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

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*When does work become play, and play 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 I apply the question 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 online fantasy games (MMOs) that reward them with virtual items 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 I show, U.S. 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 U.S. 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 caselaw 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 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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## INTRODUCTION

By the best available estimates, roughly 400,000 people are employed as gold farmers, all of them in developing countries outside the U.S., the vast majority of them in China.<sup>1</sup> The job of a gold farmer is to play a single online computer game all day, all week. The game is always of a genre known as massively multiplayer online role-playing games, or MMOs. Typically the game is World of Warcraft, the most popular of the MMOs, with 7 million paying players worldwide, down from 11 million at its height but still the most popular in the class. The gold farmer does things all the other players do: Kills monsters; collects coins, weapons, and other loot from the corpses of the monsters; kills more monsters; collects more loot; takes loot into town and sells it to other players for more coins. This routine is known as farming, or grinding. All players must deal with it if they want to advance in the game. But there is a great variety of other, often more interesting activities, and few players pursue the grind as relentlessly as gold farmers. The few who do are known as power gamers, and while their style of play, in particular, is hard to distinguish from a gold farmer's, their incentives for playing, like those of all

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<sup>1</sup> Richard Heeks, *Virtual Economies, Virtual Goods and Service Delivery in Virtual Worlds*, 2 J. VIRTUAL WORLDS RESEARCH 1, 7 (2010). All remaining facts about gold farmers and online games are from Julian Dibbell, *The Life of the Chinese Gold Farmer*, THE NEW YORK TIMES MAGAZINE, June 17, 2007, <http://www.nytimes.com/2007/06/17/magazine/17lootfarmers-t.html>.

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the other players, differ from the gold farmer's in one important respect: The gold farmer is paid a wage, in real money, to play the game.

Generally, in fact, a Chinese gold farmer's playing environment is less like a typical Chinese gamer's than like a typical Chinese factory worker's. 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 works with. He punches a clock at the start of his shift, and at the end of his shift he hands over the product of his work day, 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 U.S. 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 one that runs World of Warcraft, Blizzard, Inc., bans the sale of virtual items for real currency (a practice known as real-money trading or 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—at least not in the way that theorists of labor 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 U.S. soil, for example, it would fall squarely within the terms of the Fair Labor Standards Act<sup>2</sup>, the National Labor Relations Act<sup>3</sup>, and most other elements of the modern labor-regulatory regime. Aside from

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<sup>2</sup> Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219.

<sup>3</sup> National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-169.

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the intangibility of the goods gold farmers produce, after all, 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: the farming that is done, as most MMO farming is, for no monetary compensation at all. 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 why, exactly, we should not call it 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 I describes the relevant aspects of MMO farming, as experienced both by ordinary gamers and by gold farmers. It also discusses the handful of legal cases in which gold farming has been explicitly at issue. Part II 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 III weighs the plausibility of legally classifying unpaid farming as employment, and sketches the consequences that might follow from doing so. Part IV, conversely, considers whether, as a legal matter, gold farmers are actually playing the games in which they work, and how it might matter if they are. The Conclusion points toward broader implications, arguing that gold farming's blurring of the lines between work and play reflects both the

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destabilizing effects of networked technology on existing concepts of labor and employment and the inherent instability of the concepts themselves.

## I. 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 what MMOs are and what they are not. MMOs are virtual worlds—online simulated environments in which users, embodied in 3D graphical representations known as avatars, interact both with their simulated surroundings and with each other. But they are not the only type of virtual world. So-called “sandbox” or “open” virtual worlds like *Second Life*, for example, seek to mirror the real world's range of open-ended possibilities, offering users an 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 them.

More specifically, it is a variant of what the digital-games industry refers to as a role-playing game, or RPG. In a typical single-player RPG, the player is a heroic character 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—a game

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character might ask the player to kill ten flying serpents and come back with their hides, for instance, or to locate a cursed amulet and destroy it in a forge. But with each new level, the number of points required to “level up” to the next one rises steeply, so that the highest levels of the game may take many hours of arduous, repetitive play to 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 players to vanquish enemies that otherwise cannot be defeated. Acquiring the necessary resources to advance usually requires trade with other players, sometimes through barter of one virtual good for another, more often through payments of the local virtual currency. These interdependencies are typically reinforced through mandatory specialization of character skills, so that players particularly adept at mining metals, say, might have to rely on others better at blacksmithing to turn those metals into armor.

It is important to note, in other words, that MMOs, though games, are generally not *zero-sum* games. 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 brings 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

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commonly found in multiplayer RPGs.<sup>4</sup> Others are “explorers,” bent on mapping the game’s virtual world and learning all they can about its underlying mechanics, or “socializers,” focused on their relationships with other players, or “killers,” hooked on the thrills of PvP and other forms of interplayer conflict.<sup>5</sup> So disparate are the motivations of these groups that it opens to question whether they are even playing the same game, let alone playing it in competition with each other.

Yet 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 don’t level up can never see those parts of the game that are accessible only to high-level characters; socializers who don’t level up will be left behind by friends who do; killers who don’t are limited to attacking low-level victims and are likelier 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, that 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>6</sup> In some MMOs, for example, some portion of the experience points

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<sup>4</sup> Richard A. Bartle *Hearts, Clubs, Diamonds, Spades: Players Who Suit MUDs*, <http://www.mud.co.uk/richard/hcdis.htm> (last visited Feb 16, 2014).

<sup>5</sup> *Id.*

<sup>6</sup> BONNIE A. NARDI, MY LIFE AS A NIGHT ELF PRIEST: AN ANTHROPOLOGICAL ACCOUNT OF WORLD OF WARCRAFT 110 (2010).

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needed to level up can only be acquired through the routinized slaying of beasts or monsters (mobs, in MMO parlance) for hours at a time.<sup>7</sup> In World of Warcraft, where it is possible to level up 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>8</sup> Yet there too, 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 do 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>9</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>10</sup> Nor are

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<sup>7</sup> *Grinding*, WOWWIKI, <http://www.wowwiki.com/Grinding> (last visited Feb 16, 2014) (“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.”).

<sup>8</sup> *Farming*, WOWWIKI, <http://www.wowwiki.com/Farming> (last visited Feb 16, 2014).

<sup>9</sup> See NARDI, *supra*, note 6 at 110; Scott Rettberg, *Corporate Ideology in World of Warcraft* in DIGITAL CULTURE, PLAY, AND IDENTITY: A WORLD OF WARCRAFT READER 19, eds. Hilde G. Corneliusen and Jill Walker Rettberg (2008); Nick Yee, *The Labor of Fun: How Video Games Blur the Boundaries Between Work and Play*, 1 GAMES AND CULTURE 68 (2006).

<sup>10</sup> T.L. TAYLOR, PLAY BETWEEN WORLDS: EXPLORING ONLINE GAME CULTURE 71 (2006). *But see also* Angry Mustache *ALOD: Go back to WoW*, THEMITTANI.COM, <http://themittani.com/features/alod-go-back-wow> (last visited Apr 15, 2014) (celebrating as a point of pride the difficulty of the MMO EVE Online as compared to World of Warcraft).

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they persuaded differently by the fact that a certain class of player, the so-called power gamer, seems to embrace wholeheartedly the worklike aspects of MMOs, investing upwards of 40-hour weeks in the game and seeking only to maximize the value of his return in virtual assets. For more casual players, on the contrary, the power gamer has missed the point of play—to have fun—and isn't legitimately playing at all.<sup>11</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, in explaining to her how and why they play, “power gamers do not use the term ‘fun’ . . . but instead talk about the more complicated notions of enjoyment and reward.”<sup>12</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>13</sup>

We may take the power gamers at their word on this or not. But if we accept that play as they experience it verges on indistinguishability from work, we should keep in mind that this probably distinguishes them only 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

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<sup>11</sup> TAYLOR, *supra* note 10 AT 71 (2006).

