

# THE AUTOCRATICALLY FLEXIBLE WORKPLACE

## A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

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## Part II

### Theory and Structure of Overtime Regulation

The saying goes that “the loyal union man, out for a good time, not only expects a good time, but a time and a half.”<sup>1</sup>

Overtime is one of the great unexplained phenomena of modern industrial life.<sup>2</sup>

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<sup>1</sup>Jerome Rosow, “Overtime Pay Policies for Executive, Administrative, and Professional Employees,” *Personnel* 30(2):105-12 at 112 (Sept. 1953).

<sup>2</sup>Simon Caulkin, “The Strange Scandal of Overtime,” *Management Today*, Apr. 1976, at 53-55, 110, at 53.



## The Struggle for the Normal Working Day: From Surplus Value to Family Values

This is a family values law. It gives somebody out there that doesn't dare to say, I don't want to work because I will lose my job, a chance to do so.<sup>1</sup>

Labor Unions over a century ago fought for the 40-hour workweek. What we are seeing today is workers working 60-hour weeks. There should be a healthy balance: eight hours of work, eight hours of sleep and eight hours with the family.<sup>2</sup>

The concept of “overtime” presupposes the existence of a normal or basic workday or workweek, but the word has, at least in English, been cut loose from the spontaneous link to its former synonym, “overwork”—and the even more pathos-laden older term “overtail”<sup>3</sup>—which is still preserved, for example, in Danish and Dutch.<sup>4</sup> The first modern use of “Over-time” and “Over-work” cited in the *Oxford English Dictionary*, though in fact not the first use, is *The Dictionary of Trade Products, Commercial, Manufacturing, and Technical Terms* from 1858, which defined the two terms (in one entry) as “extra labour done beyond the regular fixed hours of business.”<sup>5</sup> In 1870 New York State enacted

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<sup>1</sup>[Maine] *Legislative Record*, H-2021 (Rep. Hatch, Mar. 30, 1998).

<sup>2</sup>House of Representatives, Commonwealth of Pennsylvania, [Hearing on] House Bills 1940 and 1941 Before House Labor Relations Committee 8 (Jan. 18, 2000) (testimony of Teresa Ruhl, regional COPE director, Penn. AFL-CIO).

<sup>3</sup>The *OED* quotes a source from 1872: “These died of overtoil in the Lowell carpet factories.” *Oxford English Dictionary* 7:331 (1961 [1933]). British unions in the nineteenth century commonly made the connection between overtoil and oversupply. Sidney Webb and Beatrice Webb, *The History of Trade Unionism* 288 (new ed. 1902 [1894]).

<sup>4</sup>See Lov om Forbud mod Overarbejde (Act: Prohibition of Overtime), in ILO, *Legislative Series*, 1937—Den. 3. The Dutch word is “overwerk.” Most major western (and some eastern) languages, including Albanian, Arabic, Basque, Czech, Finnish, French, German, Greek, Hebrew, Hungarian, Italian, Latvian, Lithuanian, Norwegian, Persian, Portuguese, Romanian, Serbocroat, Slovene, Spanish, Swedish, and Yiddish, express the term “overtime” with some variant of overtime, overhours, or additional or extra hours or time. Russian and Polish use a slightly different framework: “time beyond that fixed” (сверхурочный) and “time beyond that programmed” (nadprogramowy), respectively. Chinese and Japanese use somewhat different approaches: extra shift (jiābān) and remaining, or left-over, or left-undone business (zangyō), respectively.

<sup>5</sup>Peter Simmonds, *The Dictionary of Trade Products, Commercial, Manufacturing, and Technical Terms* 269 (1858); *Oxford English Dictionary* at 7:331, 338. The New Zealand Factories Act, 1894, which for the first time permitted overtime, at premium rates, for women and children, used an unusual hybrid term: “The Inspector shall keep a list of the

a legal day's work statute declaring that "eight hours shall constitute a day's work for all classes of mechanics, workingmen, and laborers, excepting those engaged in farm and domestic labor, but overwork for extra compensation by agreement between employer and employe is hereby admitted."<sup>6</sup> The survival of "overwork" in New York's current legal day's work statute (which "does not prevent an agreement for overwork at an increased compensation")<sup>7</sup> appears to be unique in the entire corpus of state and federal statutes.<sup>8</sup> The disuse into which the word has fallen is reflected in the fact that, since World War II only one court decision has, according to another computerized database search, used the word "overwork" in a FLSA case, except for quoting from a 1942 U.S. Supreme Court case, which in turn was quoting from President Roosevelt's FLSA message to Congress.<sup>9</sup> And even that one court used "overwork" merely in citing the plaintiffs' complaint and did not itself adopt the term.<sup>10</sup>

Deprived of this connection to overexertion, "overtime," which, instead, has now also come to mean the premium wage paid for overwork, clothes abnormally long working time with such a self-explanatory patina that it is workers' resistance to, rather than employers' demand for, overtime work that seems to require justification. In the words of one economist: "The existence of 'overtime unemployment'—that is, of offers to work at premium rates that are not taken up—is evidence of disequilibrium of some kind."<sup>11</sup> But generally economists perceive the best of all possible equilibria: "Premium rates of time and one-half or double time are more than adequate to offset any natural disinclination to work overtime...."<sup>12</sup>

In contrast, the fundamental purpose behind the struggle for the normal work-

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names of all those women or young persons for whom permission to work overtime has been granted, and shall note against the name of each the hours of overtime worked by him or her, so that the full amount of overwork-time be not in any case exceeded." The Factories Act, 1894, § 55, N.Z. Stat., No. 31, at 144-45.

<sup>6</sup>1870 N.Y. Laws, ch. 385, § 1 at 919. See also 1897 N.Y. Laws, ch. 415, § 3 at 461, 463. An earlier law repealed by the 1870 law used "overtime" instead. 1867 N.Y. Laws, ch. 856, § 2 at 2138. Prof. David McCabe, a historian of labor relations, testified at an important FLSA-overtime trial in 1946 that the first use of the word "overtime" in the United States that he could recall was a resolution of the iron moulders at their 1876 convention, "overwork" being the preferred term until the 1880s. Testimony of David McCabe, Transcript of Record at 419, in *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1947).

<sup>7</sup>N.Y. Labor Law § 160 (Consol. 2001). The term is also used in § 163.

<sup>8</sup>A search of the Lexis and Westlaw databases revealed no other uses.

<sup>9</sup>*Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 578 (1942).

<sup>10</sup>*Association of Court Reporters of Superior Court v. Superior Court for the District of Columbia*, 424 F. Supp. 90, 91 (D.D.C. 1976).

