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## Invisible Labor, Invisible Play: Online Gold Farming and the Boundary Between Jobs and Games

Julian Dibbell

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## Invisible Labor, Invisible Play: Online Gold Farming and the Boundary Between Jobs and Games

*Julian Dibbell\**

### ABSTRACT

*When does work become play and play become work? Courts have considered the question in a variety of economic contexts, from student athletes seeking recognition as employees to professional blackjack players seeking to be treated by casinos just like casual players. Here, this question is applied to a relatively novel context: that of online gold farming, a gray-market industry in which wage-earning workers, largely based in China, are paid to play fantasy massively multiplayer online games (MMOs) that reward them with virtual items that their employers sell for profit to the same games' casual players. Gold farming is clearly a job (and under the terms of service of most MMOs, clearly prohibited), yet as shown, US law itself provides no clear means of distinguishing the efforts of the gold farmer from those of the casual player. Viewed through the lens of US labor and employment law, the unpaid players of a typical MMO can arguably be classified as employees of the company that markets the game. Viewed through case law governing when the work of professional players does and does not constitute game play, gold farmers arguably are players in good standing. As a practical matter, these arguments suggest new ways of approaching the regulation of so-called virtual property and of*

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online gaming in general. More broadly, the very viability of these arguments shows that the line between work and play is not so much an empirical fact as it is a social one, produced by negotiations in which the law has a leading role to play. This insight contributes to an ongoing debate about commodification and play that grows more urgent as digital technologies suffuse the world’s economy with gaming and its logic.

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I. INTRODUCTION

There are roughly 400,000 “gold farmers” in the world, all in developing countries outside the United States, with the vast majority of them in China.<sup>1</sup> A gold farmer’s job is to play a massively

1. Richard Heeks, Understanding “Gold Farming” and Real-Money Trading as the Intersection of Real and Virtual Economies, 2 J. VIRTUAL WORLDS RES. 3, 7 (2010). All remaining facts about gold farmers and online games are, except where noted to the contrary, from the author’s own reporting on the phenomenon in 2007. See generally Julian Dibbell, The Life of the Chinese Gold Farmer, N.Y. TIMES MAG. (June 17, 2007), http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html [http://perma.cc/GKR4-QYSQ].

multiplayer online role-playing game (MMO) every full day of the week. Most commonly, the game is World of Warcraft, which is the most popular MMO, with 5.6 million paying players worldwide and eleven million at its height of popularity.<sup>2</sup> The gold farmer does things all the other players do: kills monsters; collects coins, weapons, and other loot from the corpses of defeated monsters; kills more monsters; collects more loot; takes loot into town and sells it to other players for more coins; and so on. This routine is known as “farming” or “grinding.” All players must engage in this routine if they want to advance in the game. But there is a great variety of other, often more interesting, activities available within the game. Thus, few players pursue farming as relentlessly as gold farmers. The few who do are known as “power gamers,” and while their particular style of play is hard to distinguish from a gold farmer’s, their incentives for playing—like those of all the other players—differ from gold farmers in one important respect: gold farmers are paid a wage in real money to play the game.

A Chinese gold farmer generally plays in an environment more akin to that of a typical Chinese factory worker than to that of a typical gamer. He plays in a workshop surrounded by other gold farmers. He works twelve-hour shifts and seven-day weeks and sleeps in a dorm with the other gold farmers. He punches a clock at the start of his shift, and at the end of his shift, he hands over the product of his workday—a modest quantity of virtual gold coins—to the factory owners who pay his wage. The owners then sell those coins—for real money—to an online retailer who will sell them—for more real money—to players in the United States or Europe who have less time or patience for the grind than most.

There is a mildly illicit quality to gold farming work. Like most MMO companies, the operator of World of Warcraft, Blizzard, Inc. (Blizzard), bans the sale of virtual items for real currency—a practice known as real-money trading (RMT)—and gold farm operators work hard to avoid detection by Blizzard lest they lose their accounts and inventory. But the work of gold farmers is hardly invisible—or at least not invisible in the way that labor theorists have come to mean when they apply that term to the work of domestic caregivers, prisoners, and others excluded from conventional definitions of employment. If gold farming took place on US soil, for example, it would fall squarely within the terms of the Fair Labor Standards Act

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2. Activision Blizzard Announces Better-Than-Expected Second Quarter 2015 Financial Results, BUSINESS WIRE, <http://www.businesswire.com/news/home/20150804006820/en/> [<https://perma.cc/R66E-3HUQ>]

(FLSA),<sup>3</sup> the National Labor Relations Act,<sup>4</sup> and most other elements of the modern labor-regulatory regime. After all, other than the intangibility of the goods produced by gold farmers, very little distinguishes their working conditions from those of typical low-wage manufacturing employment.

Yet, there is another, less-recognizable sort of labor hidden in gold farming's shadow: farming completed for no monetary compensation at all, which comprises the majority of farming in MMOs. Convention requires that we call this unpaid effort "play," but given its stark similarities to what gold farmers do all day, it is worth asking exactly why it is not a job. And if that question bears asking, then so does another: why not call what the gold farmers do a "game?"

This Article explores the implications of these two interlocking questions both for the regulation of online games and, more broadly, for the contemporary relationship between work and play. Part II describes the relevant aspects of MMO farming as experienced by both ordinary gamers and gold farmers. It also discusses the handful of legal cases in which gold farming has been explicitly at issue. Part III locates gold farming, as an instance of commodified play, within long-running debates about the commodification of "priceless" goods in general and of play in particular. Part IV weighs the plausibility of legally classifying unpaid farming as employment and outlines the consequences associated with such classification. Part V, conversely, considers whether gold farmers, as a legal matter, are actually playing the games in which they work and the implications if they are. This Article concludes by pointing toward broader implications and arguing that gold farming's blurring of the lines between work and play reflects both the destabilizing effects of networked technology on existing concepts of labor and employment and the inherent instability of the concepts themselves.

## II. GOLD FARMING: A CULTURAL, ECONOMIC, AND LEGAL OVERVIEW

### *A. Farming as Play: Gaming Culture in MMOs*

To understand farming and its place in the culture of MMOs, it is important to understand MMOs themselves. MMOs are virtual worlds—online simulated environments in which users, embodied in three-dimensional graphical representations, known as avatars, interact with both their simulated surroundings and each other. But they are not the only type of virtual world. So-called "sandbox" or

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3. Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201–219 (2014).

4. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2014).

“open” virtual worlds like Second Life,<sup>5</sup> for example, seek to mirror the real world’s range of open-ended possibilities, offering users almost limitless freedom to build their own objects and invent their own goals. An MMO, on the other hand, is by design a far more constrained experience. It is above all a game, with a rich but bounded set of pre-defined goals and rules for attaining these goals.<sup>6</sup>

More specifically, an MMO is a variant of what the digital-games industry refers to as role-playing games (RPGs). In a typical single-player RPG, the player is a protagonist advancing through a fantasy-world setting by completing a series of multistep tasks, or “quests,” each of which rewards the player with a certain number of experience points toward the next level of skill and challenges. The quests themselves are relatively simple—an in-game character might ask the player to kill six invading wolf-men,<sup>7</sup> for instance, or to find and retrieve the ingredients for an invisibility potion.<sup>8</sup> But with each new level, the number of points required to “level up” rises steeply, so that the highest levels of the game may take many hours of arduous, repetitive play to achieve or traverse.

In the MMO variety of RPGs, the additional presence of thousands of other players—all potentially interacting—adds further complexities. Tasks may require banding together with dozens of other player-controlled characters to vanquish enemies that otherwise cannot be defeated individually. Acquiring the necessary resources to advance usually requires interaction with other players that may include trading virtual goods or payments of the local virtual currency. These interdependencies are often reinforced through mandatory specialization of character skills. For example, players particularly adept at mining metals might have to rely on others better at blacksmithing to turn their mined metals into armor, which, in turn, may be needed to facilitate completion of tasks and quests.

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5. See THOMAS M. MALABY, *MAKING VIRTUAL WORLDS: LINDEN LAB AND SECOND LIFE* 7 (2009) (“Second Life, launched in June 2003, stands in contrast to many of the other well-known virtual worlds (World of Warcraft, Everquest II, Lineage II) in that it has no established and universal game objectives. . . . Second Life has thus quickly risen to prominence as the most celebrated ‘social’ virtual world.”).

6. See *id.*

7. See *Beating Them Back!*, WOWHEAD, <http://www.wowhead.com/quest=28763/beating-them-back> [<http://perma.cc/Z9LF-DF4L>] (describing a beginner quest in World of Warcraft).

8. See *Collecting Kelp*, WOWHEAD, <http://www.wowhead.com/quest=112/collecting-kelp> [<http://perma.cc/M2ZY-JTM4>] (same).

Thus, while MMOs are games, they generally are not *zero-sum* games.<sup>9</sup> Except in player-versus-player combat (PvP)—a common feature of MMOs but rarely their main focus—players do not compete directly with each other. Although each level attained may bring new rewards in the form of better skills, stronger weapons, and the like, there are no such rewards for reaching a given level faster than anybody else. Even informal competition is blunted by the fact that not all players approach the game as a race to level up. In fact, game designers have long observed that the highly competitive “achiever” is just one of several player types commonly found in multiplayer RPGs.<sup>10</sup> Other players may be “explorers,” bent on mapping the game’s virtual world and learning all they can about its underlying mechanics; “socializers,” focused on their relationships with other players; or “killers,” hooked on the thrills of PvP and other forms of inter-player conflict.<sup>11</sup> So disparate are the motivations of these groups that one may question whether they are even playing the same game, let alone playing it in competition with each other.

Nonetheless, even if leveling up is a primary goal only for the achievers, other player types cannot realistically pursue their own goals without it. Explorers who do not level up can never see the parts of the game that are accessible only upon achievement of higher levels; socializers who do not level up will be left behind by friends who do; killers who do not are limited to attacking low-level victims and are more likely to end up victims themselves. To play an MMO with any commitment, then, requires a commitment to the path of leveling up. And given the rigors of the leveling treadmill, this means committing to a baseline style of play that is, at times, not obviously playful.

Farming, a typical—if not integral—aspect of the leveling process, is MMO play at its most laborious. Broadly, the term—like its approximate synonym, grinding—refers to any monotonously repeated action undertaken solely for the purpose of gathering resources useful for advancement in the game.<sup>12</sup> In some MMOs, for example, some portion of the experience points needed to level up can only be acquired through the routine slaying of beasts or monsters

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9. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. Rev. 754, 784 (1984) (“[T]he interests of the two players have to be precisely opposed for a game to be ‘zero-sum.’”).

10. Richard A. Bartle, *Hearts, Clubs, Diamonds, Spades: Players Who Suit MUDs*, MUD (Aug. 28, 1996), <http://www.mud.co.uk/richard/hcds.htm> [perma.cc/77UZ-62B6].

11. *Id.*

12. BONNIE A. NARDI, *MY LIFE AS A NIGHT ELF PRIEST: AN ANTHROPOLOGICAL ACCOUNT OF WORLD OF WARCRAFT* 110 (2010).

(“mobs,” in MMO parlance) for hours at a time.<sup>13</sup> In *World of Warcraft*, where it is possible to level up by just relying on the somewhat less onerous mechanism of pre-assigned quests, farming more often means killing mobs for the gold coins or crafting materials that can be looted from their corpses.<sup>14</sup> Yet, because quests and other challenges can often be completed more efficiently with the help of farmed resources, most players end up devoting at least some of their leveling time to the tedium of farming.

Perhaps more to the point, however, even players who only complete quests are still engaged in a series of tasks that, as several researchers have observed, bears a more than passing resemblance to the relatively mindless clickwork of the modern low-level corporate job.<sup>15</sup> It might be easy to conclude that this resemblance diminishes an MMO’s value as a game—that the more it looks like work, that is, the less it qualifies as play. Indeed, many players seem to feel exactly that: a game that compels players to submit to hours of boredom for the sake of a marginal reward, they complain, is a flawed game.<sup>16</sup> Nor are they persuaded differently by the fact that a certain class of player—the so-called “power gamer”—seems to embrace wholeheartedly the work-like aspects of MMOs, investing upwards of forty-hour weeks in the game and seeking only to maximize the value of his return in virtual assets. In the mind of most casual players, power gamers are missing the point of play—to have fun—and are not legitimately playing at all.<sup>17</sup>

Another view, however, is that the power gamer’s approach is not so much a rejection of play as a challenge to conventional ideas of what play looks and feels like. That is the perspective of T.L. Taylor, who has conducted ethnographic research on power gamers and writes that “power gamers do not use the term ‘fun’ . . . but instead talk

13. *Grinding*, WOWWIKI, <http://www.wowwiki.com/Grinding> [<http://perma.cc/HCS4-MM5A>] (“In older MMORPGs, such as *EverQuest*, grinding was the primary way to advance your character’s level. The quest system was very underdeveloped, as opposed to the quest system in *World of Warcraft*.”).

14. *Farming*, WOWWIKI, <http://www.wowwiki.com/Farming> [<http://perma.cc/VGE4-EUZR>].

15. See, e.g., NARDI, *supra*, note 12, at 111; see Scott Rettberg, *Corporate Ideology in World of Warcraft*, in *DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCRAFT READER* 19–20 (Hilde G. Corneliussen & Jill Walker Rettberg eds., 2008); Nick Yee, *The Labor of Fun: How Video Games Blur the Boundaries Between Work and Play*, 1 *GAMES & CULTURE* 68, 68 (2006).

16. T.L. TAYLOR, *PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE* 71 (2006). *But see* Angry Mustache, *ALOD: Go Back to WoW*, THE MITTANI (Mar. 4, 2014, 7:35 PM), <http://themittani.com/features/alod-go-back-wow> [<http://perma.cc/V82V-SMA2>] (celebrating as a point of pride the difficulty of the MMO *EVE Online* as compared to *World of Warcraft* (*WoW*)).

