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The Sharing Economy and the Edges of Contract Law: Comparing U.S. and U.K. Approaches

Miriam A. Cherry*

Technology and the rise of the on-demand or sharing economy have created new and diverse structures for how businesses operate and how work is conducted. Some of these matters are intermediated by contract, but in other situations, contract law may be unhelpful. For example, contract law does little to resolve worker classification problems on new platforms, such as ridesharing applications. Other forms of online work create even more complex problems, such as when work is disguised as an innocuous task like entering a code or answering a question, or when work is gamified and hidden as a leisure activity. Other issues involve internet users making contributions to online communities, believing their efforts are volunteer, when in fact they are being monetized by others.

To date, courts in the United States have largely failed to recognize what is happening in these new online work cases, and plaintiffs have yet to find a solid doctrinal ground for recovery. Contract law is stymied in many of these online work situations because assent—widely acknowledged as foundational to contract—is generally absent. In some of these situations, one party was unaware that work was even being performed, or that their work might later be monetized. A comparative approach with law in the United Kingdom is therefore helpful. Even though the U.S. courts that have examined these cases have purported to use an unjust enrichment or restitution formulation to analyze the issues, in reality they are defaulting to traditional notions of agreement or assent that are grounded in contract law. Referring to the more richly nuanced and developed law of unjust enrichment and restitution in U.K. law may result in a more fruitful and well-reasoned analysis of

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online work cases.

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INTRODUCTION

Most internet users are familiar with the process in which they are asked to retype a distorted display of letters and numbers to sign up for an email list or post a comment on a blog. These garbled sequences are known as “Captchas.”¹ The word “Captcha” is an acronym, which stands for Completely Automated Public Turing Test To Tell Computers and Humans Apart.² The reference to “Turing” in the acronym is based on the famous test used to distinguish answers to questions given by humans from answers given by computers.³ Captchas help to distinguish internet users who are real

¹ CAPTCHA: *Telling Humans and Computers Apart Automatically*, CAPTCHA.NET, <http://www.captcha.net/> (last visited Sept. 11, 2017).

² *Id.*

³ Sara Robinson, *Human or Computer? Take This Test*, N.Y. TIMES (Dec. 10, 2002), <http://www.nytimes.com/2002/12/10/science/human-or-computer-take-this-test.html>; see

people from automated scripts or programs (known as “robots” or “bots”).⁴ Such safeguards protect websites from spammers or hackers who might otherwise try to overwhelm or take down blogs, email lists, or websites with automated comment posts or requests.⁵ Most users understand that they are inserting the letters and numbers as a type of security measure, which is worth the time and minor inconvenience.⁶

Captchas have long been a fixture of the web since they were invented in 2000 by a Carnegie Mellon computer science graduate student, Luis von Ahn.⁷ Users have become accustomed to the idea that they need to fill in a Captcha code to gain access to various website services, but this has shifted to being asked to insert a second verification. These second verifications, known as “reCaptchas,” also look like random combinations of numbers and letters.⁸ But these “reCaptchas” are far from random. Rather, they are small bits of transcription that could not be identified by computer scanners and need a human eye to do the work.⁹ After the Captcha technology was sold to Google in 2009, Google expanded upon the original idea, enlisting its millions of users to do free work for both Google Books and Google Maps.¹⁰ While filling out the second code takes only a few additional seconds for the individual user, when multiplied by millions of users, the aggregate amount

also Gary Marcus, *What Comes After the Turing Test*, NEW YORKER (June 9, 2014), <http://www.newyorker.com/tech/elements/what-comes-after-the-turing-test> (explaining the role of the Turing test in spurring the growth of artificial intelligence). For more on Alan Turing, the originator of the test and visionary in the field of artificial intelligence, see Emma C. Fitzsimmons, *Alan Turing, Enigma Code-Breaker and Computer Pioneer, Wins Royal Pardon*, N.Y. TIMES (Dec. 24, 2013), <http://www.nytimes.com/2013/12/24/world/europe/alan-turing-enigma-code-breaker-and-computer-pioneer-wins-royal-pardon.html>.

⁴ Avi Loewenstein, Note, *Ticket Sniping*, 8 J. ON TELECOMM. & HIGH TECH. L. 243, 247 (2010) (describing how Captchas are used to prevent the problem of ticket sniping).

⁵ *Harnessing Human Computation*, ECONOMIST (June 1, 2013), <https://www.economist.com/news/technology-quarterly/21578514-luis-von-ahn-helped-save-internet-spammers-his-larger-quest-put>.

⁶ See *id.*; see also Robinson, *supra* note 3.

⁷ Brian de Graft, *Meet Luis von Ahn: The Man You’ve Worked for, Without Knowing It*, NEXT WEB (Aug. 17, 2016), https://thenextweb.com/insider/2016/08/17/meet-luis-van-ahn-man-youve-worked-without-knowing/#.tnw_j74WwfEY.

⁸ See Sarah Perez, *Google Now Using ReCAPTCHA to Decode Street View Addresses*, TECHCRUNCH (Mar. 29, 2012), <https://techcrunch.com/2012/03/29/google-now-using-recaptcha-to-decode-street-view-addresses/>.

⁹ See *Creation of Value*, GOOGLE RECAPTCHA, <https://www.google.com/recaptcha/intro/#creation-of-value> (last visited Sept. 11, 2017).

¹⁰ See *id.*; Leena Rao, *Google Acquires reCaptcha to Power Scanning for Google Books and Google News*, TECHCRUNCH (Sept. 16, 2009), <https://techcrunch.com/2009/09/16/google-acquires-recaptcha-to-power-scanning-for-google-books-and-google-news/>.

of transcription work that could be accomplished is staggeringly large.¹¹

In *Rojas-Lozano v. Google, Inc.*,¹² class action plaintiffs brought a federal case seeking financial recovery for the value of the time that users had invested in working (without knowledge) through reCaptchas.¹³ The plaintiffs argued that they had all, in fact, been working for Google without compensation, and that this was either a deceptive trade practice or a form of unjust enrichment. However, the court in *Rojas-Lozano* granted Google's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss.¹⁴ The court found that the elements pleaded did not amount to misrepresentation.¹⁵ Further, the court held that the plaintiffs could not make out the elements of a California consumer law claim, as they had suffered no detrimental reliance or damage.¹⁶ Even if the profit that Google would make was not revealed to users, the court pointed out that any harm to an individual plaintiff would be de minimus due to the very small amount of time that each person would spend in filling out a reCaptcha.¹⁷

The court went on to discuss the plaintiff's unjust enrichment claim, which it categorized as a claim in quasi-contract or restitution.¹⁸ The court's discussion of restitution theory was confined to two brief paragraphs, concluding in a summary fashion that there was no misrepresentation or omission from the defendants; and that even if there had been, there had been no reliance or damage based on the omission.¹⁹ Throughout the opinion, the court emphasized the small amount of time that any one individual had spent on the reCaptchas.

The court's reasoning in *Rojas-Lozano* left a great deal to be desired. While the court acknowledged that Google had made a profit based on the plaintiffs' work, the court also minimized this point by noting that the time

¹¹ De Graft, *supra* note 7 (estimating that the New York Times archives were quickly digitized thanks to this transcription process). Interestingly, Google has recently been listening to complaints that reCaptcha is annoying and wastes users' time; but the "NoCaptcha" system that they are now testing has privacy watchdogs upset, rather than asking users to enter a code it tracks and monitors users to ensure that they are not bots. Lara O'Reilly, *Google's New CAPTCHA Security Login Raises 'Legitimate Privacy Concerns,'* BU. INSIDER (Feb. 20, 2015), <http://www.businessinsider.com/google-no-captcha-adtruth-privacy-research-2015-2>.

¹² 159 F. Supp. 3d 1101 (N.D. Cal. 2016).

¹³ *See id.* at 1106–07.

¹⁴ *See id.* at 1106.

¹⁵ *See id.* at 1113–14.

¹⁶ *See id.* at 1114.

¹⁷ *See id.* at 1115.

¹⁸ *See id.* at 1120.

¹⁹ *Id.*

involved for each user was extremely small.²⁰ To be sure, an individual inserting a reCaptcha code involves only a few seconds, but in the aggregate, the time that Google had harnessed was considerable. Further, the court seems to have misunderstood the basis for awarding a remedy in an unjust enrichment case.²¹ To be sure, it is difficult to tell, as the court barely considered the theory before summarily foreclosing it.

The type of unknowing or even unconscious labor that was taking place in the reCaptcha situation is not an isolated phenomenon. As technology advances and new ways of working are developed, it has become fruitful to mix work and leisure, which previously were considered binary opposites. A prior article by the author, *The Gamification of Work*, describes how games can be deployed to turn boring tasks into more fun activities, and how games themselves (like World of Warcraft) can be turned into work by monetizing different elements of the games.²² The portmanteau “playbor” describes situations in which online games combine work with fun or “play.”²³ Other forms of work are breaking down the old divide between those who produce products and those who consume them. New websites, such as Threadless, allow their customers both to design products like T-shirts and also to purchase them.²⁴ Known as “prosumers,” website or app users may bear responsibility for both creation of content or products as well as their use or consumption.²⁵

These are just some examples of major changes that are occurring to the fundamental structure and nature of the labor relationship. Gig economy platforms on websites or cell phone apps are also part and parcel of these

²⁰ *Id.* at 1115.

²¹ The court summed up this point by stating in conclusory fashion: “Plaintiff has also not alleged that she suffered any damages as a result of the alleged misrepresentation. At best, she alleges that Google profited from her allegedly uninformed decision to complete the two-word reCAPTCHA. But Google’s profit is not Plaintiff’s damage.” *Id.* at 1114–15.

²² See Miriam A. Cherry, *The Gamification of Work*, 40 HOFSTRA L. REV. 851 (2012). See generally KEVIN WERBACH & DAN HUNTER, FOR THE WIN: HOW GAME THINKING CAN REVOLUTIONIZE YOUR BUSINESS (2012).

²³ Andrew Ross, *In Search of the Lost Paycheck*, in DIGITAL LABOR: THE INTERNET AS PLAYGROUND AND FACTORY 13, 26 (Trebor Scholz ed., 2013).

²⁴ THREADLESS, www.threadless.com (last visited Sept. 11, 2017); see also JEFF HOWE, CROWDSOURCING: WHY THE POWER OF THE CROWD IS DRIVING THE FUTURE OF BUSINESS 1–3 (2008) (describing the “Threadless” website).

²⁵ See generally Marie-Christine Pauwels, *Work and Prosumerism: Collaborative Consumption in the United States*, in DIGITAL LABOUR AND PROSUMER CAPITALISM: THE US MATRIX 66 (Olivier Frayssé & Mathieu O’Neil eds., 2015). Note that “prosumers” is a new name but that the idea that customers would also be working is an older one. See, e.g., MICHAEL PALM, TECHNOLOGIES OF CONSUMER LABOR: A HISTORY OF SELF-SERVICE 26, 57–59 (2016) (detailing history of consumer work in the grocery store and on the telephone).

changes. While traditional “employment” relationships involved a steady forty-hour work week and accompanying benefits, the gig economy instead stresses limited commitment and extreme flexibility.²⁶ Rather than having an individual assigned employee to take on tasks as work arises, the work is broken down into smaller pieces and placed out via internet or cellular phone app on an “open call.”²⁷ Workers sign in and complete tasks at their own pace and on their own time. There are no obligations of the worker or the platform to each other past the conclusion of one particular gig or task.²⁸

What all of these new forms of work have in common is that they are largely intermediated by and through standardized form contracts. In most instances the terms of these contracts are contained in end user license agreements (“EULAs”), which are displayed in an online format, sometimes with scrollable texts.²⁹ Some EULAs are presented in a format that requires the user to click “I agree” before continuing to use the site or platform. Courts have held that the “click” signifies an objective assent to the form terms.³⁰ Others are presented in a scattered way throughout the website or platform. Known as “browsewrap,” these kind of contracts require no manifestation of assent and thus are not typically enforceable.³¹ Regardless, like many online adhesion contracts, the contracts in the sharing economy contain many one-sided terms that are favorable to the website or platform.³² EULAs for many on-demand economy companies contain a statement that the work is done on an “independent contractor” basis and that no employee benefits are designated or even desired. Currently, courts in the United States are grappling mightily with the classification problem. In the employment law context, courts have typically looked past the nomenclature used by the parties.³³ Instead, courts delve into the true substance of the relationship to determine indicia of employment, including the ability to control the worker

²⁶ See, e.g., Miriam A. Cherry, *Beyond Misclassification: The Digital Transformation of Work*, 37 COMP. LAB. L. & POL’Y J. 577 (2016).

²⁷ See Frederick E. Allen, *Names You Need to Know: Jeff Howe*, FORBES (Nov. 11, 2010), <https://www.forbes.com/sites/frederickallen/2010/11/11/names-you-need-to-know-jeff-howe/#5ff50211759d>. See generally HOWE, *supra* note 24.

²⁸ Cherry, *supra* note 26, at 581–82. See generally Charlotte Garden, *Disrupting Work Law: Arbitration in the Gig Economy*, 2017 U. CHI. LEGAL F. (forthcoming Fall 2017).