<sup>11</sup>Frederic Meyers, "The Economics of Overtime," in *Hours of Work* 95-110 at 95 (Clyde Denkert et al. eds. 1965).

<sup>12</sup>Albert Rees, *The Economics of Trade Unions* 147 (1962).

day of eight hours or workweek of 40 hours lay in withdrawing all time beyond that norm from the economic play of forces and economic calculations—whether by employers or workers—and committing it exclusively to workers’ nonproduction-oriented personal development or collective activities. No matter what the length of the workday, as the AFL Executive Council declared in 1919, “sufficient remuneration should be received by the workers to make it possible to live comfortably without working overtime....”<sup>13</sup> To this extent, universalist, collective, and egalitarian notions prevailed with regard to the distribution of work within the working class as a whole and avoidance of the creation of subclasses of overworked and unemployed workers.<sup>14</sup>

Normalization of working time also means knowing long before clocking in whether the employer will demand overwork later that day.<sup>15</sup> Yet, for example, workers scheduled for only four hours of work daily have not even been permitted to call home or take a break when the boss informed them at the end of their workday: “You can’t leave, it’s busy, I got to hold you over...three hours....” This version of compulsory overtime is especially insidious because it enables employers “to hold the people over at no extra cost....”<sup>16</sup>

The institutionalization of overwork has long blinded market-knows-besters to its nonconsensual aspects, although the enveloping rhetoric has grown more sophisticated. In 1859, when one of the demands of London building tradesmen striking for a reduction in their working day from ten to nine hours was abolition of “systematic overtime,”<sup>17</sup> the *Times* reported that “the great object of the masters is to crush once and for ever those trade societies which, in their view, interfere so arbitrarily and so vexatiously in trade arrangements between the employer and his men. ... For example, the masons...will not allow...overtime.”<sup>18</sup> Workers resisted systematic overtime because it “reduced the normal day to a nullity.”<sup>19</sup>

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<sup>13</sup>*Report of the Proceedings of the Thirty-Ninth Annual Convention of the American Federation of Labor* 454 (1919).

<sup>14</sup>Christoph Deutschmann, “Arbeitszeit und Arbeitsmarkt: Historische und institutionelle Aspekte,” in *Arbeitszeitpolitik: Formen und Folgen einer Neuverteilung der Arbeitszeit* 33-45 at 42 (C. Offe, K. Hinrichs, H. Wiesenthal eds.; 2d ed. 1983 [1981]).

<sup>15</sup>Dale Buss, “Overtime Debate: Economics v. Exhaustion,” *Automotive News*, Sept. 13, 1999, at 30U (Westlaw). On a Yukon Territory statute that required 24-hour notice, see below ch. 18.

<sup>16</sup>[California] Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime* 1:289-90 (Nov. 8, 1977) (statement of Frank Bradburn, Retail Clerks Union, Local 770).

<sup>17</sup>George Potter, letter to editor, (London) *Times*, July 30, 1859, at 5:2 (secretary of United Building Trades).

<sup>18</sup>“The Nine Hours Movement,” (London) *Times*, Aug. 5, 1859, at 3:3.

<sup>19</sup>Webb and Webb, *History of Trade Unionism* at 333. Legal restriction of systematic overtime was one of the British unions’ primary legislative goals in the early twentieth

A century later, the discourse had been purged of any trace of conflict. Operating with a presumption that work schedules constitute an “optimum for the majority of workers,” blackboard economics posits that “overtime pay will always induce the typical worker to offer his services beyond the standard schedule....” Indeed, economists are puzzled by those who prefer more leisure, chalking it up to “inertia, or lack of other opportunities....”<sup>20</sup>

Such economists also ignore the costs to workers of overwork. If a collectively bargained or statutorily imposed overtime rule is required to bring about a substitution of unemployed workers at straight-time wages for already employed workers at premium rates, they infer an increase in unit labor costs “since presumptively employers would have substituted additional workers for additional hours of existing workers even without such a rule if such a course would have been efficient.”<sup>21</sup> Overlooked is the cost of the shortened working lives of workers, which overtime premiums cannot internalize.

Historically the concept of overtime (“over-hours” in nineteenth-century Britain)<sup>22</sup> did not arise until coercive collective action, either through labor unions or the state, had created a normal or standard working day. And even then, workers paid by the hour or the piece did not initially benefit from the normalization if employers continued to work them at the regular rate; only workers receiving a fixed daily wage for a day’s work consisting of a variable number of hours could gain—provided that the employer did not lower the day wage.<sup>23</sup>

The advantages of overtime work to employers paying workers on a daily or weekly basis can be illustrated today in terms of salaried employees who are required to work unlimited hours for a fixed salary.<sup>24</sup> The impact of an atomized labor market, unregulated by the state, on the length of the working day is also exemplified by the situation of 10,000 low-paid female department store employees in New York City around the time of World War I:

“Most of us think that the girls’ work...is over at 6 o’clock, but this is not true. It is

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century. E. H. Phelps Brown, *The Growth of British Industrial Relations: A Study from the Standpoint of 1906-14*, at 303-304 (1974 [1959]).

<sup>20</sup>Richard Perlman, “Observations on Overtime and Moonlighting,” *Southern Econ. J.* 33(2):237-44 at 237, 238 (Oct. 1966).

<sup>21</sup>Meyers, “The Economics of Overtime” at 106.

<sup>22</sup>Factories Inquiry Commission, *First Report of the Central Board 12* (1833).

<sup>23</sup>Webb and Webb, *History of Trade Unionism* at 333 n.3; Robert Leiter, “The Principle of Overtime,” *Lab. Law J.* 2:24-30 at 24 (June 1951). As late as 1920 the Webbs wrote that some unorganized workers in Britain “are still required to work longer hours to cope with a press of orders without getting any additional pay for the extra labor.” Sidney Webb and Beatrice Webb, *Industrial Democracy* 329 n.1 (1920 [1897]).