17. TAYLOR, *supra* note 16, at 71.



about the more complicated notions of enjoyment and reward.”<sup>18</sup> Play, for them, is indeed a lot like work, but mainly in the sense that its pleasures do not vanish on contact with boredom, frustration, and sober intensity—and may even in some ways depend on them.<sup>19</sup>

We may have to take power gamers at their word on this issue. But if power gamers’ notion of “play” is close to indistinguishable from work, this may only distinguish them in degree from most other MMO players. As should be clear by now, the leveling-up mechanic at the core of MMOs is essentially a simulation of economic production. And as the next Section makes clear, the differences between a robust economic simulation and an actual economy are fewer and less meaningful than one might think. Given that the very premise of the game confuses play and productive labor, then, it would be surprising to find that even its most casual players had not incorporated into their sense of play at least some trace of the power gamer’s pleasure in the laborious.

### *B. Farming as Production: The Economies of MMOs*

In 2001, economist Edward Castronova calculated the gross national product (GNP) of what was then the most populous MMO, EverQuest.<sup>20</sup> He arrived at the figure through the inventive application of standard econometric methods. First, he analyzed dollar-denominated sales of high-level EverQuest character accounts on real-money auction sites to derive the effective market price of a character’s level.<sup>21</sup> Then, Castronova used player surveys to establish the hourly rate at which the average EverQuest player leveled up.<sup>22</sup> Multiplying that rate by the price of levels gave him the amount of character wealth an average player created in an hour. Multiplying that amount by hours in a year, he got a GNP per capita of \$2,266 (a little more than Bulgaria’s).<sup>23</sup> And multiplying that figure by

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18. *Id.* at 88.

19. *Id.* at 89.

20. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 1 (Ctr. for Econ. Studies & Ifo Inst. for Econ. Research, CESifo Working Paper No. 618, 2001), <http://papers.ssrn.com/abstract=294828> [<http://perma.cc/M4NK-PEEX>]. Among other indicators, Castronova also calculated an exchange rate of \$0.0107 for EverQuest’s platinum piece currency (stronger than the yen) and an average hourly wage per player of \$3.42. *Id.*

21. *Id.* at 32–33. Castronova presumes the market price of a given character level to reflect the value of both the level attained and the coin, weapons, and armor typically owned by characters at that level. *Id.* at 33.

22. *Id.* at 33–34.

23. *Id.* at 33.

EverQuest's player population produced, finally, a total GNP of \$135 million.<sup>24</sup>

The figure shows statistically what any MMO player knows intuitively: MMOs may be games, but they are also economies. That they are virtual economies and not real ones might be a meaningful distinction for some purposes but not, as Castronova established, for the purposes of basic economic analysis. Nor is it the real-money market for virtual goods that makes them valid objects of such analysis. Indeed, even if MMOs had no internal markets of their own, the leveling treadmill alone would arguably supply the two basic features of any economic system: scarcity of goods and a choice of ways to allocate them.<sup>25</sup> More than any other feature of the games, however, it is the simple ability of players to transfer goods among themselves—found universally in MMOs—that has proved to be the most economically fateful. Without transferability, there can be no virtual currencies, virtual markets, real-money trading, or, of course, gold farming. With transferability, all of these are practically inevitable.

The economic history of MMOs, at least, suggests as much. The earliest MMOs, dating to the mid-1990s, had built-in transferability and virtual currencies. Organized player-to-player markets then arose in them spontaneously as buyers and sellers gravitated toward common trading spots, and some players began to set themselves up as full-time in-game merchants.<sup>26</sup> Only later did game designers start routinely building MMOs with markets in mind, as World of Warcraft's designers did, for instance, when they located automated auction houses in the capital cities of the game's fantasy realms.<sup>27</sup> Real-money trading emerged just as spontaneously and at least as predictably, given the number of players short on time or patience for the grind and happy to buy their way around it. The first trades, presumably, were informal arrangements among acquaintances, initiated with a check or cash payment outside the

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24. *Id.* For a similar, if less rigorous, macroeconomic portrait of an MMO, see Bo Moore, *Inside the Epic Online Space Battle That Cost Gamers \$300,000*, WIRED (Feb. 8, 2014, 6:30 AM), <http://www.wired.com/2014/02/eve-online-battle-of-b-r/> [<http://perma.cc/C92V-4XRR>] (calculating the aggregate real-money value of virtual goods lost in Eve Online during a single spaceship battle involving 7,548 participants).

25. Roger E. Backhouse & Steven G. Medema, *Retrospectives: On the Definition of Economics*, 23 J. ECON. PERSP. 221, 229 (2009) (citing a widely accepted definition of economics as "the science which studies human behavior as a relationship between ends and scarce means which have alternative uses").

26. See Castronova, *supra* note 20, at 26–29.

27. *Introducing the WoW Token*, BLIZZARD ENTMT. (Mar. 2, 2015), <http://us.battle.net/wow/en/blog/18141101/introducing-the-wow-token-3-2-2015> [<http://perma.cc/QY2N-AMAB>].

game and sealed with an in-game “gift” of goods from the seller’s character to the buyer’s. But the rise of auction sites like eBay and payment systems like PayPal soon ushered in a more commercial RMT. In-game merchants became real-money merchants, earning comfortable livings scouring virtual markets for bargains and selling their haul at a markup on websites like eBay.<sup>28</sup> When MMO companies started working with eBay and other auction sites to shut down virtual-item sales, the commercialization only accelerated, pushing RMT retailers onto their own increasingly high-volume e-commerce sites.<sup>29</sup>

Gold farming was the natural next step. As RMT retailers consolidated and their sales volumes grew (fueled in large part by the unprecedented success of the newly launched World of Warcraft), it grew clear that the cottage industry of individual players that had thus far been supplying merchants was too scattered a production force to keep up. Automation was one solution. For a time, programmers running “bot farms”—teams of unmanned MMO characters scripted to harvest virtual resources around the clock—became a major source of wholesale virtual gold for some retailers.<sup>30</sup> But the economics of offshoring ultimately prevailed. The going rate for one hour of a Chinese worker’s time was roughly \$0.30.<sup>31</sup> The virtual goods one MMO player could produce in an hour, meanwhile, were worth easily ten times that amount.<sup>32</sup> At these rates, some bot farmers have complained, a Chinese gold farm’s labor costs can be competitive even with a US bot farm’s hardware costs.<sup>33</sup> Live labor also makes it possible for gold farms to offer a product bot farms cannot: “power leveling” services, in which workers temporarily take charge of customers’ game accounts and level up their characters for them in round-the-clock bouts of play. These advantages alone perhaps explain why, five years after the launch of World of Warcraft,

28. See generally JULIAN DIBBELL, *PLAY MONEY: OR, HOW I QUIT MY DAY JOB AND MADE MILLIONS TRADING VIRTUAL LOOT* (2006).

29. See Andy Patrizio, *Virtual Baggage, Real Bucks*, WIRED (Oct. 1, 2001, 2:00 AM), <https://web.archive.org/web/20011001201825/http://www.wired.com/news/print/0,1294,47181,00.html> [<http://perma.cc/9PXH-WE3T>] (“Initially, EverQuest equipment was sold on eBay. But after Sony put a squeeze on the online auction site, all EverQuest-related sales have been banned. But nature abhors a vacuum and so does business. Enterprising gamers established PlayerAuctions, an eBay-like site purely for buying and selling equipment and accounts from online games.”).

30. See *id.*

31. See Dibbell, *supra* note 1.

32. See Castronova, *supra* note 20, at 35 (noting that the “average wage” of EverQuest players is \$3.42).

33. See, e.g., Mithra, Comment to *How a Gold Farm Works*, TERRA NOVA (Jan. 19, 2006), [http://terranova.blogs.com/terra\\_nova/2006/01/how\\_a\\_gold\\_farm.html#comments](http://terranova.blogs.com/terra_nova/2006/01/how_a_gold_farm.html#comments) [<http://perma.cc/E4E4-AYZB>].

a gold farm industry employing an estimated 400,000 workers had sprung into existence.<sup>34</sup>

What the logic of labor arbitrage cannot fully explain, however, is why so much of that industry has been located in China.<sup>35</sup> After all, other countries also have cheap labor and Internet connections, evidenced by the existence of gold farms in countries such as Indonesia, Romania, and Mexico. However, China has at least one advantage for gold farming not available to other low-wage countries—its vast population of online gamers, including roughly as many World of Warcraft players as are found in North America and Europe combined.<sup>36</sup> This means, for one thing, that gold farm operators can rely on a work force that needs little on-the-job training. It also means they can rely on workers who remain—to a surprising extent—engaged with the job not just as workers, but also as players. Even after months of twelve-hour shifts and eighty-four-hour weeks, for example, gold farmers may nonetheless visit nearby Internet cafés in their free hours to play World of Warcraft and other online games at their leisure.<sup>37</sup> Others, who will not go near a game after their working hours and are frank about their disenchantment with the job, will nonetheless admit they cannot help feeling the occasional burst of excitement in the midst of the virtual combat that is their daily routine.<sup>38</sup>

That even these ostensibly ludic moments redound to the potential economic benefit of the employer (after all, an excited worker is a focused worker, and even a worker killing monsters off-the-clock may be refining the efficiency of his on-the-job technique) might suggest that their playfulness is only illusory, lacking the defining autonomy of true play. Yet, as we saw with the power gamers, their play might also be spurring us toward more complicated notions of what play can be. Indeed, if we grant that power gaming (notwithstanding the suspicions of more casual players) is, in fact, a form of play, then there remains only narrow ground for insisting that gold farming is not. Looking purely at their behavioral interactions with the game, for example, one finds little to distinguish a power

34. Heeks, *supra* note 1, at 7.

35. See generally *id.* (estimating 85 percent of gold farmers to be from China).

36. Leigh Alexander, *World Of Warcraft Hits 10 Million Subscribers*, GAMASUTRA (Jan. 22, 2008), [http://www.gamasutra.com/php-bin/news\\_index.php?story=17062](http://www.gamasutra.com/php-bin/news_index.php?story=17062) [<http://perma.cc/HVQ2-R2PS>] (reporting subscriber figures of 5.5 million in Asia, 2 million in Europe, and 2.5 million in North America).

37. See Dibbell, *supra* note 1.

38. See Julian Dibbell, *The Chinese Game Room: Play, Productivity, and Computing at Their Limits*, 2 ARTIFACT 82, 83 (2011), <http://scholarworks.iu.edu/journals/index.php/artifact/article/view/3950/3629> [<http://perma.cc/84SW-RZ4B>].

gamer's long hours and maximal efficiency from those of the gold farmer. As for the more subjective aspects of their gaming, if a power gamer's stoic endurance of extended tedium and fatigue for the sake of more remote rewards can count as play, surely a gold farmer's activities can as well? Should the fact that a gold farmer's rewards are real wages, while the power gamer's are virtual prizes, be enough to draw a firm analytical line between gold farming and the entire universe of play? Perhaps this should be answered in the affirmative. Conversely, the more straightforward analysis may be to view gold farming as simply another one of the several play styles that commingle in an MMO, given how little the distinction between real wealth and virtual wealth seems to matter for most other purposes.

### *C. Farming as Problem: Gold Farming and the Law*

The area of law that speaks to gold farming most directly and most frequently is the law of contracts. Indeed, the job of a gold farmer is in one sense a daily encounter with contract law. By logging into a valid MMO account, a gold farmer begins each shift by stepping into a relationship that is bound by the provisions of the targeted MMO's End User License Agreement (EULA) and Terms of Use (TOU).<sup>39</sup> However, gold farming almost always constitutes an extended violation of those terms. Real-money trading and, by extension, gold farming are prohibited by the TOUs or EULAs of all popular MMOs;<sup>40</sup> the decisiveness of these prohibitions often contrasts strikingly with the cultural and economic ambiguities discussed above. For example, Blizzard's blunt ban on RMT in World of Warcraft—" [Y]ou may not sell in-game items or currency for 'real' money, or exchange those items or currency for value outside of the Game"<sup>41</sup>—does not appear to leave room for loopholes.

Though the language of these bans is clear, the reasons underlying them are not. The texts of the bans themselves say little or nothing about what harms they are meant to protect against. Elsewhere, in company statements and interviews, user forums, and game news sites, a handful of explanations have emerged over the years. Game companies sometimes complain of costs in goodwill and

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39. *World of Warcraft Terms of Use*, BLIZZARD ENTMT, [http://us.blizzard.com/en-us/company/legal/wow\\_tou.html](http://us.blizzard.com/en-us/company/legal/wow_tou.html) [<http://perma.cc/9YVK-3GYS>] [hereinafter *WoW Terms of Use*].

40. See, e.g., *id.*; see also *Zenimax Media Terms of Service*, ELDER SCROLLS ONLINE, [https://account.elderscrollsonline.com/terms-of-service?q=00000000-0000-0000-0000-000000000000&p=8ed9ff39-9396-4e77-a969-0195d391912e&ts=1450799256&c=zenimaxonline&e=live&rt=AfterEvent&h=d5ce8936b1644cba1b70678b43161847#\\_EN\\_Toc\\_02](https://account.elderscrollsonline.com/terms-of-service?q=00000000-0000-0000-0000-000000000000&p=8ed9ff39-9396-4e77-a969-0195d391912e&ts=1450799256&c=zenimaxonline&e=live&rt=AfterEvent&h=d5ce8936b1644cba1b70678b43161847#_EN_Toc_02) [<http://perma.cc/X8LC-7CX7>].

