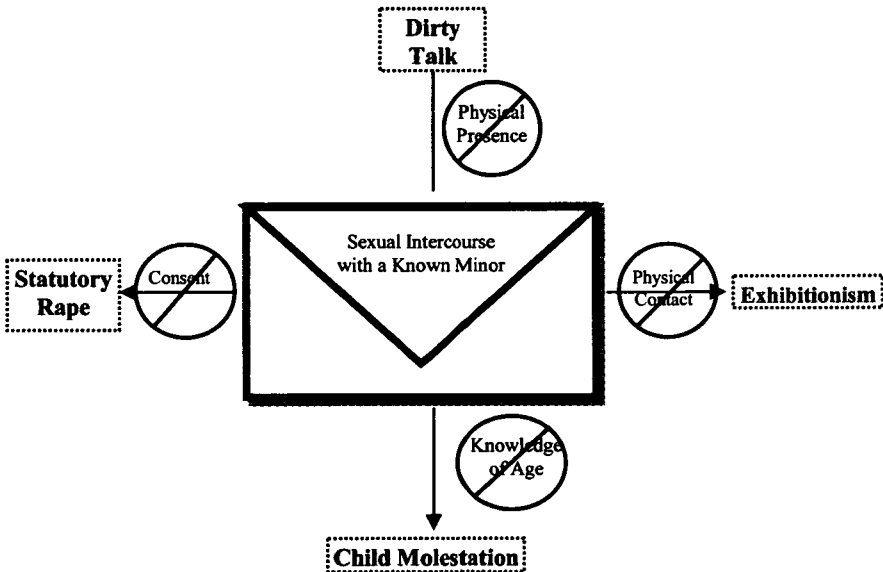
181. See, e.g., ARIZ. REV. STAT. ANN. § 13-1407(B) (2009) (providing mistake of age defense if defendant thought victim was sixteen or older); IND. CODE § 35-42-4-9(c) (2004) (same).

182. Commercial enterprises like PayPal have emerged in response to the difficulty of ensuring the security of one's financial information. For a fee, PayPal provides a secure financial "lock box." A similar market-based solution may emerge to verify ages for players who prefer not to gamble on a criminal prosecution. Paul Gil, *PayPal 101: How Paypal*

Alternatively, players can limit their virtual sexual hijinks to partners with whose pedigrees they are familiar. As with real-world sex, players who take no steps to limit their virtual sexual encounters to other adults may run the risk of criminal prosecution.

*B. The Difficulty with Extending Existing Crimes to Virtual Sex with a Child*

As subpart III.A demonstrates, broadened definitions of child sexual abuse permit the prosecution of conduct that extends well beyond the classic case of child sexual abuse—namely, vaginal or anal intercourse with a known minor. As Figure 2 illustrates, sexual conduct in a virtual world pushes the envelope of child sexual abuse in every direction. No physical contact occurs. The players come nowhere near each other physically. An adult may play with a person she does not know to be a child, and the child is perfectly happy to play her part.



**Figure 2. Expanding Definitions of Child Sexual Abuse**

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*Works*, ABOUT.COM, <http://netforbeginners.about.com/od/ebay101/ss/paypal101.htm> (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). The recent settlements between state Attorneys General and MySpace and Facebook obligate the sites to develop better age verification. Barnard, *supra* note 97.

Certainly, not every justification for expanding the definitions of child sexual abuse applies to virtual sex between an adult and a child. For example, one justification for child molestation and statutory rape laws is the prevention of teen pregnancy,<sup>183</sup> an impossible outcome of any virtual encounter that stays online.

This brings us back once more to whether virtual sex will act as a prelude to real-world encounters. Certainly, the possibility that virtual sex may lead to off-line conduct gives many parents and policymakers pause. The potential for this is great.<sup>184</sup> Indeed, some worlds like *RedLightCenter.com* assist participants to meet in the real world.<sup>185</sup> As the *Doe v. SexSearch*<sup>186</sup> and *Doe v. MySpace*<sup>187</sup> cases show, these segues can have serious consequences.<sup>188</sup> To the extent that virtual sex acts as a prelude to real-world sex, even anti-pregnancy rationales for criminalizing sex with a child are relevant.

When virtual sex remains only a virtual encounter, justifying the extension of existing state criminal statutes becomes more difficult. Nonetheless, many of the child protection rationales for such statutes still apply. Clearly, if an adult and child in the real world used real sex dolls to simulate graphic sexual acts, like fellatio, it would be a crime in many jurisdictions if the adult intended to excite himself or the child.<sup>189</sup> If the adult coached the child over an intercom from another location to use the doll to mimic fellatio, it would still be a crime if the adult acted with the necessary intent.<sup>190</sup> Just as these sex games with real-world dolls involve targeted, one-on-one encounters of a sexual nature between

183. See GOLDSTEIN, *supra* note 103, at 158 (analyzing research suggesting that many teen pregnancies involve adult male partners).

184. See *supra* note 68 and accompanying text (discussing the differing virtual world policies on encouraging real-world meetings).

185. *RedLightCenter.com*, <http://www.redlightcenter.com> (last visited Sept. 29, 2009).

186. See *Doe v. Sexsearch.com*, 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007) (granting defendant's motion to dismiss plaintiff's claim of negligent misrepresentation after plaintiff was prosecuted for having sex with a fourteen-year-old he met on defendant's website).