<sup>12</sup> *Id.* at 88.

<sup>13</sup> *Id.* at 89.

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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 domestic product of what was then the most populous MMO, EverQuest.<sup>14</sup> He arrived at the figure through standard econometric methods, inventively applied. First he looked at dollar-denominated sales of high-level EverQuest character accounts on real-money auction sites and from those derived the effective market price of a character's level (presumed to reflect the value of both the level attained and the coin, weapons, and armor typically owned by characters at that level). Then he conducted player surveys to establish the hourly rate at which the average EverQuest player leveled up. 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 GDP per capita of \$2,226 (a little more than Bulgaria's). And multiplying that figure by EverQuest's player population gave him, finally, a total GDP of \$135 million.

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<sup>14</sup> Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* (CESifo Working Paper Series No. 618, 2001), <http://papers.ssrn.com/abstract=294828> (last visited Mar 24, 2014). 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.

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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>15</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 transferability and virtual currencies built in, and organized player-to-player markets arose in them spontaneously, as buyers and sellers gravitated toward common trading spots and some began to set themselves up as fulltime in-game merchants.<sup>16</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

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<sup>15</sup> Roger E. Backhouse and Steven Medema, *Retrospectives: On the Definition of Economics*, 23 J. ECON. PERSPECTIVES 221, 225 (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.”)

<sup>16</sup> See Castronova, *supra* note 14.

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automated auction houses in the capital cities of the game's fantasy realms. 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 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 the virtual markets for bargains and selling their haul at a markup on eBay.<sup>17</sup> When the MMO companies started having eBay shut down virtual-item sales, that only accelerated the commercialization, pushing RMT retailers onto their own increasingly high-volume ecommerce sites.

Gold farming was the 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 the merchants was too scattered a production force to keep up. Automation was one response. 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>18</sup> But in the end the

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<sup>17</sup> See generally JULIAN DIBBELL, PLAY MONEY: OR HOW I QUIT MY DAY JOB AND MADE MILLIONS SELLING VIRTUAL LOOT (2006).

<sup>18</sup> See *id.*

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economics of offshoring prevailed. The going rate for one hour of a Chinese worker's time was roughly \$0.25.<sup>19</sup> The virtual goods one MMO player could produce in an hour, meanwhile, were worth easily ten times that amount.<sup>20</sup> At these rates, some bot farmers have complained, a Chinese gold farm's labor costs can be competitive even with a U.S. bot farm's hardware costs.<sup>21</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, a gold farm industry employing an estimated 400,000 workers had sprung into existence.<sup>22</sup>

What the logic of labor arbitrage cannot fully explain, however, is why so much of that industry has been located in China.<sup>23</sup> After all, other countries also have cheap labor and Internet connections (as the gold farms found from time to time in places like Indonesia, Romania, and Mexico attest). But when it comes to gold farming, China has at least one advantage not available to other low-wage countries: Its own vast population of online gamers, including roughly as many World of Warcraft players as are found in

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<sup>19</sup> See Dibbell, *supra* note 1.

<sup>20</sup> Castronova, *supra* note 14 ("average wage" of EverQuest players: \$3.47).

<sup>21</sup> See, e.g., Mithra, Comment to *How a Gold Farm Works*, TERRA NOVA (Jan. 19, 2006, 5:38 PM)

[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).

<sup>22</sup> Heeks, *supra* note 1 at 7.

<sup>23</sup> *Id.* (estimating 85%).

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North America and Europe combined.<sup>24</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 as players. Even after months of 12-hour shifts and 84-hour weeks, for example, gold farmers may still in their free hours visit the nearest Internet café to play World of Warcraft and other online games at their leisure. Others, who won't go near a game after hours and are frank about their disenchantment with the job, will nonetheless admit they can't help feeling the occasional burst of excitement in the midst of the virtual combat that is their daily routine.<sup>25</sup>

That even these ostensibly ludic moments redound to the potential economic benefit of the employer (an excited worker is a focused worker, after all, 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, it 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

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<sup>24</sup> Leigh Alexander, *World Of Warcraft Hits 10 Million Subscribers*, GAMASUTRA, [http://www.gamasutra.com/php-bin/news\\_index.php?story=17062](http://www.gamasutra.com/php-bin/news_index.php?story=17062) (last visited Feb 18, 2014) (reporting subscriber figures of 5.5 million in Asia, 2 million in Europe, 2.5 million in North America).

<sup>25</sup> 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>.

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example, one finds little to distinguish the power gamer's long hours and maximal efficiency from those of the gold farmer. As for the more subjective aspects of their gaming: if the power gamer's stoic endurance of extended tedium and fatigue for the sake of more remote rewards can count as play, why can't the gold farmer's? Should the fact that the 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. Or then again, given how little the distinction between real wealth and virtual wealth seems to matter for most other purposes, maybe the more straightforward analysis is to view gold farming, finally, as just another of the several play styles that commingle in an MMO.

### 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: Each shift begins with the gold farmer's implicitly agreeing, by logging in to a valid MMO account, to be bound by the provisions of the targeted MMO's End User License Agreement (EULA) and Terms of Use (TOU) and proceeds to the extended violation of those terms that gold farming almost always represents. Real-money trading and, by extension, gold farming are prohibited by the TOUs

DRAFT; please do not cite or circulate without author's express permission or EULAs of all popular MMOs<sup>26</sup>, and with a decisiveness that contrasts strikingly with the cultural and economic ambiguities discussed above. Blizzard's blunt ban on RMT in World of Warcraft, for example—" [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>27</sup>—does not appear to leave room for loopholes.

Though the language of these bans is clear, however, the reasons behind them are less so. The texts of the bans themselves say little or nothing about what harms they are meant to protect against. Elsewhere, in game-company statements and interviews, in user forums and game-news sites, a handful of explanations has emerged over the years. Game companies sometimes complain of costs in good will and 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 simply a form of cheating, or queue jumping. A more sophisticated variation on this argument targets not so much RMT itself as the gold farming it incentivizes: By producing more wealth than the game economy was designed to accommodate, goes the reasoning, the concentrated labor of gold farming creates in-game inflation that makes it harder for other players to get ahead.<sup>28</sup>

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<sup>26</sup> See, e.g., *World of Warcraft Terms of Use*, BLIZZARD ENTERTAINMENT, [http://us.blizzard.com/en-us/company/legal/wow\\_tou.html](http://us.blizzard.com/en-us/company/legal/wow_tou.html) (last visited Apr 15, 2014).

<sup>27</sup> *Id.*

<sup>28</sup> Muhammad Aurangzeb Ahmad, Brian Keegan, Jaideep Srivastava, Dmitri Williams, and Noshir Contractor, *Mining for Gold farmers: Automatic Detection of Deviant Players in MMOGs*, in *Computational Science and Engineering, 2009. CSE'09. International*

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However, none of these complaints explains, without more, why game companies should want to ban real-money trading. For one thing, the bans have costs of their own, including loss of subscription revenues from gold farms successfully shut down and, perhaps more significant, the 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 cheating rather than, as they do with other controversial play styles, segregate the minority of players who embrace it from the majority who don't.<sup>29</sup> As for gold farming's inflationary effects, they may be real, but they beg the question: Of all the many sources of inflation in MMO economies—including, notably, the hyperproduction of power gamers—why prohibit only this one?<sup>30</sup> If game companies felt it made commercial sense to accommodate gold farming, they presumably would do

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*Conference on*, vol. 4, pp. 340-345. IEEE, 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.”)