41. *WoW Terms of Use*, *supra* note 39.

customer-support time incurred when RMT deals go bad and players look to the company for redress. The complaint more commonly heard, especially from players themselves, is that buying advancement in the game is a form of cheating or “queue jumping.” A more sophisticated variation on this argument targets the gold farming incentivized by RMT, rather than RMT itself. By producing more wealth than the game economy was designed to accommodate, some players complain, the concentrated labor of gold farming creates in-game inflation that makes it harder for other players to get ahead.<sup>42</sup>

However, none of these complaints sufficiently explain why game companies should want to ban RMT. For one thing, the bans have costs of their own, including loss of subscription revenues from gold farms that are successfully shut down and, perhaps more significantly, potential loss of players who depend on RMT purchases for their enjoyment of the game. Even assuming fewer players rely on RMT than revile it as cheating, that assumption in itself does not make blanket prohibition the most cost-effective response. In a game without clear winners and losers, after all, it is not obvious what harms a player causes any other by spending more money than time to get ahead. It is also, therefore, not obvious that companies should ban RMT as a form of cheating rather than (as they do with other controversial play styles) segregate the minority of players who embrace it from the majority who do not.<sup>43</sup> And while gold farming’s inflationary effects may be real, they raise the question: of all the many sources of inflation in MMO economies—including the notable hyperproduction of power gamers—why prohibit only this one?<sup>44</sup> If game companies felt it made commercial sense to accommodate gold farming, they presumably would do so, factoring it into their fine-tuning of the game’s economy—just as they do with other inflationary phenomena.

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42. Muhammad Aurangzeb Ahmad, Brian Keegan, Jaideep Srivastava, Dmitri Williams, & Noshir Contractor, *Mining for Gold Farmers: Automatic Detection of Deviant Players in MMOGs*, 4 COMPUTATIONAL SCI. & ENG’G 340, 340, (2009) (“In-game economies are designed with activities and products that serve as sinks to remove money from circulation and prevent inflation. Farmers and gold-buyers inject money into the system disrupting the economic equilibrium and creating inflationary pressures [within the game economy].”).

43. For the majority of World of Warcraft players who do not enjoy being attacked by the “killer” type players, for example, unrestricted PvP play is a nuisance more concrete than RMT; yet rather than ban the killer style altogether, Blizzard has created separate servers where open PvP is permitted, while keeping it restricted on the rest. At least one company, in fact, has experimented with taking that approach to RMT. See Michael Zaenke, *SOE’s Station Exchange—The Results of a Year of Trading*, GAMASUTRA (Feb. 7, 2007), [http://www.gamasutra.com/view/feature/1716/soes\\_station\\_exchange\\_the\\_php](http://www.gamasutra.com/view/feature/1716/soes_station_exchange_the_php) [<http://perma.cc/JFE7-6J39>].

44. Castronova, *supra* note 20, at 33–35.

Even if the business logic of banning RMT remains somewhat opaque, it seems safe to assume that some underlying logic regarding the ban in fact exists. The almost universal presence of the ban in MMOs certainly suggests a reasoned conclusion by game companies that the prohibition's costs and benefits weigh ultimately in its favor. So too does the companies' willingness to defend their RMT bans in court. As early as 2002, in *Blacksnow Interactive v. Mythic Entertainment, Inc.*,<sup>45</sup> MMO developer Mythic Entertainment fended off an abortive challenge to its RMT prohibition by one of the first known gold farming operations.<sup>46</sup> In *Blizzard Entertainment, Inc. v. In Game Dollar, LLC*,<sup>47</sup> Blizzard sued a seller of farmed gold and power-leveling services and, though the harms alleged were chiefly from the seller's in-game advertising to World of Warcraft players, secured an injunction barring the defendant from RMT of any kind.<sup>48</sup>

In a more recent farming-related case, the much-cited *MDY Industries, LLC v. Blizzard Entertainment, Inc.*,<sup>49</sup> Blizzard won a judgment against a company that was selling software designed to automate World of Warcraft bots.<sup>50</sup> Although the ban on RMT was not directly at issue in that case, the district court's initial ruling noted that Blizzard objected to the software in part because it facilitated "farming" and real-money trading of virtual assets, "an activity expressly prohibited by the TOU."<sup>51</sup> That the case turned on an important question of first impression—namely, the extent to which violation of an online-service license agreement can trigger provisions of digital copyright—probably suffices to explain how it reached the appellate level.<sup>52</sup> But the fact that Blizzard fought the case as far as it did hints also at the importance to game companies of the RMT ban.

However, not all attempts at enforcing the ban have originated with the companies that impose it. In *Antonio Hernandez v. Internet*

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45. *Blacksnow Interactive v. Mythic Entm't, Inc.*, No. 8:02-cv-00112 (C.D. Ca. 2002).

46. Compl. at 1, *Blacksnow*, No. 8:02-cv-00112 (bringing action for interference with prospective economic advantage and unfair business practices against an MMO developer that had shut down virtual goods seller's eBay auctions and in-game accounts); see also Julian Dibbell, *Serfing the Web: Black Snow Interactive and the World's First Virtual Sweat Shop*, JULIAN DIBBELL (Jan. 2003), <http://www.juliandibbell.com/texts/blacksnow.html> [<http://perma.cc/U9VQ-RRNN>].

47. *Blizzard Entm't, Inc. v. In Game Dollar, LLC*, No. 8:07-cv-00589 (C.D. Cal. 2007).

48. Consent Permanent Inj. at 2, *In Game Dollar*, No. 8:07-cv-00589.

49. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010).

50. *Id.* at 954 (holding the bot maker liable for violation of the Digital Millennium Copyright Act and affirming the lower court's entry of a permanent injunction to prevent future violations); see also *Jagex Ltd. v. Impulse Software*, 750 F. Supp. 2d 228 (D. Mass. 2010).

51. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 2008 WL 2757357 at \*1 (D. Ariz. July 14, 2008).

52. *MDY Indus.*, 629 F.3d at 954–55.

*Gaming Entertainment, Ltd.*,<sup>53</sup> a World of Warcraft player brought a class action suit on behalf of all non-gold-selling players against what was then the leading retailer of farmed gold, Internet Gaming Entertainment, Ltd. (IGE), naming as co-conspirators all gold farmers who had ever supplied IGE. Though the parties settled before the court could reach a decision, the merits of the complaint are worth a closer look. The core harms alleged in it would have been familiar to anyone who had ever heard World of Warcraft players complain about the farming and selling of gold: it stoked inflation, obliging players either to buy gold or to play at a “competitive disadvantage,” spending far more hours gathering resources needed to level up than they otherwise would.<sup>54</sup> The central cause of action was a relatively simple contractual claim: IGE and its co-conspirators breached their promise under the TOU and EULA not to sell gold and, by doing so, breached their obligations to all other players as intended third-party beneficiaries of the initial contractual promise.<sup>55</sup> Yet, as Professor Joshua Fairfield has pointed out, it is not clear that a judge in this case would have found a third-party beneficiary clause implied in Blizzard’s licensing terms—or, for that matter, that a bilateral user license agreement can ever really be the right tool to protect the complex multilateral interests of an online social world’s users.<sup>56</sup>

Here, for example, the Blizzard EULA’s blanket prohibition of real-money trading does not quite align with Hernandez’s inclusion in his plaintiff class of players who have bought gold, presumably on the theory that it was gold farming’s impoverishing macroeconomic effects that obliged them to “violate the EULA and the [TOU] by purchasing gold from the Defendants . . . .”<sup>57</sup> Likewise, the inclusion of gold farmers generally as a vast class of uncharged co-conspirators further strains the limits of the contractual framework. It is almost as if what the plaintiff was seeking was not so much a private law remedy as something more broadly social—a sort of labor and employment law of the MMO, perhaps, in which courts serve to referee the conflict between competing modes of organizing the productive activity of players.

The legal scholarship relevant to RMT and gold farming traces roughly the same conceptual contours as the case law. Legal-academic fascination with virtual worlds, in general, and virtual

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53. *Hernandez v. Internet Gaming Entm’t*, No. 1:07-cv-21403 (S.D. Fla. 2008).

54. *See* Am. Class Action Compl. at 1–3, *Hernandez*, No. 1:07-cv-21403.

55. *Id.*

56. Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 453–54 (2008).

57. Am. Class Action Compl. at 12, *Hernandez*, No. 1:07-cv-21403.



economies, in particular, has generated hundreds of articles in the last decade.<sup>58</sup> And just as in the courts, the topic addressed most often in these articles appears to be that of virtual property rights.<sup>59</sup> This focus partly reflects attention drawn to the open virtual world Second Life, where RMT has never been prohibited and individual users have been known to amass holdings of virtual assets valued in the millions of dollars. But the question of whether MMO players retain any rights to their in-game assets other than what the game company grants them by agreement—a question looming in every legal challenge to the ban on RMT—has also produced a significant amount of scholarship. Virtual work, on the other hand, has been the subject of only a dozen or so articles discussing virtual work, and this includes articles that have taken up the question of whether virtual items acquired through in-game efforts should be taxed as income.<sup>60</sup> If we exclude these articles, there appear to be only two articles viewing virtual worlds through the lens of labor—both by Professor Miriam Cherry—focusing on how US employment and labor laws might apply to a range of activities in and around virtual worlds.<sup>61</sup>

In a sense, this Article simply picks up where Cherry's comments leave off. Unlike her work, however—and that of most other commentators on virtual worlds—this Article looks only at MMOs, forgoing discussion of Second Life and other virtual worlds marketed more as open-ended platforms than as games. The point is not so much to narrow the scope of the analysis as to sharpen its focus. In other words, this Article aims to keep the element of play front and center, thereby connecting the literature on virtual economies to work on the commodification of play and, through the latter, to debates on commodification more broadly.

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58. WestLaw Search, WESTLAW, [https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (search for “virtual worlds”). As of March 8, 2016, this search returns 1,242 articles and treatise entries.

59. WestLaw Search, WESTLAW, [https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=\(sc.Default\)](https://a.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default)) (search for “virtual property”). As of March 8, 2016, this search returns 509 articles and treatise entries.

60. See, e.g., Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1 (2007); Leandra Lederman, “Stranger Than Fiction”: *Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620 (2007); Theodore P. Seto, *When Is a Game Only a Game?: The Taxation of Virtual Worlds*, 77 U. CIN. L. REV. 1027, 1029–30 (2009).

61. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 993–94 (2011) [hereinafter Cherry, *A Taxonomy of Virtual Work*]; see Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009) [hereinafter Cherry, *Working for (Virtually) Minimum Wage*].

### III. COMMODIFICATION AND PLAY

#### A. *The Commodification Debate*

Norms against taking or giving money in exchange for the performance of an otherwise licit activity are, of course, a phenomenon much older than the bans on gold farming. Ancient examples include the Bible's strictures against prostitution and usury.<sup>62</sup> Newer restrictions have emerged as markets, technologies, and cultural practices have evolved. Babies and human body parts, for example, now number in the class of things that, for the most part, may be given but not sold. Likewise, the persistence of term limits on copyright, the denial of patents on human genes, and other checks on the modern expansion of intellectual property rights can be taken to express a judgment that some kinds of information are (or should be) priceless.

These prohibitions all seek to avoid what has come to be known as "commodification." Among social theorists, commodification has been a focus of analysis and debate for many years. The term itself is rooted in Marxist critique of capitalism's tendency to capture any aspect of human experience as a commodity to be bought and sold.<sup>63</sup> Among legal scholars, however, the commodification debate arguably began with the wholehearted embrace of that tendency by adherents of the market-oriented "Chicago school" of law-and-economics analysis, such as Professor Gary Becker and Judge Richard Posner.<sup>64</sup> Judge Posner's argument in favor of an open market in babies, for example, was a particularly provocative conversation starter, challenging defenders of the status quo of adoption laws to show that payments from adoptive to birth parents would not, in fact, produce

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62. See *Deuteronomy* 23:17–18 (King James) ("There shall be no whore of the daughters of Israel . . . Thou shalt not bring the hire of a whore, or the price of a dog, into the house of the Lord thy God for any vow: for even both these [are] abomination unto the Lord thy God"); *Ezekiel* 18:5–9 (King James) ("But if a man be just, . . . and hath not oppressed any, but hath restored to the debtor his pledge . . . [and] hath not given forth upon usury, neither hath taken any increase . . . he shall surely live . . .").

63. See, e.g., Jernej Prodnik, *A Note on the Ongoing Processes of Commodification: From the Audience Commodity to the Social Factory*, in 10 *TRIPLE-C: COMMUNICATION, CAPITALISM & CRITIQUE* 274, 274 (2012) (citing Marx and others for the proposition that "processes of transforming literally *anything* into a privatized form of (fictitious) commodity that can be exchanged in the circulation process are of fundamental importance for both the rise and reproduction of capitalism").

64. For an overview of the commodification debate in legal scholarship, see generally *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams, eds., 2005).

better outcomes for all involved, including the adopted children.<sup>65</sup> The debate ever since has largely been, on some level, a response to the Chicago school's commitment to what Professor Margaret Jane Radin has called "universal commodification" as both an analytic tool and a policy preference.<sup>66</sup>

Radin's own work on the subject is an extended, nuanced critique of universalism. For Radin, there are two main concerns that arguments like Posner's do not fully consider. First is the concern, resting on what Radin calls a "domino theory" of commodification, that creating markets in even a limited subclass of intimately personal interactions will cause market logics to spread corrosively to comparable but as-yet uncommodified interactions.<sup>67</sup> For example, even if adopted children and their parents are on balance better off with robust baby markets in place, their gains may not fully compensate for the harms—dignitary or otherwise—that could befall all children once they and their families know how the market quantitatively values any child's particular attributes.<sup>68</sup> The other concern is that, even if the mere act of pricing the priceless in itself does only marginal harm, such harm is inevitably interwoven with and magnified by the effects of poverty, racism, sexism, and other "wrongful subordinations" on would-be sellers of their own commodified personhood.<sup>69</sup>

Radin's arguments have in turn been challenged by another set of commentators. These scholars draw upon the insights and observations of economic sociology to question the notion implied in Radin's domino theory that there are realms of the social environment that are or could be kept wholly free of commodification. "Actual studies of concrete social settings, from auctions to households, do not yield descriptions of spheres neatly separated," write legal scholar Patricia Williams and sociologist Viviana Zelizer.<sup>70</sup> Instead, they explain that there exist "dense networks of social relations that intertwine the intimate and economic dimensions of life": markets and corporations sustained by personal ties, family homes shot through

65. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

66. MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS 2* (1996) ("Our investigation of contested commodification must begin with an understanding of the archetype in which commodification is uncontested.")