²⁹ See, e.g., *Lyft Terms of Service*, LYFT, <https://www.lyft.com/terms> (last visited Sept. 12, 2017).

³⁰ *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012).

³¹ *Id.* at 836.

³² See NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 2, 4 (2013).

³³ See, e.g., Richard R. Carlson, *Variations on a Theme of Employment: Labor Law Regulation of Alternative Worker Relations*, 37 S. TEX. L. REV. 661, 663–65 (1996).

or the worker's economic dependency.³⁴ Even beyond this relatively well-known classification debate, interesting disguised forms of online work are presenting a new and difficult set of problems for both contract law and the law of unjust enrichment and restitution.³⁵

The first part of this Article provides the relevant background needed for a full discussion of the on-demand or sharing economy. The second part discusses the evolving precedents in the United States and in the United Kingdom on the issue of employee status for on-demand economy workers. Perhaps surprisingly, even though the on-demand economy started in the San Francisco Bay Area, and lawsuits have been ongoing for several years now, as of 2016, there still is no caselaw precedent in the United States answering whether on-demand workers are independent contractors or employees.³⁶ In contrast, the Council of London Employment Tribunal found that Uber drivers did, in fact, meet the definition of employees and thus were entitled to the accompanying rights and benefits of that status.³⁷

The third part of this Article looks to the new types of on-demand labor where the work is being carried out wholly within cyberspace. In some instances, these new forms of work do not look anything like "traditional" forms of work at all.³⁸ Work may be disguised as part of a game, with the work product or useful data that is produced only a tiny fraction of a person's time or even consciousness. In other instances, work may seem to be an innocuous computer program. In still others, users share their time and contribute their efforts online to a "community," only to later discover that it is a commodified space and someone else has profited from their efforts.³⁹

These instances, which mostly amount to unpaid or in some instances even unacknowledged or unconscious labor on the internet, have been the subject of lawsuits in the United States. These cases have been brought by plaintiffs under contract law, and they have largely been rejected under

³⁴ See *id.*; *infra* note 86 and accompanying text. Note also that terms in the EULAs that involve arbitration agreements or class action waivers are also becoming more important. See Garden, *supra* note 28.

³⁵ See *infra* Part IV.

³⁶ See *infra* Section II.B.

³⁷ *Aslam v. Uber B.V.* [2017] IRLR 4 [86].

³⁸ Of course, use of the words "traditional work" is somewhat misleading, as there are many forms of work that are unrecognized, hidden, and invisible. See *INVISIBLE LABOR: HIDDEN WORK IN THE CONTEMPORARY WORLD* 3–5 (Marion G. Crain, Winifred R. Poster & Miriam A. Cherry eds., 2016). But "traditional work" can be used as a shorthand for forms of work that we are used to seeing, work that is remunerated, takes place at a factory, office, or place of business, within the bounds of set and standardized work hours. See *id.* at 3.

³⁹ See *infra* Part III.

traditional contract theory.⁴⁰ While these cases have largely been unsuccessful in the United States to date, it is possible that they might gain more traction in the United Kingdom, where restitution and unjust enrichment have flowered into a recognized and developed field of jurisprudence.⁴¹ Although the U.S. cases have seen interesting fact patterns dealing with virtual and online work, the U.S. courts lack a fundamental familiarity with restitution law to deal with the topic adequately. The United Kingdom, on the other hand, has a great deal of theoretical writing and legal cases on the topic of restitution and unjust enrichment, but has yet to apply unjust enrichment doctrine in reference to any concrete disputes about online labor.⁴² The last part of the Article examines the more expansive ideas of restitution developed in the United Kingdom. These ideas provide assistance in thinking through the current issues and disputes surrounding global virtual work issues. For instance, one could ask how the reCaptcha case would have been decided if it had been brought in the United Kingdom under an unjust enrichment theory.

I. OVERVIEW OF THE SHARING ECONOMY

The so-called “shared,” “sharing,” “gig,” or “on-demand” economy⁴³ has its roots in longstanding community exchange structures in the United States. While often informal and based on religious community, kinship, or frontier ties, many communities set up exchange systems based on time sharing or barter.⁴⁴ Tool exchanges and book lending libraries were prototypes of these collective efforts that depended upon a mix of altruism, government funding, and community initiative.⁴⁵

The internet, mobile phones, and computer technology provided a boost

⁴⁰ See *infra* Section II.A.

⁴¹ See *infra* Section IV.B.

⁴² See *infra* Section IV.B.

⁴³ The terminology for these new forms of business and work is still being debated. “Shared” economy is the terminology of the European Union and the U.K., while “sharing” economy is more common in the United States. That said, there is a debate about whether either “shared” or “sharing” is the correct term at all, given that these are mostly for-profit businesses in the sector. Because of the title of the Symposium panel (“Share Economy and the Edges of Contract Law”), I am using the terms interchangeably, even while recognizing that “sharing” or “shared” economy may be a misnomer. See Steven Greenhouse, *The Whatchamacallit Economy*, N.Y. TIMES (Dec. 16, 2016), <https://www.nytimes.com/2016/12/16/opinion/the-whatchamacallit-economy.html>.

⁴⁴ *The Rise of the Sharing Economy*, ECONOMIST (Mar. 9, 2013), <http://www.economist.com/news/leaders/21573104-internet-everything-hire-rise-sharing-economy>.

⁴⁵ See Jenny Kassan & Janelle Orsi, *The LEGAL Landscape of the Sharing Economy*, 27 J. ENVTL. L. & LITIG. 1, 3 (2012); see also Cherry, *supra* note 23, at 579.

to new forms of sharing and business structures, matching providers or sellers with those eager for goods and services.⁴⁶ Transaction costs fell, and entering the 2010s, average computer users were able to create markets for used or specialty goods on outlets such as Amazon, Etsy, and eBay.⁴⁷ Underutilized or unused resources (like an extra room or above-garage apartment) could be rented out through space-sharing website AirBnB.⁴⁸ Many people began to buy and sell small pieces of their time and labor through mobile cell-phone platforms or online marketplaces for work.

Technological platforms offered innovations; instead of buying or selling a good, users of certain platforms could rent access to what they needed.⁴⁹ A driver with a private car could transform an ordinary morning commute into a profit-generating enterprise by picking up a passenger through Uber or Lyft.⁵⁰ Other websites, like Amazon's Mechanical Turk, crowdsourced computer tasks to a global market of workers, using only very small slices of time.⁵¹ Websites that were part of "prosumer" movements involved customers in design or marketing decisions, only to then sell those same consumers products.⁵² On-demand services seemed to thrive in an environment that was increasingly globalized, anonymous, and—with lowered transaction costs—more efficient.

Despite their "shared" roots, the irony is that many of these newest services or marketplaces are for-profit entities that are highly commodified; everything and anything is now being monetized, from slices of time, to what were formerly shared or open access resources. Back in 2013, the author examined how some parts of the internet were based on a "sharing" model while others were highly commoditized.⁵³ While many businesses, like Craigslist, struggled with these issues of community access and profit throughout the early and mid 2000s, many later businesses, like Uber, had the pursuit of profit as their mainline goal.⁵⁴ Despite an outward veneer of

⁴⁶ See Cherry, *supra* note 26, at 577.

⁴⁷ See Miriam A. Cherry, *Cyber Commodification*, 72 MD. L. REV. 381, 384–85 (2013).

⁴⁸ See Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, FORBES (Jan. 23, 2013), <http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/>.

⁴⁹ See *id.*

⁵⁰ See *Start Driving with Uber*, UBER, <https://www.uber.com/drive/> (last visited Sept. 12, 2017).

⁵¹ AMAZON MECHANICAL TURK, <https://www.mturk.com/mturk/welcome> (last visited Sept. 12, 2017).

⁵² See HOWE, *supra* note 24, at 2, 4.

⁵³ See generally Cherry, *supra* note 47.

⁵⁴ See *id.* at 418–21; John Biggs, *The Inside Story of the Rise and Rise of Uber*, TECHCRUNCH (Feb. 7, 2017), <https://techcrunch.com/2017/02/07/the-inside-story-of-the-rise->

sharing and an appeal to the community, many of these newest crowdsourcing and labor sites were focused on profit maximization, to the detriment of labor standards.⁵⁵ The next Section looks at the legal treatment of for-profit platforms that are used to intermediate work and labor relations, providing a comparative assessment of the United States and the United Kingdom.

II. THE LEGAL TREATMENT OF PLATFORM WORK IN THE U.S. AND U.K.

A 2016 survey by *TIME* Magazine revealed that approximately 45 million people had participated in some way in the on-demand economy.⁵⁶ While some have quibbled with these statistics,⁵⁷ most would readily agree that there has been rapid growth in the on-demand sector. The new companies responsible for such growth include those sites that offer services in the real world, like Handy⁵⁸ and Instacart,⁵⁹ as well as well-known ridesharing services like Uber and Lyft. They also include platforms where the work takes place wholly online, like the crowdsourced computer tasks on Amazon Mechanical Turk.⁶⁰ These platforms tend to classify their workers as “independent contractors” under their terms of use, even if that description may not be legally accurate.⁶¹ Workers have struck back by bringing class action lawsuits, claiming they should rightfully be classified as employees.⁶² This question of misclassification is particularly important

and-rise-of-uber/.

⁵⁵ See Rashmi Dyal-Chand, *Regulating Sharing: The Sharing Economy as an Alternative Capitalist System*, 90 TUL. L. REV. 241, 241, 292 (2015) (arguing that current forms of regulation do not fit well with the sharing economy because of a lack of fit with traditional business models).

⁵⁶ Katy Steinmetz, *Exclusive: See How Big the Gig Economy Really Is*, TIME (Jan. 6, 2016), <http://time.com/4169532/sharing-economy-poll/>.

⁵⁷ See Cole Stangler, *December Jobs Report: How Many Gig Economy Workers Are There, Really?*, INT’L BUS. TIMES (Jan. 8, 2016, 7:33 AM), <http://www.ibtimes.com/december-jobs-report-how-many-gig-economy-workers-are-there-really-2255765>. Prominent economists Alan Kreuger and Larry Mishel both quibble with the numbers in the Time survey, arguing that the numbers of on-demand economy workers are far lower. *Id.* There may be political or ideological reasons for minimizing the gig economy, including staving off regulation (from the right) or perhaps appealing to traditional union constituencies and minimizing technological change (from the left). See Lawrence Mishel, *Uber is Not the Future of Work*, ATLANTIC (Nov. 16, 2015), <https://www.theatlantic.com/business/archive/2015/11/uber-is-not-the-future-of-work/415905/>.

⁵⁸ HANDY, <http://www.handy.com/> (last visited Sept. 12, 2017).

⁵⁹ INSTACART, <https://www.instacart.com/> (last visited Sept. 12, 2017).

⁶⁰ AMAZON MECHANICAL TURK, *supra* note 51.

⁶¹ See, e.g., *Lyft Terms of Service*, *supra* note 29.

⁶² Cherry, *supra* note 26 at 578.

because employee status is a “gateway” to many of the rights and benefits provided under employment law.⁶³

A. *Litigation in the United States*

Although the ridesharing cases involving Uber and Lyft have been the most high profile on-demand economy cases, there are many other ongoing cases in the United States regarding the employee status of platform workers.⁶⁴ The author has been following many of those cases and has described the stories and trends in these litigations in other published work.⁶⁵ These platform workers perform home repair services,⁶⁶ cleaning services,⁶⁷ grocery delivery and errand services,⁶⁸ and piecemeal computer tasks intermediated by a platform.⁶⁹ Despite the varying nature of these tasks, the central issue in all of these cases is the same: whether the contract’s description of the work as that done by an “independent contractor” should control, or whether the control or economic realities test would lead to a different result. Some of these cases have been sent to arbitration, per the terms and conditions, never to be heard from again; others have settled without resolving the question of employee status.⁷⁰

The lawsuits over transportation service networks have certainly received a large share of attention. In the two cases *Cotter v. Lyft, Inc.*⁷¹ and *O’Connor v. Uber Technologies, Inc.*⁷² drivers filed class action wage and hour claims in the Northern District of California.⁷³ The availability of a remedy under wage and hour laws, however, depends upon employee status.⁷⁴ As will be discussed in more depth below, U.S. law does not depend simply on the label assigned by the parties, but rather whether a worker is an employee or independent contractor is determined through one of two

⁶³ For example, the rights to minimum wage, protection from discrimination, unemployment insurance, and worker’s compensation are only available for those workers who qualify as employees under the federal statutes that deal with those topics. *Id.*

⁶⁴ For a full discussion of these ongoing cases, see *id.* at 579–93.

⁶⁵ *See id.*

⁶⁶ *See id.* at 586.

⁶⁷ *See id.* at 588.

⁶⁸ *See id.* at 584.

⁶⁹ *See id.* at 592.

⁷⁰ *See id.* at 581–85.

⁷¹ 60 F. Supp. 3d 1067 (N.D. Cal. 2015).

⁷² 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁷³ *See Cotter*, 60 F. Supp. 3d at 1070; *O’Connor*, 82 F. Supp. 3d at 1135.

