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Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace

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WORKING FOR (VIRTUALLY) MINIMUM WAGE: APPLYING THE FAIR LABOR STANDARDS ACT IN CYBERSPACE

*Miriam A. Cherry**

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INTRODUCTION

When Congress passed the Fair Labor Standards Act (“FLSA”)¹ in 1938 to help relieve the downward spiral of wages in the Great Depression, America’s workers commonly showed up to an employer’s place of

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1. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–19 (2006)).

business, leaving little doubt if they were “working” and thus entitled to the statute’s minimum wage. Times, and technologies, have changed. With modern computers, individuals often perform work on someone else’s behalf while sitting at home, using not their employer’s factory machinery, but rather a computer they purchased for themselves, as well as their own Internet connection. The work is often engaging and is far more pleasant than operating a drill press of the 1930s. In ways, some of this online “labor” can even feel creative, or be part of a game or a competition.

Are such new forms of “work” entitled to the minimum payment standards mandated under the FLSA? As the United States finds itself in another economic crisis, and with advances in technology key to continued economic growth and stability, these questions demand serious consideration. The FLSA now faces a variety of new scenarios created by work in cyberspace, and there is a strong case that the economic and equitable purposes of the FLSA are best served by ensuring that the statute is construed broadly so that clickworkers—the new virtual workers—receive the federal minimum wage.

As more work enters cyberspace, takes place in virtual worlds, and collapses traditional nation-state barriers, we are entering a new era of “virtual work.” In this Article, I use “virtual work” as an umbrella term to encompass work in virtual worlds, crowdsourcing, clickworking, and even sweeping in, to some degree, the commonplace telecommuting and “mobile executives” that have become ubiquitous over the past decade.² This Article primarily focuses on how minimum wage laws apply to crowdsourcing and clickworking,³ but these two phenomena are natural extensions of trends within labor markets that have been occurring for decades.⁴

Today, millions of people worldwide entertain themselves, supplement their incomes, or both by working within virtual worlds such as Second Life or by casually “clicking” to make a few dollars for simple tasks on websites like Amazon.com’s Mechanical Turk.⁵ One economist, Edward Castronova, has estimated that the economy of Sony’s game EverQuest

2. See Kevin Courtney, *Con Text M-Worker*, IRISH TIMES, Apr. 1, 2008, at 17, available at 2008 WLNR 6100967.

3. This Article is the first of a series that I am working on, which analyzes in detail the effect that virtual work will have on labor and employment law. See Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 ST. LOUIS U. L.J. (forthcoming 2009); Miriam A. Cherry, *A Taxonomy of Virtual Work* (forthcoming). Other forthcoming articles will deal with the public policy and whistleblowing concerns in cyberspace, and employment discrimination law in virtual worlds.

4. See KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 67–116 (2004); see also Miriam A. Cherry, *No Longer Just Company Men: The Flexible Workforce and Employment Discrimination*, 27 BERKELEY J. EMP. & LAB. L. 209 (2006) (reviewing Professor Stone’s book).

5. See EDWARD CASTRONOVA, SYNTHETIC WORLDS: THE BUSINESS AND CULTURE OF ONLINE GAMES 2–3 (2005).

and its world, Norrath, has a per capita Gross National Product (GNP) equivalent to that of Bulgaria.⁶ Because Norrath has a real world monetary exchange rate,⁷ Castronova has applied standard tools of measuring economic growth to this virtual environment.

In numerous worlds, workers hold various jobs that, in the words of leading commentators, make it possible to “work in a fantasy world to pay rent in reality.”⁸ In addition to work in virtual worlds, crowdsourcing and clickworking—where complicated tasks are broken down and distributed to thousands of workers throughout cyberspace, then later consolidated into a finished product—are also on the rise.⁹ While these developments have profound implications for the field of labor and employment law, this topic has yet to be fully explored in the legal literature.

Academics and commentators have begun a dialogue about the legal issues present in virtual worlds,¹⁰ including conceptions of property,¹¹ free speech,¹² intellectual property,¹³ criminal law,¹⁴ tax,¹⁵ corporate law,¹⁶ and

6. *Id.* at 19–20.

7. *Id.*

8. F. Gregory Lastowka & Dan Hunter, *The Laws of the Virtual Worlds*, 92 CAL. L. REV. 1, 11 (2004).

9. See Jeff Howe, *The Rise of Crowdsourcing*, WIRED, June 2006, at 176, 178–79 (using term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the Internet).

10. See, e.g., BENJAMIN TYSON DURANSKE, *VIRTUAL LAW: NAVIGATING THE LEGAL LANDSCAPE OF VIRTUAL WORLDS* (2008) (discussing briefly some of the intellectual property, criminal law, property, and tort issues present in virtual worlds).

11. See, e.g., M. Scott Boone, *Virtual Property and Personhood*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 715 (2008); Joshua A.T. Fairfield, *Virtual Property*, 85 B.U. L. REV. 1047 (2005); Elizabeth Townsend Gard & Rachel Goda, *The Fizzy Experiment: Second Life, Virtual Property and a 1L Property Course*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 915 (2008) (using virtual worlds as a method of teaching property law class); James Grimmelmann, *Virtual Worlds as Comparative Law*, 49 N.Y.L. SCH. L. REV. 147, 150–62 (2004) (describing property and contractual issues within games); Lastowka & Hunter, *supra* note 8, at 56–66 (describing property issues).

12. See, e.g., Jack M. Balkin, *Law and Liberty in Virtual Worlds*, 49 N.Y. L. SCH. L. REV. 63, 68–71 (2004); Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845 (2005); Bettina M. Chin, Note, *Regulating Your Second Life: Defamation in Virtual Worlds*, 72 BROOK. L. REV. 1303 (2007).

13. See, e.g., Woodrow Barfield, *Intellectual Property Rights in Virtual Environments: Considering the Rights of Owners, Programmers and Virtual Avatars*, 39 AKRON L. REV. 649 (2006) (discussing rights of virtual avatars, should they become sentient); Candidus Dougherty & F. Gregory Lastowka, *Virtual Trademarks*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 749 (2008).

14. See, e.g., F. Gregory Lastowka & Dan Hunter, *Virtual Crimes*, 49 N.Y.L. SCH. L. REV. 293 (2004).

15. See, e.g., Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1 (2007); Leandra Lederman, “Stranger Than Fiction”: *Taxing Virtual Worlds*, 82 N.Y.U. L. REV. 1620 (2007) (presenting a clear discussion of taxation issues within virtual worlds, based on existing tax concepts and policy analysis tailored to the type of world at issue); Scott Wisniewski, Note, *Taxation of Virtual Assets*, 2008 DUKE L. & TECH. REV. 5; Julian Dibbell, *Dragon Slayers or Tax Evaders?*, LEGAL AFF., Feb. 2006, at 47 (preliminary analysis of tax questions).

16. See, e.g., David R. Johnson, *Virtual Companies*, CONCURRING OPINIONS, June 15, 2008, <http://www.concurringopinions.com/archives/Virtual%20Companies3.doc>.

comparative law.¹⁷ There have also been impassioned cries about the regulation of virtual worlds. More accurately, these have been impassioned cries against regulation.¹⁸ While there has been some discussion of the broader impact of technology on work in the labor and employment field (such as Professor Travis's excellent treatment of the impact of telecommuting on employment discrimination law and gender)¹⁹ a broad survey of the intersections of employment regulation and computer technology by Professors Gabel and Mansfield,²⁰ a discussion of the challenges of organizing a labor union via electronic mail,²¹ and a discussion of the legal issues facing unemployed telecommuters,²² there has yet to be a full discussion of virtual work in the legal literature. Commentators have tended to view virtual worlds through the lens of other subjects like intellectual property, rather than examining the labor and employment law issues that are present.

However, because employment activity is unquestionably taking place in virtual worlds, these subjects will soon require attention. In June 2008, the Internal Revenue Service ("IRS") issued a private letter ruling holding that greeters for the Electric Sheep Company in the virtual world Second Life were employees, rather than independent contractors.²³ This determi-

17. See, e.g., Caroline Bradley & A. Michael Froomkin, *Virtual Worlds, Real Rules*, 49 N.Y.L. SCH. L. REV. 103, 139–46 (2004) (suggesting that virtual worlds can be a testing ground for governmental regulations, especially those with economic effects).

18. See, e.g., Edward Castronova, *The Right to Play*, 49 N.Y.L. SCH. L. REV. 185 (2004) (making an impassioned argument that "play" spaces on the Internet should be preserved apart from regulation and real legal entanglements); David G. Post, *Governing Cyberspace: Law*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 883 (2008) (arguing that law should be developed specifically for virtual worlds, rather than relying on the maze of conflicts of law principles to determine which jurisdiction's laws apply to virtual worlds).

19. See Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283 (2003) (examining gendered effect of telecommuting).

20. See Joan T.A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as it Relates to Teleworkers*, 2001 U. ILL. J.L. TECH. & POL'Y 233 (providing a broad survey of court cases involving new technology and employment law, including employee/independent contractor questions, common law invasion of privacy claims for intercepting employee emails, noncompetition contracts, sexually harassing emails, accommodation of disabilities by allowing employees to work from home, wage and hour issues, and workplace injuries). This article presents a valuable descriptive analysis of the state of litigation roughly five years ago. In contrast, the present Article analyzes additional aspects of the employment relationship, finds a broader theoretical basis for the discussion, and discusses in far more depth appropriate regulatory responses to the issues discussed.

21. See Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000).

22. See Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261 (2002); Beverly Reyes, Note, *Telecommuters and Their Virtual Existence in the Unemployment World*, 33 HOFSTRA L. REV. 785 (2004).

23. The IRS ruling has been issued but has not yet been published. Secondary sources have, however, confirmed the existence of this IRS ruling, as has the Electric Sheep Company itself, which is planning an appeal. See, e.g., Pixeleen Mistral, *IRS Says Virtual Greeters Are Real Employees*, ALPHAVILLE HERALD, May 12, 2008, <http://foo.secondlifeherald.com/slh/2008/05/irs-rules-in-wo.html> (news report discussing decision); Interview by Benjamin Duranske with Dave Elchoness, Employment Attorney, Executive Dir. of the Ass'n of Virtual Worlds (May 15, 2008), available at

nation has had the real world effect of making virtual employers responsible for Social Security taxes for those workers domiciled in the United States.²⁴ Although the IRS ruling is not dispositive as to the FLSA, the analysis in determining employment status is similar.²⁵

The advent of virtual work simultaneously provides immense promise and peril for workers in the new digital economy.²⁶ New technology allowing collaboration can provide remarkable opportunities for workers and employers alike. Traditional limitations on collaboration—of travel, of meeting, of commuting—can be minimized or reduced. Employers can use virtual spaces to make contacts and recruit talent, without spending money on transportation.²⁷ Recently, in his book, *The Wealth of Networks*, Professor Yochai Benkler has described the potential for collaborative work in cyberspace, especially in a nonmarket setting.²⁸ Certainly, the possibility of matching workers and jobs in cyberspace creates more opportunities and more efficient labor markets.²⁹ In addition, employees have used virtual worlds as part of their protected right to organize and to protest.³⁰ For example, in September 2007, over 2,000 employees protested IBM Italy's pay package by appearing at IBM's headquarters in Second Life.³¹

Simultaneously, virtual work presents many of the same enduring problems that workers' rights advocates have struggled with over the

<http://virtuallyblind.com/2008/05/15/virtual-world-employees/> (interview of Electric Sheep Company about IRS decision); Posting of Giff Constable to the Electronic Company Blog, *Note on the IRS and Contractor Ruling*, <http://blog.electricsheepcompany.com/?p=1139> (May 29, 2008) (Chief Operating Officer of the Electric Sheep Company discussing IRS determination and decision to appeal the ruling); E-mail from Jason Mirvis, Business Development, Electric Sheep Company, to Miriam A. Cherry (July 28, 2008, 15:18 PST) (on file with author) (confirming that reports of adverse ruling by IRS were accurate).