67. *Id.* at 95.

68. *Id.* at 100.

69. *Id.* at 163–72.

70. Joan C. Williams & Viviana A. Zelizer, *To Commodify or Not to Commodify: That Is Not the Question*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 362, 366 (2005).

with economic relations both internal and external.<sup>71</sup> For example, Noah Zatz extends this argument in his work on prison labor and employment law to show how even seemingly crisp distinctions between market and nonmarket activities can blur under close inspection—as when the freedom of participation that might be presumed to distinguish market labor from prison labor reveals itself to be less than total, compromised by the inequality of workplace power relations, the coercive threat of unemployment, and other elements of the “backdrop of compulsion” against which ordinary employees work.<sup>72</sup>

For Zatz, the instability of the distinction between markets and nonmarkets has a clear methodological implication—it suggests abandoning the distinction as a tool of analysis and making it instead an object of study, examining the lawmaking and other social processes that, under the guise of policing the line between markets and other social spheres, are often constructing it.<sup>73</sup> For Williams and Zelizer, similarly, the belief in a clear separation of markets and nonmarkets rests not on empirical reality, but on liberal and patriarchal ideologies whose pedigree dates to the origins of industrial capitalism.<sup>74</sup> There is a long and impressive intellectual history, they note, of dividing social reality into discrete, mutually antagonistic realms of possessive individualism, on the one hand, and domestic communalism on the other—of rationality and sentiment, of self-interest and solidarity, of *Gesellschaft* and *Gemeinschaft*.<sup>75</sup> This way of looking at the world has shaped the world we know, Williams and Zelizer acknowledge, but it is not the only plausible way; nor is it, they argue, the most accurate.<sup>76</sup>

In rejecting this history of dualisms, commodification theory’s sociological turn seeks also to reframe the commodification debate as more than a binary choice between resisting commodification and embracing it. Yet, ultimately, there is a conflict of interests at the core of the debate that is not so easily rationalized away. Consider the “double bind” that Radin poses as a paradigmatic hard problem for commodification theory: that of the impoverished person whom hunger has pushed to the brink of prostituting herself or selling a

71. *Id.*

72. Noah D. Zatz, *Prison Labor and the Paradox of Paid Nonmarket Work*, in *ECONOMIC SOCIOLOGY OF WORK* 369, 386 (Nina Bandelj ed., 2009).

73. *Id.*; see also Nina Bandelj, *Toward an Economic Sociology of Work*, in *ECONOMIC SOCIOLOGY OF WORK*, *supra* note 72, at 15.

74. Williams & Zelizer, *supra* note 70.

75. *Id.* at 364.

76. *Id.* at 365.

kidney.<sup>77</sup> If the law stops her, she may starve. If the law permits her to proceed, she risks harms to her health and dignity. In neither case does she fully have a choice; in neither case can we be happy with the consequences of the law. The dilemma is gripping, but for Williams and Zelizer, and as Radin herself acknowledges, it may also be false, an artifact of the compulsion to judge commodification rather than the broader conditions of oppression that give rise to hunger and marginalization.<sup>78</sup>

Yet Radin is right, at least rhetorically, to focus on the double bind, because it highlights a tension that has thus far fueled the debate and cannot be written off as a figment of the liberal imagination. There is ultimately no easy resolution of the conflict between, on the one hand, individuals' interest in the right to maximize the value of a personal attribute by trading it away and, on the other hand, the equally powerful individual interest in the integrity of self and of the ties that bind individuals' selves, based on more than the immediate self-interest of commercial exchange, to other selves. The former interest thrives in market settings, and the latter does not—yet neither is purely economic nor purely personal. There is a dignity in the autonomy that freedom to participate in markets to the fullest represents, just as there are material benefits to social solidarity and psychic well-being. They are the defining poles of the commodification debate, and they are just as critical to understanding what is at stake when the commodified human attribute is the capacity for play.

## *B. The Commodification of Play*

### 1. Play Theories and Commodification

In a list of things closely related to human beings' sense of personhood and community (and therefore likely to be governed by regulatory regimes that limit their circulation as market goods), Radin includes the following: "homes, work, food, environment, education, communication, health, bodily integrity, sexuality, family life, and political life."<sup>79</sup> Radin does not explain why play is not on the list, but she is hardly alone in leaving it out. Indeed, play appears to be absent as a topic of discussion from the entire body of legal scholarship with which Radin's work on commodification is in conversation.

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77. RADIN, *supra* note 66 at 161.

78. Williams & Zelizer, *supra* note 70, at 373; see RADIN, *supra* note 66 at 123–30.

79. RADIN, *supra* note 66 at 113.

This absence is puzzling. In other scholarly realms, the commodification of play has been a topic of at least indirect concern for nearly a century. After all, in the conventional modern view, play is not just an essentially noneconomic activity but, arguably, *the* essential noneconomic activity. That we conventionally speak of work and play as opposites is perhaps the bluntest cultural expression of this notion. But sophisticated theories of play have also tended to support it. Johan Huizinga, in his classic cultural history of play *Homo Ludens*,<sup>80</sup> declared it a defining characteristic of play that it is “connected with no material interest, and no profit can be gained by it.”<sup>81</sup> Taking the definition further, sociologist Roger Caillois called play “an occasion of pure waste”<sup>82</sup> and warned of what follows when it becomes productive of real-world consequences, such as money:

What was an escape becomes an obligation, and what was a pastime is now a passion, compulsion, and source of anxiety. The principle of play has become corrupted. It is now necessary to take precautions against cheats and professional players, a unique product of the contagion of reality.<sup>83</sup>

Along similar lines, philosopher Bernard Suits emphasized the essential inefficiency of play and games, citing the example of foot race contestants circling around a track rather than cutting more directly across the field to the finish line.<sup>84</sup> For Suits, this thoroughgoing commitment to the non-productiveness of play was the key ingredient in the “lusory attitude” that distinguishes play from other forms of exertion.<sup>85</sup>

More recent thinking about play, however, has begun to question the insistence on separating it from productivity. Particularly through the work of play theorist Brian Sutton-Smith, this reconsideration of play’s productive dimensions has resulted from careful review of developments in the philosophy, psychology, and ethnography of games and play.<sup>86</sup> Among those developments, special

80. JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE* (1955).

81. *Id.* at 13.

82. ROGER CAILLOIS, *MAN, PLAY, AND GAMES* 5 (Meyer Barash, trans., 2001).

83. *Id.* at 44–45.

84. BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE AND UTOPIA* 65 (2014).

85. *Id.* at 49 (“[I]t will be necessary to take account of one more element, namely, the attitudes of game players *qua* game players. I add ‘*qua* game players’ because I do not mean what might happen to be the attitude of this or that game player under these or those conditions (e.g., the hope of winning a cash prize or the satisfaction of exhibiting physical prowess to an admiring audience), but the attitude without which it is not possible to play a game. Let us call this attitude . . . the *lusory* (from the Latin *ludus*, game) attitude.”).

86. See BRIAN SUTTON-SMITH, *THE AMBIGUITY OF PLAY* 173–213 (1997). See also Thomas M. Malaby, *Anthropology and Play: The Contours of Playful Experience*, 40 *NEW LITERARY HIST.* 205 (2009).

mention should go to psychologist Mihaly Csikszentmihalyi's research on "flow," an exhilarating state of hyper-focused activity that appears to happen to people as often and as intensely on the job as in the midst of play.<sup>87</sup> Yet as much if not more of the impetus to rethink the work-play opposition has come not from combing through the literature, but from researchers' direct experience of a burgeoning landscape of video games that ranges from deceptively simple exercises in mobile-app masochism like Flappy Bird to the level grinding, power gaming, and real-money trading of MMOs.<sup>88</sup> The more play theorists see of what play can be, the firmer they appear to grow in their conviction that the once-sacrosanct conceptual firewall between play and productivity has all along really been just a relic of capitalist ideological history: a four-hundred-year-old "Puritan ethic of play" (as Sutton-Smith calls it) designed to reinforce the Protestant work ethic by dismissing play as utter uselessness.<sup>89</sup>

Having moved swiftly from its initial faith in industrial-age dualisms to a more nuanced sense of the intertwining of economic and noneconomic dimensions within a single social realm, play theory has traced an intellectual trajectory almost identical to the one described above for commodification theory—and the similarity can hardly be accidental. In fact it is not—the arguments play theorists have been working through are more than just analogous to the commodification debate; they are part of it.

This can be difficult to recognize when so much of the commodification that stirs gamers to debate falls outside familiar patterns. Real-money trading is of course a classic encroachment of markets on nonmarket space. But online games provide many opportunities for markets to make themselves felt without money ever changing hands. As observed in the phenomenon of MMO power gaming,<sup>90</sup> for example, power gamers' playing hours and task pacing can reach levels that can feel like those of a paid job—especially when considered with the economic mechanisms that permeate the game—and provoke some of the same anxiety, compulsion, and sense of obligation Caillois identified as symptoms of play's contamination by the "contagion of reality."<sup>91</sup> At what point are there enough indicia

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87. See MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 143–63 (2008) (chapter on "Work as Flow").

88. See Celia Pearce, *Productive Play: Game Culture From the Bottom Up*, 1 *GAMES & CULTURE* 17 (2006); Yee, *supra* note 15.

89. See SUTTON-SMITH, *supra* note 86, at 201 (citing Max Weber's famous essay *The Protestant Ethic and the Spirit of Capitalism* to explain the powerful religious and cultural forces that have elevated work at the expense of play in the modern West).

90. See *supra* text accompanying notes 15–19.

91. See *supra* note 83 and accompanying text.

of commodification that we can declare, even absent any real-money transaction, that commodification has occurred? And would we do so even knowing that a power gamer may profess to take a certain pleasure in the stress and intensity of his playing style?

Spillover effects are another way for market dynamics to make themselves felt. Assuming we count the power gamer's play style as an instance of commodification in itself, then the more casual player who feels pressured to keep up with that pace has also been influenced by commodification. Such effects can be more acute in other types of games. Social-media-based leveling games like the Facebook hit FarmVille, for instance, are typically played for free by the majority of players, with revenues derived from advertising and in-game sales of power-ups to players impatient to reach the next level.<sup>92</sup> In principle, those who play for free need never think of themselves as customers, but they may feel in practice the effects of the business model one way or another. Incentivized to sell more power-ups, the game company will tend to slow the leveling pace or otherwise jigger the game mechanics to wear down the patience of the highest-level free players. The advertisements channel, likewise, will incentivize the company to keep players in the game for as long as possible, leading to more addictive game mechanics than the player of a subscription-fee-based game would encounter.

Other revenue models pose yet more challenging commodification scenarios. For example, some games accrue revenues from third-party purchases of player services rather than from advertisements or sales to players. To illustrate, players who want a power-up may first have to fill out a customer's survey or give feedback on a customer's product.<sup>93</sup> In these circumstances, the player steps outside the game to perform revenue-generating actions required to continue with the game. In some variations known by the generic term "gamification," playing the game *is* the required action.<sup>94</sup> In one such experiment, Google offered a moderately addictive team-based, matching game online in which teams were presented with images from Google's database and earned points if, without colluding,

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92. See Doug Gross, *The Facebook Games that Millions Love (and Hate)*, CNN (February 23, 2010, 10:07 AM), <http://www.cnn.com/2010/TECH/02/23/facebook.games/> [<http://perma.cc/46VH-ARX7>] (describing the principle source of player-derived revenue in games owned by FarmVille's operator as "the roughly 1 to 3 percent of the player base that pays for in-game items, such as a barn in FarmVille").

93. 'Crowdsourcing' Employer Denies Minimum-Wage Violations: *Otey v. CrowdFlower Inc.*, 2013 WL 444500 at \*1 (WESTLAW J. EMP.) (quoting a CrowdFlower executive, "I love it because we almost trick the game players into doing something useful for the world while playing these games. Just to do 10 minutes of real work that a real company can use and we'll give you a virtual tractor").

94. See Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851 (2011).



they came up with the same terms as labels for the images. Players knew that in playing the game they were performing a service for Google—coming up with functioning image tags at a rate that artificial intelligence was incapable of matching at the time.<sup>95</sup> Players did not have to know this to enjoy the game, however. Could we even call it commodified play if only Google felt the economic effects of the transaction? What about other instances of gamification? Does a website that turns children’s household chores and homework into a leveling game cross the line into commodification of play, even if there are no revenues?<sup>96</sup>

In sum, play poses a rich set of questions for commodification theory, which would be well served by the incorporation of play into its list of core problem areas. Now that play theorists have rejected the “Puritan” dismissal of play as pure waste, they are faced with a model that provides more flexibility but also more complexity. Before, any activity that had an economic dimension was not play. But what then is play? In their own attempts to move beyond simple binarisms, play theorists would do well to recognize their common intellectual cause with the theorists of commodification. And to begin with, play theory might do best to look more closely than it has at commodification theory’s primary source for social understandings of the relationship between markets and fundamental human attributes: the law.<sup>97</sup>

## 2. Commodified Play and the Law

Unlike both classic play theory and conventional wisdom, the law seems to recognize no stark distinction between work and play. It certainly has no trouble acknowledging that a player can be a worker—as indicated by the well-established recognition of professional athletes’ unions under labor laws.<sup>98</sup> Likewise, even a

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95. Michael Arrington, *Google Image Labeler Uses Human Labor*, TECHCRUNCH (Sept. 1, 2006), <http://techcrunch.com/2006/09/01/google-image-labeler/> [<https://perma.cc/N4ZB-N9QQ>].

