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Using AI to Mitigate the Employee Misclassification Problem

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Misclassification of employees as independent contractors is widespread. This article aims to make two contributions. My first goal is to sharpen the explanation of why misclassifications persist; I argue that three well-known problems – the indeterminacy of employee status tests, the barriers to self-enforcement, and the inequality of bargaining power – together combine to give employers *de facto* power to set the default legal status. Putting the burden on the worker to initiate legal proceedings and challenge their classification as an independent contractor is the ultimate reason for persistent misclassifications. The second and main contribution is to propose a solution that relies on new AI capabilities. Thanks to technological advancements it is now possible to require employers to seek pre-authorisation before engaging with someone as an independent contractor. The authorisation would be granted (or refused) by a state-run automated system, based on an AI prediction about the law. Both parties would still be able to bring the case before a court of law; but the power to set the default legal status would be taken away from employers. The article considers the difficulties with relying on AI predictions, and argues that those difficulties can be addressed, proposing a model that can be justified.

INTRODUCTION

Employment is subject to extensive regulation. An employee is entitled to a minimum wage, working time limitations, annual leave, a right to join a union and bargain collectively, and much more. An employer is bound by all of these duties. For employers, this is costly and also limits their managerial flexibility, which leads some employers to misclassify workers who appear to be employees and treat them as independent contractors.[1] In such cases, the workers do not enjoy the rights enshrined in labour laws, and the purpose of these laws is frustrated. Such occurrences are part of a larger problem of noncompliance and insufficient enforcement in the field of labour law. Some employers violate specific legal obligations, for example by paying an employee less than the minimum wage. Instances of misclassification – also known as bogus (or false/sham) self-employment, or as 'disguised employment' – amount to a wholesale violation of the entire body of labour law with respect to the specific

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1 I use the term 'worker' in this article to refer to all people who work for others, whether as employees or as independent contractors. This is not to be confused with the intermediate category of 'limb (b) worker' under the UK Employment Rights Act 1996, s 230(b).

worker. Unfortunately this is a common and persistent problem throughout the world.

This article aims to make two contributions. The first is to sharpen the explanation of why misclassifications persist, and why the various solutions proposed to improve enforcement of labour laws – and more specifically to fight misclassifications – cannot make a significant difference. I argue that three well-known problems – the indeterminacy of employee status tests, the barriers to self-enforcement, and the inequality of bargaining power – together combine to give employers *de facto* power to set the default legal status. By 'default legal status' I mean the status that applies to a worker until a court rules otherwise.[2] Putting the burden on the worker to initiate legal proceedings and challenge their classification as an independent contractor is the ultimate reason for persistent misclassifications. We have to address this root cause; proposals designed to improve the determinacy of the tests or to lower the barriers to self-enforcement are useful, but not sufficient.

The second and main contribution of the article is to propose a solution to this problem that relies on Artificial Intelligence (AI), and to examine whether it can be justified. Existing AI capabilities can predict with relatively high accuracy the probability that a worker will be considered an 'employee' by a court of law. Thanks to this new technology, it is now possible – as I argue below – to require employers to seek pre-authorisation before engaging with a worker as an independent contractor.[3] In my proposal, the authorisation would be granted (or refused) by an automated system, created and controlled by the state. The decision of the system would be based on the probability predicted by AI regarding employee status, in light of the previous case-law. The prediction has to rely on facts, and those would be supplied by the employer – but the proposed system would send the reported facts (together with the conclusion) to the worker, who would be able to ask the system for a re-assessment at any stage based on their own version of the facts. Importantly, the AI prediction will *not* have the power to legally determine the status; either one of the parties would be able to ask a (human) court to do so. The automatic prediction would nonetheless have the power to prevent an employer from (legally) treating someone as an independent contractor, unless and until a judicial ruling determines otherwise. The proposal is thus to take the power to set the default legal status away from employers, giving this power to a governmental AI system.

The proposed new procedural requirement – to secure pre-authorisation from the automated system before contracting with an independent contractor – would be relatively easy to enforce. The article considers the different ways in which employers are expected to respond, distinguishing between employers who consider themselves 'good people' and those who are 'calculative

2 I use the term 'court' throughout the article for convenience; in practice, in the UK the question of employee status will usually be determined by an employment tribunal.

3 A requirement from employers to seek pre-authorisation was previously proposed by Christopher Buscaglia, 'Crafting a Legislative Solution to the Economic Harm of Employee Misclassification' (2008) 9 *UC Davis Business Law Journal* 111. However, this proposal assumed a human examination of each application, which seems unrealistic in terms of the burden on employers, the state, and the economy.

wrongdoers'. It also considers the impact on workers' ability to understand their legal situation and to overcome the barriers to self-enforcement. Overall, I argue that the proposal can be expected to significantly minimise misclassifications by addressing head-on the problem of a default legal status set by employers. Admittedly, it will impose some new costs on businesses and other organisations contracting with independent contractors, especially when the system is wrong about its prediction. There is also a worry that genuine independent contractors might lose some work to bigger businesses, if employers prefer to avoid the risk of contracting with them in 'close call' cases. The article explains and discusses these costs, ultimately arguing that the benefits outweigh them.

There are also, of course, some difficulties with the idea of relying on an AI system. After examining the expected implications of the proposal, the article turns to ask whether it can be justified in this respect, with a discussion divided into two parts. I start by examining the idea of determining the legal default based on an assessment of probabilities regarding the legal situation. What if a governmental agency, staffed with human legal experts, had the power to decide on pre-authorisations based on such an assessment? The problem is that any assessment (prediction) of the law could be wrong. However, bearing in mind the fact that the parties can still bring a case to court to challenge the decision, as well as the harsh implications of misclassification for vulnerable workers and society at large, I argue that changing the legal default based on an assessment of the law can be justified.

Does this conclusion change when a human legal expert is replaced by an AI system? This is a crucial element of the proposal, because the vast number of engagements with independent contractors makes human authorisation unrealistic. I discuss several difficulties raised once AI is introduced. First, the risk that the system will fail to assess the law correctly when facing new factual scenarios, such as a new model of work that did not appear in previous cases. Second, the worry of legal ossification; we rely on courts to develop the law in response to new realities and in light of changing societal values, and the question is whether enough cases will reach the courts to perform this role. Third, there is a possibility of 'automation bias', if judges show deference to the assessment of the AI system and refrain from using their own judgement when a case reaches the court. Finally, there is a question of transparency; the worry that AI systems are a 'black box' which we do not understand and therefore cannot trust. I discuss all of these points and conclude that while they raise important concerns, they can be addressed by structuring the proposed model in a way that significantly minimises the risks.

The article is organised as follows. The next part introduces the problem of employee misclassification and offers an explanation for its persistence. The following part puts forward the proposal for an AI-powered pre-authorisation system, including the details of the legislative change that will accompany it. This is followed by an assessment of the expected implications, first in terms of the impact on misclassifications, and then with regard to different types of employers, as well as the impact on small businesses, workers and public resources. The next part then asks whether the proposed plan can be justified,

first because it relies on probabilities (an assessment of the likely law) to change the legal default, and secondly because it relies on AI. The final part concludes.

One preliminary note is in order. The advent of AI has already attracted a lot of attention in labour law scholarship. So far, however, the focus has mostly been on new problems resulting from the use of AI by employers.[4] Businesses are increasingly relying on algorithmic management, which can be a threat to worker privacy and may also increase discrimination. There is a further worry that algorithmic management increases employer power vis-à-vis workers, thereby worsening the problem of inequality of bargaining power. These are all important issues. My goal in this article is to suggest that in the specific context of fighting misclassification, AI can be used by the state and could have a *positive* impact on labour rights. This does not detract in any way from the justified concerns about the possible *negative* implications of algorithmic management.

EMPLOYEE MISCLASSIFICATION AND WHY IT PERSISTS

A business contracting with other businesses to buy services has very few limitations regarding the content of the engagement. Imagine, for example, a company that retains the services of a lawyer as an independent contractor. Such relations are governed by general contract law. In contrast, the same company can also decide to hire a lawyer to work in-house, as an employee. The different legal structure carries with it enormous implications for the parties. There are various advantages for a business choosing the in-house employment option – notably, having a worker who is available at your disposal to do as requested, who knows the business from the inside and is committed to it. But the subjection to labour law brings with it significant costs and some loss of flexibility. This creates a temptation for trying to square the circle: enjoying the advantages of employment, while avoiding the costs associated with it. Although such misclassification is clearly prohibited, it is widespread throughout the world. Data from the 2015 European Working Conditions Survey, which included approximately 36,000 interviews with workers from 28 EU Member States, suggested that 32 per cent of the self-employed without employees were misclassified, and an additional 15 per cent were questionable (meeting two out of the following three criteria: they only have one client; they have no authority to hire staff; they

4 For a recent overview and analysis see Pauline T. Kim, 'Artificial Intelligence, Big Data, Algorithmic Management, and Labour Law' in Guy Davidov, Brian Langille and Gillian Lester (eds), *The Oxford Handbook of the Law of Work* (Oxford: OUP, 2024) 819. See also Jeremias Adams-Prassl, 'What If Your Boss Was an Algorithm? Economic Incentives, Legal Challenges, and the Rise of Artificial Intelligence at Work' (2019) 41 *Comparative Labor Law & Policy Journal* 123; Antonio Aloisi and Valerio De Stefano, *Your Boss is an Algorithm: Artificial Intelligence, Platform Work and Labour* (Oxford: Hart, 2022). A few labour law scholars have advanced in contrast a positive account, hailing the potential of AI to *improve* equality. See notably Orly Lobel, *The Equality Machine: Harnessing Digital Technology for a Brighter More Inclusive Future* (New York, NY: Public Affairs, 2022).

have no authority to make important strategic decisions).[5] Evidence abounds from other parts of the world as well.[6] Specifically in the United Kingdom, the number of self-employed is especially high, and among them a relatively high share of misclassified or at least questionable self-employed.[7] There are several reasons that make this possible. Two of them are particularly important: the indeterminacy of employee status tests, creating legal uncertainty; and the inherent difficulty of enforcing labour laws, in particular the barriers to challenging misclassifications before a court of law. Together with inequality of bargaining power in the background, I argue that the combined effect of these problems is that employers have the power to choose the default legal status.

Inequality of bargaining power is traditionally considered a major characteristic of employment relationships.[8] Neoclassical economists generally object to the idea that any party has 'power' in contractual relations, based on the view that only supply and demand determine the price (and in this context, the wage and other terms). However, even conservative economists agree that

5 Colin C. Williams and Ioana Alexandra Horodnic, 'Evaluating the prevalence and distribution of dependent self-employment: some lessons from the European Working Conditions Survey' (2018) 49 *Industrial Relations Journal* 109.

