

## Would You Kindly Consider the Consequences?

A Model for the use of video game plots as legal learning  
fact patterns

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### Abstract

This article seeks to introduce as a thought exercise the application of laws to the plot lines of videogames as a source of legal scholarship and reflexive social critique through an analysis of the legal liability for the killing of Big Daddies in *Bioshock*.

### Keywords

law; education; legal training; Bioshock

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## Introduction

Imagine in the near future that Amazon Prime Air is up and running. It is a regular occurrence to receive deliveries from drones. Now imagine that one of them malfunctions and is rapidly falling from the sky. It appears as though the drone is going to fall on a little girl playing on the sidewalk. You have several options open to you. You can try and tell the little girl to move, but she may not be able to flee quickly enough, exposing her to great risk. You can try to run to the little girl and move her yourself, but you might not reach her in time. You can try and shoot the drone out of the air before it reaches the little girl. Such an encounter may stretch the imagination for some but the fact of the matter is that such technology poses new social and legal concerns as it develops (Whitlock, 2014).<sup>1</sup>

I posit that the application of legal standards to video game plots can help students and trainees of every educational level approach complex legal, ethical and moral issues. This paper relies on the facts of *Bioshock*, from the vantage point of the player, Jack, seeking to explore the possible and ideal legal ramifications of choices that Jack is offered. The article seeks to introduce an exercise with international appeal meant to expand on education. It seeks to advocate for two possible uses of the exercise. First, the exercise may abate some of the social concerns over exposing children to violent video games by building in a component that challenges players to think through the consequences of in game decisions. Second, the exercise seeks to revitalize the hypothetical element of legal education. By analyzing the legal liability, both criminal and civil, of characters at the end of gameplay, one can explore the laws of a jurisdiction as they are, and further, as they should be. This exercise can be a fresh and exciting challenge for even the most refined legal scholar and a more accessible avenue for legal discussion and analysis for those new to the discipline. Further, such an analysis allows the scholar to consider the inherent interdisciplinary character of law and the dialectic relationships that law has with culture and social control. Rather than engaging in a sanitized application of law to facts, this approach encourages the consideration of external pressures on behaviour, the inherent complexity of human behaviour, the law's role as a tool of social control and culture's influence on both the application and promulgation of laws.

However, the article is limited in scope as the exercise has not been enacted and cannot offer quantifiable proof effectiveness nor can the article establish a comparative study of international education before

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<sup>1</sup> Retrieved 10 June 2015, from <http://www.washingtonpost.com/sf/investigative/2014/06/23/close-encounters-with-small-drones-on-rise/>.

addressing how the exercise would fit into such varying educational schemes.

### Why use Video Games in Legal Analysis?

The intersection of law and video games is hardly an unexplored frontier. Lawmakers have sought to exert power over the gaming industry through bans, copyright enforcement, mandatory and compulsory content warning regimes and purchase restrictions. Regulation of video games has been a global concern sparking intense and long lasting debate over whether violent games encourage violent behaviour and further, whether such a connection would support censorship and purchasing bans. The video game industry has also drawn considerable legal academic interest proliferating books and articles regarding free speech and expression in games, privacy and copyright constraints and even the fascinating possibility of video games as demonstrative aides in jury trials (Jewel, 2012). There is even a growing body of scholarship regarding the moral and ethical underpinning of violence in games, expanding the conversation from the rudimentary repulsion of hyper realistic violence to the rational underpinnings of violent actions in games (Losh, 2009). On the other hand, game designers have sought to influence the legal landscape, using the medium as an astute critique of specific legal policies and systemic flaws in regulatory systems. For example, *Activism, The Public Policy Game* charges players to balance multiple public policy concerns with constraints on players' human and monetary capital (Persuasive Games, LLC).<sup>2</sup> This exercise can serve as a poignant, immersive critique of legal promulgation, weighed down by too many competing public policy issues.

In at least some sense, the relationship between law and games is rather natural. Each activity is, at its core, about marshalling a certain set of rules to achieve a goal or reach a destination working through an expansive set of possible paths based on a plethora of choices at each step along the way. It is from this dialectical relationship between the promulgation of laws or legal analysis and the design of video games that the application of laws to the story of games emerges. Deeply rooted in the global moral panic regarding violent games and youth behaviour as well as the power of games to instigate a reflection and critique of systematic legal concerns, such a pursuit envisions an understanding of how lawyers apply law to facts, tell stories and determine consequences. Beyond this dynamic relationship between the law and games, there are certain characteristics of video games which make them uniquely apt to this form of legal analysis, namely, video

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<sup>2</sup> Persuasive Games, LLC. Retrieved 10 June 2015, from <http://www.persuasivegames.com/games/game.aspx?game=activism>

games are immersive, fictional, contingent, imaginative, bounded and geographically flexible.