96. CHORE WARS, <http://www.chorewars.com/help.php> [[perma.cc/88SA-H7QY](https://perma.cc/88SA-H7QY)] (“Chore Wars lets you claim experience points for household chores. By getting other people in your house or workplace to sign up to the site, you can assign experience point rewards to individual tasks and chores, and see how quickly each of you levels up.”).

97. A notable exception to play theory’s general lack of attention to case law is Greg Lastowka’s chapter on “Games” in his *Virtual Justice: The New Laws of Online Worlds*, to which my own discussion in the following section is greatly indebted. See GREG LASTOWKA, VIRTUAL JUSTICE: THE NEW LAWS OF ONLINE WORLDS 103–21 (2010). Huizinga also famously discusses law in *Homo Ludens*, but he does so only to compare its systemic similarities to—and ancient roots in—play. HUIZINGA, *supra* note 80 at 76.

98. See, e.g., Michael H. LeRoy, *Federal Jurisdiction in Sports Labor Disputes*, 2012 UTAH L. REV. 815 (2012) (“Textual and data analysis of eighty-three published opinions from 1970-2011 shows that professional athletes . . . used two federal laws to achieve greater labor

rigorously policed amateurism may not suffice to keep courts from assimilating play to the laws that govern work, as rulings granting employee status to student athletes have shown.<sup>99</sup> Conversely, there is no precedent to rule out the proposition that work can still be play. Indeed, whatever Caillois's doubts about the corrupting influence of money and professionalism on play,<sup>100</sup> strong norms against the "throwing" of professional games evince a general expectation that professional athletes are not merely mimicking play when they do their jobs—and the law's support for such norms, exemplified in the legal aftermath of the 1919 "Black Sox" scandal, implicitly endorses that expectation.<sup>101</sup> By the same token, if the law really accepted the mutual exclusivity of work and play, it would have to exclude from its definitions of employment not only any professional player who takes her job seriously but also, arguably, anyone who has fun doing her job.

This is not to say that the law is incapable of drawing lines between what is play and what is not. When called upon to do so, however, courts tend to focus not on the presence or absence of Suits's "lusory attitude"<sup>102</sup> in the participants (a difficult inquiry even granting the distinguishability of such an attitude from the "flow" state of a happy worker), but on the arbitrary rules that are equally pervasive features of play. When intervening in disputes arising from the midst of organized game play, such as negligence suits over unnecessary roughness or bad referee calls on the football field, courts have often deferred to the game as if to a parallel jurisdiction, presuming to pass judgment only on behavior that did not constitute play as the game's rules defined it.<sup>103</sup> Where courts have presumed to

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market mobility. Under the National Labor Relations Act (NLRA), players formed unions and bargained collectively with leagues.”)

99. See, e.g., Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete As Employee*, 81 WASH. L. REV. 71 (2006). But see *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015) (allowing the NCAA to restrict colleges from compensating athletes beyond the cost of attendance); *Nw. Univ.*, 362 NLRB 167 (2015) (declining to assert National Labor Review Board jurisdiction over a petition by Northwestern University football players for recognition of their right to unionize).

100. See *supra* note 83 and accompanying text.

101. See Douglas Linder, *The Black Sox Trial: An Account* (2010), <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksoxaccount.html> [<http://perma.cc/66CA-V5ML>] (detailing the trial and acquittal of eight Chicago White Sox players on charges of fraud for throwing the 1919 World Series). But see Matthew B. Pachman, Note, *Limits on the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1414 (1990) (discussing legal limits on the power of governing athletic bodies to enforce rules including those against gambling on games by participants).

102. See *supra* note 83 and accompanying text.

103. See *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979) (finding a football player's crippling backhand blow to another's head mid-game to be actionable only because it exceeded the degree of violence permitted by football's rules); *Ga. High Sch. Ass'n v.*

pass judgment on a rule itself, they have done so on the similarly deferential premise that they judged only whether the rule was actually a rule of the game in question.

In deciding which rules are, in fact, game rules, courts have looked to a variety of factors. In some cases, the question has been who imposed the rule. In *Uston v. Resorts Int'l Hotel, Inc.*,<sup>104</sup> the New Jersey Supreme Court held that the state's Casino Control Commission had sole authority to make the rules of casino games and that an Atlantic City casino's rule against card counting in blackjack—unsupported by any corresponding rule set by the Commission—was therefore unenforceable against a professional card counter.<sup>105</sup>

In other cases, courts have inquired more directly into the relationship between the rule and the game. In *PGA Tour Inc. v. Martin*,<sup>106</sup> for example, the Supreme Court invalidated a rule by the Professional Golf Association (PGA) requiring golfers to walk between holes rather than take a cart on the grounds that it was not “an essential attribute of the game itself.”<sup>107</sup> The reasoning in *Martin* drew in part on historical accounts of how golf has always been played.<sup>108</sup> But in videogame clone cases like *Tetris Holding, LLC v. Xio Interactive, Inc.*,<sup>109</sup> courts have had to make more purely formal decisions about which aspects of a computer game are embodiments of rules (and therefore not copyrightable) and which are aesthetic features.<sup>110</sup>

Therefore, if the law seems willing to accept in principle that play is at times indistinguishable from work, it seems equally amenable to the task of protecting play from the “contagion of reality”

Waddell, 285 S.E.2d 7 (Ga. 1981) (holding that courts of equity are without authority to review decisions of high school football referees because those decisions do not present judicial controversy); see also LASTOWKA, *supra* note 97, at 105–13 (citing Hackbart and other cases to argue that “the gulf between law and games is . . . due to the fact that games constitute a rival regime of social ordering”).

104. *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370 (N.J. 1982).

105. *Id.* at 166. By counting the number and face values of cards dealt by a casino blackjack dealer, players can gain an advantage over the house that effectively assures them a profit from long-term play. In this and other aspects of their livelihood, professional card counters are perhaps the nearest analogue to gold farmers outside of the MMO context.

106. *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001).

107. *Id.* at 685.

108. *Id.* at 683–85.

109. *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012).

110. See *id.* at 404 (“The game mechanics and the rules are not entitled to protection, but courts have found expressive elements copyrightable, including game labels, design of game boards, playing cards and graphical works.”); see also Bruce E. Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439, 442, 477 (2011) (elucidating the rationale for the exclusion of game rules from copyright).

as may be necessary. In the context of online games and their economies, this structural ambiguity has led some commentators to call, perhaps impatiently, for clarification of the law's position on the commodification of online play. On one hand, Joshua Fairfield has advocated for recognition of robust player property rights in virtual assets held not only in Second Life-type worlds but also in MMOs, arguing that the standard end-user contract is an insufficient mechanism for protecting players' interests in the valuable fruits of their play.<sup>111</sup> On the other hand, Edward Castronova, disturbed by the implications of his own economic analyses, has both echoed Radin's concerns about runaway commodification and argued that the transmutability of virtual commodities into real ones threatens the function of virtual worlds as havens of play and fantasy.<sup>112</sup> He shares Fairfield's skepticism that the EULA is adequate to protect players' interests, including their interests in guarding against the domino effects of commodification.<sup>113</sup> Castronova proposes strengthening the EULA through creation of a doctrine of "interration" for virtual worlds, analogous to that of incorporation for organizations, which would limit the reach of property, tax, employment, and other primarily economic laws into these play spaces.<sup>114</sup>

Even focusing instead on the fault line between work and play rather than on questions of property and contract does not bypass or resolve the disagreement between Fairfield and Castronova. Their respective concerns effectively recapitulate the commodification debate's fundamental tension—between validating the interest in the market alienability of intimate attributes and preserving the integrity of personal and communal space—and a mere reframing of that tension is not likely to resolve it. Moreover, the line between work and play is hardly, in itself, a fount of clarity. Nonetheless, by narrowing the question to the similarities and differences between gold farmers and other online gamers, we gain a perspective on the problem of commodified play that may afford both new insights and solutions.

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111. Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047, 1082 (2005). *But see, among others*, Steven J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443, 444 (2007) (arguing that any property claims players might advance in a game's assets must remain subordinate to those of the game developer).

112. Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185, 196 (2004).

113. *Id.* at 197.

114. *Id.* at 201; *see also* Yen-Shyang Tseng, Note, *Governing Virtual Worlds: Interration 2.0*, 35 WASH. U. J.L. & POLY 547, 562 (2011) (discussing further the "interration" concept). Other discussions of virtual worlds have similarly argued for protecting them from the impingements of economic law. *See, e.g.* Camp, *supra* note 60, at 69 (arguing for qualified exemption of virtual economies from income taxation as a response to "the feared commodification of virtual worlds").

## IV. ARE UNPAID FARMERS EMPLOYEES?

This Article presumes that gold farming meets the definition of employment necessary for coverage under US labor and employment laws.<sup>115</sup> Therefore, the first question to ask in distinguishing gold farmers from their unpaid counterparts is the extent to which that definition also covers unpaid farming. As mentioned above, this inquiry relies largely on Miriam Cherry's analysis of employment law as it applies to virtual work.<sup>116</sup> However, Cherry's treatment of the question is in some ways at once both too broad and too narrow to serve this Article's purposes. It is too broad because Cherry's focus extends beyond the uniquely ludic space of MMOs—to Second Life and other virtual workplaces in which the element of play has a less than central role.<sup>117</sup> It is simultaneously too narrow because it does not extend to varieties of work that might, by way of comparison, situate gold farming within the commodification debate more generally.

Apposite points of comparison are not difficult to identify. The contested employment status of student athletes is an obviously relevant case of ambiguously commodified play. Sex work also comes to mind as the commodification of a pleasure that is as peculiarly personal, in many ways, as that of play. Yet the singularly economic character of MMO play complicates these comparisons. Leave the money out of sport, sex, domestic care, and other canonically contested commodities, and what remains are not obviously economic activities. Keep the RMT out of an MMO, however, and it remains essentially a game of productive accumulation and market exchange. Accordingly, MMO farming invites comparison not so much to other forms of commodified or commodifiable play as to prison or slave labor, in which the laborer performs conventionally economic activities (for example, construction, manufacture, or farm work) but for unsettlingly unconventional motives.<sup>118</sup>

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115. See *supra* text accompanying notes 3–4 (describing the similarity of gold farmers' conditions of employment to those of workers covered by US employment and labor laws).

116. See, e.g., Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 61.

117. See *id.* at 1089 (discussing the “crowdsourcing” site Amazon Mechanical Turk, a virtual labor market in which data entry, metatagging, and other microtasks are assigned and paid for); see also AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome> [perma.cc/6AED-3BHE].

118. The rumor that Chinese prisons have long enlisted inmates in gold farming operations lends no particular force to this comparison but is hard to resist passing along. See Danny Vincent, *China Used Prisoners in Lucrative Internet Gaming Work*, THE GUARDIAN (May 25, 2011), <http://www.theguardian.com/world/2011/may/25/china-prisoners-internet-gaming-scam> [perma.cc/9V5V-BEU9] (quoting one ex-prisoner's recollection of forced gold farming, “If I couldn't complete my work quota, they would punish me physically. . . . We kept playing until we could barely see things”).

For this and other reasons, the analysis in this Part rounds out its frame of reference by looking to modern case law on prison labor, particularly to Noah Zatz's insightful discussions of the law's struggles to resolve the employment status of prison laborers.<sup>119</sup>

### A. Do Players Meet the Control Test of Employment?

The Fair Labor Standards Act defines an "employee" as "any individual employed by an employer."<sup>120</sup> To "employ," in turn, is to "suffer or permit to work."<sup>121</sup> As federal statutory definitions of employment go, this one is fairly typical in its opacity.<sup>122</sup> Faced with such definitions, courts fill in the blanks by reading them to incorporate the common law test for employment. This test derives from traditional agency law and focuses on "the hiring party's right to control" the worker and her work.<sup>123</sup> Courts have developed a long, non-exhaustive list of factors for determining whether a worker is under such control and therefore an employee rather than an independent contractor.<sup>124</sup> A finding of employee status is supported when: (1) the employer has the power to direct the way work is done, to set the hours worked, or to hire and fire; (2) when the employer provides work benefits; (3) when the employer (rather than the worker) supplies the requisite equipment; (4) when the work relationship between the parties is permanent or relatively long-lasting; (5) when the work requires low skills and little training; or (6) when pay is tied to time worked rather than projects completed.<sup>125</sup>

Applying this control test to virtual work, Cherry does not appear to contemplate the possibility that the test could identify a relationship of employment between an MMO's developer and its players.<sup>126</sup> This may be a simple oversight, since Cherry's subsequent

119. See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857 (2008); see also Zatz, *supra* note 71.

120. 29 U.S.C. § 203(e)(1) (2014).

121. 29 U.S.C. § 203(g) (2014).

122. See Zatz, *supra* note 119, at 871 n.50 (citing the Equal Employment Opportunity Act's similarly "brief, vague" definition of employment).

123. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–23 (1992).

124. See *id.* at 323–24 (providing a nonexclusive list of twelve such factors).

125. See *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1208–09 (11th Cir. 2003); *Herman v. Express Sixty-Minutes Delivery Serv.*, 161 F.3d 299, 303–05 (5th Cir. 1998).