187. See *Doe v. MySpace*, 528 F.3d 413, 416–17 (5th Cir. 2008) (dismissing plaintiff's negligence claim after plaintiff was sexually assaulted by a man she met through defendant's social networking service).

188. See WOLAK ET AL., *supra* note 56, at 59 (noting that "adults who use the Internet to meet and form sexual relationships with young teens are often committing crimes and likely to get themselves and their partners in serious trouble").

189. See, e.g., *State v. Every*, 578 S.E.2d 642, 647 (N.C. Ct. App. 2003) (upholding the defendant's conviction for taking indecent liberties with a minor for engaging in sexually explicit phone conversations with a twelve-year-old under a statute requiring that the defendant willfully took an indecent liberty with the victim "for the purpose of arousing or gratifying sexual desire").

190. *Id.*

an adult and child, so does sex play in virtual worlds. When the child manipulates an avatar through explicit sexual positions and acts, responding to the adult's choices, she engages in an explicit sexual act, albeit one that is simulated—just as she does when she simulates sex acts with real-world dolls. To the extent that the child is aroused, the virtual sex act becomes a form of masturbation at the adult's invitation.

A hard line stance that treats sex play in virtual worlds like real-world instances of child sexual abuse is complicated by the nature of the sexual contact. Is virtual sex simply a game played online that just does not matter? Even if we would not want our child to play those games, should we care if someone else's child does? In other contexts, the fact that an action occurred in the virtual world has not negated the possibility of harm in the here and now. A Dutch court recently convicted two Dutch boys of "theft of virtual property after they threatened a classmate with violence" on the rationale that the crime "was accomplished through physical violence in the real world, and against a real person, not an avatar."<sup>191</sup> Like virtual sex, sex play in virtual worlds affects children in the here and now. Virtual or real, games or not, sex play at premature ages imprints on the child's psyche certain understandings of sex and sexual relationships.<sup>192</sup>

Policymakers could choose to wait until an adult attempts to arrange a real-world meeting with his virtual sex partner—a child—and prosecute that physical contact.<sup>193</sup> Or authorities could take a more cautious stance and say that children should not be exposed to virtual sex play because it is sexually charged, will sexualize them, and will change their understanding of sex and sexual relationships. Just as children are sexualized when an adult exposes his genitals to them, minors in the present are being sexualized in the course of this play. Further, the increasingly realistic, graphic representations of sex by avatars in virtual worlds<sup>194</sup> make it more probable that children will be sexually stimulated by this play.

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

192. See GOLDSTEIN, *supra* note 103, at 144 (listing the harms to children of premature sexual exposure).

193. See, e.g., *Karwoski v. State*, 867 So.2d 486, 489 (Fl. Ct. App. 2004) (upholding conviction for child pornography and attempted exploitation of a minor); *State v. Bouse*, 150 S.W.3d 326, 336 (Mo. Ct. App. 2004) (upholding conviction for attempted sexual misconduct with a minor); *Hix v. Commonwealth*, 619 S.E.2d 80, 88 (Va. 2005) (upholding conviction for attempted indecent liberties with a minor); *Podracky v. Commonwealth*, 662 S.E.2d 81, 88 (Va. Ct. App. 2008) (same); *Brooker v. Commonwealth*, 587 S.E.2d 732, 736 (Va. Ct. App. 2003) (same).

194. See Plantec, *supra* note 61 (discussing Image Metric's highly realistic Emily Project).

Just as crucially, an adult's actions contribute to the child's sexualization. Criminal statutes prohibiting sex with children seek both to protect children *and* to prevent adults from overreaching. The adult who engages in virtual sex with a child also engages in his own sex act, albeit simulated. He manipulates one of the two avatars and makes choices about the nature of the graphic sexual acts the avatars engage in or reciprocates the child's choices—presumably for his own sexual excitement. The classic crimes of child molestation and indecent liberties with a minor are designed to prevent adults from engaging in experiences for their own gratification at the expense of others.

Whether the First Amendment requires it or not,<sup>195</sup> policymakers certainly will care about the prerogatives of adults in these spaces if they cannot easily verify the age or identity of their partner. Yet, as this Part has documented, ignorance of age does not always bar the application of criminal sanctions in the real world. If it did, the State could not effectively prevent the sexual exploitation of children. Arguably, ignorance of age also should not preclude sanctions here. Many states already provide a defense of mistake when the adult acts with due care, creating in effect a duty to inquire.<sup>196</sup> This duty could easily carry over to the virtual world, enabling adults to engage in sex play with one another while leaving children out of it.

#### *IV. Challenges to Reaching Virtual Sex with a Child*

Any attempts to regulate sex play in virtual worlds inevitably will have to address what the government can proscribe without trampling on constitutionally-protected expression. Whole treatises and books examine the thicket of issues raised by the interplay of speech and conduct on questions of child protection. It is not possible here to do justice to these questions. This Part simply identifies, without resolving, four specific questions that would have to be answered before prosecuting adults for state law crimes against a child. While other questions may also arise,<sup>197</sup> at least these four questions

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195. See *infra* Part IV (examining the First Amendment issues involved in prosecuting virtual sex with a minor).

196. See, e.g., ARIZ. REV. STAT. ANN. § 13-1407(B) (2009) (providing mistake of age defense if defendant thought victim was sixteen or older); IND. CODE § 35-42-4-9(c) (2004) (same).