Applying laws to hypothetical fact patterns has long been the basis of legal education. These hypothetical situations are used to teach students how to apply laws to facts and argue on behalf of a client. Similar to the approach of this paper, Professor Cynthia Hawkins-Leon used literature as a lens to develop an understanding of the insanity plea by imaging a mock trial for literary characters invoking the plea as a defence (Hawkins-Leon, 1999). Further, the popular book, *The Law of Superheroes* and the accompanying blog, *Law and the Multiverse* applies law to the numerous situations that fictional superheroes asking such questions as 'is Thor an illegal immigrant?' (Daily, 2015). Video games provide readily available complex fact patterns that are fictional, contingent, imaginative, geographically flexible, and bounded.

### Video Games are Fictional

Video games are fictional in that they offer players and scholars alike a world with predominately fictional consequences. To a certain extent, games can have real world consequences. For example, some games offer in game purchases where players can buy certain virtual goods for real currency. Further, some may argue that in game conflicts have, in some instances, caused real world injury, which can be seen as a consequence of gameplay (Leung, 2005)<sup>3</sup>. Despite such external effect, largely, the consequences of gameplay are contained to the game. In this way, they are fictional; they affect only the fictional story line of the game. When you steal a car in *Grand Theft Auto*, you have not actually stolen that car, no one is missing their property and your character can continue his adventure. Therefore, immoral behaviour does not have to be punished. Without the need to protect from nefarious action, there is no need for punishment, deterrence or laws to those effects. In fact, immoral behaviour can even be rewarded, if the game designer so desires. For example, a *Grand Theft Auto* franchise player can choose to exchange money for intercourse with a prostitute (an act considered immoral in some countries and cultures) and this act will replenish the player's energy levels. Taking it one step further, the player can then choose to kill the prostitute and take his or her money back. In this scenario, the player has done something immoral, but no one is actually dead, the consequences are not real. Therefore, regardless of what basis we accept as motivation for punishment, there is no reason to punish the player. This means that video games can function as worlds without legal or moral representation, should that be the design of the developer.

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<sup>3</sup> Retrieved 10 June 2015, from <http://www.cbsnews.com/news/can-a-video-game-lead-to-murder-17-06-2005/>.

### Video Games are Immersive and Contingent

Video games depend on players to take actions that allow the story to unfold and, in this way; they are contingent upon players' choices. The first and most basic contingency is that players play a game. If no player chooses to play, the game exists as art in a vacuum, not finished and not exhibited. Once a player has made the initial choice to play a game, she is faced with further choices as she continues to play, ultimately deciding the trajectory of the story initiated by the designer, within the preordained boundaries. In this way, players have agency in the actions and outcomes of characters and games. This level of choice players have, combined with the virtual character of the consequences of those choices, makes video games ripe for the exploration of the dialectical relationship between choice and consequence, which is at the core of legal analysis.

### Video Games are Imaginative

Video games also offer us a nearly limitless world. Essentially, anything that is imaginable is possible. This means that, they are leaps and bounds ahead of even the best-funded research and development teams. On the other hand, the law is, for the most part, a reactive enterprise. Rules and regulations are promulgated in response to undesirable events or conditions. For this reason, it is a helpful exercise to stretch the imagination, applying existing laws to outlandish fact patterns. Such a mental exercise lends the student a vehicle to consider ideal approaches in anticipation of future challenges to application and promulgation.

### Video Games are Bounded

While they allow for a certain level of consumer agency unprecedented by other forms of media, video games are bounded in that they are constrained by sets of rules and algorithms. Players have agency in the choices they are allowed to make, but the options are limited.

### Video Games are Geographically Flexible

Video games take place in fictional jurisdictions whether entirely fictional or a stylized versions of real jurisdictions. While some games are located in certain geographic areas, like *L.A. Noire*, others take place in fictionalized versions of real counter parts such as Los Santos of *Grand Theft Auto V* or in entirely fictional realms like Rapture of *Bioshock*. Still others are international enterprises like *Assassin's Creed* and *Twisted Metal*. This geographic flexibility and complexity allows one to evaluate what legal consequences would be, in a certain jurisdiction and compare such an analysis, or, in the case of a fictional jurisdiction, argue what the legal consequences should be, in an ideal situation. For example, a player may face different criminal and tort liability for the same or similar actions in each stage of *Twisted Metal III* as she moves from Los Angeles, to Washington D.C., to London, to Tokyo and finally, to the entirely fictional jurisdiction in the final stage because each of these

jurisdictions may have slightly or even gravely different laws. This jurisdictional posturing allows for a natural comparative study of laws and their application, as well as an exercise in arguing on behalf of a legal ideal to be applied in the fictional jurisdiction.

