The Autocratically Flexible Workplace

A History of Overtime Regulation in the United States

Marc Linder

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Part VII

Conclusion

"In the long run," warns Inland Steel Vice President William Caples, "anything that becomes expensive, we eliminate—we engineer it out." The risk is that such [increased overtime] penalties might provide the impetus for new breakthroughs in automation that would make unemployment even worse.[1]

Overtime is [a] normal part of business life and you can't price it out of existence.[2]

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[1]"The Debate About Overtime," *Time*, Jan. 24, 1964, at 61, 62.

[2]*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. 918 (1964) (statement by Warren Lacke, general manager, industrial relations, Continental Can Co.).

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Increased Velocity of Throughput and Autocratic Flexibility

The type of overtime...we're opposing is the oppressive type that goes far beyond the employee's obligation to his employer. ... The type of overtime that...makes the employee feel more like an indentured servant than a free man.[1]

The fact that the process of weakening hours laws in Europe and Canada during the past two decades in the name of creating more "flexible" workplaces that can then compete more robustly in an international economy has been as inexorable as globalization itself strongly suggests that pressure may mount to dilute the FLSA's overtime compensation provision too. One possible explanation for the failure thus far to revamp that law is that, unlike hours regulation in most other countries, the FLSA has never imposed on employers any non-monetary constraints on the length of the workday or workweek. Thus facing only the premium overtime rate for weekly hours beyond 40 and a much smaller unionized sector than their counterparts in other advanced capitalist countries (with the exception of France),[2] U.S. employers have presumably been subjected to less intense competitive pressure to reduce the cost of overtime premiums. Nevertheless, a congressional drive, begun in the 1990s, to introduce hours-averaging in order to eliminate some liability for overtime premiums, which firms have achieved in Europe and Canada, will doubtless remain on employers' agenda.

Conversely, it is equally certain that nothing remotely approaching a congressional majority exists for shortening the workweek, let alone for protection against forced overwork, even if hedged with exceptions for employer emergencies. Equally unthinkable is serious congressional consideration of a free-market alternative that would raise the overtime premium to double- or triple-time in order to test how commercially important the overwork is to the buyers of the products in such putatively urgent demand and, derivatively, to the buyers of the labor that must produce them. These questions are so distant from public concerns or the AFL-CIO's agenda that it has been years since even dead-on-arrival pro forma bills on these issues have been introduced in Congress. Ideological

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[1]1 [California] Senate Committee on Industrial Relations, *Interim Hearings on AB 1295—Mandatory Overtime* 133 (Nov. 7, 1977) (statement of Ian McIntyre, Communication Workers of America, legislative and political chairman, Southern California).

[2]International Labour Office, *World Labour Report 1997-98: Industrial Relations, Democracy and Social Stability* tab. 1.2 at 237-38 (1997).

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momentum has shifted so far in capital's favor that the labor movement would consider itself fortunate if it can stave off attempts to repeal the FLSA's existing overtime pay provisions.[3]

However, the brute fact that no legislative majority yet exists for protecting workers against forced overwork does not necessarily speak against advocating such intervention before its time. But it also does not immunize advocates from the need to learn from past legislative-judicial fiascoes. Chief among these were the Alaska eight-hour law of 1917-18 and Pennsylvania's 44-hour law of 1937-38, the only general-application state maximum-hours laws ever enacted (and almost enforced) in the United States.[4] Although the laws foundered judicially and constitutionally on issues (deprivation of due process and impermissible delegation of legislative power to an administrative agency) that would no longer be likely to lead to invalidation, the manifold practical—in contradistinction to the intense and widespread ideological—objections to them voiced by employers would have to be taken into account by any new initiative to restrain employers from imposing overwork on their employees. Even if the Pennsylvania Department of Labor and Industry erred in seeking to accommodate numerous industries by issuing a confusing thicket of regulations tailored to meet their alleged individual special needs, no maximum-hours law can avoid the issue of providing for emergencies that justify exceptions to the workday and workweek caps. Such clauses would have to be carefully worded to confine the set of triggering events to those that result from various natural catastrophes or would result in imminent injury to life or significant physical assets (which would, in turn, jeopardize future employment) if work were to cease.[5]

Abundant historical experience in Britain and the United States has shown that unless such terms as "emergencies" are precisely defined, "advantage may easily be taken of the exception to permit unnecessary overtime."[6] British hours

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[3]Shortly after Clinton's election, stating that such legislation had a chance of enactment under an executive and legislature controlled by Democrats, the AFL-CIO announced that it would push the new administration to amend the FLSA to raise the overtime premium to 100 percent. David Francis, "Are Those Working Overtime Whistling?" *Christian Sci. Monitor*, Apr. 2, 1993, at 8 (Lexis). Nothing came of this initiative.