⁷⁴ *See* 29 U.S.C. § 203(e)(1) (2012) (defining “employee” for the purposes of the Fair Labor Standards Act).

doctrinal tests: the control test or the entrepreneurial activities test.⁷⁵

Deriving from cases and decisions in the area of agency law, the control test, as its name hints, focuses on a principal's right to control the agent working on its behalf.⁷⁶ The right to control is the hallmark or cornerstone of being an employer, and a multifaceted test for measuring the indicia of control has developed through the caselaw. Some of these indicia of control that lead to a finding of employee status are the ability to control the method and ways in which the work is performed, ability to set the hours of work, and the ability to provide the employee with direction.⁷⁷ On the other hand, elements that lean toward classification as an independent contractor include work that requires high skill, the workers' provision of their own instruments and tools of the trade, workers being able to set their own schedules, and payment per project, not per hour.⁷⁸

In the entrepreneurial activities test, courts examine the economic realities of the working relationship to determine whether the worker is acting as an entrepreneur.⁷⁹ This might include an opportunity for both financial gain and loss from the work.⁸⁰ Such indicia of entrepreneurial activity could justify the label of independent contractor. On the other hand, if the worker is financially dependent, and there is no potential downside to the relationship, that tends to resemble the traditional employee-employer relationship.⁸¹ In both the control and entrepreneurial activities tests, the label affixed to the relationship is one factor in the outcome, but it is certainly not dispositive to the determination, as courts will look further into the

⁷⁵ 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 caselaw). Relevant cases on this subject include *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323–26 (1992); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 726–30 (1947); *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 170–72 (2d Cir. 1968).

⁷⁶ Stone, *supra* note 75, at 261.

⁷⁷ See, e.g., *Herman v. Express Sixty-Minutes Delivery Serv., Inc.*, 161 F.3d 299, 303 (5th Cir. 1998).

⁷⁸ See, e.g., *Carlson*, *supra* note 33, at 663 (“Most labor and employment laws assume a paradigmatic relationship between an ‘employer’ and ‘employee.’ The employer in this model contracts directly with an individual employee to perform an indefinite series or duration of tasks, subject to the employer’s actual or potential supervision over the employee’s method, manner, time and place of performance. This model describes most workers well enough, but there has always been a large pool of workers in alternative relationships with recipients of services. Some workers are ‘independent contractors’ who contract to perform specific tasks or achieve particular results, but who retain independence and self-management over their performance.”).

⁷⁹ See Stone, *supra* note 75, at 257–58.

⁸⁰ See *id.*

⁸¹ See *id.*

substance of the relationship.⁸² In any event, both tests are known for being notoriously malleable, even when dealing with what should be a fairly straightforward analysis.⁸³ As the tests themselves are difficult to apply, the federal judges of the Northern District of California struggled in the ridesharing cases for the appropriate way to characterize the drivers' triangular working relationship with the customers and the platforms.⁸⁴ This issue is especially difficult given the binary nature of employee status.⁸⁵ In the ridesharing cases, some of the factors in the control test point toward an employee relationship, while others could be viewed as fitting into an independent contractor relationship.⁸⁶ For example, crowdworker drivers have more flexibility in setting their schedules than workers in a traditional taxi environment who work a set shift. Drivers also provide their own cars and their own cellular telephones, i.e., tools and instrumentalities of the work. Finally, and for further discussion later in the Article, EULAs contractually label drivers as "independent contractors."⁸⁷

Many factors, however, point toward employee status. Ridesharing

⁸² See *id.*

⁸³ Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 298 (2001) ("Indeed, in the case of employee status, the law encourages ambiguity. On the one hand, employers often crave the control they enjoy in a normal employment relationship. On the other, the advantages (to employers) of employing workers who are plausibly not employees motivate a good deal of arbitrary and questionable 'non-employee' classification. It is not uncommon to find employees and putative contractors sitting side by side, performing the same work without any immediately visible distinguishing characteristics. And the trend of the working world is toward greater complexity and variation, driven partly by the temptation to capitalize on the fog that obscures the essence of many working relationships." (footnote omitted)).

⁸⁴ See generally *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1067 (N.D. Cal. 2015); *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁸⁵ Again, this has been a longstanding problem. See, e.g., Alan Hyde, *Employment Law After the Death of Employment*, 1 U. PA. J. LAB. & EMP. L. 99, 101 (1998) ("The new ways of working, that I believe challenge normal legal analyses, include such new relations of employment as temporary employment placed by an agency and part-time employment rendered by people who have no other employer but are treated as contingent workers without benefits or implicit promises. They also include ways of working that are not, technically, 'employment' relations under any statute: independent contractors, free-lancers, consultants, and people out of the labor market after downsizing or other elimination of former career jobs.").

⁸⁶ See Benjamin Means & Joseph A. Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1541–42 (2016) (arguing that many Uber drivers are independent contractors); Brishen Rogers, *The Social Costs of Uber*, 82 U. CHI. L. REV. DIALOGUE 85, 100 (2015) (noting that some aspects of both employee and independent contractor relationships are present in Uber's business model, but that policy reasons would favor coverage of workers as employees).

⁸⁷ *Lyft Terms of Service*, *supra* note 29 ("[T]he relationship between the parties under this Agreement is solely that of independent contracting parties."); see Garden, *supra* note 28.

platforms exert significant control over drivers, given that both Uber and Lyft use customer ratings in order to maintain what amounts to constant surveillance over quality of service; customers are essentially deputized to run the workforce.⁸⁸ Many on-demand companies spend a great deal of time and effort to implement quality control policies.⁸⁹ Further, in turning to the entrepreneurial activities test, it would seem very difficult to say that there is truly the opportunity for entrepreneurial expansion, or gain or loss. As noted in an earlier article, the “terminology in a EULA is far from dispositive, as such online contracts are known to be extremely one-sided and are construed against the drafter. The possibility for exploitation is high, and low-skilled workers are those that are most in need of [labor law] protection.”⁹⁰

The uncertainty of the legal test combined with a difficult set of facts meant that the judges in the ridesharing cases were left with a major problem.⁹¹ As Judge Vince Chhabria in *Cotter v. Lyft, Inc.* noted, “the jury . . . will be handed a square peg and asked to choose between two round holes. The test the California courts have developed over the 20th Century for classifying workers isn’t very helpful in addressing this 21st Century problem.”⁹² The court denied Lyft’s motion for summary judgment, and for a time at least, the case seemed to be headed to trial.⁹³

Faced with the uncertainty of jury verdicts, perhaps a settlement was unsurprising. In January 2016, Lyft agreed to pay \$12.25 million to resolve their wage and hour claims.⁹⁴ In addition, Lyft pledged to provide drivers with additional due process rights before termination. Many drivers had complained about the previous summary method of dismissal, especially because the threshold rating for dismissal was actually quite high. Out of a five-point scale, with one being “terrible” and five being “terrific,” drivers were at risk of being terminated from the app if they fell below a threshold rating of 4.8.⁹⁵ Under the settlement, rather than being summarily deactivated

⁸⁸ Alex Rosenblat, *The Truth About How Uber’s App Manages Drivers*, HARV. BUS. REV. (Apr. 6, 2016), <http://hbr.org/2016/04/the-truth-about-how-ubers-app-manages-drivers>.

⁸⁹ See, e.g., *id.*

⁹⁰ Cherry, *supra* note 26 at 583.

⁹¹ See *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1069, 1081–82 (N.D. Cal. 2015).

⁹² *Id.* at 1081.

⁹³ *Id.* at 1080.

⁹⁴ Maya Kosoff, *Lyft Just Agreed to Pay More than \$12 Million to Settle a Driver Lawsuit—Here’s What That Means for Its Drivers*, BUS. INSIDER (Jan. 27, 2016, 9:34 AM), <http://www.businessinsider.com/what-lyfts-12-million-settlement-means-for-drivers-2016-1>.

⁹⁵ See LYFT, <https://help.lyft.com/hc/en-us/articles/213586008-Driver-and-Passenger-Ratings> (last visited Sept. 12, 2017) (explaining that drivers “may want to consider ways to improve” their ratings if below 4.8).

(i.e., kicked off) from the app with no explanation, the settlement required the platform to provide a driver with the reason for termination.⁹⁶ Further, if the reason given is low user ratings, the driver would be given an opportunity to improve. Finally, drivers would have the ability to challenge a deactivation through an arbitration proceeding if they believe they were deactivated outside the permitted reasons.⁹⁷ Despite the terms of the proposed settlement on compensation and deactivation, the underlying issue of employee status remained unresolved.⁹⁸ Only a few months later, Judge Chhabria rejected the Lyft settlement as inadequate and sent the parties back for additional negotiations, which resulted in a financially enhanced settlement for the drivers of \$27 million.⁹⁹ Still, there is no more certainty about the employment status of Lyft drivers than before the lawsuit began.

A similar settlement story is in the process of playing out in *O'Connor v. Uber Technologies, Inc.* A class of Uber drivers had been certified and the case was set for trial in summer of 2016.¹⁰⁰ In advance of the trial, however, in April 2016, the parties announced a \$100 million settlement of claims.¹⁰¹ While initially that seems like a large account, given the number of drivers, the result would be the recovery of only small or nominal payment for each driver.¹⁰² As in the Lyft settlement, the ultimate question of employee misclassification was not resolved.¹⁰³

Judge Edward Chen, however, rejected the settlement as inadequate, and as of the writing of this Article, the parties are still negotiating.¹⁰⁴ Judge Chen wrote that certain state statutory claims (California's Private Attorneys General Act, or "PAGA" claims) could not be waived through an adhesive

⁹⁶ See Kosoff *supra* note 94.

⁹⁷ See *id.*

⁹⁸ Cotter v. Lyft, Inc., 176 F. Supp. 3d 930, 936 (N.D. Cal. 2016). On the role of arbitration clauses in the settlement of *O'Connor v. Uber Technologies, Inc.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015), see Katherine V.W. Stone, *Uber and Arbitration: A Lethal Combination*, ECON. POL'Y INST.: WORKING ECONOMICS BLOG (May 24, 2016, 11:33 AM), <http://www.epi.org/blog/uber-and-arbitration-a-lethal-combination/>.

⁹⁹ Tracey Lien, *Judge Approves Lyft's \$27-Million Class-Action Settlement with Drivers*, L.A. TIMES (June 23, 2016, 6:13 PM), <http://www.latimes.com/business/technology/la-fi-tn-lyft-settlement-approval-20160623-snap-story.html>.

¹⁰⁰ See *O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 550–51 (N.D. Cal 2015).

¹⁰¹ Mike Isaac & Noam Scheiber, *Uber Settles Cases with Concessions, but Drivers Stay Freelancers*, N.Y. TIMES (Apr. 21, 2016), <https://www.nytimes.com/2016/04/22/technology/uber-settles-cases-with-concessions-but-drivers-stay-freelancers.html>.

¹⁰² See *id.* (reporting that the certified class contained roughly 385,000 drivers).

¹⁰³ *Id.*

¹⁰⁴ *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d. 1110, 1113 (N.D. Cal 2016).

EULA given that these PAGA claims were potentially quite valuable, worth upward of \$1 billion.¹⁰⁵ At the same time, the possible need to arbitrate these claims or pursue them in individual actions could undermine their value. Regardless of the monetary value of the claims, the underlying question of employee status of the drivers does not seem any closer to being resolved.

Interestingly, there are some long-term trends relevant to contract law that can be gleaned from the partial decisions and rulings in the United States. One is the growth in use of arbitration and class-waiver provisions in EULAs, and the courts' willingness to enforce them, even when they seem one-sided and the product of contracts of adhesion.¹⁰⁶ Although perhaps not directly relevant to issues in the sharing economy, the trend toward arbitration through EULAs is one that already seems to be having an effect on the incentives of litigation.¹⁰⁷

Aside from issues of forum, there is an emerging pushback from numerous U.S. federal courts on the adequacy of the settlement agreements. In both the *O'Connor v. Uber* and *Cotter v. Lyft* cases, courts rejected the initial settlement agreements as inadequate for the workers and sent the

¹⁰⁵ *Id.* at 1132–35.

¹⁰⁶ Updated analyses of these cases are provided by Garden, *supra* note 28. For an old look at many of the arbitration issues as they appeared in 1998, see Miriam A. Cherry, Note, *Not-So-Arbitrary Arbitration: Using Title VII Disparate Impact Analysis to Invalidate Employment Contracts That Discriminate*, 21 HARV. WOMEN'S L.J. 267 (1998).

