

# THE AUTOCRATICALLY FLEXIBLE WORKPLACE

## A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

**Marc Linder**

**Fānpìhuà Press**  
**Iowa City**  
**2002**

Digitized by Google

Original from  
UNIVERSITY OF MICHIGAN

HD  
5111  
.U5  
L56  
2002

Copyright © 2002 by Marc Linder  
All rights reserved  
Printed in the United States of America

Cover illustration: Ralph Reichhold, "The Great Puzzle!"  
*The Pittsburgh Press*, Dec. 16, 1937, at 16, cols. 4-7, with  
permission of the *Pittsburgh Press-Gazette*. The cartoons  
by Ralph Reichhold, "Out of Order!" and "Just About  
Washed Up!" appeared in *The Pittsburgh Press* on Dec. 1,  
1937, at 14, col. 4-7 and Dec. 6, 1937, at 14, col. 4-7, and are  
reprinted between pages 150 and 151 with permission of the  
*Pittsburgh Post-Gazette*.

Suggested Library of Congress Cataloging  
Linder, Marc, 1946—

The Autocratically flexible workplace:  
A History of overtime regulation in the  
United States/by Marc Linder.

viii, 532; 23 cm.

Includes bibliographical references and index

ISBN 0-9673899-9-2

1. Overtime--United States. 2. Hours of labor--laws and legislation--United  
States--history. 3. United States. Fair Labor Standards Act of 1938.

HD5111.U5 L56 2002

331.2572—dc21 Library of Congress Preassigned Control Number: 2002105994

# Part I

## Introduction

The Department of Labor and Industry and the Industrial Board is empowered by the statute to grant "overtime" in appropriate instances, i.e. to grant the privilege of employing workers more than eight hours per day where unnecessary hardship would otherwise be entailed. What form of statute meeting the needs of public health and welfare would these [employer-]plaintiffs prefer? Would they be better pleased with a law establishing a truly rigid eight-hour day and containing no provision for variation? Would they prefer a law establishing an invariable basic eight-hour day but permitting "overtime" at a scheduled increase in compensation? Clearly a general provision for "overtime" transforms hour legislation into a thinly-disguised wage bill; in effect the Legislature says to employers, "You may consistently work your employees excessive hours, detrimental to both public health and welfare, if you only pay them enough." As a matter of fact, the statute in question is as mild as any such legislation feasibly could be and still accomplish the objectives of promoting public health and welfare. Obviously, the real objections of the plaintiffs are not to the terms of this act, but to any form of regulation of hours of employment.<sup>1</sup>

---

<sup>1</sup>Brief for Appellants [Penn. Dept. of Labor and Industrial Board] 99-100, *Holgate Bros. Co. v. Bashore*, 331 Pa. 255 (1938).



## Autocratic Flexibility

It is wrong for the Government to deny our citizens the privilege of working as long as they wish so long as the choice is theirs and so long as the opportunity presents itself.<sup>1</sup>

[M]y grandfather at the turn of century fought for the 40 hour [week]. His slogan used to be, “8 hours for work, 8 hours for rest and 8 hours for what we will.” I am not sure what the slogan is for a 72 hour week or a 96 hour overtime over a three week period.<sup>2</sup>

As the word “overtime” in the sense of abnormally long workdays or work-weeks has come to share cramped dictionary space with the alternative, positively-valued meanings of the premium wage for such work and the extension of a tied sporting contest, its original, distinctly unpleasant significance for workers has been submerged.<sup>3</sup> Nevertheless, employers’ power to compel employees to work beyond their normal hours—or lose their livelihood—remains a stark reminder that the modern “flexible” workplace is no haven of libertarianism. Acquiescence in this autocratic regime is in part accounted for by an ideological inversion, which enables the power of profit-making capital to legitimate itself as carrying on business “for the benefit of the community at large,” meaning the market and the aggregated demand of consumers in search of commodities now, whereas recalcitrant workers are viewed as selfish owners of one factor of production, who are thwarting the general will “for the benefit of a particular class....”<sup>4</sup> Employers’ ideological success is also a gauge of the decline of the early twentieth-century progressive consumers’ movement, which conceived of

---

<sup>1</sup>*Overtime Penalty Pay Act of 1964: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 2d Sess. Pt. 2 at 768 (1964) (statement of Rep. John B. Anderson).

<sup>2</sup>[Maine] *Legislative Record*, H-2022 (Rep. Samson, Mar. 30, 1998). The word “week” has been substituted in brackets for “day,” which was manifestly a typo or a misspeaking.

<sup>3</sup>The sports meaning is even illustrated before the workplace meaning in *Webster’s Third New International Dictionary of the English Language Unabridged* 1611:2 (1993). Even for the newspaper of record, a computer search reveals that the vast majority of uses of “overtime” in *The New York Times* are sports-related. Whether the participants share the spectators’ excitement or regard extended time as unpaid overtime work may in large part be a function of their perception of their activity as play and/or work.

<sup>4</sup>*Hersees of Woodstock Ltd. v. Goldstein*, 38 Dominion Law. Rep. (2d) 449, 454 (Ontario Ct. App. 1963) (holding that a union’s putative right to engage in secondary picketing must yield to a store’s “right to trade”). A related phenomenon of ideological inversion situated on a different epistemological plane causes newspaper reports of strikes “to describe the event as the story of interference with the reader’s life.” Walter Lippman, *Public Opinion* 350 (1960 [1922]).

consumers “as the arbiters of the interests of the community, or the ‘general welfare’” in fostering “ethical consumption” designed to improve working conditions and raise labor standards.<sup>5</sup>

In a renewed drive to repress the irrepressible fact that the commodity labor power is inseparable from mortal human beings seeking to lead another life outside the sphere subject to the monolithic laws of capital’s self-valorization, employers all over the world adamantly insist that labor standards laws are “out of touch with the business realities and social aspects of the new world of work. The new world involves 7 days a week, 24 hours a day, ‘just in time’ demands on businesses....”<sup>6</sup> Not surprisingly, the pressures inherent in such just-in-time regimes have increasingly spawned disputes over the imposition of overtime work.<sup>7</sup> Even firms that do not seriously question “the role of the government as a guarantor of the minimum standards of employment for all employees,” have vociferously objected to state control of hours of work. In their drive to attain the “flexibility” needed to accommodate “customers’ demands” and expand their hours of operation, employers, even in countries that merely impose overtime premiums rather than maximum-hours caps, have demanded the right to “exploit their power” to “enter into private agreements with their employees that circumvent” national norms.<sup>8</sup> Thus one Canadian employers’ organization urges the creation of the right to opt out of compulsory labor norms so long as employees “have freely entered into agreements to work outside the strict requirements” of the law. As the prime example of what it regards as the law’s inefficient impediment to flexibility the group cites overtime regulations: “[I]f an employee wished to work more hours in order to earn money to meet certain personal needs and the employer has work available, but does not wish to pay overtime for that work, they cannot agree to have that work performed at straight time rates, even though both the employer and the employee mutually benefit from that arrangement.”<sup>9</sup>

The enormous increases in the productivity and intensity of labor that have brought about a post-industrial, hi-tech, information society have done little to

---

<sup>5</sup>Landon Storrs, *Civilizing Capitalism: The National Consumers’ League, Women’s Activism, and Labor Standards in the New Deal Era* 18, 19 (2000).