[4]See above chs. 5 and 7.

[5]The leading leftist labor law scholar in Germany considers a complete prohibition of overtime "illusory" since the situation may arise in almost all plants that suddenly additional work has to be performed and no additional workers are available or able to do it: he also believes that emergency clauses are no solution because employers would almost always find a way to construct an emergency together with a work force interested in overtime payments. He views as the only legal and economic solution making overtime "drastically" more expensive through collective bargaining, 120 per cent being a plausible penalty rate. Wolfgang Däubler, *Das Arbeitsrecht: Ein Leitfaden für Arbeitnehmer* 2:84-85 (1979).

[6]John Commons and John Andrews, *Principles of Labor Legislation* 121 (4th ed. 1936

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statutes for women and children in textile factories, the country's most important in the nineteenth century, absolutely prohibited overtime, while later laws governing various other industries permitted overtime "by reason of press of work arising at certain recurring seasons of the year, or by reason of the liability of the business to a sudden press of orders arising from unforeseen events,"[7] or even when the process in which children or women were employed was "in an incomplete state at the end of the period of employment" of the protected workers.[8] Advocates of strict enforcement criticized such permissiveness and unionists argued that such partial exemptions were self-fulfilling prophecies: sudden spurts in orders were the result of customers' very knowledge of this overtime provision.[9] Yet even as late as the British Factories Act of 1961, employers were permitted to deal with the "pressure of work in any factory...by the overtime employment of women and young children" up to six hours per week and 100 hours per year.[10]

Historical models for more rigorous definitions of emergency provisos are also available. As long ago as 1913, Oregon prohibited a workday in excess of eight hours for governmental work except for "necessity, emergency, or where the public policy absolutely requires it," and then created a presumption that none of them existed "when other labor of like skill and efficiency, which has not been employed full time, is available."[11] Oregon's current maximum hours regulations specify that: "When the normal production process is interrupted by a breakdown of machinery or unexpected absences of employees, life and property are not normally threatened with harm or destruction. For this reason, the exemption is not applicable to normal routine operational occurrences."[12] The attorney general of Arizona has interpreted that state's "emergency where life or property is in imminent danger" exception in its eight-hour law for miners narrowly so that the loss of revenue arising from the halting of production would not in itself justify working more than eight hours; moreover, the emergency would have to be so unforeseen, unexpected, and threatening as to "place a reasonable and prudent

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[1916]).

[7]Factory and Workshop Act, 1878, 41 Vict. ch. 16, § 53, at 137, 157. The exempt industries included letter-press printing, bookbinding, lithographic printing, and a warehouse that was a part of a factory. *Id.* at 184-85.

[8]Factory and Workshop Act, 1878, § 54, at 158.

[9]Sidney Webb and Harold Cox, *The Eight Hours Day* 157-63 (1891); B. Hutchins and A. Harrison, *A History of Factory Legislation* 181 (2d ed. 1911); Robert Leiter, "The Principle of Overtime," *Lab. Law J.* 2:24-30 at 25 (June 1951).

[10]Factories Act, 1961, § 89(1), 9 & 10 Eliz. 2, ch. 34, at 165, 227.

[11]1913 Or. Laws ch. 61, § 4 at 90, 91.

[12]Or. Admin. R. § 839-001-0125(2) (2001).

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man to the instant defense of either life or property."[13]

Since many life- and property-threatening catastrophes would be unpredictable and supervene without notice, (nonunion) employers[14] might have to be permitted, in the first instance, to declare such emergencies on their own, subject to review by the labor standards agency.[15] For example, an early Colorado law prescribing a strict eight-hour day for mines and smelters required employers to submit a report within ten days detailing the circumstances creating the alleged emergency.[16] In order to deter employers from frivolously declaring emergencies, such a provision would have to include significant financial penalties for wilful and/or repeated false declarations as well as a private right of action for the affected workers to sue employers for having deprived them of their statutorily guaranteed freedom from wage labor.

Even if the question of emergencies can be resolved, no rigorous maximum-hours norm is feasible unless it applies generally across product and labor markets, thus depriving employers of the argument that if they fail to meet some sudden spike in demand, other firms will and will also eventually drive them out of business. In turn, however, this type of rigorous regulation presupposes the social acceptance of the notion that the time-sensitive aggregated whims of consumers (and firms) do not automatically trump the norm of a standard, fixed, known, and limited workday and workweek, which is subordinated to other life

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[13]Ariz. Op. Atty. Gen. No. 73--17, at 38-41 (1973).