¹⁰⁷ For more updated and recent accounts of the movement toward arbitration as a way of managing workplace liability for employers, see Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1310 (2015) (“Today employers, with substantial assistance from the Supreme Court, are using mandatory arbitration clauses to ‘disarm’ employees, effectively preventing them from bringing most individual or class claims and thereby obtaining access to justice. It has been estimated that roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.” (footnotes omitted)). For more on arbitration as a method of containing costs toward consumers, see Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. DISP. RESOL. 433, 434–37 (2010); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008) (“We provide the first study of varying use of arbitration clauses across contracts within the same firms. Using a sample of 26 consumer contracts and 164 nonconsumer contracts from large public corporations, we compared the use of arbitration clauses in firms’ consumer and nonconsumer contracts. Over three-quarters of the consumer agreements provided for mandatory arbitration but less than 10% of the firms’ material nonconsumer, nonemployment contracts included arbitration clauses. The absence of arbitration provisions in the vast majority of material contracts suggests that, ex ante, many firms value, even prefer, litigation over arbitration to resolve disputes with peers. Our data suggest that the frequent use of arbitration clauses in the same firms’ consumer contracts may be an effort to preclude aggregate consumer action rather than, as often claimed, an effort to promote fair and efficient dispute resolution.”).

parties back for additional negotiation.¹⁰⁸ While the rulings stop short of holding that the drivers are employees, they may signal that judges believe that the workers' substantive claims are valuable. Again, the issue of employee status has not been definitively decided by a court in the United States, so for the meantime this question remains unresolved.¹⁰⁹

B. *Litigation in the United Kingdom*

Unlike the U.S. Uber and Lyft settlements, which do not provide much in the way of resolution to the employee status issue, a recent decision from the Employment Tribunal in London reached a more definitive answer. In the case of *Aslam v. Uber B.V.*,¹¹⁰ the London Employment Tribunal ruled that the drivers were employees of Uber. At first the Tribunal considered, but rejected, Uber's contention that it was merely a software company, not a provider of labor services. The Tribunal noted that it would be

unreal to deny that Uber is in business as a supplier of transportation services. Simple common sense argues to the contrary. . . . One might ask: Whose product range is it if not Uber's? The "products" speak for themselves: they are a variety of driving services. Mr. Aslam does not offer such a range. Nor does Mr. Farrar, or any other solo driver. . . . "Uber does not simply sell software; it sells rides. Uber is no more a 'technology company' than Yellow Cab is a 'technology company' because it uses CB radios to dispatch taxi cabs."¹¹¹

Rather, the Tribunal felt that Uber's basic business model involved the provision of transportation. The Tribunal also suggested that the attempt to circumvent an employment relationship by using online contracts and inventing new terminology seemed to be a form of legerdemain.¹¹²

The Tribunal also spent a good deal of time analyzing the web of contracts between Uber and its drivers as well as Uber and its passengers. Regarding the former relationship, the Tribunal was extremely critical, noting that

the terms on which Uber rely do not correspond with the reality of

¹⁰⁸ See *O'Connor v. Uber Techs., Inc.*, 201 F. Supp. 3d 1110 (N.D. Cal. 2016) (denying plaintiffs' motion for preliminary approval of class action settlement); *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930 (N.D. Cal. 2016) (denying motion for preliminary approval of class action settlement).

¹⁰⁹ See *Cotter v. Lyft, Inc.*, 193 F. Supp. 3d 1030, 1037 (N.D. Cal. 2016) (granting motion for preliminary approval of class action settlement).

¹¹⁰ [2017] IRLR 4 [86].

¹¹¹ *Id.* [89] (quoting *O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (N.D. Cal. 2015)).

¹¹² See *id.* [87].

the relationship between the organisation and the drivers. Accordingly, the Tribunal is free to disregard them. As is often the case, the problem stems at least in part from the unequal bargaining positions of the contracting parties Many Uber drivers (a substantial proportion of whom, we understand, do not speak English as their first language) will not be accustomed to reading and interpreting dense legal documents couched in impenetrable prose. This is . . . an excellent illustration . . . of “armies of lawyers” contriving documents in their clients’ interests which simply misrepresent the true rights and obligations on both sides.¹¹³

The court, therefore, relied on its thirteen-point analysis to show that Uber was not working for the drivers; instead, the drivers were working for Uber.¹¹⁴ These points included key issues of recruitment, control over information regarding the passengers, Uber’s setting of default routes, pricing structures, conditions on drivers, instructions for drivers, the establishment of disciplinary and rating systems, and the fact that Uber handles complaints from passengers.¹¹⁵ While not identical, the list of factors considered tracks many of the factors in the U.S. control test.¹¹⁶ That said, Uber is appealing the Employment Tribunal’s opinion, throwing a great deal of resources and legal expertise at the problem.¹¹⁷ In September 2017, Transport for London refused to renew Uber’s transport license due to a concerns about the company’s lack of corporate social responsibility.¹¹⁸ Uber is appealing this licensure determination as well.¹¹⁹

III. COMPUTER TASKS AND LABOR ON THE INTERNET: APPLICATION OF PRINCIPLES OF UNJUST ENRICHMENT AND RESTITUTION

The ridesharing cases and many of the other sharing economy cases

¹¹³ *Id.* [96].

¹¹⁴ *See id.* [92], [95]. The analysis proceeded under the Employment Rights Act 1996, Section 230(3)(b), referred to in the decision as a “limb (b)” type case. *Id.* [98].

¹¹⁵ *Id.* [92].

¹¹⁶ *See supra* Section II.A.

¹¹⁷ *See* Robert Booth, *Uber Granted Right to Appeal Against Ruling on UK Drivers’ Rights*, *GUARDIAN* (Apr. 19, 2017), <https://www.theguardian.com/technology/2017/apr/19/uber-appeal-uk-employment-ruling-drivers-working-rights>.

¹¹⁸ Sarah Butler & Gwyn Topham, *Uber Stripped of London License Due to Lack of Corporate Responsibility*, *GUARDIAN* (Sept. 22, 2017), <https://www.theguardian.com/technology/2017/sep/22/uber-licence-transport-for-london-tfl>; Prashant S. Rao & Mike Isaac, *Uber Loses License to Operate in London*, *N.Y. TIMES* (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/business/uber-london.html?_r=0.

¹¹⁹ *See* Butler & Topham, *supra* note 118.

(house cleaning, delivery services, and the like), all involved platforms or mobile apps that coordinate work that happens in the real world. In addition to these types of work, there are also many forms of gig work that do not require real world interactions. Rather they involve tasks, jobs, and work that are performed wholly on the computer, in cyberspace. From Amazon Mechanical Turk, which matches up computer workers with small tasks, like transcription or photo-tagging, to other sites that employ web designers and programmers through mechanisms like bidding or contests, these forms of cyberspace-only crowdwork are becoming more common.¹²⁰ As an example of computer-based crowdwork, imagine taking a large-scale e-commerce project and breaking it into its smaller parts, such as writing product descriptions or taking photos of the goods being sold.¹²¹ Platforms then promulgate an “open call” that allows thousands of workers all over the world to complete these micro-tasks. After thousands of workers complete their tasks, computers re-aggregate and compile their work to finish the larger assignment.

Workers on these types of cyber crowdworking sites are also bringing lawsuits, challenging sub-minimum wage pay. In *Otey v. CrowdFlower, Inc.*,¹²² a group of computer workers challenged the pay practices of a crowdworking platform, which they alleged paid less than the U.S. minimum wage.¹²³ CrowdFlower is a platform specializing in micro-task computer work.¹²⁴ In 2014, workers brought suit against CrowdFlower under the Fair Labor Standards Act (“FLSA”)¹²⁵ and Oregon’s minimum wage law for failure to pay adequate wages.¹²⁶ In response, CrowdFlower argued that the

¹²⁰ See AMAZON MECHANICAL TURK, *supra* note 51; INNOCENTIVE, www.innocentive.com (last Sept. 15, 2017) (linking creative problem solvers with posted tasks).

¹²¹ See Randall Stross, *When the Assembly Line Moves Online*, N.Y. TIMES (Oct. 30, 2010), <http://www.nytimes.com/2010/10/31/business/31digi.html>.

¹²² No. 12-cv-05524-JST, 2014 WL 1477630 (N.D. Cal. Apr. 15, 2014).

¹²³ See *id.* at *1.

¹²⁴ *Id.*

¹²⁵ Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–219 (2012).

¹²⁶ *Otey*, 2014 WL 1477630, at *1. In addition to the lawsuit, other stories have appeared about the poor wages for online micro-task work. See, e.g., Matthew Bingham & Joseph Dunn, *Wanted: Digital Drones to Earn ½p an Hour*, SUNDAY TIMES (Jan. 11, 2009, 12:00 AM), <https://www.thetimes.co.uk/article/wanted-digital-drones-to-earn-p-an-hour-psrsz0s316> (journalists performing tasks on Amazon Mechanical Turk and earning a little over \$2 for four hour’s work); Moshe Z. Marvit, *How Crowdworkers Became the Ghosts in the Digital Machine*, NATION (Feb. 5, 2014), <http://www.thenation.com/article/178241/how-crowdworkers-became-ghosts-digital-machine> (recounting stories of two workers on Amazon Mechanical Turk who earned less than minimum wage); Alyson Shontell, *My Nightmare Experience as a TaskRabbit Drone*, BUS. INSIDER (Dec. 7, 2011),

micro-task workers were independent contractors, based on the terms in the EULA, and thus the minimum wage laws would not apply.¹²⁷

The employee status question, however, was foreclosed by settlement before it could be decided by the court.¹²⁸ By the terms of the settlement, CrowdFlower agreed to compensate the workers for the difference between their actual pay and the statutory minimum wage.¹²⁹ CrowdFlower also agreed to pay attorney's fees and to cease involvement in crowdwork for ten years.¹³⁰ Judge Tigar, however, rejected the settlement as inadequate,¹³¹ instead approving a revised settlement that increased the amount of money paid to \$585,507, inclusive of attorney's fees.¹³² The finalized settlement, however, contained no ban on CrowdFlower's crowdwork operations.¹³³

The CrowdFlower settlement might be viewed as encouraging to other plaintiffs bringing minimum wage lawsuits for crowdwork. The success in this case in part hinged on the "smoking gun" of several YouTube videos referenced in the plaintiff's complaint. The complaint alleged that these (now-removed) YouTube videos showed the CrowdFlower CEO boasting that there was no requirement to pay workers minimum wage.¹³⁴ In a contemporaneous interview with the BBC, (the record of which is still available online), the CrowdFlower CEO stated that "we almost trick the game players into doing something useful for the world while playing these games. Just do ten minutes of real work that a real company can use, and we'll give you a virtual tractor. That way everyone wins."¹³⁵ Willful or bad faith violations of the FLSA may result in additional liquidated damages. Because there was the possibility the plaintiffs could establish such a willful violation, one assumes that CrowdFlower chose to settle rather than run a risk that additional damages would be awarded in litigation.

Two cases on classification and online work that had interesting potential to set precedent (but that ended up in arbitration or settling)

<http://www.businessinsider.com/confessions-of-a-task-rabbit-2011-12> (noting no guarantee of minimum wage); Stross, *supra* note 121.

¹²⁷ See *Otey*, 2014 WL 1477630, at *1.

¹²⁸ *Id.* at *2.

¹²⁹ See *id.*

¹³⁰ *Id.*

¹³¹ *Id.* at *11.

¹³² *Otey v. CrowdFlower, Inc.*, No. 12-cv-05524-JST, 2015 WL 4076620, at *2 (N.D. Cal. July 2, 2015).

¹³³ See *id.*

¹³⁴ Second Amended Complaint at 8, *Otey v. CrowdFlower, Inc.*, No. 12-5524 CRB, 2013 WL 3132291 (N.D. Cal. June 17, 2013).

¹³⁵ Fiona Graham, *Crowdsourcing Work: Labour on Demand or Digital Sweatshop?*, BBC NEWS (Oct. 22, 2010), <http://www.bbc.co.uk/news/mobile/business-11600902>.

involved Netflix, the popular movie and television streaming service. These two cases, *Akbay v. Netflix*,¹³⁶ and *Moss v. Netflix*,¹³⁷ involved virtual editors, who were paid to sign into the Netflix site and select representative scenes and still shots for use on the Netflix platform.¹³⁸ Essentially, these video editors were responsible for choosing the “still shot” that comes up to represent an episode or movie on the Netflix site. This is invisible work in the sense that not many users are even aware that people manually choose these still shots or selecting scenes; many users likely believe this is an automated process. These backstage editors performed their duties in a remote location and signed in through a website.¹³⁹ The plaintiffs argued in their filings that they were nonetheless closely controlled and supervised by Netflix and that, therefore, they were entitled to the basic protections of the FLSA.¹⁴⁰ While these cases had the potential to be quite interesting, the *Moss* case settled on undisclosed terms, and the *Akbay* case was sent to arbitration.¹⁴¹

The litigations in *Otey v. CrowdFlower* and those against Netflix largely fit into the same mode as the earlier litigations about crowdwork and platform workers who perform tasks in the real world. In addition to these computer work cases, there are other methods of accomplishing computer-based tasks online that comprise novel forms of work that are just beginning to be explored. Let’s return for a moment to the CrowdFlower CEO’s comments about giving workers “a virtual tractor” in exchange for their time and labor.¹⁴² In the new forms of work discussed below, the work activity is often disguised as a different task, sometimes as a chore, but sometimes as a game or a leisure activity.¹⁴³ Increasingly, as work becomes sliced up, broken down, and crowdsourced as part of an “open call,” it is not always apparent, even to the worker, what exactly their goal is by completing a task.¹⁴⁴ In other instances, the participants are unclear even as to whether the activity they are engaging in is one requiring remuneration or that actually is considered

¹³⁶ Complaint, *Akbay v. Netflix, Inc.*, No. BC620190 (Cal. Super. Ct. May 11, 2016).