<sup>6</sup>Coalition of BC Businesses, *Labour Policies that Work: A New Vision for BC: Response to Fair and Effective: A Review of Employment Standards in British Columbia* 8 (Dec. 2001), on <http://www.cfib.ca/legis/bcyukon/index.asp>.

<sup>7</sup>Richmond Die Casting Ltd. and C.A.W., Local 1994, 44 C.L.A.S. 197 (1996); DDM Plastics Inc. and I.A.M.A.W., Local 2792, 94 Labour Arbitration Cases (4th) 215, 217 (2001).

<sup>8</sup>Mark Thompson, *Rights and Responsibilities in a Changing Workplace: A Review of Employment Standards in British Columbia* 23, 102, 104 (1994).

<sup>9</sup>Coalition of BC Businesses, *Labour Policies that Work: A New Vision for BC: Response to Fair and Effective: A Review of Employment Standards in British Columbia* at 19.

abate capitalism's drive to impose a longer workday and workweek than millions of workers want to work. Although rising productivity makes shorter working hours possible and heightened fatigue associated with greater intensity of labor should make them necessary,<sup>10</sup> employers and economists still regard longer hours as a means of boosting the rate of growth and accumulation.<sup>11</sup> Nor has the rhetoric of the new virtual economy rid capitalists of their venerable habit, as Victorian factory inspectors put it, of "petty pilferings of minutes"<sup>12</sup> of unpaid overtime labor: by massively ignoring the law, employers in the United States have "shortchanged" employees by a conservatively estimated \$19 billion a year.<sup>13</sup>

The end of the nineteenth and beginning of the twentieth century witnessed large-scale campaigns by organized labor for the eight-hour day. A century later the legislative initiative on hours regulation in the United States (and other advanced capitalist societies) has passed back to capital. The so-called maximum hours provision of the Fair Labor Standards Act (FLSA),<sup>14</sup> which in reality is merely a "maximum nonovertime hours" provision—designating "40 hours as the maximum number that an employee subject to its provisions may work for an employer in any workweek without receiving additional compensation at not less than the statutory rate for overtime"<sup>15</sup>—has never prohibited employers from working their adult employees for as long as firms find necessary: "Not only may an employee be worked twenty-four hours per day; but one hundred and twenty-four hours of overtime per week would not violate the law so long as the employee was paid for all such overtime at the required rate."<sup>16</sup> While more than

---

<sup>10</sup>Edward Denison, *Why Growth Rates Differ: Postwar Experience in Nine Western Countries* 59 (1969 [1967]).

<sup>11</sup>Edward Denison, *The Sources of Economic Growth in the United States and the Alternatives Before Us* 35-66 (1962).

<sup>12</sup>*Reports of the Inspectors of Factories for the Half Year Ending 31st October, 1856*, at 48 (C. 2153, 3 Parl. Pap. 1857 Sess. 2).

<sup>13</sup>G. Pascal Zachary, "Shortchanged: Many Firms Refuse to Pay for Overtime, Employees Complain," *Wall St. J.*, June 24, 1996, at A1 (Westlaw). See also Brian Tumulty, "Many Low-Wage Workers Getting Shortchanged on the Job," *Gannett News Service*, Dec. 20, 1997 (Lexis); Marc Linder, "*Moments Are the Elements of Profit*": *Overtime and the Deregulation of Working Hours under the Fair Labor Standards Act* 209-11 (2000).

<sup>14</sup>The title of the overtime provision is "Maximum Hours." Fair Labor Standards Act of 1938, ch. 676, § 7, 52 Stat. 1060, 1063 (current version at 29 U.S.C. § 207 (1994)). As a court noted with regard to a related statutory term (used in § 218): "'Maximum workweek' does not in fact limit the number of hours an employee may work. ... It must refer to that number of excess hours worked for which an overtime rate must be paid." *State v. Comfort Cab, Inc.*, 286 A.2d 742, 748 (N.J. Super. 1972).

<sup>15</sup>29 C.F.R. § 778.101 (2001).

<sup>16</sup>*Missel v. Overnight Motor Transp. Co.*, 126 F.2d 98, 104 (4th Cir. 1942). The court calculated 124 hours as the difference between the 168 hours in a week and the 44-hour statutory overtime threshold that was in effect in 1938-39 when the action arose.

a hundred countries from Albania to Zimbabwe statutorily impose a maximum limit on the length of the workday or week and/or the number of overtime hours per day, week, month or year, the United States stands virtually alone among major economic powers in entrusting the enforcement of this crucial labor norm exclusively to a legislated financial disincentive.<sup>17</sup>

The possible components of a national working-time regime<sup>18</sup> include: (1) a definition of the length of the normal workday and workweek beyond which employers: (a) may not require or permit workers to work additional hours at all; (b) are privileged to require or permit workers to work additional hours, but only subject to certain conditions; or (c) must pay a wage premium/penalty for the privilege of operating such an overtime system; (2) a right to refuse to work such overtime hours; (3) the maximum number of permissible daily, weekly, monthly, and/or annual overtime hours; (4) the maximum number of total permissible daily or weekly hours equal to the sum of normal and overtime hours; (5) a fixing of the overtime premium/penalty; (6) the minimum number of mandatory weekly or monthly days of rest; (7) a limit or ban on unsocial night and weekend hours; (8) the minimum number of days of mandatory annual paid leave (vacation)<sup>19</sup>; (9) the designation of public holidays: (a) on which non-essential employment is prohibited<sup>20</sup>; (b) which must be compensated at regular rates even if work-free; or (c) which, if worked, work must be compensated at overtime rates<sup>21</sup>; and (10) the minimum scope of mandatory meal, rest, and bathroom breaks.<sup>22</sup>

No country rigorously enforces a national working-time regime incorporating all of these dimensions, but the system prevailing in the United States is especially and distinctively underdeveloped: its national law encompasses only the setting of an aspirational 40-hour week and the requirement of a 50-percent wage premium/penalty for overtime hours.<sup>23</sup> And even this meager protection excludes

---

<sup>17</sup>International Labour Office, *Conditions of Work Digest*, vol. 14: *Working Time Around the World* 289-92, tab. 2 at 319-36 (1995).