[14]In Germany, works councils have co-determination rights (provided that no statutory or collective bargaining provision is involved) with respect to the "beginning and end of daily working hours...as well as the distribution of working hours among the individual days of the week." Betriebsverfassungsgesetz, vom 15. Jan. 1972, § 87(1)2., Bundesgesetzblatt I:13, 30. The practical significance of this empowerment is, however, limited by the works councils' ambiguous position, which may lead them to "agree to patterns of promoting the competitiveness of the company, even if in terms of social policy there may be doubts as to whether such an agreement is reasonable." M. Weiss, "Germany," in *Legal and Contractual Limitations to Working Time in the European Union* 333-65 at 357 (2d rev. ed.; R. Blanpain et al. eds. 1997).

[15]In smaller (or very well staffed) jurisdictions the labor standards agency may be able to make determinations in real time. For example, the Labour Services Branch in the Yukon does provide instantaneous (but nonbinding) telephonic responses to questions from employees as to whether they have statutory "just cause" to refuse to work overtime. Telephone interview with Lee Ann Campbell, Employment Standards Officer, Labour Services Branch, Whitehorse, Yukon Terr. (Jan. 31, 2002). According to Theodore Kheel, who was director of the office of impartial review of the electrical industry of New York in the early 1960s, the mechanism established by the collective bargaining parties for reviewing construction firms' requests to work emergency overtime was "effective in preventing extra overtime." *Hours of Work: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor*, 88th Cong., 1st Sess., Pt. 2, at 547-52 at 548 (1964) (reprinting Theodore Kheel, "Report of Findings and Recommendations").

[16]1905 Colo. Sess. Laws ch. 119, § 2, at 284, 285, *repealed by* 1911 Colo. Sess. Laws ch. 149, at 454-55.

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needs outside the sphere of for-profit production.

Employers' claim—which is applicable to all mandatory labor norms—that the imposition of limits on overtime work would have untoward and unfair competitive consequences is of such overriding importance that it must be answered directly. That Big Business takes it seriously was made abundantly clear by its representatives at the congressional hearings in the mid-1960s on the Johnson administration's proposal to increase the overtime penalty rate to 100 percent.[17] Owens-Illinois Glass Company, for example, submitted testimony that first articulated the overarching principle of capitalist economies and then illustrated it by reference to the firm's corrugated box division:

> Overtime is often necessary as a result of rush orders. The meeting of such rush orders has long been a trademark of this Nation's competitive economy. Need it be stated, if one does not fill a customer's rush order, that order, as well as the customer's future orders, whether rush or not, will be taken to a competitor who will.
>
> ... Customers of corrugated boxes require and demand quick service. It is not unusual for a customer to call late one afternoon for a truckload of boxes to be delivered the next morning; in such event, it is often necessary to hold over printing and finishing crews beyond their scheduled hours in order to make the delivery. Again, many times it is necessary to operate on Saturday to meet Monday morning rush deliveries as a result of Friday afternoon orders. ... Simply stated, we have no alternative other than to attempt to meet such rush orders through overtime if we intend to retain the business of such customers.[18]

Looking at the question from the perspective of costs, the Aluminum Company of America came to the same dog-eat-dog conclusion: "With present wages and costs already so high that they impair our opportunity to make any reasonable profit in many of our product lines, we might...have to forego customer orders requiring special treatment or fast delivery rather than pay the double overtime required to do the job."[19]

Finally, General Electric's vice president for labor relations, Virgil Day, a prominent figure in formulating large employers' postwar national labor policy, presented the point dramatically:

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[17]See above ch. 14.

[18]*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. 1005, 1006-1007 (1964) (statement of W. Boyd Owen, vice pres., personnel adm., Owens-Illinois Glass Co.).

[19]*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 at 1092 (statement of John Harrison, vice president, industrial relations, Alcoa).