126. Cherry's control-test discussion focuses, instead, on the documented relationship between a marketing company operating inside Second Life and the Second Life users it hired to work shifts as "greeters" in its virtual retail shops. Noting that the Internal Revenue Service already issued a private letter ruling that, under a control-test analysis, the greeters were employees for the purposes of Social Security tax laws, Cherry nonetheless concludes that their

discussion of MMO item farming seems to presume that if farming is *work* covered by the FLSA, then it is the MMO's developer for whom the farmer effectively works.<sup>127</sup> Yet if Cherry means to instead imply that courts are likely to be wary of claims that game companies control players to the same extent employers control employees, her doubt is reasonable. Considering some of the work regimes that have been found insufficiently controlling to amount to employment—like the delivery service in *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*,<sup>128</sup> which contractually required its drivers to be on-call around the clock but otherwise allowed them to “set their own hours and days of work and . . . reject deliveries without retaliation”<sup>129</sup>—a court might take one look at the similarly permissive quest-assignment engines of most MMOs and declare them just another form of independent-contracting scheme.

Yet any court that took the time to understand MMOs as a whole would likely recognize that the analogies do not come so easily. Control as it is exercised in a modern online game is very different from control as it functions in a traditional workplace; proper comparison requires some adjustment for the differences. Imagine, first, a real-world workplace in which the proprietor controls the environment as totally as an MMO developer controls its world: a delivery service, for example, that can alter at whim not only the decor in the drivers' break room but the look, feel, and function of everything else they interact with, such as the cars they drive, the roads they drive on, or even the bodies they come to work in. Imagine, next, that the real-world employer also has the MMO developer's power to fine tune not just the working environment but the workers' motivations—that it can dispense with the blunt incentive of regular wages and instead deploy the proven behavioral-psychological methods of operant conditioning, doling out loot and other rewards on a frequency curve precisely calibrated to induce compulsive repetition of even the most mindless tasks.<sup>130</sup> Finally, consider whether—in so thoroughly controlled a workplace—the ability of workers to “set their own hours and days of work” or to “reject [assignments] without

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employee status under the FLSA would be “a close question.” Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 61, at 1096–98.

127. *Id.* at 1102 (“[W]hile performing a task may not directly benefit the company, it might provide an indirect benefit . . . [that] could attract more users to the world.”).

128. *Herman*, 161 F.3d at 303.

129. *Id.*

130. See NICK YEE, *THE PROTEUS PARADOX: HOW ONLINE GAMES AND VIRTUAL WORLDS CHANGE US—AND HOW THEY DON'T* 39–43 (2014) (discussing MMO designers' deliberate use of operant-conditioning reward schedules to structure the leveling grind).

retaliation” can really be the same persuasive indicium of independence that it was to the *Herman* court.

It cannot. Once the full extent of the MMO’s control over its players is conceded, there remain no decisive obstacles to deeming MMO players employees of the MMO and its developer among the factors and principles of the control test.<sup>131</sup> It is true that an MMO developer’s control over player performance is less direct than a conventional employer’s control. But even if that fact necessarily made such control less efficacious, control-test doctrine explicitly abjures any inherent distinction between direct and indirect control.<sup>132</sup> A more qualified objection might be that MMO play fails more robust versions of the control test, such as the variation often applied in FLSA cases and sometimes characterized as a test of “economic reality.”<sup>133</sup> In this variant, courts may find employment of an individual by a hiring entity “if, as a matter of economic reality, the individual is dependent on the entity.”<sup>134</sup> If dependence here means dependence for survival, then no unpaid game play could qualify. What appears to be meant by the word, however, is simply a more ample notion of employer control, which in some courts’ expressions of the concept, seem even more likely than the standard test to find employment in the kind of control to which MMO players are subject.<sup>135</sup>

Even narrower objections to the claim that MMO companies control their players’ efforts are possible. For example, one could argue that quest rewards and other loot drops effectively pay players for projects completed rather than time worked or that players effectively invest in their own work equipment by using their own computers and Internet connections.<sup>136</sup> Both of these arguments would indicate independent-contractor status under the control test. But as to the first example, quests and other tasks in MMOs generally proceed to completion at rates predictable enough that their rewards amount to piecework pay, which courts repeatedly have found

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131. In principle, even gold farm employees can also be employed by the game company in this sense, since the common-law test recognizes no inherent bar to a worker having more than one employer. *Martinez-Mendoza v. Champion Int’l Corp.*, 340 F.3d 1200, 1208 (11th Cir. 2003) (recognizing the possibility of joint employment under the FLSA).

132. *Id.* (“[C]ontrol may be either direct or indirect, taking into account the nature of the work performed.”).

133. See *Zatz*, *supra* note 119, at 871 n.50 (gathering “economic reality” cases).

134. *Martinez-Mendoza*, 340 F.3d at 1208.

135. See *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) (calling the “economic reality” variant a test of “functional control over workers even in the absence of . . . formal control . . .”).

136. Cherry makes this argument in applying the control test to virtual work in general. *Cherry, Working for (Virtually) Minimum Wage*, *supra* note 61, at 1098.



consistent with employment status.<sup>137</sup> As to the second example, even the most avid MMO players use their computers and Internet connections for more than just playing MMOs, and courts applying the control test have only found equipment used *exclusively* for work to weigh against employee status.<sup>138</sup> And even if both arguments proved valid, it would take more than two minor adverse factors to tip the balance of a totality-of-the-circumstances inquiry such as the control test.<sup>139</sup>

If control were the only issue that mattered in deciding whether MMO play constitutes employment—as in most such decisions it does—then the matter would stand decided. But one more question—typically reserved for cases testing the outer limits of employment law—must be asked: does MMO play constitute work?

### *B. Do Players Meet the Economic Test of Employment?*

When the law must decide what does and does not fall under the governance of the FLSA or other employment statutes, it typically does so on the basis of either the control test or a statutory exemption.<sup>140</sup> If the activity in question neither fails the control test nor belongs to any category of employment explicitly exempted by the statute, then the inquiry almost always ends, and the activity is recognized as employment. In rare cases, however, the court may insist on a new stage of inquiry, aimed at a set of questions markedly distinct from those of the control test.

What provokes the heightened scrutiny in these cases is an anomaly that Zatz, in his work on the labor of prisoners, calls “paid nonmarket work.”<sup>141</sup> This includes not only prison labor but a range of other phenomena—graduate student teaching, workfare programs, therapeutic jobs for the disabled, to name a few—in which people are paid for labor performed in institutional contexts aimed primarily at rehabilitation or self-improvement.<sup>142</sup> As Zatz explains:

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137. See *Herman v. Express Sixty-Minutes Delivery Serv.*, 161 F.3d 299, 309 (5th Cir. 1998) (gathering cases holding pieceworkers of various sorts to be employees).

138. See *id.* at 304 (finding drivers' personal use of delivery cars to weigh against their being independent contractors); see also *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1051–52 (5th Cir. 1987) (discounting as evidence of independent contractor status a worker's work-related use of a home computer originally bought for school use).

139. See *Brock*, 814 F.2d at 1054 (quoting *Brennan v. Partida*, 492 F.2d 707, 709 (5th Cir. 1974)) (noting that in applying the control test, “[i]t is erroneous to focus on a single factor . . . and thereby fail to consider the entire circumstances of the work relationship”).

140. Zatz, *supra* note 119, at 867–68.

141. Zatz, *supra* note 119, at 862.

142. *Id.*

When these workers assert employment rights, they face fierce resistance on the ground that their work lies outside of the labor market. The dispositive legal question always is whether an employment relationship exists. Courts determine the answer by asking whether the relationship is economic in nature.<sup>143</sup>

Zatz traces the emergence of this new employment test through a series of lawsuits by prisoners seeking minimum wages and other rights under the FLSA for their labor while confined.<sup>144</sup> For years, opponents of these suits were powerless to stop them on the usual fronts: no statutory exemptions for prison labor could be found in or read into the pages of the FLSA, and the control test tended naturally to find imprisoned workers to be quite well controlled.<sup>145</sup> Eventually, courts began to pick up on a third approach first articulated by the D.C. District Court in *Souder v. Brennan*,<sup>146</sup> an FLSA wages and overtime suit brought by three involuntarily committed mental patients. Under the circumstances, sufficient control for a finding of employment could be presumed. The statute, likewise, held no obviously applicable exemptions, and the court could not persuade itself that an exemption was to be inferred. What interested the court instead was a different sort of statutory hook: the FLSA's definition of "employ" as "to suffer or permit to work."<sup>147</sup> The phrasing suggested a new question by which to gauge the plaintiffs' employment status: not whether their work was under someone else's control, but whether it actually was *work*. The answer was not obvious. Indeed, the defendants' key claim was that the services performed by patients—acting as "dishwashers, kitchen helpers, messengers, and the like"<sup>148</sup>—were better understood as therapy than as work. But the court ruled otherwise; the services were work because the institutions accrued "consequential economic benefit" from the services in spite of any therapeutic benefit accrued by the patients providing them.<sup>149</sup> In short, a new employment test emerged: regardless of who controlled the laborer or to what extent, there could be no employment relationship if there was not additionally an *economic* relationship between them.

According to Zatz's reading of the prison labor cases, this new test—what this Article calls the economic test of employment—has evolved over the years into two mutually incompatible strains.<sup>150</sup> The

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143. *Id.*

144. *Id.* at 867–82.

145. *Id.* at 871–79.

146. 367 F. Supp. 808 (D.D.C. 1973).

147. *Id.* at 813 (quoting 29 U.S.C. § 203(g)).

148. *Id.* at 811–13.

149. *Id.* at 813.

150. Zatz, *supra* note 119, at 882–97.

first version, adopted by the majority of courts, takes what Zatz calls an “exclusive market” approach.<sup>151</sup> Defining the required economic relationship as fundamentally a market relationship, this version of the test recognizes employment only where it has been entered into under the conditions of a classically free and open market, which include liberty of contract, mutually gainful exchange, and arms-length bargaining.<sup>152</sup> As these conditions do not often typify relations between prison and prisoner, the practical effect of the exclusive market test has been to invalidate whatever prisoner employment claims to which it has been applied.<sup>153</sup>

Zatz calls the other variant of the economic test the “productive work” approach.<sup>154</sup> And just as reliably as the exclusive-market approach invalidates employment status when applied, the productive-work approach affirms it. Echoing *Souder’s* emphasis on the economic value of the work performed—and indifference to the noneconomic values that may in part have motivated the work—the productive-work test focuses almost exclusively on the economic effects of the employment relationship, particularly as they are felt by parties outside that relationship.<sup>155</sup> The test’s most full-throated expression may be a Ninth Circuit dissent voicing, on one hand, concern with the “pernicious competitive effect of cheap [prison] labor”<sup>156</sup> on outside labor markets and, on the other hand, bafflement with the exclusive-market view of FLSA coverage as incompatible with the relationship between prison and prisoner.<sup>157</sup> Crucial to such determinations, Zatz notes, is the fungibility of inmate labor’s products—that is, the extent to which “[e]mployers of prison labor can substitute inmates for other workers, and consumers can substitute products of inmate labor for those produced by other means.”<sup>158</sup> Thus, even where inmates’ work is consumed solely by the incarcerating institution (as with in-house laundry or food-preparation services), the fact that outside workers might otherwise have been paid for it may lead the productive-work view to see economic activity where the exclusive-market view would see activity better characterized as rehabilitative.<sup>159</sup>

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151. *Id.* at 884–92.

152. *Id.* at 863–64.

153. *Id.* at 882.

154. *Id.* at 914.

155. *Id.* at 921–22.

156. *Hale v. Arizona*, 993 F.2d 1387, 1400 (9th Cir. 1993).

157. *Id.* at 1403.

158. Zatz, *supra* note 119, at 893.

159. *Id.* at 895.

The present question is which of these two views, if either, would find that a player farming an MMO is doing “work,” as the economic test defines it. Certainly the productive-work view would have no trouble finding consequential economic effects resulting from MMO farming, whether it feeds directly into the RMT markets or not. The well-established fungibility of virtual assets assures as much. From the perspective of a Chinese gold farmer, gold coins and other loot produced by unpaid players enter the MMO’s virtual markets with a “pernicious competitive effect” on his labor just as surely as his own products impinge on the unpaid player’s efforts. Nor is it much more complicated to identify the economic benefits flowing from the unpaid player to the putative employer—the game developer. In a cultural product as uniquely social as a virtual world, even basic farming activities can add value to the product insofar as they make the virtual world more interesting for other users.<sup>160</sup> Thus, Cherry notes that “while performing a [virtually productive] task may not directly benefit the company, it might provide an indirect benefit.”<sup>161</sup> And there seems to be little reason to assume, in an age of billion-dollar social media empires built on foundations of virtual “likes” and “pokes,” that the indirect benefits cannot be precisely the sort of consequential benefit *Souder’s* economic test contemplates.

Would the exclusive-market test’s additional requirements be any harder for MMO play to meet? Possibly not. Though the core dynamics of play may be different from the workings of markets, it would be hard for a court to frame the two as mutually inimical in quite the same ways free markets and prisons are. Indeed, as discussed above, existing law on paid sports scarcely supports finding any such mutual antagonism.<sup>162</sup> Even if it did, the uniquely economic nature of MMO play itself might suggest relaxing any presumption of inherent incompatibility between markets and play. As for the relationship between player and developer—formally grounded in the terms of the EULA and TOU and functionally grounded in the exchange of consideration from both sides—a court would likely find it more fundamentally contractual than many real-world employment relationships.

MMO play thus might well meet the explicit requirements of either view of the economic test for employment. This is not, however, the end of the inquiry. As Zatz observes, there is a further requirement—implicit under both views—that the employer-employee relationship not only produce economic benefits but also constitute a

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160. Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 61, at 1102.