24. See Interview with Dave Elchness, *supra* note 23.

25. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006 (9th Cir. 1997).

26. See Robert D. Hof, *The End of Work as You Know It*, BUS. WK., Aug. 20, 2007, at 80 ("Will this be a new world of empowered individuals encased in a bubble of time-saving technologies? Or will it be a brave new world of virtual sweatshops, where all but a tech-savvy few are relegated to an always-on world in which keystrokes, contacts, and purchases are tracked and fed into the faceless corporate maw?").

27. See, e.g., Joel Dresang, *Manpower Opens Office in Online Virtual Society*, MILWAUKEE J. SENTINEL, July 13, 2007, at D1; Gabrielle Monaghan, *A Virtual Way to Find Real Talent*, SUNDAY TIMES (London), Mar. 16, 2008, at 19 (describing KPMG and Accenture recruiting events on Second Life and the fact that the Manpower recruiting agency has also opened an island within Second Life).

28. See YOCHAI BENKLER, *THE WEALTH OF NETWORKS* 9 (2006) ("As collaboration among far-flung individuals becomes more common, the idea of doing things that require cooperation with others becomes much more attainable, and the range of projects individuals can choose as their own therefore qualitatively increases. The very fluidity and low commitment required of any given cooperative relationship increases the range and diversity of cooperative relations people can enter, and therefore of collaborative projects they can conceive of as open to them.").

29. See ALAN HYDE, *WORKING IN SILICON VALLEY: ECONOMIC AND LEGAL ANALYSIS OF A HIGH-VELOCITY LABOR MARKET* 144-47 (2003).

30. The Labor Management Relations Act of 1947 guarantees, *inter alia*, that employees have the right to organize and protest in most instances. See Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, 61 Stat. 136 (codified as amended in scattered sections of 29 U.S.C.).

31. See *On Strike, Virtually*, THE ECONOMIST, Mar. 15, 2008, at 87.

years. Many types of virtual work have been criticized in the press as creating new “virtual sweatshops.”³² For years corporations have engaged in a race to the bottom, not only in selecting the jurisdiction of incorporation that will govern their internal corporate affairs,³³ but also to find the jurisdictions with the cheapest labor and the least regulation of employment relationships.³⁴ While such behavior is economically rational, whether such a race maximizes sustainable development and worker’s interests, is another question altogether. The concern about virtual work is that it will further accelerate the race to the bottom and ultimately further erode worker’s rights and benefits.³⁵

The challenges associated with reconciling virtual work with traditional labor and employment law doctrines are numerous, yet that does not mean that virtual work is (or should be) a lawless zone. Indeed, here I argue that the FLSA could have a positive application to worker’s rights in cyberspace and in virtual worlds. In some regards, such as with globalization and outsourcing,³⁶ virtual work will only accelerate existing trends, and in doing so will force us to confront difficult questions about labor across borders. Instead of presenting a race to the bottom that will eviscerate many legal rights, some imposition of background standards might be used to transform the vicissitudes of the unregulated market and the race to the bottom into a situation that helps to increase efficiency—without worker exploitation.³⁷ Some of these protections, I argue, should be available for the most deskilled work. I also argue that setting some voluntary

32. See David Barboza, *Ogre to Slay? Outsource it to Chinese*, N.Y. TIMES, Dec. 9, 2005, at A1; see also Wendy N. Duong, *Ghetto’ing Third World Workers with Hi-Tech: Exploring Regulatory Solutions for the Effect of Artificial Intelligence on “Third World” Foreign Direct Investment*, 22 TEMP. INT’L & COMP. L.J. 63 (2008).

33. See, e.g., Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects*, 31 HOFSTRA L. REV. 681 (2003) (describing the decision process of choosing a jurisdiction of incorporation).

34. See, e.g., Archie A. Alexander III, *American Diagnostic Radiology Moves Offshore: Is This Field Riding the “Internet Wave” Into a Regulatory Abyss?*, 20 J.L. & HEALTH 199 (2006–2007) (analyzing outsourcing of medical services); Christina Laun, *The Central American Free Trade Agreement and the Decline of U.S. Manufacturing*, 17 IND. INT’L & COMP. L. REV. 431 (2007) (considering impact of Central American Free Trade Agreement on U.S. manufacturing industries); Raúl Delgado Wise & James M. Cypher, *The Strategic Role of Mexican Labor under NAFTA: Critical Perspectives on Current Economic Integration*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 120 (2007) (discussing the impact of the North American Free Trade Agreement on outsourcing); Keith Woffinden, *Surfing the Next Wave of Outsourcing: The Ethics of Sending Domestic Legal Work to Foreign Countries Under New York City Opinion 2006-3*, 2007 BYU L. REV. 483 (2007) (discussing the legal and ethical implications of outsourcing legal work).

35. See Katherine Van Wezel Stone, *To the Yukon and Beyond: Local Laborers in a Global Market*, 3 J. SMALL & EMERGING BUS. L. 93 (1999) (describing race to the bottom phenomenon within global labor markets).

36. See *supra* notes 32–35 and accompanying text.

37. The global dimension of this question is one that I reserve for discussion in another article. See Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 ST. LOUIS U. L.J. (forthcoming 2009).

“best practices” standards for virtual work could assist in the process of drawing the lines between work and entertainment.

This Article begins with a brief background discussion of labor markets in cyberspace. Part I contains an in-depth description of the process of pounding the virtual pavement—looking for work in cyberspace—for the purpose of showing the special employment challenges in this context and thus why such work warrants the protection of the FLSA. With that background, Part II discusses the application of the FLSA to work in virtual worlds, crowdsourcing, and clickworking. Finally, Part III makes the normative argument that the purposes of the FLSA are best achieved by extending its application to virtual work in the United States. Finally, the conclusion offers some thoughts about the broader applications of this argument.

I. LABOR MARKETS IN CYBERSPACE

Not long ago—and currently in many of the traditional blue collar “trades” and among day laborers—workers would present themselves at a central gathering hall, showing that they were present, ready, and willing to take on work for the day.³⁸ In many ways, websites that match up job-seekers with companies seeking workers are much like these labor halls, only transported into cyberspace. Certain websites match up employers and workers, offer screening devices, and allow employers to provide feedback on workers’ performance.³⁹ Unlike the traditional labor halls, these new cyber labor markets are available to anyone who wants to work from any location—provided that he or she happens to have a speedy Internet connection. And, also, unlike the traditional labor halls, these “new economy” markets have as their *sine qua non* knowledge and computer skills, not “old economy” skills such as those associated with physical skill or manual labor.⁴⁰

Such job matching websites are only the beginning of the virtual work story, however. The types of work being performed wholly in cyberspace are diverse and far-ranging. The most ubiquitous of these arrangements could be classified as “telecommuting” or “telework.”⁴¹ Especially in an era of high gas prices and long commutes, many workers view taking a day to work at home as a valuable economic benefit, as well as one that enables them more flexibility in their personal lives. Such telecommuting could easily translate to the virtual world, which would allow for more

38. See JENNIFER GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* (2005) (describing day labor phenomenon for immigrants). While the discussion today tends to focus on immigrant day labor, the hiring hall model has also been more traditionally affiliated with unions.

39. See, e.g., Elance, <http://www.elance.com> (website that facilitates such connections).

40. See STONE, *supra* note 4, at 1–9.

41. See Travis, *supra* note 19, at 289–95.

engagement of the individual who is working remotely. Some old economy positions—jobs that involve client counseling, for example—can be performed in a virtual environment.⁴² Other work, such as particular programming jobs, is a product of the new economy—these jobs only exist because of the presence of technology. In clickworking and crowdsourcing, computers break down massive tasks to their lowest common denominator, send the work out in tiny bits to humans, then take the results and aggregate them.⁴³ Finally, in “gold farming,” First World gamers hire those in developing nations (who can work while the gamers sleep), to play their characters, obtain experience, or acquire virtual objects. Other First World gamers purchase the fruits of Third World virtual labor via the conduit of online auctions.

A great deal of work is also taking place in virtual worlds, and is driving the engine of virtual economies like Norrath, the world of EverQuest, described in the introduction. Numerous scholars and commentators have previously written comprehensive overviews of virtual worlds,⁴⁴ and therefore I provide only a brief description of the development and history of the different types of virtual worlds that exist. Nevertheless, I want to provide sufficient detail of the motivations and operations of virtual worlds, because such an understanding is necessary to assess whether the activities should qualify for the protection of the FLSA.

Virtual worlds, in the words of one of the original game designers, are “persistent, computer-mediated environments in which a plurality of players can interact with the world and each other.”⁴⁵ Beginning with text-based games in the late 1970s that adapted the plot and characters of author J.R.R. Tolkien, virtual worlds evolved as use of computers and the Internet increased, making these environments simultaneously more familiar and more exciting.⁴⁶ Today, it seems that most virtual worlds are fundamentally one of two types—scripted worlds that involve a quest, game, or puzzle, and those worlds that promote social interaction.⁴⁷ The first

42. See, e.g., Attila Berry, *Lawyers Earn Actual Cash in Virtual World*, LEGAL TIMES, July 30, 2007, at 15 (describing law firm that brought in \$20,000 in revenue in first year from its Second Life office); Monaghan, *supra* note 27, at 19 (describing attorney who used Second Life to find clients and within two weeks had made \$7,000).

43. See *infra* notes 78–107 and accompanying text (describing clickworking and crowdsourcing in more detail).

44. See, e.g., Andrew E. Jankowich, *Property and Democracy in Virtual Worlds*, 11 B.U. J. SCI. & TECH. L. 173 (2005) (comparing similarities and differences of real and virtual worlds); Beth Simone Noveck, *The State of Play*, 49 N.Y.L. SCH. L. REV. 1, 6–10 (2004) (describing the history and development of virtual worlds); Bobby Glushko, Note, *Tales of the (Virtual) City: Governing Property Disputes In Virtual Worlds*, 22 BERKELEY TECH. L.J. 507 (2007) (describing the nature of a virtual world and its comparison to the physical world).