<sup>18</sup>Unless otherwise noted, most of these components are included in the Council Directive 93/104/EC of 23 November 1993 Concerning Certain Aspects of the Organisation of Working Time, in *Official Journal of the European Communities* L 307/18-24 (Dec. 13, 1993) or in European national statutes; see below ch. 16.

<sup>19</sup>Paul Blyton, *Changes in Working Time: An International Review* 77-88 (1985).

<sup>20</sup>General Laws of Massachusetts, ch. 149, § 45 (2000).

<sup>21</sup>An Act to Revise the Law Relating to Employment Standards, §§ 24-32, Ontario Stat. 2000, ch. 41, at 799, 821-26.

<sup>22</sup>Cf. Iain Campbell, "Cross-National Comparisons—Worktime Around the World: 3. Why Is Australia Distinctive" (Aug. 10, 2001), on <http://www.actu.asn.au/vunions/actu/article.cfm?objectid=20295E92-CB16-47AB-B07BC0EEC9158FEE>.

<sup>23</sup>State laws in the United States provide fragmentary protection in the form of days of rest, rest and meal breaks, and public holidays. On the lack of nationally mandated rest and meal breaks and the vindication of the right to bathroom breaks, see Marc Linder and

from its scope almost 50 million workers (or 40 percent of all wage and salary employees) from managers to farm laborers.<sup>24</sup> Unsurprisingly, by the year 2000, workers in the United States worked the longest annual hours (1,979) in the advanced capitalist world.<sup>25</sup>

Even the national working-time regimes of Japan and South Korea, characterized in recent decades by extraordinarily long annual working hours, not only include mandatory rest days, rest periods, and paid annual leave,<sup>26</sup> but are subject to several substantive overtime constraints. In Japan—where average annual hours were intentionally reduced, from 2,031 to 1,842, from 1990 to 1999<sup>27</sup>—employers under the Labor Standards Law are not only formally required to obtain the permission of the union or a person representing a majority of the employees before exceeding the eight-hour day or 40-hour week (at which point overtime rates ranging between 25 and 50 percent are imposed), but must also conform such overtime over a longer period of time to an average of 40 hours per week. Moreover, the workdays of those performing work underground or that is especially injurious to health may not exceed 10 hours, subject to further intervention by the Labor Minister, who may prescribe standards for limiting the extension of working hours based on workers' welfare.<sup>28</sup>

In South Korea, a newly industrialized country, but—with a per capita gross domestic product in 1999 only one-half of that of the United States—not in the group of advanced capitalist countries,<sup>29</sup> the world's longest working hours and very low wages undergirded the labor-repressive economic 'miracle' of the 1960s and 1970s,<sup>30</sup> reaching as many as 2,800 annually in factories producing for the world market in the mid-1970s; as late as 1986, the average workweek amounted

---

Ingrid Nygaard, *Void Where Prohibited: Rest Breaks and the Right to Urinate on Company Time* (1998).

<sup>24</sup>U.S. Dept. of Labor, Wage and Hour Division, *Minimum Wage and Overtime Hours Under the Fair Labor Standards Act: 1998 Report to the Congress Required by Section 4(d)(1) of the Fair Labor Standards Act*, tab. 2 at 14 (1998). The data, which are for 1996, show a rise in the proportion of excluded workers during the 1990s.

<sup>25</sup>International Labour Office, *Key Indicators of the Labour Market 2001-2002*, tab. 6b (2002), on <http://www.ilo.org/public/english/employment/strat.kilm/table/htm>.

<sup>26</sup>Rōdōkijunhō, art. 34, 35, and 3, on <http://www.geocities.co.jp/WallStreet-Bull/5198/rodokijunho.htm>; Labour Standards Law (Law No. 49 of Apr. 7, 1947, as amended by Law No. 104 of July 16, 1999), on <http://www.jil.go.jp/laborinfo-e/library/law1.shtml>; Labor Standards Act, Act No. 5309 (Mar. 13, 1997), as amended by Act No. 5885 (Feb. 8, 1999), art. 53-54, 57, 59, in Statutes of the Republic of Korea 19:1, 12-14 (1999).

<sup>27</sup>International Labour Office, *Key Indicators of the Labour Market 2001-2002*, tab. 6b.

<sup>28</sup>Rōdōkijunhō, art. 32, 36, and 37.

<sup>29</sup>United Nations Development Programme, *Human Development Report 2001: Making New Technologies Work for Human Development* 141 (2001).

<sup>30</sup>See, e.g., Richard Halloran, "South Korean Labor Benefits Little in Boom," *N.Y. Times*, Mar. 20, 1976, at 2:3.

to 57 hours.<sup>31</sup> At an annual average of 2,474 hours in 2000, South Korean workers still work the world's longest hours, though 215 fewer than in 1980.<sup>32</sup> Amendments in 1989 to the Labor Standards Act shortened the normal workweek from 48 to 44 hours and the normal workday is eight hours, but employers are granted a "flexible working hours system" permitting them to extend these norms, provided that average weekly hours over two weeks do not exceed 44 and hours in neither week exceed 48; a written agreement with the workers' representative privileges employers to average hours over four weeks, provided that the average does not exceed the 44-hour norm and no weekly or daily hours exceed 56 or 12, respectively. Workers are not entitled to premium overtime wages under this hours-averaging scheme—an exemption that employers in the United States are zealously pursuing—but under a separate provision requiring an agreement between the parties, employers must pay a 50-percent premium for weekly hours that may be extended for up to 12 beyond the norm. Under special circumstances, even this ceiling may be raised, with the Labor Minister's approval and the workers' consent; in urgent situations, an employer may obtain the Minister's approval after the fact, but if the Minister determines that the extension was inappropriate, he may order the employer to give the workers rest periods or days off equivalent to the unilateral extension.<sup>33</sup> Although the South Korean working-time regime is obviously exceedingly generous to employers, it nevertheless imposes absolute limits on the length of the workweek that have always been lacking in the U.S. labor-protective system.

Likewise, European countries have long prohibited employers from making full use of their economic power to compel workers to work supra-normal hours. Even in the United Kingdom, which until recently had outdone the United States in committing its national-hours regime to voluntarism in the form of collective bargaining (or individual adhesion contracts), implementation of the European Union's Working Time Directive in the 1990s has finally made principled inroads into the U.K.'s largely *laissez-faire* system.<sup>34</sup>

The three English-speaking, former white-settler colonies of the British Commonwealth maintain systems that differ from the U.K. and U.S. regimes.<sup>35</sup>

---

<sup>31</sup>Folker Fröbel, Jürgen Heinrichs, and Otto Kreye, *Die neue internationale Arbeitsteilung: Strukturelle Arbeitslosigkeit in den Industrieländern und die Industrialisierung der Entwicklungsländer* 538 (1977); U.S. Department of Labor, Bureau of International Labor Affairs, *Foreign Labor Trends: Korea, 1986*, at 5 (FLT-87-31, 1987).