161. *Id.*

162. *See supra* Part III.B.2.

mutual *exchange* of economic benefits between the parties.<sup>163</sup> In other words, the economic test has an exemption for volunteers: a way for people to contribute economically productive services to organizations without triggering wage requirements and other burdens of employment law.<sup>164</sup> Cherry likewise notes the exemption and cites the Supreme Court's holding in *Walling v. Portland Terminal Co.*<sup>165</sup> that the FLSA does not count as employees those who "without promise or expectation of compensation, but solely for [their] personal purpose or pleasure, [work] in activities carried on by other persons."<sup>166</sup>

For Cherry, this exemption indeed poses the principal obstacle to a finding of employment for unpaid MMO farmers under the economic test.<sup>167</sup> Yet it is important to note here that, even assuming most MMO players play primarily or even solely for their "personal purpose or pleasure," it is not clear that the purpose or pleasure attained through farming can be meaningfully distinguished from compensation. For one thing, as Cherry herself observes, the readily ascertainable dollar value of virtual assets makes it easy to translate the rewards of farming into an hourly wage.<sup>168</sup> Even in the absence of monetary compensation, courts additionally may hold that contingent in-kind benefits given to a worker can invalidate a claim of volunteerism.<sup>169</sup> Finally, and perhaps most decisively, authorities have further stated that workers may not volunteer their labor to

163. See Zatz, *supra* note 119, at 918–21.

164. This exemption is not fully tested in prison labor cases, since those generally concern inmates paid money for their work, but Zatz finds it delineated in cases where unpaid labor has given rise to claims of volunteerism. See *id.* at 921 (citing *Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 73 (8th Cir. 1990)) ("[A]n employer is someone who pays, directly or indirectly, wages or a salary or other compensation to the person who provides services—that person being the employee."). Note that this mutuality requirement also creates an exemption for interns and other trainees, who themselves gain economically valuable experience through their work but do not in turn produce economic value for anyone else through it. See Zatz, *supra* note 119, at 921 (citing *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947)) (holding that railroad trainees were not employees because "the railroads receive[d] no 'immediate advantage' from any work done by the trainees").

165. 330 U.S. at 153.

166. Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 61, at 1100 (citing *Walling*, 330 U.S. at 152); see also *Volunteers*, US DEP'T OF LABOR, <http://www.dol.gov/elaws/esa/flsa/scope/ee16.asp> [perma.cc/4P4X-GB96] (citing *Walling*, 330 U.S. at 152) ("[T]he Supreme Court has made it clear that the FLSA was not intended 'to stamp all persons as employees who without any express or implied compensation agreement might work for their own advantage on the premises of another.'").

167. Cherry, *Working for (Virtually) Minimum Wage*, *supra* note 61, at 1096–1105 (presenting the control test and the volunteer exemption as the two main hurdles to finding employment status for virtual workers, but considering only the latter in the MMO context).

168. *Id.* at 1103.

169. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (holding that for the purposes of the volunteerism analysis, "in-kind benefits . . . expected in exchange for . . . services" are "another form of wages").

for-profit enterprises under the FLSA.<sup>170</sup> MMO developers are profit-seeking companies that would not trigger this restriction if players, like interns, could be presumed to provide no economic benefit to their putative employers.<sup>171</sup> But since we are presuming the opposite, it is hard to see how the volunteer exemption could stop an MMO player from being recognized as an employee where the economic test alone fails to do so. It remains, then, only to consider the consequences that might follow from such recognition.

### C. What Happens if Unpaid Farmers Are Employees?

Assimilating unpaid play into the employment law regime might seem to be the ultimate victory of commodification over play. This, in fact, is precisely the concern that gives rise to calls by Castronova and others for laws protecting virtual worlds from the reach of economic laws.<sup>172</sup> Moreover, Zatz provides some support for this concern in his criticisms of the economic test as an analysis of economic reality. For Zatz, the problem with both the productive-work and exclusive-market analyses is that they are essentially binary: the exclusive-market view refuses to characterize as economic any relationship that is not *purely* economic, while the productive-work view renders relationships wholly economic even those that are only *partly* economic.<sup>173</sup> As applied to the productive-work view, in particular, this complaint broadly tracks the concerns of the anti-commodificationists with market-based incursions on nonmarket spheres of life,<sup>174</sup> flagging especially the domino effects that may result from the application of employment law to activities not previously governed by it.<sup>175</sup> For example, a relationship held to be employment under the FLSA's economic-reality test may become, as the result of imposed wage and hour conditions, cognizable as employment under the NLRA, and so on.

In practice, Zatz finds an inconsistent adoption of both the exclusive-market and productive-work views by courts, which tends to provide a check on the "runaway tendencies" of either view.<sup>176</sup> Yet

170. See US DEPT OF LABOR, *supra* note 166.

171. See *Glatt v. Fox Searchlight Pictures Inc.*, 2016 WL 284811 at \*6 (2d Cir. July 2, 2015).

172. See *generally* Cherry, *supra* note 94.

173. See Zatz, *supra* note 72, at 371.

174. See Zatz, *supra* note 119, at 923 ("The difficulty, then, is that when employment law intervenes in an economic relationship, even with regard to its economic terms, it necessarily also intervenes in the relationship's noneconomic aspects.").

175. *Id.* at 924.

176. See *id.* at 926.

there is less hope of such constraint where, as in the case of unpaid MMO farming, the exclusive-market view may lead almost as probably as the productive-market view to findings of employment. Therefore, those who fear the commodification of MMO play would appear to be justified in opposing it at every turn if employment status for MMO players is plausible under any circumstance.

Yet before they do, they might do well to remember that the employment law regime itself originated as a kind of bulwark against commodification—a way of setting limits to the market’s control over our working lives. To suggest that employment law could have a similarly protective effect on our playing lives might be incongruous, but it is not absurd.

Consider employment law’s restrictions on work hours. As Cherry notes, among the first elements of the FLSA that would kick in once players become employees would be child labor laws.<sup>177</sup> Among other things, these laws place hard limits on the number of hours children can work. Would we want to place such limits on the hours they can play? In the United States, the question is scarcely considered, yet in other jurisdictions the obsessive quality of MMO and other online play—and related news reports of death and injury resulting from online-game “addiction”—has given rise to restrictions not dissimilar to those of child labor law.<sup>178</sup> In China, for example, authorities have required online game developers to implement an “Online Game Anti-Fatigue System” barring minors from the game for five hours after five hours of continuous play.<sup>179</sup> Korea, too, has proposed a curfew on underage online play during a six-hour block of night.<sup>180</sup> There is more than a hint of moral panic in these responses, and players and game companies alike have either contested or evaded them.<sup>181</sup> Yet it is difficult to imagine what principled objections to such restrictions could be made by those whose objections

177. See Cherry, *supra* note 94, at 856.

178. See generally Nachshon Goltz, “ESRB Warning: Use of Virtual Worlds By Children May Result in Addiction and Blurring of Borders”: *The Advisable Regulations in Light of Foreseeable Damages*, 11 U. PITT. J. TECH. L. & POLY 2 (2010).

179. *Id.* at 43.

180. Christine Kim, *South Korea To Put Curfew on Online Games for Kids*, REUTERS, Apr. 13, 2010, <http://in.reuters.com/article/2010/04/13/us-korea-onlinegames-idINTRE63C1AJ20100413> [perma.cc/KQL7-ZZEJ]; see also Brian Ashcroft, *Korea’s Silly “Shutdown Law” Might Be Unconstitutional*, KOTAKU, (Apr. 6, 2010), <http://kotaku.com/5921659/koreas-silly-shutdown-law-might-be-unconstitutional> [perma.cc/L9LV-GXCT].

181. See *supra* note 180 (describing game companies’ constitutional challenge to the proposed Korean curfew); see also Goltz, *supra* note 178, at 46 (describing underage players’ ability to evade the Chinese play restrictions).

to commodification of MMO play include complaints about the extra hours of grinding that paid farming forces all players to engage in.<sup>182</sup>

For that matter, why should they object to the application of FLSA restrictions to *adult* play hours? Though the FLSA puts no caps on the number of hours adults can work, it does require overtime wages for work in excess of a forty-hour week.<sup>183</sup> China's Online Game Anti-Fatigue System already implements a somewhat analogous rule for underage players, *reducing* by half any experience points or other quantifiable reward the game delivers after three hours of continuous play.<sup>184</sup> Arguably, of course, *increasing* rewards by half after forty hours of play might only incentivize the kind of power gaming anti-commodificationists dislike. But then again, it might have the more targeted effect of incentivizing only those who already find the farming grind a peculiar sort of fun, while allowing those for whom it is a more burdensome means to a quantifiable end to reach that end sooner once the time investment exceeds that of a normal workweek.

The FLSA's minimum wage requirements might serve as a similarly counterintuitive check on the effects of commodification.<sup>185</sup> They would be trickier to apply, of course, since they would require game companies to track the real-money value of in-game assets. Whenever the rate at which that value became available to players falls below the statutorily defined minimum hourly wage, game companies would need to increase that rate without either restricting or expanding the supply of assets so much that the increase is negated. As a practical matter, this scheme would be a burdensome one for MMO companies to implement, but given that at least one such company keeps an accredited economist on staff to deal with its virtual money supply, the burden would presumably be manageable.<sup>186</sup> The more philosophical question is whether MMOs would be sustainable as businesses if required to maintain their reward rates at minimum-wage levels. Considering that Castronova found an effective hourly wage of \$3.42 in the leading MMO of 2001, this is an important question.<sup>187</sup> However, assuming that this

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182. See *Hernandez v. Internet Gaming Entm't*, No. 1:07-cv-21403 (S.D. Fla. 2008); Castronova, *supra* note 20.

183. See DANIEL B. ABRAHAMS ET AL., *FLSA EMPLOYEE EXEMPTION HANDBOOK* app. 4 (2006), 2006 WL 3290802 (Administrative Letter Rulings: DOL, Wage & Hour Division).

184. Goltz, *supra* note 178, at 43.

185. See *Compliance Assistance—Wages and the Fair Labor Standards Act (FLSA)*, US DEPT OF LABOR, <http://www.dol.gov/whd/flsa/> [perma.cc/L56E-83AH].

186. See Neal Ungerleider, *Meet the Alan Greenspan of Virtual Currency in "EVE Online,"* FAST CO. (Jan. 6, 2014), <http://www.fastcompany.com/3024392/meet-the-alan-greenspan-of-virtual-currency-in-eve-online> [perma.cc/K95M-7KAC].

187. See TAYLOR, *supra* note 16, at 72.



extension of the minimum wage does not significantly harm the businesses to which it applies—as has arguably been the case with most extensions of the minimum wage—it is again difficult to explain why its effects would not be welcomed by people critical of MMO play's convergence toward full-time work.

But the application of standardized hours caps and wage floors to the unique context of MMOs need not be the only effect of finding employment in that context. As unionized workers, employees are empowered—in ways that they are not in individually contracted work relationships—to negotiate terms tailored to the specific conditions of their workplaces. If MMO players are recognized as employees under the NLRA, they could form unions and find themselves similarly empowered. But this would not be that drastic a transformation in some ways. MMO players already make their interests known to and felt by MMO developers in a variety of coordinated ways, including participation in player discussion forums provided by developers, attendance at conferences hosted by game companies, and formation of team-like “guilds” composed of dozens or even hundreds of players. It is not entirely clear what unionization would add to this array of coordinating mechanisms. Whether the resulting work-stoppage rights could be construed to give force to threats of collective boycott is hard to say. But implementation of NLRA-sanctioned, game-wide player organizations would, at the very least, put players in a legal relationship with one another. This change would counter a key commodification effect at work in MMOs: the consignment of player-developer relations to the strictly bilateral model of consumer contracts.<sup>188</sup>

This is not to say that any of these developments is likely. Even if a finding of employment status for MMO play is consistent with existing case law, most courts will undoubtedly be reluctant to extend employment law so sweepingly to an activity as ostensibly dedicated to the principle of play. But working through the likely consequences of such an extension ultimately suggests that it would not necessarily usher in the “contagion of reality” that both Caillois and Castronova feared. To the contrary, such contagion might be checked through employment laws more effectively than through the contractual status quo.

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188. See Fairfield, *supra* note 56, at 453–54.

## V. ARE PAID FARMERS PLAYERS?

A. *Are Gold Farmers Actually Playing the Game?*

The law, we have seen, has little difficulty accepting that an activity can be at once work and play. But it also has no trouble drawing lines between what is play and what is not.<sup>189</sup> In many cases, for example, courts determine whether an activity conforms to the rules of a game, and thus whether someone engaged in that activity is actually playing the game.<sup>190</sup> Whether that activity is or is not play remains, of course, a logically separate question.<sup>191</sup> However, deciding the first question in practice tends to look a lot like deciding the second.<sup>192</sup> To find that someone is not playing a particular game is, for most courts and in most cases, to find that they are not engaging in play at all.

Whether Chinese gold farmers are engaging in play at all is, as we saw, not easily determined just by looking at their attitudes toward—and day-to-day experience of—the games in which they work.<sup>193</sup> Yet it is not clear the problem is made any easier just by looking instead at the rules of those games. To be sure, there is no ambiguity in the MMO companies' bans on RMT and gold farming, and it would seem to be within reason for a court to consider any such ban a game rule. Unlike the casino in *Uston*, an MMO developer is fully authorized to set its own rules for its own games. Why then

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189. See CAILLOIS, *supra* note 82.