45. Richard A. Bartle, *Virtual Worldliness: What the Imaginary Asks of the Real*, 49 N.Y.L. SCH. L. REV. 19, 19 (2004–2005) (describing virtual worlds and rules from the point of view of the game designer).

46. See *id.* at 20–22.

47. See DURANSKE, *supra* note 10, at 263–65 (providing a listing of virtual worlds current as of

type are commonly known as a “Massively Multiplayer Online Role-playing Game” (“MMORPG”).⁴⁸ These games have the player/protagonist follow a quest or complicated series of puzzles to obtain an objective.⁴⁹ In the process of following the quest, the player/protagonist may interact with other real player characters and the computer (AI) characters (“bots”).⁵⁰

On the other hand, there are worlds, such as *The Sims* and *Second Life*, which are fundamentally concerned with social interaction. Each person who enters these worlds assumes an identity—an avatar—that can be tailored to reflect their personality.⁵¹ Rather than requiring users to pursue a quest or play a game, these other social worlds depend on users to create their own content, economies, and entertainment.⁵² I use the word economies deliberately, as *Second Life* is a commodified space—an environment friendly to businesses that encourages trading and wealth-building.⁵³

To investigate further the question of what types of jobs existed in virtual worlds, my valiant research assistant spent a week of his summer on a quest. Instead of spending time on *World of Warcraft* slaying dragons,⁵⁴ however, he undertook a different heroic (quixotic?) journey—to attempt to support himself financially by working in the virtual world *Second Life*. We took Barbara Ehrenreich’s books *Nickel and Dimed*⁵⁵ and *Bait and Switch*⁵⁶ as the models for this experiment. In *Nickel and Dimed*, Ehrenreich vowed to sustain herself by working at various minimum wage jobs, then to use her experiences to illuminate the hardships that minimum wage workers have to face, including the lack of health insurance and the

2008).

48. See Ung-gi Yoon, *A Quest for the Legal Identity of MMORPGs—From a Computer Game, Back to a Play Association*, 10 J. GAME INDUSTRY & CULTURE, Fall 2005, available at <http://ssrn.com/abstract=905748> (describing the nature of MMORPGs and their impact on the legal landscape).

49. *Id.*

50. *Id.*

51. See Barfield, *supra* note 13, at 649–57.

52. Cory Ondrejka, *Escaping the Gilded Cage: User Created Content and Building the Metaverse*, 49 N.Y.L. SCH. L. REV. 81, 81–83 (2004) (describing differences between role-playing fantasy worlds and *Second Life*).

53. It is significant that one of the first academics to study virtual worlds is an economist. See CASTRONOVA, *supra* note 5, at 1–22 (describing commodified nature of *Second Life*).

54. See Julian Dibbell, *Dragon Slayers or Tax Evaders?*, LEGAL AFF., Feb. 2006, at 47. In this story, journalist Julian Dibbell described how he decided to sell objects in an MMPORG to support himself. He actually made more money in the last month than he had as a writer. However, the article took a turn for the surreal when he attempted to report the money he had made from selling virtual objects to the IRS, and faced confused and bemused IRS workers who could not provide guidance. For a discussion of the tax treatment of objects within the virtual world, see *infra* notes 126–137 and accompanying text.

55. BARBARA EHRENREICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001).

56. BARBARA EHRENREICH, *BAIT AND SWITCH: THE (FUTILE) PURSUIT OF THE AMERICAN DREAM* (2005).

struggle for decent food and housing.⁵⁷ Our project, however, was instead focused on the question of whether anyone could actually find work on Second Life, and what types of work were offered rather than the resulting difficulties that would arise if the payment is at, or below (which is the case in many of the virtual work situations), the federal minimum wage.

In looking for work, my research assistant encountered many of the challenges that anyone seeking a job in the real world faces: rejection, false leads, and the need to find more networking contacts.⁵⁸ He also encountered some challenges unique to Second Life. For example, he had to learn how to walk.⁵⁹ Amazed to see how large Second Life was, he likened looking for work to moving to a new city to look for a job, every single day.⁶⁰ The technological challenge was high; his laptop, only a year old, barely had the capability to run the software needed and the connection speed functioned at a crawl.⁶¹

Another rather unusual feature of seeking work in Second Life that I saw for myself when I signed on, is the heavy onslaught of the twin evils of the Internet, spam and pornography.⁶² Users can search bulletin boards for jobs, but there are so many fake advertisements that my research assistant described the process as “junk filtering.”⁶³ Because it is costless to place these ads, spammers post numerous advertisements designed to entice you to show up at certain locations:

Money Island and Money Tree Island Atms and Money Trees are located HERE! Stop by Freebie Island and Click on a Mylindens.com “Atm” or a Money Tree Island “Tree” and start earning extra Cash Today! If Freebie Island is full try Money Island or Money Tree Island! If there [sic] all full which they are most of the Time! Do a search for Money Island Atms or Mylindens and find an Affiliate Atm around Second Life! Plus there is a ton of Free items all around the Island! Make some Cash and shop for Free!⁶⁴

57. EHRENREICH, *supra* note 55. Similarly, in BAIT AND SWITCH, Ehrenreich submitted her resume as a college educated professional hoping to land a white-collar “middle class” job. While she was extremely successful in meeting with career counselors, the prospects for an actual job that would support a middle class lifestyle remained slim. EHRENREICH, *supra* note 56.

58. See Interview with Joshua Smith, Research Assistant, in Sacramento, Cal. (July 24, 2008) (on file with author).

59. See *id.*; see also Berry, *supra* note 42 (describing difficulties with setting up her avatar, the author explains that the avatar would keep walking into walls and that the avatar’s hair would turn blue). In Second Life you walk using the keyboard.

60. See Interview with Joshua Smith, *supra* note 58.

61. See *id.*

62. See *id.*

63. See *id.*

64. See *id.*

Trying to keep an open mind, my research assistant visited these islands, only to find that, indeed, it was just a ploy to entice unsuspecting avatars,⁶⁵ and there was, sadly, no free money to be had, despite all of the talk of virtual ATMs.⁶⁶ Other want ads that my research assistant encountered were too risqué for a law review publication.⁶⁷

After determining that bulletin boards were getting him nowhere, my research assistant posted his own ad, only to be spammed with many x-rated offers,⁶⁸ which probably would not have happened if he went to a job placement agency or were browsing an online job website like Monster.com. After he posted an ad saying that he was looking for work, he received the following solicitation (one of the tamer ones that he received):

Seeking uber-sexy, experienced male and female exotic dancers who know how to make their clients' knees go weak with their awesome emotes! Join our team of elite Centerfold dancers and enjoy a fun & friendly work environment. Shifts avail 12-2 and/or 7-9 SLT M-Sat. Also hiring hosts/hostesses who make every client immediately feel welcome.⁶⁹

I assured my research assistant that this need not become a part of his legal studies (or his resume), and that he could discount that particular work opportunity.

Humor aside, there are actually many non-erotic jobs posted to the bulletin boards in Second Life. One of the more common opportunities is to become a "travel agent," where you advise newcomers of what opportunities exist in the world, and as greeters, where you represent a business and explain available services to visitors.⁷⁰ Other opportunities include "custom avatar designers, party and wedding planners, casino operators, nightclub owner, car manufacturers, fashion designers, freelance scripters, [and] game developers."⁷¹

65. Luring additional traffic on Second Life is valuable, just as attracting more "eyeballs" is valuable to a website on the Internet.

66. See Interview with Joshua Smith, *supra* note 58.

67. The fact that the Internet is used by a large number of people for pornography is ubiquitous and yet shocking. It has even entered the popular culture in the song "The Internet is for Porn," which appeared in the comedic puppet-musical, "Avenue Q." See also *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997) ("Sexually explicit material on the Internet includes text, pictures, and chat and 'extends from the modestly titillating to the hardest-core.'" (quoting *Am. Civil Liberties Union v. Reno*, 929 F. Supp. 824, 844 (E.D. Pa. 1996))).

68. See Interview with Joshua Smith, *supra* note 58.

69. See *id.*

70. See *id.*

71. Monaghan, *supra* note 27; see also Ondrejka, *supra* note 52, at 94 (explaining that Second Life users have "become entrepreneurs, opening stores, bars, and strip clubs, and searching out creators to provide goods and services for them").

After being bombarded with junk information and fake offers, my research assistant found what appeared to be an actual Linden-paying⁷² position as a greeter for a large store in Second Life.⁷³ Unfortunately, the store was mostly unattended, and he was repeatedly told to come back and apply for a position at another time.⁷⁴ However, no one was ever there to take his application, and so my research assistant ended forty hours of job searching that week in the virtual unemployment line.⁷⁵

Although frustrating, my research assistant's experience is enlightening from a few perspectives. First, despite a good deal of hype promising amazing work opportunities in Second Life,⁷⁶ it takes a great deal of skill and patience to make a living there—essentially the same effort and dedication that it takes in the real world. Finding work in the virtual world requires a good deal of computing power, a speedy Internet connection, and, preferably, computer programming skills. My research assistant, while relatively technologically savvy, was not a computer programmer and, as a newcomer to Second Life, lacked a familiarity with the game that would have allowed him to start working immediately. He is, however, college-educated, hardworking, and ambitious. If the opportunities for someone of his caliber were slim, one can imagine how difficult it would be for someone without an education or good communications skills in attempting to navigate such a virtual environment—certainly an important consideration in evaluating whether such workers who do find paying jobs in virtual worlds should be entitled to the protection of the FLSA.⁷⁷

Another form of work that might come under the ambit of the FLSA is crowdsourcing. In crowdsourcing, computers automate and break down tasks, and then the work for which humans are needed is sourced out to them. The work is matched with thousands of computer workers who perform tasks that require only minimal awareness and the entry of a few characters or the clicking of a mouse.⁷⁸ Crowdsourcing takes the products

72. Lindens are the official currency of Second Life, named after Linden Labs, the name of the company that runs Second Life. See Berry, *supra* note 42 (“Second Life even has its own currency, the Linden Dollar, as well as its own currency exchange, where users can buy Lindens using American dollars and also change them back. Currently, the exchange rate is about 186 Lindens per American dollar.”), <http://secondlife.com/whatis/> (last visited Aug. 8, 2008).

73. See Interview with Joshua Smith, *supra* note 58.

74. See *id.*

75. See *id.*

76. See, e.g., Dresang, *supra* note 27 (describing an employment agency's office in Second Life).

77. Cf. STONE, *supra* note 4 at 258–89 (describing the division between knowledge workers and “old economy” workers, who she believes are being left behind in this period of increasing technological advancement).

78. Crowdsourcing is currently being used in ways that do not take particular advantage of human intelligence. However, there is some indication that crowdsourcing has some potential for creating more accurate journalism, for example. In Rashomon-style, different observers may collect and tell different stories, which journalists can then use to compile a more complete story, rather than a top-down vision.

of many workers to create something greater than the sum of its parts.⁷⁹ The individuals who are engaged in this work are known as “clickworkers.”