197. For instance, some may argue that children have their own rights under the First Amendment to be turned on virtually. Compare, e.g., *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576–77 (7th Cir. 2001) (noting that children "have First Amendment rights" and that they "must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise"), and MARJORIE HEINS, NOT IN FRONT OF THE CHILDREN: "INDECENCY,"

deserve consideration: Is virtual sex speech or conduct? Does the fact that virtual sex play occurs *between avatars* online place it beyond the government's ability to regulate? Will criminal liability for virtual sex play with a person one does not know to be a child impermissibly burden adults' access to protected speech? Can virtual worlds even be regulated at all?

The first question that would have to be resolved, perhaps the thorniest in First Amendment jurisprudence, is whether virtual sex is speech or conduct. When an activity combines conduct with speech, it sometimes receives less protection.<sup>198</sup> As Smolla explains, "when the government promulgates a rule for reasons unrelated to the content of expression, and the governmental interests at stake are 'substantial,' the regulation will normally be upheld even though it may have the incidental effect of interfering with speech."<sup>199</sup> In *United States v. O'Brien*,<sup>200</sup> the United States Supreme Court considered an action at the intersection of speech and conduct—the burning of draft cards in

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CENSORSHIP, AND THE INNOCENCE OF YOUTH 258 (2001) ("If a First Amendment difference is to be maintained between minors and adults, there ought at least to be more thoughtful and finely calibrated judgments about it."), with KEVIN W. SAUNDERS, SAVING OUR CHILDREN FROM THE FIRST AMENDMENT 2 (2003) (arguing that "[w]hen the recipient of the speech is a child still developing psychologically, the costs of unrestrained speech may be too high").

Whether children have these rights may matter not only to whether an adult commits a crime but to whether children do, as well. Part II noted that children actively participate in virtual sex. As the recent spate of prosecutions of teenagers for "sexting" nude photographs to each other on their cell phones suggests, it is possible that children engaging in virtual sex may also be committing a crime. Samantha Anderson, *Teens Using Cell Phones for 'Sexting' Face Serious Charges*, Mar. 16, 2009, [http://www.krdo.com/Global/Story.asp?S=10015780&nav=menu552\\_1](http://www.krdo.com/Global/Story.asp?S=10015780&nav=menu552_1) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). In Alabama, several middle school students were arrested for exchanging nude photographs. *Id.* The head of the Special Victims Unit of the Colorado Springs' District Attorney's Office, Donna Billek, says "[I]t's a criminal charge under sexual exploitation of a child," adding that, "[t]he person who sent the photo is distributing child pornography." *Id.* Judges have been more circumspect about whether sexting should be treated as a crime. In Ohio, eight male and female teens between fourteen and seventeen received community service and were directed to survey their classmates about sexting after sending nude photographs over their cell phones. Wendy Koch, *Teens Caught Sexting Face Porn Charges*, USA TODAY, Mar. 11, 2009, [http://www.usatoday.com/tech/wireless/2009-03-11-sexting\\_N.htm](http://www.usatoday.com/tech/wireless/2009-03-11-sexting_N.htm) (last visited Sept. 29, 2009) (on file with the Washington and Lee Law Review). The Juvenile Court judge assigned to the case struggled with how to handle the situation because, as he said, "If the 17-year-old who sent the nude photos to an ex-boyfriend were convicted of a child-porn charge, she would be a registered sex offender for 20 years." *Id.*

198. See RODNEY A. SMOLLA, *LAW OF DEFAMATION* § 4.63 (2d ed. 2008) (noting that hate speech may be prosecuted if it is on the brink of inciting violence).

199. *Id.*

200. See *United States v. O'Brien*, 391 U.S. 367, 386 (1968) (upholding the conviction of a man for burning his draft card during an anti-war demonstration).

protest of the Vietnam War.<sup>201</sup> In upholding O'Brien's conviction, the Court held that the government may regulate an activity that combines speech and conduct if the governmental regulation is: (1) "within the constitutional power of the Government," (2) furthers an important or substantial governmental interest, (3) is unrelated to the suppression of free expression, and (4) "if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."<sup>202</sup> The third prong acts as a "gatekeeper," determining whether a particular regulation receives the benefit of O'Brien's "lower standard"<sup>203</sup> of review. Distilling the essence of O'Brien, Smolla notes that, "when governmental intent is truly 'clean' and genuinely unrelated to the suppression of free expression, then a standard of judicial review less stringent than strict scrutiny is warranted for the incident 'spillover' effect that the law has on free speech."<sup>204</sup>

A number of contexts blur speech and conduct. Consider, for example, sexual harassment. MacKinnon urges that "if ever words have been understood as acts, it has been when they are sexual harassment."<sup>205</sup> Although, as she notes, "sexual harassment might be characterized as 'sexual expression,' it has never been suggested that its regulation must meet obscenity standards. . . . Harassment that is sexual is a sexual act . . . ."<sup>206</sup>

Like sexual harassment, virtual sex also has elements of both speech and conduct. As Balkin notes, "virtual worlds greatly raise the stakes in the conflict between freedom of speech and association and antidiscrimination norms."<sup>207</sup> Balkin argues that in the real world, social conventions "distinguish governmental purposes for regulation as being directed at speech or at conduct. The line between 'speech' and 'conduct' is a legal fiction that does not represent a natural division of the social world, but is rather largely

201. *Id.* at 377.

202. *Id.*

203. SMOLLA, *supra* note 198, § 4:63 n.2.

204. *Id.* § 4:63 n.1.