<sup>24</sup>See Marc Linder, “*Moments Are the Elements of Profit*”: *Overtime and the Deregulation of Working Hours Under the Fair Labor Standards Act* ch. 2 (2000).



the custom to keep the girls until 7, 8, 9, 10 and later to sort stock, to put things in order, to change departments. In most of the stores they receive nothing for this overtime, but in some of them they are given 35 cents for supper money. One store pays 17 cents an hour for overtime."<sup>25</sup>

The change that labor standards legislation could bring about was documented in New Zealand at the end of the nineteenth century, when adult men were excluded from the Factories Act. As the Department of Labour there observed: "If a woman works overtime she had not only to be paid for it, but a minimum wage for it is fixed, and the employer is liable to suffer for a breach of the law if such wage is not paid. The man, on the contrary, may be worked not only outrageously long hours at his ordinary day's work, but kept on at overtime, without pay, till either his strength or his patience is exhausted."<sup>26</sup>

Karl Marx provided an economic analysis of this regime in the 1860s. Assuming that the average workweek consisted of six 12-hour days and that 10 of those 12 hours were devoted to creating the value that reproduced the worker, leaving the capitalist with two hours of surplus value, Marx set a hypothetical case in which the workday was extended by one hour or six hours weekly. Since these six hours were all devoted to creating surplus value, the capitalist was getting a very good deal: otherwise he would have to pay wages to an additional worker for three days or three additional workers for one day to extract six hours of surplus value.<sup>27</sup> That European workers as late as 1880 did not always receive premium wages for overwork is clear from a questionnaire that Marx devised: "Are extra wages—and which—paid in case of overtime?"<sup>28</sup>

Marx also furnished a general framework for understanding struggles over the length of the workday or workweek.<sup>29</sup> On the surface, this struggle centers on the conflict between the buyer and the seller of a commodity which generates

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<sup>25</sup>"Demands Better Pay for Girl Employees," *Brooklyn Daily Eagle*, Jan. 12, 1914, at 7:8 (quoting speech, "What Is the Matter with Our Department Stores?," by Mrs. Frank H. Kathryn, chairman of the committee for the organization of department store workers of the Woman's Trades Union).

<sup>26</sup>New Zealand, *Report of the Department of Labour* iv (Sess. II.—1897).

<sup>27</sup>Karl Marx, "Zur Kritik der politischen Ökonomie (Manuskript 1861-1863)," in Karl Marx [and] Friedrich Engels, *Gesamtausgabe (MEGA)* II:1:162-63 (1976).

<sup>28</sup>Karl Marx, "Questionnaire for Workers," in Karl Marx [and] Friedrich Engels, *Gesamtausgabe (MEGA)* I:25:199-207 at 204 (1985 [1880]). In 1836, members of the machinists union in London, who had worked a 10 and a half hour day and often an additional two hours at the ordinary rate, successfully struck for time and a quarter and time and a half for overtime hours. James Jefferys, *The Story of the Engineers, 1800-1945*, at 21 (n.d. [1945]).

<sup>29</sup>For an attempt to place Marx's unique analysis within the framework of economic theories of the length of working time, see Chris Nyland, "Capitalism and the History of Worktime Thought," *British J. of Sociology* 37(4):513-34 (Dec. 1986).

special problems because, unlike the situation with a general run-of-the-mill commodity, the body and mind of the human seller of labor power cannot be separated from its daily use by the buyer. Since the law of exchange of commodities, however, does not recognize any special rules for this particular exchange, the capitalist buyer tries to extract the greatest possible profit from the use of the worker's labor power for the day's or week's worth he has bought. The question then becomes: how long is a workday or workweek? Since the human seller lives beyond the day, he must make sure that he sells his only commodity for a price high enough to enable him to reappear at work the next day with his labor power in a condition of strength and health that meets the standards set by his competitors. But the worker as a rational labor market participant must also exercise sufficient foresight to husband his only economic asset for a lifetime—or at least the standard working life of his type of labor. If the daily value of his commodity equals its lifetime value divided by 30 years or approximately 10,000 workdays, then he must make sure that overlong workdays and workweeks do not force him to expend so much additional energy that he uses up 1/5,000 or 1/3,333 of his lifetime supply for only 1/10,000 of its lifetime value.<sup>30</sup> As a sociologist of work said in the 1990s of highly skilled white-collar workers in Germany who were working increasingly longer hours: “there is a risk that many ‘brains’ will be able to function for only 10-20 years, rather than a full working life.”<sup>31</sup> For this reason socialist unions regarded eight-hour laws as “life lengthening” acts.<sup>32</sup>

The worker therefore regards such overwork as crossing the line from the capitalist's rightful use to plundering of his labor power and, as such, a breach of their contract and of the law of the exchange of commodities. His demand for a workday or workweek of normal length—defined by its compatibility with a healthy 30-year worklife—is as rightful as the capitalist's demand that the worker work as long as possible each day and week. Because the capitalist is not a slaveholder, he has no (capital-) invested interest in the length of the worklife of his individual employees: “A quick succession of unhealthy and short-lived generations will keep the labour market as well supplied as a series of vigorous and long-lived generations.”<sup>33</sup> Thus as long as the employer can find equivalent replacements in the labor market when he needs them, this private contractual dispute cannot be resolved between individual buyer and seller. The resulting “anti-

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<sup>30</sup>Karl Marx, *Das Kapital: Kritik der politischen Ökonomie*, vol. I, in Karl Marx [and] Friedrich Engels, *Werke* 23:247-48 (1962 [1867]).

<sup>31</sup>Gerhard Bosch, “Working Time Reductions, Employment Consequences and Lessons from Europe: Defusing a Quasi-Religious Controversy,” in *Working Time: International Trends, Theory and Policy Perspectives* 177-95 at 184 (Lonnie Golden and Deborah Figart eds. 2000).

<sup>32</sup>“Illegally Overworked,” *Alaska Labor News*, Mar. 31, 1917, at 4:1 (editorial).

<sup>33</sup>Karl Marx, *Value, Price and Profit* 57 (Eleanor Marx Aveling ed. 1935 [1865]).

nomy” of right against right<sup>34</sup> must, Marx argued, be decided by “the respective powers of the combatants.” But since “in its merely economic action capital is the stronger side,” a class-wide settlement of the hours issue was possible only through “general political action,” which meant “legislative interference” under pressure from the working class.<sup>35</sup> Consequently, the normalization of the work-day and workweek appears historically as a struggle between the “aggregate capitalist, i.e., the class of capitalists, and the aggregate worker, or the working class.”<sup>36</sup>

In contrast, neoclassical economics has tried to reduce this society-defining struggle between two rights into mere market failure: “the marginal social cost of longer workweeks exceeded the marginal private cost to employers. In the absence of government intervention these divergencies persisted because low family incomes did not permit many women and children the luxury of turning down jobs with low wages and long hours....” The overtime penalty can then be “thought of as a tax to make employers bear the full marginal social cost of their hours decisions.”<sup>37</sup>

The sea change in the conflict over a shorter workweek is captured by the current union refrain that “[t]he question is...[s]hould workers be forced to work or should they be given the choice to spend time with their families?”<sup>38</sup> This individualistic turn is also deeply embedded in the very collective bargaining agreements that offer some union members a modicum of protection against imposition of overtime work. The Memorandum of Understanding on Overtime appended to the 1993 agreement between the United Automobile Workers (UAW) and the major U.S. automobile manufacturers, which programmatically declares that it “represents an accommodation between the needs of the Corporation and the rights of individual employees to decline overtime work on occasion for a variety of individual and personal reasons,”<sup>39</sup> prohibits and penalizes any collective action by workers:

Any right to decline daily overtime or Saturday or Sunday work that this Memorandum of Understanding confers on any employee may be exercised only by such

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<sup>34</sup>Marx, *Das Kapital* at 1:249.