<sup>29</sup> 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 (February 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)

<sup>30</sup> Castronova, *supra* note 14.

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so, factoring it into their fine-tuning of the game's economy just as they do with other inflationary phenomena.

Yet even if the business logic of banning RMT remains somewhat opaque, it seems safe to assume that the logic is there. The almost universal presence of the ban in MMOs certainly suggests a reasoned conclusion, on the part of 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>31</sup>, MMO developer Mythic Entertainment fended off an abortive challenge to its RMT prohibition by one of the first known gold farming operations.<sup>32</sup> In *Blizzard Entertainment, Inc v. In Game Dollar, LLC*<sup>33</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>34</sup> In a more recent farming-related case, the much-cited *MDY Industries, LLC v. Blizzard Entertainment, Inc.*<sup>35</sup>, Blizzard won a judgment (vacated but not defeated by the Ninth Circuit) against a company that was

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<sup>31</sup> *Blacksnow Interactive v. Mythic Entertainment, Inc.*, No. 8:02-cv-00112 (C.D. Ca. 2002).

<sup>32</sup> Complaint, *Blacksnow* at 1 (bringing action for interference with prospective economic advantage and unfair business practices against MMO developer that had shut down virtual goods sellers eBay auctions and in-game accounts). See also Julian Dibbell, *Serfing the Web: Black Snow Interactive and the World's First Virtual Sweat Shop*, WIRED, Jan. 2003, available at <http://www.juliandibbell.com/texts/blacksnow.html> (last visited Apr 15, 2014).

<sup>33</sup> *Blizzard Entertainment, Inc. v. In Game Dollar, LLC*, No. 8:07-cv-00589 (C.D. Cal. 2007).

<sup>34</sup> Consent Permanent Injunction at 2, *In Game Dollar*, No. 8:07-cv-00589.

<sup>35</sup> *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928 (9th Cir. 2010).

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selling software designed to automate World of Warcraft bots.<sup>36</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>37</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>38</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.

Not all attempts at enforcing the ban have originated with the companies, however. In *Antonio Hernandez v. Internet Gaming Entertainment, Ltd.*<sup>39</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, 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,"

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<sup>36</sup> *Id.* at 957–58. *See also* Jagex Ltd. v. Impulse Software, 750 F. Supp. 2d 228 (D. Mass. 2010).

<sup>37</sup> MDY Indus., LLC v. Blizzard Entm't, Inc., 2008 WL 2757357 \*1 (D. Ariz. July 14, 2008).

<sup>38</sup> MDY, 629 F.3d at 954–55.

<sup>39</sup> *Antonio Hernandez v. Internet Gaming Entm't*, No. 1:07-cv-21403 (S.D. Fla 2008).

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spending far more hours gathering resources for leveling than they would otherwise have to.<sup>40</sup> The central cause of action, meanwhile, was a relatively simple contractual claim: Namely, that IGE and its co-conspirators breached their promise under the TOU and EULA not to sell gold and, in so doing, breached their obligations to all other players as intended third-party beneficiaries of that promise.<sup>41</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 for protecting the complex multilateral interests of an online social world's users.<sup>42</sup> Here, for example, the Blizzard EULA's blanket prohibition of real-money trading doesn't 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>43</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's almost as if what Hernandez was seeking wasn't so much a private law remedy as something more broadly social—a judicial refereeing of the conflict between two competing modes of organizing the

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<sup>40</sup> Amended Class Action Complaint, Hernandez, No. 1:07-cv-21403.

<sup>41</sup> *Id.*

<sup>42</sup> Joshua A.T. Fairfield, *Anti-Social Contracts: The Contractual Governance of Virtual Worlds*, 53 MCGILL L.J. 427, 453-54 (2008).

<sup>43</sup> *Id.*

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productive activity of players, perhaps: A sort of labor and employment law of the MMO.

The legal scholarship relevant to RMT and gold farming traces roughly the same conceptual contours as the case law. There is just a lot more of it. Legal-academic fascination with virtual worlds in general and virtual economies in particular has generated hundreds of articles in the last decade.<sup>44</sup> Among those, the topic probably addressed most often is that of virtual property rights.<sup>45</sup> This focus in part 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 whether MMO players retain any rights to in their in-game assets other than what the game company grants them by agreement—the question looming in every legal challenge to the ban on RMT, that is—has also accounted much of the scholarship on the subject. Look for articles discussing virtual work, on the other hand, and you will find a dozen at most, and then only if you count the handful of articles that have taken up the question whether virtual items acquired through in-game efforts should be taxed as income.<sup>46</sup> Leave those out, and the number of articles viewing virtual worlds through the lens of labor appears to be exactly two, both by Professor Miriam Cherry, and both intent on how U.S. employment

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<sup>44</sup> A WestLaw search on “virtual +1 worlds” as of March 12, 2014, returns 1062 articles and treatise entries.

<sup>45</sup> A WestLaw search on “virtual +1 property” as of March 12, 2014, returns 434 articles and treatise entries.

<sup>46</sup> See, e.g., Theodore P. Seto, *When Is a Game Only a Game?: The Taxation of Virtual Worlds*, 77 U. Cin. L. Rev. 1027, 1029-30 (2009); 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).

DRAFT; please do not cite or circulate without author's express permission and labor laws might apply to a range of activities in and around virtual worlds.<sup>47</sup>

This article in a sense just 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, to the exclusion 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. The point, that is, is to keep the element of play front and center and, in so doing, connect the literature on virtual economies to work on the commodification of play and, through it, to debates on commodification more broadly.

## II. 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>48</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,

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<sup>47</sup> Miriam A. Cherry, *Working for (Virtual) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009); Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 993-94 (2011).

<sup>48</sup> See *Deuteronomy* 23:17–18 (prostitution); *Ezekiel* 18:7–9 (usury).

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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.

The target of all these prohibitions is what in some academic circles is called commodification. Among legal scholars, commodification has been a focus of debate for many years.<sup>49</sup> Pro-market law-and-economics thinkers gave an early impetus to the discussion. Judge Richard Posner's argument in favor of an open market in babies, for example, was a particularly provocative conversation starter, challenging defenders of adoption law's status quo to show that payments from adoptive to birth parents would not in fact produce better outcomes for all involved, including the adopted children.<sup>50</sup> The debate ever since has largely been, on some level, a response to the Chicago school and its commitment to what Professor Margaret Jane Radin has called "universal commodification" as both analytic tool and policy preference.<sup>51</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 fail to fully account for. One, resting on what Radin calls a "domino

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<sup>49</sup> See generally RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman and Joan C. Williams, eds., 2005).

<sup>50</sup> Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, *The*, 7 J. LEGAL STUD. 323 (1978).

<sup>51</sup> 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.").

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theory” of commodification, is the concern 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>52</sup> For example, even if on balance adopted children and their parents are better off with robust baby markets in place, their gains may not fully compensate for the harms, dignitary and otherwise, that could befall all children once they and their families know to the dollar how the market values any child's particular attributes.<sup>53</sup> The other concern is that, even if the mere act of pricing the priceless in itself does only the airiest of harms, in the world as it exists those harms inevitably are 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>54</sup>

Radin's arguments have in turn been challenged by another set of commentators. Drawing on the insights and observations of economic sociology, these scholars question the notion, implied in Radin's domino theory, that there are realms of the social that are or even 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>55</sup> Instead, they explain, we see “dense networks of social relations that intertwine the intimate and economic dimensions of life”: markets and

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<sup>52</sup> *Id.* at 95.

