THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

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Unsuccessful Congressional Initiatives to Raise the Overtime Premium or Lower the Overtime Threshold: The 1950s to 1970s

Whether the premium is 200 or 500 percent does not make more people with the necessary abilities available for employment.¹

In our plant...an employee gets three hours pay just for coming to work on short notice. Most overtime situations make an employee eligible for a meal paid for at the company’s expense. ... I can assure you that this penalty by itself is enough to make even the most generous plant manager shudder when he considers the need for overtime. This is adequate incentive to discourage businesses from working unnecessary overtime. In other words, gentlemen, I can assure you that we work overtime only when we believe the work must be done, and overtime is the only way to achieve it. ... I believe we are reasonable men, and we conduct our businesses accordingly.²

Comforted perhaps by the congressional relaxation of overtime standards enacted in 1949, by the early 1950s, the business press began taking a positive view of “Premium Pay Fattening Take-Home Wage,”³ which had “helped to prop up consumer buying for a long time.” Indeed, as firms cut workweeks “back to the peacetime standard of 40 hours” after the Korean war, the accompanying decline in income not only presented workers with “a new problem: how to live without overtime pay in the manner to which they have become accustomed,”⁴ but also became “a business factor to be watched.”⁵ By the mid-1960s, it was reported that in “many companies overtime has been so much prized by workers that it has had to be allocated by some rationing device such as seniority.”⁶

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²[California] Senate Committee on Industrial Relations, Interim Hearings on AB 1295—Mandatory Overtime 1:224 (testimony of Doug Bockstanz, resident mgr., Crown Zellerbach Los Angeles mill).


⁵Neil Chamberlin, The Labor Sector: An Introduction to Labor in the American Econ-
The Autocratically Flexible Workplace

If the FLSA overtime provision was originally designed as a work-sharing mechanism to combat unemployment, as the social wage rose from 5 percent in 1938 to 20, 30, and 40 percent of payroll costs in the postwar decades, the 50 percent premium became less effective in deterring firms from relying on overworking current employees in preference to hiring additional ones. (However, the 50 percent premium was and remains higher than the rates established by law or collective agreements in many European countries, which rely more heavily on mandatory norms than financial disincentives to prohibit overwork.)

The diminished impact of the 50-percent overtime penalty in the wake of the increasing nonwage share of the social wage is illustrated by the steel industry. In 1940, when the hourly wage was 84 cents and social wage benefits only 7 cents, the overtime premium of $1.26 strongly encouraged steel companies to hire new workers at 91 cents per hour. By 1993, when the hourly wage had risen to $15.78, overtime wages of $23.67 served to deter firms from hiring new permanent workers at an hourly cost (including benefits) of $31.73. Despite the $5 an hour overtime penalty that the United Steelworkers negotiated with employers to be paid into a career development fund for every hour in excess of 56 per week, overtime accounted for 15 to 20 percent of all working hours in 1994. Even an employer adamantly opposed to the 1977 California anti-mandatory overtime bill conceded that with weekly fixed costs of $97.12 per employee, a straight-time hourly wage rate of $6.20, and overtime of $9.30, “it is cheaper for us to work a regular employee 30 overtime hours a week than it is to hire an


7Hours of Work: Hearings Before the Select Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., Pt. 1, tab. 31 at 95 (1963); see also below ch. 16. In the People’s Republic of China, the overtime premium amounts to 300 percent of regular wages when workers are required to work on statutory holidays such as Spring Festival. Làođọngfá [Labor Law], § 44 (July 5, 1994); Gōngmǐn làođồng quanyí bǐzhě zhī shì shōuce 56-67 (Jing Tao and Zhêng-xiào Yuán, 1999); “Chūnjié jiābān gōngzí yǒu biáozhūn,” Yangze Wānbào, Feb. 19, 2000, at C4.

additional employee to do that work."9 Yet others insisted that at union time-and-
a-half and double-time rates, "overtime is largely self-policing."10

Periodically, unions' concern with the sharp increases in unemployment has
given rise to new drives for a shorter workweek. Yet employers in the United
States and elsewhere have long suspected that shorter-hours campaigns were
"merely a pretense for raising wages by applying overtime rates earlier."11 As
long ago as 1786, employers charged that London bookbinders' willingness to
work overtime contradicted their claims of fatigue and revealed that behind the
demand for reduced hours lay a desire for greater income.12

Perhaps the most startling example of what a union with control of the labor
market could achieve in terms of short hours cum overtime was offered by Local
3 of the International Brotherhood of Electrical Workers in New York City.
Known journalistically as a "cradle-to-grave" "welfare state,"13 and "an island of
socialism in a sea of capitalistic electrical enterprise,"14 the local, through collec­tive bargaining, had by 1936 already achieved a 30-hour week, which at the time
of World War II was increased to 35 hours, including one hour of mandatory
overtime.15 This regime was still in effect in January 1962, when Local 3 struck
for a 20-hour week as part of a spread-the-work campaign designed not to absorb
then unemployed electricians—in fact there was a shortage of electricians in New
York City—but to ward off the future labor-saving consequences of the intro-

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9[California] Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime 2:565 (testimony of Dale Zechar, dir., ind. rels. Davis-Walker Corp.).

10[California] Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime at 1:260 (testimony of James Watson, vice pres., Hunt-Wesson Foods). According to Watson, in the food processing industry fringe benefit costs such as life insurance and vacation were paid on the basis of number of hours worked in the sense that they were a percentage of gross earnings including overtime. Id. at 260-61.

11Gary Cross, A Quest for Time: The Reduction of Work in Britain and France, 1840-1940, at 187 (1989) (referring to France in the early twentieth century). In the 1930s, too, it was “sometimes alleged that the real objective of the short work week is not so much to reduce actual working hours as to place labor in a position to extract extra pay for overtime, computed on a shorter standard week.” Brookings Institution, The Recovery Problem in the United States 521 (1936).


duction of automatic machinery.\textsuperscript{16} Although the union leadership denied that it was fighting for overtime pay, some electricians admitted that if the standard daily work schedule fell to four hours, they would still work seven hours. Ironically, the electricians and union officials themselves feared that, since it was ""only human nature"" to take a second job just to keep occupied,\textsuperscript{17} the intensified job competition caused by such moonlighting might require government intervention ""protecting people from these moonlighters"" and to ""restrict men from looking for second and third jobs."\textsuperscript{18} It did not gain the 20-hour week, but beginning in July 1962, Local 3 entered into a two-year collective bargaining agreement with electrical contractors in New York City that called for a five-hour day plus one hour of mandatory overtime—""the shortest work week ever negotiated by any American union."\textsuperscript{19} Despite efforts to restrict overtime, electricians generally worked a seventh hour at overtime rates as well. Although this additional overtime work appears to have been largely the result of the heavy concentration of scheduled vacations during the peak summer building months and by the winter of 1962-63 hundreds of (out-of-town) electricians were laid off,\textsuperscript{20} the \textit{Wall Street Journal} called the arrangement an ""overtime bonanza."\textsuperscript{21}