Amazon has launched a service, known as the Mechanical Turk, which is described as a “marketplace for work,” and claims that it can provide an “on-demand, scalable workforce.”⁸⁰ Named after an eighteenth-century mechanical device that could beat humans at the game of chess (a chess master was hidden inside),⁸¹ the Amazon Mechanical Turk is one of the most prominent crowdsourcing websites. Individuals or companies formulate and post tasks for the vast crowd of turkers/workers on the Mechanical Turk website.⁸² These tasks may include tagging photos, comparing two products, or determining if a website is suitable for a general audience.⁸³ The turkers⁸⁴ are able to browse among the listed tasks and complete them, receiving payment in the form of credits from the Amazon.com website.

“Requesters” have many rights on the Mechanical Turk website; turkers, on the other hand, have far fewer. Requesters may set hiring criteria; they may accept or reject the work product, which has an effect on a turkers’s online reputation and ability to compete for work in the future. While requesters must have a United States address, turkers can be located anywhere in the world.⁸⁵ Amazon.com makes money by charging a service fee for requests, typically ten percent of the value of the “wages” being sourced.⁸⁶

In the past few years, the Mechanical Turk’s results have been mixed. For example, thousands of people logged onto their computers to donate their time searching the Nevada desert looking for missing aviator Steve

79. See Howe, *supra* note 9, at 178–79 (using term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the Internet).

80. See Amazon Mechanical Turk Welcome, <http://www.mturk.com/mturk/welcome> (last visited June 4, 2009).

81. See Katharine Mieszkowski, *I Make \$1.45 a Week and I Love It!*, SALON.COM, July 24, 2006, available at <http://www.salon.com/tech/feature/2006/07/24/turks/index.html> (describing origin and history of the name “Mechanical Turk”).

82. See, e.g., *Amazon Web Services Launches New Web-Based Tools For Mechanical Turk*, DATAMONITOR, July 30, 2008, available at 2008 WLNR 14200460.

83. See Andrea James, *Service Offers Pay For Doing Tiny Tasks Online*, SEATTLE POST-INTELLIGENCER, July 31, 2008, at D2.

84. The Mechanical Turk website neutrally describes the turkers/workers as “Providers,” most likely to avoid calling them employees or to give rise to any of the obligations that may attach if these workers were to be considered employees of Amazon.com. See Amazon Mechanical Turk Welcome, <http://www.mturk.com/mturk/welcome> (last visited June 4, 2009) (using term “Providers”). Of course, the label that one party attaches to a relationship is far from dispositive in determining whether an employment relationship actually exists.

85. See *Technology Quarterly: Artificial Artificial Intelligence*, THE ECONOMIST, June 10, 2006, at 80.

86. See, e.g., John Cook, *New Photo Tagging Service Gains Popularity*, SEATTLE POST-INTELLIGENCER, Apr. 1, 2008, at E2; George Johnson, *An Oracle Part Man, Part Machine*, N.Y. TIMES, Sept. 23, 2007, at 41.

Fossett.⁸⁷ Using satellite photographs of the vast area where Fossett had likely disappeared, the computer program split up the task of searching, farming out the work to the thousands of turkers who were running the Mechanical Turk program.⁸⁸ If a turker was to find anything out of the ordinary, the frame was referred to other turkers to double-check, and ultimately was passed onto the search and rescue team.⁸⁹ Amazon highly hyped the search, and the newsmedia picked up on the dramatic rescue efforts. Unfortunately, even with all the publicity, and even after thousands of hours of work that was involved, the turkers were unable to find either Fossett or any traces of his airplane. Since that time, the ruins have been found—apparently in rough terrain that was inaccessible to aerial survey.⁹⁰ This was not the fault of the technology, but rather a limitation of the natural world.

The tasks that turkers perform are typically simple and repetitive.⁹¹ According to online accounts, requesters “do not have to file forms for, nor to pay, payroll taxes and they avoid laws regarding minimum wage, overtime, and workers compensation.”⁹² Turkers, on the other hand, are still responsible for reporting their income to the IRS. How many turkers actually *do* report these earnings, however, is another question, especially those turkers who use the website only occasionally.⁹³ The ultimate result is a fuzzy gray market for casual clickwork services, where there is practically no regulation. Perhaps a good analogy would be that this is almost like hiring a neighborhood teen to mow your lawn twice a summer, but on a grand and global scale.⁹⁴

87. See, e.g., Dan Fost, *Despite Silicon Valley Optimism, a Disease Resists Cure*, N.Y. TIMES, Apr. 14, 2008, at C6 (describing failed searches for Fossett and James Gray, a scientist who was lost at sea); Steve Friess, *Searching by Land, Air and the Web*, N.Y. TIMES, Sept. 16, 2007, at 42 (describing search for missing adventurers); *The Search for Steve Fossett: Turk and Rescue*, THE ECONOMIST, Sept. 22, 2007, at 61.

88. See Fost, *supra* note 87; Friess, *supra* note 87; *The Search for Steve Fossett: Turk and Rescue*, *supra* note 87.

89. See Friess, *supra* note 87; THE ECONOMIST, *supra* note 87; Fost, *supra* note 87.

90. See, e.g., Miriam Cherry, *The Limitations of Technology and “Right Size” Challenges*, CONCURRING OPINIONS, Oct. 11, 2008, http://www.concurringopinions.com/archives/2008/10/limitations_of.html (discussing the eventual discovery of the wreckage); Steve Friess, *DNA in Bones Near Plane Crash Matches Fossett’s*, N.Y. TIMES, Nov. 4, 2008, at A19.

91. My research assistant was eager to try mechanical turking the bluebooking citations for this Article, but ultimately I decided that such an experiment, while perhaps time-saving for everyone involved, was beyond the scope of this Article.

92. Amazon Mechanical Turk, WIKIPEDIA, http://en.wikipedia.org/wiki/Amazon_Mechanical_Turk (last visited June 4, 2009). The entry goes on to point out that the Mechanical Turk has given rise to other questionable employment practices, noting that some requesters have had workers perform tasks, only later to reject their work so that they do not have to pay for the work. See *id.* In the real world, taking advantage of workers in a similar way would violate the FLSA and would result in fines and penalties.

93. While I would suspect that given the incredibly low wages, this work would be *de minimus*. However, if someone worked steadily enough for long enough and then did not report the income, it could arguably create a tax problem for the turker.

94. See Richard A. Epstein, *The Moral and Practical Dilemmas of an Underground Economy*, 103

Crowdsourcing and other types of distributed work are likely to increase in the coming years. Imagine using computers to aggregate thousands of perspectives on a political speech among different groups of voters and using those perspectives to inform—or to constitute—the news accounts of how that speech was perceived.⁹⁵ Tasks that once seemed unmanageably large can now be broken down into more manageable sub-tasks, making it possible to achieve the larger goal. For example, SETI@home uses underutilized computer time to conduct sweeping searches for aliens in outer space.⁹⁶ Others would use crowdsourcing to search for different types of aliens—along the United States–Mexico border through the use of surveillance cameras that would be outsourced to online users.⁹⁷ Whatever the wisdom of such projects, the technological aspects are neutral and transferable to many different types of large tasks that can be disaggregated, broken down, sent to individuals, and then reassembled by computers in a way that is more efficient than individuals could ever hope to accomplish on their own.

While there are no statistics available (that I could find) on the class background of workers on the Mechanical Turk, according to the company at least some number of them are middle class, live in the First World, and casually perform clickwork for fun when they have a few spare minutes.⁹⁸ This group of workers plows whatever money they make back onto the Amazon.com website, where they buy books, videos, or other goods on offer. The result is work that is collaborative but still monetized and which interestingly hovers between work and leisure.⁹⁹

To examine the nature of work in cyberspace further, and to determine whether such work might warrant FLSA protection, I interviewed a regular user of the Mechanical Turk service, who had some informative insights about why he used the service and how it helped him with his business plans.¹⁰⁰ This user emphasized to me that he had seen many business-people who had financial success not because of the value of their ideas, but because they were able to have “good judgement [sic] of people and

YALE L.J. 2157, 2157 (1994).

95. Cf. *Business: The Wisdom of Crowds*, ECONOMIST, Sept. 27, 2008, at 14.

96. See SETI@home, <http://setiathome.ssl.berkeley.edu> (last visited June. 5, 2009); see also BENKLER, *supra* note 28, at 81–83.

97. See BENKLER, *supra* note 28, at 81–83.

98. See Matthew Bingham & Joseph Dunn, *Wanted: Digital Drones to Earn ½ p an Hour*, SUNDAY TIMES (U.K.), Jan. 11, 2009, at 6 (quoting vice president of Amazon Mechanical Turk, stating that she sees full-time workers use the service as well as those who “work from home and are there when the kids get home . . . or they are retired”); see also Mieszkowski, *supra* note 81 (describing middle class Turkers who use the proceeds from their work as “mad money” to make purchases on Amazon.com).

99. See Bingham & Dunn, *supra* note 98.

100. E-mail from Hemant Dhingra to Miriam A. Cherry, Associate Professor of Law, University of the Pacific, McGeorge School of Law (Jan. 13, 2008, 09:56 PST) (on file with author).

delegation” skills.¹⁰¹ When I probed further into his motivations, the user emphasized that one cannot “scale [a business] if you are doing everything yourself.”¹⁰² When I questioned the user about the difficulty of monitoring or supervising the work of others, especially if those workers are far flung across the country or the world, the user essentially told me that I was being too narrow-minded.¹⁰³

In fact, this user emphasized to me that the environment “[has] changed in these years . . . these sites have [an] ebay style feedback system so you will know [the] track record of the [worker].”¹⁰⁴ Not only that, but the user emphasized that no matter where the worker is located, “you can do [a] video conference to get a feel of the [workers], they have online tests that providers can do—[which] gives you an idea of intellectual capacity of the person.”¹⁰⁵ Further, “with broadband penetration in other countries—the pool of candidates has expanded . . . [the] hiring and payment process has been streamlined.”¹⁰⁶ Again, when I pressed on the costs of monitoring and supervising remote employees who one has never met, I was assured that “scalability” was much easier than I imagined.¹⁰⁷

These comments from the Mechanical Turk user, as well as the experience of my research assistant, illustrate some of the possibilities—and the perils—of various types of virtual work. There is the potential for greater efficiency, but some of the problems of the “old economy” are still present. Low pay, the deskilling of labor, and possible exploitation have, unfortunately, no immediate technical panacea. In fact, some of these problems may actually be exacerbated by online technologies.