<sup>53</sup> *Id.* at 100.

<sup>54</sup> *Id.* at 163–2.

<sup>55</sup> Joan C. Williams and Viviana A. Zelizer. *To Commodify or Not to Commodify: That Is Not the Question*, in *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* at 367 (2005).

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corporations sustained by personal ties, family homes shot through with economic relations both internal and external.<sup>56</sup> Noah Zatz, in his work on prison labor and employment law, extends the argument 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>57</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 in fact constructing it.<sup>58</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. 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

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<sup>56</sup> *Id.* at 366.

<sup>57</sup> Noah D. Zatz, *Prison Labor and the Paradox of Paid Nonmarket Work*, in *ECONOMIC SOCIOLOGY OF WORK* at 25 (Nina Bandelj ed., 2009). [Vol. 18 of *Research in the Sociology of Work*.] [369–98]

<sup>58</sup> *Id.* at 4.

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*Gesellschaft* and *Gemeinschaft*. 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.

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 kidney. 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>59</sup>

Yet Radin is right, rhetorically at least, to focus on the double bind, because it throws into relief a tension that has fueled the debate so far and that cannot be written off as a figment of the liberal imaginary. The tension is this: On the one hand, individuals have an interest in the right to maximize the value of a personal attribute, whether it is their intelligence or a bodily organ, and whether they realize its highest value by using it themselves or by

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<sup>59</sup> Williams, *supra* note 55, at 373; RADIN, *supra* note 51 at 123–30.

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trading it away. On the other hand, they have an equally powerful interest in the integrity of their selves and of the ties that bind them, out of more than the immediate self-interest of commercial exchange, to other selves. The one interest thrives in market settings and the other does not, yet neither is purely economic or 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 as we will see, they are just as critical to understanding what's at stake when the human attribute commodified 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>60</sup> Why play is not on the list Radin does not say, but a good guess would be that it simply did not cross her mind. This would certainly be consistent

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<sup>60</sup> RADIN, *supra* note at 113.

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with the fact that, as a topic of discussion, play comes up nowhere in the remainder of Radin's works on commodification. And that fact, in turn, is entirely consistent with play's more or less complete absence from the body of legal scholarship with which those works are in conversation.

The absence is puzzling. In other scholarly realms the commodification of play has been a topic of at least oblique concern for nearly a century, and not surprisingly. In the conventional modern view, after all, play is not just an essentially noneconomic activity but, arguably, *the* essentially 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>61</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>62</sup> Taking the definition further, the sociologist Roger Caillois called play "an occasion of pure waste"<sup>63</sup> and warned of what follows when it becomes productive of real-world consequences:

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

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<sup>61</sup> JOHAN HUIZINGA, *HOMO LUDENS: A STUDY OF THE PLAY-ELEMENT IN CULTURE*. (1955).

<sup>62</sup> *Id.* at 13.

<sup>63</sup> ROGER CAILLOIS, *MAN, PLAY, AND GAMES* 5 (Meyer Barash, trans., 2001).

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against cheats and professional players, a unique product of the contagion of reality.<sup>64</sup>

Along similar lines, the 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>65</sup> For Suits, this thoroughgoing commitment to the nonproductiveness of play was the key ingredient in what he called the “lusory attitude” that distinguishes playful from other kinds of exertions.

More recent thinking about play, however, has begun to question the insistence on separating it from productivity. In part, and 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>66</sup> Among those developments, special mention perhaps should go to psychologist Mihaly Csikszentmihalyi's research on “flow,” an exhilarating state of hyperfocused activity that appears to happen to people as often and as intensely on the job as in the midst of play.<sup>67</sup> But 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

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<sup>64</sup> *Id.* at 44–45.

<sup>65</sup> BERNARD SUITS, *THE GRASSHOPPER: GAMES, LIFE AND UTOPIA* (2005).

<sup>66</sup> 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 HISTORY* 205 (2009).

<sup>67</sup> MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* 143–63 (2008) (chapter on “Work as Flow”).

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landscape of hardcore 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>68</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 really, all along, been just a relic of capitalist ideological history: a four-hundred-year-old “Puritan play ethic” (as Sutton-Smith calls it) designed to elevate the post-Calvinist virtues of accumulative labor by slandering play as utter uselessness.<sup>69</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's 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 we saw when discussing the phenomenon of MMO power gamers, for example, the

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<sup>68</sup> See Celia Pearce, *Productive Play: Game Culture From the Bottom Up*, 1 GAMES & CULTURE 17 (2006); Yee, *supra*, note 6.

<sup>69</sup> SUTTON-SMITH, *supra* note 66, at 201.

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power gamers' playing hours and task pacing can reach levels that, especially in combination with the economic mechanisms that permeate the game, can feel like those of a paid job 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." At what point are there enough indicia 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 touched by commodification. Such effects can be more acute in other types of games. Social-media-based leveling games like the former Facebook hit FarmVille, for instance, are typically played for free by the majority of players, with revenues derived both from advertising and from in-game sales of power-ups to players impatient to reach the next level. In principle, those who play for free need never think of themselves as customers, but in practice they may feel 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 in attempts to wear down the patience of the highest-level free players. The ads channel, likewise, will incentivize the company to keep players in the game for as long as possible, leading to

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more addictive game mechanics than the player of a subscription-fee-based game would encounter.

Other revenue models pose yet more challenging commodification scenarios. In some games, for example, revenues come neither from ads nor from sales to players but from third party purchases of *player* services. That is, players who want a power-up will first have to, say, fill out a customer's survey or give feedback on a customer's product.<sup>70</sup> In these games the player steps outside the game to perform the revenue-generating actions required to continue with the game. In some variations, though, known by the generic term gamification, playing the game *is* the required action.<sup>71</sup> In one such experiment, Google offered a moderately addictive online team-based, matching game in which teams were presented with images from Google's database and earned points if, without colluding, 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 still not capable of matching.<sup>72</sup> Players didn't 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? The web site that

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<sup>70</sup> *'Crowdsourcing' Employer Denies Minimum-Wage Violations: Otey v. CrowdFlower Inc.*, 2013 WL 444500 \*1 (WESTLAW J. EMP.) (quoting 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").

<sup>71</sup> See Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851 (2011).

<sup>72</sup> *Google Image Labeler*, WIKIPEDIA, THE FREE ENCYCLOPEDIA (2014), [http://en.wikipedia.org/w/index.php?title=Google\\_Image\\_Labeler&oldid=594327595](http://en.wikipedia.org/w/index.php?title=Google_Image_Labeler&oldid=594327595) (last visited Apr 15, 2014).

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turns children's household chores and homework into a leveling game?<sup>73</sup>

Does that cross the line into commodification of play, even if there are no revenues?

All of this is to say that play poses a rich set of questions for commodification theory, which would thus be well served by the incorporation of play into its list of core problem areas. As for play theorists, now that they have rejected the Puritan model 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 is play now? In their own attempts to move beyond simple binarisms, play theorists, in their turn, 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>74</sup>

## 2. Commodified play and the law

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<sup>73</sup> CHORE WARS, <http://www.chorewars.com/help.php> (last visited Apr 15, 2014) ("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.).

<sup>74</sup> 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 61.