<sup>35</sup>Marx, *Value, Price and Profit* at 58-59.

<sup>36</sup>Marx, *Das Kapital* at 1:249.

<sup>37</sup>Ronald Ehrenberg and Paul Schuman, “The Overtime Pay Provisions of the Fair Labor Standards Act,” in *The Economics of Legal Minimum Wages* 264-95 at 265, 287 (Simon Rottenberg ed. 1981).

<sup>38</sup>“Mandatory Overtime Seen as Key Bargaining Issue,” 161 *Lab. Rel. Rep.* 435 (Aug. 2, 1999) (quoting Rick Bank, director, AFL-CIO Center for Collective Bargaining).

<sup>39</sup>*Agreement Between UAW and the General Motors Corporation: October 24, 1993*, at 244.

employee acting separately and individually, without collusion, conspiracy or agreement with, or the influence of, any other employee or employees or the Union or pursuant to any other concerted action or decision. No employee shall seek by any means to cause or influence any other employee to decline to work overtime. Violation by any employee of the terms, purpose or intent of this Paragraph shall, in addition to subjecting the employee to discipline, nullify for one (1) month...the employee's right to decline overtime.<sup>40</sup>

This individualistic “family values” approach—which in a feminist framework becomes workers’ need for “flexibility in order to combine paid employment with their lifestyle decisions, the most important of which, from a social perspective, is the decision to care for others, especially children”<sup>41</sup>—stands in sharp contrast to the nineteenth- and early twentieth-century collectivist context, when labor “predicated its demand for leisure as a means to the creation of a better social order. To produce intelligent citizens, essential to the existence of a democracy, everybody should have sufficient leisure to permit attendance at night schools, time for reading, discussion, and attendance at political meetings.”<sup>42</sup> Around the time of the Civil War, the eight-hours movement was in part driven by the demand that a bright line be drawn between the time during which workers were wage-slaves to capital and the time during which they were free.<sup>43</sup> The thousand-page brief that Louis Brandeis, Felix Frankfurter, and Josephine Goldmark produced in support of the 1913 Oregon ten-hour law when its constitutionality was attacked before the U.S. Supreme Court collected massive evidence on the detrimental impact of long hours on workers’ health, safety, morals, and citizenship.<sup>44</sup>

Press accounts of long workweeks have been common for decades, though they appear in cycles. Often they have one-sidedly focused on factory (especially automobile) workers who voluntarily work “unbelievable amounts of overtime”—upwards of 80 hours a week—over months and even years in order to achieve six-figure annual incomes to finance consumption patterns otherwise unattainable for the manual working class. Such presentations do mention the disruptive impact such total absorption by work can exert on workers’ family lives and also allude to the greater exposure to injuries associated with the attendant

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<sup>40</sup>*Agreement Between UAW and the General Motors Corporation: October 24, 1993*, at 248.

<sup>41</sup>Judy Fudge, “Flexibility and Feminization: The New Ontario Employment Standards Act,” *J. Law and Social Policy* 16:1-22 at 5 (2001).

<sup>42</sup>Marion Cahill, *Shorter Hours: A Study of the Movement Since the Civil War* 14 (1932).

<sup>43</sup>David Montgomery, *Beyond Equality: Labor and the Radical Republicans, 1862-1872*, at 237-39 (1967).

<sup>44</sup>Felix Frankfurter, *The Case for the Shorter Work Day* (n.d. [ca. 1915]).

fatigue, but they insist on the consensual nature of the choices.<sup>45</sup> Even the UAW, arguably the country's strongest union and collective bargaining partner of the automobile manufacturers, which have adamantly insisted on the practice for decades, is said not to "press too hard because its members tend to enjoy the extra income from those overtime hours more than they're distressed by having to work them." The president of one Ford UAW local in Michigan estimated in 1999 that "probably 70 percent of my people would be pretty upset if the UAW helped get restrictions on overtime."<sup>46</sup> Similar conflicts have riven the Canadian Auto Workers.<sup>47</sup> Such attitudes underscore how profound the sea change has been since the AFL representative told Congress in 1948 that the FLSA "was established to reduce unemployment and put everybody on a 40-hour week. ... [T]he intent of the act is not to give the worker more money for overtime but to reduce unemployment."<sup>48</sup>

Nevertheless, occasionally the press also reported on "rebellion against overtime...." As the business cycle moved toward its high point in 1972-73, factory workers began "losing their taste for longer hours, whatever the pay." Discussing why 15 cement-plant repair-crew workers had refused to perform five hours of overtime on a Friday night, the *Wall Street Journal* quoted this explanation by a 51-year-old employee: "When you work around cement kilns, it just sweats everything out of you. Eight hours of work in this heat and filth is enough." But this attitude in a work force covered by contracts with a mandatory overtime clause did not sit well with "an angry and worried" official, who remarked: "A few years ago you never had a problem like this.... Men simply didn't refuse overtime work before." As the economy expanded and orders increased and more overtime would be needed, industrial managers feared "more instances in which workers balk."<sup>49</sup>

A new phase in the history of overtime work appeared by the end of the

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<sup>45</sup>Aaron Lucchetti, "Overdrive: An Auto Worker Earns More Than \$100,000, But at a Personal Cost," *Wall St. J.*, Aug. 1, 1996, at A1 (Westlaw). On the lifestyle that "few others" the age of a 25-year-old overtime-worker can have, see Al Stamborski, "Overtime in U.S. Reaches Highest Level in 42 years: Workers Weigh Money Against Loss of Free Time," *St. Louis Post-Dispatch*, Sept. 6, 1998, at A1 (Electric Library). For related examples among truck drivers, including one who works 3,400 hours a year for only \$40,000, see Peter Kilborn, "In a Nonstop Economy, Truckers Keep Rolling," *N.Y. Times*, Nov. 24, 1999, at A14:1 (nat. ed.).

<sup>46</sup>Dale Buss, "Overtime Debate: Economics v. Exhaustion."

<sup>47</sup>Leslie Papp, "Paying the Price for Hard Work: Excess Overtime Now 'Epidemic' as Firms Flout Little-Known Rules," *Toronto Star*, Feb. 21, 1991, at A15 (Lexis).

<sup>48</sup>*Fair Labor Standards Act Amendments: Hearings Before a Subcommittee of the Senate Committee on Labor and Public Welfare*, 80th Cong., 2d Sess., Pt. 1 at 129-30 (1948) (testimony of Walter Mason).