¹³⁷ Complaint, *Moss v. Netflix, Inc.*, No. BC602420 (Cal. Super. Ct. Nov. 25, 2015).

¹³⁸ Complaint at 4, *Akbay*, BC620190; Complaint at 6, *Moss*, No. BC602420.

¹³⁹ Complaint at 5, *Akbay*, No. BC620190; Complaint at 7, *Moss*, No. BC602420.

¹⁴⁰ Complaint at 2–3, 6, *Akbay*, No. BC620190; Complaint at 2, 8, *Moss*, No. BC602420.

¹⁴¹ See Stipulation to Continue Status Conference, *Akbay*, No. BC620190; Declaration in Support of Request for Dismissal of Entire Case, *Moss*, No. BC602420.

¹⁴² See Graham, *supra* note 135.

¹⁴³ See Cherry, *supra* note 22, at 856.

¹⁴⁴ See MIRIAM A. CHERRY & WINIFRED R. POSTER, *Corporate Social Responsibility and Crowdwork*, in RESEARCH HANDBOOK ON DIGITAL TRANSFORMATIONS 291, 302–03 (F. Xavier Olleros & Majlinda Zhegu eds., 2016).

“work” per se.¹⁴⁵

A new management trend is “gamification,” with some websites using fun games to entice users to work for them.¹⁴⁶ For example, one website presents players with puzzles, the answers to which help scientists to determine how proteins fold.¹⁴⁷ Other games ask users to match themselves in a vocabulary game with the computer, which then “learns” from the responses that they give.¹⁴⁸ In *Reality is Broken*, Jane McGonigal suggested that harnessing the power of games could help us fix problems and issues in the real world.¹⁴⁹ After all, people spend billions of hours playing solitaire each year.¹⁵⁰ If only a fraction of the time spent on games were spent on productive uses, there would be potential for solving many other types of problems. The introduction to this Article and the discussion of the reCaptcha codes note that work may be disguised. Indeed, the inventor of reCaptcha went on to found the company Duolingo, which helps users learn another language.¹⁵¹ At the same time, users “practice” their new language skills by helping to translate portions of the web, with the translation work generating revenue for the company.¹⁵²

Finally, our notion of work could also be changing to encompass the profit to be made from user-generated content, whether on social media websites like Facebook and Twitter,¹⁵³ or whether from streams of data that consumers generate as they surf the web and shop online.¹⁵⁴ While perhaps

¹⁴⁵ See Cherry, *supra* note 22, at 857.

¹⁴⁶ See Cherry, *supra* note 22, at 852–53.

¹⁴⁷ See FOLDIT, <http://fold.it/portal> (last visited Sept. 15, 2017). The game is described in more detail in Lewis Dartnell, *Your Computer Needs You*, NEW SCIENTIST, Nov. 8, 2008, at 36.

¹⁴⁸ For more on this trend, see Cherry, *supra* note 22, at 855–56 (describing a game called “verbosity” which is a vocabulary game designed to teach the computer the meaning of words); *Website Taps into Human Factor*, CARNEGIE MELLON U., <https://www.cmu.edu/homepage/computing/2008/summer/games-with-a-purpose.shtml> (last visited Sept. 15, 2017).

¹⁴⁹ See JANE MCGONIGAL, *REALITY IS BROKEN: WHY GAMES MAKE US BETTER AND HOW THEY CAN CHANGE THE WORLD* 12–13 (2011).

¹⁵⁰ See Stefanie Olsen, *ReCaptcha: Reusing Your ‘Wasted’ Time Online*, CNET (July 16, 2008, 10:08 AM), <https://www.cnet.com/news/recaptcha-reusing-your-wasted-time-online/>.

¹⁵¹ DUOLINGO, <https://www.duolingo.com/> (last visited Sept. 15, 2017); see Alison Griswold, *How Luis von Ahn Turned Countless Hours of Mindless Activity into Something Valuable*, BUS. INSIDER (Mar. 13, 2014, 2:56 PM), <http://www.businessinsider.com/luis-von-ahn-creator-of-duolingo-recaptcha-2014-3>.

¹⁵² See Griswold, *supra* note 151. This model seems less problematic, as the purpose of the translated materials are described to the users of the website.

¹⁵³ See, e.g., Miriam A. Cherry, *supra* note 47, at 423.

¹⁵⁴ Christian Fuchs, *Class and Exploitation on the Internet*, in *DIGITAL LABOR: THE*

not “work” per se, these concepts do involve the monetization of information, shopping habits, or preferences that a person holds.¹⁵⁵ As marketing tools become more sophisticated, this information becomes ever more valuable. How should one think about these new forms of labor and the ways that they might be included in unjust enrichment or restitution theory when there is no agreement, i.e., resting at the edges of contract law?

The rest of this Section describes some of the cases that have been litigated in the United States that fall into the classification of hidden work in cyberspace. The response to these lawsuits has been largely conclusory, unwelcoming to workers’ claims, and without much in the way of legal reasoning or theory to guide the results. U.S. courts apparently have had a difficult time connecting the work being performed online and the profit made by those who assign the tasks. Contract law offers little hope for such workers, in part because many of these casual work arrangements lack upfront agreement regarding remuneration, and the work itself is often hidden or disguised. Therefore, the last part of this Section seeks to examine U.K. law on unjust enrichment and restitution. A more developed theory of unjust enrichment and restitution could provide a more solid basis for workers’ rights in cyberspace.

A. AOL Chat Room Moderators

While the pace of digital work has certainly expanded in recent years, a lawsuit from the first internet bubble sheds some light on the genesis of many of these issues. In the 1990s, America Online (“AOL”) was a leading internet provider that provided dial-up internet access for many users. AOL also provided its users with “chat rooms,” areas where its users could connect on boards to talk about various topics like sports or movies. But with the large number of subscribers, AOL faced the problem of having little control over these chat rooms, and the concern that some of the content posted by users might be obscene, crude, or otherwise offensive to other users within their community.¹⁵⁶

INTERNET AS PLAYGROUND AND FACTORY, *supra* note 23, at 217–18.

¹⁵⁵ See Alex Wilhelm, *Facebook Sets Revenue Per User Records Around the World in Q2*, TECHCRUNCH (July 23, 2014), <https://techcrunch.com/2014/07/23/facebook-sets-revenue-per-user-records-around-the-world-in-q2/>.

¹⁵⁶ Note that this was in the days before rational people stopped taking the comments on websites seriously, and before people had resigned themselves to the fact that Internet chat rooms were well-known as the “wild west” of the World Wide Web. See *generally* JOSEPH M. REAGLE, JR., *READING THE COMMENTS: LIKERS, HATERS, AND MANIPULATORS AT THE BOTTOM OF THE WEB* (2016). Of course, many social media sites today face the same issues, and they have largely turned to unseen overseas workers to moderate the worst types of abuses, such as torture or beheading videos. These invisible “digital janitors” make platforms like

To remedy the issue, AOL recruited what it called “community leaders,” a group of volunteer members who would help administer the chat rooms and make sure that the subscribers felt safe.¹⁵⁷ Community leaders also provided other services, including “website maintenance, technical support, and training and supervision” of other users.¹⁵⁸ While these content moderators were not given wages, they were provided with free internet access.¹⁵⁹ Given that AOL charged its subscribers based on usage, free access was a significant benefit to high-volume users.¹⁶⁰ By the end of the decade, some estimated that there were over 10,000 content moderators who were monitoring and assisting AOL not only with chat rooms, but with other services to help fellow subscribers.¹⁶¹

Toward the end of the 1990s, AOL became more corporatized and some of the “volunteers” began to balk at what they viewed as more onerous assignments and reduction of benefits that they would receive.¹⁶² Initially, two workers filed suit in federal district court in Manhattan, alleging that they were entitled to compensation for the time they spent on content moderation.¹⁶³ In the words of their lawyer, “AOL is a for-profit business. . . . The minimum-wage laws require people get paid a minimum wage.”¹⁶⁴ According to the allegations in the complaint, AOL had treated the content moderators much like employees, asking those users who wanted to be moderators to apply for the position, agree to time commitments of at least three hours per week, and even to fill out timecards.¹⁶⁵ After another suit alleging violations of the California minimum wage law was filed, the company fought back through a series of motions over jurisdiction.¹⁶⁶

Ultimately, though, AOL settled the case for \$15 million, with one third of the recovery allocated to the content moderators, one-third to the

Facebook and Instagram much more palatable for a mass audience. Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED (Oct. 23, 2014, 6:30 AM), <https://www.wired.com/2014/10/content-moderation/>.

¹⁵⁷ See Lisa Morgonelli, *Inside AOL's "Cyber-Sweatshop,"* WIRED (Oct. 1, 1999), <https://www.wired.com/1999/10/volunteers/>.

¹⁵⁸ Johnson v. Am. Online, Inc., 280 F. Supp. 2d 1018, 1020 (N.D. Cal. 2003).

¹⁵⁹ See *id.*

¹⁶⁰ See Alex Mayyasi, *The AOL Chat Room Monitor Revolt*, PRICEONOMICS (Aug. 21, 2014) <https://priceonomics.com/the-aol-chat-room-monitor-revolt/>.

¹⁶¹ See Lisa Napoli, *Former Volunteers Sue AOL, Seeking Back Pay for Work*, N.Y. TIMES (May 26, 1999), <http://www.nytimes.com/1999/05/26/nyregion/former-volunteers-sue-aol-seeking-back-pay-for-work.html>.

¹⁶² For a lengthy blog post on this topic, see Mayyasi, *supra* note 160.

¹⁶³ Napoli, *supra* note 161.

¹⁶⁴ *Id.* (quoting attorney Leon Greenberg).

¹⁶⁵ See Mayyasi, *supra* note 160.

¹⁶⁶ See Johnson v. Am. Online, Inc., 280 F. Supp. 2d 1018, 1021 (N.D. Cal. 2003).

attorneys, and one-third dedicated as a donation to charity.¹⁶⁷ Even though the case settled, it was prescient. Rather than buy into AOL's idea that work online should be seen as "free" or "volunteer," the content moderators noted that they were doing the same type of work that would generate remuneration in other contexts. Just because they were fellow users, or because they enjoyed what they were doing, did not mean that they were not working.

B. *Huffington Post Bloggers Lawsuit*

Another, later case pertaining to internet labor also involved AOL in its later iteration as a media and content provider. The Huffington Post, also known as either HuffPo or the "HuffPost," is a "popular weblog that serves as a forum for current news events and left-leaning political commentary."¹⁶⁸ The HuffPost features straightforward news reports as well as op-ed commentaries, which have a left-leaning ideological slant.¹⁶⁹ Regardless of political affiliation, the HuffPost was able to attract sophisticated and skilled writers to produce posts.¹⁷⁰ This is because professional writers and politicians who would normally be paid for their writing contributed their efforts to the Huffington Post for free.¹⁷¹ Most of the contributing authors volunteered their time on the assumption that they were adding to a political community and promoting progressive causes.¹⁷² Fresh and updated content attracted a large audience to the blog, which reached 15 million hits per weekday.¹⁷³

In 2011, media conglomerate AOL submitted a \$315 million bid to

¹⁶⁷ *Hallisey v. AOL Time Warner, Inc.*, No. 02-CV-00423 (S.D.N.Y. May 25, 2010); see FREDRIC C. LEFFLER, AM. BAR ASS'N LABOR & EMPLOYMENT LAW SECTION, WAGE & HOUR BOOTCAMP: MISCLASSIFYING WORKERS AS INDEPENDENT CONTRACTORS 25 (2010).

¹⁶⁸ Cherry, *supra* note 26 at 590; HUFFPOST, www.huffingtonpost.com (last visited Sept. 15, 2017).

¹⁶⁹ For example, in the months before the 2008 elections, many posts in the HuffPost criticized then-President George W. Bush. See, e.g., Shayana Kadidal, *Guantánamo, Six Years Later*, HUFFPOST, http://www.huffingtonpost.com/shayana-kadidal/guantanamo-six-years-late_b_81025.html (last updated May 25, 2011).

¹⁷⁰ See Paul Farhi, *Freelancer to File Class-Action Suit Against HuffPost and AOL Over Compensation*, WASH. POST (Apr. 12, 2011), http://www.washingtonpost.com/lifestyle/style/freelancer-to-file-class-action-suit-against-huffpost-and-aol-over-compensation/2011/04/12/AFa9QGQD_story.html.

¹⁷¹ See Nate Silver, *The Economics of Blogging and the Huffington Post*, N.Y. TIMES: FIVETHIRTYEIGHT (Feb. 12, 2011), <http://fivethirtyeight.blogs.nytimes.com/2011/02/12/the-economics-of-blogging-and-the-huffington-post/>.

¹⁷² See Jason Linkins, *How the Huffington Post Works (In Case You Were Wondering)*, HUFFPOST, http://www.huffingtonpost.com/2011/02/10/huffington-post-bloggers_n_821446.html (last updated May 28, 2013).