President Kennedy publicly ""regretted"" the electricians' shorter workweek because it was not rooted in productivity increases. More importantly, he insisted that the ""many obligations"" the United States faced domestically and abroad made the 40-hour week the ""national goal."\textsuperscript{22} In turn, the business press reported, the union movement itself was generally ""embarrassed"" by Local 3's great leap on the grounds that it might actually slow down labor's progress in reducing the workweek.\textsuperscript{23}
Skeptics in the 1950s and 1960s could also hardly be reassured by the best-known example of short hours in manufacturing—the 36-hour week of unionized rubber workers in Akron, 10 to 20 percent of whom held a second full-time job and another 30 to 40 percent a part-time job.\(^\text{24}\) Because moonlighting by short-week workers undermined not only other workers' labor market position,\(^\text{25}\) but also the legitimacy of the campaign for reduced working time, the AFL-CIO quickly asserted that the issue had been "grossly exaggerated. The basic reason for dual job-holding stems from a desire for added income and—this is most important—it is hardly at all related to a reduction in working hours without a cut in weekly pay."\(^\text{26}\) The president of the United Steelworkers, David McDonald, sought to shift the blame onto employers by arguing that the whole problem of moonlighting could be "swiftly corrected" if firms "exercise their social responsibilities" by simply asking job applicants whether they already had a job and not hiring them if they did.\(^\text{27}\) And the admission by Harry Bridges, president of the International Longshoremen's and Warehousemen's Union and arguably the country's most prominent left-wing union official, to the *Wall Street Journal* that "large numbers of our members, especially younger men who've accustomed themselves to a six or even seven-day week and the fat paychecks it brings 'would certainly disagree with' Bridges' preference to raise overtime rates to induce employers to hire more workers, cast doubt on grassroots support for the AFL-CIO's campaign.\(^\text{28}\)

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\(^{24}\) Woodrow Ginsburg and Ralph Bergmann, "The Worker's Viewpoint," in AFL-CIO, *The Shorter Work Week* 36-42 at 38 (1957); Gabriel Kolko, "High Pay and a 'Six-Hour Day' in Akron," *New Republic* 134(7):10-11 (Feb. 13, 1956); "Akron Rubber Union Gives Up Short Day," *Bus. Wk.*, Apr. 21, 1956, at 45; Harvey Swados, "Less Work—Less Leisure," *Nation* 186(8):153-58 at 156 (Feb. 22, 1958); Sebastian de Grazia, *Of Time, Work, and Leisure* 64-65 (1964 [1962]). Benjamin Hunnicutt, *Kellogg's Six-Hour Day* 137 (1996), characterizes moonlighting as merely "the media 'take' on the shorter-hours story during the fifties, as reporters copied each other’s explanation that workers wanted to work six hours so that they could work another job as well. The wildest reports...asserted that 33 percent of the workers on the short shift had second jobs in Akron...." Nevertheless, Hunnicutt fails to offer empirical evidence refuting the reports, several of which were written by the United Rubber Workers itself or leftists.


\(^{27}\) "Firms Say Double Time Pay for Extra Hours Wouldn't Boost Hiring," *Wall St. J.*, Jan. 23, 1964, at 1:6, at 16:5. A similar split between union leaders and members arose two years later when many workers agreed to employers' requests to give up some of their vacation for double-time wages. Unions opposed such arrangements because they feared
The basis for some automobile workers' resistance to the UAW's efforts to reduce overtime was not difficult to grasp: loss of premium wages was "actually worse than a layoff." Whereas the union contract secured workers 95 percent of their take-home pay for up to a year—during which they were "free to loaf or pick up temporary work"—eliminating overtime could bring about wage reductions of as much as 50 percent for those working 70 hours a week and being paid double time on Sundays and triple time on contractual holidays.29

In spite of the contentiousness of the issue within the union movement, at the annual convention of the AFL in 1953, its Shorter Work Week Committee recommended lowering the overtime threshold to 35 hours under the FLSA.30 A number of liberal and pro-union Democratic legislators promptly began introducing a series of congressional bills to revise the overtime provision accordingly. In 1954, Senator James Murray and Representative Lee Metcalf, both of Montana, introduced identical bills lowering the time-and-a-half premium-pay threshold to 37.5 and then 35 hours over four years.31 At the AFL's annual convention later in 1954, the Executive Council reported that the Murray-Metcalf bills included changes suggested by the AFL and in accordance with action taken at the 1953 convention, and that they would be reintroduced in 1955.32 At the convention in 1954, one year before the AFL merged with the CIO, the Shorter Work Week Committee, ostensibly alarmed by a rise in unemployment and involuntary part-time employment brought on by rising productivity, again recommended the 35-hour overtime threshold, which it equated with a legislative "mandate" of a shorter workweek, despite its view that the record of the (Republican-controlled) Eighty-Third Congress gave little if any reason to expect passage of such an amendment; consequently, it recommended placing "primary emphasis" on "militant and intelligent collective bargaining...."33 The Executive Council and the convention went on record in support of amending the FLSA to reduce, within

that employers would resist demands for longer vacations in the future on the grounds that workers did not really want all the vacation they already had; in addition, since long vacations, like overtime premiums, were intended to spread work, trading them in for overtime was self-defeating. Frederick Klein, "Firms Offer Employes [sic] Double Wages If They Give Up Some Vacation," Wall St. J., May 24, 1966, at 1:6, at 14:2.


two years, from 40 to 35 hours the trigger for the time-and-a-half premium.\textsuperscript{34}

In 1955, with the Democrats once again in control of the Eighty-Fourth Congress, Senator Murray, as the AFL had announced, reintroduced his bill;\textsuperscript{35} another bill was filed that would have required daily time-and-a-half payments after eight hours of work.\textsuperscript{36} At a FLSA hearing that year focused on increasing the minimum wage and expanding coverage, George Meany, the president of the AFL, testified in passing that although little progress in reducing the workweek had been achieved since 1929: “In the past year or two...American workers have once again given increased attention to the possibility of greater leisure through reduced hours of work. A number of our affiliated unions are giving this objective priority in collective bargaining. In some industries, notably women’s clothing and printing, the 35- or 37\(\frac{1}{2}\)-hour week is already more common than a 40-hour week.” Referring to the AFL’s recommendation at its 1954 convention, Meany rather perfunctorily urged Congress to make a start “toward reducing the 40-hour standard” in the FLSA.\textsuperscript{37}

At the outset of the Eighty-Fifth Congress in 1957, Senator Pat McNamara of Michigan assumed the leadership on the overtime question, introducing the by now standard AFL bill lowering the threshold to 35 hours in two stages and over four years.\textsuperscript{38} The same year saw numerous identical bills introduced in the House of Representatives, where Elmer Holland and John Dent of Pennsylvania and James Roosevelt of California would continue to submit such bills into the 1960s.\textsuperscript{39} Roosevelt and Dent refiled them in 1959, while Holland’s bill would have instituted the 35-hour threshold within one year.\textsuperscript{40} By 1959, when John F. Kennedy, the chairman of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, was chairing yet another round of FLSA hearings, he observed that of the many bills pending before the committee “several demand special consideration, for they push back what might be called the frontiers in the wage and hour field.” Here he singled out McNamara’s aforementioned bill.\textsuperscript{41}