205. CATHERINE MACKINNON, ONLY WORDS 45 (1993). MacKinnon argues that "[c]onstruing these [acts] as 'speech'—in terms of their form as expression and their content as ideas—apparently looks like what it is: a transparent ploy to continue bigoted abuse and avoid liability." *Id.* at 47–48.

206. *Id.* at 49–56.

207. Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2089–90 (2004) (arguing that the most important distinction in virtual worlds between speech and conduct "may be whether the virtual space is acting like a marketplace" and secondarily whether the virtual world is "offered as a space for the free exchange of ideas, or is created to realize the artistic or ideological vision of the platform owner").

conventional. Even so, in a wide variety of settings, the categorization of certain activities as speech or conduct, or of government purposes as attempts to regulate speech rather than conduct, can become widely accepted."<sup>208</sup> By contrast:

[C]onventional agreements about what is speech and what is conduct [in virtual worlds] quickly break down, because we have not yet developed understandings about what counts as "acting" versus "speaking" in a virtual environment. . . . [T]orts that are actionable in virtual environments are, by and large, communications torts. They are activities where one person harms another through speaking or communicating. Virtual worlds blur the conventional boundaries between speech and conduct as we currently understand them precisely because all conduct in virtual worlds must begin as a form of speech.<sup>209</sup>

Here, the application of existing crimes to virtual sex with a child, rather than the creation of new crimes, may evidence a "clean" intent unrelated to "the suppressing of free speech."<sup>210</sup> As Part III illustrated, the State can reach dirty talk over the phone, notwithstanding First Amendment protection of speech, because it impacts an actual child or other person. In other words, dialogue alone is actionable when it occurs over the phone if it is intended to gratify the adult. This is so because sexual dialogue constitutes one kind of sexual interaction with an *actual child*. Criminal bans are intended to protect *actual* children from *actual* harm flowing from sexual exploitation.<sup>211</sup> Further, virtual sex involves a lot more than mere sexual dialogue.<sup>212</sup> Virtual sex combines sex chat via voice or IM with a graphic interactive sexual performance in which both the adult and child participate through their avatars.

Speech proponents also may argue that virtual sex is no different than publishing, frame by frame, successive images of an avatar engaged in, for example, intercourse—first with engorged genitalia, then inserting it into an orifice of the other avatar, ejaculating, and withdrawing. The publication by adults of such "snapshots" should be permitted, this argument goes, despite the risk that some child might happen upon them. Again, the characterization of virtual sex as mere publication of lawful pornography discounts the involvement of a specific, actual child in an interactive sexual exchange.

208. *Id.*

209. *Id.*

210. SMOLLA, *supra* note 198, § 4:63.

211. Some crimes are intended to protect all people, not just children, such as the prohibition against indecent acts with another. *See supra* Part III.A.1 (discussing the crime of indecent acts with another).

212. *See World of Warcraft Online, supra* note 72 (describing emoting).



Unlike still or moving images of sexual acts, these "images" are created in part by the child's actions and responses. Children who play along are not passive observers of a pornographic movie created and distributed by an adult for other adults—they are participants in it. Moreover, the involvement of an actual child authorizes the State to encroach more significantly on the liberties of adults.<sup>213</sup>

A second question also will require evaluation: Does the fact that virtual sex play occurs *between avatars* online place it beyond the government's ability to regulate? As a general matter, the First Amendment protects depictions of "virtual child pornography"—defined as pornographic images that appear to depict actual children but that do not use an actual child in the production<sup>214</sup>—so long as those depictions are not obscene.<sup>215</sup> Thus, adults engaged in virtual sex with one another presumably cannot be prohibited from doing so if it is not obscene—even if one or both adults use a child-like avatar.<sup>216</sup>

213. See, e.g., *New York v. Ferber*, 458 U.S. 747, 761 (1982) (noting that the government's interest in protecting children was substantially weightier than the interest in protecting free speech).

214. Some images of virtual child pornography are computer generated while others use adults who appear to be children. See *United States v. Williams*, 128 S. Ct. 1830, 1838 (2008) (upholding the PROTECT Act of 2003, which bans the distribution of certain child pornography involving the use of actual children); *id.* at 1850 (Souter, J., dissenting) (noting that *Ashcroft v. Free Speech Coalition* "held that pictures without real minors (but only simulations, or young-looking adults) may not be the subject of a non-obscenity pornography crime"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 258 (2002) (striking down as overbroad and unconstitutional a section of the Child Pornography Prevention Act of 1996 (CPPA)). The CPPA banned "a range of sexually explicit images, sometimes called 'virtual child pornography,' that appear to depict minors but were produced by means other than using real children, such as through the use of youthful-looking adults or computer-imaging technology." *Id.* at 234.

215. See *Williams*, 128 S. Ct. at 1839 (noting that constitutionally proscribable material under *Ferber* and *Miller* includes "obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct"); *Ashcroft*, 535 U.S. at 258 (finding that the CPPA impermissibly chilled speech because it reached speech that was not obscene under the *Miller* test, nor the product of sexual abuse, as in *New York v. Ferber*).

216. See Bloomfield & Duranske, *supra* note 11, at 1192 (arguing that "in light of the *Miller* test, it would be inappropriate to ask whether a reasonable person would find that *Second Life*, taken as a whole, lacks serious literary, artistic, political, or scientific value, just as it would be inappropriate to ask the question about a museum"). The authors go on to note the following:

Some activities in *Second Life* clearly possess such value, just as some exhibits in a museum do. However, certain user-created works may be offensive and lack redeeming value. In such cases, accusations of obscenity would need to be leveled against the particular content, not against *Second Life* itself, or a museum.