6 See International Labour Office, *Non-Standard Employment Around the World* (Geneva: ILO, 2016) 14; Colin C. Williams and Frederic Lapeyre, 'Dependent Self-employment: Trends, Challenges and Policy Responses in the EU' ILO Employment Working Paper 228 (2017); Charlotte S. Alexander, 'Misclassification and Antidiscrimination: An Empirical Analysis' (2017) 101 *Minnesota Law Review* 907; Lisa Xu and Mark Erlich, 'Economic Consequences of Misclassification in the State of Washington' (Harvard Labor and Worklife Program, 2019) at https://lwp.law.harvard.edu/files/lwp/files/wa_study_dec_2019_final.pdf [https://perma.cc/5YLK-42BK]; Ratna Sinroja and others, 'Misclassification in California: A Snapshot of the Janitorial Services, Construction, and Trucking Industries' (UC Berkeley Labor Center, 11 March 2019) at https://laborcenter.berkeley.edu/pdf/2019/Misclassification-in-CA-Fact-Sheet.pdf [https://perma.cc/4QWH-HAYM]; National Employment Law Project, 'Independent Contractor Misclassification Imposes Huge Costs on Workers and Federal and State Treasuries' (Policy Brief, October 2020) at https://www.nelp.org/app/uploads/2017/12/Independent-Contractor-Misclassification-Imposes-Huge-Costs-Workers-Federal-State-Treasuries-Update-October-2020.pdf [https://perma.cc/XVF6-MB9L]; Nathaniel Goodwell and Frank Manzo IV, 'The Costs of Wage Theft and Payroll Fraud in the Construction Industries of Wisconsin, Minnesota, and Illinois' (Midwest Economic Policy Institute, 14 January 2021) at https://midwestepi.org/wp-content/uploads/2020/10/mepi-ilepi-costs-of-payroll-fraud-in-wi-mn-il-final.pdf [https://perma.cc/J3B2-A9WQ]; Lian Kosters and Wendy Smits, 'False Self-Employment: The Role of Occupations' (2021) 42 *International Journal of Manpower* 322; Rossella Bozzon and Annalisa Murgia, 'Independent or Dependent? European Labour Statistics and Their (In)ability to Identify Forms of Dependency in Self-Employment' (2022) 160 *Social Indicators Research* 199.

7 As of 2015, 56 per cent of the self-employed without employees in the UK were either misclassified or questionable, according to Williams and Horodnic, n 5 above. See also Citizens Advice, 'Neither one thing nor the other: how reducing bogus self-employment could benefit workers, business and the Exchequer' (2015) at https://www.citizensadvice.org.uk/Global/CitizensAdvice/Work%20Publications/Neither%20one%20thing%20nor%20the%20other.pdf [https://perma.cc/68WX-UKYN] (estimating that 10.4 per cent of the self-employed in the UK are misclassified). For a recent discussion of the phenomenon, see Catherine Barnard and Despoina Georgiou, 'Self-Employment in UK Law' (2023) 103 *Acta Universitatis Lodziensis – Folia Iuridica* 97.

8 Paul Davies and Mark Freedland, *Kahn Freund's Labour and the Law* (London: Stevens and Sons, 3rd ed, 1983) 18.

market failures (or 'frictions') create exceptions, so the question becomes an empirical one – whether labour markets are in fact competitive. There is plenty of evidence to suggest that they are not; employers commonly have market power (sometimes called 'monopsony power').[9] Even small employers can have *some* monopsony power, especially because of the high cost of searching for and moving to a new job.[10] Among labour lawyers, there has been some debate in recent years about the usefulness of the 'inequality of bargaining power' concept for identifying employment relationships and for explaining why labour laws are needed, and some discussion about the exact causes of the power imbalance.[11] However, there are no doubts among labour law scholars about the reality of unequal workplace power. I will proceed with this understanding, without delving into it any further, and move to explain the other two problems – and how they all come together to make misclassifications so common and hard to fight.

The implications of indeterminacy

In the example noted above concerning a company engaging with a lawyer, the distinction between an employee and an independent contractor appears easy. The company has a choice: it can contract with an external entity (even a small one) for the service, or hire someone to do this work internally. There are also, however, many situations that are less clear-cut; scenarios in which a worker has some characteristics of an employee, but also some characteristics of an independent contractor. The solution of legislatures around the world has been to avoid rigid definitions and give courts discretion to decide who is an employee. Courts, in turn, developed tests which rely on a holistic examination of several factors ('multi-factor tests').[12] Such tests are inherently indeterminate, creating some degree of legal uncertainty.

In principle, uncertainty is a problem for both parties, who want to be clear about their legal situation before contracting with each other. In practice,

9 Just recently three special issues have been dedicated to this topic, from economic as well as legal and philosophical perspectives; see the introductions to those special issues: Orley Ashenfelter and others, 'Monopsony in the Labor Market: New Empirical Results and New Public Policies' (2022) 57 *Journal of Human Resources* S1; Lawrence Mishel, 'Introduction – The Goliath in the Room: How the False Assumption of Equal Worker-Employer Power Undercuts Workplace Protections' (2022) 3 *Journal of Law and Political Economy* 4; Eric A. Posner, 'Introduction to the Symposium on Labor Market Power' (2023) 90 *University of Chicago Law Review* 261.

10 See notably Alan Manning, *Monopsony in Motion: Imperfect Competition in Labour Markets* (Princeton, NJ: Princeton University Press, 2003); Alan Manning, 'Monopsony in Labor Markets: A Review' (2020) 74 *ILR Review* 3; Eric A. Posner, *How Antitrust Failed Workers* (New York, NY: OUP, 2021) ch 1; Stewart J. Schwab, 'Monopsony, Sticky Workers, and Bargaining Power' in Davidov, Langille and Lester (eds), n 4 above, 143.

11 See for example Guy Davidov, *A Purposive Approach to Labour Law* (Oxford: OUP, 2016) 52 ff; David Cabrelli, 'Traditional Justifications of Labour Law' in Davidov, Langille and Lester (eds), *ibid*, 103; Matthew Dimick, 'Marx and Domination: Issues for Labour Law' in Richard Chaykowski and Kevin Banks (eds), *New Foundations of Workplace Law* (Toronto: University of Toronto Press, forthcoming).

12 For a brief comparative overview of such tests see Guy Davidov, 'The Concept of Employee' in Davidov, Langille and Lester (eds), *ibid*, 173.

however, it is the workers who usually suffer the consequences of this uncertainty. The employer has better knowledge of the law, being a 'repeat player' and with more resources to get legal advice. Many workers will fail to understand the full implications of being misclassified as independent contractors; some might be tempted by the short-term possibility of getting higher net payments. Others, who prefer to be considered employees, might face a 'take it or leave it' choice, and in the absence of other alternatives could be pushed to accept the misclassification. The reality of legal uncertainty, in which it is not entirely clear whether the status preferred by the employer is illegal – especially to workers who are not legal experts and often lack access to legal advice – makes it extremely difficult for workers to object.

Can we solve the problem by replacing the multi-factor, open-ended test, with a highly specific, rule-type test for employee status? Not really. There are good reasons for adopting a standard rather than a rule in this context.[13] A clear-cut test will be easy to work around and can be expected to lead to more evasions. For example, if the law says that anyone working at least 20 hours per week for the same client/employer is an employee, employers could limit the engagement to 19 hours if they want to avoid liability. Leaving discretion for courts to look at the overall picture emerging from various indicators can prevent such easy evasions. It also allows courts to develop tests and adapt them from time to time for new work arrangements.

This does not mean that the *level* of indeterminacy is fixed and unavoidable; there are various ways to reduce it. First, in some legal systems one factor is given priority over others, putting most of the focus on a single factor. But in such cases this factor itself tends to be open-ended ('control' or 'subordination').[14] Second, using a purposive approach to interpret the term 'employee' can arguably reduce uncertainties by clarifying what the tests are looking for and making evasion more difficult.[15] Instead of a vague formula with multiple variables, the main focus turns to the purpose behind the employee/independent contractor distinction, and the tests are developed and applied in this light.[16] However, the actual application of this approach in the UK has been somewhat inconsistent.[17] In any case, the tests are still open-ended and leave significant room for judicial discretion, so a purposive approach cannot purport to eliminate indeterminacy. Third, and most significantly, it is possible to adopt a test that shifts the balance towards more specificity.[18] A notable example is the ABC test used in California since 2018 – first adopted by the California Supreme Court and then by the legislature – which creates a presumption of employment and puts the burden on the client/employer to prove three conditions of independent contractor status.[19] However, the three conditions are themselves

13 Guy Davidov and Pnina Alon-Shenker, 'The ABC Test: A New Model for Employment Status Determination?' (2022) 51 ILJ 235.
14 See for example the Italian Civil Code, Art 2094.
15 See *Autoclenz Limited* v *Belcher and others* [2011] UKSC 41; *Uber* v *Aslam* [2021] UKSC 5.
16 Davidov, n 11 above, ch 6.
17 See for example *Independent Workers Union of Great Britain* v *CAC* [2023] UKSC 43.
18 For a fuller discussion see Davidov and Alon-Shenker, n 13 above.
19 *Dynamex Operations West, Inc* v *Superior Court of Los Angeles* (2018) 4 Cal.5th 9 (explicitly noting the need to fight misclassifications as a reason for adopting the new test); later codified and

quite open-ended; the first one, for example, asks whether the worker is 'free from the control and direction of the hiring party', which often does not have a clear-cut answer. In short, even with the ABC test, or any of the other methods mentioned above, some degree of indeterminacy – and legal uncertainty – still exists.

The barriers to self-enforcement

Indeterminacy creates a fertile ground for misclassification, but in theory it can still be prevented through enforcement efforts. Labour laws have two main enforcement tracks: by the state or through self-enforcement. State enforcement is notoriously lacking in this field. In recent years various ideas have been proposed, and sometimes adopted, to improve state enforcement. Most notably there is an understanding that enforcement agencies cannot rely solely on employee complaints, but should rather search proactively for violations and focus particularly on sectors identified as most problematic.[20] These ideas are important, but are yet to have a significant impact.[21] Moreover, such new methods are mostly directed at violations of specific legal obligations (minimum wage, working time etc) rather than misclassifications. Workers classified as independent contractors, who are not reported to any state authority as employees, present a formidable challenge for inspectors. In practice, then, the burden of enforcing employment rights – in general but especially with regard to misclassifications – falls first and foremost on the workers themselves.

It has already been noted that when entering the work relationship, many workers lack knowledge about their rights regarding employee status, and others lack the power to object to employer demands in this context. If they would nonetheless be able to sue at the *end* of the relationship, and secure their rights retrospectively, this could change the incentive of the employer to misclassify in the first place. But unfortunately, the same problems persist at the end of the relationship, creating significant barriers to self-enforcement.[22] Knowledge

adopted for additional labour law contexts in Assembly Bill No 5, Chapter 26, Statutes of 2019, incorporated into the California Labor Code, § 2775(b)(1). This new test can reduce uncertainties because we know that someone is an employee even if just a single test (each one of the three) leads in that direction. For an extensive discussion see Davidov and Alon-Shenker, *ibid*.