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The reasons for overtime are many, and they differ from one period of business and defense activity to another and from one plant and product situation to another. But one reason stands out. It is this. Customer orders and delivery dates are not spread evenly over the hours of a day or the days of a week or the weeks of a year. Customers "want what they want when they want it" without regard to whether their orders add up to a regular or very irregular daily, weekly, or yearly work schedule.[20]

These high-profile corporate managers were making two interrelated but distinct points. One was the claim that if the state deprived these employers of the power to force ("hold over") workers to work longer hours than they want to work in order to satisfy unexpected demand, other firms would fill those orders and permanently take market share away from companies unable to compel overtime. There is a straightforward and complete answer to this complaint: By applying labor norms universally, the state can avoid such skewed competitive consequences. Whether the subject is child labor, minimum wages, safety and health regulations, or overtime, the purpose of imposing national standards on all employers is, in the rhetoric of the New Deal, precisely to prevent "chiseling" employers from gaining an unfair competitive advantage. Thus, if no employer is permitted to work employees more than 40 hours per week, no corrugated box producer need worry that it will lose market share because a competitor can "hold over" its employees.[21]

Employers' other argument, however, cannot be reduced to a matter of regulating competition and is not answered by reference to the creation of universally applicable norms. This other claim, which does not apply to monetary standards such as minimum wages, in effect insists that taking away firms' prerogative to compel overtime would detrimentally alter the very character of American capitalism by suppressing one of its most fundamental long-term efficient features—namely, ratcheting up the overall systemic "velocity of throughput."[22] Although overtime work is not the only possible method of meeting unexpected demand, others, such as operating additional shifts or continuous production, require unsocial night or rotating shifts—by 1997 two-fifths of workers in the

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[20]*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. at 949, 950.

[21]The only objection to this answer is that such national labor norms cannot protect firms from competitors in other countries that are not subject to U.S. laws. This objection either proves too much—it would doom all labor standards legislation—or can be met by introducing labor norms into international trade rules. There is also the subsidiary empirical consideration that it seems unlikely that firms in the United States would seek to fill rush orders for (for example) corrugated boxes from producers in Asia, thus incurring significant air freight costs.

[22]Alfred D. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 244 (1978 [1977]).

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United States worked evenings, nights, weekends, or rotating shifts, while only 32.8 percent of women and 26.5 percent of men worked Monday through Friday, 35 to 40 hours per week on a fixed daytime schedule[23]—may be as detrimental to workers' health and safety as overwork. Still others, such as producing for inventory, may introduce risks and inefficiencies.

There is no doubt that a socioeconomic system that elevates production and profit above all other values can underwrite 24-hour-a-day consumerism in ways that are foreclosed to other modes of production. As a physician observed of the implications for the expansion of wage labor of a new drug that may "ultimately make regular sleep unnecessary": "Even as sleep disorders increase, firms are pushing their employees to disrupt their normal sleep patterns in order to provide services around the clock. A fitness center that is open twenty-four hours a day, or a restaurant that can deliver in the early morning, or a brand manufacturer that can take orders and ship clothes and shoes and backpacks and watches whatever the hour may enjoy a significant advantage over its competitors."[24] For those who have welcomed or at least acquiesced in the recreation of society as one gigantic 'convenience' store, whose wealth appears as an "enormous collection"[25] of instantaneously and continuously available commodities and commodified services, the question is whether they have so fully accepted wage work and consumption as their sole life activities that they are willing to permit nonstop consumerism to dictate nonstop work.

A libertarian alternative to an absolute maximum-hours statute is the just-say-no model, which theoretically entitles individual workers to refuse employers' demands to work overtime without subjecting themselves to any workplace penalties. In addition to Ontario, the profoundly flawed character of whose legislation and enforcement of such a right has already been examined,[26] two Canadian provinces and one territory have implemented this approach by embedding a right to refuse in non-maximum-hours overtime laws. In yet another province the government is empowered to require employers to reduce hours of work that are excessive or detrimental to workers' health or safety. None has proved successful.

Saskatchewan enacted a right to refuse in 1976-77 prohibiting employers from requiring employees to work more than 44 hours per week (which amounts to four hours of statutory overtime)[27] without their consent: "Where an employee

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[23]Harriet Presser, "Toward a 24-Hour Economy," *Science* 284:1778-79 (June 11, 1999).

[24]Jerome Groopman, "Eyes Wide Open: Can Science Make Regular Sleep Unnecessary?" *New Yorker*, Dec. 3, 2001, at 52-57, at 52, 54.

[25]Karl Marx, *Zur Kritik der Politischen Ökonomie*, in Karl Marx [and] Friedrich Engels, *Werke* 13:3-160 at 15 (1961 [1859]).

[26]See above ch. 17.