<sup>49</sup>Jeffrey Tannenbaum, "More Factory Workers Give Firms Headaches by Spurning Overtime," *Wall St. J.*, Aug. 28, 1972, at 1:6, at 8:3.

1990s, employers' unrelenting appropriation of their employees' time began "wearing down" assembly line workers, making "many fatigued workers finally...ready to value a normal workweek more than the considerable financial incentives...." Average weekly overtime in manufacturing in the mid- and late 1990s reached their highest levels since the Bureau of Labor Statistics (BLS) began collecting such data in 1956. Prior to 1993, the highest average weekly level of overtime in manufacturing had been 4.1 hours at the height of the Vietnam War boom in early 1966; from January 1993 on, the figure virtually never fell below 4 hours until February 2001, reaching annual averages between 4.4 and 4.8 hours from 1995 through 1998, and exceeding five hours in some months.<sup>50</sup> Manufacturing firms were so reliant on overtime during the expansion phase of the business cycle between March 1991 and January 1998 that the increase in overtime hours equated to 571,000 full-time 40-hour per week jobs, only slightly fewer than the increase in production worker jobs totalling 601,000.<sup>51</sup> As corporate strategies polarized the labor force into "overtimers" and "temps"—already Marx had observed that such terms reduced workers to nothing but "personified labor time"<sup>52</sup>—journalists could point to the self-identified "greedy" "overtime hogs" and those who "are grabbing all the hours they can...merely to stay afloat in a time of stagnating wages."<sup>53</sup>

At times the press also turns its attention to overtime imposed by employers on unwilling workers, who are fired for refusing to work. Such accounts raise the question as to how much has changed with regard to control over the length of the workweek exerted by the compulsions of spontaneous labor markets and employers' autocracies since the middle of the nineteenth century, when British factory

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<sup>50</sup>BLS, *Employment, Hours, and Earnings: United States, 1909-94*, at 2:1195-96 (Bull. 2445, 1994); BLS, *Employment, Hours, and Earnings: United States, 1988-96*, at 432-33 (Bull. 2481, 1996); 42 (1) *Employment and Earnings*, tab. B-15 at 102 (Jan. 1995); *Employment and Earnings* 46(1):tab. 50 at 230 (Jan. 1999); *Employment and Earnings* 48(1):tab. 52 at 231 (Jan. 2001); *Employment and Earnings* 48(10):tab. B-8 at 61 (Oct. 2001). The BLS defines overtime hours as those worked by production workers "for which overtime premiums were paid because the hours were in excess of the number of hours of either the straight-time workday or the workweek" during the survey pay period. *Employment and Earnings* 46(1):252 (Jan. 1999). This methodology overstates overtime since some workers receiving premium pay for working more than eight hours daily do not work 40 hours weekly. A BLS survey from May 1985 revealed that 1.6 million or 15 percent of the 10.5 million workers receiving overtime pay worked 40 hours or fewer. Darrell Carr, "Overtime Work: An Expanded View," *Monthly Lab. Rev.* 109(11):36-39 (Nov. 1986).

<sup>51</sup>Ron Hetrick, "Analyzing the Recent Upward Surge in Overtime Hours," *Monthly Labor Rev.* 123(2): 30-33, tab. 3 at 33 (Feb. 2000).

<sup>52</sup>Marx, *Das Kapital* at 1:257-58 (referring to the terms "full times" and "half times" used in Victorian Britain for factory workers).

<sup>53</sup>Sandra Livingston, "Overdosing on Overtime: Workers See Companies Increase Their Hours Instead of Work Force," *Cleveland Plain Dealer*, Oct. 2, 1994, at 1A (Lexis).

inspectors reported on adult male cotton spinners who preferred to work 10-hour days for less wages, but were compelled to work as many as five hours of overtime daily lest they be forced to change places with the unemployed.<sup>54</sup> The *Wall Street Journal*, for example, in the wake of the Reagan-depression of the early 1980s, quoted a worker bemoaning the irony that at the end of the twentieth century “we’re working the same hours our grandfathers worked.” The reporters were even alive to the need to educate the paper’s typical readers that not all overtime is created equal:

Americans with steady, white-collar jobs, many of whom also work 50 to 60 hours a week, often without extra pay, may find it hard to identify with factory workers bitter about working overtime following a recession when many were laid off. But office work tends to be more interesting than running a stamping press. And office workers are free to sit down, take a few minutes for coffee and, if necessary, slip out to the dentist.<sup>55</sup>

Until the 1990s, governmental concern with and union opposition to overtime work were largely rooted in fears of exacerbating already high levels of unemployment. But as the declining volume of unemployment in the mid- and late 1990s brought on a resurgence of and opposition to overtime, the trigger has been overtime’s coercive character and corrosive impact on workers’ lives. This resistance to what one steelworker called “a new form of slavery,”<sup>56</sup> found its adequate rhetorical expression in a firefighters’ lawsuit alleging that extended forced overtime violates the constitutional prohibition against involuntary servitude.<sup>57</sup>

In the 1990s, protests, especially in the automobile industry, also took the form of strikes. The collective bargaining agreement in force at the time ritualistically recited that while General Motors “recognized the legitimacy of the Union’s concern that production not be scheduled on a sustained basis on overtime rather than recalling laid off employees or hiring new employees,” the UAW “recognized that the scheduling of overtime serves an essential purpose in many situations in order to meet temporary or seasonal increases in sales, at new-model start-up, and to make up for production lost due to factors beyond the parties’ control....” The contract set up a procedure for reviewing overtime work schedules to insure that overtime not be scheduled “on an ongoing basis in cases where

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<sup>54</sup>Marx, *Das Kapital* at 1:301.

<sup>55</sup>Gregory Stricharchuk and Ralph Winter, “Worked Up: As the Recovery Gains, Compulsory Overtime Becomes a Rising Issue,” *Wall St. J.*, Jan. 20, 1984 (Westlaw).

<sup>56</sup>Barnet Wolf, “Pushed to the Limit,” *Columbus Dispatch*, Dec. 17, 2000, at 16 (Lexis).