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\textit{Report of the Proceedings of the Seventy-Third Annual Convention of the American Federation of Labor at 82.}

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\textit{S. 662, § 6, 84th Cong., 1st Sess. (1955) (Sen. Herbert Lehman, D. N.Y.).}

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\textit{H.R. 428 (Roosevelt), H.R. 1899 (Dent), H.R. 3310 (Holland), 86th Cong., 1st Sess. (1959).}
Even as a presidential candidate, however, Kennedy emphatically rejected a reduction in the workweek. In a campaign speech at the annual convention of the United Steelworkers of America on September 19, 1960, he made it clear that such an initiative was inconsistent with his cold war priorities. He raised only to dismiss the suggestion of union president David McDonald "that the only way to meet the problem of overabundance is to have a 32-hour week." Kennedy favored a "different solution. I would prefer the solution of this economy going ahead at such full blast that in 40 hours a week we barely produce what we can consume, that at the time when we have a productive race with the Soviet Union, I would like to see economic and fiscal policies by this Government will be directed toward stimulating the economy so that the steel industry works full time...."

Nevertheless, at the outset of the Kennedy administration, indeed, even before his inauguration in 1961, numerous bills lowering the overtime threshold were introduced, the boldest, Representative Holland's, reducing the overtime trigger to 32 hours. In August 1962, the AFL-CIO Executive Council announced that achievement of the 35-hour week and double-time for additional hours was the organization's next major goal. Big Business was not amused. The chairman of the board of Dow Chemical Company, Carl Gerstacker, countered that unions were marching in the wrong direction: "'We should be talking about a 50-hour week, rather than a twenty-hour or a 30-hour week, which in the present state of affairs is so much tommyrot and a national danger.'"

Although none of the shorter-hours campaigns bore fruit, the 1963-65 push during the Kennedy-Johnson administrations came closest to marshalling executive and congressional support. Without any backing from President Kennedy, who saw a reduction in work-time as a distant goal which had to be subordinated to the need to increase production in the struggle against communism, several

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44"Shortest Workweek in History?" Newsweek, Aug. 27, 1962, at 65.

bills were again introduced in the House in early 1963 to lower to 32 or 35 hours the trigger for the overtime premium.46 Another bill would have lifted the premium to 100 percent in industries "of major economic importance," including mining, communications, public utilities, wholesale trade, construction, and manufacturing.47 The House Select Subcommittee on Labor held more than two weeks of hearings on the various bills.48 Unions welcomed the initiative, but were skeptical of the efficacy of the proposed overtime penalty: after all, the UAW Skilled Trades Conference had passed a resolution in December 1962 calling for double-time for the first two hours, triple-time thereafter, double-time for Saturday work, triple-time for Sunday work, and triple-time plus holiday pay on holidays.49 The business press seriously monitored the initiative from the outset. While Business Week correctly predicted that the debate over a short workweek would be the merest "chin music,"50 the Wall Street Journal reported on it extensively and editorialized repeatedly against it.51 In addition to bemoaning the further state infringement of "managerial prerogatives," the Journal editors, ever solicitous of workers' rights, intoned: "By what theory of freedom does the Government presume to tell a man he can't work as much as he wants and make as much as an employer is willing to pay?"52

The drive to update the overtime provision received strong support from a Bureau of Labor Statistics (BLS) study conducted in May and published in August 1963. The timing was hardly coincidental: BLS commissioner Ewan Clague had testified before Congress in June on the "seeming paradox" of the coexistence of large volumes of overtime and unemployment.53 The unprecedented study revealed that only 4.5 million or 29.4 percent of 15.2 million wage and salary workers working 41 hours or more at one job reported receiving premium pay for overtime. Interestingly, across the board, the longer the hours worked, the lower the proportion of workers reporting premium pay—even when "exempt" professional, technical, managerial, and sales workers were excluded. In construction fully 61 percent of "nonexempt" workers failed to receive premium

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46H.R. 355 (Holland, 32 hours), H.R. 3102 (Powell, 35 hours), H.R. 3320 (Libonati, 35 hours), H.R. 9075 (Roosevelt, 35 hours), H.R. 9525 (Roosevelt, 35 hours), 88th Cong., 1st Sess. (1963).
pay as did 26.4 percent of their manufacturing counterparts. Viewed occupa-
tionally, 48.8 percent of all blue-collar workers, including 60.4 percent of
nonfarm laborers, were not paid for their overtime hours.\textsuperscript{54}

The rather lengthy article that \textit{The New York Times} devoted to the survey
quoted Department of Labor officials as “surprised” by the findings, which they
conceded could not be fully explained by exemptions from the FLSA, although
they declined to conclude that the act “was being violated on any widespread
basis” without further information.\textsuperscript{55} Further surveys conducted in May 1964 and
May 1965 confirmed the original findings and added new details without shedding
any light on violations. In 1964, of manufacturing operatives 3.0 percent in
motor vehicles, 10.2 percent in other durable goods, and 15.7 percent in non-
durable goods worked overtime, but did not receive premium pay; similarly, 22.5
percent of laborers in manufacturing and 35.9 percent of construction craftsmen
failed to be paid premium rates for their overtime hours.\textsuperscript{56}

In mid-November, a week before President Kennedy’s assassination, George
Meany alerted the AFL-CIO’s annual convention to a possible “national catas-
trophe” brought on by a “‘mad race to produce more and more with less and less
labor.’” \textit{The Wall Street Journal} interpreted the speech, which posited the 35-
hour week and double pay for overtime as the main answer, as reflecting “the
state of near-panic among many union officials over what they see as the almost
endless job-displacing impact of the present pace of automation.”\textsuperscript{57} Significantly,
the convention resolution in favor of these two changes in the FLSA overtime
provision was focused exclusively on unemployment, virtually dismissing any
other basis for shorter hours: “We do not claim that the present standard work-
week is hazardous to individual health and safety. In most industries, this is not
the case. But mass unemployment \textit{is} hazardous to the health and safety of the
economy....”\textsuperscript{58} At the House Select Subcommittee on Labor hearings in Decem-
ber 1963, Andrew Biemiller, the director of the AFL-CIO’s department of legis-
lation, took this disclaimer even further, demonstratively renouncing an appeal
to any of the other grounds on which the labor movement had been basing its
demand for shorter hours since the nineteenth century. Instead, remarkably, the
union movement’s chief lobbyist rested the entire argument on the potentially

\textsuperscript{54}Blackwood and Kalish, “Long Hours and Premium Pay,” tab. 5 and 3 at x, viii.


\textsuperscript{57}AFL-CIO President Describes Automation As ‘Curse to Society,’” \textit{Wall St. J.}, Nov.

\textsuperscript{58}Proceedings of the Fifth Constitutional Convention of the AFL-CIO: Daily Pro-
refutable empirical claim that a 35-hour week and double-overtime wages would absorb some significant proportion of the “grim” unemployment that had been haunting the United States for six years:

We in the AFL-CIO do not claim it is an unreasonable standard on most jobs. We do not assert that a 40-hour week is exhausting; or that it leaves too little time for cultural pursuits or self-improvement; or that it inhibits the proper development of family life.