II. VIRTUAL WORK AND THE FAIR LABOR STANDARDS ACT

The last Part explored the various forms of virtual work that are becoming more ubiquitous. Returning to the central question of this Article, must such virtual workers be paid according to the FLSA?¹⁰⁸ While this issue has yet to be addressed, it will inevitably reach the legislature and courts. As mentioned in the introduction, the IRS has taken notice of virtual work,¹⁰⁹ with other governmental agencies and plaintiff’s lawyers surely to follow. Understanding that this issue will likely be the eventual

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. The question addressed in this Article largely concerns workers domiciled in the United States. In a forthcoming article, I consider the problem from a global perspective. See Miriam A. Cherry, *The Global Dimensions of Virtual Work*, 54 ST. LOUIS U. L.J. (forthcoming 2009).

109. See *supra* notes 23–25.

topic of litigation and potential regulation, I will discuss several of the more salient points that will in all probability be raised. In the next Part, I make a normative argument about the most desirable outcome of such litigation. While there are differences between working in cyberspace or in a virtual environment and working in a traditional employment setting, I argue that physical presence or absence is not sufficiently different to justify deviating from the basic worker protections provided in the FLSA.

Within this Part, I first describe the low wage work problem in cyberspace and virtual worlds, building on the discussion set out in the previous Part. Second, I highlight the two major issues that are likely to be raised in any FLSA litigation relating to virtual work: A) whether the workers are employees or independent contractors; and B) whether the workers are volunteers under the exemption in the statute due to the nature of the “gaming” aspect involved in the tasks that they perform.¹¹⁰ From discussing the issues, I argue that, from a public-policy perspective, the FLSA framework can and should be applied to work that takes place in virtual worlds.¹¹¹

A. Low Wage Work in the Virtual World

In crowdsourcing schemes, as described above, each individual is paid a small amount for their participation in certain simplistic tasks that are later consolidated.¹¹² The amount may be half a cent or two pennies for brief tasks such as tagging or labeling a photo. While browsing Amazon.com’s Mechanical Turk website, I have seen many (if not most) tasks advertised at pay rates of pennies or fractions of pennies. The hourly return on these tasks is not calculated, and ultimately would depend on how quickly a worker would be able to complete the tasks.¹¹³ However, consi-

110. A third argument could be made that the workers are “computer professionals,” and thus subject to the FLSA exemption for those workers. Because this issue is about the classification of workers as exempt or non-exempt in terms of overtime pay, but does not preclude the requirement of paying the basic minimum wage, I discuss the issue here rather than in the text. The “computer professionals” exemption is a significant piece of special interest legislation—in this case aimed at appeasing the high technology industry. However, while the “computer professionals” exemption from the FLSA would refer to computer programmers, it probably was not intended to apply to data entry clerks. *See Martin v. Ind. Mich. Power Co.*, 381 F.3d 574, 580 (6th Cir. 2004) (holding that a computer professional is a person whose work requires “theoretical and practical application of highly-specialized knowledge in computer systems analysis, programming, and software engineering”). The computer professional question is essentially a red herring, because it is about whether the exemptions to FLSA overtime pay apply, not the initial question of whether the minimum wage law applies at all.

111. The minimum wage law was passed in 1938. Given the time of its passage, and its somewhat dated references, one could question if the advent of virtual world could point to the necessity of change for the statute.

112. *See Howe, supra* note 9, at 178–79 (using the term “crowdsourcing” to describe work performed with the aid of contributions from diverse groups of users on the Internet).

113. *See Bingham & Dunn, supra* note 98 (journalists performed tasks on the Amazon Mechanical Turk and earned a little over \$2 for four hour’s work).

dering the low base rate, even if a worker was exceedingly efficient at these tasks, it would be difficult to perform enough of them to equal the current U.S. federal minimum wage of \$6.55 /per hour.

When economist Edward Castronova studied the economy of Norrath, the virtual world in the online Everquest game, he found that the average wage was \$3.42 an hour—approximately half the wage mandated by the FLSA.¹¹⁴ As for virtual worlds like Second Life, it is difficult to discern the rates of pay, because, as my research assistant found, it was difficult to even obtain a paying position, let alone one that paid minimum wage in U.S. dollars after conversion from Lindens. The comparison cannot be tied to the cost of any particular good or necessity, because mere existence in Second Life, although thoroughly commodified, does not cost anything.¹¹⁵

Markets are based on supply and demand, and these extremely low virtual wages may be the only level that this emerging market may support. But why would the amount be this drastically below minimum wage? Looking first at demand, many turkers have taken on the lowest skill jobs online; identifying photographs, for example, requires only a basic level of concentration and alertness. So perhaps the wage for even minimally more skilled workers might be higher. Looking at the supply side, perhaps there are far too many turkers, driving the price of labor down. After all, some percentage of mechanical turk workers are performing these tasks from Third World countries where an hourly wage of \$3.42 an hour would not only be above the minimum wage in that country, but might satisfy all of the necessities of life.¹¹⁶ Some people in the developed world perform mechanical turk tasks, however, as a way to combine business and pleasure. Some websites rely upon volunteers, perhaps relying on a certain novelty factor to attract users.

But how did work regress to this particular state, where people are supposed to act like machines, and are paid pennies to click away, doing mind-numbingly simple tasks? The promise of a knowledge economy was that workers would be freed from manual labor. Instead, workers would generate value through their added creativity, intelligence, and insight. In her book, *From Widgets to Digits*, Katherine Van Wezel Stone comments on the shift from the traditional manufacturing economy (widgets) to one

114. Edward Castronova, *Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier* 35 (CESifo Working Paper No. 618, 2001), available at <http://ssrn.com/abstract=294828>.

115. Having an avatar on Second Life is free, unless a user wishes to purchase or sell “real” estate there, in which case the user pays Linden Labs for a premium membership.

116. In fact, there are 39 countries where the GDP per capita is less than \$5 per day. Côte d’Ivoire is on the high end at \$4.65 per day, and Zimbabwe is on the low end at \$0.55 per day. See CENTRAL INTELLIGENCE AGENCY, *Rank Order-GDP-per capita (PPP)*, in THE WORLD FACTBOOK (2009), <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2004rank.html>.

based on knowledge work (digits).¹¹⁷ Throughout the book, Professor Stone catalogues the systemic changes that technology has brought to work.¹¹⁸ Mostly, Professor Stone concentrates on knowledge workers, and how the human capital that individuals possess is going to be among a worker's (and a business's) most valuable assets.¹¹⁹ She claims the old economy involved piece-work, deskilled assembly lines, while the new economy values skills, training, education, and the like.¹²⁰

However, crowdsourcing may reverse this trend completely. With crowdsourcing, only a few individuals—those at the top—need do the “thinking,” planning, and designing. The rest of the work can be broken down into discreet tasks that can be performed by legions of untrained and unskilled clickworkers. This type of crowdsourcing scheme, far from fulfilling the democratizing potential of the Internet,¹²¹ seems to contradict this promise. Instead of freeing workers to think, workers become of use for their optical recognition skill or their quickness to press a button. These types of tasks treat humans like machines; they fail to help workers reach their full potential.

B. Future Issues to Consider in Potential FLSA Litigation

First, this Subpart provides some background to the FLSA issues. Under the FLSA, an “employee” is “any individual employed by an employer.”¹²² The statute then goes on to define “employ” as “to suffer or permit to work.”¹²³ While this definition is extremely circular, some guidelines for determining whether the FLSA minimum wage provisions do apply. First, it is suspicious, if for-profits have “volunteers” who are paid an amount that happens to be below the minimum wage. Second, according to the Department of Labor's Wage & Hour Division Opinion Letters, even nonprofits have limitations on volunteer work, as nonprofit employees cannot volunteer for the type of work for which they are normally paid.¹²⁴

117. See STONE, *supra* note 4; Cherry, *supra* note 4.

118. Stone, *supra* note 35.

119. See, e.g., STONE, *supra* note 4, at 5 (“One defining characteristic of the digital era is the central role of human intellectual capital—skills, knowledge, information, know-how, tacit knowledge, imagination, and capacity for learning and innovation embodied in employees.”).

120. See *id.* at 5–6.

121. See Lawrence Lessig, *Open Code and Open Societies: Values of Internet Governance*, 74 CHI.-KENT L. REV. 1405, 1416 (1999) (discussing democracy and the Internet).

122. 29 U.S.C. § 203(e)(1) (2006).

123. 29 U.S.C. § 203(g) (2006).

124. See, e.g., Wage & Hour Division, Opinion Letter, 2008 FLSA-3NA, Feb. 29, 2008, available at 2008 WL 1847286 (“[I]ndividuals who are paid firefighters may not work some shifts for pay and continue to work other shifts as a ‘volunteer’ for the same employer. In such cases, the volunteer and paid work are in the same capacity, and all hours worked on all shifts are combined and compensable for FLSA purposes.”).

However, these basic points do not definitively answer the question of the FLSA's applicability with regard to virtual work, because much of what happens on these websites occupies the line between "work" and "play"—activity that people engage in for fun, even if it is set up by a for-profit company. Virtual work is a gray area; employers want a vast army of eyeballs and itchy mouse-fingers to help with tasks and, in turn, might be willing to pay something for those services, but they do not want these part-time users to be considered employees and certainly do not want to pay them as employees. The motives of the users may be diverse, and some may be mixed; this group could be termed "playborers." Some may be users who are performing this work for fun or out of altruistic motivations, and have no expectation of payment. Others are attempting to eke out a living through this type of work.¹²⁵

With that background on the statute more generally, I go on to consider two more complicated legal questions: (A) whether the workers are employees as opposed to independent contractors and thus subject to the FLSA; and (B) whether the volunteer exemption applies, which then ultimately becomes a question of whether one can dichotomize work versus leisure in virtual world situations. The answers to these questions depend on the individual situations and particular work that is being performed. In the final Part of this Article, I discuss a normative argument that would extend the FLSA to online workers. I discuss a few methods of implementing this protection in ways other than direct governmental regulation, although private ordering in this context appears to have problems of its own.

1. *Employees versus Independent Contractors*

As described in the introduction, in June 2008 the IRS determined that greeters who worked in Second Life for the Electric Sheep Company were employees, rather than independent contractors.¹²⁶ The ruling's impact would mean that the employer would be responsible for Social Security taxes for those workers.¹²⁷ Although the IRS ruling is not dispositive as to the FLSA, the analysis in determining employment status is similar.¹²⁸

Analytically there is no reason why what happens in Second Life should not be treated the same as any other type of work that happens with the facilitation of the computer. As virtual worlds have real-money-

125. Throughout this section, I do not mean to be unduly dismissive of these altruistic motivations. Family, religion, enjoyment, creativity, the advancement of human knowledge—all of these are motivations that may be far stronger than money.

126. See sources cited *supra* note 23 and accompanying text (providing secondary sources describing the IRS private letter ruling).

127. See sources cited *supra* note 23 and accompanying text.

128. See, e.g., *Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1009–13 (9th Cir. 1997).

convertible economies that include as their basis a value on time that people spend in the world, the IRS ruling is not surprising at all. For example, to make an analogy to an avatar, if an employee wears a costume while they are working, this is still considered “work.” Another analogy, perhaps closer to what occurs in virtual worlds, would be if a worker had the use of a puppet and controlled that puppet to do work.¹²⁹ The presence of the avatar/costume/puppet does not change the fundamental nature of the activity—it is still work. And if that activity is the same, then the minimum wage, payroll tax, and workers’ compensation laws would all similarly apply.