¹⁷³ Silver, *supra* note 171 (estimating 15.6 million page hits per weekday on HuffPost and analyzing types of posts and attention they typically were attracting).

acquire the Huffington Post website.¹⁷⁴ AOL had been searching for more content as well as web traffic for its sites, and so the merger made business sense. The owners of HuffPost, Arianna Huffington and her financial backers, anticipated making quite a handsome profit from the deal.¹⁷⁵ The acquisition, however, failed to credit the work of the writers who had built the blog from the ground up; they were to receive nothing.¹⁷⁶ One of the bloggers, Jonathan Tasini, a journalist and labor activist, filed a lawsuit along with other unpaid bloggers to challenge the deal.¹⁷⁷ The HuffPost bloggers claimed that because their efforts and work had built up the value of the blog, they deserved a share of the profit.¹⁷⁸ They structured their complaint to pursue alternate theories of contract and unjust enrichment/restitution.¹⁷⁹

Just like many other contract disputes, the ultimate issue with Huffington Post was the differing expectations that motivated the respective parties. Looking at the issue from the bloggers' perspective, they wrote posts without payment partly for exposure, but also because most probably believed that they were contributing to a political website that advanced the

¹⁷⁴ *Id.*; see also Julianne Pepitone, *Huffington Post Blogger Sues AOL for \$105 Million*, CNN: MONEY (Apr. 12, 2011, 2:58 PM), http://money.cnn.com/2011/04/12/technology/huffington_post_blogger_lawsuit/index.htm#.

¹⁷⁵ Tim Rutten, *AOL? HuffPo. The Loser? Journalism*, L.A. TIMES (Feb. 9, 2011), <http://articles.latimes.com/2011/feb/09/opinion/la-oe-rutten-column-huffington-aol-20110209>.

¹⁷⁶ See Jeff Bercovici, *AOL, Arianna Huffington Hit with Class Action Suit*, FORBES (Apr. 12, 2011, 8:42 AM), <http://www.forbes.com/sites/jeffbercovici/2011/04/12/aol-arianna-huffington-hit-with-class-action-suit/>; see also Rutten, *supra* note 175 (“To grasp its business model . . . you need to picture a galley rowed by slaves and commanded by pirates.”).

¹⁷⁷ See *Tasini v. AOL, Inc.*, 505 F. App'x 45, 46 (2d Cir. 2012). Jonathan Tasini was previously the successful lead plaintiff in a lawsuit challenging the rights of newspapers to license the work of freelance writers to electronic databases without additional compensation. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 487, 506 (2001) (ruling in favor of freelance writers).

¹⁷⁸ Ashby Jones, *Do Huffington Post Bloggers Deserve to Get Paid?*, WALL ST. J.: L. BLOG (Apr. 12, 2012, 4:01 PM), <http://blogs.wsj.com/digits/2011/04/12/should-huffington-post-bloggers-get-paid/tab/print/>.

¹⁷⁹ Under a theory of restitution, the claim would be that although a formal contract was lacking, the organizers of the Huffington Post were unjustly enriched and thus the bloggers should be compensated. See Jones, *supra* note 178. Also known as an action in quasi-contract or *quantum meruit*, unjust enrichment is an alternative to contract theory. Here, there was no express contract between HuffPost and the bloggers, but under an unjust enrichment theory, no agreement is necessary. It is enough if a benefit was conferred, there was an appreciation of the benefit, and then acceptance and retention of the benefit. See generally Caprice L. Roberts, *A Commonwealth of Perspective on Restitutionary Disgorgement for Breach of Contract*, 65 WASH. & LEE L. REV. 945 (2008); Caprice L. Roberts, *Restitutionary Disgorgement as a Moral Compass for Breach of Contract*, 77 U. CIN. L. REV. 991 (2009).

causes that they were passionate about.¹⁸⁰ Profit wasn't a motivating factor for the writers and they believed this to be true of Arianna Huffington and the other blog backers. After the merger was announced, the bloggers learned that the founders of the website were motivated by profit. It was that disconnect that led the bloggers to feel taken advantage of by the organizers.¹⁸¹ On the other hand, the Huffington Post claimed that the bloggers did receive a substantial benefit, as they used the Huffington Post "to connect and help their work be seen by as many people as possible It's the same reason people go on TV shows: to promote their views and ideas."¹⁸²

In 2012, the Federal District Court for the Southern District of New York granted AOL's motion to dismiss, holding that the bloggers had not pleaded the elements of an unjust enrichment claim.¹⁸³ The bloggers appealed to the Second Circuit, only to have their claim rejected there as well.¹⁸⁴ The court opinions cited the well-known elements for unjust enrichment in the state of New York: "(1) that the defendant benefitted; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution."¹⁸⁵

Both the district court and the Second Circuit found that there was no unjust enrichment based on the elements of the doctrine.¹⁸⁶ They pointed to the fact that there was no agreement for remuneration at the outset and thus there was no unfairness that would justify a recovery.¹⁸⁷ As the district court stated, "[T]he plaintiffs entered into their transactions with the defendants with full knowledge of the facts and no expectation of compensation other than exposure."¹⁸⁸ At another point in the opinion, the court noted that the plaintiffs "got what they paid for" and that "[n]o one forced the plaintiffs to

¹⁸⁰ See Linkins, *supra* note 172.

¹⁸¹ The unpaid bloggers posted on the Twitter account #huffpuff, claiming that the HuffPost "built a blog-empire on the backs of thousands of citizen journalists." Silver, *supra* note 171.

¹⁸² Jeremy W. Peters, *Huffington Post Is Target of Suit on Behalf of Bloggers*, N.Y. TIMES: MEDIA DECODER (Apr. 12, 2011, 12:49 PM), <http://mediadecoder.blogs.nytimes.com/2011/04/12/huffington-post-is-target-of-suit-on-behalf-of-bloggers/?pagemode=print> (quoting Arianna Huffington's spokesperson Mario Ruiz).

¹⁸³ *Tasini v. AOL, Inc.*, 851 F. Supp. 2d 734, 741 (S.D.N.Y. 2012).

¹⁸⁴ *Tasini v. AOL, Inc.*, 505 Fed. App'x 45, 48 (2d Cir. 2012), *aff'g* 851 F. Supp. 2d 734 (S.D.N.Y. 2012).

¹⁸⁵ *Tasini*, 851 F. Supp. 2d at 739 (quoting *In re Mid-Island Hosp., Inc.*, 276 F.3d 123, 129 (2d Cir. 2002)).

¹⁸⁶ See *Tasini*, 505 F. App'x at 47–48; *Tasini*, 851 F. Supp. 2d at 741.

¹⁸⁷ See *Tasini*, 505 F. App'x at 47; *Tasini*, 851 F. Supp. 2d at 740.

¹⁸⁸ *Tasini*, 851 F. Supp. 2d at 740.

give their work to The Huffington Post for publication.”¹⁸⁹ The court then went on to cite many instances in which they stated that “an expectation of compensation” was an important and necessary component of an unjust enrichment or restitution claim.¹⁹⁰

The court in the Huffington Post case seems to have conflated the reasoning in a contract case (based on mutual assent and consideration) with recovery under an unjust enrichment or restitution theory in which the agreement itself may be defective or only partial. Indeed, it is hornbook law that an unjust enrichment or restitution plaintiff does not require traditional assent.¹⁹¹ Nor need an unjust enrichment or restitution plaintiff show that there was consideration or the element of exchange. Indeed, the elements of the test in the United States suggest that to prove unjust enrichment or restitution, it is enough to show that a benefit that was bestowed upon the other party and unfairness or injustice results.¹⁹² As society moves toward forms of work that are increasingly a mixture of both work and potentially disguised leisure activities, the rationale, such as it is in this case, is extremely conclusory and problematic. The following case bears some resemblance to the Huffington Post bloggers, involving more politically liberal causes, but it has yet to give rise to a lawsuit.

C. *Facebook Group: Pantsuit Nation*

In October of 2016, a “secret” Facebook group called “Pantsuit Nation” formed on Facebook.¹⁹³ The purpose of the invitation-only group was to show support for Democratic presidential candidate Hillary Rodham Clinton, and the group encouraged voters to wear a pantsuit to the polls when voting in the national election.¹⁹⁴ The Facebook group proved popular, swelling to almost four million members.¹⁹⁵ In days leading up to the election, a variety of posts emerged online, some hewing to the original idea of wearing a pantsuit and expressing support for Clinton, but others telling stories about facing down sexism or longstanding activism in the Democratic

¹⁸⁹ *Id.* at 740–41.

¹⁹⁰ *See id.* at 740.

¹⁹¹ *See, e.g.*, ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 104 (3d ed. 2014).

¹⁹² *See id.*

¹⁹³ Annie Correal, *Pantsuit Nation, A ‘Secret’ Facebook Hub, Celebrates Clinton*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/us/politics/facebook-pantsuit-nation-clinton.html>.

¹⁹⁴ *See id.*

¹⁹⁵ Alexandra Alter, *Book Deal for Pantsuit Nation, Facebook Page Supporting Hillary Clinton*, N.Y. TIMES (Dec. 19, 2016), https://www.nytimes.com/2016/12/19/books/pantsuit-nation-facebook-page-hillary-clinton-book-deal.html?_r=1.

party.¹⁹⁶

After the election results were announced, “Pantsuit Nation” evolved into a space where members could write about their thoughts, feelings, and fears surrounding the outcome of the election.¹⁹⁷ Some of the stories in “Pantsuit Nation” involved standing up to sexism, racism, or other intolerance, some were family pictures or those of LGBT couples getting married, and still other stories presented “feel-good” tales about random acts of kindness.¹⁹⁸ Many people found support in the website as they dealt with feelings of disappointment and grief over the outcome of the election. Some speculated that the Facebook group could create a motivated base that might help Democratic candidates in state and local elections.¹⁹⁹

On December 19, 2016, Libby Chamberlain, the original creator of the secret Facebook group, announced that she had landed a contract to publish a coffee table book based on the posts within Pantsuit Nation.²⁰⁰ While some members of the group applauded the announcement and many committed to buying the book, thousands of critical and negative comments appeared.²⁰¹ Many people thought that they were participating in a “secret” group, which implied that the posts would not be shared, let alone published.²⁰² Many members who commented on the post were outraged and offended at what they saw as the exploitation of the group’s stories and pictures for the profit of only one group member.²⁰³

For a sample of the type of posts that appeared, take one op-ed from a member of the group that appeared a day after the decision to print a coffee-table book was announced:

¹⁹⁶ See Correal, *supra* note 193.

¹⁹⁷ See *Trump Election Pantsuit Nation: Clinton Fans Find Comfort on Facebook*, BBC NEWS (Nov. 16, 2016), <http://www.bbc.com/news/world-us-canada-37997606>.

¹⁹⁸ See *id.*

¹⁹⁹ See *id.*

²⁰⁰ Alter, *supra* note 195.

²⁰¹ Erin Gloria Ryan, *Pantsuit Nation Is the Worst: Why a Book of Uplifting Facebook Posts Won't Heal America*, DAILY BEAST (Dec. 21, 2016, 1:13 AM), <http://www.thedailybeast.com/articles/2016/12/21/pantsuit-nation-is-the-worst-why-a-book-of-uplifting-facebook-posts-won-t-heal-america>.

²⁰² See *id.* (describing a “low-level riot among the commenters, many of whom balked at the fact that material they posted in a private Facebook group might be used in a book without their permission.”).

²⁰³ See Christina Cauterucci, *Can Pantsuit Nation Survive Its Book Deal?*, SLATE (Dec. 22, 2016, 4:13 PM), http://www.slate.com/articles/double_x/doublex/2016/12/can_pantsuit_nation_survive_its_book_deal.html; see also Alexandra Alter, *A Book Deal for Pantsuit Nation, and Then a Backlash*, N.Y. TIMES (Dec. 21, 2016), <https://www.nytimes.com/2016/12/21/business/a-book-deal-for-pantsuit-nation-and-then-a-backlash.html>.

What had once been a space of solidarity started to feel like a branding machine. And now, of course, there is a book deal, announced with no transparency as to where the profits from the book are going, [and] whether the contributors whose posts Chamberlain is presumably selecting for this book will get paid Pantsuit Nation reportedly is working to become a 501(c)(3) and 501(c)(4) charity, which raises more questions about profit allocation and distribution. Chamberlain is the only person credited on the book pre-order page, which . . . is already available for \$17.99 on Barnes and Noble's website.²⁰⁴

In response, Chamberlain posted another explanatory message noting that permission would be obtained before using any story or picture from the group.²⁰⁵ Furthermore, she stated that Pantsuit Nation was filing the papers to be recognized as a non-profit, and that proceeds from the book would be used to further the goals and priorities of the group.²⁰⁶ However, many commenters were unhappy and continued to voice their objections; to the point where Chamberlain shut down the comments.²⁰⁷ Chamberlain followed up with members, letting them know that the book would be helping to raise money for Planned Parenthood, the ACLU, and the Southern Poverty Law Center.²⁰⁸

Perhaps because Chamberlain was subject to pressure from members of the Facebook group (who, besides being contributors were also the intended audience for the book), she modified her plans for the book itself. By making sure to receive permission and then agreeing to donate money to charity, a lawsuit may have been avoided. No lawsuit had been filed as of the time of the writing of this Article. That said, the key difference between Pantsuit Nation and the unsuccessful case of the Huffington Post bloggers is the aspect of publicity and exposure. The court in *Huffington Post* seemed to focus on the fact that the bloggers gained notoriety through their contributions to the blog. The writers did not bargain for money, but they did expect publicity. This argument, however, would not work for Chamberlain or Pantsuit Nation. The authors posted in the Facebook group specifically to

²⁰⁴ Harry Lewis, *Pantsuit Nation Is a Sham*, HUFFPOST (Dec. 20, 2016, 3:53 PM), http://www.huffingtonpost.com/entry/panstuit-nation-is-a-sham_us_585991dce4b04d7df167cb4d.