[27]Although employers are otherwise required to pay time-and-one-half rates for all

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refuses to work or to be at the disposal of an employer contrary to the employer's requirement...and where no emergency circumstances exist, no disciplinary action shall be taken against the employee by the employer."[28] The emergency circumstances—the existence of which it is the employer's burden to prove—are defined, rather loosely, as "any sudden or unusual occurrence or condition that could not, by the exercise of reasonable judgment, have been foreseen by the employer."[29] Whatever the legislative formulation, the fecklessness of the law can be gauged by the admission of the senior labor standards officer in the Regina office that the provincial Department of Labour has received no complaint from a worker during the quarter-century the right to refuse has been in effect.[30]

Similarly, since 1977 Manitoba's Employment Standards Act has declared that "the management rights of an employer do not include an implied right to require an employee to work overtime."[31] In 1998 this limitation was considerably restricted by a capacious provision permitting employers to "require overtime if an occurrence interrupts or threatens to interrupt work urgently required to be done in respect of the business of the employer to the extent necessary to avoid serious interference with the ordinary operation of the business."[32] Even this paper right to refuse to work overtime, however, has been called "innocuous" by the executive director of Manitoba's Employment Standards Division, who has explained that employers have neutralized the workers' right merely by the device of requiring employees at the time of hire to sign an agreement that they are willing to work longer hours when required.[33]

In 1992 the Yukon Territory amended its Employment Standards Act to empower employees who had been requested to work beyond their regularly sched-

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hours beyond eight daily or 40 per week, an employer is, with the authorization of the Director of the Labour Standards Branch and the agreement of the union representing its workers or, if there is no union, the agreement of a majority of the employees in any occupational classification, permitted to require workers to work more than eight hours a day or 40 hours a week without having to pay premium overtime wages, provided that average hours over a period (as long as a month) as prescribed by the Director does not exceed eight per day or 40 per week. Labour Standards Act, § 9, Rev. Stats. of Saskatchewan 1978, ch. L-1, at 2479, 2483; Saskatchewan Department of Labour, "Rights & Responsibilities: A Guide to Labour Standards in Saskatchewan," on http://www.labour.gov.sk.ca/standards/guide/schedules.htm#Overtime.

[28]Labour Standards Act, § 12(2), Rev. Stats. of Saskatchewan 1978, ch. L-1, at 2484.

[29]Labour Standards Act, § 12(4), Rev. Stats. of Saskatchewan 1978, ch. L-1, at 2484.

[30]Telephone interview with Al Gudmundson, senior labor standards officer, Saskatchewan Department of Labour, Regina (Feb. 19, 2002).

[31]Stat. Manitoba 1977, ch. 50, § 8 at 255, 257 (codified in Employment Standards Code, § 16, Stat. Manitoba 1998, ch. 29, at 207, 231).

[32]Employment Standards Code, § 19(b)(iii), Stat. Manitoba 1998, ch. 29, at 232.

[33]Telephone interview with Dave Dyson, executive director, Employment Standards Division, Manitoba Department of Labour and Immigration, Winnipeg (Feb. 19, 2002).

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uled shift without at least 24 hours' notice to refuse to work the additional hours except in emergencies. Even where employees had been given the requisite 24-hour notice, they were still permitted to refuse to work the additional hours if they had their own "emergency." On request of the employer or the employee, the Labour Services Branch was authorized to determine what an emergency was.[34] Three years later, these safeguards were repealed in favor of a broader provision: "An employee may refuse to work overtime for just cause but is required to state the refusal and the cause for refusing to the employer in writing."[35] At the same time the legislature provided that: "An employee who considers that he or she is being required to work hours which are excessive or which are detrimental to his or her health or safety may file a complaint" with the director of Employment Standards; if, after inquiry, the director agrees with the worker, he is empowered to order the employer to limit daily hours to eight or weekly hours to 40.[36] Thus far, however, workers have not tried to avail themselves of this protection.[37]

Finally, in British Columbia "an employer must not require or directly or indirectly allow an employee to work excessive hours or hours detrimental to the employee's health or safety."[38] If the Director of Employment Standards determines that a worker is in fact working excessive hours, "the director can require the employer to reduce the number of hours." If the employer fails to comply, the remedy is a penalty and triple-time overtime.[39] However, workers in British Columbia have also not yet successfully availed themselves of this protection. In the one pertinent case, which the worker lost on factual grounds, it was held that the criteria for determining whether a worker could rightfully refuse work for the reason that his health was at risk include: the honesty and reasonableness of the worker's belief; whether he communicated it reasonably to his supervisor; and whether the danger was sufficiently serious to justify the worker's action.[40] Otherwise enforcement officials report that they cannot recall ever having pro-

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[34]An Act to Amend the Employment Standards Act, § 8, Yuk. Stat. 1992, ch. 5 (amending Employment Standards Act § 8).

[35]An Act to Amend the Employment Standards Act, § 5.1, Yuk. Stat. 1995, ch. 7 (creating new § 8(3) of the Employment Standards Act).