This type of analysis that uses video games as a fact pattern for legal hypothetical study is applicable broadly across games and areas of law. The plot of *Grand Theft Auto* could easily serve as the basis of a first year criminal law casebook or a supplemental text for examination preparation. Further, depending on the plots of popular games may help to bridge the gap between laymen and lawmen leading to a greater understanding of and appreciation for both the promulgation and application of laws. Finally, should such an analysis be embraced by primary educational institutions, it may help to engage younger students in a critical study of laws and, on a more basic level, of consequence.

### Why begin with Bioshock?

*Bioshock* lends itself to my form of study for several reasons. *Bioshock* is a globally popular franchise and this popularity frames the game as a solid stepping stone that can help connect law people with laws and lawyers with this form of legal study. Further, *Bioshock* deals directly with choice and consequence in a predominately unregulated society and future technology.

### Bioshock is Globally Popular

Released in 2007, the highly anticipated *Bioshock* game has stretched across platforms and countries (Boyer, 2007).<sup>4</sup> Now a wildly popular series with blockbuster sequels, *Bioshock* has won countless awards and sold over two million copies in its first year (Acuna, 2014).<sup>5</sup>

### Bioshock Directly Confronts Choice and Consequence

Set in the fictional world of Rapture, *Bioshock* directly deals with the dialectic relationship between choice and consequence. Andrew Ryan, one of plot's central characters created the undersea city of Rapture in order to experience a world free of government intrusion and only subject to minimal, if any, regulation whether social or commercial. Andrew Ryan's anthem, "A man chooses, a slave obeys" underscores the importance of choice and free will in the plot of *Bioshock*. It is important to note that Rapture does seem to have at least some laws, given the characters imprisoned in Persephone and put to death for violating the ban on products smuggled into Rapture from the surface world. Here, the laws are used as a tool of social control, wielded by Andrew Ryan against detractors. While the laws are only inadvertently referred to, it is clear that Rapture is not a world without law, simply an extremely deregulated one. Ryan's Randian *laissez faire* capitalism still requires

<sup>4</sup> Retrieved 10 June 2015, from [http://www.gamasutra.com/php-bin/news\\_index.php?story=16707](http://www.gamasutra.com/php-bin/news_index.php?story=16707)

<sup>5</sup> Retrieved 10 June 2015, from <http://www.businessinsider.com/bioshock-will-continue-irrational-games-closing-2014-2>

laws or at the very least community standards, even if only minimal ones, for example, art cannot be censored. It's a culture that requires at least some enforcement. Further, games require rules whether to make the story work, (e.g. only Ryan can use the Bathysphere system) or to make gameplay technology work (e.g. characters cannot walk through walls). So, while on a whole Rapture is largely unregulated, there are some rules, whether technical or societal, which constrain a player's behaviour.

Further, *Bioshock* has judgement built directly into the plot of the game. Fairly quickly, *Bioshock* players are instructed to kill Big Daddies and faced with a choice to harvest or kill Little Sisters. At the end of the game, players are offered different outcomes based on the choice they made.

### **Bioshock is Forward Looking**

Despite the fact that *Bioshock* takes place nearly a century ago, it deals with technology on the horizon. Naturally, it is outlandish to think that any jurisdiction will ever be faced with trying a defendant for killing protective robots made from prison experiments in an attempt to harvest some sort of magical slug from the belly of a young girl while under the influence of mind control, even despite the human history of prison experimentation. However, criminal and civil liability for harm to drones may not be such a stretch for many jurisdictions in the near future. Video games that stretch the imagination are riddled with moral, ethical and legal questions similar to those that we may face in the near future.

### **What is Jack's Liability for Killing Big Daddies?**

Throughout the plot of *Bioshock*, players face any number of decisions that would constitute crimes or grounds for civil liability. If at the end of the game, presuming Rapture has courts and an extradition treaty, Jack were put on trial for his actions, what would be his legal liability? While instinctually this may seem an easy question to answer, the analysis will show that it is not. As is often the way with assigning legal liability a multi-layered analysis is required.