<sup>57</sup>Rachel Gottlieb, “Fire Union Calls Forced Overtime Form of Slavery,” *Hartford Courant*, Sept. 13, 1999, at B6 (Westlaw).

there are practical and economical alternatives.”<sup>58</sup> In 1994, General Motors workers in Flint, Michigan, who had been working six days a week as long as 11 and a half hours a day for two years, struck, demanding that the company hire additional workers. The psychological and physical toll that such unrelenting work had taken caused the modal middle-aged workers to realize that even \$60,000 annual incomes could not make them “bounce back” from injuries or fatigue as they could when they were younger; they simply needed more non-worktime.<sup>59</sup> An agreement was reached in this instance, but the UAW continues to regard GM’s overtime levels as “relentless” as the company insists on reducing its unionized workforce through attrition.<sup>60</sup>

Ironically, even the compellers at times recognize the irrationality of compulsory overtime from their own perspective in confrontation with workers acting as rational owners of the commodity labor power seeking to preserve its long-term value against opportunistic deprecations by employers<sup>61</sup>: “Prolonged overtime often cuts productivity...because workers pace themselves to be able to stand the extra hours.”<sup>62</sup> One company that relentlessly imposes overtime on its employees, US West, seemed to portray itself as its own hapless victim when it asserted that it was “just as interested in reducing mandatory overtime because it wants its employees to be rested and refreshed when they begin work.” The US West case is especially important because it reveals that although forced overtime has become a “big flashpoint” for unions, even strong unions such as the Communication Workers of America (CWA) have been relatively powerless to resist employers’ demands. In 1998, when the union made overtime a key issue because members “were missing Little League games and sometimes even church services,” the best the CWA could achieve after a two-week strike by 35,000 workers was capping mandatory overtime at 16 hours weekly in 1999 and 8 hours in 2000, and a guarantee of at least one five-day week per month in 1999 and two in 2001.<sup>63</sup> During negotiations in 2000, the largest CWA local at BellSouth “asked that workers have the right to turn down overtime, but the contract only tinkers with BellSouth’s power to force the work.” The company continued to

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<sup>58</sup>*Agreement Between UAW and the General Motors Corporation: October 24, 1993*, at 538-39 (Doc. No. 116: Overtime).

<sup>59</sup>Doron Levin, “G.M. Impasse: Work Strain vs. Rising Car Sales,” *N.Y. Times*, Sept. 29, 1994, at B10:1 (Lexis).

<sup>60</sup>“UAW-GM Talks Reflect Difficult Relationship,” 156 *Lab. Rel. Rep.* 373, 374, 375 (Nov. 17, 1997). After a three-day strike GM agreed to hire some additional workers. Doron Levin, “G.M. and Auto Workers Reach an Accord,” *N.Y. Times*, Oct. 1, 1994, at 7:1 (Lexis).

<sup>61</sup>Marx, *Das Kapital* at 1:568-70.

<sup>62</sup>Stricharchuk and Winter, “Worked Up.”

<sup>63</sup>“Mandatory Overtime Seen as Key Bargaining Issue” at 436.



“have the right to compel 12 hours of overtime each week, with one exception: For three months of the year, the company would trim it to 10 hours per week.”<sup>64</sup> When the same issue confronted members of the International Brotherhood of Electrical Workers employed by GTE, one local union business manager said “he would settle only reluctantly for limiting the amount of required overtime to 16 hours a week. ‘This bothers all unions.... Our forefathers in the labor movement died to get the 8-hour work day.’”<sup>65</sup>

Resistance to demands for overtime has been undermined by administrative and judicial rulings, dating back to the inception of the National Labor Relations Act (NLRA), vindicating employers’ claims that, just as “[f]ailure to work overtime hours is the same as failure to work regular straight-time hours,”<sup>66</sup> employers’ autocratic rule applies to both. The National Labor Relations Board disqualifies such a refusenik as seeking to “dictate the terms of his employment” and thus engaging in “unprotected insubordination” leaving him “legitimately subject to discipline.”<sup>67</sup>

Consequently, workers who concertedly refuse to work overtime while continuing to work the normal working day forfeit their rights under the NLRA; their employers may lawfully consider them strikers and permanently replace them. The legal basis for this outcome is judges’ rejection of guerrilla warfare as protected activity—of the notion, as a federal appellate court declared as early as 1939, that “an employee can be on a strike and at work simultaneously. We think he must be on the job subject to the authority and control of the employer, or off the job as a striker, in support of some grievance.” The monopoly hold that this binary world has on the judicial mind stems, in turn, from a deeper bias concerning capitalist control of the workplace as the natural order of things and codetermination as anarchy or tyranny: “We are aware of no law or logic that gives the employee the right to work upon terms prescribed solely by him. ... It is not a situation in which employees ceased work in protest against conditions imposed by the employer, but one in which the employees sought and intended to work upon their own notion of the terms which should prevail. If they had a right to fix the hours of their employment, it would follow that a similar right existed by

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<sup>64</sup>Michael Kanell, “Decision Time at BellSouth,” *Atlanta Journal and Constitution*, Aug. 29, 2000, at IF (Lexis).

<sup>65</sup>Eve Tahmincioglu, “Strain from Overtime Piles Up for Workers,” *St. Petersburg Times*, Aug. 28, 1999, at 1E (Westlaw) (quoting Danny Johnson, Local 824 in Florida).

<sup>66</sup>Van Dorn Co., 48 Lab. Arb. (BNA) 925, 926 (1967).

<sup>67</sup>Mead Corp.-Publishing Paper Div.-Escanaba, 275 NLRB 323, 324 (1985). See also Poppin Fresh Pies, Inc., 256 NLRB 233, 234 (1981), in which a Spanish-speaking married couple at a pie factory were fired for refusing to work overtime because the employer had not paid them properly for previous overtime: “‘me no work no more overtime for this company, this company no pay overtime, and me and Hortencia is going la casa’” (Member Jenkins, concurring in part and dissenting in part).

which they could prescribe all conditions...affecting their employment.”<sup>68</sup>

One point virtually everyone agrees on is that: “Employers can force their employees to work overtime—no matter how much they object.” Employees, according to the U.S. Department of Labor (DOL), “must work as many extra hours as their employers demand or face losing their jobs. ... ‘(Labor laws) don’t give employees any protection if they refuse to work overtime,’ Richard Backer, assistant district director for the U.S. Department of Labor, said....”<sup>69</sup> The more aseptic version in the DOL regulations explains: “Since there is no absolute limitation...on the number of hours that an employee may work in any workweek, he may work as many hours a week as he and his employer see fit” so long as the required overtime compensation is paid.<sup>70</sup> The reason that workers acquiesce in these impositions, according to a professor of management, is straightforward: “If the alternative to overtime is unemployment, that isn’t so attractive. Workers don’t see 70 hours versus 40 hours, but 70 hours versus nothing.”<sup>71</sup> Under state labor laws, too, “adult employees can be required to work overtime as long as they’re paid time and a half for more than a 40-hour week....” A Washington state labor official offered this explanation of employer behavior: “If I have two employees, I have to pay two Labor and Industries coverage, two medical-care payments, two Social Security.... If I can take one employee and work the heck out of him, then my overall costs are going to be down.”<sup>72</sup>