Our task would be easier if we could make and support such claims. Unfortunately we must appeal to reason, to intelligence, rather than to emotion.

In urging a shorter workweek we are not fighting against exploitation or inhumanity. We are fighting for the preservation of the American economic system. Our allies are not the sob sisters, but the economists. I wish it were the other way around; the sob sisters reach a larger audience.59

Biemiller was willing to make the success of the campaign contingent on a single economic variable, even though he was constrained to concede both that “some overtime is obviously unavoidable and would be worked even at double time” and that no one knew what its share of total overtime hours was,60 and the AFL-CIO admitted that the “‘moonlighting’ issue cannot be dismissed.”61

The AFL-CIO had made it clear in early 1962 that its demand for a shorter workweek and less overtime was purely conjunctural and driven solely by the impact of unemployment. It had let it be known then that it had drafted a kind of sliding-scale formula under which the 40-hour week would be retained during periods of full employment, cut back as unemployment rose, and restored when full employment returned.62 In other words, organized labor’s position was that the length of the workweek should be adjusted to insure full employment.63

By the time the House Select Subcommittee on Labor hearings were over in December 1963, a new phase had begun with the intervention of President Johnson. As 1964 opened, Secretary of Labor Willard Wirtz floated the notion to the press that raising the overtime premium might be a partial solution to the problem of unemployment since the volume of overtime equated to almost a million full-time jobs.64 In his State of the Union address to Congress five days later, Johnson

62Raskin, “If We Had a Twenty-Hour Week” at 15.
63“Even Labor Has Doubts About 25-Hour Week” at 36.
bluntly rejected the 35-hour week as a way of reducing unemployment (then numbering 4 million) because it would increase costs, lower competitiveness, and share rather than create jobs. But he was "equally opposed to the 45- or 50-hour week in those industries where consistently excessive use of overtime causes increased unemployment." He therefore recommended legislation creating a tripartite industry committee to determine in which industries an increased penalty overtime rate would spur job creation without unduly increasing costs. Modest as the recommendation was, The New York Times called it "by far the most radical" of Johnson's anti-poverty proposals. A few days later in his annual Economic Report, Johnson repeated his opposition to "forcing the standard work week down to 35 hours." Then on January 31, identical administration bills (S. 2486 and H.R. 9802) were introduced in both Houses of Congress mandating not less than double overtime for hours beyond the number (but not fewer than 40) specified by the tripartite committees in industries affected by "substantial and persistent overtime" and in which the higher penalty rate "would increase employment opportunities...without excessive costs." The enhanced penalty would not apply if the excessive overtime hours was "required only by reason of a period of extraordinary emergency or "unusually compelling need," as those terms were defined by the Secretary of Labor.

Despite massive amounts of overtime at automobile plants in 1963 and unions' loudly declared intention to make excessive overtime a major point in collective bargaining negotiations in 1964, the business-oriented press reported that "[u]ntil President Johnson put overtime in the headlines, many people were not aware that it was developing into an issue." And despite Johnson's rejection of labor's demands for a lower weekly threshold for overtime—as early as March 1964 the Wall Street Journal was reporting that the AFL-CIO's opposition to the tripartite committees had effectively killed the bill—employers let it be known that they intensely resented Johnson's indirect support for demands by the UAW and other unions for double overtime in upcoming negotiations. More threaten-
ing to the automobile manufacturers was a UAW bargaining proposal giving workers the option not to work overtime. As one GM production worker explained to *U.S. News & World Report:* "If they left it up to us...they'd never get enough guys to get the line moving. As it is now, they can barely get enough on Saturday nights."

Other employers, including David Rockefeller, opposed the whole proposal. The president of the NAM, who told a Congressman that "if your daddy wanted to work 72 hours I should not deny him," objected to any statutory overtime premium, though he was constrained to admit that "one and half times is what we have learned to live with." Most firms understood the public relations game well enough to avoid knee-jerk ideological reactions. For example, Caterpillar Tractor Company made a virtue of an alleged necessity by asserting that its reasons for scheduling overtime instead of hiring additional workers when the volume of orders increased, but it did not know how long the increase would last, were "more humanitarian" than economic: "In our opinion, it is socially ill advised and morally wrong to induce men and women and their families to move from one place or job to another if the transfer does not offer a reasonable chance of permanence and stability." Other firms, however, succumbed to the temptation to let down their ideological masks. Ex-Cell-O Corporation, a leading manufacturer of precision machine tools and machines, lambasted the legislative proposal on the grounds that it would "remove key management decisions from corporate management, and centralize this responsibility in the Department of Labor." The firm instinctively knew which way the ill wind was blowing:

The Government now tells us what we can spend our money on, through the allowance or disallowance of corporate expenses for tax purposes. The Government tells us our minimum rates of pay. ... The Government regulates our relationships with our employees. The Government cuts itself in for half of our profits; and, now it is extending its power

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to regulate the amount of overtime and over-time pay in our plants. Gentlemen, it seems obvious to us that we are rapidly approaching the time when American industry will be nationalized.  

This type of rhetoric comported well with the intransigence that Ex-Cell-O was about to exhibit in its six-year struggle with the UAW, which prompted a National Labor Relations Board trial examiner to issue an unprecedented order for compensatory relief to remedy the employer's refusal to bargain collectively with the union.  

Employers' self-interest also impelled them to give voice to the undeniably self-contradictory feature of a statutory premium overtime regime that organized labor rarely conceded. As Virgil Day, General Electric's vice president in charge of labor relations, put it: "Increasing the incentive to want more overtime on the part of those presently employed works at cross purposes with the objective of providing employment for more people." The closest that Labor Secretary Wirtz came to sounding a note of candor in this regard was his cautiously formulated concession that the overtime premium "has always been realistically and analytically a proper figure only in terms of employer cost, not in terms of employee compensation."  

During 1964 the House Labor Subcommittee held three weeks of hearings, which triggered intense national debate, on which the press reported extensively. The UAW, which stood at the forefront of the campaign to modernize the "antiquated" overtime penalty deterrent by increasing it to 100 percent, also insisted on working class solidarity as the driving force behind it. (Ironically, 30 years  

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77The Board eventually ruled that it lacked the statutory authority to impose such a remedy. Ex-Cell-O Corp., 185 NLRB 107 (1970).