²⁰⁵ Alter, *supra* note 203.

²⁰⁶ *See id.* According to its website, Pantsuit Nation is a registered 501(c)(4) nonprofit, with a pending 501(c)(3) application. *See Our Mission*, Pantsuit Nation, <http://www.pantsuitnation.org/mission.html> (last visited Sept. 15, 2017).

²⁰⁷ *See id.*

²⁰⁸ *Id.*

support each other and candidate Hillary Clinton, not for profit and not for exposure. Moreover, Pantsuit Nation was an invitation-only, moderated, “secret” group—a key difference between it and the HuffPost case.

D. *Yelp Case*

A final online labor case that involves contract and unjust enrichment themes is *Jeung v. Yelp, Inc.*²⁰⁹ Most internet users are familiar with Yelp, which exists to help the crowd rate commercial businesses. Anyone who is a Yelp member can write a review, either lauding or railing against hotels, restaurants, and bars, among other services.²¹⁰ Most people treat Yelp as an occasional pastime, and might write one or two reviews a month, while other users spend a great deal of time on the site writing reviews. While Yelp does not pay reviewers, they do acknowledge that very active contributors do build value for its website and app.²¹¹ In recognition of this fact, Yelp has encouraged its most active and well-respected reviewers to keep writing by awarding them “Elite” status along with perks.²¹²

The plaintiffs in *Jeung* alleged that they should be entitled to minimum wage for time spent writing customer reviews that they posted on Yelp.²¹³ Their alternative argument was that they were entitled to recover the amount of money that Yelp gained from the reviews under a type of unjust enrichment or restitution theory.²¹⁴ The plaintiffs further alleged that they were injured when Yelp removed their status as “Elite” reviewers and that they were treated unfairly when their accounts were deactivated.²¹⁵

Before any substantive issues could be decided, however, the case was dismissed due to a lack of follow-up by the plaintiff.²¹⁶ Arguably, the

²⁰⁹ No. 15–cv–02228–RS, 2015 WL 4776424 (N.D. Cal. Aug. 13, 2015).

²¹⁰ *Content Guidelines*, YELP, <https://www.yelp.com/guidelines> (last visited Sept. 15, 2017).

²¹¹ *See Terms of Service*, YELP, <https://www.yelp.com/static?p=tos> (last visited Sept. 15, 2017); *see* Katherine Bindley, *Monetary Value of Yelp Reviews, Tweets and Status Updates Examined In New Study (Infographic)*, HUFFPOST, http://www.huffingtonpost.com/2012/04/12/the-value-of-tweets-status-update-yelp-reviews_n_1420598.html (last updated Apr. 12, 2012).

²¹² *See* Lydia O’Connor, *Yelp Reviewers File Class-Action Lawsuit Claiming They Are Unpaid Writers*, HUFFPOST (Oct. 31, 2013, 3:41 PM), http://www.huffingtonpost.com/2013/10/30/yelp-lawsuit-_n_4179663.html.

²¹³ *See Jeung*, 2015 WL 4776424, at *1.

²¹⁴ *See id.* at *2 n.5.

²¹⁵ *See* O’Connor, *supra* note 212.

²¹⁶ *Jeung*, 2015 WL 4776424, at *3. Plaintiffs’ counsel had filed some questionable and bizarre filings before the court dismissed the case. *See* Eric Goldman, *Court Says Yelp Reviewers Aren’t Employees*, FORBES (Aug. 17, 2015, 10:28 AM), <http://www.forbes.com/sites/ericgoldman/2015/08/17/court-says-yelp-reviewers-arent-employees>.

minimum wage claims for Yelp reviews were marginal; most people do not expect to be compensated for offering a “man on the street” type of opinion, or their rants and raves about favorite restaurants or shoddy service at a bar. But people can volunteer their time on the internet, and offering people an opportunity to do so (even on a for-profit website) certainly is fine, so long as those who are contributing are informed about their involvement. Of course, that said, if someone invested a great deal of time volunteering, perhaps that user might have some colorable claim to continue using a service, and not to be summarily kicked off without notice, even if that would technically be allowed under a EULA. While the claims in *Jeung* were arguably weaker than those asserted in *Tasini v. AOL* or *Rojas-Lozano v. Google*, it would have been interesting to watch the court more fully explore the unjust enrichment issues.

IV. THEORIES OF UNJUST ENRICHMENT AND RESTITUTION APPLIED TO ONLINE AND VIRTUAL WORK

A. *Problems with Applying Existing Contract, Restitution, and Unjust Enrichment Law Online*

The on-demand economy is part of an ongoing digital transformation of work with technology as its catalyst.²¹⁷ Some of these fast-paced changes are creating forms of work that many may not recognize, or that may be indistinguishable from other forms of work due to their mimicry of other activities, including those that people do as mundane tasks or chores, or those that people engage in for fun or leisure.²¹⁸ At present, however, part of the issue is that people may not even be aware that they are “working” or that activities that they take part in are being monetized or commodified.²¹⁹ Some of this commodification activity online may result in contests, disputes, and even legal battles.²²⁰

Contract law is stymied in many of these online work situations because assent, widely acknowledged as the underpinning of contract, is generally absent. In many of the examples provided in Part III, there was technically no “contract,” if only because one party was unaware that work or monetized activity was being performed. Although the United States courts that have examined these cases have purported to use an unjust enrichment or restitution formulation to analyze the issues, they seem to have defaulted to what they know—i.e., a traditional contract analysis. For example, in *Tasini*

²¹⁷ See Cherry, *supra* note 26, at 577–78.

²¹⁸ See *supra* Part III.

²¹⁹ See *supra* Part III.

²²⁰ See *supra* Part III.

v. *AOL*, the court fell back on the question of what the Huffington Post and the bloggers had agreed to in the first instance.²²¹ Because there was no remuneration promised up front, the court reasoned, that meant that the bloggers could not have expected payment for their work.²²² Never mind the contributors' beliefs that they were contributing to a community rather than a money-making endeavor.

Of course, people may choose to volunteer their time or money, but many people would recognize that the decision to volunteer must be based on accurate information.²²³ That is why charity watchdogs and websites that monitor charitable donations exist.²²⁴ People want to know that if they are going to give time or money, it goes to a cause that they believe in, and not to extraneous activities like enrichment of the charity's founders or to marketing activities. The same is true for donations of time and effort in cyberspace.

Unfortunately, contract law and theory as applied in the United States has largely proven to be a dead-end for these unpaid "work-like" monetized activities on the internet. Due to the adhesion and boilerplate structures inherent in the EULAs, discussed earlier, the terms and conditions on many of these websites are far removed from "agreement" that forms the bedrock notion of voluntary assent inherent in contract law.²²⁵ In many instances, the platforms or websites claim full rights over anything that is produced on their website, deeming the labor that users provide to be part of a different, separate contract that they have no concern with, or to be volunteer work. The idea of agreement to these terms is a fiction; the terms are those of a EULA which is essentially a one-sided boilerplate. In the instances where platforms are used, but the tasks are performed in the real world, courts have expressed a willingness to look at the substance of the relationship beyond the EULA.²²⁶ The question is why courts are unwilling to undertake the same type of searching analysis when tasks are performed wholly within cyberspace, on an unknowing basis.

²²¹ See *supra* notes 176–190 and accompanying text.

²²² See *supra* notes 187–190 and accompanying text.

²²³ This is not isolated only the context of online work; in fact, volunteers in general are a group of people who are generally absent from the law, and have been taken advantage of in some instances. See generally Mitchell H. Rubinstein, *Our Nation's Forgotten Workers: The Unprotected Volunteers*, 9 U. PA. J. LAB. & EMP. L. 147 (2006).

²²⁴ See Kerri Anne Renzulli, *Everything You Need to Know About Giving to Charity*, TIME: MONEY (Nov. 29, 2016), <http://time.com/money/4583851/charity-donations-giving-guide/>.

²²⁵ See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 88–89 (2013); *supra* note 106 and accompanying text.

²²⁶ Compare *supra* Part II with *supra* Part III.

B. *Toward a More Expansive Theoretical Account: Restitution and Unjust Enrichment in U.K. Law*

The U.S. and U.K. law of restitution and unjust enrichment share common roots. Of course, the concepts and ideas behind restitution and unjust enrichment are ancient, tracing back to notions first expressed in Roman law.²²⁷ In modern times, an attempt at organization, categorization, and modernization of the doctrine came from the American Law Institute, which in 1937 published the *Restatement of the Law of Restitution*.²²⁸ After this innovation, however, the field of restitution for the most part languished in the United States.²²⁹ As Professor John Langbein has noted, it was “as though a neutron bomb has hit the field – the monuments have been left standing, but the people have been killed off. . . . What restitution is taught in American law schools today turns up mostly in snippets in the remedy units of contracts and trust books”²³⁰ As Professor Douglas Laycock has noted, over the years the subject of restitution standing on its own has largely been dropped from the law school curricula in the United States.²³¹

Luckily for our purposes, a great deal more theoretical development of the doctrine has occurred within the law of the United Kingdom, where in 1966 an expansive, influential, and canonical discussion of the subject appeared in Robert Goff and Gareth Jones’s *The Law on Restitution*.²³² In U.K. law,²³³ restitution is seen as its own doctrinal area, containing a number

²²⁷ Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2083 (2001).

²²⁸ RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS (Am. Law Inst. 1937).

²²⁹ See Douglas Laycock, Book Review, *Restoring Restitution to the Canon*, 110 MICH. L. REV. 929, 930 (2012).

²³⁰ John H. Langbein, *The Later History of Restitution*, in RESTITUTION: PAST, PRESENT, AND FUTURE 57, 61 (W.R. Cornish et al. eds., 1998); see also Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 100–02 (2008).

²³¹ Laycock, *supra* note 229, at 930.

²³² ROBERT GOFF & GARETH JONES, *THE LAW OF RESTITUTION* (1966).

²³³ Professor Martin Hogg has noted that one must be cautious when characterizing a “U.K.” view on unjust enrichment law. The law in England, Wales, and Northern Ireland is essentially unified in this area. Scotland, however, has quite a different law of unjustified enrichment. See 1 ROBIN EVANS-JONES, UNJUSTIFIED ENRICHMENT 24–25 (2003) (“Although English and Scots law can certainly learn from each other, differences of approach between the two systems in this area make uncritical assimilation of the two undesirable.”). Rather than the traditional “unjust factors” approach of English law, Scots law has a closer connection to Roman law and tends not to cite caselaw from elsewhere in the U.K. See 2 ROBIN EVANS-JONES, UNJUSTIFIED ENRICHMENT 4 (2013) (“The major building blocks of the modern Scots law of unjustified enrichment, in common with all civilian and mixed legal systems, originate for the most part in Roman law.”).

of theories, including that of unjust enrichment.²³⁴ As one leading commentator has put it, restitution is “the area of law concerned with relieving a defendant of wealth which, in the eyes of the law, he should not be entitled to retain.”²³⁵ Restitution may also refer to the remedial measure that may be available to a plaintiff who has been wronged through an unjust enrichment. As defined by another commentator, “where a wrong has been committed the victim of the wrong may be able to bring a restitutionary claim to recover the value of the benefit obtained by the defendant as a result of the wrongdoing.”²³⁶

Commentators and law professors including Peter Birks, Andrew Tettenborn, and Graham Virgo, among many others, have published rich theoretical accounts that explore the constituent components of when an obligation should be recognized or a civil remedy should be awarded. As Professor Tettenborn has noted:

Why should the law of tort, which is normally concerned with loss, allow recovery of benefits gained instead? Why should a term requiring payment for part performance be implied in a contract? What justifies giving a remedy to a mistaken payer who has divested himself of ownership of the sum paid? It is suggested that if we can find a common explanation for recovery here we should; and further that, subject to certain variations, that explanation is the broad principle of unjust enrichment.²³⁷

To a foreign reader, these accounts all seem to be searching for an underlying unifying concept or philosophy behind the award of remedies. English cases have recognized the existence of unjust enrichment and restitution theories. As noted by Professor Gerhard Dannemann, “Preceded and helped by scholarly work, English courts have unfrozen the law of restitution and have . . . achieved a rapid development which might have taken a century in other areas of law.”²³⁸

²³⁴ Peter Birks distinguishes the two theories as follows: “Every unjust enrichment gives rise to a right to restitution and therefore belongs in the law of restitution. But that proposition cannot be turned around, because, quite often, a right to gain-based recovery is the law’s response to some other causative event.” PETER BIRKS, *UNJUST ENRICHMENT* 4 (2d ed. 2005); see also Peter Birks, *Misnomer*, in *RESTITUTION: PAST, PRESENT, AND FUTURE*, *supra* note 230, at 1.