To be sure, workers under union collective bargaining agreements may grieve particularly egregiously motivated dismissals. For example, a telephone repairman with 24 years’ seniority won his arbitration 18 months after he had been discharged for refusing to work overtime on the grounds that as a divorced parent with sole custody he had to pick up his two children after school; the employer had found the “excuse” unreasonable on the grounds that he could have made other arrangements.<sup>73</sup> However, for the overwhelming majority of workers in the

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<sup>68</sup>C.G. Conn, Ltd. v. NLRB, 108 F.2d 390, 397 (7th Cir. 1939). See also NLRB v. Mt. Clemens Pottery Co., 147 F.2d 262 (6th Cir. 1945). First Nat. Bk. Omaha v. NLRB, 413 F.2d 921 (8th Cir. 1969), upheld the same principle, but enforced the Board’s order of reinstatement both because the employer had committed the form error of not replacing the women who walked off the job in the middle of their involuntary overtime before they had returned to work the next morning and the weight of the evidence did not support the employer’s claim that “the girls intended to walk off the job again if their overtime demands were not met....” *Id.* at 924.

<sup>69</sup>Marcelene Edwards, “Employers Have Right to Demand Overtime,” *Idaho Statesman*, Aug. 22, 1998, at 1d (Lexis).

<sup>70</sup>29 C.F.R. § 778.102 (1999).

<sup>71</sup>Michelle Conklin, “All Work and No Play: Overtime Bringing More Cash, at a Cost,” *Rocky Mountain News*, Feb. 1, 1998, at 1G (Electric Library).

<sup>72</sup>Tamra Fitzpatrick, “Compulsory Overtime Creates Much Heartache,” *Seattle Times*, May 2, 1999, at K1 (Lexis).

<sup>73</sup>Kevin Galvin, “Some Workers Protest Rise in Forced Overtime,” *Chattanooga Free*

United States, who lack union representation, no such protection from autocratic employers is available.

But even in the unionized sector, in 1980 only 19.3 percent of major collective bargaining agreements conferred on only 21.6 of all workers covered by such contracts the right to refuse overtime.<sup>74</sup> In the mid-1970s, fewer than 5 percent of a sample of collective bargaining agreements had entitled workers to refuse overtime without limitations, while another 19 percent permitted them to do so under certain conditions such as a reasonable excuse or the availability of a replacement worker.<sup>75</sup> And “[i]n the absence of an express contractual stipulation or a binding prior understanding, arbitrators universally rule that management has the right to require employees to work reasonable amounts of overtime.”<sup>76</sup>

A case involving a strong union that failed to negotiate any express limitation on overtime illustrates both the power that even unionized firms may retain and the modicum of freedom that counter-organization secures unionists. In 1947 the Ford Motor Company announced at one of its plants that, beginning six days later, workers would work nine hours daily until further notice. Near the end of the very first day of the new schedule, “Supervision instructed the employees to continue working until the production schedule for that day was completed.” Two workers who refused to remain at work beyond the already lengthened

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*Press*, Nov. 22, 1998, at A4 (Lexis).

<sup>74</sup>Calculated according to BLS, *Characteristics of Major Collective Bargaining Agreements, January 1, 1980*, tab. 4.1 at 61 (Bull. 2095, 1981). Major agreements were defined as covering 1,000 or more workers. In Canada, the proportion of all major collective bargaining agreements with provisions affording the right to refuse overtime under certain circumstances was 31.7 percent in 1988, 30 percent in 1993, and 31.8 percent in 1998; the proportion providing an unconditional right rose from 7.7 percent in 1988 to 10.3 percent in 1998. Human Resources Development Canada, *Work and Family Provisions in Canadian Collective Agreements*, ch. 1 (Mar. 2001), on [http://labour.hrdc-drhc.gc.ca/psait\\_spila/dfcfc\\_wfpcca/ch1a-en.html](http://labour.hrdc-drhc.gc.ca/psait_spila/dfcfc_wfpcca/ch1a-en.html). According to a 1970 survey, only 18 percent of workers reported that they could not refuse to work overtime without being penalized, although 30 percent reported that they would like to work less overtime. University of Michigan Survey Research Center, *Survey of Working Conditions: Final Report on Univariate and Bivariate Tables*, tab. 7.14 at 231, tab. 7.16 at 234 (1971).

<sup>75</sup>BLS, *Hours, Overtime and Weekend Work 20-22* (BLS Bull. 1425-15, 1974).

<sup>76</sup>Roger Abrams and Dennis Nolan, “Time at a Premium: The Arbitration of Overtime and Premium Pay Disputes,” 45 *Ohio St. L. J.* 837, 845 (1984). See also Marvin Hill, Jr. and Anthony Sinicropi, *Management Rights: A Legal and Arbitral Analysis* 513 (1986) (“Management’s right to require that an employee work overtime has been consistently recognized by arbitrators”). Nevertheless, arbitrators have not universally vindicated employers’ power to compel overtime work. In *Connecticut River Mills, Inc.* 6 Lab. Arb. (BNA) 1017, 1019 (1947), the arbitrator ruled that under a contract providing that an 8-hour day, 40-hour week “shall be in effect without revision,” work beyond these hours was “solely within the discretion of the employee,” even where workers for some time had been working 6-day, 48-hour weeks. According to the arbitrator, employers requiring scheduling flexibility had to include express language in their contracts.

workday were initially discharged but then reinstated with a three-day lay-off penalty. After asserting that the amount of overtime requested would not have endangered the workers' health, the prominent labor arbitrator, Harry Shulman, the Sterling Law Professor and later Dean of the Yale Law School, rejected the UAW's argument that work beyond the standard 40-hour week was optional with the workers: it flew in the face of an express contractual provision—only recently added—according to which Ford “retains the sole right...to determine the starting and quitting time and the number of hours to be worked.”<sup>77</sup> Despite this clear basis, Shulman also found that a worker's refusal to work overtime may be justified under certain circumstances:

Except when specifically so hired, employees are not on continuous call 24 hours a day. While they must recognize that they may be called upon to work overtime, they may properly plan their lives on the basis of their customary work schedules. Under the parties' present Agreement, when an employee is asked to work overtime, he may not refuse merely because he does not like to work more than eight hours, does not need the extra money, or for no reason at all. But if the overtime work would unduly interfere with plans he made, then his refusal may be justified. If he is given advance notice sufficient to enable him to alter his plans, he must do so. But if the direction is given to him without such notice, then it would be arbitrary to require him to forego [sic] plans which he made in justifiable reliance upon his normal work schedule—unless, indeed, his commitments are of such trivial importance as not to deserve consideration.<sup>78</sup>

Despite the fact that management had handed down its order shortly before quitting time, Shulman ruled that one of the workers was unjustified in refusing to work without offering any reason; nevertheless, the arbitrator's award reduced his suspension without pay to one day. Shulman then rescinded Ford's punishment of the other worker altogether because overtime work would have caused him to lose his ride home with another worker and to take public transportation, which would have taken a substantially longer amount of time, which was also disproportionate to the amount of overtime. The arbitrator added that if Ford had given the worker notice a day or two earlier, the case would have been different.<sup>79</sup>

This arbitral mercy, based on the common law of the unionized shop, con-

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<sup>77</sup>Ford Motor Co., 11 Lab. Arb. (BNA) 1158, 1159 (1948).