81For an argument that in the 1950s and 1960s the UAW president Walter Reuther successfully deflected rank and file calls for shorter hours (a 30-hour week with 40 hours' pay), see Ronald Edsforth, "Why Automation Didn't Shorten the Work Week: The Politics of Work Time in the Automobile Industry," in Autowork 155-79, at 160-75
later, modernizing the "[h]opelessly outdated" depression-era FLSA for "today's fast-paced, information-based society" became the watchword of employers seeking not to increase the overtime penalty, but to eliminate it altogether either through hours-averaging over several weeks or time-off.\textsuperscript{82} Leonard Woodcock, UAW vice president and later president, testified about his own personal experience of working at the nadir of the Great Depression in 1933 when, as a result of the implementation of the National Industrial Recovery Act code in the automobile industry, he saw his weekly hours drop from 84 to 40, while his hourly wage rose from 45 to 60 cents: "Now it is true my total wage was sharply reduced, but I certainly had no feeling of compunction about that because of the fact that we put on in that plant some 200 additional workers." He also reported to the House Labor Subcommittee how surprised and impressed he had been by a recent survey revealing "the substantial feeling of shame that our members had at being forced to work overtime when their neighbors were out of work."\textsuperscript{83}

Woodcock's insistence that "the forcing of overtime work is immoral" provoked one Congressman to engage him in Socratic dialog concerning the complex and ticklish relationship between working-class morality and individual workers' self-interest in still larger overtime premiums:

\begin{quote}
MR. FRELINGHUYSSEN. Would you mind a brief interruption...with respect to the immorality of overtime? If it is immoral to work overtime, if there are those unemployed who would be qualified to work, how does increasing the penalty make it moral or is it still immoral even though the penalty is doubled? I am not sure I follow your reasoning. If it is immoral I should think we might forbid it rather than increasing the penalty.

MR. WOODCOCK. The purpose of the penalty is to be a deterrent toward the working of overtime.

MR. FRELINGHUYSSEN. But it still is immoral, is that right?

MR. WOODCOCK. It is immoral to require some Americans to work against their will beyond 40 hours when their neighbors and friends are totally without work and in want.

MR. FRELINGHUYSSEN. Is it immoral if they want to work overtime?

MR. WOODCOCK. The record shows they do not want to work overtime when others are out of work.

MR. FRELINGHUYSSEN. If it is immoral might we not consider forbidding it?

MR. WOODCOCK. I don't see how you could put industry in such a straitjacket. The testimony has been—and we concede some overtime on occasion is necessary and flat prohibition would put a straitjacket on—would be entirely impractical. This is why we need an economic deterrent that will insure that the overtime that is worked is actually
\end{quote}

(\textit{Robert Asher and Ronald Edsforth eds. 1995}).


\textsuperscript{83}Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, Pt. 2 at 834.
necessary and unavoidable, but wipe out the great excess of overtime which is unnecessary.  

A suspicion of evasion seemed to cling to Woodcock’s responses. The failure of nerve to express support for the venerable model of a strict eight-hour day or 40-hour week (with exceptions only for emergencies) and the surprising sympathy with employers’ operational imperatives and support for a free-market financial incentive rather than use of the state’s police powers left the impression that the UAW could not afford to deprive even some of the country’s highest paid manufacturing workers of access to more work at yet higher wages. Much later in his testimony Woodcock was able to dispel that impression (objectively if not intentionally) by reminding Senator Taft that the UAW had long been on record as “willing to have the extra penalty deterrent, the difference between the time and a half and double time...used for other purposes.” Woodcock refused, however, to include relief of employers’ unemployment compensation payments among those purposes. The UAW’s credibility was, however, enhanced by a resolution that it passed at its nineteenth constitutional convention in 1964 condemning moonlighting: “As it is immoral for an employer to deny job opportunities to unemployed workers by scheduling avoidable overtime work, so it is equally immoral in a time of high unemployment for a worker who already has a full-time job to deny an unemployed worker his right to employment by working at a second job...” The ambiguity in the UAW’s position on overtime in large part reflected a generational split among industrial workers, with younger workers pushing for more hours and more income, while older workers favored shorter hours.

Automobile management also sought to hoist supporters of the mono-purpose theory of the overtime penalty with their own petard. Ford Motor Company vice president Theodore Yntema asked why, if proponents assert that its purpose is not to compensate workers, but to discourage employers from offering overtime, workers should receive the premium payment:

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84Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, Pt. 2 at 780.

85Overtime Penalty Pay Act of 1964: Hearings Held Jointly Before the General Subcommittee on Labor and Select Subcommittee on Labor of the House Committee on Education and Labor, Pt. 2 at 834. Woodcock was referring to collective bargaining demands, but seemed amenable to extending the principle to statutory regulation.


88For example, Rep. Dent stated that “[o]vertime pay was never intended to be a bonus
Given the alleged objectives and premises of the bill, it was really illogical to frame a proposal making overtime less attractive to business, but at the same time making it more attractive to labor. A logical proposal would make overtime less attractive to both business and labor. This could be done by requiring that penalty pay for overtime should not be given to the worker, but should be used for the benefit of the unemployed.

While we do not advocate such a proposal, it would coincide precisely with the stated objectives of the administration.... However, it would not provide the windfall that H.R. 9802 does for the workers continuing to be employed overtime at the higher penalty rate. I suspect there would be little enthusiasm for any proposal from which the windfall was missing.89

Representative O'Hara, one of the chief sponsors of the overtime initiative in the 1960s, responded that Yntema had a “terrific idea... that had not occurred to me. ... But, by George, there is not any good reason why the extra half should go to the worker. As a matter of fact, there might be some good reasons why it should not. [W]hen the time arrives, I am going to revive the Yntema amendment to H.R. 9082 to pay that extra half...[to] some sort of fund to provide for training or retraining of workers....”90

If the only purpose of the overtime penalty were in fact to encourage employers to absorb the unemployed rather than to overwork the already employed, Yntema’s ironic logic would be unexceptionable. Employers had demonstrated its validity—if not its practical effectiveness—during World War II, when they deployed it to contest the continued compulsory payment of overtime premiums when there were no more unemployed for firms to absorb. Oddly, its force failed to prompt supporters of an increase in the penalty rate in the 1960s to admit, even rhetorically, that the premium had also always served to guarantee workers’
freedom from (alienated) labor, to preserve their health, and to compensate them for the shortening of their working lives. Such an argument would have helped deflate employers’ claim that the amendment was merely a disingenuous covert attempt to raise wages, but perhaps its evocation of Marxist class struggle was too high a rhetorical price to pay. Unions’ failure to develop this perspective was so much the more puzzling since such a taint did not deter Malcolm Denise, vice president in charge of labor relations at Ford Motor Company, from supplying the missing historical testimony: “I do not think that it can be legitimately said that the sole purpose of the Fair Labor Standards Act of 1938 was to spread employment. The drive for shorter working hours in this country has a long history. Its history was concerned with the health and welfare of people and their working and living lives.”91 Since the labor movement in the nineteenth and early twentieth century had pressed for an absolute limit of eight hours of work per day and not for overtime premiums, the AFL-CIO’s newfound preference for flexible financial incentives may have caused it to suppress the reality of its traditions.