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Unlike both classic play theory and conventional wisdom, the law seems to recognize no stark distinction between work and play. Certainly it has no trouble acknowledging that a player can be a worker—as indicated, for example, by the well-established recognition of professional athletes' unions under labor laws.<sup>75</sup> Likewise, as rulings granting employee status to student athletes have shown, even a rigorously policed amateurism may not suffice to keep courts from assimilating play to the laws that govern work.<sup>76</sup> Conversely, nothing in these precedents or any others rules out the proposition that what is work can still be play. Indeed, whatever Caillois's doubts about the corrupting influence of pay on play, strong norms against the “throwing” of professional games evince a general expectation that pro athletes are not merely mimicking play when they do their jobs—and the law's support for such norms, as for example in the legal aftermath of the 1919 “Black Sox” scandal, implicitly endorses that expectation.<sup>77</sup> By the same

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<sup>75</sup> 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 [ ] federal laws to achieve greater labor market mobility. Under the National Labor Relations Act (NLRA), players formed unions and bargained collectively with leagues.”).

<sup>76</sup> 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). See also Alejandra Cancino, *Northwestern, Football Players, Cap Off NLRB Arguments in Union Effort*, CHICAGO TRIBUNE (Mar. 18, 2014), [http://articles.chicagotribune.com/2014-03-18/business/chi-northwestern-football-union-closing-brief-20140318\\_1\\_football-players-former-players-graduate-head-football-coach](http://articles.chicagotribune.com/2014-03-18/business/chi-northwestern-football-union-closing-brief-20140318_1_football-players-former-players-graduate-head-football-coach) (discussing NLRB's hearing of a petition by Northwestern University football players for recognition of their right to unionize). Michael McCann, *Two Potentially Game-Changing Developments in O'Bannon vs. NCAA*, SI.COM (DEC. 17, 2013), <http://sportsillustrated.cnn.com/college-football/news/20131217/obannon-case-ncaa-latest-developments/> (last visited Mar. 24, 2014) (discussing N.D. Cal. ruling allowing former student athletes to proceed with suit demanding shares of profits from broadcasts and licensing of their play and likenesses).

<sup>77</sup> See Douglas Linder, *The Black Sox Trial: An Account*, <http://law2.umkc.edu/faculty/projects/ftrials/blacksox/blacksoxaccount.html> (last

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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, arguably, anyone who has fun doing her job.

This is not to say that the law is incapable of drawing lines between activity that is play and activity that is not. When called upon to do so, however, courts tend to focus not on the presence or absence of a “lusory attitude” 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 an equally pervasive feature 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>78</sup> Where courts have presumed to 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.

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visited Mar 24, 2014) (detailing the trial and acquittal of eight Chicago White Sox players on charges of fraud for throwing the 1919 World Series). *But see also* 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).

<sup>78</sup> 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). See also LASTOWKA, *supra* note 74, 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”).

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In deciding which rules are and are not 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>79</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>80</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>81</sup>, for example, the U.S. Supreme Court invalidated the Professional Golf Association's rule 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>82</sup> The reasoning in *Martin* drew in part on historical accounts of how golf has always been played.<sup>83</sup> But in videogame clone cases like *Tetris Holding, LLC v. Xio Interactive, Inc.*<sup>84</sup>, courts have had to make more purely formal decisions about what aspects of a computer game are embodiments of rules (and therefore not copyrightable) and which are aesthetic features.<sup>85</sup>

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<sup>79</sup> *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163 (1982).

<sup>80</sup> *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.

<sup>81</sup> *PGA Tour Inc. v. Martin*, 532 U.S. 661 (2001).

<sup>82</sup> *Id.* at 685.

<sup>83</sup> *Id.* at 683–85.

<sup>84</sup> *Tetris Holding, LLC v. Xio Interactive, Inc.*, 863 F. Supp. 2d 394 (D.N.J. 2012).

<sup>85</sup> *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.

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If the law seems willing to accept in principle, therefore, that play is at times indistinguishable from work, it seems equally amenable to the task of protecting play from the “contagion of reality” if need be. 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 the 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 in MMOs, arguing that the standard end-user contract is an insufficient mechanism for protecting players’ interests in the fruits of their play.<sup>86</sup> On the other hand, Edward Castronova, disturbed by the implications of his own economic analyses, and echoing Margaret Radin’s concerns about runaway commodification, has argued that the transmutability of virtual commodities into real ones threatens the function of virtual worlds as havens of play and fantasy.<sup>87</sup> Castronova shares with Fairfield a skepticism that the EULA is adequate to protect players’ interests, in this case their interests in guarding against the domino effects of commodification.<sup>88</sup> He 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

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Boyden, *Games and Other Uncopyrightable Systems*, 18 GEO. MASON L. REV. 439 (2011) (elucidating the rationale for the exclusion of game rules from copyright).

<sup>86</sup> Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005). *But see, among others*, Steven J. Horowitz, *Competing Lockean Claims to Virtual Property*, 20 HARV. J.L. & TECH. 443 (2007) (arguing that any property claims players might advance in a game’s assets must remain subordinate to those of the game developer).

<sup>87</sup> Edward Castronova, *The Right to Play*, 49 N. Y. L. SCH. L. REV. 185, 196 (2004).

<sup>88</sup> *Id.* at 197.

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reach of property, tax, employment, and other primarily economic laws into these play spaces.<sup>89</sup>

To propose, instead, shifting the analytical focus away from questions of property and contract and onto the fault line between work and play is not to presume that doing so bypasses 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, on the one hand, and preserving the integrity of personal and communal space on the other—and a mere reframing isn't likely to resolve it. Moreover, as should be clear by now, the line between work and play is hardly, in itself, a fount of clarity. Nonetheless, by narrowing the question to what is and is not different between gold farmers and their fellow online gamers, we gain a perspective on the problem of commodified play that may afford both new insights and new solutions.

### III. ARE UNPAID FARMERS EMPLOYEES?

This article presumes that gold farming meets the definition of employment necessary for coverage under U.S. labor and employment laws. The first question it asks in distinguishing gold farmers from their unpaid

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<sup>89</sup> *Id.* at 201. Other discussions of virtual worlds have similarly argued for protecting them from the impingements of economic law. *See, e.g.* Camp, *supra* note 46, at 69 (arguing for qualified exemption of virtual economies from income taxation as a response to “the feared commodification of virtual worlds”).

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counterparts, therefore, is the extent to which that definition also covers unpaid farming. As mentioned above, this inquiry relies in no small measure on Miriam Cherry's analysis of employment law as it applies to virtual work.<sup>90</sup> In some ways, however, Cherry's treatment of the question is at once too broad and too narrow to serve this article's purposes. It is broad in that 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>91</sup> It is narrow, on the other hand, in *not* extending 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, as we have seen, an obviously relevant case of ambiguously commodified play. Sex work, too, comes readily 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. In this, MMO farming invites comparison not so much to other forms of commodified or commodifiable

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<sup>90</sup> See, in particular, Cherry (2009), *supra* note 47.

<sup>91</sup> 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> (last visited Mar 25, 2014).

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play as, somewhat surprisingly, to prison or slave labor, in which the laborer performs conventionally economic activities (construction, manufacture, farm work) but for unsettlingly unconventional motives.<sup>92</sup>

For this and other reasons, therefore, the analysis in this section rounds out its frame of reference by looking to modern case law on prison labor, and in particular to Noah Zatz's insightful discussions of the law's struggles to resolve the employment status of prison laborers.<sup>93</sup>

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

The FLSA defines an “employee” as “any individual employed by an employer.”<sup>94</sup> To “employ,” in turn, is to “suffer or permit to work.”<sup>95</sup> As federal statutory definitions of employment go, this one is fairly typical in its opacity.<sup>96</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 “the hiring party’s right to

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<sup>92</sup> 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> (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”).

<sup>93</sup> 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 57.

<sup>94</sup> 29 U.S.C. § 203(e)(1) (2006).