<sup>78</sup>Ford Motor Co., 11 Lab. Arb. (BNA) at 1160.

<sup>79</sup>Ford Motor Co., 11 Lab. Arb. (BNA) at 1160-61. In contrast, in a nonunion case involving a minimum wage worker who sought unemployment benefits after quitting a job which for three months had required four hours of commuting daily on public transportation following the demise of his truck which he could not afford to repair, the court ruled that such commutes in the Los Angeles area were too common to make the claimant's travel time unreasonable. *Zorrero v. Unemployment Ins. App. Bd.*, 47 Cal.App.3d 434 (1975).

tinues to characterize arbitrations, which subject managerial prerogatives in this area to a reasonableness criterion: employers' power to order overtime may be overridden where the extended work period is unreasonably long, inconsistent with workers' health, safety, and endurance, or is imposed under unreasonable circumstances.<sup>80</sup> To be sure, this standard does not attain the stage of enlightenment embodied in a prominent Canadian arbitrator's suggestion that "the reasonability of discipline for refusal to work overtime does not simply involve the employer's 'reserved' right of management to control its own property and production but also involves the employee's 'reserved' right to the use of his own time."<sup>81</sup>

This sphere of autocracy tempered by reasonableness may be contrasted with the fate of workers in the union-free sector. When a key punch operator was told on a Thursday that mandatory overtime was scheduled for Saturday, she reminded her supervisor that she would not be able to work because she had planned a birthday party for her husband. Working for a nonunion firm, Deborah Butler could not challenge her discharge; instead, her legal dispute focused merely on whether she was entitled to unemployment compensation. Under Colorado law, as in many other states, resolution of that question pivoted on whether organizing her spouse's birthday party constituted good cause for refusing mandatory overtime; that standard was defined by reference to "compelling personal reasons affecting either the worker or his immediate family."<sup>82</sup> The court glossed those reasons by adopting phraseology from other courts: "'quitting must be for such a cause as would, in a similar situation, reasonably motivate the average able-bodied and qualified worker to give up his or her employment with its certain wage rewards in order to enter the ranks of the unemployed.' ... While claimant understandably desired to give the birthday party for her husband, we do not think a reasonable person would refuse to work overtime and thereby sacrifice employment for this reason."<sup>83</sup>

Employers' entitlement to extract overtime is so deeply anchored in the judicial mind that even a worker who had been injured on the job and whose physician suggested that he not work more than eight hours a day was denied relief under the Americans with Disabilities Act (ADA) after his employer had rejected

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<sup>80</sup>Donald Peterson, "Arbitration of Employee Refusal to Work Overtime," *Dispute Resolution J.*, Jan. 1997, at 21-27.

<sup>81</sup>Printing Specialties & Paper Products Union, Local 466, and Cryovac Div, Grace Chemicals Ltd., 24 Labour Arbitration Cases 127, 138 (1972) (Arbitrator P. C. Weiler).

<sup>82</sup>Action Key Punch Service, Inc. v. Industrial Comm'n of Colorado, 709 P.2d 970, 971 (Col. Ct. App. 1985) (quoting Col. Rev. Stat. § 8-73-108(4)(k) (1984 Cum. Supp.)).

<sup>83</sup>Action Key Punch Service, Inc. at 972 (quoting Evenson v. Unemployment Ins. App. Bd., 62 Cal.App.3d 1005, 1016 (1976)). This language apparently derives from 81 *Corpus Juris Secundum* § 226 at 449-50 (1977).

his request that it accommodate his disability by not assigning him overtime. In 2000 a federal appeals court held that the Florida Power & Light Company's "aggressive same-day" policy of meeting consumer demand by connecting and disconnecting electric meters within 24 hours made the performance of mandatory overtime an essential function of the job by creating fluctuating production requirements so that the worker, who could not work overtime, failed to meet the ADA's threshold requirement and therefore suffered no unlawful discrimination when he was fired.<sup>84</sup> Thus an employer's prestatutory power to force workers to work overtime instead of hiring additional workers trumps this protective statute: the company can bootstrap itself into the privilege of firing workers injured on the job who can no longer work 216 overtime hours per year simply by understaffing the workplace in terms of the long-term health of its employees.<sup>85</sup>

Nor does the case stand alone. Two years later a Washington State appeals court looked to it for "guidance" in interpreting a similar state anti-discrimination law. When an employee who had worked at Microsoft 60 to 80 hours per week for nine years was diagnosed with hepatitis C, his doctor advised him to reduce his working hours to 40 to insure adequate rest. Since the employee was engaged in marketing to two large Microsoft customers, he proposed dropping one of them so that he could work 40 hours; Microsoft agreed to this proposal while it evaluated the feasibility of the accommodation. Although the employee performed well with the one customer, "Microsoft concluded that it was unable to accommodate Davis in his position short of hiring additional staff, which it determined was not reasonable," and terminated him.<sup>86</sup> Despite the court's inability to cite any facts—other than "management's view that long hours is the 'cultural norm' for jobs in sales"<sup>87</sup>—in support of the claim by one of the most profitable large corporations in the United States that it would be unreasonable to require it to hire one additional person to work 40 hours, the court held that "[r]easonable minds could not differ that overtime in the systems engineer position were [sic] essential functions of the job that Microsoft was not required to eliminate."<sup>88</sup>

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<sup>84</sup>Davis v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000).

<sup>85</sup>To be sure, the ADA regulations state that a "job function may be considered essential...because of the limited number of employees available among whom the performance of that job function can be distributed." 42 CFR § 1630.2(n)(2)(ii) (1999). But the definition is circular if "can" merely means that the employer has for reasons of profitability decided not to hire additional workers.

<sup>86</sup>Davis v. Microsoft Corp., 37 P.3d 333, 335 (Wash. App. 2002) (Lexis).

<sup>87</sup>Petition for Review at 14 (quoting RP 10/12 135:5), Davis v. Microsoft Corp. (Wash. Sup. Ct. 2002) (No. 47887-7-I).

<sup>88</sup>Davis v. Microsoft Corp., 37 P.3d at 336, 337 (quote).