After the bills failed to be enacted, Representative O’Hara and Senator McNamara, who had introduced them, filed stripped-down versions in 1965, which simply raised the overtime premium across the board to 100 percent.92 The Johnson administration then supported a new initiative, which took into account the uniform opposition that “virtually all the witnesses” had directed at the previous bills. Armed with new data from 1964 showing that 3.5 million employees worked five or more hours of overtime weekly for a total of 19.6 million hours, and that much of the overtime was being performed on a “fairly standard recurring basis...in occupations in which there is presently a surplus of manpower” (that is, a higher proportion of low-paid workers in almost all industries worked overtime than of higher-paid workers), Secretary of Labor Wirtz, “acting...from a kind of hardheaded idealism,” proposed a two-tiered overtime premium.93 S. 1986 and H.R. 8259 would have phased in over three years a higher 100-percent premium applying to hours above 48, 47, 46, and finally 45 hours, below which the old 50-percent penalty would have applied. The impact of double-time would have been further softened by a provision permitting employers to pay the lower rate when the overtime work (beyond 45 hours) was “required only by reason of a period of extraordinary emergency or unusually compelling need” as defined

by the Secretary of Labor.\footnote{94}

Wirtz was even receptive to liberal Republican Senator Jacob Javits's suggestion—which would have tested unions’ commitment to the underlying principle of work-sharing—that some administrative machinery be created exempting employers from the higher penalty rate if they could prove that its imposition would increase costs without leading to increased hiring.\footnote{95} Numerous firms and industries, such as General Electric and the telephone, paper and rubber industries, inundated the congressional labor committees with evidence purporting to prove precisely such futility.\footnote{96}

Both the House and Senate labor committees heard extensive testimony in 1965, much of which replicated what they had heard in 1963 and 1964. The threat that the amendment might be adopted was serious enough to prompt \textit{U.S. News \& World Report} to declare (hyperbolically as it turned out): “The day may not be too far away when employers will be required by law to pay double-time rates for overtime work. But before that day comes...the issue is sure to bring on one of the biggest fights in the history of labor legislation.”\footnote{97} Many employers sought to portray the move for a higher overtime penalty both as a transparent grab for higher wages by well-paid union members and a singularly counter-productive mechanism for reducing unemployment. For example, the National Electrical Contractors Association (NECA), long a staunch advocate of collective bargaining, told the House Labor Committee that in the electrical contracting industry and generally in construction it was “a well-known fact that...overtime jobs attract skilled workers. Once these workers are employed on the job, they wish to work as much overtime as is possible and at the same time restrict the employer from employing additional workmen.” Indeed, the association’s public relations director testified that an electrician’s double-time hourly wage of $9.42 “would seriously be personally attractive enough to me to make me want to enter the industry tomorrow, on the union side.” From the NECA’s perspective, the enhanced overtime penalty was doomed to failure because it prompted responses

\footnote{94S. 1986, § 404(a), 89th Cong., 1st Sess. (May 18, 1965).}

\footnote{95Amendments to the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, Pt. 1, 89th Cong., 1st Sess. 54 (1965).}


from labor and capital diametrically opposed to those presumed by the underlying policy: instead of showing solidarity by sharing work with their unemployed brethren, employed craftsmen would monopolize it, while firms, instead of hiring additional workers, would automate any labor task that could lend itself to automation.98 Other industries, such as petroleum refining (with above-average benefit costs), offered data to undermine the claim that the 50-percent penalty rate did not suffice to give them an incentive to prefer hiring additional workers to overtime.99

The industry widely viewed as the chief abuser of overtime went to great pains in its testimony to undermine the economic underpinnings of the demand for a higher penalty by emphasizing "why overtime is not readily convertible into more jobs."100 First, however, the automobile manufacturing firms stressed that the three-year agreement they had just entered into with the UAW had been preceded by extensive negotiations over the union's demand for double- and triple-time, which it finally abandoned in favor of other demands, such as inducements to early retirement and more holidays, vacation, and relief time, designed to spread employment. The auto firms were not amused that the UAW was now seeking to achieve through lobbying what it had lacked the power to gain through negotiations.101 The main burden of the Automobile Manufacturers Association's testimony was the assertion that the vast majority of overtime work resulted from emergencies, retooling and model changeovers, cyclical and seasonal production patterns, and changes in customer preferences, which were "[q]uite obviously...inherent rigidities...that cannot be legislated out of existence." Furthermore, in many instances the overtime was being performed by skilled craftsmen, of whom the firms complained of suffering a serious shortage. Moreover, that a considerable proportion of overtime work was already being compensated at 100 percent under the UAW contract demonstrated that "there is no practical alternative regardless of how high the penalty."102 Indeed, John Bugas, a Ford vice president and former head of the FBI's office in Detroit who had helped make

100 Minimum Wage-Hour Amendments, 1965, at 1755 (statement of John Bugas, vice pres., Ford Motor Co.).
Ford’s primitive red-baiting practices more sophisticated after World War II,\textsuperscript{103} testified that, despite the focus of congressional attention on the allegedly increasing impotence of the overtime penalty to induce employers to hire additional workers in the face of the expanding quasi-fixed benefits, in fifteen years of attending monthly scheduling meetings, he could not recall a single instance in which Ford had opted for overtime because it was cheaper: “We make the decision on overtime on completely different bases.”\textsuperscript{104} And finally, Bugas claimed on behalf of the auto manufacturing employers that they “would run into tremendous resistance” if they tried to reduce overtime in favor of additional hiring because the “vast majority—almost an infinitesimal minority do not like overtime, but the vast majority likes overtime. ... In tribute to the American worker he is a pretty industrious character if he gets paid for it.”\textsuperscript{105}

To be sure, the UAW offered rebuttals of all these arguments in its own written submissions. Its counter-propaganda was especially effective in establishing that most overtime was systematic and long-term and had nothing to do with emergencies, cyclicity, or shortages of skilled craftsmen, and least plausible in distancing itself from the overtime system and denying complicity by its own members in its survival.\textsuperscript{106} But because the congressional committees, as is almost always the case in such hearings,\textsuperscript{107} failed to arrange for direct confrontation between these diametrically opposed points of view, and, many of the underlying data were either uniquely within the firms’ possession or interpretable only by reference to arcane details of collective bargaining agreements, the dispute remained practically unresolvable.

Following the lengthy hearings on the overtime issue, Congress decided not to enact the proposals. Insisting that their absence reflected not “a negative view towards their advisability,” but a “prudent, cautious approach to an important proposal that deserves further serious consideration,”\textsuperscript{108} Congress retained only a slight trace in the landmark FLSA amendments of 1966 of the fervor that had once attached to the issue. It instructed the Secretary of Labor to submit the


\textsuperscript{104}Minimum Wage-Hour Amendments, 1965, at 1790 (testimony of John Bugas).

\textsuperscript{105}Minimum Wage-Hour Amendments, 1965, at 1800-1801 (testimony of John Bugas).


\textsuperscript{107}Congressional hearings were not always aseptic. In the late nineteenth and early twentieth centuries high-ranking representatives of labor and capital frequently cross-examined one another.

following year a "complete study of present practices dealing with overtime payments for work in excess of forty hours per week and the extent to which such overtime work impedes the creation of new job opportunities in American industry."109 Since congressional concern was directed at the flagging deterrence generated by the overtime penalty, the legislature expected the Labor Department’s study of excessive hours to enable Congress to judge whether a higher penalty rate would "curtail long workweeks and create additional jobs."110 The Department’s agnosticism served to maintain the status quo. Despite the evidence that the overtime penalty had lost much of its deterrent value, the Secretary of Labor found it “difficult...to develop with any degree of certainty any reliable estimate of the number of jobs which could be created if the original effectiveness were restored. More important, it is difficult to insure that there would not be a temporary reduction in total productive potential during the transition period if a stricter standard were applied.” Consequently Secretary Wirtz proposed no legislative changes.111 And as the Vietnam war drove the unemployment rate down to its lowest rate (3.8, 3.6, and 3.5 percent in 1967, 1968, and 1969) since the Korean war,112 unemployment and its possible exacerbation by overtime work drifted out of public consciousness and discourse—until the next depression phase of the business cycle.