<sup>95</sup> 29 U.S.C. § 203(g) (2006).

<sup>96</sup> See Zatz, *supra* note 93, at 871 n.50 (citing the Equal Employment Opportunity Act’s similarly “brief, vague” definition of employment).

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control” the worker and her work.<sup>97</sup> Courts have developed a long, nonexhaustive list of factors for determining whether a worker is under such control and therefore an employee, rather than an independent contractor.<sup>98</sup> A finding of employee status grows likelier, for example, when the employer has the power to direct the way work is done, to set the hours worked, or to hire and fire, when the employer provides work benefits, when the employer (rather than the worker) supplies the requisite equipment, when the work relationship between the parties is permanent or relatively long-lasting, when the work requires low skills and little training, when pay is tied to time worked rather than projects completed.<sup>99</sup>

In applying the control test to virtual work, Cherry appears not to contemplate the possibility that the test could identify a relationship of employment between an MMO's developer and its players.<sup>100</sup> This may well be a simple oversight, since, as we will see, Cherry's subsequent discussion of MMO item farming seems to presume that if farming is *work* covered by the FLSA, then it is the MMO's developer that the farmer effectively *works for*.<sup>101</sup> Yet if Cherry means to imply, instead, that courts are likely to be wary of

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<sup>97</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

<sup>98</sup> *See id.* at 323–24 (providing a nonexclusive list of 12 such factors).

<sup>99</sup> *See Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303–305 (5th Cir. 1998); *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1209 (11th Cir. 2003).

<sup>100</sup> 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 employee status under the FLSA would be “a close question.” Cherry, *supra* note 47, at 1096–98.

<sup>101</sup> *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”).

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claims that game companies control players to the same extent employers control employees, her doubt is not unreasonable. 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>102</sup>, to name just one example, that 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>103</sup>—a court might well 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 don't come so easily. Control as it is exercised in a modern online game and control as it functions in a traditional workplace are two very different things, and properly comparing them requires some adjustment for the differences. Imagine, to begin with, 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 décor in the drivers' break room but the look, feel, and function of everything else they interact with: the cars they drive, the roads they drive on, even the bodies they come to work in. Imagine, next, that the real-world employer additionally 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

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<sup>102</sup> *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299 (1998).

<sup>103</sup> *Herman* 161 F.3d at 303.

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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>104</sup> Now, 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 retaliation” can really be the same persuasive indicium of independence that it was to the *Herman* court?

It cannot. Nor, once the full extent of the MMO's control over its players is conceded, do there remain among the factors and principles of the control test any decisive obstacles to deeming MMO players employees of the MMO and its developer.<sup>105</sup> That the MMO developer's control over player performance is less direct than a conventional employer's may be true, but even if that necessarily made it less effective, control-test doctrine explicitly abjures any inherent distinction between direct and indirect control.<sup>106</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>107</sup> In this variant, courts may find employment of an individual by a hiring entity

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<sup>104</sup> 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).

<sup>105</sup> 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's having more than one employer. *Martinez-Mendoza*, 340 F.3d at 1208 (recognizing the possibility of joint employment under the FLSA).

<sup>106</sup> *Id.* (“control may be either direct or indirect, taking into account the nature of the work performed”).

<sup>107</sup> See *Zatz*, *supra* note 93, at 871 n.50 (gathering “economic reality” cases).

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“if, as a matter of economic reality, the individual is dependent on the entity.”<sup>108</sup> If dependence, in this sense, 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 seems, if anything, even likelier than the standard test to find employment in the kind of control MMO players are subject to.<sup>109</sup>

Objections even narrower are possible: That quest rewards and other loot drops effectively pay players for projects completed rather than time worked (an indicator of independent-contractor status under the control test). Or that in using their own computers and Internet connections, players effectively invest in their own work equipment (ditto).<sup>110</sup> Yet as to the first point, 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 consistent with employment status.<sup>111</sup> As to the second, 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

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<sup>108</sup> Martinez-Mendoza, 340 F.3d at 1208.

<sup>109</sup> 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”).

<sup>110</sup> Cherry makes this argument in applying the control test to virtual work in general. Cherry, *supra* note 47, at [ ].

<sup>111</sup> See *Herman* 161 F.3d at 306 (gathering cases holding pieceworkers of various sorts to be employees).

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against employee status.<sup>112</sup> And even if both arguments proved valid, it would take more than two minor adverse factors to tip the balance of an inquiry as searchingly committed to the totality of the circumstances as the control test.<sup>113</sup>

If control were the only issue that mattered in deciding whether MMO play is or is not employment—as in most such decisions it is—then the matter would stand decided. But one more question—typically reserved for cases testing the outer limits of employment law—must be asked, and that is, in effect, whether MMO play is or is not 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 some other employment-based statute, it typically does so on one of two bases: It applies the control test or it applies a statutory exemption. 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 there, with the activity recognized conclusively as employment. In rare cases, however, the court

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<sup>112</sup> *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 (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).

<sup>113</sup> *See id.* at 1054 (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.” (quoting *Brennan v. Partida* 492 F.2d 707, 709 (5th Cir. 1974))).

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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>114</sup> This includes not only prison labor but a range of other phenomena—graduate student teaching, workfare programs, therapeutic jobs for the disabled—in which people are paid for labor performed in institutional contexts aimed primarily at rehabilitation or self-improvement. As Zatz explains:

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>115</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>116</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

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<sup>114</sup> Zatz, *supra* note 93, at 862.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 867–82.

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to be pretty well controlled.<sup>117</sup> Eventually, though, courts began to pick up on a third approach first articulated by the D.C. District Court in *Souder v. Brennan*,<sup>118</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, nor could the court 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>119</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*. Nor was the answer obvious. Indeed, the defendants' key claim was that the services performed by patients—acting as "dishwashers, kitchen helpers, messengers, and the like"<sup>120</sup>—were better understood as therapy than as work. But the court ruled otherwise: The services were work, and they were work because, whatever therapeutic benefit accrued to the patients providing them, "consequential economic benefit" accrued to the institutions receiving them.<sup>121</sup> In short, there was now a new employment test: Regardless of who controlled the laborer or how well, if there was not additionally an *economic* relationship between them, there could be no employment relationship either.

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<sup>117</sup> *Id.* at 871–79.

<sup>118</sup> *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973).

<sup>119</sup> *Id.* at 813 (quoting 29 U.S.C. § 203(g) (2006)).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 814 n.29.

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According to Zatz's reading of the prison labor cases, this new test has evolved over the years into two mutually incompatible strains.<sup>122</sup> The first, adopted by the majority of courts, takes what Zatz calls an "exclusive market" approach. 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, chief among those conditions being liberty of contract, mutually gainful exchange, and arms-length bargaining. As these 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 it has been applied to.<sup>123</sup>

The other variant of the economic test, what Zatz calls the "productive work" approach, just as reliably affirms employment status when applied. Echoing *Sonder*'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. The test's most full-throated expression perhaps has been a Ninth Circuit dissent voicing, on the one hand, concern with the "pernicious competitive effect of cheap [prison] labor"<sup>124</sup> on outside labor markets and, on the other, bafflement with the exclusive-market view of FLSA coverage as incompatible

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<sup>122</sup> Zatz, *supra* note 93, at 882–897.

<sup>123</sup> *Id.* at 882.

<sup>124</sup> *Hale v. State of Ariz.*, 993 F.2d 1387, 1400 (9th Cir. 1993).