A different result may obtain when a child controls one of the two avatars. Certainly, the State's interest in protecting children from exploitation can sometimes outweigh even the need to protect speech under the First Amendment.<sup>217</sup> In *New York v. Ferber*,<sup>218</sup> the Supreme Court upheld a New York state law banning the sale or promotion of child pornography.<sup>219</sup> The Court held that the banned material need not meet the obscenity standard set forth in *Miller*<sup>220</sup> because the State's interest in protecting children was substantially weightier than its interest in regulating obscene speech.<sup>221</sup> As the Court explained, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance."<sup>222</sup>

In its 2008 decision in *United States v. Williams*,<sup>223</sup> the Court reiterated the significance of an actual child's involvement. In *Williams*, the Court considered the PROTECT Act's<sup>224</sup> anti-pandering provision.<sup>225</sup> This provision, as the Court explained:

*Id.*

217. See Ann Bartow, *Why Hollywood Does Not Require "Saving" from the Recordkeeping Requirements Imposed by 18 U.S.C. Section 2257*, 118 YALE L.J. POCKET PART 43, 47 (2008) ("[I]t is children for whom the protections of [the law] are clearly intended. Some twelve-year-olds can be made up to look as though they were twenty-five. If a twelve-year-old is one of the performers, the work is 'child' pornography."). Bartow notes that "[s]urely that is a content-based distinction that the First Amendment can tolerate." *Id.*

218. See *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that material that is the product of child sexual abuse is not protected by the First Amendment).

219. *Id.* at 774.

220. For material to be declared obscene, the government must satisfy a three-part test: "(a) whether [the work] . . . taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (holding that obscene material is not protected by the First Amendment).

221. See *Ferber*, 458 U.S. at 761 ("The *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the State's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children.").

222. *Id.* at 757. According to the National Center for Missing & Exploited Children, between 2002 and 2005, the Center reviewed 4,264 child pornography cases and identified nearly 600 child victims. WOLAK ET AL., *supra* note 56, at 60.

223. See *United States v. Williams*, 128 S. Ct. 1830, 1847 (2008) (upholding the PROTECT Act).

224. 18 U.S.C. § 2252A (2006).

225. See *id.* § 2252A(a)(3)(B) (prohibiting certain activities related to the online transmission of child pornography). The PROTECT Act contained the following provision providing for the imprisonment of:

(a) Any person who-- . . . (3) knowingly-- . . .

(B) advertises, promotes, presents, distributes, or solicits through the mails, or

[B]ans the collateral speech that introduces [child pornography] into the child-pornography distribution network. Thus, an Internet user who solicits child pornography from an undercover agent violates the statute, even if the officer possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute.<sup>226</sup>

The Court acknowledged that while the State could not ban virtual child pornography, the State could restrict the pandering of a visual depiction of an actual minor because this requirement "makes clear that, although the sexual intercourse may be simulated, it must involve actual children (unless it is obscene)."<sup>227</sup> Congress may proscribe such conduct because the "definition of the material or purported material that may not be pandered or solicited precisely tracks the material held constitutionally proscribable in *Ferber* and *Miller*: Obscene material depicting (actual or virtual) children engaged in sexually explicit conduct, and any other material depicting actual children engaged in sexually explicit conduct."<sup>228</sup> Virtual sex with a child by definition involves an actual child.<sup>229</sup>

The Court long has held that speech connected to the commission of a crime receives far less protection than other speech: "Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities."<sup>230</sup> Such speech receives less protection because offers to give or receive what is unlawful have no social value,

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using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains--

- (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or
- (ii) a visual depiction of an actual minor engaging in sexually explicit conduct;

*Id.*

226. *Williams*, 128 S. Ct. at 1838–39.

227. *Id.* at 1841; *see also* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2006) (stating that the First Amendment does not protect obscenity or pornography produced with actual children); *id.* at 256 (holding invalid the challenged provision of the CPPA because it "cover[ed] materials beyond the categories recognized in *Ferber* and *Miller*").

228. *Williams*, 128 S. Ct. at 1839. The Supreme Court upheld the anti-pandering prohibition in part because it required a knowing violation of each element, including the fact that the image traded contained an obscene visual depiction of a minor or an explicit sexual depiction of an actual minor. *Id.*

229. *See supra* Figure 1, scenarios 3–6.

230. *United States v. Williams*, 128 S. Ct. 1830, 1841–42 (2008).

affording the purveyor no First Amendment protection.<sup>231</sup> Thus, in *Williams*, the Court concluded against a First Amendment challenge that "[o]ffers to provide or requests to obtain unlawful material [namely, child pornography] . . . are similarly undeserving of First Amendment protection."<sup>232</sup> As Part III suggested, virtual sex with a child may well constitute a real-world crime. As a consequence, courts may be inclined to give it much less protection under the First Amendment, although this too is an open question.