III

In the midst of the overtime hearings, the Wall Street Journal devoted a long front-page article in 1964 to detailing employers’ denials that the proposed double-time would spread employment. While some firms conceded that even double-time would be cheaper than “handing out fringe benefits new workers would have to be given,” others asserted that double-time might even motivate them to lay workers off. A construction association went so far as to doubt that even triple-time would preclude the continued use of overtime. The only hint that human volition might be able to prevail over the compulsions of capital valorization came from a manager who stated that he would react to mandatory double-time not by hiring additional workers, but by stretching out schedules and making customers wait longer.113 Why, then, the world of widget production could not

also be slowed down to accommodate workers' desire for more time away from alienated labor, was not explained.

Yet the very next year, the Wall Street Journal was reporting that "[h]eavy overtime boosts absenteeism and quality control problems in the auto industry." Suddenly management recognized the human costs associated with overwork: "Monday absenteeism has shot up as one effect of the continuous Saturday work, a Buick official reports," while Ford had to "enlarge[ ] its quality control force to correct mistakes caused by workers weary from long hours."114 Three months later, with similar evidence accumulating throughout industry, "many factory managers now believe the regular overtime they have long scheduled to keep production ahead of swelling orders is both costly and inefficient." Having discovered that overtime "is a heavy cost burden...breeds absenteeism and hurts production efficiency as workers tire," "bosses" suddenly found it possible to implement measures that employers had told the newspaper in 1964 were impossible. They included different scheduling methods, upgrading unskilled workers, hiring new workers, expanding capacity, and buying labor-saving machinery. Moreover, all these efforts "'to wash out the premium-time problem'...would surely be much intensified if Congress" enacted the double-time amendment.115 Indeed, within three months the Wall Street Journal reported that "[m]ore and more companies" were hiring additional workers and expanding facilities "to cut time-and-a-half overtime pay premiums. Even at this late date, when the prospect of passage of an overtime amendment appeared remote, "[m]any employers sa[id] pending legislation to require double pay for overtime adds urgency to their control efforts."116 Two years later yet another front-page Journal piece chronicled the proliferation of overtime cutbacks motivated by the perception that fatigue


115Joseph Mathewson, "Many Factories Find Extra Hours Costly, Try to Eliminate Them," Wall St. J., June 23, 1965, at 1:6, at 20:2-3 (quoting a manufacturing company official). One of the most unusual political-moral contexts in which wage laborers have performed extended overtime sheds light on these managerial judgments. Construction firm employers and New York City officials in charge of the 24-hour a day excavation of the remains of the World Trade Center destroyed by the attacks on Sept. 11, 2001 stated that using two 12-hour shifts rather than three eight-hour shifts saved at least a month and was "worth" the "high cost of overtime" of skilled workers whose straight-time hourly wages amounted to as much as $40. The time saved resulted from not having had to train additional workers and having avoided the time wasted on shift changes. The participants saw the source of such efficiencies, in spite of "grueling" 12-hour days and 72- to 84-hour weeks, in "[p]atriotism and compassion" and "sheer sense of purpose." Understandably, after four months even this extraordinary feeling of "honor...has given way to exhaustion...." Interestingly, the workers were reported to be anticipating only the "emotional hell" to be paid after the completion of the work. Charlie LeDuff and Steven Greenhouse, "Far From Business As Usual: A Quick Job at Ground Zero," N. Y. Times, Jan. 21, 2002, at A1:5 (Lexis).

The Autocratically Flexible Workplace

and absenteeism were wasteful and inefficient.  

As the business cycle drove relentlessly toward its next high point in 1972-73, and workers in some key automobile plants had been working seven days a week for months, *Newsweek* reported that UAW members began wearing "Overtime: ASK ME Don’t Tell Me" buttons. One worker explained the libertarian message this way: "[A] guy ought to have the right to say ‘no’ once in a while. A guy gets to be 55, and those extra hours are murder." But management rejected even this mild-mannered plea for recognition of the mortal human heart that beats deep within the commodity labor power: "[A]utomakers maintain that they simply could not carry out a rational production plan if workers had the right to walk off the job at the end of their regular shifts. ... ‘You could have half a dozen guys who say they won’t work and shut a whole plant down,’ GM vice president George B. Morris Jr. contends. ‘It’s giving them a hell of a weapon.'" Faced with such intransigence, UAW president Leonard Woodcock and vice president Douglas Fraser tried to make the demand more "palatable" by offering the availability of a new component of the reserve army: "UAW retirees could serve as a stand-by work force at plants where there is a problem in filling overtime schedules."  

Renewed union interest in amending the FLSA’s overtime provision was in fact sparked by the next expansion of the conventional reserve army of the unemployed during the recession of 1974-75. Although this drive did not find expression in a congressional bill until the late 1970s, the prestigious journal *Industrial Relations* published an article in 1975 arguing that it had become “particularly important in light of the recent strong efforts by labor unions to gain the right for workers to reject unwanted overtime work” for firms with large and uncontrollable fluctuations in demand to hire “employees with a high propensity to work overtime....” The bill introduced by Representative Conyers from Detroit on March 22, 1978 (H.R. 11784) sought to restore the work-spreading impact of the FLSA by normalizing the workweek at 37.5 hours by 1980 and 35 hours by 1982 and penalizing overtime at 100 rather than 50 percent. More innovative was the bill’s ban on mandatory overtime: "No employer shall knowingly permit any employee to perform work for which the employee is entitled under this section to receive compensation at the rate of pay applicable for overtime employment.

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unless the employee gives his or her consent to perform such work.” To discourage employers from unlawfully compelling workers to work overtime, Conyers inserted a liquidated damages provision making employers liable for an amount equal to three times the regular rate at which the workers were employed. To anticipate charges that the bill would place a straitjacket on enterprise, the bill—like the 1937 Pennsylvania 44-hour week law—also authorized the Secretary of Labor to issue regulations to permit such exceptions to the ban on mandatory overtime “as may be necessary to deal with emergency situations (as determined by such Secretary) in which the production in an establishment would be severely jeopardized if no such exceptions existed.”

Without explaining why it was not feasible or desirable to prevent workers from undermining their own labor standards by working 60 hours a week while millions were unemployed, Conyers himself acknowledged that to achieve the bill’s objective—namely, to dampen employers’ tendency to increase overtime among those already on the payroll rather than hiring additional workers during the recession and early recovery phases of the business cycle—it was necessary to apply sanctions against employers because “[n]o one wishes to curb an individual’s choice of how much and for whom he or she works.”