DRAFT; please do not cite or circulate without author's express permission with the relationship between prison and prisoner.<sup>125</sup> Crucial to such determinations, Zatz notes, is the fungibility of inmate labor's products—the extent, that is, 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>126</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>127</sup>

The question that concerns us here 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, after all, gold coins and other loot produced by unpaid Western 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 here, the game developer. As Miriam Cherry observes, in a cultural

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<sup>125</sup> *Id.* at 1403.

<sup>126</sup> Zatz, *supra* note 93, at 893.

<sup>127</sup> *Id.* at 895.

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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>128</sup> Thus, notes Cherry, “while performing a [virtually productive] task may not directly benefit the company, it might provide an indirect benefit.”<sup>129</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 Cherry imagines 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 was previously discussed, existing law on paid athletic play scarcely supports finding any such mutual antagonism at all.<sup>130</sup> Even if it did, the uniquely economic nature of MMO play itself might, in this case at least, suggest relaxing any presumption of inherent incompatibility between markets and play. As for the relationship between player and developer—which is grounded, formally, in the terms of the EULA and ToS and, functionally, in the exchange of consideration from both sides—a court would likely find it more fundamentally contractual than many real-world employment relationships.

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<sup>128</sup> Cherry, *supra* note 47, at 1102.

<sup>129</sup> *Id.*

<sup>130</sup> See *supra* Part II.B.2.

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MMO play thus might well meet the explicit requirements of either view of the economic test for employment. To say so, however, is not to end 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 constitute a mutual *exchange* of economic benefits between the parties.<sup>131</sup> That is to say, 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>132</sup> Cherry likewise notes the exemption, citing the Supreme Court's holding in *Walling v. Portland Terminal Co.*<sup>133</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>134</sup>

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<sup>131</sup> See Zatz, *supra* note 93, at 918–21.

<sup>132</sup> This exemption isn't 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 93, 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 no ‘immediate advantage’ from any work done by the trainees”).

<sup>133</sup> *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947).

<sup>134</sup> Cherry, *supra* note 47, at 1100, citing *Walling*, 330 U.S. 148, 152. See also Department of Labor, *Volunteers* (elaws - Fair Labor Standards Act Advisor), <http://www.dol.gov/elaws/esa/flsa/scope/ee16.asp> (last visited Jan. 3, 2014) (“[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.’”), citing *Walling*, 330 U.S. 148, 152.

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Indeed, for Cherry, this exemption poses the principal obstacle to a finding of employment for unpaid MMO farmers under the economic test.<sup>135</sup> Yet here it's important to note that, even assuming most MMO players play primarily or even solely for their "personal purpose or pleasure," it's 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>136</sup> For another, even in the absence of monetary compensation, courts may hold that contingent in-kind benefits given to a worker can invalidate a claim of volunteerism.<sup>137</sup> Finally, and perhaps most decisively, authorities have further stated that under FLSA workers may not volunteer their labor to for-profit enterprises.<sup>138</sup> That MMO developers are profit-seeking companies would not trigger this restriction, of course, if players, like interns, could be presumed to provide no economic benefit to their putative employers.<sup>139</sup> But since we are presuming just the opposite at this point, 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 has failed to.

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<sup>135</sup> Cherry, *supra* note 47, 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).

<sup>136</sup> *Id.* at 1103.

<sup>137</sup> *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (holding that for the purposes of the volunteerism analysis, "in-kind benefits . . . expected in exchange for [ ] services" are "another form of wages").

<sup>138</sup> See Department of Labor, *supra* note 134.

<sup>139</sup> See *supra* note 132.

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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>140</sup> Zatz, moreover, 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, on the one hand, refuses to characterize as economic any relationship that is not purely so while the productive-work view, on the other, renders wholly economic even those that are only partly so.<sup>141</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>142</sup> flagging especially the domino effects that may result from the application of employment law to activities not previously governed by it.<sup>143</sup> For example, a relationship held to be employment under the FLSA's economic-reality test

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<sup>140</sup> See *supra* text accompanying notes 87–89.

<sup>141</sup> Zatz, *supra* note 93, at 895.

<sup>142</sup> *Id.* 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.”).

<sup>143</sup> *Id.* at 923.

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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 tends to provide a check on the “runaway tendencies” of either.<sup>144</sup> Yet 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. If employment status for MMO players is plausible under any circumstances, therefore, then those who fear the commodification of MMO play would appear to be justified in opposing it at every turn.

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's 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>145</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 U.S. 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

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<sup>144</sup> *Id.* at 903–4.

<sup>145</sup> Cherry, *supra* note 47, at 1100.

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resulting from online-game “addiction”—has given rise to restrictions not dissimilar to those of child-labor law.<sup>146</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>147</sup> Korea, too, has proposed a curfew on underage online play during a six-hour block of night.<sup>148</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>149</sup> Yet it is difficult to imagine what principled objections to such restrictions could be made by those whose objections to commodification of MMO play include complaints about the extra hours of farming that paid farming forces all players to engage in.<sup>150</sup>

For that matter, why should they object to the application of FLSA restrictions to *adult* play hours either? 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. 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

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<sup>146</sup> 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. & Pol’y 2.

<sup>147</sup> *Id.* at 43.

<sup>148</sup> 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> (last visited Apr 15, 2014).

See also Brian Ashcroft, *Korea's Silly “Shutdown Law” Might Be Unconstitutional*, KOTAKU, <http://kotaku.com/5921659/koreas-silly-shutdown-law-might-be-unconstitutional> (last visited Apr 6, 2014).

<sup>149</sup> See *id.* (describing game companies’ constitutional challenge to the proposed Korean curfew) and Goltz, *supra* note 146, at 46 (describing underage players’ ability to evade the Chinese play restrictions).

<sup>150</sup> See Castronova, *supra* note 87; Hernandez, *supra* note 39.

DRAFT; please do not cite or circulate without author's express permission after three hours of continuous play.<sup>151</sup> Arguably, of course, *increasing* rewards by half after forty hours of play might only incentivize the kind of power gaming that the anti-commodificationists complain about. 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 work week.

The FLSA's minimum wage requirements might serve as a similarly counterintuitive check on the effects of commodification. They would be trickier to apply, of course, since they would require game companies both to track the real-money value of in-game assets and, whenever the rate at which that value became available to players falls below \$7.25 an hour, increase that rate without either restricting or expanding the supply of assets so much that the increase is negated. As a practical matter this would be burdensome but, given that at least one MMO keeps an accredited economist on staff to deal with its virtual money supply, presumably not unreasonable.<sup>152</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 no idle question.<sup>153</sup> But it's worth noting, as well, that it is essentially the same question that has been asked about

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<sup>151</sup> Goltz, *supra* note 146, at 43.

<sup>152</sup> See Neal Ungerleider, *Meet the Alan Greenspan of Virtual Currency in "EVE Online"*, FAST COMPANY (Jan. 6, 2014), <http://www.fastcompany.com/3024392/meet-the-alan-greenspan-of-virtual-currency-in-eve-online>.

<sup>153</sup> See *supra* note 14.

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minimum-wage requirements for as long as they have existed. And assuming, as has arguably been the case with most extensions of the minimum wage, that this one does not significantly harm the businesses to which it applies, it is again difficult to think 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 the midst of that context. As unionized workers, employees are empowered—in ways that they are not in purely contractual work relationships—to negotiate terms tailored to the specific conditions of their workplaces. If recognized as employees under the NLRA, MMO players could form unions and find themselves similarly empowered. In some ways, this would not be as drastic a transformation as it might seem. 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 teamlike “guilds” composed of dozens and 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 at the very least, implementation of NLRA-sanctioned, game-wide player organizations would put players in a legal relationship with one another, thus countering what could be considered a key commodification effect at work in MMOs: The consignment of player-

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developer relations to the strictly bilateral model of consumer contracts, complained about by Fairfield in his discussion of the *Hernandez* case.<sup>154</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 no doubt be reluctant to extend employment law so sweepingly to an activity so ostensibly dedicated to the principle of play. But working through the likely consequences of such an extension suggests, ultimately, that it would not necessarily usher in the “contagion of reality” that Caillois feared and Castronova still complains about. In fact, and to the contrary, that same contagion might be checked through employment laws more effectively than through the contractual status quo.