<sup>32</sup>International Labour Office, *Key Indicators of the Labour Market 2001-2002*, tab. 6b.

<sup>33</sup>Labor Standards Act, art. 49-50, 52, 55, in Statutes of the Republic of Korea 19:10-13. On employers' efforts to amend the FLSA to create hours-averaging without overtime liability, see below chs. 1 and 18.

<sup>34</sup>See below ch. 16.

<sup>35</sup>International Labour Office, *Conditions of Work Digest*, vol. 14: *Working Time*

In governmentally centralized New Zealand, hours and overtime rates are determined by individual and collective contracts. To be sure, New Zealand's Minimum Wage Act fixes the workweek at 40 hours, but it also both excludes overtime and permits the parties to establish a longer workweek by agreement.<sup>36</sup> In Australia, "neoliberal notions of labour market deregulation...have grafted on to an inadequate inherited system" of compulsory conciliation and arbitration awards, which set hours and overtime premiums, "an even more inadequate system that fosters small islands of single-employer collective agreements and a sea of individual contracting." The result has been the emergence of a large and growing sector of the labor force working "very extended or indeed extremely extended weekly hours," many of them unpaid.<sup>37</sup> Thirty-one percent of full-time (largely non-professional managerial) employees work more than 48 hours per week. Australia also has "the developed world's highest rate of unpaid over-time, with 25% of full time employees not paid for an average 2.7 hours a week each."<sup>38</sup> However, in 2001-2002 the Australian Council of Trade Unions brought a (still pending) test case before the Australian Industrial Relations Commission seeking the insertion of a clause in awards prohibiting employers from requiring employees to work unreasonable hours;<sup>39</sup> the unreasonableness would be judged by reference to a large number of criteria, including the employee's total number of hours, risk of fatigue, and family responsibilities. In addition, under the unions' approach, employees would be given a two-day paid rest break if they worked an average of 60 hours over four weeks, 54 hours over eight weeks, or 48 hours over 12 weeks.<sup>40</sup>

Least laissez-faire of the three Commonwealth countries is Canada, whose federal government is constitutionally disabled from enacting national labor legislation. All Canadian jurisdictions impose overtime penalties, while legislation in the federal jurisdiction, Alberta, Newfoundland, Ontario, and the Northwest Territories impose various daily and/or weekly maximum hours limits; moreover,

---

*Around the World* at 64, 95-97, 193-95, 248-49.

<sup>36</sup>Minimum Wage Amendment Act 1991, § 10, N.Z. Stats. 1991, No. 27, at 298, 300-301.

<sup>37</sup>Campbell, "Cross-National Comparisons—Worktime Around the World: 3. Why Is Australia Distinctive."

<sup>38</sup>Australian Council of Trade Unions, "Reasonable Hours Test Case—Fact Sheet" (Nov. 19, 2001), on <http://www.vunions.com.au/vunions/actu/article.cfm?objectid=B2049F27-2E18-4AC1-8B692DA9E1BF73C4>.

<sup>39</sup>Australian Industrial Relations Commission, "Working Hours Statement" (Feb. 12, 2002), on <http://www.airc.gov.au/PR914347.htm>.

<sup>40</sup>"Unions Push to Stop Bosses' Forcing Overtime," *Sydney Morning Herald*, Feb. 12, 2002, at 4 (Lexis); Australian Council of Trade Unions, "Reasonable Hours Test Case—The Proposed Clause" (June 6, 2001), on <http://admin.vunions.com.au/vunions/actu/article.cfm?objectid=403B1267-5B81-4448-B7E7DF6B64EF39EA>.

laws in British Columbia, Manitoba, Ontario, Saskatchewan, and Yukon Territory facially entitle workers to refuse to work overtime.<sup>41</sup> The crucial distinction between, on the one hand, prohibiting long hours and/or giving workers the right to refuse to work such hours and, on the other hand, empowering employers to require workers to work beyond the standard workweek at premium wages or risk losing their livelihoods has become so unfamiliar to American public policy analysis that two U.S. labor relations scholars in a recent comparison of labor standards in the United States and Canada defined the category of “overtime/hours of work” exclusively by reference to the threshold number of weekly hours triggering premium pay.<sup>42</sup> This narrow view ignores the fact that the Canadian provincial labor standards laws entitling workers to refuse to work overtime represent a protective dimension virtually unheard of and unimaginable for the nonunion sector in the United States.

Disillusionment with the efficacy of overtime penalties as a means of deterring employers from forcing employees to work excessive hours is venerable. As far back as 1894, when New Zealand amended its Factories Act to permit some overwork by women and boys under 16 years of age in exchange for a premium: “It was expected to reduce greatly the amount of overtime worked, but...[w]hen trade was brisk the employers paid the extra money rather than delay to execute orders.”<sup>43</sup> As the FLSA’s time-and-a-half for overtime provision has increasingly lost its deterrent force, thus advancing the de facto deregulation of working hours, the labor movement has at times sought to make a virtue of the market-knows-best Zeitgeist by claiming that the “purpose of the FLSA’s overtime provision is not to create an entitlement of employees, who work long hours for premium pay for overtime work. Rather, its purpose is to generate a national system in which employers are discouraged from requiring overtime work. The overtime provisions of the Act are intended to be a free market mechanism to enforce a national ‘hours of work’ rule.”<sup>44</sup> Even when the labor movement takes the opposite position, pragmatically advocating creation of a right to refuse

---

<sup>41</sup>Canada Labour Code, §§ 169-74, in Revised Statutes of Canada 1985, ch. L-2 at 89-92; Human Resources Development Canada, “Hours of Work and Overtime” (Dec. 19, 2001), on [http://www.labour.hrdc-drhc.gc.ca/pdf/pdf\\_e/hours\(e\).pdf](http://www.labour.hrdc-drhc.gc.ca/pdf/pdf_e/hours(e).pdf); chs. 17-18 below (on Canadian provincial statutes).

<sup>42</sup>Richard Block and Karen Roberts, “A Comparison of Labour Standards in the United States and Canada,” *Relations Industrielles/Industrial Relations* 55(2):273-306 at 277, 288 (Spring 2000).

<sup>43</sup>William Pember Reeves, *State Experiments in Australia and New Zealand* 2:42 (1903).