This brings us to a third question that must be resolved: Even if an actual child participates, will criminal liability for virtual sex play with a person one does not know to be a child violate the First Amendment by burdening adults' access to protected speech? Virtual worlds, by their very nature, frustrate the ability to know with certainty the identity or age of the person on the other end of a virtual sexual interaction. Players lack the opportunity, available in the real world, to evaluate physical cues suggesting youth—inordinate acne, peach fuzz, a cracking voice, immature social skills—all things that might alert one to the possibility of statutory rape charges for real sex.<sup>233</sup> Certainly, plenty of adults in the real world misjudge a partner's true age, as the SexSearch.com case and the cases in Part III illustrate. In the real world, an adult who engages in sexual conduct with a minor is not saved (in many jurisdictions) by her ignorance of the child's minority.<sup>234</sup>

Moreover, other technology, like the telephone, also frustrates the ability to know with certainty the identity, or age, of the person on the other end. As Part III demonstrated, if a conversation over the phone is intended to arouse the speaker or the listener, it may be a crime in many states, despite the fact that the

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231. See *id.* at 1841 (noting that "offers to give or receive what is illegal to possess have no social value").

232. *Id.* at 1842.

233. See Steven Dowshen, Understanding Puberty, Kids Health, [http://kidshealth.org/parent/growth/growing/understanding\\_puberty.html#](http://kidshealth.org/parent/growth/growing/understanding_puberty.html#) (last visited Sept. 29, 2009) (describing common physical changes that occur in adolescents during puberty) (on file with the Washington and Lee Law Review).

234. See, e.g., GA. CODE ANN. § 16-6-4 (2009) ("A person commits the offense of child molestation when such person does any immoral or indecent act to or in the presence of . . . [a minor]."); *Schultz v. State*, 599 S.E.2d 247, 248 (Ga. Ct. App. 2004) ("The legislature has carefully worded the child molestation statute so that the defendant's knowledge of the age of the victim is not an element of the crime . . ."); N.C. GEN. STAT. § 14-202.1 (2008) (prohibiting a person from "willfully" taking an indecent liberty with a child under sixteen). North Carolina's statute requires that the State must prove five elements: (1) the defendant was at least sixteen years of age, and (2) five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, who was (4) under sixteen-years of age at the time, and (5) the defendant's action was for the purposes of arousing or gratifying sexual desire. *State v. Rhodes*, 361 S.E.2d 578, 580 (N.C. 1987).

speaker did not and could not know the listener was a child.<sup>235</sup> To the extent that statutes criminalizing dirty talk over the phone with a specific child do not chill speech in violation of the Constitution, their application to virtual sex would seem to pose no more problems.

Activities on the Internet always have posed special challenges for the State's ability to regulate, however.<sup>236</sup> Fairfield notes, for example, that the Supreme Court thrice struck down Congressional attempts to protect children online.<sup>237</sup> He distills from these decisions the fact that "Congress can only burden speech if it uses the least restrictive means available to it."<sup>238</sup>

Fairfield notes that "the United States Supreme Court has long maintained that where users of a service are anonymous, criminal liability cannot ride on the un-knowing communication of harmful material to users who turn out to be children."<sup>239</sup> Indeed, in *Reno v. ACLU*,<sup>240</sup> the Supreme Court concluded the permissibility of nonobscene expression by adults cannot turn on the remote possibility of a child viewing it.<sup>241</sup> There, the Court struck as overbroad Section 223 of the Communications Decency Act (CDA),<sup>242</sup> which prohibited the online transmission of "indecent" or "patently offensive" material to a known minor.<sup>243</sup> Under that construction of the CDA, the Court observed, constitutionally protected communications between adults would be curtailed because some minor somewhere might view them electronically.<sup>244</sup> The Court

235. See *supra* Part III.A.3 (discussing statutory schemes where ignorance of a victim's age is no defense).

236. Fairfield and Bloomfield more than adequately depict the struggle between Congress and the U.S. Supreme Court to define the limits of the First Amendment as it relates to the transmission of pornographic materials. Fairfield, *supra* note 11, at 1225–31; Bloomfield & Duranske, *supra* note 11, at 1186–91.

237. See Fairfield, *supra* note 11, at 1229 (noting that "Congress has had three bites at this apple").

238. *Id.* at 1230.

239. *Id.* at 1228.

240. See *Reno v. ACLU*, 521 U.S. 844, 885 (1997) (invalidating portions of the Communications Decency Act).

241. See *id.* at 876 ("Knowledge that, for instance, one or more members of a 100-person chat group will be a minor—and therefore that it would be a crime to send the group an indecent message—would surely burden communication among adults.").

242. See 47 U.S.C. § 223 (2006) (prohibiting the transmission of material that is obscene or contains child pornography).

243. See *Reno*, 521 U.S. at 859–61 (listing the applicable provisions of the CDA).

244. See *id.* at 876 ("Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it."). Congress re-enacted § 223 of the CDA to prohibit the transmission of material that is obscene or child pornography. 47 U.S.C. § 223(a)(1)(B)(ii) (2006).

explained that "[t]he general, undefined terms 'indecent' and 'patently offensive' cover large amounts of nonpornographic material with serious educational or other value."<sup>245</sup> As Part III illustrated, criminal prohibitions against sex with a child require the involvement of an *identifiable child*, not the mere possibility of one, in a sexual exchange with an adult.<sup>246</sup> This—together with the interactive nature of virtual sex, which requires child-players to make independent choices to take actions or reciprocate the adult's actions—also makes it difficult to know how this question would be resolved. Moreover, it is probable that prosecutors will choose to prosecute only the most compelling cases—e.g., those in which the adult player knew or had reason to believe that they were playing sex games with a child—making concerns about ability of adults to avoid prosecution when playing sex games a more academic problem, than a real one.<sup>247</sup>

A fourth question also merits consideration: Should real-world law penetrate virtual worlds at all? Commentators have only recently explored whether actions in virtual worlds might someday provide a basis for real criminal prosecutions.<sup>248</sup> Some argue that a "magic circle" surrounds virtual

245. *Reno*, 521 U.S. at 877.