### **What are Big Daddies?**

To begin the exercise, the first question that must be considered is what are Big Daddies? The outcome here will influence whether Jack is liable for murder, manslaughter, vandalism, destruction of property or an entirely separate offence. In *Bioshock*, Big Daddies are cyborgs created through a panel of prison experiments and charged with protecting Little Sisters. But what would such a creature be considered under the law? Because they have both organic human elements and biomechatronic components, it is difficult to ascertain whether the law would consider them citizens of Rapture or property of the state or the corporation that created them or perhaps something different altogether. This is

reminiscent of the law's struggle with classifying enslaved people, teetering between property and personhood (Gross, 1995).

On the one hand, the Big Daddies will likely be considered just property. If a thing is bought, sold or traded in a market, it will be treated as property under the law (Holmes, 1897). The Big Daddies were created as works for hire and therefore, they seem to fit squarely into this definition.

On the other hand, the law could endow the Big Daddies with at least some level of personhood. Personhood is an ever-expanding concept, at least in American jurisprudence (*Burwell v. Hobby Lobby Stores, Inc.* 2014). As artificial intelligence becomes more intelligent, jurisdictions will have to decide if such creatures should be endowed with personhood, in both a legal sense and a cultural sense. In his article "Do Androids Dream?: Personhood and Intelligent Artifacts", professor Patrick Hubbard advocates a three prong test to evaluate such an inquiry. He suggests that a being should be endowed with legal personhood if it is able to: (1) think and communicate, (2) recognize a sense of self and a life goal and, (3) successfully live with others in a community somewhat based on mutual self-interest (Hubbard, 2011). From the information players can glean about the Big Daddies, they may have a difficult time satisfying such a test. They certainly have a life goal, to protect the Little Sisters and they are aware of this goal, which drives their actions and to some extent they can think and communicate. However, their motivations seem to be purely altruistic. Whether the Big Daddies are to be considered persons under the law would be an issue for trial. So, surviving Big Daddies would be available to testify regarding their abilities to critically think, communicate and cohabitate. Ultimately, under the facts, the Big Daddies are likely going to be considered property.

### **Is Jack Liable for Destruction of Property?**

If the Big Daddies are to be considered property, would Jack be held liable for their destruction? What would be the extent of his liability?

It is clear that Jack destroyed the Big Daddies; he could hardly argue that he is innocent of this. However, he may be able to limit his liability by drawing upon the common law doctrine of necessity used in English and American courts, arguing that it was necessary for him to destroy the Big Daddies (Cohan, 2007). Jack needed to harvest their ADAM. The only way to reach the Little Sisters was to destroy the Big Daddies. Common law necessity is divided into major concepts, public necessity and private necessity (Cohan, 2007). Public necessity governs cases where the defendant has committed a crime against property to protect the public, the classic example being the defendant who destroyed a house in order to stop a fire from spreading. A defendant who has committed a public necessity will not be liable for the property crime and generally will have no duty to compensate for the destroyed property.



On the other hand, private necessity governs such cases where the defendant has committed a crime against property to protect himself. A defendant who has committed a private necessity will not be liable for the property crime but will likely have to compensate for the destroyed property. In Jack's case, his actions seem to lie somewhere between public and private necessity. He is being instructed and guided by Atlas to protect himself and to save Atlas' family. It is likely that this is going to be considered a private necessity, even if Jack's motives are not strictly selfish because they are not on behalf of some societal greater good. Therefore, even though Jack is not going to be criminally liable for destruction of property, he is going to owe some compensation for the Big Daddies that he has destroyed.

If Jack owes compensation for the destruction of the Big Daddies, whom does he owe? If the Big Daddies are property, whose property are they? Several parties may claim ownership to them. The Big Daddies were commissioned by Andrew Ryan and created by Dr. Suchong. The Big are charged with protecting Little Sisters and are individually bonded to a sister. Does this mean the Little Sisters own the Big Daddies? It is likely that Ryan has the strongest claim to ownership over the Big Daddies as they were likely made for him as works for hire. As such, it is possible that Jack will not be held civilly liable for their destruction because Ryan has died and Jack is Ryan's only heir of which we are aware.

The doctrine of necessity is underpinned by the philosophy that certain acts of destruction should not be punished because the destroyer had to take his action in order to protect the public or prevent some greater harm (Cohan, 2007). This is an opportunity to examine the reflection of cultural values in law and use of law as a tool of social control. In a Randian utopia such as Rapture, it is unlikely that the laws would seek to incentivize an individual's sacrifice on behalf of the greater good. As such, the doctrine of necessity may not be available in such a jurisdiction. In that case, Jack would be liable for the underlying property offence and compensation for the destroyed Big Daddies.