#### IV. 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>155</sup> In many cases, for example, courts determine whether an activity does or does not conform to the rules of a game and thus, in effect, whether or not someone engaged in that activity is actually playing the game.<sup>156</sup> Whether that activity is or is not play remains, of

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<sup>154</sup> See *supra* note 42.

<sup>155</sup> See *supra* notes 75–77 and accompanying text.

<sup>156</sup> See *supra* notes 78–85 and accompanying text.

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course, a logically separate question.<sup>157</sup> But in practice, deciding the first question tends to look a lot like deciding the second.<sup>158</sup> To find that someone in some way is not playing a particular game is, for most courts and most cases, to find that they are not playing at all.

Whether Chinese gold farmers are playing at all is, as we saw, not easily determined just by looking at their attitudes toward and day-to-day experience of the games they work in.<sup>159</sup> But it isn't clear that just by looking instead at the rules of those games we make the problem any easier. 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*, after all, an MMO developer is fully authorized to set its own rules for its own games. Why then shouldn't any contractual provision by which a developer governs players' behavior be deemed a rule defining the game they play?

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<sup>157</sup> 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 61; CAILLOIS, *supra* note 63; SUITS *supra* note 65.

<sup>158</sup> 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* 601 F.2d at 520 (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 *Martin*, 532 U.S. at 683 (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* 89 N.J. at 168, 173 (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).

<sup>159</sup> See *supra* text accompanying note 25.

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Yet the same question can be asked of the PGA and the walking requirement it sought to enforce as a game rule in *Martin*. And the Supreme Court's holding there 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>160</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 above all perhaps the intensely social and essentially economic nature of MMO play—all these urge founding the inquiry on an 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. Thus, just as in post-*Uston* New Jersey casinos the law dictates that a professional card counter is as legitimate a player of blackjack as any other,<sup>161</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.

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<sup>160</sup> *Martin*, 532 U.S. at 685.

<sup>161</sup> *See Uston*, 89 N.J. at 169 ("[A casino] has no right to exclude [a card counter] on grounds that he successfully plays the game under existing rules.").

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 they 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, were the New Jersey Supreme Court to hear a gold farmer's challenge to an MMO company's RMT ban—like the one brought in *Blacksnom*, for example<sup>162</sup>—it might well find *Uston* to control. In *Uston*, the court held that a property owner's common law right to exclude, which in most states is limited only by statutory exceptions, in New Jersey “is substantially limited by a competing common law right of reasonable access to public places.”<sup>163</sup> That an online game might be deemed a public place for the purpose of the rule is hardly inconceivable.<sup>164</sup> Once reached, such a finding would leave no very clear remaining grounds for distinction. For example, though the *Uston* court suggested blackjack professionals might lose their right of reasonable access

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<sup>162</sup> See *supra* note 32 and accompanying text.

<sup>163</sup> *Uston*, 89 N.J. at 168.

<sup>164</sup> See, e.g., *Nat'l Ass'n of the Deaf v. Netflix, Inc.*, 869 F. Supp. 2d 196, 200–2 (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”).

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if their methods were inherently “disorderly” or otherwise disruptive of a casino’s “essential operations”<sup>165</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>166</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, as we have noted, does not necessarily vest exclusive rulemaking authority in MMO companies either. 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>167</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>168</sup> But the possibility illustrates how finding gold farmers to be players might affect key procedural issues in particular. Just as 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 on which it ultimately decided the case, so too a finding that an MMO’s ban on

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<sup>165</sup> *Uston*, 89 N.J. at 173.

<sup>166</sup> See *supra* notes 27–30 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-blackjack.htm> (last visited Apr 14, 2014) (giving novice players tips on how to keep their subcompetent play from drawing the ire of the more experienced).

<sup>167</sup> See *supra* note 85 and accompanying text.

<sup>168</sup> 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.

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RMT is a game rule, even if it had to be supported with messy, complicated evidence of player practices and game-design imperatives, 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 a harm to her interests from the practice of RMT, the plaintiff might even be able to win declaratory and injunctive remedies, at least, without having to wade into the difficulty of proving more concrete harms.

Finally, too, note 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

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company's product, in fact, are players of its game. This might be so if 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 therefore endowed, presumably, 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 their real-money wages.

#### CONCLUSION

Let me now clarify: 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 apps whose growth began to eclipse theirs several years ago, virtual 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 and/or economic urgency. The point, rather, is to glance, from what may be a particularly enlightening angle, at a question much broader and for quite a long time now more urgent: The momentous

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instability of the boundaries by which work, in a given age and culture, is defined.

Of the factors that contribute to that instability, the present exercise shines light on two in particular. The first is technology and its evolutions. This, of course, is a subject already much discussed within the commodification debate. From its beginnings in Marx's analysis of alienated factory labor, in fact, 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 no less 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 such already contested commodities as human eggs and Nazi paraphernalia.<sup>169</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 hypercasual "microlabor" brokered by sites like Amazon Mechanical Turk and Task Rabbit; the ubiquitous triangle trade in "user generated content" between users, service providers, and advertisers on sites like Facebook and Twitter and Google

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<sup>169</sup> Margaret Jane Radin and Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, in RETHINKING COMMODIFICATION, *supra* note 49 at 8–9.

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Search; even to some extent the open source software production system, built on volunteer work and celebrated by some as the antithesis of commodified labor but productive of massive economic benefits to the software and Internet industries and of complex forms of compensation to the producers.<sup>170</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>171</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 all the rest 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 as play. This is useful because play, while not as markedly identifiable in other kinds of digital labor, pervades them. Under the guise of leisure, creativity, amusement, passion, play is a key motivating element across the landscape of online production. To fully understand how these new forms of labor function, then, it may be

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<sup>170</sup> 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).

<sup>171</sup> For legal scholars, see, e.g., Cherry, *A Taxonomy of Virtual Work*, *supra* note 47; Jonathan Zittrain, *Ubiquitous Human Computing*, 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 SOCIAL TEXT 33–58 (2000).

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not only useful but in some sense necessary to begin the inquiry with a focus on the most clearly ludic of them. 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 so peculiarly playful a work environment presents.

But if the peculiarities of the online setting itself are part of what makes work so Protean a category there, the other and probably more important part is that work happens to be a Protean category to begin with. For Zatz, recall, the interest in studying how courts decide what is work and what is not is not that it brings us any closer to actually understanding what work is; what it shows, rather, is how courts, through their decisions, are continuously helping to construct and reconstruct what we recognize as work.<sup>172</sup> Yet if directly studying those decisions is one way to get close to that constructive process, trying to imagine how those decisions might be adapted to some new set of circumstances—in effect, to imagine the next iteration of the process oneself—gets us arguably even closer.

And that, in the end, is probably the real value of this 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 assimilating the unadulterated play of the unpaid MMO player to the laws of employment—

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<sup>172</sup> See *supra* notes 57–58 and accompanying text.

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or, likewise, of rendering the wage-bought play of the professional gold farmer legally equivalent to any other's play—still has a whiff of paradox about it. To proceed nonetheless to think through the concrete steps it might take 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.