20 See generally David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Cambridge, MA: Harvard University Press, 2014); David Metcalf, Director of Labour Market Enforcement, *United Kingdom Labour Market Enforcement Strategy 2018/19* (London: HMSO, May 2018) at https://assets.publishing.service.gov.uk/media/5af1ce9fe5274a699169c2dd/labour-market-enforcement-strategy-2018-2019-full-report.pdf [https://perma.cc/D36Q-X9PZ]; Leah F. Vosko and others, *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto: University of Toronto Press, 2020).

21 For the most recent report of the Director of Labour Market Enforcement, see Margaret Beels, Director of Labour Market Enforcement, *United Kingdom Labour Market Enforcement Strategy 2023/24* (London: HMSO, October 2023) at https://assets.publishing.service.gov.uk/media/65324da6e839fd001486724f/uk_labour_market_enforcement_strategy_2023_2024_accessible_version.pdf [https://perma.cc/JZ2K-Y8LJ].

22 Charlotte S. Alexander and Arthi Prasad, 'Bottom-Up Workplace Law Enforcement: An Empirical Analysis' (2014) 89 *Indiana Law Journal* 1069; Jennifer J. Lee and Annie Smith, 'Regulating

about the law is lacking at this stage as well. Even those who realise that they have been misclassified, or suspect it, often face the prohibitive costs of legal representation. In addition, many fear being tagged as 'trouble makers' in the eyes of prospective employers. This can be direct (an employer might retaliate by refusing to recommend an employee who sued them) or indirect (the information on lawsuits against former employers can be accessible to everyone on the internet).

The challenges of enforcement are inherent in this field, and have intensified in recent years for various reasons, including decreased union density, increased pressure on employers to cut costs because of global competition, and the increase in outsourcing and subcontracting.[23] In the context of self-enforcement as well, some ideas have been proposed, and some have even been adopted, to address the problem. Most notably, class action suits and punitive damages can change employers' cost-benefit calculation.[24] But again, it remains to be seen whether these important methods can make a significant difference. In any case, they are especially limited in the context of misclassifications, because a determination of status is extremely fact-sensitive and usually requires a separate examination for each worker. Moreover, even when a judgment appears to have broad impact – for example, a determination that drivers of a specific online platform are employees – the employer can introduce small changes to the model, thereby requiring the workers to start their fight all over again.[25] Companies that rely heavily on misclassification as part of their business model will drag the workers through years of costly litigation.

As part of the efforts to improve enforcement, another method – designed specifically to fight misclassifications – is a presumption of employment. A notable example is the ABC test adopted in California, mentioned above,[26] which also puts a high burden on employers to refute the presumption. But a presumption by itself was adopted in several other jurisdictions in recent years.[27] It is also included, in qualified form, in the new EU Platform Work Directive, which requires Member States to adopt (only for platform workers) a presumption of employment that will come into effect 'when facts indicating control and direction, according to national law, collective agreements or practice in force in the Member States and with consideration to the case-law of the Court of Justice, are found'.[28] Presumptions are a welcome development; shifting the burden of

Wage Theft' (2019) 94 *Washington Law Review* 759, 784-789; Charlotte Garden, 'Enforcement-Proofing Work Law' (2023) 44 *Berkeley Journal of Employment & Labor Law* 191.

23 For a fuller discussion see Weil, n 20 above; Davidov, n 11 above, ch 9.

24 For a discussion and examples of implementation see Guy Davidov, 'Compliance with and Enforcement of Labour Laws: An Overview and Some Timely Challenges' (2021) 3/21 *Soziales Recht* 111.

25 For example, Deliveroo changed the contracts with workers during the litigation, as discussed in *Independent Workers Union of Great Britain* v *CAC* n 17 above.

26 See n 19 above.

27 See Bernd Waas, 'Comparative Overview' in Bernd Waas and Guus Heerma van Voss (eds), *Restatement of Labour Law in Europe – Vol I: The Concept of Employee* (Oxford: Hart, 2017) xxxiv.

28 Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work, 2021/0414 (COD), final version, approved 8 March 2024, Art 5(1) at https://data.consilium.europa.eu/doc/document/ST-7212-2024-ADD-1/en/pdf (last visited 4 August 2024). This text was approved by the EU Parliament in April 2024;

proof to the employer to convince the court that the worker is *not* an employee makes it somewhat easier for workers to succeed in court proceedings regarding their status. However, the impact of a legal presumption is quite limited, because it only comes into effect if a case gets to court. To be sure, shifting the burden of proof could have some impact on the calculations of the employer before misclassifying an employee. But given that the presumption only becomes relevant in very 'close call' cases, when neither side is able to prove their case in court, the impact is likely to be negligible when the employer calculates it against the chances of a case getting to court in the first place. Similarly, while a presumption can have an impact on the incentives of the worker to sue (given some increase in the chances of success), this impact is bound to be minimal compared to the various barriers. Overall, while I agree with the view that a presumption is justified and worthwhile,[29] at the end of the day it is just an 'evidentiary instrument',[30] which in my view will have rather minimal impact.

The employer's power to set the default legal status

In most cases (even if not all), the employer enjoys superior bargaining power, as well as superior understanding of the legal situation, as noted above. They can use the legal uncertainty resulting from the indeterminacy of the tests to their advantage. They also know that the risk of being sued by a worker is not high, given the barriers to self-enforcement. With all this in mind, it is hardly surprising that many employers misclassify employees as independent contractors, and that many workers agree to sign contracts for the performance of work presenting them as independent contractors. As far as the 'law on the books' is concerned, the parties cannot set the legal status. They agree on the factual elements of the engagement, but the legal status that follows from those facts, for all labour law purposes, is determined by the law. As a matter of principle, employee status is considered nonwaivable. As a matter of practice, however, the initial agreement of the parties regarding status is rarely challenged, for all the reasons mentioned above. More often than not, then, an employer has *de facto* power to determine the status of the worker by dictating the terms of the contract.

The combined effect of the inequality of bargaining power, the indeterminacy of the tests and the barriers to self-enforcement is that employers have the power to set the *default legal status*. I propose this term to highlight this important power that employers have, that can be obscured by the double fiction of a freely agreed contract and the practical availability of a legal challenge. Such a challenge is of course still possible, so the classification chosen by the employer is not conclusive; but as a matter of practice, it applies without contest

see European Parliament, News 'Parliament adopts Platform Work Directive' (Press release, 24 April 2024) at https://www.europarl.europa.eu/news/en/press-room/20240419IPR20584/parliament-adopts-platform-work-directive [https://perma.cc/622C-ZXPK].

29 See Miriam Kullmann, '"Platformisation" of work: An EU Perspective on Introducing a Legal Presumption' (2022) 13 *European Labour Law Journal* 66.

30 *ibid*, 69.

in a majority of cases. The term 'default legal status', which I chose for lack of a better term, should not be confused with legal norms that apply to a contract unless the parties agree otherwise. It is meant to capture the status of employee or independent contractor that applies, *de facto*, as long as a court does not rule otherwise. To seriously combat misclassifications we have to tackle them at this foundational stage: to take away from employers the unilateral power to set the default legal status. Imagine that employers could only hire workers as employees, unless specifically authorised in a given case to do otherwise. This would reverse the legal default: a worker has to be treated as an employee, from the first day of the engagement, unless there is a specific authorisation from a state authority to treat them as an independent contractor.

It is important to clarify that this is dramatically different from adopting a legal presumption of employment. Such a presumption, as noted above, can be helpful when a case reaches litigation, but has almost no impact on the probability of misclassification in the first place, or on the barriers to bringing a case to court. Even with a presumption of employment in place, an employer is legally allowed to treat a worker as an independent contractor (claiming that, if needed, they can rebut the presumption). The burden of bringing a case to court, with all the related costs and barriers, is still on the worker who wants to challenge the way they were classified. In contrast, changing the default legal status would upend the calculations of the employer from the start. The employer will no longer be legally allowed to treat someone as an independent contractor, unless pre-authorisation is secured. This does not mean that all avenues of evasion will be closed, but misclassification will become significantly more difficult and costly, as explained in detail in the next part.

On first sight such a solution might seem too damaging to benign economic activities. Certainly we do not want to prevent businesses and other organisations from engaging with genuine independent contractors. Requiring full legal proceedings in order to get judicial approval for independent contractor status would be utterly unrealistic. Clients/employers should be able to get official approval for engaging with someone as an independent contractor – an authorisation to divert from the new legal default – without a long and expensive process. An application submitted to a government agency is much less burdensome than taking an issue to court, but given the large number of contracts with independent contractors, the examination of each application to ensure that the status is genuine is bound to be slow, and highly disruptive to the economy. This is where AI capabilities can come in, by making the process quick and cheap and the entire idea much more realistic.

Some readers might find this too radical a departure from the principle of freedom of contract. Why should anyone need approval from the government to contract with others (independent contractors)? However, the context is crucial. The entire field of labour law is a departure from freedom of contract, based on the understanding that supposedly 'free' contracts between employer and employees would lead to unacceptable results. The law intervenes by creating a long list of labour rights, that advance various societal goals and values. Labour law imposes obligations on employers to respect those rights. Employee misclassification is an attempt to evade those obligations, thereby harming the

workers and frustrating the important goals of labour law. We know that misclassifications are prevalent, and that none of the other solutions adopted so far could change that. I have argued in this part that the problem persists because employers have *de facto* power to set the default legal status of those working for them. To tackle misclassifications and the wholesale evasion of labour laws that comes with them, we have to change this default. Moreover, it is not unusual for the law to require businesses to secure pre-authorisation for some actions: a license to open a business, a permit to operate certain businesses, a plan to merge with another business. In all of these cases, we accept some limitation on the freedom of occupation and freedom of contract because of some other societal interests. With this in mind, hopefully *a priori* freedom of contract objections can be set aside, clearing the way for an examination of the actual implications of the specific proposal – including, of course, on businesses and the economy – to see whether changing the default can be justified. The next part sets forth the proposal in more detail, and then engages with such an analysis.

HOW AI CAN HELP: PRE-AUTHORISATION AND ITS EXPECTED IMPLICATIONS

The dramatic development in AI capabilities in recent years has led to a wealth of research on potential applications in the legal sphere. There are various proposals, ranging from technical assistance to lawyers all the way to futuristic 'robot judges'.[31] A major component of these proposals is predictive algorithms. If a machine can predict the solution to a legal problem, this can be useful for assisting lawyers when giving legal advice, or even replacing them with a much cheaper alternative, and the same is true potentially with regard to judges. My proposal here is somewhere between the minimal and maximal options: more than just an aid to lawyers, but not purporting to replace human judges in any way. This part starts with a brief introduction on the technology that is already available, making the proposal advanced here a current possibility rather than a futuristic one. This is followed by an outline of the details of the proposal, before moving to examine the impact it can be expected to have on employers, workers, and other relevant 'players'. Critiques concerning the reliance on AI predictions are discussed separately in the next part.