[36]An Act to Amend the Employment Standards Act, § 10, Yuk. Stat. 1995, ch. 7 (amending § 15 of the Employment Standards Act).

[37]One reason for this failure to take advantage of the protection may lie in the availability of a similar protection in the territorial workers compensation law. Telephone interview with Lee Ann Campbell, Employment Standards Officer, Labour Services Branch, Justice Dept., Whitehorse, Yukon Terr. (Feb. 1, 2002).

[38]Employment Standards Act, § 39, Rev. Stat. B.C. 1996, ch. 113.

[39]*British Columbia Employment Standards Act and Regulations: Interpretation Guidelines Manual* § 39, on http://www.labour.gov.bc.ca/esb/igm/sections/ sect_039.htm.

[40]Blackburn, B.C. Employment Standards Tribunal, #D543/98 (Dec. 16, 1998), on http://www.bcest.bc.ca/decisions/1998/ list.htm.

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cessed a complaint under this section, which is "little used if ever." The Program Advisor at the Employment Standards Branch could not recall any case involving its interpretation or application in his more than 22 years there.[41]

The current version of the provision goes back to the 1946 amendments to the Hours of Work Act, which stated that where the Board of Industrial Relations "is satisfied that extra working-hours are necessary to overcome emergent conditions that may arise from time to time and that such extra working-hours are not inimical to the interests of the employee," it may permit the worker to work longer than 44 hours.[42] From 1923 to 1980 the Hours of Work Act was, on the surface, a maximum-hours statute, but in practice it permitted employers as much overtime as they needed; in contrast, since 1980 the Employment Standards Act has been a mere overtime law, under which employers can require workers to work overtime, provided that they pay time and a half after 40 hours and double time after 48 hours.[43] Whatever potential force the "excessive" hours provision has may vanish after the new Liberal government, which occupies 77 of 79 seats in the provincial legislature, revises the ESA in 2002 to create greater "flexibility."[44] The amendments' radical character was signalled by the Labour Ministry's Discussion Paper, which contemplated excluding from coverage "workers who request [*sic*] their employer, or agree to their employer's request, for work arrangements that operate outside the requirements of the Act."[45] The first installment, Bill 48, passed on May 30, 2002, repealed the double-time pay for long weeks and authorized averaging 40-hour weeks over four weeks and 160 hours.[46]

These weaknesses in the only relevant provincial laws prompted the authors of a prominent employment law treatise to observe that the "lack of an effective right to refuse overtime...is a major gap in Canadian hours of work legislation."[47]

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[41]Telephone interview with Terry Hughes, Employment Standards Branch, Ministry of Skills Development and Labour, Victoria, British Columbia (Feb. 12, 2002); telephone interview with Graeme Moore, Surrey, British Columbia (Feb. 13, 2002).

[42]An Act to Amend the "Hours of Work Act," § 3, B.C. Stat. 1946, ch. 34, at 105, 106.

[43]An Act Limiting the Hours of Work in Industrial Undertakings, B.C. Stat. 1923, ch. 22, at 147; Employment Standards Act, §§ 28 and 30, B.C. Stat. 1980, ch. 10, at 47, 57-58. On the political background of British Columbia hours legislation, see Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948*, at 178 (2001).

[44]"B.C. Throne Speech Signals Tough Times Ahead for the Cash-Strapped Province," *Guelph Mercury*, Feb. 13, 2002, at A10 (Lexis).

[45]British Columbia, Ministry of Skills Development and Labour, *Fair and Effective: A Review of Employment Standards in British Columbia: Discussion Paper* 5 (Nov. 2001), on http://www.labour.gov.bc.ca/esreview/.

[46]Employment Standards Amendment Act 2002, §§ 17 and 19 on http://www.legis.gov.bc.ca/37th3rd/1st_read/gov48-1.htm.

[47]Geoffrey England and Roderick Wood, *Employment Law in Canada* 1:8.86 (3d ed. 1998).

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In 1994, the Advisory Group on Working Time and the Distribution of Work established by the Canadian Minister of Human Resources Development recommended that "employees be given the right to refuse overtime work after the legislated standard work week of 40 hours and that this right be incorporated into employment standards legislation,"[48] but no progress toward this objective has been made. The Advisory Group's recommendation was all the more remarkable because it was ostensibly the outcome of balancing "two competing pressures"—"the principle that an individual should have the right to accept or to refuse to work overtime" and the fact that "many companies, for very sound economic reasons, must respond to consumer demand and competitive pressures by extending their hours of operation." Since the recommendation failed to strike a balance, it is unclear how the Advisory Group imagined that it was accommodating what it acknowledged as employers' "legitimately requiring safeguards to ensure that...unexpected increases in demands can be met."[49]

To be sure, implementation of this right to refuse would leave both firms and advocates of strict labor standards dissatisfied. Whereas employers would object that in cases where either everyone must or no one can work overtime, such a regime would enable hold-outs effectively to veto overtime for a majority that has agreed to perform it, proponents of mandatory standards would liken the race-to-the-bottom consequences of this approach to those that would be triggered if desperate workers were free to opt out of minimum-wage requirements.

