

UC Berkeley

UC Berkeley Previously Published Works

Title

Work after the end of employment - An introduction

Permalink

<https://escholarship.org/uc/item/8km336hv>

Journal

Law and Contemporary Problems, 82(3)

ISSN

0023-9186

Author

Fisk, CL

Publication Date

2019

Peer reviewed

WORK AFTER THE END OF EMPLOYMENT – AN INTRODUCTION

CATHERINE L. FISK*

We are living through one of those periods—industrialization, urbanization, the Civil War and Reconstruction, and prior waves of immigration—in which disruptive technologies, the restructuring of economic and political arrangements, and the migrations of peoples have dramatically altered work relationships. Labor’s share of national income has trended downward over the last two business cycles as economic inequality has reached unprecedented levels. The rapid growth of automation and machine learning are changing the work that humans perform, and perhaps reducing the need for human labor. The huge growth of the platform economy has already enabled companies to coordinate vast workforces while insisting they have few actual employees. The migration of people to the United States in numbers not seen since the turn of the twentieth century has altered the demographics of the labor force and transformed labor organizations, while the legal and social safety net has proved no match for the capacity of deregulatory capitalism to exploit new immigrants and other vulnerable workers. These phenomena pose significant challenges for law and for the future of American democracy.

This Symposium explores how law might address the changing shape of work relationships in the contemporary economy. At a minimum, three major questions demand the attention of scholars from law and other disciplines. *First*: How should labor or employment law address the rapid spread of automation that threatens or promises to eliminate jobs? *Second*: As the platform economy enables millions to provide services through an entity that disclaims any legal responsibility for the conditions of employment, how should law respond? *Third*: the contemporary regulatory framework has rendered migrant and other workers extremely vulnerable and aggregated capital apparently invincible and has generated historically unprecedented levels of inequality. At the same time, political forces have galvanized nationalist backlash against some of the most vulnerable workers to thwart alliances among low- and moderate-income workers of all races and immigration statuses. What organizations and regulatory frameworks are developing to empower labor as a countervailing force?

The title and organizing theme—work after the end of employment—should be taken quite literally in the several senses in which these words may be read. The articles that follow do so, addressing in an interdisciplinary manner the three constellations of questions raised by work after the end of employment.

Copyright © 2019 by Catherine L. Fisk.

This article is also available online at <http://lcp.law.duke.edu/>.

* Barbara Nachtrieb Armstrong Professor of Law, University of California, Berkeley Law School.

First, what happens if there is less work? Professor Cynthia Estlund begins with the big picture about work in a future in which automation has destroyed jobs. As she recognizes, technology has been replacing human labor for all of recorded history, but always the new technologies created new jobs to replace the ones that disappeared. She proposes what law should do if this time is different—if technology generates a net loss of jobs. To fairly spread the gains and mitigate the losses of automation-related job destruction, Professor Estlund proposes a three-dimensional alternative to the three big ideas that have surfaced in academic and policy debates. In lieu of universal basic income, federally guaranteed jobs, or mandatory shorter working hours, she advocates a combination of variations of all three. That is, Estlund argues that expansion of income support and universal social benefits, starting with health care and higher education, would do better than universal basic income to provide an adequate standard of living. Increased public investment in infrastructure, social and community services, and early education would create jobs more effectively than a federally-guaranteed jobs program. Finally, before prohibiting work weeks longer than 40 hours as a way of spreading working, Estlund argues we should mandate paid leaves and access to part-time work and early retirement. By combining these three types of programs, Estlund says, we can promote liberty and freedom of choice, recognizing that not everyone agrees about the benefits and burdens of work, money, and leisure or family time.

Second, what happens if there is work but less employment? The next two articles in the Symposium consider the understudied role of antitrust law in eroding working conditions and how changes in antitrust law could help ensure that work remains decently remunerative after the end of employment. Law professor Sanjukta Paul calls for a fundamental rethinking of antitrust law's assumption that only firms can coordinate the price of labor. Economics professor Marshall Steinbaum examines the antitrust-labor issues in the gig economy from the standpoint of economic theory and data.

Steinbaum begins with several troubling observations that defy what neoclassical economic theory used to predict: median wages have fallen since 1979 even as worker productivity increased, inequality within the distribution of labor income has risen more than would be expected by a supposed gap between worker skills and employer needs, and labor's share of the national income has declined over multiple business cycles, though economists had predicted it was stable over the long run. Finding in these phenomena evidence of significant erosion of labor's power to negotiate a share of the wealth produced by work, Professors Steinbaum and Paul explore two ways antitrust law has contributed to that erosion.

First, Steinbaum shows that the legalization of vertical restraints, combined with the increasingly widespread phenomenon of workers being deemed contractors or franchisees and therefore unprotected by minimum labor standards, enables dominant firms to direct the performance of services and impose price- and non-price restraints without liability under antitrust law. This

enables powerful firms to drive down the cost of such services and leaves workers who provide service with no recourse in either antitrust or employment law. Hence, antitrust law is part of the explanation for why the rich are getting richer and wages are steadily falling.