The technological capabilities

The background assumption behind the proposal is that automated prediction of the legal status (employee or independent contractor) is technologically possible. This legal question is especially fitting for AI applications, being a

31 The literature is vast. Useful entry points are Richard Susskind, *Online Courts and the Future of Justice* (Oxford: OUP, 2019) and Tania Sourdin, *Judges, Technology and Artificial Intelligence* (Cheltenham: Edward Elgar, 2021). Both authors are generally positive about using AI in the legal process but also acknowledge and discuss the difficulties and limitations.

'fact-intensive question of law' with a binary determination.[32] In a recent study by Cohen and others, a machine learning system trained on Canadian cases achieved over 90 per cent prediction accuracy, as high as 96 per cent in one of the models.[33] Another system, trained on American Federal tax cases, is reported to have 97 per cent accuracy.[34] These results predate the dramatic developments in AI technology over the past couple of years, so further improvements are very likely. Another improvement can be achieved by separating the cases decided through the multi-factor test from cases in which preliminary (often implicit) tests are deployed. The study by Cohen and others includes a detailed analysis of the (few) failed predictions, and it appears that some of them are not concerned with the distinction between employees and independent contractors, but rather with the preliminary tests used to identify interns, directors of a company etc.[35] Note also that the accuracy is examined by checking the algorithm's performance against the facts of reported cases. But most of the 'easy' cases never reach the courts, because lawyers advise their clients in such cases – whether it is the worker or the employer – that they have no reasonable chance in court. And when 'easy' cases do reach the courts, they are likely to end up through settlement rather than a public reported judgment. It is fair to assume, therefore, that a pre-authorisation system required to examine *all* the cases, including 'easy' ones, will be even more accurate. Remember also that AI prediction capabilities have to be compared with those of human experts. Although I am not aware of any study that examined the predictive capability of labour lawyers on the question of employee status, it is obviously not 100 per cent or anywhere close to that.

It should be mentioned that on other legal questions, results of AI experiments have also been promising, but usually not with such exceptionally high accuracy.[36] Alongside enthusiasm about the potential of AI to assist in the legal process, there is also some scepticism about the technological possibility of

32 Benjamin Alarie, Anthony Niblett and Albert H. Yoon, 'How Artificial Intelligence Will Affect the Practice of Law' (2018) 68 (Supp) *University of Toronto Law Journal* 106.

33 Maxime C. Cohen and others, 'The Use of AI in Legal Systems: Determining Independent Contractor vs. Employee Status' *Artificial Intelligence and Law* 30 March 2023 at https://doi.org/10.1007/s10506-023-09353-y [https://perma.cc/WY85-B2GG]. The authors tried several AI models. The results ranged from 85 per cent to 93 per cent for Canadian cases when using various supervised machine learning models. They also trained the system on Californian cases and reached somewhat lower accuracy. When removing cases with missing information the accuracy improved, up to 96 per cent for Canadian law when using a 'random forest' model (a multitude of 'decision trees').

34 Benjamin Alarie and Kathrin Gardhouse, 'Predicting Worker Classification in the Gig Economy' (2021) 173 *Tax Notes Federal* 1733. The tests are somewhat different in the tax context, but with many similarities. The short paper does not provide any details beyond noting the figure in passing. The authors are associated with a company (Blue J Legal) that develops AI legal tools, founded by researchers from the University of Toronto.

35 For a recent analysis of the preconditions to employee status – which should be examined *before* turning to the multi-factor test – see Pnina Alon-Shenker and Guy Davidov, 'Employee Status Preconditions: A Critical Assessment' (2024) 45 *Berkeley Journal of Employment & Labor Law* 233.

36 See for example Nikolaos Aletras and others, 'Predicting judicial decisions of the European Court of Human Rights: A Natural Language Processing perspective' (2016) *PeerJ Computer Science* 2:e93 (predicting decisions of the European Court of Human Rights with 79 per cent accuracy). Even this result has been questioned on methodological grounds; see Frank A. Pasquale and Glyn Cashwell, 'Prediction, Persuasion, and the Jurisprudence of Behaviorism' (2018) 68 *University of*

predicting legal outcomes.[37] However, the specific legal question of employee status is arguably more amenable than others to AI modelling, and more generally, focusing on one specific legal question when training the model can yield better results.[38] Overall, it seems fair to proceed on the understanding that the proposal advanced here is technologically possible; while acknowledging, of course, that the algorithm can sometimes be wrong about the prediction, just like human experts.[39]

Some might argue that applying a multi-factor test is more an art than a science: a 'judgement call' based on a holistic understanding of the situation. To some extent this is true; we need human judgement especially when assessing new factual situations and when developing new law (for example, changes to the existing tests). But in a large majority of the cases, lawyers and judges are called to apply existing laws on familiar facts (familiar in the sense that cases with similar facts have already been decided in the past). And in such cases, lawyers and judges rely on a hidden 'formula' of sorts, that they uncover from previous precedents; an understanding of which tests (or facts) should be given more weight than others, and what facts assume special importance when appearing alongside other facts. For humans, this is a process of delicate balancing, which relies on experience and familiarity with previous cases and knowledge about how they have been decided. The unstated formula determines the weight given to each factor. In the study by Cohen and others mentioned above,[40] the authors relied on significant human effort to extract this formula from the case-law: they used a team of law students to label the data, including by giving a score on the strength of different factors. The 'formula' exists in the sense that based on this labelled data, machine learning models can predict the outcome when provided with information regarding the same factors. Perhaps with advancements in AI technology, it might be possible to achieve the same results without humans labelling the data – but that is not necessary for the purpose

Toronto Law Journal 63. For a recent (critical) overview of the field see Masha Medvedeva and Pauline McBride, 'Legal Judgment Prediction: If You Are Going to Do It, Do It Right' [2023] *Proceedings of the Natural Legal Language Processing Workshop* 73.

37 See for example Simon Deakin and Christopher Markou, 'Evolutionary Interpretation: Law and Machine Learning' (2022) 1 *Journal of Cross-Disciplinary Research in Computational Law*; Masha Medvedeva, Martijn Wieling and Michel Vos, 'Rethinking the Field of Automatic Prediction of Court Decisions' (2023) 31 *Artificial Intelligence and Law* 195. It should be noted that the authors of these two papers are also against using AI for legal prediction (at least when leading to decision-making) on *normative* grounds.

38 See for example Joe Collenettea and others, 'Explainable AI Tools for Legal Reasoning About Cases: A Study on the European Court of Human Rights' (2023) 317 *Artificial Intelligence* 103861 (achieving 97 per cent accuracy when focusing on the specific question of whether applications to the European Court of Human Rights concerning violations of the European Convention on Human Rights, Art 6 (right to fair trial) are admissible, ie can be considered on the merits. There is a set of rules regarding admissibility with some judicial discretion required. The authors note that a large majority of the applications to the Court are declared inadmissible, suggesting that the legal question is far from trivial).

39 For proposals on how to make legal prediction through AI more reliable, see Rohan Bhambhoria and others, 'Evaluating AI for Law: Bridging the Gap with Open-Source Solutions' (Cornell University, arXiv, 18 April 2024) at https://arxiv.org/abs/2404.12349 [https://perma.cc/UUX3-HZ2U].

40 Cohen and others, n 33 above.

of the current proposal. The important point is that a system based on AI – however it was 'trained' – can compare a new case with previous similar cases (in the sense of having the same or a very similar combination of facts) and assess the outcome of the new case accordingly with impressive accuracy.

Can we trust the government to create (or commission) such a system? There is understandable scepticism given some unfortunate failures, in different countries, about the use of AI or other technological tools by public agencies. In some past examples, governments have failed by using unreliable systems, not questioning their conclusions, and not being transparent about those systems.[41] A system employed by the UK's tax agency (HMRC) to determine employee status for tax purposes, known as CEST,[42] has been criticised on similar grounds.[43] One might hope that increased awareness to such problems, manifested also in AI regulations (or proposed regulations) across the globe, would lead to better results in future experiments. Moreover, the detailed proposal below includes various components designed to minimise the risk of repeating those failures.

The proposal

The proposal advanced and examined here is to amend labour legislation so as to require any business (or other organisation) engaging with someone to do work to treat that worker as an employee, unless pre-authorisation was granted to consider this worker an independent contractor. Engaging with someone to deliver a result (or a service) shall be subject to the same duty, in order to prevent employers from evading by arguing that the engagement is not 'to do work'. For similar reasons, the duty will apply even if the worker is providing the service through a firm or a partnership; or when they have their own employees; or when there is no contractual obligation to do the work in person. These are all facts that could be relevant for receiving the pre-authorisation, but cannot prevent the need to apply for it. One-time, isolated, short-term engagements can be exempted (for example when a small business is inviting a plumber to fix something). It is also possible to exempt engagements with firms that have more than a certain number of employees. Any exemption must be explicit and drafted as a clear-cut rule.

Pre-authorisation will be sought from a governmental agency through a dedicated website, and shall be granted (or denied) immediately, through an

41 Examples include the SyRI scandal in the Netherlands (see 'How Dutch activists got an invasive fraud detection algorithm banned' *Algorithm Watch* 6 April 2020 at https://algorithmwatch.org/en/syri-netherlands-algorithm/ [https://perma.cc/S7AP-ZN92]); the Robodebt scandal in Australia (see Frances Mao, 'Robodebt: Illegal Australian welfare hunt drove people to despair' *BBC News* 7 July 2023 at https://www.bbc.com/news/world-australia-66130105 [https://perma.cc/V6NJ-5K9K]); and the British Post Office scandal (see the website of the Post Office Horizon IT Inquiry at https://www.postofficehorizoninquiry.org.uk/about-inquiry [https://perma.cc/6332-7NDP]). Many thanks to Simon Deakin for pointing my attention to those examples.

42 See https://www.gov.uk/guidance/check-employment-status-for-tax [https://perma.cc/9CP3-J6F7].

43 Simon Deakin, 'Decoding Employment Status' (2020) 31 *King's Law Journal* 180, 188-191.

automated system. The system will rely on AI technology to predict whether the worker would be considered an employee by a court of law. Authorisation will be granted if the system predicts with at least 51 per cent certainty that the worker would be considered an independent contractor by the court. The probability shall be delivered to the employer together with the decision. When training the AI system, attention will be given to changes in the law. If, for example, the tests for deciding who is an employee have changed in a specific precedent, earlier cases should not be relied upon. To reflect gradual changes in the application of the tests, more weight should be given to recent cases.

To predict the legal status of the worker – employee or independent contractor – the automated system will rely on the facts reported by the client/employer. These will be provided as answers to a set of questions put forward by the system. The questions will be drafted by human labour law experts (depending on technological advancements, the questions could be drafted by AI based on the previous case-law, but in such a case they should be examined and approved by human experts). It will be clarified that the reported facts have to be 'in reality' and not those stated in the contract;[44] with false statements of facts carrying a significant penalty. The prediction by the automated system will rely on a machine learning assessment comparing the combination of facts reported by the employer with similar cases in the system's database. When an application for pre-authorisation is denied, the employer will have the right to appeal this decision. It is possible to create an accelerated process of appeal before a (human) governmental agency – either in general or only for 'close call' cases – or alternatively directly to the court.