It was precisely such libertarian debasement of labor standards that prompted the Fabian Society in Britain in 1890 to propose an eight hours bill that dealt with the predicament of a majority "compelled to work against their wish...by the obstinacy or disloyalty of the minority...." Under the bill, whenever it had been proved to the satisfaction of the Home Secretary (who administered the factory acts) that a majority of workers in any trade or occupation in the United Kingdom favored a fixing by law of the maximum weekly working hours in their trade or occupation, he was required to declare such a maximum, employer violations of which would then have triggered fines. In order to ascertain the workers' desires, the Home Secretary was empowered to conduct a public inquiry or a poll. Such a procedure could be triggered either by a request by a labor union or by the official's own belief that "excessive" working hours prevailed. In the first case, where the workers took the initiative of approaching the government, the clause would have promoted organizing and made state aid "conditional upon the workers first using their opportunities of self-help"; in the second case, the government would have intervened for the "relief of those exceptionally unfortunate

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[48]*Report of the Advisory Group on Working Time and the Distribution of Work* 55 (Dec. 1994).

[49]*Report of the Advisory Group on Working Time and the Distribution of Work* at 55.

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workers who, by their condition or the circumstances of their employment, are hindered from associating for the purpose of discussing their position." The Fabians regarded it as one of the chief virtues of this approach that the "clause could not practically be put in force until a prolonged discussion had convinced a considerable majority of the workers of its advantage; and by that time the minority would have become prepared to acquiesce in the law, and the employers would have been able to make arrangements to avoid any inconvenience from the change."[50]

The only problem with such a thoroughly democratic, participatory, and majoritarian process for establishing industry- or occupation-wide working-time norms is that it transcends Congress's political-economic horizons. One imaginable compromise between what remains of the labor movement and employers eager to be rid of what they regard as invasively detailed overtime regulations for administrative, executive, and professional workers[51] would be the elimination of all exclusions and exemptions in favor of coverage of all employees whose weekly or hourly wage or salary fell below a certain high level.[52] Yet even this reform, which would be far from optimal for white-collar workers, offer manual workers nothing, and fail to satisfy many employers, is very unlikely, at least standing alone, to attract broad and intense enough employer support to galvanize congressional action.

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[50]Fabian Society, *An Eight Hours Bill* 7-8 (Fabian Tracts No. 9, May 1890).

[51]Marc Linder, *"Moments Are the Elements of Profit": Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act* ch. 2 (2000).

[52]An organization of the senior human resources executives of more than 200 of the largest corporations in the United States has put forward $40,000 as such a coverage threshold. *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. 124 (2000) (written statement of Labor Policy Association). A current debate in British Columbia offers a sense of the unrealistically low levels that the government and employers in the United States might envision. In a discussion paper of possibilities for revising the provincial Employment Standards Act, the new Liberal government proposed various monetary thresholds (converted here to U.S. dollars): four times the minimum wage ($20.36) per hour or $37,224 per year; twice the average industrial wage ($22.40) per hour or $40,923 per year; or a set $38,202 per year. British Columbia, Ministry of Skills Development and Labour, *Fair and Effective: A Review of Employment Standards in British Columbia* at 1. Calling these thresholds "simply too high," a coalition of provincial employers instead proposed the average industrial wage of $12.10 per hour or $25,468 per year. This group asserted that the rationale of "basic minimum standards to ensure that employees are not taken advantage of by employers who seek to impose unacceptable terms...loses its legitimacy when applied to employees" earning such an average, "who, by virtue of the skills and experience they bring with them to the job, are able to negotiate their terms and conditions of employment on a relatively even footing with the employer." 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* 10, 11 (Dec. 2001), on http://www.cfib.ca/legis/bcyukon/index.asp.