One of the more telling comments about the minimum wage and low pay issue was posted in comments to an Alphaville Herald article discussing the IRS determination that Electric Sheep Company’s workers were employees rather than independent contractors.¹³⁰ One commenter jokingly invited the IRS to tax him or her, because three cents an hour would not bring in a particularly large amount of money.¹³¹ The irony was evident—and so were the implications. Because of the IRS ruling, there is the possibility that the “employee” determination will translate from the IRC to the FLSA.

As described above, the FLSA only applies to “employees.”¹³² Whether a worker is an employee or independent contractor is determined via a multifaceted test that depends on the facts of the employment relationship.¹³³ The multifaceted test derives from the caselaw and decisions on agency law, and attempts to classify whether the worker has independent judgment and control over their own work, the manner in which the work is performed, and whether it is customary to use employees to perform this type of work.¹³⁴ The control test is well-known for determining independent contractor versus employee status, and in addition the courts will look at the economic realities of the relationship to determine whether the employee is dependent upon the employer.¹³⁵ Some of the factors for finding employee status are whether the employer may direct the way in which the work is performed, determine the hours involved, and provides the employee with direction.¹³⁶ On the other hand, elements that lean toward

129. Thank you to Michael Wolf for proposing the puppet analogy.

130. See *Mistral*, *supra* note 23.

131. See *id.*

132. See, e.g., 29 U.S.C. § 206(a) (2006) (minimum wage provisions only apply to “employees”).

133. See Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 257–58 (2006) (listing factors from the cases). Oft-cited cases on this subject include *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 170 (2d Cir. 1968).

134. See Stone, *supra* note 133, at 257–58 & n.17.

135. See *id.*

136. See, e.g., *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299 (5th Cir.

independent contractor determinations include workers providing their own equipment, setting their own schedules, and getting paid per project, not for their work hours.¹³⁷

Work in virtual worlds falls somewhere in the middle of this employee-independent contractor spectrum. On the one hand, virtual workers may have more control over their schedules and more ability to come and go from the virtual environment than real-world workers tethered to a workplace desk or factory floor do. But this may not be true of all positions in the virtual world—after all, one cannot perform the duties of a greeter in a virtual store if one is not “there” (i.e. logged on) to actually meet the shoppers or to explain what services are on offer. On the one hand, the workers need to supply their own avatars, computer equipment, and Internet connections, which would lean toward making them independent contractors. On the other hand, the degree of freedom to control their own actions in the virtual world seems, again coming back to the greeters, to be extremely limited. In short, although the many factors that constitute the control test might lean toward a finding of an employment relationship, it would still be a close question, and one that must be carefully considered.

2. *Volunteers, and the Work versus Leisure Distinction*

As raised earlier in the Article, one of the more challenging questions is how to classify many of the activities that occur in virtual worlds—are these activities work or leisure?¹³⁸ Many who immerse themselves in virtual worlds view what they are doing as “play” or leisure. Research indicates that time spent in the virtual world is time that people use to spend on the computer, surfing the Internet, watching television, or reading books.¹³⁹ In other words, Second Life or other virtual worlds are seen as a substitute for other forms of entertainment.¹⁴⁰

What makes these worlds fun? Virtual worlds are new, interesting, and in short, “cool.” They have a “gee whiz” factor and incorporate “play” as the cornerstone that attracts new users. Their novelty, the fact that you can change your avatar into an animal, have your avatar fly, and encounter new and unexpected situations and interactions all contribute to the “fun factor” that simply does not exist in many jobs. Of course, this

1998).

137. *See id.*

138. *Cf.* David C. Yamada, *The Employment Law Rights of Student Interns*, 35 CONN. L. REV. 215, 224–34 (2002) (describing the application of the FLSA to unpaid student internships).

139. *See* CASTRONOVA, *supra* note 5, at 6–8.

140. *See, e.g.*, Erez Reuveni, *On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age*, 82 IND. L.J. 261 (2007) (describing players who use online games for entertainment and artistic expression).

“fun factor” might dissipate over time as aspects of the activity become more routine. Further, much—if not most or all—of this fun would evaporate if the activity stopped being viewed as recreation but instead became routinized and was done to provide the necessities to support oneself.

Perhaps it is mere novelty, then, that accounts for the lack of any regulation of work in virtual worlds. The time lag between technology and the law is far from new; this scenario has been oft-repeated as different technologies are developed and the law must adapt.¹⁴¹ In the interim, there is often the prospect of a time lag where certain activities that would normally be regulated instead “fall through the cracks.” At the moment this seems to be the case with virtual worlds. If many of the profit-seeking activities on Second Life are classified as “non work” or “fun” activities, and thus exempt from regulation, there is a real worry that workers will be exploited. No one has ever attempted to determine whether workers are “having fun” or “derive satisfaction” from their jobs and attempted to pay them accordingly. Some of the most fun jobs may also be well-paid. Further, work that some would find pure drudgery others find fascinating and fun. These hedonic differences do not result in differential pay—rather, workers are paid based on what the market will bear—taking into account minimal hard-won limitations that have been imposed in order to protect the lowest-paid workers.

As for the distinction between volunteer work and paid work, consider Facebook, currently a prominent social-networking site. There is no doubt that meeting, “friending,” “poking” other Facebook members, and updating one’s own profile on one’s “wall” is a recreational and fun activity.¹⁴² Recently, however, Facebook has asked its users to translate various pages, instructions, and other information into other languages, so that Facebook can expand into additional countries.¹⁴³ Some users, however, have resisted and indeed have been critical of the effort:

[A Facebook user], a Californian who teaches English in Seoul, South Korea, has volunteered in the past to translate for the non-profit Internet encyclopedia Wikipedia but said he won’t do it for Facebook. “[Wikipedia is] an altruistic, charitable, information-sharing, donation-supported cause,” [he] told The Associated Press in a Facebook message. “Facebook is not. Therefore, people should not be tricked into donating their time and energy to a mul-

141. Cf. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996) (arguing, provocatively, that there should not be a specialized law of cyberspace, but rather an application of general legal principles).

142. Of course, this is with the caveat that Facebook could also be used to network with people and potentially find employment or clients through contacts made there.

143. See Tomoko A. Hosaka, *Users Around the Globe Translating Facebook for Free*, SEATTLE TIMES, Apr. 21, 2008, at E4.

timillion-dollar company so that the company can make millions more—at least not without some type of compensation.”¹⁴⁴

Similar concerns have been raised by other commentators in discussing recent efforts by Yahoo and other companies to begin crowdsourcing pieces of different for-profit projects.¹⁴⁵

In the landmark 1947 opinion of *Walling v. Portland Terminal Co.*,¹⁴⁶ the Supreme Court set forth some of the factors relevant to determining whether a participant was an employee or a volunteer under the FLSA:

The definition ‘suffer or permit to work’ was obviously 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 . . . such a construction would sweep under the Act each person who, without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit. But there is no indication from the legislation now before us that Congress intended to outlaw such relationships as these. The Act’s purpose as to wages was to insure that every person whose employment contemplated compensation should not be compelled to sell his services for less than the prescribed minimum wage.¹⁴⁷

From this description, the issue with virtual work becomes obvious; it falls into the divide that the Supreme Court was trying to describe. Much of the work in virtual worlds is remunerative—either because a worker is directly employed, or because the worker is able to convert his or her virtual objects into cash because the world is commodified and there is a robust market for the virtual goods.

For another example that brings the work-leisure question into sharp relief, consider a virtual world setting designed specifically for children.

144. *Id.*

145. See Posting of Mike Yamamoto to CNET Media Blog, *Can “Crowdsourcing” Be Slave Labor*, http://news.com.com/2061-10802_3-6095563.html (July 18, 2006, 12:47 PDT). The blog post describes crowdsourcing and then states blog author’s opinion that if

“this trend is carried to its logical extreme, it could conceivably make the always-contentious practice of offshore outsourcing look downright patriotic. Just imagine what the AFL-CIO would say about legions of people devoting hours of their own time doing essentially volunteer work for large commercial enterprises. . . . We just think [workers] should be compensated where appropriate—and not toil away simply for the honor of having participated in a project that some company trumpets with idealistic Web 2.0 rhetoric.”

Id.

146. 330 U.S. 148 (1947).

147. *Id.* at 152.

Many tweens¹⁴⁸ enjoy visiting a virtual world named “Club Penguin,”¹⁴⁹ where users play penguin-like avatars, inhabit igloos, go skiing, play connect four, purchase candy canes, talk with fellow penguins, and take care of pet puffins.¹⁵⁰ For a monthly “premium” subscription fee, users are allowed to decorate their igloos.¹⁵¹ Children who log in frequently are rewarded with additional points to spend, and they may also “purchase” additional goodies if they perform “virtual chores.”¹⁵²

If a nine-year-old child spends six hours per day on the Club Penguin website performing chores for her own account, say to purchase a flat-screen television for her igloo, this raises an interesting question—are the virtual chores or games that are played online in reality child labor?¹⁵³ The answer depends somewhat on perspective. On the one hand, this is certainly not in the same category as the type of child labor that occurred in the agricultural era and in the early industrial revolution, which involved chimney sweeps, children crammed into mineshafts, and twelve-year-olds with black lung disease.¹⁵⁴ This is an odd type of “child labor,” indeed, where nothing is actually being created or manufactured except imaginary virtual objects used for the purpose of entertaining and occupying time. These virtual objects are not, in and of themselves, inherently value creating, except perhaps to other penguin avatars within the game. Maybe this fits well into the *Walling v. Portland Terminal Company* framework as it seems to be “work” that is part of a game, “solely for his [or her] personal purpose or pleasure.”¹⁵⁵

On the other hand, these young computer users are, in a sense, “working.” They are on the computer—which is, after all, a machine—repetitively clicking the mouse, typing, and performing tasks that comprise some element of “work” in the professional white-collar world—for long

148. The term “tween” signifies a child between the age of eight and twelve.

149. There are other virtual worlds that are also aimed at this age group, including Webkinz (building on a stuffed animal theme), and projected new entrants into this area, including the television station Nickelodeon.

150. See Dawn Margolis, *Puffle Kerfuffle*, WIRED MAGAZINE, 15.03, Mar. 2007, available at <http://www.wired.com/wired/archive/15.03/posts.html?pg=2>.

151. See Carleen Hawn, *Time to Play, Money to Spend*, BUSINESS 2.0 MAGAZINE, Mar. 23, 2007, available at http://money.cnn.com/magazines/business2/business2_archive/2007/04/01/8403359/index.htm.