246. See *supra* Part III (discussing various statutory schemes that criminalize sexual conduct with a minor).

247. Personal communication with Brian Klebba, Assistant United States Attorney for the Eastern District of Louisiana, Aug. 6, 2009.

248. See Greg Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293, 315 (2004) (exploring the possibility of prosecuting virtual world harms under criminal trespassing statutes). The application of laws to virtual worlds raises very difficult jurisdictional questions about where the conduct occurs and what jurisdictions may reach it, although these questions are not unique to virtual worlds. See Terrence Berg, *www.wildwest.gov: The Impact of the Internet on State Power to Enforce the Law*, 2000 BYU L. REV. 1305, 1305–06 (2000) ("For those charged with enforcing state law, whether civil or criminal, this new world of cyberspace has sometimes been compared to the 'wild, wild west' without a sheriff."). Furthermore, "the Internet also offers criminals a huge and easy-to-reach pool of potential victims; so state law enforcement authorities will increasingly need to respond to cybercrimes that are perpetrated and located outside the boundaries of territorial jurisdiction." *Id.* at 1307; see also Henry H. Perritt, Jr., *Jurisdiction in Cyberspace*, 41 VILL. L. REV. 1, 2 (1996) ("The Global Information Infrastructure . . . links suppliers and users of electronic resources around the world, making it more difficult to localize wrongdoing for purposes of criminal or civil litigation."). Perritt poses the following problem:

Similar questions, addressed by different rules, arise in the criminal context. Suppose the message is criminal instead of defamatory, involving child pornography or indecency, or representing some sort of financial fraud, forgery or terrorism. Must the wrongdoer be tried only where he or she is physically found? If the answer is yes, how should the wrongdoer be apprehended and moved to the place of trial? Whose substantive criminal law should apply?

*Id.* at 3.

worlds, making them immune from real-world law.<sup>249</sup> Proponents advance three arguments for the exclusion of real-world law. First, the application of one jurisdiction's laws to borderless virtual worlds would allow the most restrictive jurisdiction to dictate virtual world practices.<sup>250</sup> Second, players in

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249. See Fairfield, *supra* note 191, at 823 (debunking the notion of a magic circle and concluding that real-world law "cannot reasonably be excluded from virtual worlds" but that players and site operators "can control the interface between law and virtual worlds through their agreements, customs, and practices").

250. See Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI. & TECH. L. 173, 199 (2005) (noting that this multi-jurisdictional approach could create a race to the bottom). The Dormant Commerce Clause may also be marshaled to preclude the application of real-world law to the virtual world. In *American Libraries Association v. Pataki*, a federal district court in New York preliminarily enjoined a statute criminalizing the knowing communication of materials containing sexual content to minors by computer. *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997). New York's statute violated the Dormant Commerce Clause because it "concern[ed] interstate commerce," and sought "to regulate conduct occurring outside its borders." *Id.* at 169, 173. The burdens imposed on interstate commerce were "excessive in relation to the local benefits it confer[red]." *Id.* at 177. Describing the Dormant Commerce Clause as a "'nuclear bomb of a legal theory' against state Internet regulation," Goldsmith notes that a number of courts have followed *Pataki* to strike down statutes regulating pornography and spam. Jack L. Goldsmith, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 786 (2001) (quoting Declan McCullagh, *Brick by Brick*, TIME DIGITAL DAILY, Jan. 31, 1997, available at <http://www.time.com/time/digital/daily/0,2822,11738,00.html>). See also *ACLU v. Johnson*, 194 F.3d 1149, 1161 (10th Cir. 1999) (affirming a lower court's injunction based on a Commerce Clause analysis of a statute criminalizing "the dissemination by computer of material that is harmful to minors"); *Psinet, Inc. v. Chapman*, 108 F. Supp. 2d 611, 627 (W.D. Va. 2000) (preliminarily enjoining a Virginia statute that criminalized using the Internet to "sell, rent or loan to a juvenile or to knowingly display for commercial purpose" certain sexual materials that are "harmful to juveniles" because it "attempt[ed] to regulate commerce wholly outside of Virginia's borders" in violation of the Commerce Clause and "potentially subjects citizens to inconsistent state regulations"); *Cyberspace Commc'ns, Inc. v. Engler*, 55 F. Supp. 2d 737, 751 (E.D. Mich. 1999) (enjoining a statute criminalizing the use of computers or the Internet to disseminate sexually explicit materials to minors "for the reasons explained in [*Pataki*]").