190. See Gross, *supra* note 92.

191. Whether the one determination follows from the other depends to some extent on one's choice of play theory. A number of games scholars in recent years have written on the subject of "transgressive play," observing that individuals who violate the rules of a game may see themselves as—and may in fact be—playing by the rules of a different game altogether. See MIA CONSALVO, CHEATING: GAINING ADVANTAGE IN VIDEOGAMES (2009); Espen Aarseth, *I Fought the Law: Transgressive Play and the Implied Player*, SITUATED PLAY. PROC. DIGRA 24–28 (2007). In classic theories of play, however, the behavior of the cheater, the spoilsport, and others who fail to conform to a game's rules is viewed, in varying degrees, as a negation of true play. See HUIZINGA, *supra* note 80; see also CAILLOIS, *supra* note 82; SUITS, *supra* note 84.

192. This is true, for example, in cases where in-game behavior falls so far outside the bounds set by the rules that it becomes actionable as tort. See *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520 (10th Cir. 1979) (unnecessary roughness tort case). It is also true where the behavior has so little relevance to the game's rules that it becomes subject to legal protections not usually thought to govern play. See *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 683 (2001) (holding that a golfer's riding, rather than walking, between shots did not affect the nature of the game and was therefore covered by the Americans with Disabilities Act's public accommodation provisions); *Uston v. Resorts Int'l Hotel, Inc.*, 445 A.2d 370, 372–73, 375–76 (N.J. 1982) (holding that a player's counting cards was irrelevant to the actual rules of casino blackjack and therefore covered not by those rules but by New Jersey's public accommodation laws).

193. See DIBBELL, *supra* note 28.

should any contractual provision by which a developer governs players' behavior not be deemed a rule defining the game they play?

Yet the same question can be asked of the PGA and the walking requirement it sought to enforce as a game rule in *Martin*. The Supreme Court's holding in that case suggests that a game owner's proprietary authority cannot always be enough on its own to turn a contractual requirement into a game rule. In *Martin*, the Court also considered both the overall design and historical evolution of golf before finally deciding that the walking rule was not among the game's "essential attribute[s]."<sup>194</sup> MMOs, and RMT-related issues in particular, would seem to invite a similarly searching evaluation of game-rule claims. The multiplicity of play styles found in an MMO, the diversity of feelings about RMT, and perhaps most importantly, the intensely social and essentially economic nature of MMO play all urge founding the inquiry on the assumption—as in *Martin*—that the game's rules are not simply what the game's owner says they are.

The inquiry itself would necessarily be a fact-intensive one, possibly verging on the ethnographic, and predicting the outcome for any given MMO or rule would likewise verge on the impossible. What cannot be ruled out in any case is that courts, asked to decide whether an MMO's RMT ban is an "essential attribute of the game itself," will hold that it is not. Just as the law post-*Uston* dictates that a professional card counter in a New Jersey casino is as legitimate a player of blackjack as any other,<sup>195</sup> so too might there one day be MMOs in which the range of legitimate play styles must, as a matter of law, include that of the professional farmer.

### *B. What Happens if Paid Farmers Are Players (and if They Are Not)?*

The legal consequences of finding gold farmers to be players would likely be less direct and less sweeping than those of finding unpaid farmers to be employees. But the determination of gold farmers as players could nonetheless determine significant legal outcomes.

*Uston* provides the obvious template for a scenario in which the question of gold farmers' status as players proves decisive. Indeed, if the New Jersey Supreme Court heard a gold farmer's challenge to an MMO company's RMT ban—like the one brought in *Blacksnow*, for example<sup>196</sup>—it might well find *Uston* controlling. In *Uston*, the court

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194. *Martin*, 532 U.S. at 685.

195. *See Uston*, 445 A.2d at 373 ("[A casino] has no right to exclude [a card counter] on grounds that he successfully plays the game under existing rules.").

196. *See supra* note 46 and accompanying text.

held that a property owner's common law right to exclude—limited in most states only by statutory exceptions—in New Jersey “is substantially limited by a competing common law right of reasonable access to public places.”<sup>197</sup> That an online game might be deemed a “public place” for the purpose of the rule is hardly inconceivable.<sup>198</sup> Once reached, such a finding would leave no clear remaining grounds for distinction. For example, though the *Uston* court suggested blackjack professionals might lose their right of reasonable access if their methods were inherently “disorderly” or otherwise disruptive of a casino’s “essential operations,”<sup>199</sup> the difficulties of showing just how RMT harms other players would complicate any attempt to bring that exception to bear on gold farmers.<sup>200</sup> Likewise, although the state’s exclusive authority to promulgate casino blackjack rules in New Jersey has no equivalent in the MMO context, that difference does not necessarily vest exclusive rulemaking authority in MMO companies. Aside from the *Martin* court’s refusal to defer to the game operator’s formulation of the game rules, copyright’s doctrine that the game operator cannot own whatever rules it formulates<sup>201</sup> further undermines whatever claim to arbitrary authority an MMO developer might want to make.

Again, none of this is to suggest that such a case is likely to occur.<sup>202</sup> But the possibility illustrates how finding gold farmers to be players might affect key procedural issues. In *Uston*, a finding that the casino’s ban on card counting was a game rule would presumably have stopped the court from reaching the loftier questions of property law that formed the basis of the court’s decision. Similarly, a finding

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197. *Uston*, 445 A.2d. at 372.

198. See, e.g., *Nat’l Ass’n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–02 (D. Mass. 2012) (holding that Netflix’s streaming video site was a public accommodation under Americans with Disabilities Act provisions covering “place[s] of exhibition and entertainment” or “place[s] of recreation”). *But see* *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1024 (N.D. Cal. 2012) (holding that the Netflix site cannot be a public accommodation under Ninth Circuit precedent because it is not “an actual physical place”).

199. *Uston*, 445 A.2d at 375.

200. See *supra* notes 29–32 and accompanying text. The parallels with blackjack, again, run deep. Because blackjack players play only against the house, the game, like MMOs, is not zero-sum competitive and should therefore leave players relatively indifferent to the success or failure of others in the same game. Yet even so, players will often complain when tablemates make rookie plays that turn out to favor the dealer and thus hurt the whole table, even though a smart play could just as likely have had the same effect. See John Grochowski, *Blackjack Etiquette and Strategy*, HOWSTUFFWORKS, <http://entertainment.howstuffworks.com/how-to-play-blackjack1.htm> [<https://perma.cc/KX7A-DKLY>] (giving novice players tips on how to keep their subcompetent play from drawing the ire of the more experienced).

201. See Gross, *supra* note 92.

202. If nothing else, the typically global reach of online games would make it easy for an MMO company to remove the suit to a venue where New Jersey’s unusual public access doctrine does not apply.

that an MMO's ban on RMT is a game rule, even if it had to be supported with messy, complicated evidence of player practices and game-design imperatives, would be worthwhile for the MMO company to pursue if only as a means of narrowing the issues in play. A similar effort might arguably be advised for the plaintiff in any future suit replaying the strategy in *Hernandez*. Making the case that an MMO's RMT ban is a rule of the game could, for example, help block any challenges to the plaintiff's otherwise fragile standing as a third-party beneficiary of the contract between MMO and gold farmer. As long as the promise to refrain from RMT is just a provision of that contract, the court may doubt that the parties intended it to benefit all other players without plain language stating that intention in the writing. But if the provision is deemed additionally to constitute a rule—or in *Martin's* terms “an essential attribute of the game itself”—then the intention is much more easily inferred. The “game itself” is after all precisely, and by definition, what the company provides to every player—so any provision aimed at protecting the essence of the game must necessarily be understood to benefit all players. Indeed, having established that basic of a harm to her interests from the practice of RMT, the plaintiff might even be able to win declaratory and injunctive remedies without having to wade into the difficulty of proving more concrete harms.

Finally, it is worth noting that even though the question of players' employee status may ultimately be more consequential than that of farmers' player status, the latter could turn out to constrain the former in one important way: the reach of any finding that players are employees of the game company might be decided in significant part by determining which users of the company's product are in fact “players” of its game. This might be so for no other reason than that a court finds the determination to be a reliable proxy for deciding whether the farmer's activity in the game creates a net economic benefit to the company and thus the basis for an employment relationship. In that case, if the ban on RMT is not a rule of the game, then gold farmers are players and are therefore presumably endowed with whatever employee rights all players enjoy. If, on the other hand, the ban is a rule, then the only companies that should ever have to treat gold farmers as employees will be the ones that pay them real-money wages.

## VI. CONCLUSION

This is not an Article about the future. Gone are the days when it was even plausible to predict that virtual worlds would one day be the universal interface through which we access the oceanic

volumes of data already surrounding and shaping us. Compared to the social media and mobile applications whose growth began to eclipse that of virtual worlds several years ago, these worlds are now more or less a backwater. If there are reasons to spend time thinking through potential reconfigurations of the laws of work and play within the context of a single subrealm of that backwater, they do not rest on any likelihood that the employment law of MMOs is poised to become a topic of particular social or economic urgency. Rather, the point is to glance from what may be a particularly enlightening angle at an issue much broader and, for quite a long time now, more urgent: the momentous instability of the boundaries by which work, in a given age and culture, is defined.

Of the factors that contribute to this instability, the present exercise shines light on two in particular. The first is technology and its evolution. This, of course, is a subject already much discussed within the commodification debate. In fact, from its beginnings in Marx's analysis of alienated factory labor, commodification theory has been sensitive to the role of technology in bringing core human attributes within the ambit of market exchange. More recently, in turning its attention to organ trafficking, in vitro fertilization surrogacy, and other increasingly intimate forms of market-mediated self-alienation, commodification theory has remained alert to emerging practices borne of—and conditioned by—advances in industrial and postindustrial technology.

The rise of the Internet has been similarly productive of new problems in commodification theory. As Radin has noted, merely by creating new and relatively unfettered channels for market exchange, the Internet has vastly expanded the markets for contested commodities, such as human eggs and Nazi paraphernalia.<sup>203</sup> But it has also created markets in new forms of commodified and semi-commodified labor at or beyond the limits of what is recognizably compensated work: the hyper-casual “microlabor” brokered by sites like Amazon Mechanical Turk and Task Rabbit; the ubiquitous trade in “user generated content” between users, service providers, and advertisers on sites like Facebook, Twitter, and Google Search; and even, to some extent, the open source software production system, which is built on volunteer work (and celebrated by some as the antithesis of commodified labor) yet provides massive economic

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203. Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in *RETHINKING COMMODIFICATION* 8–9.

benefits to the software and Internet industries and complex forms of compensation to producers.<sup>204</sup>

Scholars both inside and outside of legal academia have begun to grapple with these new forms and to gauge the extent of their challenge to existing social and regulatory regimes governing labor.<sup>205</sup> The labor of MMO farmers, both paid and unpaid, is yet another of these boundary-bending forms of digital work, and its similarities to the rest of those forms is part of what makes it a potentially illuminating point of comparison. But even more illuminating is what sets it apart: the degree to which it is marked or recognized as play. This is useful because play, while not as markedly identifiable in other kinds of digital labor, pervades MMOs. Under the guise of leisure, creativity, amusement, or passion, play is a key motivating element across the landscape of online production. To fully understand how these new forms of labor function, it may be not only useful but in some sense necessary to begin the inquiry with a focus on the most clearly ludic of them: the labor of the MMO player. To explore the limits of MMO farming's capacity to bend to existing legal categories of work and play is thus, to an extent, to consider how those categories interact in online settings generally—and to prepare, perhaps, new strategies, both legal and nonlegal, for handling the new kinds of exploitation and opportunity presented by such a peculiarly playful work environment.

But if the peculiarities of the online setting itself are part of what makes “work” so protean a category, the other and probably more important consideration is that work happens to be a protean category to begin with. Recall that, for Zatz, the interest in studying how courts decide what is work and what is not derives from his impression that this analysis does not bring us any closer to actually understanding what constitutes work. Rather, it shows how courts, through their decisions, are continuously helping to construct and reconstruct what we recognize as work.<sup>206</sup> Yet, if directly studying those decisions is one way to get close to that constructive process, then trying to imagine how those decisions might be adapted to some

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204. See generally Eli M. Noam, *The Economics of User Generated Content and Peer-to-Peer: The Commons as the Enabler of Commerce*, in PEER-TO-PEER VIDEO 3–13 (Eli M. Noam & Lorenzo Maria Pupillo eds., 2008).

205. For legal scholars, see, e.g., Cherry, *A Taxonomy of Virtual Work*, *supra* note 61; see Jonathan Zittrain, *Ubiquitous Human Computing*, in 366 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY A: MATHEMATICAL, PHYSICAL AND ENGINEERING SCIENCES 3813–3821 (2008); Dan Hunter & F. Gregory Lastowka, *Amateur-To-Amateur*, 46 WM. & MARY L. REV. 951 (2004). For nonlegal scholars, see, e.g., DIGITAL LABOR: THE INTERNET AS PLAYGROUND AND FACTORY (Trebor Scholz, ed., 2012), Tiziana Terranova, *Free Labor: Producing Culture for the Digital Economy*, 18 SOC. TEXT 33–58 (2000).

206. See Seto, *supra* note 60 and accompanying text.

new set of circumstances—in effect, to imagine the next iteration of the process oneself—gets working society arguably even closer.

In the end, this is probably the real value of the current exercise. As a culture and society, we may be closer now than at any time in the last three centuries to accepting that work and play may not, in fact, be mutually exclusive categories. But even so, the thought of the unadulterated play of the unpaid MMO falling under the laws of employment—or, likewise, of the wage-bought play of the professional gold farmer being rendered the legal equivalent of any other play—still has a whiff of paradox about it. To proceed nonetheless to think through the concrete steps potentially required to reach either of those paradoxical ends, and thereupon to learn that both in fact lie just a few short leaps of reasoning away from existing case law, is to understand, at last, just how malleable the concepts of work and play can be.