152. See Margolis, *supra* note 150.

153. Child labor has long been a concern, because of the vulnerability of the population involved, the potential for exploitation, and the lack of political mobilization. Although a much more serious problem at the advent of the industrial revolution, child labor is still a serious concern in many developing countries. See generally David M. Smolin, *Conflict and Ideology in the International Campaign against Child Labour*, 16 HOFSTRA LAB. & EMP. L.J. 383 (1999) (describing how both cultural norms and international economic trends combine to encourage child labor).

154. See *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (describing child laborers’ working conditions and holding that the government could not use the Commerce Clause to justify the regulation of labor conditions), *overruled by* *U.S. v. Darby Lumber Co.*, 312 U.S. 100 (1941).

155. *Walling v. Portland Terminal Co.*, 330 U.S. 148, 152 (1947).

stretches of time.¹⁵⁶ And the tasks that they perform do have value to other players in the game. If we change the example to one in which an enterprising young penguin decides to work hard in order to stockpile virtual candy canes, and then sell the excess virtual candy to other users, they have in a sense accumulated something worthwhile based on the amount of time they have spent in their world—which could easily be broken down to an hourly wage for labor. In essence, the game is boring if it is too “easy,” and the user is automatically given all of the virtual objects that they could possibly want or need. Scarcity—the heart of the discipline of economics¹⁵⁷—is necessary for the “fun” of the virtual world to thrive.

On the other hand, assuming a flat-rate access to the club, the company itself may not directly benefit from a user’s marginal hour spent performing chores. That may be one way to distinguish “work” from “hobby” activity that takes place online. With work, one assumes that an additional hour spent supplies additional benefits to the employer. Unfortunately, this line also begins to blur, because while performing a task may not directly benefit the company, it might provide an indirect benefit. Sometimes the efforts of the users—in generating the content—makes the entire world more fun, or more interesting, more complicated, and could attract more users to the world.¹⁵⁸

While Club Penguin might look more like “just a game,” the fact that it makes it so hard to differentiate between work and leisure is telling, and perhaps informative. Further, the fact that generally people seem to be willing to do certain repetitive and boring tasks—like clicking a mouse or making an identification—for fun might be a very instructive and perhaps valuable contribution to the world of work and management. It is a simple idea, but recognizing that even the most mundane work *might be* fun if structured in the right way could lead to significant breakthroughs in overall utility.¹⁵⁹

156. See Lederman, *supra* note 15, at 1627 (“In this [type of world], users create virtual lives by building houses, publishing newsletters, and creating alter-egos. They spend hours upon hours creating their existence.” (quoting Daniel C. Miller, Note, *Determining Ownership in Virtual Worlds: Copyright and License Agreements*, 22 REV. LITIG. 435, 436–37 (2003))).

157. See, e.g., Tim Kane, *The Terrifying Liberation of Labor*, 20 NOTRE DAME J.L. ETHICS & PUB. POL’Y 815, 816 (2006) (“No amount of prosperity satisfies these critics, just as it does not satisfy economic man who is insatiable. This is, after all, the first lesson of economics, which is the study of scarcity and insatiable appetites.”).

158. An analogy can be drawn to the process of building an audience for a blog—one marginal post might not directly affect readership, but if the blog consistently has frequent high-quality posts, it will attract additional readers.

159. See Posting to Virtual World News, *Liveblogging MetaverseU: A Conversation with Christian Renaud, Rueben Steiger, and Bryon Reeves about Work* (Feb. 16, 2008, 12:31 EST), <http://www.virtualworldsnews.com/2008/02/liveblogging-3.html> (suggesting that work could be designed or structured the same way as a game might be, and that making the game of work fun could increase a firm’s productivity tremendously).

My suspicion is that most people do their best work when they are fully engaged in their jobs and, to the extent possible, are able to have fun with their work. For example, in explaining what factors motivate happy and productive individuals, Mihaly Csikszentmihalyi describes a concept that he terms “flow.”¹⁶⁰ According to Csikszentmihalyi, flow-states involve concentration, the use of skills, learning, and adaptation.¹⁶¹ By engaging in activities that are challenging and at the same time enjoyable an individual experiences “flow,” “the state in which people are so involved in an activity that nothing else seems to matter; the experience itself is so enjoyable that people will do it even at great cost, for the sheer sake of doing it.”¹⁶² Csikszentmihalyi attributes much of a person’s happiness and feelings of accomplishment to entering flow-states.¹⁶³

Perhaps if large employers and managers can think through the elements that make virtual worlds so much fun to engage with, more forms of work would become more enjoyable; in turn leading to a utilitarian benefit. Since work consumes a great portion of the day, and in fact is in some ways central to the building of one’s professional and personal identity,¹⁶⁴ making work a form of fun rather than a form of drudgery could benefit workers as well as employers. I am not suggesting that employers institute some sort of virtual bread and penguin circus, but that many workers would find the occasional element of play that a game provides a welcome break from tasks that, in many cases, are not particularly intellectually stimulating. For example, identifying and tagging photographs is a fairly boring task that does not require much of the average person’s intellect or interest. However, set two or more individuals to compete against each other to identify the pictures, and award the winner a monetary prize in addition to the money they make for identifying the pictures, and you have an exciting game.¹⁶⁵ Routine tasks are still accomplished in both of these scenarios, but it is my suspicion that the overall happiness and engagement of the workers increases when the employer uses technology and games to achieve the result.

Of course, one would need to be careful in designing such a “game” so that it would not result in competition that would be harmful. If the game were “zero sum,” or had negative incentives or consequences built into its structure, that would actually hurt worker morale. The actual game design would need to be given thoughtful consideration from a human resources perspective. Any such design would need to be dedicated to more efficient work and to helping employees improve their skills; if it

160. See MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* (1990).

161. *Id.* at 6–7.

162. *Id.* at 4.

163. See *id.* at 40–41.

164. See Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881, 1890–92 (2000).

165. See Posting to Virtual World News, *supra* note 159.

were used to punish workers, it would probably become terribly stressful. My point here is that much depends on thoughtful implementation.

In his book *The Wealth of Networks*, Professor Yochai Benkler focuses his attention on nonmarket collaborative efforts, making the argument that they allow for motivations beyond the economic ones that in the past have driven the traditional information economy.¹⁶⁶ For example, Benkler discusses the reasons that people would be willing to produce knowledge for “free” on websites such as Wikipedia.¹⁶⁷ Some of this type of “social production” is the result of the humanistic urge to learn and to teach, that is not done for profit, but which is done as a substitution effect—working or surfing online instead of passive forms of entertainment such as television or reading.¹⁶⁸ Benkler’s view is progressive, humanistic, and ultimately optimistic about the future of the Internet. At various points he celebrates the collaborative nature of these new modes of social production, the open-source nature of the collaboration, and the vibrancy of these networks.¹⁶⁹

However, this vision neglects in some ways the valuable nature of information that may be gleaned from crowds, especially those who would ordinarily be compensated in a market setting.¹⁷⁰ Further, it reinforces the notion of the separate and distinct spheres of work and leisure, setting to the side the fact that this always has been, and perhaps more than ever has become, an artificial distinction. And, as pointed out by Professor Noah Zatz in his article on prison labor, Benkler also ignores work that is on the margins between voluntary and coerced.¹⁷¹ Finally, Benkler perhaps works too hard to come up with an alternative to the market system—relying on unpaid collaboration and networks instead. It is for this reason that he tries a (conscious) play on Adam Smith’s *Wealth of Nations* for the title of his book as an alternative. I am concerned that in proposing nonmarket alternatives, Benkler may instead be proposing a class of people who are left out of traditional labor protections and as a result, marginalized.¹⁷²

Of course, part of the question might be why any rational person would agree to work at such a reduced rate, either for free or practically for free. Perhaps at this time, virtual work is seen as a novelty. In other words, right now it might be fun and interesting for a person to tell others

166. See BENKLER, *supra* note 28, at 59–132.

167. See *id.* at 71–74.

168. See *id.* at 92–99.

169. See *id.* at 91–132.

170. See Miriam A. Cherry & Robert L. Rogers, *Tiresias and the Justices: Using Information Markets to Predict Supreme Court Decisions*, 100 NW. U. L. REV. 1141, 1144–45 (2006).

171. See Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 915 n.274 (2008).

172. Women’s rights advocates have long made the argument that childcare is undervalued because this service was traditionally performed as part of women’s unpaid labor in the private sphere. See, e.g., *id.* at 916.

that he or she was participating in the development of cool new crowd-sourcing websites; however, one must wonder how long that novelty will last and when this type of work will become low-paid virtual drudgery.

III. EXTENSION OF THE FLSA TO VIRTUAL WORK

The outcome of any potential FLSA litigation is not immediately evident, and it is entirely possible that in any upcoming litigation, workers might encounter serious problems with either proving employee status or with the application of the volunteer exemption. From a normative perspective, I would then argue that the FLSA should be amended or interpreted by the courts of appeals to require the payment of minimum wage to virtual workers. Minimum wage is a meager enough means of support, and there is no principled distinction that can be drawn between work that takes place in cyberspace and work that takes place in a real world physical setting.

The goal of the FLSA, as part of the New Deal economic programs designed to lift the country out of the Great Depression, was to prop up wages and provide a basic level of support to workers. During that period, approximately one in every four workers was jobless, and far more workers were underemployed.¹⁷³ The high supply of labor, coupled with slumping demand, resulted in an extreme level of competition for any work that became available.¹⁷⁴ Desperate, workers would underbid each other resulting in continually dropping wages. Although such cheap labor would, on the margins, tend to provide incentives for increased employment, it did not succeed in that environment. The fact that workers' wages were so low instead meant that workers did not have enough purchasing power to buy the goods that factories were producing. Low wages perpetuated a downward economic spiral.¹⁷⁵ The intervention of the FLSA in the market was therefore a cornerstone of the New Deal economic legislation.¹⁷⁶

Today, minimum wage work is only minimally adequate. As described above, Barbara Ehrenreich performed a study in which she attempted to

173. See U.S. DEP'T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 58 (2001), available at <http://www.bls.gov/opub/rtaw/pdf/rtaw2001.pdf>; see also BROADUS MITCHELL, DEPRESSION DECADE: FROM NEW ERA THROUGH NEW DEAL, 1929-1941, at 92-99 (1947); GEORGE E. REJDA, SOCIAL INSURANCE AND ECONOMIC SECURITY 329 (2d ed. 1984).

174. See MITCHELL, *supra* note 173, at 97-99.

175. See RONALD EDSFORTH, THE NEW DEAL: AMERICA'S RESPONSE TO THE GREAT DEPRESSION 24 (2000); SAR A. LEVITAN, FRANK GALLO & ISAAC SHAPIRO, WORKING BUT POOR: AMERICA'S CONTRADICTION 94 (rev. ed. 1993).