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A more plausible legislative scenario would be the success of the potent employer lobby in finally extending the "revolution" of "total quality management," as the Flexible Employment, Compensation, and Scheduling Coalition explained to Congress in 1996, to the "one last bastion which remains untouched—the laws governing the workplace. Nowhere is this more devastating than the wage and hour laws that continue to impose mid-20th century strictures on a workplace racing into the next millennium."[53] The legislative result might be implementation of the "greater flexibility in employment standards"[54] that has swept Europe and Canada. Employers in the United States have given this regime the innocuous-sounding description of "releas[ing] employers and employees from the strict overtime rules that presently restrict their ability to experiment with non-traditional, flexible work arrangements."[55] This reorientation may take the form of the abolition of the 40-hour week even as an aspirational norm and its replacement by some variant of an 80-hour, 2-week or 160-hour, 4-week pay period, during which firms would be privileged to employ workers as many or as few hours per week as fit the firms' production schedules without incurring any overtime liability, provided that they remained within the 80-hour or 160-hour limit for the two or four weeks.[56]

Whatever the shape of the next phase in the struggle over working hours, so long as workers and unions implicitly accept profitability and instantaneous satis-

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[53]*Oversight of the Fair Labor Standards Act: Hearing of the Senate Committee on Labor and Human Resources,* 104th Cong., 2d Sess. 52, 59 (1996) (prepared statement).

[54]British Columbia, Ministry of Skills Development and Labour, *Fair and Effective: A Review of Employment Standards in British Columbia: Discussion Paper* [no pagination].

[55]*Flexibility in the Workplace: Does the Fair Labor Standards Act Accommodate Today's Workers? Hearing Before the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce*, 107th Cong., 2d Sess. (Mar. 6, 2002) (statement of William Kilberg, representing the United States Chamber of Commerce), on http://www.house.gov/ed_workforce/hearings/107th/wp/flsa3602/kilberg.htm.

[56]S. 1129, 104th Cong., 1st Sess. (1995). Juliet Schor's well-intentioned proposals to substitute time off for premium overtime wages ignores the political reality that if they could be enacted, the "flexibility" they would wind up promoting would be overwhelmingly employers' without securing workers real protection against coercion. Juliet Schor, *The Overworked American: The Unexpected Decline of Leisure* 143-44 (1991); Juliet Schor, "Worktime in Contemporary Context: Amending the Fair Labor, Standards Act," 70 *Chicago-Kent Law Rev.* 157-72 at 168 (1994). For the latest Republican version of such a bill, see the Working Families Flexibility Act of 2001, H.R. 1982, 107th Cong., 1st Sess. (May 24, 2001). For a thorough critique of such proposals, see David Walsh, "The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?" *Berkeley J. of Employment and Labor Law* 20:74-137 (1999). Significantly, when Congress amended the FLSA to authorize comp-time schemes in the public sector, it acted not to afford workers greater flexibility, but in response to claims by state and local government employers that they could not afford to pay time and a half for overtime. *Fair Labor Standards Amendments of 1985: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources*, 99th Cong. 1st Sess. (1986).

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faction of consumer demand as the social economy's supreme ordering principles, depriving capital of its status as "economic Juggernaut"[57] and sole authorized interpreter of human needs will remain—to vary the Wage and Hour Administrator's 1938 dictum—an impious wish.[58]

As the watchwords of their patiently and strategically conducted campaign to dismantle the remnants of societal regulation of working hours employers have rhetorically appropriated "flexible" and "flexibility" in their almost universally accepted positive senses.[59] After all, it would seem quixotic, if not reactionary, to declare opposition to the ability to respond to changing or new situations. But not all changes are for the good, and re-imposition of ten- or twelve-hour workdays and 50- or 60-hour workweeks (with or without overtime premiums) represents precisely the kind of class-biased change that the antagonistic capital-labor relationship inherently recreates. At the same time, employers have been careful to keep at bay the other, less flattering, meaning of their slogan: to be willing or ready to yield to the influence of others—tractable, manageable, governable, pliant, docile.[60] Yet the ultimate question in the struggle over the control of working time is whether workers will bend to capital's demands or whether capitalism will prove to be flexible enough to accommodate the extraction of surplus value to the needs of the human creators of profit—and, if it is incapable of such flexibility, whether workers will replace it with a society in which production no longer dictates to other life spheres.

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[57]John Maynard Keynes, "The Economic Consequences of Mr. Churchill," in *idem*, *Essays in Persuasion* 244-70 at 261 (1963 [1925]).

[58]See above ch. 9.

[59]Even the Ontario Task Force on Hours of Work and Overtime viewed "flexibility" as an "almost inevitable" concomitant of a maximum-hours law that "potentially constrained" "such a large portion of the workforce." *Working Times: Phase II: The Report of the Ontario Task Force on Hours of Work and Overtime* 2 (1987).

[60]*Webster's Third New International Dictionary of the English Language Unabridged* 869:3 (1993).

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