Professor Steinbaum proposes a solution: any vertical restraint, price or non-price, imposed by a firm with market power should be a presumptive Sherman Act violation. He also proposes a test for determining when firms have market power to trigger the presumption. They have such power if they can unilaterally raise prices for customers or lower them for suppliers (as, I would point out, Uber did in the spring of 2019), or if they can discriminate in prices or wages among customers, suppliers, or workers, or if they can impede or control entry by prospective competitors, or other things described in his paper. Professor Steinbaum proposes an array of other legal and regulatory responses as well.

The second significant economic consequence of antitrust law in the new economy in which workers are not employees is that it empowers firms to litigate against labor organizations that form to fight back against the steadily declining wages. As Professor Sanjukta Paul's article explains, one recent example of this comes from Seattle, where app-based ride-hailing drivers and taxi drivers secured legislation to protect their efforts to bargain collectively. Uber, Lyft, and taxi companies insist their drivers are independent contractors, not employees, and are therefore outside the protections the National Labor Relations Act extends to collective bargaining. Accepting that federal law did not apply, the State of Washington authorized Seattle to regulate the ride-hailing market by enacting a local ordinance protecting the right to bargain collectively. The Chamber of Commerce and the companies promptly filed litigation arguing that collective bargaining by independent contractors violates antitrust law.

Professor Paul uses the Seattle example and many others to problematize the fundamental antitrust principle that firms are allowed to coordinate prices for services within the firm but that outside the firm, any effort to coordinate the price charged for services is anticompetitive and an antitrust violation. Returning to the first principles of antitrust law, Professor Paul makes the bold and provocative claim that workers should be allowed to coordinate (as in to bargain collectively) over the price they charge when they provide services to or through a firm. The lively discussion at the Symposium among the antitrust experts over Professor Paul's argument for the scope of the firm exemption from antitrust and the labor exemption was one of the highlights of the Symposium. It also is evidence, if further evidence were needed, that labor scholars and antitrust scholars trained in law and in economics need to be in conversation with one another much more than they have been if the fields of labor and antitrust law are to respond effectively to the rising inequality and creative destruction generated by platform-based work and the fissured workplace.

The third set of questions addressed by this Symposium consider the need for countervailing power raised by both Professors Paul and Steinbaum. Michael Oswald in describing and theorizing the concept of "Alt-Bargaining" identifies a

new way that workers are bargaining collectively. He begins with the phenomenon of “bargaining for the common good” pioneered by the Chicago public school teachers in 2012. Bargaining for the common good, which has now become standard for all teachers unions and has been the basis for the success of teachers’ negotiations and strikes in states from West Virginia and Oklahoma in 2018 to Colorado and California in 2019, insists that collective bargaining is not strictly about labor versus management but is instead a process by which workers and their communities negotiate with economically powerful counterparties over the matters that concern us all. From this case study and others, Professor Oswalt envisions a new conceptualization of, and a new legal regime to govern, collective bargaining in the private and public sector both. Oswalt proposes a nuanced and sophisticated understanding of interest formation among workers. He sees the possibility that worker campaigns across the spectrum of occupations and identity groups are already and will in the future increasingly press for broad, “common good”-type community benefits with minimal outside conflict and minimal internal dissension. He sees this happening as worker organization leaders draw heavily from practices steeped in community-based activism that incorporate months of transformational political and relational education with the goal of getting nurses, custodians, fast-food workers, and Uber drivers to understand their fates as intertwined and to collaborate in various ways.

Finally, Sameer Ashar and Catherine Fisk examine close up the leadership and internal governance practices of worker organizations that undergird the social movement activism that Professors Oswalt and Paul call for in their articles. Professors Ashar and Fisk interviewed a small but representative sample of worker center leaders to understand how they engage their members in self-governance of the organization and why they consider internal democracy both intrinsically and instrumentally valuable in building worker power. They find that the organizations are pluralistic in terms of their commitment to and modes of incorporating worker voice and worker leadership and that the variations correlate with the economic and political power of employers in the sector, the origins and development of an affiliate structure of the worker organization, characteristics of the leadership and the workers, and the advocacy modes and organizational resources of the worker organization.

Together, these articles present a rich picture of the grave challenges facing American labor and the innovative worker organizations that are grappling with these challenges. The articles propose a variety of specific legal reforms that could address the most pressing issues of political economy today. The proposals are bold and provocative. Adopt laws that mandate more generous paid leaves to encourage work spreading. Increase job-creating investments in infrastructure, social services, and early childhood education and increase financial and other forms of support for people affected by job loss. Rethink the law of vertical restraints and the firm and labor exemptions to antitrust law to enable fair competition and a more equitable division of the national wealth. Revise labor law to facilitate new approaches to collective bargaining. Allow worker organizations to continue to experiment with member engagement and

democratic accountability. This is an ambitious agenda, but all of the proposals are within reach of courts and legislatures that wish to create an equitable American political economy as we enter the third decade of the twenty-first century.