When delivering the decision – either to grant or deny the request for authorisation – the system will include reasons. The system should state regarding each reported fact whether it points in the direction of employee or rather an independent contractor (possibly adding whether it points 'strongly' in that direction). The system will then explain that looking at all the indicators together, in light of the existing case-law, the conclusion is X with probability Y. When authorisation is granted, the system will send a copy to the worker, together with the facts reported by the client and the full decision (including the probability determined by the system and the reasons explaining the decision). The worker will be able to request a re-assessment at any time, confidentially, based on their own version of the facts. If the system concludes based on the new facts that the worker is in fact an employee, with the worker's consent the employer will receive notification that the authorisation is revoked.

The duty to secure pre-authorisation will be enforced through significant penalties, as well as a presumption of employment in litigation when pre-authorisation was not secured. It is also possible to create an accelerated judicial process to allow a worker to get employment rights when the client/employer failed to secure authorisation (for example a summary judgment as a

44 The principle of 'primacy of reality' (or 'primacy of fact') is widely recognised in this context. See Waas, n 27 above, xxvii, li; Sergio Gamonal and César Rosado Marzán, *Principled Labor Law: U.S. Labor Law Through a Latin American Method* (New York, NY: OUP, 2019) ch 3. In the UK, see *Autoclenz Limited* v *Belcher and others* n 15 above at [35]; *Uber* v *Aslam* n 15 above at [62]-[63], [76]-[78].

default, unless the court is convinced that full litigation is justified). A worker should also be able to initiate an inquiry with the automated system when authorisation was not sought. In such cases, the worker will be the one who submits the facts, and if the system concludes that they are an employee, the employer will be notified accordingly. If the relationship continues, the worker must be treated as an employee; otherwise, significant penalties shall be imposed.

Pre-authorisation shall *not* be considered as setting the legal status. Workers will be able to challenge an independent contractor classification just as they can today, and a court of law examining the question will not give any consideration to the fact that authorisation was granted, or to the probability included in the automated system's prediction.[45] The system shall be continuously monitored by humans to ensure its reliability; for example, by labour law experts checking a random sample of the cases, as well as carefully reviewing any decision of the system that was later overruled by a court of law, and considering whether it requires changes to the system. In principle, the same system can be used to determine if one is a 'limb (b) worker' and entitled only to *some* labour rights. This adds some complication and has not yet been tested, so I will not discuss it further here. But there is every reason to believe that the system can be reliable for this determination as well.

The impact on misclassifications

Given that the proposed system will rely on the factual details submitted by the client/employer, can it be trusted to minimise instances of misclassification? While the worker will have the ability to request a re-assessment according to their own understanding of the facts, it should be assumed that most workers will not challenge the facts submitted by the employer, given the various barriers and the fear of losing the job offer. Relying on the facts submitted by the employer is obviously not ideal. But on the understanding that a quasi-judicial process to determine the facts is not realistic for the pre-authorisation stage, relying on the facts declared by the client/employer seems like the best alternative. To explain why I believe it can still have a significant impact on misclassifications, it is useful to distinguish between three types of employers. Yuval Feldman divides people who break the law into 'erroneous wrongdoers', 'situational wrongdoers', and 'calculative wrongdoers'.[46] Employers in the first group break the law mistakenly, because they are not aware of the law or do not fully understand it. Those in the second group realise that what they are doing is not in line with the law or at least questionable, but they rationalise it

45 In contrast, according to the model proposed by Buscaglia, n 3 above, the pre-authorisation would determine the conclusive status as employee or independent contractor. It would be a violation for an employer to knowingly make a false statement in the application, or to require the worker to perform services outside those described in the authorisation, *ibid*, 132. In my view, this would leave too little room for workers to challenge a status that was determined based on the employer's description of facts.

46 Yuval Feldman, *The Law of Good People: Challenging States' Ability to Regulate Human Behavior* (Cambridge: CUP, 2018) 61.

to themselves. They see themselves as 'good people', generally law-abiding, yet convince themselves that the specific action is not necessarily illegal, or at least morally justified. Employers in the last group are those who deliberately ignore the law because it is beneficial for them, without any moral hesitations. We do not know how many employers there are in each group, and in any case the lines between the groups are not always clear-cut. But the distinction between them is useful for analysing the expected impact.

Employers in the first group could be small employers, who do not have regular access to legal advice, and are not aware of the law concerning employee status; and also some employers who have ongoing access to legal services, but are unaware of the law – perhaps they see misclassifications being normalised in their sector – and fail to realise that they need to ask for legal advice on the matter. In these cases, the simple, procedural requirement of securing pre-authorisation for certain engagements is much more likely to be known and followed. And if the automated system will tell them that the worker in question should be treated as an employee, this will enlighten them about the law, which they can then be expected to follow. I will discuss below separately what this actually means for the worker, but for now the point is that misclassification is prevented.

Employers in the second group are those whose actions are shaped by various psychological mechanisms studied under the heading of behavioural ethics. People tend to deceive themselves, from time to time, in order to justify violations that serve their interests, or to turn a blind eye to the illegality and immorality of such actions. There is ample empirical evidence showing that people break the rules more easily if they can still convince themselves that they are moral, maintaining their self-image as 'good people'. The literature explores various mechanisms – such as 'moral disengagement', 'bounded awareness', 'ethical blind spots', 'motivated reasoning' and more – that people use to help themselves with such self-deceit.[47] An obvious solution in such cases is to force people to 'look in the mirror' and to recognise the truth. Given the indeterminacy of the law concerning employee status, it is quite easy for employers to tell themselves in a specific situation that the status is not clear-cut – ie there is a chance that the worker will be legally considered an independent contractor – and this is enough for them to choose this option (which is more convenient for them).[48] A pre-authorisation requirement will change that. Once the automated system tells the employer, officially, that the worker has to be treated as an employee, those in the second group will no longer be able to create a 'moral wiggle room'[49] for themselves. They can be expected to comply and avoid misclassification. Even in 'close call' cases – for example when the system concludes with 51 per cent certainty that someone is an

47 For an overview of this research see *ibid*, chs 1-2. For a brief summary, and some possible implications for improving compliance with labour rights, see Guy Davidov and Edo Eshet, 'Improving Compliance with Labor Laws: The Role of Courts' (2022) 43 *Comparative Labor Law & Policy Journal* 71, 77-80.

48 See Feldman, n 46 above, 102, 187 (open-ended standards open room for moral ambiguity).

49 Jason Dana and others, 'Exploiting Moral Wiggle Room: Experiments Demonstrating an Illusory Preference for Fairness' (2007) 33 *Economic Theory* 67.

employee – the legal requirement will now be crystal clear: engaging with someone as an independent contractor without pre-authorisation is prohibited.

What about the final group, the calculative wrongdoers? These are employers who have no moral problem ignoring the law, they do whatever is more profitable for them. To affect the behaviour of such employers we need to change their cost-benefit calculation. This can be done through deterrence, for example by increasing the probability of being caught by inspectors, and inflicting high penalties for violations. The pre-authorisation requirement can help these efforts in two ways. First, the new legal duty will be easier to enforce, being a procedural rule rather than an open-ended standard. Employers who fail to apply for pre-authorisation should expect high penalties. Second, if an employer's request is denied, and they choose to ignore this decision and proceed with the independent contractor engagement without pre-authorisation, the cost side in the calculation becomes clearer. They face the risk of the penalty for breaking the law regarding pre-authorisation, as well as a high risk of losing in a case concerning misclassification, if either the worker or the state initiate one. Moreover, the worker will automatically receive the information about the request being denied, which is likely to significantly raise the chance of a legal suit later on. For such purposes, the message to the worker should provide a clear explanation of its meaning, and efforts should be made to ensure that the details provided by the employer about the worker and their contact information are verified.

This analysis applies whether an employer misclassifies one specific employee, or thousands of them at the same time. Imagine, for example, an on-demand platform relying on numerous drivers who are classified as independent contractors, but appear (based on a legal analysis) to be employees. Ignoring the need to apply for pre-authorisation is unlikely, assuming there is a high fine (multiplied by the number of drivers); it is a procedural requirement relatively easy for the authorities to enforce. For the same reason, the platform is unlikely to treat the drivers as independent contractors if a request for pre-authorisation is denied. The platform might try to report false facts and secure a bogus authorisation, but the proposal includes some safeguards against that. In any case, the expectation is not to achieve zero misclassifications, but rather to reduce their numbers significantly.

The discussion in this section helps to further clarify the difference between changing the legal default and merely creating a legal presumption of employment. A legal presumption can possibly raise awareness and thereby somewhat reduce misclassifications by 'erroneous wrongdoers' (the first type of employers). Even that is far from certain. For the other two groups, it is hard to expect any change in their behaviour as a result of a legal presumption. For the 'situational wrongdoers', there would still be plenty of wiggle room to convince themselves that they are not doing anything wrong; the tests are still indeterminate, and there is nothing wrong about contracting with someone as an independent contractor in principle. A presumption will not change any of that. For the 'calculative wrongdoers', who will calculate the risk of being sued, the impact of a presumption on their calculations will be small, as already explained

above.[50] In contrast, once we change the legal default, the wiggle room for self-deceit disappears, enforcement becomes easier, and the cost of misclassification becomes much more determinate and significant.

The impact on employers – and on small businesses

In the previous section we have seen how the proposal can be expected to minimise misclassifications. This is true whatever the reason that the employer is contemplating treating an employee as an independent contractor. It is important, however, to consider additional expected impacts, and I start here with the impact on employers, and on small businesses.

On its face, a pre-authorisation requirement could be seen as a bureaucratic nightmare, slowing down the ability of businesses to operate. But with AI capabilities, it becomes just a simple form that the client/employer has to fill online, with the authorisation received immediately from the automated system. For clients who engage with genuine independent contractors, the burden will be minimal and the cost negligible. The exemption of short-term isolated engagements would also help to ensure that.

What if the client secures pre-authorisation, but learns that the confidence of the system in the independent contract status is low (say, 51 per cent)? A risk-averse client might choose to forgo the engagement with the specific contractor and engage with a larger business instead. This can be seen as creating inefficiency (the client did not get to work with its first choice of a contractor) and also a disadvantage for small businesses, that are often seen as an important and valued part of the economy. However, the same results can be expected from gaining access to human legal advice. It is difficult to find fault in providing free legal advice just because the additional knowledge affects people's decisions. Moreover, the advice provided by the automated system can equally have the opposite impact. Imagine, for example, a business interested in engaging with an independent contractor, but worried about the possibility of a future misclassification claim. With assurances from the automated system (say, probability of 60 per cent or more), some clients could be more inclined to engage with small businesses than before.