### **Is Jack Criminally Liable for Murdering the Big Daddies?**

If the Big Daddies were endowed with legal personhood, would Jack be criminally liable for their murder? It's obvious that Jack killed the Big Daddies, but he might be able to argue that he should not be held criminally liable for such action. Jack can make a claim that he had to kill the Big Daddies in self-defence. Jack needed to get ADAM from the Little Sisters or he would not have survived in Rapture. Here, Jack's self-defence claim would likely fail because, in most, if not all, jurisdictions, self-defence requires a subjective belief of imminent harm. For example, in Sweden, self-defence requires the defendant to have faced one of four situations of peril:

1. a criminal attack on property or person;

2. the retrieval of stolen property when the criminal is caught red handed;
3. home invasion;
4. the refusal to leave a property when so demanded (Swedish Criminal Code Chapter 24).

Clearly, Jack's argument that he had to kill the Big Daddies to survive would not meet these standards. However, Rapture is a fictional jurisdiction, allowing us to compare and contrast the outcome for Jack under several competing standards. Under English common law, Jack was entitled to use "reasonable force" to protect himself (Beckford v. R). Applying this looser standard, Jack might win his claim of self-defence given that he had to kill the Big Daddies to reach the Little Sisters. He would need to show that murder was "reasonable force" under the circumstances which he likely could because the Big Daddies would not have let him reach the Little Sisters otherwise. In contrast, under the English statutory regime, Jack was only entitled to harm the Big Daddies using reasonable force "in the prevention of crime" (Criminal Law Act 1967 Section 3(1)). Given that Jack attacked the Big Daddies first and they were involved in no crime, Jack's claim would fail under this more stringent standard.

This comparison can highlight the ways that different cultures can use the law to regulate the same behaviour, with different outcomes. Further, these outcomes may challenge our sense of fairness and underscore that a justifiable law may not always reach what would be considered a just result.

Jack can also claim that he should not be held legally responsible for his actions in Rapture because he was under the influence of Atlas. When Atlas uses the command phrase "would you kindly", Jack has been conditioned to comply with the following request. Morally, it may not make sense to punish Jack because ultimately, he did not choose to commit any wrongdoings. Further, on a basic level, it may not feel just or fair to hold Jack culpable. Legally, Jack could argue that he cannot be held responsible for killing the Big Daddies, and, in fact, all of his actions in Rapture because he never committed a volitional act, they were compulsory or because he was temporarily insane, due to the influence of Atlas.

Criminal jurisprudence seeks to punish criminals for their bad acts and at its very base, draws a distinction between voluntary and involuntary actions. Under the Model Penal Code, which seeks to standardize American jurisprudence across jurisdictions, actions taken under hypnosis are specifically defined as involuntary actions (Model Penal Code Sec. 2.01). This suggests that Jack may be able to avoid criminal liability for killing the Big Daddies because he was under the hypnotic influence of Atlas. Jack is left some level of choice and this may destroy

his argument that his acts in Rapture were involuntary. He can kill the Little Sisters or harvest their ADAM allowing them to live. However, he likely has a strong argument that his killing of the Big Daddies was involuntary because Atlas made him act by conditioning him to obey.

While the specific rules regarding insanity defences may vary from jurisdiction to jurisdiction, the defence itself is underpinned by the idea that society should not impose criminal liability on a defendant who, at the time of the criminal act, did not know right from wrong (Hawkins-Leon, 1999). Here, Jack may avoid criminal liability by arguing that because of Atlas' influence he could not discern right from wrong and could only obey.

Ultimately, Jack's strongest argument is that he cannot be held criminally responsible for his actions in Rapture because they were involuntary. Further, he will assert that he cannot be held civilly liable either because he acted on behalf of the public necessity. It is interesting to note that these arguments are, in a sense, divergent. On the one hand, Jack is arguing that he cannot be held responsible because he could not help the way he acted. On the other hand, he is arguing that he should not be held responsible because he acted for the greater good. As it happens in life, it happens in law, parties can advance two arguments that seemingly are at odds with each other.

## Conclusion

By analyzing Jack's legal liability one can explore the laws of different jurisdiction as they are and should be. Whether the jurisdiction of Rapture decides that Big Daddies are people or property or somewhere in between, it is possible that Jack would not be held legally liable for any harm to them.

This application of legal standards to video game plots is an approach to complex legal, ethical and moral applications and issues. This undertaking can be the basis of ideal legal schemes to approach new scenarios and forthcoming technologies. Such an approach has broader applicability than thought exercise for legal trainees including primary education and other disciplines such as philosophy. It is possible to consider games being developed specifically as educational tools, such as a first person game created to allow psychological trainees to attempt an ordinary day as someone suffering from symptoms of schizophrenia. In this way, educators can marshal the emotional and physiological connection to games as an educational resource.

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