# Uber, China, and Robots

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**Date :** May 14, 2018

Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, NYU School of Law, Public Law Research Paper No. 17-28, NYU Law and Economics Research Paper No. 17-26 (Jan. 5, 2018), available at SSRN.

Reams of law review pages have been written about the effects of technological change on employment law. The typical narrative tends to portray technology as a disruptor, changing the structure of work and challenging the assumptions on which our employment law regime is built. Scheduling software, for instance, enables employers to assign workers for last-minute shifts and send them home during slow periods, creating a form of wage and hour instability that was never contemplated by wage and hour law. App-based companies build their entire business models around workers they classify as independent contractors, and yet retain some measure of labor control, putting pressure on the legal definition of "employee."

Cynthia Estlund's timely new working paper offers a different description of technology's relationship to the law that both challenges and complements the narrative above. Her particular focus is automation, or the takeover of previously human-performed tasks by technology both "hard" (robots) and "soft" (algorithms). Estlund portrays automation as related to the larger trend that David Weil has labeled "fissuring," or employers' "flight from direct employment." Employers might choose to hire workers through layers of subcontractors, they might convert employees to independent contractors, they might hire foreign workers in other countries, and they might replace human workers entirely with automated or machine-provided labor. In the public imagination, as Estlund points out, the shorthand for these trends might be "Uber," "China," and "robots." Each of these moves reduces the number of directly employed workers, and, concomitantly, reduces employers' legal and regulatory obligations. Instead of focusing on the *effect* of these moves on employment law, however, Estlund conceives of employment law, at least in part, as their *cause*.

In Estlund's telling, employment law imposes costs on employers – what she labels a "legal tax on employment." Antidiscrimination mandates tie employers' hands in selecting their workforce; overtime requirements increase the wage bill; employment litigation sucks up large portions of employers' budgets. Employers, therefore, will do almost anything "to avoid the costs and risks of employing human beings." As direct employment becomes more costly, employers seek out avoidance strategies, and automation and fissuring result. The pressures of the global capital markets for ever-higher profits also incentivize avoidance, as does technology itself. (Here, technology acts both as a driver of fissuring and as an enabler of automation: communications technology enables the offshoring of labor, for example, just as automation technology replaces human workers.)

As Estlund cautions, then, some worker-friendly proposals advanced in the face of automation and fissuring that would strengthen and extend employment law's reach may actually have a perverse effect: increasing the legal tax on employment, and therefore also increasing employers' incentives to automate, to offshore, and to move to a more contingent and contracted workforce. In her words, "[T]his sensible response to fissuring not only fails to meet the looming though uncertain challenge of automation-based job loss; it tends to further tilt firms' calculus away from human labor and toward machines."

Estlund offers solutions by performing a careful inventory of the costs that employment law – writ large – requires employers to bear. She then advocates reallocating employer mandates that are not directly related to guaranteeing decent work. So, a basic minimum wage, occupational health and safety protections, and antidiscrimination obligations should remain, as they are directly related to the quality and conditions of work. However, employer-provided health insurance, and its attendant costs, should end, as should employer-funded paid family and medical leave (where it exists), as these are essentially "politically expedient off-budget ways to fund social entitlements that bear no necessary relation to employment or to work."

To be clear, Estlund does not argue that people should lose health insurance coverage or paid leave. The opposite is true: she proposes that these benefits should extend to more people outside the traditional employment relationship, and their costs should be funded via the tax system or another non-employment mechanism. Estlund also considers ideas such as increasing the reach and impact of the Earned Income Tax Credit, and implementing various forms of a universal basic income. In sum, she envisions replacing some employer mandates with a more robust and wide-reaching social safety net, which will perform two simultaneous, salutary functions: 1) reducing the costs of direct employment, thereby also reducing employers' incentives to automate and fissure, and 2) protecting the workers who are harmed as a result of the fissuring and automation that does occur, in the form of job loss or job degradation.

Estlund closes by acknowledging probable objections to her approach, including the ideas that employers deserve to bear the cost of some societal guarantees, that her proposals are unlikely to succeed politically, that the current state of "churn" in the labor market will ultimately produce more and better jobs, and that her proposals will do no more than tinker with employers' incentives at the margins, without slowing the inevitable march toward automation. In the face of these critiques, she acknowledges that none of us knows with certainty how fast automation and other forms of fissuring might take over jobs or pieces of jobs as we know them. However, she makes a compelling case for taking seriously the push toward ever more precarious and automated forms of labor, and for undertaking a clear-eyed assessment of the role of employer costs – and employment law – in driving that trend. And she admirably offers practical solutions, as a way "to start somewhere, even in a context of uncertainty and intense debate" over the future of work, and the future of employment law in a world increasingly dominated by Uber, China, and robots.

Cite as: Charlotte S. Alexander, *Uber, China, and Robots*, JOTWELL (May 14, 2018) (reviewing Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, NYU School of Law, Public Law Research Paper No. 17-28, NYU Law and Economics Research Paper No. 17-26 (Jan. 5, 2018), available at SSRN), https://worklaw.jotwell.com/uber-china-and-robots/.