176. While the Supreme Court had stricken down earlier laws regulating the employment relationship under the "freedom of contract" ethos exemplified in *Lochner v. New York*, 198 U.S. 45 (1905), toward the midpoint of the Great Depression, the Court stopped striking down New Deal economic recovery legislation. See William G. Ross, *When Did the "Switch in Time" Actually Occur?: Rediscovering the Supreme Court's "Forgotten" Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153 (2005).

live on minimum wage, documenting her experiences along the way.¹⁷⁷ Ehrenreich was barely able to find the money to cover basic food and shelter costs; in the end, she realized that she would have to take a second job if she would have any hope of finishing the experiment.¹⁷⁸ For all too many, the minimum wage situation is not an “experiment” that they can quit when their writing project is finished. The minimum wage laws are more than an intervention in the market; they are also a statement that a basic level of support is needed, and that less money would be exploitative of labor. Having a basic floor of regulation is a political and social choice. Anything less would likely perpetuate even greater divides in income and wealth in a nation that already has far too much social inequality.¹⁷⁹

Further, the question of whether a minimum wage is needed was decided nearly a century ago, as one of the answers to the dark era of the depression; that question was resolved in favor of worker protection. The only reason to raise this question again at all is that, currently, no such standards are being applied to work that occurs only in cyberspace. As explored above, this distinction does not seem logically sound. A computer is a machine; the fact that the work may be mentally taxing rather than physically taxing should not make a difference; nor should physical presence be the determining factor for coverage. Data entry, if it took place in an office, would be a covered activity under the FLSA. There is no logical reason why such activity would not be covered if it took place only in cyberspace or in a virtual world. The only possible explanation for such a distinction is the novelty of such working arrangements, and the difficulty of applying a Depression-era statute to modern day situations involving technology.

I realize that making the argument for intervention and greater regulation is somewhat controversial, and invites criticism from libertarians who argue that even the most basic price floor is an unnecessary government intervention into the labor market.¹⁸⁰ Indeed, studies have shown that true full-time minimum wage workers are actually a rarity, with most minimum wage workers being either teenagers or part-time working adults.¹⁸¹ An increase in the minimum wage typically results in some teenagers at

177. See generally EHRENRICH, *supra* note 55.

178. See *id.* at 197–99 (summarizing Ehrenreich’s earnings and expenses at each of the three low-wage jobs she worked during her experiment).

179. See Greg Ip, *Income-Inequality Gap Widens*, WALL ST. J., Oct. 12, 2007, at A2.

180. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (arguing that most forms of regulation of the employment relationship, including minimum wage, should be banned); Richard A. Epstein, *Standing Firm on Forbidden Grounds*, 31 SAN DIEGO L. REV. 1, 1–2 (1994).

181. See, e.g., BUREAU OF LABOR STATISTICS, *CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2007* (2008), available at <http://www.bls.gov/cps/minwage2007.pdf> (workers under the age of twenty-five represent one-fifth of hourly wage workers, but almost half of workers earning the minimum wage and part-time workers were much more likely to be paid the minimum wage).

the margin losing after-school jobs as employers substitute capital for labor in the face of a rising wage.¹⁸² Others have contended that modest, phased-in increases in the minimum wage do not alter the level of employment of low-wage workers.¹⁸³ Despite this, it has been widely acknowledged that there needs to be a minimum payment for workers, capable of sustaining basic requirements for items such as food and shelter.

As well, I realize that this argument may also provoke criticism from those who wish virtual worlds to have the maximum freedom to develop, far from regulation of any sort. Although I am sympathetic to such arguments,¹⁸⁴ and understand that virtual worlds may also wish to develop their own systems and processes for resolving legal issues,¹⁸⁵ at the same time, any such private response should take into account the importance of the interests at stake, including workers, employers, and the interest of society in having these wonderful new innovations continue to thrive. The status quo, however, which is a vacuum devoid of any protection, is not that thoughtful balance.

A question that will be increasingly important to ask is how to facilitate drawing the distinction between those who are participating in crowdsourcing websites or other virtual work for fun even though some of their services might be paid in another context (such as editing Wikipedia) and those who are opting to work in the market economy and thus arguably should receive the traditional legal protections for employment activity (clickworkers clicking away on Amazon's Mechanical Turk). As it currently stands, this distinction is notoriously difficult to draw. Might any particular law or legal regime assist in this sorting process?

One solution would be to leave the issue in the regime of voluntary, contractual private ordering. If the majority of users participate just for fun, that might weigh in favor of the default rule being no regulation, with an opt-in to the protections of labor and employment law. On the other hand, one could argue that the default rule should be protection, and then users must deliberately and unequivocally state they are volunteers, acknowledge that they will not receive monetary payment, and clearly opt

182. See Bruce Bartlett, *Minimum Wage Hikes Help Politicians, Not The Poor*, WALL ST. J., May 27, 1999, at A26 (surveying literature supporting the notion that minimum wage hikes hurt teen employment).

183. See generally DAVID CARD & ALAN B. KRUEGER, *MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE* (1995); Daniel Shapiro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997) (evaluating Card and Krueger's work).

184. See Miriam A. Cherry & Robert L. Rogers, *Prediction Markets and the First Amendment*, 2008 U. ILL. L. REV. 833, 878-79 (2008) (offering author's conclusion that prediction markets, a new collaborative technology on the Internet, should not be regulated by strict application of anti-gambling laws).

185. See Grimmelmann, *supra* note 11 (discussing developments of law and private ordering within the games themselves).

out. In my view, the later approach—requiring an extremely clear opt-out—is the better approach. Considering the differential bargaining power often at issue in employment situations—which is why certain legal protections exist—it may make more sense to create a default rule of regulation, with clear assent needed in order to disclaim the protections.

Of course, this runs the risk of making the opt-out process potentially burdensome for those looking for fun and not looking to be bogged down with legalities. One way to deal with the opt-out would be to include it in the form clickwrap agreements that users must necessarily agree to in order to use many websites, receive free downloads, or order products.¹⁸⁶ This is the format that many businesses currently use on websites, and it would, at the very least, provide some sort of notice as to what type of legal category or relationship the user was entering.

This is merely one suggestion, however, and it is far from perfect. First, the FLSA is an immutable default rule—normally it cannot be waived. After all, if employers and employees could “opt out” of the minimum wage, that would undercut its very existence. Companies might choose to exploit such an exemption opportunistically, not just to apply to those who participate as volunteers and for entertainment. The example of Facebook, discussed above, is instructive in this regard. Using the website to get back in touch with old friends could be a “hobby,” but getting users to do work on translating portions of the website looks more like the traditional “work” that one would assume the company’s employees would typically handle.

Further, there are serious critiques of clickwrap licenses themselves.¹⁸⁷ Clickwrap “agreements” are problematic because they incorporate some of the worst characteristics of adhesion contracts,¹⁸⁸ allowing for “acceptance” or “rejection” of the terms as a whole only on a take it or leave it basis with no negotiation on behalf of the user.¹⁸⁹ Many of the boilerplate terms contained in online agreements are often harsh, some so much so that they are likely unenforceable.¹⁹⁰ In so-called “browsewrap” contracts, certain contractual provisions are found only by visiting another portion of the website.¹⁹¹ Courts have hesitated to enforce browsewraps because of the very real problem of lack of assent—if the user was not on notice that

186. See, e.g., Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002).

187. See *id.* at 440–41.

188. For a discussion of contracts of adhesion see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

189. *Id.* at 1174.

190. See generally Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006); Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041 (2005).

191. See, e.g., *Specht v. Netscape Commc'ns Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001) (discussing various forms of online contracting).

these terms even existed, it is difficult to think of them as being part of a voluntary contract.¹⁹² Thus, there is a real concern that these types of “agreements” may not embody a worker’s true assent, or represent any kind of an informed decision about the terms. This may not be the type of “assent” or “agreement” that is needed in order to inform workers of their rights, especially since workers tend not to understand some of the basic rights governing the employment relationship anyway.¹⁹³

Given the problematic nature of private ordering by contract, might some other solution be found? Although this is not a definitive answer, there are several factors that should be given a prominent role in any determination of whether the FLSA should apply to a particular activity. One such factor should be whether the activity is already being monetized and commodified. In that case, perhaps commodification indicates that the market activity should properly be classified as paid work. Another factor is whether the work is “deskilled” work. In such situations, the potential for exploitation might be higher, and thus the protections of the FLSA might be more important.

Finally, since the Department of Labor may choose to regulate this activity in the near future, it might make sense for private employers that are experimenting with this type of work—and the websites that facilitate them—to attempt some type of private response in order to frame the dialogue if in fact an extension of the FLSA is proposed, which seems likely. One such response might be to construct a code of “best practices” for cyberwork that attempts to draw some of the lines between work and entertainment activity, and set out some guidelines that would prevent the more extreme forms of exploitation. These “best practices” would be influential if they formed a coherent set of expectations to which both workers and employers could adhere. If such a voluntary response were present, the line-drawing exercise necessitated by the FLSA may not be as difficult as it might first appear.

CONCLUSION

As detailed throughout the Article, virtual work presents a seeming paradox. One side of the coin presents great potential for workers and employers alike, making work increasingly more efficient and enabling globalization and cooperation between workers on an unprecedented level. The other side of the coin presents the specter of eroding labor rights and relentless races to the bottom. Virtual work, rather like many other aspects of emerging technologies on the Internet, is a diverse mix of free collabo-

192. See, e.g., *id.*

193. See Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997).

ration coexisting with monetized and commodified settings.¹⁹⁴ As Professor Lior Strahilevitz has described, one of the models for clickwork depends on collaboration, and this collaboration is not always successful if the market economics are subtracted from the equation.¹⁹⁵ It may be that virtual worlds may be big enough for several economies (or non-economies, as the case may be) to coexist with each other. Collaborative work does show great potential, but as a matter of fairness and equity this type of employment relationship cannot take place by disregarding what should be an appropriate and proper extension of our current labor and employment protections into cyberspace.

Ultimately, then, this Article has made the case for a limited extension of the minimum wage laws into cyberspace and the virtual world, especially as it pertains to low-skilled work. Of course, as outlined above, the lines between “work” and “leisure” are not always entirely easy to discern. Yet, as I have also shown, no principled distinction can be drawn between deskilled work that is performed in person and work that is performed wholly over the Internet. Regardless of where the work occurs, it must be acknowledged that some basic protections are needed. Like the Mechanical Turk of the eighteenth century, which falsely concealed a human chessmaster pretending to be a machine, the current day Amazon Mechanical Turk seemingly treats the workers hidden behind computer algorithms as machines themselves, ignoring their very real economic needs.

194. For example, while the Internet is encouraging a culture of sharing, open source software, and distributed, collaborative work, *see* Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002), the Internet is also encouraging the joining of thousands of people to interact in a market system to predict future events. *See, e.g.*, MICHAEL ABRAMOWICZ, PREDICTOCRACY: MARKET MECHANISMS FOR PUBLIC AND PRIVATE DECISION MAKING (2007) (describing the vast array of ways in which prediction market technology can be applied); JAMES SUROWIECKI, THE WISDOM OF CROWDS (2004); Cherry & Rogers, *supra* note 170.

195. Lior Jacob Strahilevitz, *Wealth Without Markets?*, 116 YALE L.J. 1472, 1498–99 (2007) (reviewing YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM (2006)).