²³⁵ ANDREW TETTENBORN, *LAW OF RESTITUTION IN ENGLAND AND IRELAND* 1 (2d ed. 1996).

²³⁶ Graham Virgo, *What is the Law of Restitution About?*, in *RESTITUTION PAST, PRESENT, AND FUTURE*, *supra* note 230, at 305, 311.

²³⁷ TETTENBORN, *supra* note 235, at 8.

²³⁸ Gerhard Dannemann, *Unjust Enrichment by Transfer: Some Comparative Remarks*, 79 *TEX. L. REV.* 1837, 1843 (2001) (footnote omitted).

In recent work, Professor Andrew Burrows has published both a treatise entitled *The Law of Restitution*²³⁹ and a *Restatement of the English Law of Unjust Enrichment*.²⁴⁰ The account of unjust enrichment and restitution law that follows draws on the work of Burrows and the canonical treatise by Goff and Jones. The following is a summary and encapsulation of the most important elements of English unjust enrichment law. The next Section applies these elements to online labor claims.

Professor Burrows distills the elements of an unjust enrichment and restitution claim by asking a series of questions: “(1) has the defendant been *benefited* (i.e. enriched)? (2) was the enrichment *at the claimant’s expense*? (3) was the enrichment *unjust*? (4) are there any *defences*?”²⁴¹ These questions are found throughout the scholarly commentary with only a few slight and token deviations in the phrasing of the questions.²⁴² As Burrows goes on to explain, the bulk of the law coalesces around the concepts of “benefit,” the idea of “the claimant’s expense,” “unjust factors,” and “defences.”²⁴³ The rest of Burrows’ treatise expands upon each of these questions and issues in turn, providing discussion of theoretical problems as well as sample cases along the way.

Under the first question of benefit and enrichment, Burrows notes several issues. The straightforward case would be one in which a claimant seeks property that has been retained by the defendant.²⁴⁴ Such a case is easy in that the defendant can hardly refuse to give up the property by claiming that it is of no value.²⁴⁵ In some instances, however, issues may be raised around benefit, especially with performances, because of the subjectivity of value and the fact that benefits may be either positive or negative.²⁴⁶ Further refinements center around so-called incontrovertible benefits, which are so obviously beneficial that “no reasonable man could seriously deny that he has been benefited.”²⁴⁷

The second question focuses on whether there is a connection between the claimant and the enrichment that he or she desires to claim. As Burrows notes, this question breaks down into two categories. These depend on

²³⁹ ANDREW BURROWS, *THE LAW OF RESTITUTION* (2d ed. 2002).

²⁴⁰ ANDREW BURROWS, *A RESTATEMENT OF THE ENGLISH LAW OF UNJUST ENRICHMENT* (2012).

²⁴¹ BURROWS, *supra* note 239, at 15.

²⁴² See BIRKS, *UNJUST ENRICHMENT*, *supra* note 234, at 39.

²⁴³ BURROWS, *supra* note 239, at 15.

²⁴⁴ *Id.* at 16.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 18.

whether there has been “subtraction,” i.e., that the “defendant’s gain has come from the claimant’s wealth.”²⁴⁸ This type of unjust enrichment, also known as *autonomous unjust enrichment*, does not require any type of wrongdoing on the part of the defendant.²⁴⁹ If, on the other hand, the defendant’s claim came as a result of wrongdoing against the claimant, it would be referred to as *dependent unjust enrichment*.²⁵⁰ In the latter instance, because of the presence of wrongdoing, there might be other remedies available in addition to or perhaps apart from restitution.²⁵¹ Further nuances and complications arise if benefits are conferred by third parties.²⁵² Exceptions exist for these instances, incorporating the doctrines of tracing, subrogation, and other concepts for third parties.²⁵³

The third question, which is potentially the most complicated portion of the analysis, yet perhaps the most crucial, focuses on whether the enrichment is, indeed, unjust. As noted by Burrows, there is a list of “unjust factors” that are “regarded as the grounds for restitution roughly analogous to the different torts in the law of tort.”²⁵⁴ The unjust factors are classified based on whether they flow from *autonomous unjust enrichment* or *dependent unjust enrichment*, with the distinguishing feature being the defendant’s wrongdoing.²⁵⁵ The grounds for restitution independent of the defendant’s wrong may include “mistake, ignorance, duress, undue influence, exploitation of weakness, legal compulsion, necessity, failure of consideration, illegality, incapacity . . .” among others, a list that may be added to based on the needs of justice.²⁵⁶ In terms of instances where there is a restitution based on wrongs of the defendant, this may refer to torts, breach of contract, or breach of fiduciary duty, but again, this list may change based on the facts and nuances of the cases.²⁵⁷ Other commentators have analyzed this particular element differently,²⁵⁸ but the majority approach

²⁴⁸ *Id.* at 25–26.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.* This point is itself controversial, but the idea is that unjust enrichment as a cause of action does not necessarily precisely “quadrante” with the restitution remedy.

²⁵² BURROWS, *supra* note 239, at 31.

²⁵³ *Id.* at 34–35.

²⁵⁴ *Id.* at 42.

²⁵⁵ *Id.*

²⁵⁶ *Id.* Some of the items on this sound odd to an American lawyer, as duress and undue influence, and possibly some of these other categories are defenses in our law of contract, and these defenses often hinge on the actions of the wrongdoer.

²⁵⁷ *Id.* at 44.

²⁵⁸ Birks analyzes this problem differently, noting that if there is no reason or, as he puts it, “no basis” for the enrichment, then it is unjust. Non-participatory enrichments, according

seems focused on having the claimant prove an unjust factor. As Goff and Jones note, however, the categories of unjust enrichment are still open and “courts have the power to recognize new grounds of recovery.”²⁵⁹

Finally, there is the fourth question of whether there are any defenses. Burrows notes eight such defenses, which focus on whether the defendant continues to be enriched, and to extinguishing the claimant’s assertion that the enrichment was unjust.²⁶⁰ The defenses include “change of position, estoppel, counter-restitution, limitation, ‘dispute resolved’, incapacity, illegality, and bona fide purchase.”²⁶¹ Birks, on the other hand, characterizes defenses as instances in which the unjust enrichment claimant will himself be unjustly enriched, when the claim breaks the rules of finality of litigation, and when it would stultify or make nonsensical the articulated law in other areas.²⁶²

The summary provides only the barest of broad-brush sketches of an important area of U.K. law, one in which there are many learned treatises. Although the United States has recently seen a resurgence of interest in the study of unjust enrichment and restitution, along with the articulation of the Restatement (Third) of Restitution and Unjust Enrichment in 2011, these theories are not generally taught in law school classes and many practicing lawyers and judges are wholly unaware of them.²⁶³ Nonetheless, in light of new types of labor and unpaid work on the internet, some of the more complex nuances of unjust enrichment and restitution under U.K. law may provide the intellectual tools necessary to process and resolve any such claim.

C. *Application of Restitution and Unjust Enrichment Principles to Online Work Situations*

The unjust enrichment and restitution frameworks present in U.K. law

to Birks, are almost always inherently unjust, i.e., the pickpocket who takes money from someone’s wallet without the owner of the wallet noticing. BIRKS, UNJUST ENRICHMENT, *supra* note 234, at 129. Putting non-participatory enrichment to the side, the rest would be termed “participatory enrichments.” Participatory enrichments then break down into the category of being either obligatory or voluntary, according to Birks. If obligatory, the question is whether the underlying obligation failed. If, on the other hand, the participatory enrichment was voluntary, Birks suggests that the question is “what end it was it intended to achieve or depend upon [?]” *Id.*

²⁵⁹ Charles Mitchell, *Unjust Enrichment*, in PRINCIPLES OF THE ENGLISH LAW OF OBLIGATIONS 242 (Andrew Burrows ed., 2015).

²⁶⁰ BURROWS, *supra* note 239, at 51.

²⁶¹ *Id.*

²⁶² BIRKS, UNJUST ENRICHMENT, *supra* note 234, at 224.

²⁶³ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT (Am. Law Inst. 2011).

are much more complete and fleshed out than their rather neglected analogues set out in American jurisprudence. Would a more complete and well-thought-out set of doctrinal tools make a difference in terms of resolving issues of what amounts to misrepresented, unpaid, or otherwise disguised labor online? As noted by J. Beatson, restitution is “an independent category of obligations . . . used to give new perspectives and new solutions to old problems . . . to fill gaps left in other categories. Restitution is therefore an interesting alternative to traditional remedies in contract and tort.”²⁶⁴ One of the long-existing struggles in industrial relations is the issue of fair and proper compensation to workers when there is a gap between the fruits of worker’s labor and the returns that accrue to them. Are these employment concerns actually contract, property, or tort law problems? The answer is that they may not be categorized neatly, and because they do not exactly “fit” one of the traditional categories, these issues go unnoticed and uncompensated. Perhaps unjust enrichment and restitution provide a better framework for answering some of these questions especially within the vast structural changes that are currently happening to the employment relationship.

To analyze the problem of online work, it is helpful to return to the questions that Burrows asks: “(1) has the defendant been *benefited* (i.e. enriched)? (2) was the enrichment *at the claimant’s expense*? (3) was the enrichment *unjust*? (4) are there any *defences*?”²⁶⁵ To turn to the first question, in all of the online labor disputes, the website operators were definitely enriched, as they received the value, in the aggregate, of free labor. That labor might have been disguised as something else, as in the reCaptcha case, but it was still work. In other situations, the work might have been masquerading as leisure, but the defendant was still benefited by the value of the website users’ time. How much this might be worth could be an open question, but thousands of hours of time completing computer tasks or writing articles for free are certainly of great value and many businesses would love to have that benefit.

The second question asks whether there is a relationship between the claimant and the enrichment. There certainly seems to be a link as noted in the discussion of the facts. *Autonomous unjust enrichment* does not require that there be any wrongdoing by the defendant; but there could be if disguised work is a kind of omission or misrepresentation. The third question then asks whether there is a “basis” for finding the enrichment to be an unjust one. This really does seem to get at the crux of the matter. Just because there has been enrichment does not mean that it is legally problematic. Therefore,

²⁶⁴ J. BEATSON, THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION 3 (1991) (footnote omitted).

²⁶⁵ BURROWS, *supra* note 239, at 15.

there is an extensive list of reasons that provide just such a basis for unjust enrichment. From this list, those that seem to be most applicable to the situation of online work that is at issue here in this Article include mistake and ignorance. Finally, with regard to question four, there do not seem to be any applicable defenses.

Keep in mind that the U.K. treatises on restitution and unjust enrichment were formulated in a time before such online work structures existed, and before the “sharing economy,” “gamification,” or digital work had any attention whatsoever. There do not appear to be any decided cases in this area in the United Kingdom; a complete analysis must therefore be left to the future and the elaboration of U.K. judges and legal scholars.

At present, the U.S. decisions about payment for online labor ultimately seem to revert to notions of contract, based on free and voluntary agreement and assent. While courts say that they are engaging in an unjust enrichment analysis (for that is how the claims are brought and styled), courts instead reflexively default to issues like a priori remuneration or whether the parties had assented. These assumptions about unjust enrichment and restitution seem to give short shrift to what those causes of action stand for, and why they exist—i.e., that they are formulated to address injustices even when there is no contract and there is no assent. At present, many of these types of cases are being litigated in the United States; yet, because judges seem to be unfamiliar with restitution and unjust enrichment concepts, they fail to draw on this body of law that would be highly applicable. The United Kingdom has a great deal of applicable law on the books, but no cases that pertain to disguised online labor as of yet.

CONCLUSION

Technology and the rise of the sharing economy have given us new and diverse structures for how businesses operate and how work is conducted. As noted in the first part of this Article, courts are beginning to examine more closely the central question of whether workers are independent contractors or employees, regardless of the label affixed to the relationship in a EULA on a website. In the absence of a definitive answer to the characterization question through contract law, courts will analyze the substance of the relationship using factors that attempt to determine a right of control over an employee or by looking at indicia of entrepreneurial activities test, to see if indeed the worker is engaged in a wholly separate business.

Other forms of online work create even more difficult problems than classification. As described above, in some instances, work is disguised as an innocuous task, such as entering a code or answering a question. In other instances, work could be hidden as a leisure activity, such as in gamification.

Still other disputes involve internet users making contributions to online activities, believing that they are contributing to an online community or non-profit.

To date, plaintiffs in these new online work cases in the United States have had their cases dismissed in part because they have yet to find a solid doctrinal ground for recovery. Contract law is stymied in many of these online work situations because assent—widely acknowledged as foundational to contract—is generally absent. Assent is lacking because, in these situations, one party was unaware that work was being performed, or that their work might later be monetized. Even though the United States courts that have examined these cases have purported to use an unjust enrichment or restitution formulation to analyze the issues, in reality they are defaulting to traditional notions of agreement or assent that are grounded in contract law. Referring to the more richly nuanced and developed law of unjust enrichment and restitution in U.K. law may result in a more fruitful and well-reasoned analysis of these cases.