<sup>44</sup>Michael Leibig, “The Attack on the Forty-Hour Week,” in *Hearings on the Fair Labor Standards Act: Hearings Before the Subcommittee on Workforce Protections of the House Committee on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 211, 213 (1996). Leibig is a long-time union-side labor lawyer.

mandatory overtime and preservation of “the right of workers to work long hours if they choose to do so,”<sup>45</sup> these efforts to salvage some elements of hours regulation ignore the contradiction inherent in basing mandatory labor standards on anarchic free labor markets, which tend to reach equilibrium at the lowest common denominator of employers that would prefer repeal of the statutory overtime penalty and a return to a totally unregulated working-time regime and choiceless or short-sighted workers, who must or will work however many overtime hours employers require of them.

An industrial bakery in a New York City suburb employing almost exclusively Latin American immigrants, many of whom are in the United States illegally, offers an apt illustration of the consequences of this libertarian subversion of labor norms. J. J. Cassone Bakery’s lawyer interprets its compulsory 72-hour weeks as what makes “[m]any of our employees...happy. They can work substantial hours and can make \$35,000 and up a year in what is basically a minimum wage industry.” Echoing this version, one Salvadoran worker asks rhetorically: “Do you think you can work just 40 hours a week and still buy a house?” Some workers are so paralyzed by this disembodied arithmetic that they voted against the Bakery and Confectionary Workers Union—which urges unionization on the grounds that payment of the \$11 to \$15 hourly wage rates prevailing at some unionized bakeries would make 40-hour weeks possible—precisely because they “fear that a union contract would limit them to 40 hours a week.”<sup>46</sup>

Nor are nonunion workers alone in being caught up in the contradiction. A recent survey of more than 4,000 unionized hourly workers in a broad range of industries in the United States found that 46 percent wanted to work even more weekly overtime than the 6.63 hours they were already working because they “feel they are likely to lose their jobs” and/or “cannot afford food, medical care, clothing, leisure activities, and monthly bills....”<sup>47</sup> The contradictory attitude was sharpened where Canadian members of the International Association of Machinists who wanted to avoid mandatory overtime were nevertheless suspicious of the employer’s proposal to create a student labor pool designed to make overtime voluntary for them: they “objected to other people being given the opportunity to work what would otherwise have been their overtime.”<sup>48</sup>

---

<sup>45</sup>Lonnie Golden and Helene Jorgensen, *Time After Time: Mandatory Overtime in the U.S. Economy 2* (Economic Policy Institute Briefing Paper, 2002), on <http://epinet.org>. The Economic Policy Institute is heavily funded by labor unions.

<sup>46</sup>Steven Greenhouse, “In Fierce Union Fight, Immigrants Are Torn,” *N.Y. Times*, Oct. 9, 2000, at A25:2-6 (nat. ed.).

<sup>47</sup>Cornell University School of Industrial and Labor Relations, Institute for Workplace Studies, “Overtime and the American Worker” [no pagination] (1999), on <http://www.ilr.cornell.edu/iws/WIS.html>.

<sup>48</sup>DDM Plastics Inc. and I.A.M.A.W., Local 2792, 94 Labour Arbitration Cases (4th

The Canadian Labour Congress (CLC)—the peak organization of Canada’s labor unions—at least acknowledges the existence of a division within the working class: “Long hours are not just imposed by employers. Many workers want to work overtime to maintain their standard of living at a time when real wages are stagnant or falling. Reducing overtime will involve a process of debate and discussion within the labour movement.”<sup>49</sup> Nevertheless, the CLC’s argument that “[w]e bargain premiums for overtime not as a reward but as a penalty”<sup>50</sup> fails to do justice to the self-defeating structure of the enhanced wage, which operates to motivate workers to work the excess hours.

And the contradiction is dissolved entirely, in an unexpected direction, when unions argue that collective bargaining agreements give individual workers “an absolute right to unlimited overtime.”<sup>51</sup> For example, the United Automobile Workers (UAW), demanding overtime work from a resistant employer, took Northern Telecom Canada, Ltd. to arbitration in the mid-1980s because the firm had failed to seek a second governmental permit to extend the number of overtime hours permissible under an exemption from Ontario’s Employment Standards Act, which imposes a maximum workday and workweek. In response to the union’s claim that the statute’s “provisions are minimum standards only and that a collective agreement can provide for greater entitlements,”<sup>52</sup> it was, conversely, the arbitrator who had to remind the UAW that:

overtime opportunity is not a benefit to which any positive entitlement is granted under the Act. Rather, the Act places a ceiling beyond which the employee is not permitted to work. The Act does provide minimum standards of pay in overtime situations but in no other sense may it be considered as a minimum standard of entitlement to actually work specific amounts of overtime. The intent and purpose of the overtime sections would appear to focus more on a protection of employees against exploitation by excessive use of overtime than on granting positive minimum entitlements apart from the actual rate of pay when working overtime.<sup>53</sup>

---

at 222.

<sup>49</sup>Canadian Labour Congress, “Creating More and Better Jobs Through Reduction and Redistribution of Working Time” 1 (1998), on <http://www.clc-ctc.ca/policy/jobs/create/html>.

<sup>50</sup>Julie O’Neill, “Labour Congress Plans Attack on Overtime: Move Could Create 200,000 New Jobs, Improve Family Life, Group Argues,” *Ottawa Citizen*, Sept. 8, 2001, at A5 (Electric Library).

<sup>51</sup>Canadian Union of Postal Workers and Canada Post Corp., [1983] A.J. No. 490, ¶ 4 (Alberta Ct. Queen’s Bench).

<sup>52</sup>Re Northern Telecom Canada Ltd. and United Automobile Workers, Local 1915, 25 Labour Arbitration Cases (3d) 444, 447 (1986).

<sup>53</sup>Re Northern Telecom Canada Ltd. and United Automobile Workers, Local 1915 at 448.

Yet at the same time 700 workers were laid off at the same factory, prompting a union leader to complain that the remaining workers' 12,700 monthly overtime hours were the result of their being "forced by the pressure of layoff threats to work as much as possible before they too become a layoff statistic" and to recommend a complete ban on overtime permits.<sup>54</sup>

The labor movement's self-contradictory position also overlooks the close affinity between "free-market" overtime laws and nineteenth-century declaratory or hortatory legal day's work statutes, which, in the words of the British economist William Stanley Jevons, "being purely permissive in character, ha[d] proved to be a dead letter."<sup>55</sup> New Hampshire enacted the first in 1847, titled, "An Act regulating the hours of labor in manufactories." It provided: "In all contracts for or relating to labor, ten hours of actual labor shall be taken to be a day's work, unless otherwise agreed by the parties; and no person shall be required to or holden to perform more than ten hours of labor in any one day, except in pursuance of an express contract requiring a greater time."<sup>56</sup> Such statutes, which indiscriminately classified involuntary overwork as consensual, reflected a conviction, not alien to that underlying the FLSA, that state intervention on behalf of workers "should not curtail individual liberty to contract, but could be effective without so doing."<sup>57</sup>

Nevertheless, the mere fact that the FLSA modestly charges employers for the privilege of violating the aspirational norm of a 40-hour week triggered employers' efforts in the 1990s, after the Republicans had gained a majority in both Houses of Congress, to repeal the act's "rigid and inflexible" hours provisions.<sup>58</sup> Associations of big and small businesses, represented by the Labor Policy Association and the Flexible Employment, Compensation, and Scheduling Coalition, began an "assault" on labor's "most sacred icon—the 40-hour week."<sup>59</sup> Employers are seeking to persuade Congress to create 80-hour two-week or even

---

<sup>54</sup>John Deverell, "Overtime Laws: Is It Time to Retool Them?" *Toronto Star*, July 29, 1986, at A14 (Lexis) (quoting Ken Ouellette, pres., Canadian Automobile Workers Northern Telecom Council). In the intervening period the CAW had been formed as the union declared itself independent of the UAW.