What if the automated system gets it wrong? Imagine that the system denies a pre-authorisation application because it concludes that a worker is an employee, but a court later decides that it was in fact a genuine independent contractor engagement. Most likely the system was not strictly speaking wrong because it still contemplated the eventual outcome with some probability (less than 50 per cent). But it is fair to say that the authorisation was denied in error in such a case. Another possibility is that the system made a mistake and did not calculate the probabilities properly. This should be rare – we know that the system can be highly accurate – but possible. In both of the situations just mentioned, in retrospect we can say that the pre-authorisation requirement has frustrated the choice of a contractual partner, thereby interfering with the

50 See text to notes 27–30 above.

parties' autonomy and probably causing some inefficiency. This is certainly a cost. It can be compared to a licence application, or a permit application, or a merger plan, that can be denied by the relevant authorities in error (an error later corrected in court). We accept these costs because of a strong societal interest in requiring pre-authorisation for the licence, or permit, or merger. We should accept it in the current context as well, because of the strong societal interest in preventing employee misclassification, and given the expectation that mistakes will be quite uncommon. As explained above, the current baseline is highly problematic. By giving employers the power to set the legal default, we allow them, in effect, to misclassify employees as independent contractors, because we give their choice of status legal power until a court rules otherwise. Given that the current baseline cannot be justified, the cost of an occasional mistake after changing it should not be overstated. It is better to err on the side of an occasional impediment to economic activity, than to continue to allow prevalent misclassifications.

Note also that when a client/employer request for pre-authorisation is denied, they have several ways to mitigate the cost. In effect they are told: do not hire someone with many characteristics (or vulnerabilities) of an employee, who is most likely legally an employee, and treat them as an independent contractor. In response, the employer can appeal before a human decision-maker (either a governmental agency, if the legislature decides to create such a process, or a court of law). Assuming that many employers would prefer to avoid the costs of such a process, they can choose to hire the same person as an employee, or alternatively to engage with someone else in a different format. In both of these cases, the employer is 'pushed' away from a questionable legal choice, but it has alternative ways to proceed with its plan to secure specific work, thereby mitigating to some extent the cost of the denial.[51] There is another possible course of action that is more problematic. The employer can change some of the reported facts and re-apply to secure the approval, possibly without changing the real characteristics of the relationship. This is no different from any other case of the employer providing fake facts (which can also happen, of course, in the original application) – an issue I discuss in the next section.

The impact on workers

I have argued above that a pre-authorisation requirement can be expected to significantly minimise employee misclassifications. This is obviously good for workers. Most important, of course, is the reversal of the legal default; but the proposal also includes several other components designed to help workers when challenging misclassifications. They will have access to free (even if preliminary

51 Compare with the possible responses to a minimum wage law: even for an employer operating efficiently, there are various ways to mitigate the cost, and sometimes even to avoid it altogether by choosing a 'high road' strategy instead of an equally efficient 'low road' one. See Simon Deakin and Frank Wilkinson, 'Labour Law and Economic Theory: A Reappraisal' in Gerrit de Geest, Jacques Siegers and Roger van den Bergh (eds), *Law and Economics and the Labour Market* (Cheltenham: Edward Elgar, 1999) 27.

and non-human) legal advice about their status, with the information automatically sent to them. If the case is a 'close call' one they will know that there is a fair chance to challenge it in court. The workers will also have access to the employer's reported facts, which can be used – if the real facts are different – to support the legal challenge.

Some readers might wonder why workers should have the right to challenge the facts reported by the employer at any stage, rather than only at the beginning. If a worker does not challenge the facts when receiving a copy of the authorisation, it could be argued that they accept this version by continuing the engagement as an independent contractor. However, the principle of nonwaivability which is fundamental to labour law highlights the difficulty in accepting any such waiver of rights.[52] According to existing laws, workers who sign contracts suggesting that they are independent contractors and listing various agreed facts, can challenge this status as well as the facts at any stage. There is no reason to change this law when adding a pre-authorisation requirement.

Is there a risk of the proposed new law 'backfiring' and harming workers in some situations? It is possible that employers who now engage with workers as employees will be enticed to examine the possibility of the independent contractor option. The availability of an immediate no-cost authorisation might lead some employers to think that it is worth a try, even if they did not consider it before. A related problem is that employers might be able to use the system to learn exactly which changes can bring them above the 51 per cent line, thereby framing the relationship a little differently to avoid employment. Note that this would not be misclassification, assuming that the client/employer reports the correct facts, ie that the change in the characteristics of the relationship is real. Still, in some cases, the change may not be what the worker in question has wanted. Note, however, that this is not a new problem. In many cases – whether they amount to misclassification or not – the format of the engagement as an independent contractor, and various elements leading to this classification, are imposed on the worker. It has to be acknowledged that the proposed automated system for pre-authorisations might exacerbate this problem by opening a new way for employers to 'game the system'. But given that pre-authorisation does not protect the employer from the possibility of a misclassification lawsuit, it seems fair to assume that cases of additional misclassifications will not be very common, certainly if compared to the expected decrease in misclassifications thanks to the proposed requirement.

Another risk is that workers will be discouraged from bringing a misclassification claim to court because of the pre-authorisation. Some workers might feel that the issue is already settled and there is no point in challenging their classification. We should distinguish, however, between cases in which the challenge would have been successful, and cases in which it would have failed. As noted at the beginning of this part, the discussion is based on the assumption that pre-authorisation powered by AI can be highly accurate. In most cases we can assume that people will be discouraged from challenging the classification

52 Guy Davidov, 'Nonwaivability in Labour Law' (2020) 40 OJLS 482.

for good reason. The information provided to workers by the system – the probability upon which the assessment was based, the facts reported by the client/employer – can help them in making an informed decision. We can probably expect fewer lawsuits claiming misclassification overall, but a higher percentage of successful claims.

Public costs

A cost-benefit analysis has to take into account the estimated impact on public resources as well. If employees are expected to bring fewer misclassification claims to court, this will save public resources. In contrast, there is the cost of building and maintaining the automated system, but this seems relatively negligible and mostly a one-time investment. We can also expect some added litigation initiated by employers, following denial of pre-authorisation applications. Creating an administrative process of appeal might be a good idea, not only to ease economic activities but also to lower the public costs. Either way, some costs can certainly be expected because of employer appeals. It is difficult to estimate how significant these costs will be, but there are reasons to believe that they will not be excessive. In most cases, it seems likely that employers will not bother to appeal, but rather find some other solution (as discussed above). If they do decide to appeal, it could be because the decision affects a large number of workers (for example drivers of an online platform); in such cases, there is a clear societal interest in resolving the issue one way or another, so the public costs can be easily justified. Moreover, against the additional cost of employer appeals, we have to consider not only the saving as a result of fewer workers' suits, but also the benefits of dramatically reducing misclassifications. Alongside the benefits to the workers themselves, there are significant societal benefits, both monetary (for example more tax payments) and non-monetary (for example vacation rights that positively affect the wellbeing of workers and their families).

IS IT JUSTIFIED TO RELY ON PROBABILITIES PRODUCED BY AI?

The proposal advanced in this article would give legal force to an assessment about the law created by AI. Any assessment of the law can only predict it with some probability, rather than claiming to know how the law applies in a given situation with absolute certainty. The reliance on an assessment of the probable law and the reliance on AI are two components of the proposal that can attract significant critiques. In this part my aim is to examine each of these issues separately, starting with the reliance on probabilities, then moving to the reliance on AI. It is important to bear in mind that I do not propose to set the final legal status of an employee or independent contractor based on AI-induced probabilities, but rather only the legal default, which can then be challenged in court. This is a big difference. Still, the legal default matters, and matters a lot – so

an attempt to justify this change must successfully confront the two challenges discussed in this part.

Relying on probabilities

For the sake of this section, assume that no AI is involved. Imagine that pre-authorisation is required to engage with someone as an independent contractor, but a governmental agency staffed by legal experts is in charge of examining the applications for authorisation. In principle, there are several options for such a model: the examination can be done in light of the facts reported by the employer, or the facts reported by the worker, or possibly even an attempt by the agency to determine the facts with some independent inquiry (such as an interview with the worker). Either way, without a full legal process, where all the evidence is presented by the parties and all the legal questions are fully explored, giving the agency power to determine the *final* legal status cannot be justified.

As already noted above, many workers are not aware of their rights, and will often be pressured to accept the status proposed by the employer without fully understanding the implications. Moreover, for many workers this is a 'take it or leave it' offer, where refusal to accept the status of independent contractor would mean loss of the job opportunity, sometimes the only opportunity available at a given time. The inequality of bargaining power characterising employment relations is always in the background. As a result, even if the agency will be checking the facts with the worker, the latter might respond as directed by the employer, thereby in effect waiving their employment rights, something that is not legally valid. These are more reasons to avoid determining the final legal status at the pre-authorisation stage; the worker must be allowed to challenge the status proposed by the employer (even if approved by the agency) later in court. Otherwise put, pre-authorisation will only make sense if it is understood as a preliminary assessment, designed to minimise situations of misclassification, without giving the employer immunity from future legal challenges. The governmental agency cannot *determine* the legal status of the worker, but will rather have to decide whether to grant authorisation based on an *assessment* of the law, in light of the reported facts.

Pre-authorisation by humans must therefore rely on what labour lawyers are commonly doing for clients: using their expertise to assess the expected resolution of a specific legal question. Lawyers advise their clients about the chances of litigation according to such assessments. They will rarely (if ever) conclude that the legal answer is 100 per cent certain, or anything close to that, but will provide an assessment based on *probabilities*. Sometimes they might provide a numerical estimate, more often they will suggest that a certain legal outcome is 'more likely' or 'very likely' or other such descriptions of probabilities. The hypothetical governmental agency will do the same, but with an important difference: the assessment will have, by itself, direct legal implications. Although it will not determine the ultimate legal solution, by setting the legal default it will have some significant normative power. Is it justified to rely on

a mere assessment of the probable legal situation for the imposition of legal limitations?[53]

A legal question such as determination of employee status is open to judicial discretion. If the agency estimates that a worker would be considered an employee with 80 per cent certainty, it means that in 100 cases based on the same set of facts, before different judges, the agency expects the worker to win 80 times and lose 20 times.[54] Anthony Casey and Anthony Niblett rightly point out that if we rely on probabilities to decide the case, we will end up changing the outcome for 20 per cent of the cases. They consider this problematic, especially because of the impact on settlements (which is how most cases conclude).[55] But if 80 out of 100 judges would decide the case in a certain way, it seems fair to conclude that this legal conclusion is, in fact, 'the law'. Not because the majority is inherently 'correct', but because the prevailing view represents the law. A person losing the case because they just happen to fall on a judge in the minority (20 per cent) group can rightly complain that they lost because of bad luck, not because it is the law. Daniel Kahneman, Olivier Sibony and Cass Sunstein call this 'noise' (distinguishing it from bias) – unwanted variability related to the identity of the judge, or other irrelevant factors that might influence them (how they decided the previous case, what day of the week it is, things that happen in their personal lives, etc).[56] Algorithms can eliminate such noise.[57] By relying on a prediction to determine the legal outcome, it is true that we will change legal outcomes (in 20 per cent of the cases, in the example above). But this is not a change in the law; rather, it is a more consistent application of it. Admittedly, this view is more challenging to accept when the probability of a given result is significantly lower. Imagine that the governmental agency predicts with merely 51 per cent probability that the worker will be considered an employee. With such a close call, it would be terribly misleading to consider the other 49 per cent as erroneous. Estimates attempting to predict how judges will rule on a given case are not exact science. We have to acknowledge that the closer the probability to 50 per cent, the greater the possibility of a mistake.