In the wake of *Pataki*, a number of courts have upheld state law convictions despite Commerce Clause challenges. Some courts have held that luring minors with materials transmitted by computer to engage in sex cannot be a form of "legitimate commerce." See *People v. Foley*, 692 N.Y.S.2d 248, 253 (N.Y. Sup. Ct. 1999) (upholding New York Penal Law § 235.22(2), which added a "luring" prong to the statute struck down in *Pataki*); *State v. Backlund*, 672 N.W.2d 431, 437 (N.D. 2003) (upholding a statute prohibiting adults from luring minors by computer to "engage in sexual acts with [the] adult or . . . sexual performance . . . for [the] adult's benefit"); *People v. Hsu*, 99 Cal. Rptr. 2d 184, 198 (Cal. Ct. App. 2000) (enforcing a statute criminalizing the knowing distribution of "harmful matter" to known minors "with the intent of arousing" either the sender or the minor and "for the purpose of seducing a minor"); *Hatch v. Superior Court*, 94 Cal. Rptr. 2d 453, 479 (Cal. Ct. App. 2000) (convicting the defendant of attempted seduction of a minor and quoting *People v. Foley*). Some courts have found in addition, that any incidental effect on interstate commerce is outweighed by the state's "compelling interest in protecting minors from . . . being seduced to engage in sexual activities." *Hsu*, 99 Cal. Rptr. 2d at 190; see also *Foley*, 692 N.Y.S.2d at 256 ("[A]ny incidental effects that

virtual worlds consent to the exclusion of real-world law through agreements with site operators.<sup>251</sup> Third, "actions that occur within virtual worlds are not real, and thus cannot be sanctioned using real-world law."<sup>252</sup> Kerr, for example, argues that the State's considerable power to sanction conduct "should be reserved for harms that other mechanisms cannot remedy."<sup>253</sup> But harms in the virtual world, like virtual murder, "should trigger internal virtual remedies."<sup>254</sup>

Other commentators reject the idea of a magic circle. As Fairfield flatly notes, "[t]here is no 'real' world as distinguished from 'virtual' worlds. Rather, all supposedly 'virtual' actions originate with real people, and impact real people, albeit through a computer-mediated environment."<sup>255</sup> Even the proponents of a magic circle leave room for the application of real-world law in some cases. Kerr would permit criminal law to redress harms that "go outside the game."<sup>256</sup> For example, if a player steals virtual furniture by using an unauthorized password, this action resembles "traditional theft, [and is] closely analogous to often-prosecuted thefts involving unauthorized use of credit cards and ATM cards."<sup>257</sup> The connection to a real-world harm is especially relevant to virtual sex with children who experience harms that continue beyond the boundaries of the virtual world.<sup>258</sup> Unlike adults, children legally cannot consent to contracts that expose them to such harms.<sup>259</sup>

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[state law] may have on commerce are not unduly burdensome in relation to the compelling interest of the State in protecting children."). Other courts reason that state law reaches only crimes committed within the state, thus precluding any extraterritorial enforcement of state law. *Hatch*, 94 Cal. Rptr. 2d at 473 ("Contrary to *Pataki's* conclusion the New York statute 'projected its law into other states' . . . here there is no reason to suppose California would attempt to impose its policies on other states in light of the relevant California penal statutes [that] . . . generally bar punishment for wholly extraterritorial offenses . . ."); *Hsu*, 99 Cal. Rptr. 2d at 191–92 (same). Finally, courts have refused to "insulate pedophiles from prosecution simply *by reason of* their usage of modern technology." *Hatch*, 94 Cal. Rptr. 2d at 471 (arguing that *Pataki* makes "a sort of preemption argument: that simply logging on the Internet automatically places one beyond the reach of state criminal prosecution").

251. Kerr sees a limited role for criminal law, which "tends to follow the physical rather than the virtual: it looks to what a person does rather than what the victim virtually perceives." Kerr, *supra* note 44, at 416.

252. Fairfield, *supra* note 191, at 825.

253. Kerr, *supra* note 44, at 417.

254. *Id.*

255. Fairfield, *supra* note 191, at 825.

256. Kerr, *supra* note 44, at 417.

257. *Id.* at 423.

258. See *supra* Part III.A.1 (discussing the harms that children experience due to sexual interactions with adults).

259. See 17A AM. JUR. 2D *Contracts* § 28 (2009) ("A natural person who manifests assent



In short, with so many thorny questions, it is anyone's guess whether states constitutionally may proscribe the sexual hijinks of adults with children in virtual worlds. To the extent that the First Amendment or the "magic circle" does not immunize adults who play sex games with children, plenty of existing crimes permit states to reach this behavior.

### *V. Conclusion*

This Article examines a phenomenon that largely has escaped the notice of regulators: The corruption of a child's innocence as a result of virtual sex play. Although children are not supposed to be in these spaces, any kid can sneak in by giving a fake birth date. Once inside, a child may take part in virtual hook-ups that are explicit, raunchy, and increasingly life-like.

A number of real-world crimes provide ready vehicles for sanctioning adults who, wittingly or unwittingly, engage in virtual hook-ups with children. These crimes encompass sexual contact with willing persons whom the adult believed to be of age, and which involve neither physical touching nor close proximity to the child. While the application of these crimes to virtual sex with a child stretches even the ballooning definition of child sexual abuse, it advances the dual child protection rationales underpinning these laws: To avoid the premature initiation of children into sexual activities that may warp their sexual identities and practices, and to prohibit adults from satisfying sexual urges with children who cannot protect themselves adequately. While speech proponents may recoil at the prospect of criminal sanctions for virtual sex with children, arguing that it would unfairly trample on the prerogatives of adults and chill all virtual sex, it is unclear whether First Amendment arguments will save adults from prosecution. Until this question is resolved, adults who engage in virtual sex with children do so at their own peril.

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to a transaction has full legal capacity to incur contractual duties unless he or she is: (1) under guardianship; (2) an infant; (3) mentally ill or defective; or (4) intoxicated.").