<sup>55</sup>W. Stanley Jevons, *The State in Relation to Labour* 64 (1882).

<sup>56</sup>1847 N.H. Laws, ch. 488, § 1 at 465-66. The Illinois legislature has never repealed its meaningless eight-hour law: "On and after the first day of May, 1867, eight hours of labor between the rising and the setting of the sun, in all mechanical trades, arts and employments, and other cases of labor and service by the day, except farm employments, shall constitute and be and legal day's work, where there is no special contract or agreement to the contrary." 820 ILCS 145/1 (1999).

<sup>57</sup>Elizabeth Brandeis, "Labor Legislation," in John Commons et al., *History of Labor in the United States, 1896-1932*, at 3:397-697 at 541 (1935).

<sup>58</sup>141 *Cong. Rec.* S 11787, 11788 (1995) (Sen. Ashcroft) (Lexis).

<sup>59</sup>Saul Friedman, "Time Short for 40-Hour Week? Partisan Clash over OT Rules," *Newsday*, Sept. 4, 1995, at A21 (Lexis).

160-hour four-week pay periods, during which they would be even freer than their aforementioned competitors in South Korea to work their employees any number of hours during an individual week without being required to pay time and a half for hours beyond 40 per week.<sup>60</sup> In contrast, the labor movement, although successful in warding off such thrusts under a Democratic president, is in no position to secure enactment of statutory protection against employers' power-based imposition of mandatory overtime, let alone to persuade Congress that a shorter workweek is possible and desirable.

In spite of the considerable attention paid to employers' recent campaign to roll back hours regulation, participants and observers have overlooked capital's vigorous opposition to such government intervention literally since the day the FLSA went into effect in 1938. The balance of social and ideological forces has become so skewed that, without having to fear public ridicule in the press, in 1995 Republican Senator John Ashcroft could characterize a bill that empowered firms to eliminate the aspirational 40-hour week as "put[ting] work schedule decisionmaking back in the hands of employees."<sup>61</sup>

In the latest iteration of this plan, Republican Senators Judd Gregg and Kay Bailey Hutchison in March 2001 introduced the Workplace Flexibility Act,<sup>62</sup> which Gregg touted as capable of having a "monumental impact on the lives" of workers.<sup>63</sup> Despite the fact that the proposal not only does nothing to shorten the workweek or interfere with employers' power to impose overtime work, but in fact presupposes that workers will continue to be "required to work overtime," Hutchison announced before the Senate: "For the first time in 50 years, America's blue collar working men and women will be empowered to help determine the course of their work week. And thereby, workers will be given greater control over their most precious asset in their lives and in the lives of their families: time."<sup>64</sup> Senator Hutchison was so far from attributing any responsibility to employers for the fact that "millions of people in this country must punch a time

---

<sup>60</sup>E.g., Work and Family Integration Act, S. 1129, § 2, 104th Cong., 1st Sess. (1995) (160 hours); H.R. 2723, § 2, 104th Cong., 1st Sess. (1995) (160 hours); Family Friendly Workplace Act, S. 4, § 3(b), 105th Cong., 1st Sess. (1997) (80 hours) (filibustered by Democrats); Family Friendly Workplace Act, S. 1241, § 3, 106th Cong., 1st Sess. (1999) (80 hours, permitting up to 50-hour workweek without overtime liability, sponsored by 38 Republicans). The U.S. Supreme Court has anticipatorily approved this policy inversion by aducing employers' privilege under the act to "tell the employee to take off an afternoon, a day, or even an entire week" as flowing from the FLSA's purpose of protecting workers from "'the evil of overwork.'" *Christensen v. Harris County*, 529 U.S. 576, 585 (2000).

<sup>61</sup>141 *Cong. Rec.* S 11787, 11788 (Aug. 7, 1995).

<sup>62</sup>S. 624, 107th Cong., 1st Sess. (Mar. 27, 2001).

<sup>63</sup>147 *Cong. Rec.* S 2989 (Mar. 27, 2001) (Sen. Gregg) (Lexis).

<sup>64</sup>147 *Cong. Rec.* at S 2993 (Mar. 27, 2001). It is unclear what Senator Hutchison believes happened 50 years ago.

clock, and they never seem to have enough time they need to get things done, much less the time they would like to spend on home and family,” that she faulted “the federal government” and its FLSA for “giv[ing] them the least amount of flexibility in scheduling their work week.”<sup>65</sup>

The key, according to Senator Gregg, to insuring that the government “get out of the way” and stop creating “barriers to opportunities for love and nurture” that single mothers and workers with a high school education and less than \$28,000 in income would be giving their families<sup>66</sup> was the proposal to permit employers (with individual workers’ consent) to establish biweekly work programs, under which workweeks as long as 50 hours without overtime compensation would be lawful, provided that hours for the two weeks did not exceed 80.<sup>67</sup> Elimination of the overtime premium for those hours must, in Senator Hutchison’s view, be a welcome relief to workers, since she described it as giving “employers and employees the option of a two-week, 80 hour work period during which, without incurring an overtime penalty, up to 10 hours could be ‘flexed’ between the two week period.”<sup>68</sup>

Management, in turn, buttresses the claim that it “has retained its inherent right...to require that employees shall respond to its call for overtime”<sup>69</sup> on the grounds that anarchy is the unthinkable alternative: rolling electrical blackouts are “of course, possible, if there is a law that says that overtime can’t be mandatory.”<sup>70</sup> Even in 1960, in the midst of the postwar Keynesian boom and cooperation between strong unions and management, a monumental Brookings Institution study of collective bargaining found nothing paradoxical in asserting that some plants had become “vulnerable to employee control of leisure” and asking: “Who is to control the use of their leisure time?”<sup>71</sup>

---

<sup>65</sup>147 *Cong. Rec.* at S 2992.

<sup>66</sup>147 *Cong. Rec.* at S 2989 (Sen. Gregg).

<sup>67</sup>S. 624, § 3.