53 It should be clarified that this is not a situation of relying on 'bare statistical evidence' to impose legal liability, because the assessment of the law will be based on the *individualised* reported facts – on evidence that is specific to the parties concerned. On the problem of statistical evidence see for example David Enoch and Talia Fisher, 'Sense and "Sensitivity": Epistemic and Instrumental Approaches to Statistical Evidence' (2015) 67 *Stanford Law Review* 557. For recent discussions connecting this problem to AI systems, see Katrina Geddes, 'The Death of the Legal Subject' (2023) 25 *Vanderbilt Journal of Entertainment and Technology Law* 1 and Vincent Chiao, 'Algorithmic Decision-Making, Statistical Evidence and the Rule of Law' *Episteme* [forthcoming].

54 See Anthony J. Casey and Anthony Niblett, 'Problems with Probability' (2023) 73(Sup) *University of Toronto Law Journal* 92.

55 *ibid*. See also Hideyuki Matsumi and Daniel J. Solove, 'The Prediction Society: Algorithms and the Problems of Forecasting the Future' GWU Legal Studies Research Paper No 2023-58, GWU Law School Public Law Research Paper No 2023-58 (5 June 2023, revised 5 February 2024) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4453869 [https://perma.cc/R23U-YURQ], 32 ('Algorithmic predictions not only forecast the future; they also create it').

56 See Daniel Kahneman, Olivier Sibony and Cass R. Sunstein, *Noise: A Flaw in Human Judgement* (New York, NY: Little, Brown Spark, 2021).

57 Cass R. Sunstein, 'Governing by Algorithm? No Noise and (Potentially) Less Bias' (2022) 71 *Duke Law Journal* 1175.

Although I do not share the view of Casey and Niblett that changing legal outcomes by relying on probabilities is problematic in itself, I agree about the difficulty of such a method when the probability is relatively low. Casey and Niblett suggest a few possible solutions that would allow using predictions about the likelihood of certain results, while giving them only limited normative impact because of the difficulty noted above. From the alternatives they mention, the one most relevant here is to rely on predictive algorithms only in 'easy' cases. As an example, they mention 95 per cent certainty. At least in the context of determining employee status, this seems like setting the bar too high; not many cases will reach this level. A different solution, which the authors do not mention but could complement their list, is the one proposed here: relying on the prediction only for setting the legal default (through pre-authorisation), rather than the ultimate legal outcome. This would significantly lower the cost of mistakes. And if the prediction is not relied upon to set the final legal status, it will not have a significant impact on settlements. In the previous part I considered the expected implications on the parties in 'close call' cases, and concluded that the negative implications are quite minimal, compared to the benefits. In this respect, there is a big difference between relying on probabilities to determine the ultimate law, and relying on probabilities only to set the legal default.

Relying on AI

In the previous section I argued that giving normative power to predictions based on probabilities can be justified, at least when this normative power is limited to pre-authorisation setting the legal default – and the ultimate decision remains with the courts. As a thought experiment, I assumed that the assessment of probabilities is made by a human legal expert. But in practice, the pre-authorisation proposal is only realistic if some automated system is involved, ie if the new model relies on AI. Can this be justified?

The advance of AI technology has the potential to affect many aspects of our lives, and to some extent it already does. Alongside the gains to society that can be expected, there are also obvious concerns about letting machines make important decisions. This has led to passionate debates, including in the specific context of introducing AI into the legal process. The strongest objections are naturally against the more radical proposals, for example to rely on AI to achieve 'legal singularity' (a highly specified and personalised solution for every legal problem, replacing adjudication),[58] or to replace human judges with AI to one extent or another.[59] Many of the arguments against such proposals are not

58 Abdi Aidid and Benjamin Alarie, *The Legal Singularity: How Artificial Intelligence Can Make Law Radically Better* (Toronto: University of Toronto Press, 2023). For a critical view see for example Christopher Markou and Simon Deakin, '*Ex Machina Lex*: Exploring the Limits of Legal Computability' in Simon Deakin and Christopher Markou (eds), *Is Law Computable? Critical Perspectives on Law and Artificial Intelligence* (Oxford: Hart, 2020) 31.

59 For discussions see Susskind, n 31 above; Sourdin, n 31 above.

relevant for the relatively modest proposal considered here. I will focus only on the arguments that are directly relevant.

Although relatively modest, the proposal is admittedly not at the bottom of the scale of AI applications in the context of determining employee status. The new predictive powers of AI can also be used to provide preliminary legal advice, letting workers know if they have a reasonable chance of winning a misclassification case – thereby suggesting to them that there is good reason to seek human legal advice.[60] Such a service offered to the public does not attract many objections, and can be very useful especially to those workers already suspecting misclassification but facing a barrier of the high costs of seeking legal advice. However, a system that merely offers an assessment of the legal situation does not address the main problems discussed above, and therefore cannot be expected to make a significant impact on the misclassification phenomenon. Most workers will not access the system on their own initiative; those who do, will face the significant barrier of the legal default. A legal challenge claiming employee status usually requires long and costly litigation, and until it is resolved the default chosen by the employer continues to apply. The proposal advanced here makes a big step further by relying on the AI prediction to change the legal default. Moreover, the prediction will reach *all* the clients/employers and those working for them as independent contractors, without requiring any initiative from the latter.

If one accepts the idea of changing the legal default based on a prediction of probabilities, together with the fact that AI predictions in this specific context are highly accurate, what are the remaining risks or worries? Four main issues can be identified. The first two relate to the characterisation of AI systems as 'backward-looking',[61] ie the fact that they are trained on past cases. This can lead to failures when applying the law to new forms of work relations. It also raises the worry of stagnation, given that we expect the law to develop through the discussion of new cases. A third concern is related to the impact that AI predictions might have on human judges when a case reaches the court, given the tendency to defer to technology. Finally there is the question of transparency – understanding the reasons behind a decision – which is important for the legitimacy of the system. I discuss each of these concerns briefly in turn.

New Factual Scenarios

While AI predictions regarding employee status can be highly accurate statistically, some mistakes are unavoidable. And it is fair to assume that such mistakes will be more common when dealing with new work arrangements – that is, factual scenarios that did not appear in previous cases which the system was

60 See for example the web legal tool, MyOpenCourt, discussed in Cohen and others, n 33 above. There are also some companies that offer a similar service to employers, especially to multinational firms interested in ensuring compliance with local laws. See for example https://lab.deel.com [https://perma.cc/MV8T-A2ZE].

61 Markou and Deakin, n 58 above, 63.

trained on.[62] Ideally, we would teach the automated system to apply a purposive approach – to analyse new forms of work through the lens of advancing the goals of labour laws, after entering those goals into the system.[63] When this becomes possible, the problem will be solved. But this is not how existing AI systems work.[64] The more different a case is from previous cases which are part of the data of the automated system, the higher the risk of a failed prediction. This is true regarding AI legal predictions in general, but the risk is significantly reduced in the specific proposal thanks to the creation of a list of questions. The employer will be asked to report the facts in a structured way. While the overall factual scenario may be new, the questions will help to focus the system on the specific facts that are most relevant for the determination of status.

If the system nonetheless fails to analyse a new work model, the impact of such a mistake is significantly reduced because of the possibility of bringing the case to court. Imagine first that the system grants pre-authorisation mistakenly, failing to appreciate that a new model of work (such as, for example, on-demand platform work) is in fact a new form of misclassification. In this case, the worker will be in the same situation as today: they will need to bring the case to court to challenge the new model. Now imagine that a pre-authorisation request is *denied* mistakenly, failing to appreciate that a new model of work is normatively different from employment. This can be seen as stifling innovation and reducing efficiency. But according to the proposal, the client/employer has the option of appealing the decision before a court (or potentially through an accelerated administrative process). The main problem for the employer in such cases is not the mistake of the system per se, but rather the fact that the legal default has changed, and any engagement with someone while considering them an independent contractor requires pre-authorisation. As already argued in the previous part, changing the legal default has some costs for businesses, but it is justified in light of the reality of prevalent misclassifications, which impose significant costs on vulnerable workers.

Hindering Legal Development

Courts obviously play an important role in developing the law. In the specific context, judges have been granted broad discretion to decide who is an employee. The tests adopted by courts to assist in this task have developed over time in various ways. Sometimes by adopting an entirely new test; a stunning example is the adoption of the ABC test by the California Supreme Court in 2019, a dramatic change from the previous test used in California.[65] At other

62 Harry Surden, 'Machine Learning and Law' (2014) 89 *Washington Law Review* 87, 105. And see Cohen and others, n 33 above, analysing the cases in which their system failed to predict the status correctly, and showing that those included the classification of gig workers in novel situations.

63 This is what Aidid and Alarie seem to envision, see n 58 above, 115. See also Sourdin, n 59 above, 232 (noting the difficulty of dealing with novel situations but also the fact that AI research is advancing towards making this possible).

64 For reviews of legal prediction systems see Medvedeva and McBride, n 36 above and Junyun Cui and others, 'A Survey on Legal Judgment Prediction: Datasets, Metrics, Models and Challenges' (2023) 11 *IEEE Access* 102050.

65 n 19 above.

times, changes have been more gradual, whether by adding more indicators,[66] or by articulating the ultimate purpose which should guide the determination,[67] or by changing the way that existing tests are being applied in practice. Christopher Markou and Simon Deakin describe this as 'an exercise in experimentation … a dynamic process'.[68] They explain that problems with existing laws are exposed through adjudication, leading to change. They bring the specific context considered here as an example: 'the categories used to determine employee status are dynamic, not static. They are continuously being adjusted in light of new fact situations coming before the courts for resolution'.[69] As the authors explain, legal evolution as a result of adjudication is not limited to direct updating of the tests by courts. Problems exposed by adjudication can also lead to legislative reform, and they can lead to commentary by academics, or to lobbying by interest groups, in turn later leading to legal change implemented either by courts or by the legislature.[70] Litigation is obviously not the only way to expose problems with existing laws, but it plays an important role in this process. In contrast, the authors claim, relying on machine learning 'would lock in existing solutions, leading to the ossification or "freezing" of the law'.[71]

Markou and Deakin conclude that (human) legal reasoning is necessary for the evolution of the law. Their view is critiqued by Abdi Aidid and Benjamin Alarie, who see it as lack of 'concern for those who can scarcely afford … to be experimented with'.[72] Aidid and Alarie focus on the problem of access to justice – the fact that most people cannot, as a matter of practice, enforce their rights. They prefer a legal system in which access to justice is quick and cheap (through AI), leaving the task of developing and improving the law to the legislature. The two views are in direct collision when debating the futuristic idea of 'legal singularity'. But in the current context they can co-exist. The proposal advanced here is designed first and foremost to improve access to justice – to address the misclassification problem and the enforcement crisis allowing it to flourish. It is intended to assist the misclassified workers who do not currently reach the courts and never challenge their misclassification. At the same time, the proposal recognises the importance of adjudication for legal evolution and preventing stagnation. The role of AI is limited to decisions on pre-authorisation; the ultimate decision about status will remain with the courts.