<sup>68</sup>147 *Cong. Rec.* at S 2992.

<sup>69</sup>*Van Dorn Co.*, 48 *Lab. Arb. (BNA)* 925, 928 (1967).

<sup>70</sup>[California] Senate Committee on Industrial Relations, *Interim Hearings on AB 1295—Mandatory Overtime* 1:177 (Nov. 8, 1977) (statement of Wayland Bonbright, industrial relations manager, Pac. Gas & Elec. Co.). Bonbright’s invocation of alleged mass refusals to work overtime in the British electrical power industry at the time of the hearings was misleading since overtime was a minor aspect of the labor action. More importantly, no British law empowered workers to refuse to work overtime, and union officials opposed the actions. The point here is that if workers feel strongly enough about their working conditions to strike and thus impose considerable inconvenience on the rest of the working class and society, they may do so with or without legal sanction. “Power Cuts Unofficial But Effective,” *Economist*, Nov. 5, 1977, at 110 (Lexis); “Pay Policy Under Public-Sector Siege,” *Economist*, Nov. 12, 1977, at 85 (Lexis).

<sup>71</sup>Sumner Slichter, James Healy, and E. Livernash, *The Impact of Collective Bargaining on Management* 238 (1960).

Although even Friedrich Engels conceded that the working hours of a modern factory are incompatible with individual workers' autonomy,<sup>72</sup> the compulsion to keep invested capital continuously in motion, as Sidney and Beatrice Webb agreed, makes it "a special aggravation of this subordination, that, under the circumstances of the modern capitalist industry, the employer's decision will perpetually be biased in favor of lengthening the working day."<sup>73</sup> A century later, even the Republican chairman of the Subcommittee on Workforce Protections of the House of Representatives confirmed this capital-logic at a hearing devoted to revising the overtime provisions of the FLSA. Cass Ballenger, himself an employer in North Carolina, informed the witnesses: "In our company, we found out that if you bought a \$3-½ million printing press, you can't afford to run it just 40 hours a week. You have to run it seven days a week, 24 hours a day. And then you end up with people working overtime."<sup>74</sup> Yet this "autocratic judgment of their employer,"<sup>75</sup> which typically reflects firms' inexorable prioritizing of the demands of competition and profitability over workers' needs, is not the only conceivable countermodel; democratic macrosocietal co-determination of the length of the workday is also thinkable. However, as long as the dominant ideology ordains, as *The New York Times* editors put it in 1912, that "[t]he interest of the public is rather in the output than in the length of the working day,"<sup>76</sup> the compulsions of production will prevail over human needs.

In a pseudo-antipaternalistic turn, factory autocrats sought to invert this logic by projecting the collective normalization of the working day as an expropriation of the worker. In rhetoric that still resonates with free-marketeers, Alfred I. Du Pont, vice-president of E. I. Du Pont Company, testified to Congress in 1904 against federal regulation of government contractors: "To peremptorily establish the eight-hour limitation, denying the right to labor more than eight hours a day...must clearly militate against the laborer in the exercise of his labor, which

---

<sup>72</sup>Friedrich Engels, "Dell'Autorità," in I:24 Karl Marx [and] Friedrich Engels, *MEGA (Gesamtausgabe)* 82-86 at 85 (1984 [1873]). Only disingenuousness can account for the following response by the Master Builders Society of London on August 26, 1858, to a request by carpenters for a reduction in hours from ten to nine with no change in pay: "inasmuch as there is no compulsion by which workmen are obliged to labour for a given number of hours, it really amounts to an alteration in the rate of wages." G. Shaw Lefevre and Thomas Bennet, "Account of the Strike and Lock-Out in the Building Trades of London, in 1859-60," in *Trades' Societies and Strikes: Report of the Committee on Trades' Societies, Appointed by the National Association for the Promotion of Social Science* 53-76 at 55 (1860).

<sup>73</sup>Sidney Webb and Beatrice Webb, *Industrial Democracy* 327 (new ed., 1920 [1897]).

<sup>74</sup>*The Fair Labor Standards Act: White-Collar Exemptions in the Modern Work Place: Hearing Before the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce*, 106th Cong., 2d Sess. 19 (2000).

<sup>75</sup>Webb and Webb, *Industrial Democracy* at 334.

<sup>76</sup>"The Eight-Hour Day," *N.Y. Times*, July 2, 1912, at 10:3.

is his property and the privilege of contracting or marketing his property rights.”<sup>77</sup> That the Du Ponts were fantasizing about workers who could exercise their labor 24 hours a day—“the immanent drive of capitalist production,” according to Karl Marx, but “physically impossible”<sup>78</sup>—emerged two decades later from a prediction by Irénée du Pont, president of the company:

“[T]here are a number of great things which chemistry can and will do....

“[A] study of the ductless glands will likely lead to the identification of some ‘reagent’ which...will maintain the vigor of youth far beyond three-score-years-and-ten. This does not refer only to sexual vigor, but to the power—more important to maintain—which enables a young man to work longer hours and withstand fatigue which can not be withstood by men who have reached their mental prime of life.

“I think it likely that material will be found which, taken into the human system, will accomplish the results of eight hours’ sleep. This will change the active existence of a man from sixteen hours a day to twenty-four hours a day....”<sup>79</sup>

As is always the case with state-imposed labor standards, overcoming the imperatives of capital’s self-valorization must confront resistance based on employers’ more prosaic principal argument—that national labor laws exert a harmful impact in a world in which global competition is no longer a menacing tendency dimly visible on the horizon, but a force to be reckoned with daily in ways big and small. In the words of the chairman of the House Economic Opportunities Committee: “As each American firm encounters the challenges of the modern global economy, it faces a seriously outdated and inflexible federal scheme of regulating employee compensation and scheduling.”<sup>80</sup>

This claim was made specifically with regard to the FLSA overtime premium by Virgil Day, vice president in charge of labor relations at General Electric and one of the central figures in articulating Big Business’s post-World War II policies toward the state. In a statement to the House Labor Committee in 1964 on a proposed FLSA amendment to increase the overtime penalty/premium from 50 to 100 percent, Day observed that “our competition everywhere else in the world would be delighted to see this overtime penalty legislation passed here. The great

---

<sup>77</sup>*Eight Hours for Laborers on Government Work: Report by the Hon. Victor H. Metcalf, Secretary Department of Commerce and Labor, on H. R. 4064 (Eight-Hour Bill) 33-34 (H. Doc. No. 413, 58th Cong., 3d Sess. 1905).*

<sup>78</sup>Karl Marx, *Das Kapital: Kritik der politischen Ökonomie*, vol. I, in Karl Marx [and Friedrich Engels, *Werke* 23:271 (1962 [1867]). For evidence that advances in biopharmacology may be on the verge of turning this capitalist fantasy into a reality, see Jerome Groopman, “Eyes Wide Open: Can Science Make Regular Sleep Unnecessary?” *New Yorker*, Dec. 3, 2001, at 52-57.

<sup>79</sup>“Chemistry’s Tremendous Tomorrow,” 79(5) *Literary Digest* 23-24 (Nov. 3, 1923).

<sup>80</sup>William Goodling, “National Press Club Remarks” (Jan. 10, 1995) (Lexis) (formerly House Labor Committee).

beneficiaries would not be the workers in Pittsburgh, Schenectady, and Detroit, but the workers in Liverpool, Hamburg, and Yokohama.”<sup>81</sup>

The defense is venerable. As far back as the 1840s, British employers defended overtime work as “necessary to compete with the lightly-taxed foreigner....”<sup>82</sup> In the late nineteenth century, when the federal government was said to be still merely “a state of courts and parties,”<sup>83</sup> expanding monopolies deployed the same capital-logic. Testifying before Congress against a bill to establish an absolute eight-hour day for laborers, workmen, and mechanics on public works or work performed for the United States government, the representative of the Bethlehem and Carnegie steel companies observed:

it is evident that the interests of many of the largest manufacturing concerns would be injured by the passage of this act. In the world’s competition for foreign trade the cheapest product secures the market. Any effort by Congress to indirectly reduce the hours of labor...must militate against the manufacturing interests of this country, compelling them ultimately to do work and produce results at a disadvantage in competition with manufacturers in other parts of the world beyond the paternal control of the Congress of the United States.<sup>84</sup>

To the owner of a shipbuilding company with six million dollars invested in plant, it made a “vast difference” whether a worker and hence that plant worked eight hours or nine.<sup>85</sup> The passage of a century has done little to alter this capital-logic, as developments in the 1990s at an “immense, windowless” AT&T/Lucent Technologies microelectronics factory in Orlando, Florida, revealed:

[M]ore and more American factory workers are being assigned the short-week, extended-hour schedules.

Management experts call them compressed workweeks. At factories like Lucent’s, the eight-hour-a-day, five-day workweek has all but vanished and given way to schedules that management deems efficient, even if they ignore the calendar’s seven-day cycles and

---

<sup>81</sup>*Overtime Penalty Pay Act of 1964: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor: Appendix, 88th Cong., 2d Sess. 958 (1964).*

<sup>82</sup>J. Binns, *Prize Essay on Systematic Overtime Working and Its Consequences, Moral, Physical, Mental, and Social* 7 (1846).

<sup>83</sup>Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920*, at 24 (1984 [1982]).

<sup>84</sup>*Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States*, Sen. Doc. No. 318, 55th Cong., 2d Sess. 5 (1898) (testimony of Joseph McCammon).

<sup>85</sup>*Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States* at 74 (testimony of Charles Cramp, pres., William Cramp & Sons Ship and Engine Building Co.).

community patterns of work, sleep and play....

Abbreviated workweeks...have been a growing trend in manufacturing. Nearly all automobile tire companies and most big semiconductor companies have shifted to the new schedules. The big General Motors plant...that turns out Saturn automobiles has adopted one, too. ...

Efforts are being made in Congress to speed the shift to abbreviated workweeks. Many companies want Congress to change overtime provisions of the Fair Labor Standards Act...that require employers to pay time and a half for any work beyond 40 hours a week, with one proposal seeking a monthly ceiling instead.

"The week is getting redistributed toward work," said Jerome M. Rosow, president of the Work in America Institute.... Part of the price, he said, is the traditional weekend: "Leisure is getting squeezed out."

The impetus, experts say, is a redoubled emphasis on efficient production, the same pressure that has been driving the tides of corporate downsizing. It is another tactic to wrest additional profits and lower-cost production from factories.

[M]anagement decided that to hold its own in competition...worldwide, it could not let its machinery sleep when people do. "The equipment has to keep running," said the plant manager, Robert B. Koch.

Before, the company had been running on a less-compressed week with four 10-hour days. But that meant that for several hours a day the machinery stood idle. "The company eyeballed that quiet time," said Thomas S. Christian, president of Local 2000 of the International Brotherhood of Electrical Workers, who helped negotiate the schedule with 12-hour shifts. ...

An extreme form of workweek compression is the product of something...experts call best cost scheduling. Under that concept people work 12-hour shifts for three days and take three days off. They also work for 30 days and then switch to nights for 30 days. ...

Four years ago the A. E. Staley Manufacturing Company...imposed the schedule on its workforce. The union local...voted 96 percent against it, precipitating a 30-month lockout before the workers acquiesced....

To give management greater flexib[ility] in setting workers' hours, Senator John Ashcroft...has proposed legislation that would replace the 40-hour week with a 160-hour month. ...

Unions...see the bill as an effort to restore the sweatshop hours of the turn of the century. ... "[C]learly this is an effort to let employers get overtime without paying for it."<sup>86</sup>

Labor's rhetoric, however, did modulate during the twentieth century. It is difficult to imagine a labor leader in the early twenty-first century echoing the sentiments of Samuel Gompers, the president of the American Federation of Labor and chief public disputant of the manufacturing interests in 1898, that the eight-hour day gave workers the opportunity for "more rest, so that they may have the means by which they can think for themselves, rather than having our

---

<sup>86</sup>Peter Kilborn, "Factories that Never Close Are Scrapping 5-Day Week," *N.Y. Times*, June 4, 1996, at A1:5 (Lexis).

captains of industry doing all the thinking for them.”<sup>87</sup> By the twenty-first century, when millions of workers had come to rely on overtime pay to make ends meet, it has even become rare for union officials to be blunt enough to complain, as they did in the 1960s, that “employers use overtime as a substitute for decent hourly rates.”<sup>88</sup> And the opposition that an Alaska territorial senator mounted in 1919 against the presence of a time and a half overtime provision in an eight-hour bill on the grounds that it offered a premium for the violation of the proposed law would doubtless stamp him as an enemy of labor today.<sup>89</sup>

---

<sup>87</sup>*Hours of Labor for Workmen, Mechanics, Etc., Employed Upon Public Work of the United States* at 41.

<sup>88</sup>*Amendments to the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, Pt. 1, 89th Cong., 1st Sess. 143 (1965) (statement of William Du Chessi, vice pres., Textile Workers Union).

<sup>89</sup>“8 Hour Law May Not Pass Senate,” *Weekly Nome Industrial Worker*, Apr. 26, 1919, at 1:4 (Sen. John Ronan). To be sure, since Ronan was a member of a mine owners association who had supported the ten-hour day and helped break strikes by recruiting strike-breakers, it seems unlikely that he was speaking as an avid advocate of the absolute eight-hour day. Evangeline Atwood, *Frontier Politics: Alaska's James Wickersham* 171 (1979).