To be sure, pre-authorisations can be expected to reduce the number of court cases dealing with employee status quite dramatically, as noted in the previous part. But people will still have an incentive to bring a case to court when it is

66 See for example in Canada, *671122 Ontario Ltd* v *Sagaz Industries Canada Inc* 2001 SCC 59, adopting a list of indicators more detailed than the previous leading case of *Montreal* v *Montreal Locomotive Works* [1947] 1 DLR 161, 169.

67 See for example *Uber* v *Aslam* n 15 above; *McCormick* v *Fasken Martineau DuMoulin LLP* [2014] 2 SCR 108.

68 Markou and Deakin, n 58 above, 63.

69 *ibid*, 59.

70 *ibid*, 63-64.

71 *ibid*, 64. This can also be described as a 'conservative bias'; see Mike Zajko, 'Conservative AI and Social Inequality: Conceptualizing Alternatives to Bias Through Social Theory' (2021) 36 *AI & Society* 1047.

72 Aidid and Alarie, n 58 above, 98.

a 'close call' (authorisation granted with relatively low certainty). Also, when dealing with new forms of work, lawyers will realise that the automated system is less reliable, and that the chances before a court of law are higher. In short, while the overall number of cases will reduce, the most important cases – which lead to legal evolution – are likely to still reach the courts.

Automation Bias

Given the risk of AI decisions perpetuating bias, or otherwise being harmful, a common solution advanced by scholars and regulators is to require a 'human in the loop'. For example, in the context of algorithmic management tools used by employers, it is maintained that the algorithm should not be allowed to make decisions about dismissals. While a business can use automated systems as an aid in evaluating the performance of employees, the ultimate decision in a crucial matter such as terminating a person's employment has to be made by a human manager.[73] A 'human in the loop' requirement has the advantage of making the employer accountable for the decision, rather than hiding behind the algorithm. And maybe, in this particular context, additional information about the employee (not known to the algorithm) will lead to a different decision. However, as far as the system's evaluation regarding performance is concerned, can we expect a human manager receiving this information to challenge it? Evidence suggests that people tend to defer to decisions of automated systems.[74] Does this apply also to courts examining claims of employee status, after the independent contractor status has been pre-approved by an AI system?

The ability to challenge the status before a court of law – with the ultimate decision taken by a human court rather than an automated system – is an important part of the proposed model. And we cannot completely rule out the possibility of some automation bias. However, several components of the proposal can be expected to minimise this problem significantly. First, the automated decision is not about facts but about their legal implication. The legal determination of status is understood to require judicial discretion, and involves some degree of policy considerations. Judges see this as their area of expertise and are less likely to defer to AI on such questions. Second, the pre-authorisation decision is made on the basis of facts reported by the client/employer before the beginning of the relationship. In contrast, the court will need to determine the facts after hearing and assessing all the evidence submitted by both parties, based on what is known at the time of the lawsuit. The facts are likely to be contested, and they may have changed over time. It will likely be clear to the court that at this stage the AI prediction is moot. Third, it is proposed that

73 See the new EU Platform Work Directive, n 28 above, Art 10(5). And see Jeremias Adams-Prassl and others, 'Regulating Algorithmic Management: A Blueprint' (2023) 14 *European Labour Law Journal* 124.

74 See for example Linda J. Skitka and others, 'Does Automation Bias Decision-Making?' (1999) 51 *International Journal of Human-Computer Studies* 991; Ben Green, 'The Flaws of Policies Requiring Human Oversight of Government Algorithms' (2022) 45 *Computer Law & Security Review* 105681. See also the discussion in Daniel J. Solove and Hideyuki Matsumi, 'AI, Algorithms, and Awful Humans' (2024) 92 *Fordham Law Review* 1923.

judges will be explicitly instructed by the legislation to ignore the AI prediction when considering employee status. This is very different from an agent asked to oversee the decisions of an automated system, to make sure that there are no grave mistakes. The fact that a full process of litigation is held before the court would also help to drive this message home and minimise the risk of automation bias.

Transparency

A common critique of AI decision-making refers to the automated system as a 'black box', in which the inner workings are not transparent and impossible to understand. Cary Coglianese and David Lehr distinguish between 'fishbowl transparency' and 'reasoned transparency', the former focusing on the 'ability to peer inside government and acquire information about what officials are doing' and the latter requiring the government to explain its actions by giving reasons.[75] AI systems generally raise concerns related to both types of transparency, but the availability of reasons for a specific decision is the problem most relevant in the current context. When a government agency makes a decision that directly affects us, such as denying an application for a permit or a licence, we expect it to provide reasoning. This is necessary in order to allow us to understand the decision and accept it as legitimate, and also to allow us to challenge it before a court. Transparency is equally important when decisions are based on AI.[76] It is crucial for the perceived legitimacy of such decisions,[77] and is seen as an important part of the rule of law.[78] Although some scholars argue that human decisions are not less opaque than AI ones,[79] I accept the view that complex, inscrutable machine learning algorithms reduce the realm of the humanly explainable in public life.[80]

These general considerations are clearly applicable when considering a decision about pre-authorisation for independent contractor engagement, whether it is taken by humans or by an automated system. When complex AI systems are deployed it might not be possible technologically to provide reasons, leading to debates about the trade-off between transparency and the benefits of such systems.[81] However, in the specific context discussed here – dealing with

75 Cary Coglianese and David Lehr, 'Transparency and Algorithmic Governance' (2019) 71 *Administrative Law Review* 1, 21.

76 See for example Tal Z. Zarsky, 'Transparent Predictions' (2013) *University of Illinois Law Review* 1503.

77 See Karl de Fine Licht and Jenny de Fine Licht, 'Artificial Intelligence, Transparency, and Public Decision–Making' (2020) 35 *AI & Society* 917.

78 See John Tasioulas, 'The Rule of Algorithm and the Rule of Law' in Christoph Bezemek and others, *Vienna Lectures on Legal Philosophy, Vol 3: Legal Reasoning* (Oxford: Hart, 2023) 17.

79 See Aziz Huq, 'A Right to a Human Decision' (2020) 105 *Virginia Law Review* 611, 640; Vincent Chiao, 'Transparency at Sentencing: Are Human Judges More Transparent Than Algorithms?' in Jesper Ryberg and Julian V. Roberts (eds), *Sentencing and Artificial Intelligence* (New York, NY: OUP, 2022) 34.

80 Eden Sarid and Omri Ben-Zvi, 'Machine Learning and the Re-Enchantment of the Administrative State' (2024) 87 MLR 371.

81 See Cynthia Rudin, 'Stop Explaining Black Box Machine Learning Models for High Stakes Decisions and Use Interpretable Models Instead' (2019) 1 *Nature Machine Intelligence* 206; Boris Babic

a relatively simple system, focused on a specific binary question and relying on structured information based on a list of questions – delivering reasons is entirely feasible and included as part of the proposal. The parties will be advised by the system, for each of the reported facts, whether it points in the direction of an employee or an independent contractor. The system will then explain that the overall picture of all those indicators taken together leads to a given determination, in light of previous case-law.

Admittedly, the exact relationship between the various indicators and their relative weights will remain a 'black box' of sorts, but this is true for the case-law as well. Some degree of opacity is inherent in multi-factor tests. The reasons that can be delivered by the system, as suggested above, are not very different from the reasons that would be delivered by human experts on the question of employee classification. Moreover, any party can challenge the decision of the automated system before a court, so access to a human decision with full human reasoning would remain available according to the proposal.

CONCLUSION

Employee misclassification is a perennial problem in labour law, with dire implications for workers, who lose the protections that they need and deserve. Over the years the efforts of labour law scholars to address it have focused mostly on improving the tests used to distinguish employees from independent contractors. In recent years there is growing interest among labour law scholars and policy-makers in the problem of enforcement, leading to various ideas to improve compliance and enforcement. Misclassification is now addressed not only through the prism of employee tests, but also as part of the enforcement problem, alongside other (more specific) violations of labour laws.

Both of these bodies of literature – one dealing with the question of 'who is an employee' and the other with the enforcement crisis in labour law – are highly important. However, neither one of them offers a sufficient solution to the misclassification problem. This is not a critique of the scholarship on these two questions, which I have contributed to myself and believe to be useful in many ways; it is just an acknowledgment that the specific problem of misclassification requires a unique solution. We cannot assume that improving the tests – an important goal in itself – would make a big difference for those unable to reach the courts. Similarly, we cannot assume that general solutions for better compliance and enforcement would work for this particular transgression. The goal of this article was to offer such a unique solution. It does not come instead of other solutions or proposals to reduce the indeterminacy of the tests or to reduce the barriers to self-enforcement, but is rather intended to supplement them.

I have argued that employers often have *de facto* power to set the status of those working for them. If an employer decides to classify a worker as an independent

and I. Glenn Cohen, 'The Algorithmic Explainability "Bait and Switch"' (2023) 108 *Minnesota Law Review* 857.

contractor, this becomes the applicable legal status until a court rules otherwise; but most workers will not challenge their classification because of various barriers. To seriously tackle misclassification – to reduce it dramatically – we have to change the default. Engaging with someone as an independent contractor should be prohibited unless an individualised pre-authorisation is secured for such classification. This solution seemed unrealistic until recently, but thanks to the advancement in AI technology it is now possible. The proposal for requiring pre-authorisation from an automated system was advanced in this article by putting forth the details of the proposed model, exploring the expected impact on employers, workers and others, and examining whether the reliance on an AI system can be justified. I concluded that the model can be structured in a way that minimises the risks and that the expected costs are quite negligible compared to the benefits. When proposing new legislation in this field, the question of political feasibility always looms large in the background. I have tried to explain why the proposed change would not be radical, and how it would help advance the goals of existing labour laws by preventing evasion. In theory at least, this should help to dispel some of the objections.

Is it possible to use the proposed solution to address other labour law violations as well? This is not straightforward, but some of the analysis included here is relevant for other such cases, with some adaptations. This requires more research. Moreover, at a more general level, the discussion in this article could hopefully be useful to show the potential of using AI in a specific legal context, and the conditions that could justify it.