Conyers’ pragmatism contrasted sharply with the startling proposal that the Teamsters president, James Hoffa, had made to Congress 14 years earlier. He had insisted that reducing the workweek or work year would not significantly redistribute work “unless there is a penalty imposed on moonlighting in the form of double time payments by the first and second employer after 32 hours or 1,600 hours per year.” Hoffa had not explained why it would not have been more efficacious to penalize moonlighting by penalizing moonlighters directly rather than offering them further incentives in the form of double overtime. Here, in any event, the extremes met: back in 1964 a Republican Representative from Nebraska had proposed (perhaps tongue in cheek) that if the overtime premium was really intended to spread employment, it would be most effectively applied by giving the second employer of a prospective moonlighter the choice between paying him the premium for all hours worked or hiring an unemployed worker.

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123 See above ch. 7.
124 H.R. 11784, § 3(a)(10).
at a straight-time rate.\textsuperscript{127}

Three weeks after introducing H.R. 11784, Conyers participated in a conference in Dearborn, Michigan, called by the All Unions Committee to Shorten the Work Week. Dissatisfied with longer vacations and more holidays and personal days as a means of spreading work, 700 union officials from 25 unions, led by UAW members, supported Conyers’ bill. What \textit{The New York Times} called the “less-work ethic” was unacceptable to management, especially since the All Unions Committee proposal envisioned no pay cut. As one industrial relations manager observed: “‘I don’t mind paying a higher wage if I’m getting productivity for it, but we’re standing strongly against this time not worked.’”\textsuperscript{128} This adamance apparently impressed some AFL-CIO officials such as UAW president Douglas Fraser, who told the conference that the history of the American labor movement suggested that picket lines and not Congress would be the source of a shorter workweek.\textsuperscript{129} What Fraser failed to acknowledge was that in a socioeconomy as balkanized and labor markets as heterogeneous as those of the United States, reliance on unions’ individual strength in preference to society-wide norms imposed on the employing and employed classes would merely widen the gap between the organized and atomized strata. The consequence would be various types of paid time-off, for example, for UAW workers that low-paid non-union workers could scarcely imagine.

After Congress took no action on Conyers’ bill in the 95th Congress, he reintroduced it essentially unchanged (the times at which the reduced workweeks became effective were moved back one year) on February 1, 1979 as H.R. 1784.\textsuperscript{130} Conyers once again emphasized that the FLSA’s 50-percent overtime penalty had lost its effectiveness in encouraging employers to hire additional workers.\textsuperscript{131}

The Labor Standards Subcommittee of the House Education and Labor Committee did hold three days of hearings in October 1979, but no further congressional action was taken. The testimony at the 1979 congressional hearings was nevertheless enlightening. The UAW representative offered a breakthrough friendly amendment to the bill that would have required employers to pay the entire increase in the overtime penalty as a tax into the Unemployment Insurance fund: “Besides the virtue of reducing the scheduling of overtime by employers

\begin{itemize}
  \item \textsuperscript{127} \textit{Cong. Rec.} 110:3003 (1964) (Rep. Glenn Cunningham).
  \item \textsuperscript{130} H.R. 1784, 96th Cong., 1st Sess. (1979).
  \item \textsuperscript{131} 125 \textit{Cong. Rec.} 7609 (1979).
\end{itemize}
without increasing its desirability to workers, such a procedure would also explicitly link the problems of overtime and unemployment. It would...make those employers whose actions increase joblessness bear a disproportionate share of the cost of maintaining the unemployed.”132 The UAW and employers had pointed to the rationality of such a suggestion during the hearings in the 1960s, but they had not highlighted its effectiveness in making the connection transparent.

Employers were especially sensitive to the bill’s deprivation of their power to force employees to work overtime. While the NAM tersely charged that the provision would “inhibit operations and scheduling,”133 the representative of the Chamber of Commerce of the United States, its deputy chief economist, offered arguments that were both mutually inconsistent and unprecedented. First, Robert Landry asserted that congressional conversion of mandatory into voluntary overtime would be an “intrusion...into the system of individual agreements between the nearly 80 percent of the work force that is not organized and their employers.” According to this logic of “individual agreements” between large corporations and its individual employees, it is puzzling that the Chamber chose not to reject the label “mandatory” altogether. Instead, Landry went on to charge that Congress would merely create antagonisms among workers by enabling one to hold an entire factory hostage: “Placing a voluntary overtime clause in the law means that one worker by refusing overtime may deprive perhaps 100 persons of overtime and the extra income that they desire if they are involved in an assembly-line operation where each person is essential to the task.”134

The representative of 35 of the country’s largest food and hotel companies seemed almost incensed over ignorant congressional meddling in his members’ prerogatives: “Who knows when a busload of hungry people will pull into one of our restaurants unannounced? We are not going to turn them away. At those times, our staff must remain on the job, even though they might have worked more than 8 hours on that particular day. ... Do we have to obtain that person’s permission to conduct our business?” Bruce Cotton, the president of the Food Service and Lodging Institute, not only found it part of the natural order of things that consumers’ purchasing power imperiously overrode workers’ conviction that the restaurant’s posted hours should be taken seriously, but combined inconsistent arguments by claiming that “[i]f there is a valid reason for refusal, the employer


133To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of 1938 at 236 (letter from Kimberly Johnson-Smith, labor relations director, NAM, Nov. 5, 1979).

will invariably accept it and look for someone else” and complaining that the FLSA amendment would make it necessary for employers to “obtain the employee’s consent—and we would assume that would be in writing—before scheduling overtime.”

When Conyers reintroduced the bill in 1985, this time proposing to phase in a 32-hour workweek over eight years, it prompted little resonance. Thus more than a grain of truth lay in employers’ later claims that “even when the Democrats controlled the House and the Senate and the White House, the issue [of forced overtime] was never even on their radar screen.” Though it remains unenacted, Conyers’ proposal of a 100-percent overtime penalty was hardly unprecedented. As far back as 1891, the Nebraska legislature had enacted a law that required employers working their employees beyond eight hours per day to “pay as extra compensation, double the amount per hour as paid for the previous hour.” This penalty was interpreted as pyramiding so that each overtime hour had to be compensated at double the rate of the previous one. Such progressive penalization of overwork offended the Nebraska Supreme Court, which promptly held the act unconstitutional as paternalistic interference with contracts.

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135 To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of 1938 at 167 (statement of Bruce Cotton). The president of the Southern California Restaurant Assoc. used similar rhetoric at the 1977 hearings in California when he asked: “if the second shift waitress...calls in sick just before the start of her shift, are we to tell waiting customers that we can’t take care of them because the waitress didn’t want to work a little overtime?” Senate Committee on Industrial Relations, Interim Hearing on AB 1295—Mandatory Overtime: Appendices at 284 (statement of Stanley Stockton).


138 1891 Neb. Laws ch. 54, § 3 at 361, 362. The contemporaneous draft eight-hours bill of the Social Democratic Federation in Britain also proposed double time. Sidney Webb and Harold Cox, The Eight Hours Day 164 (1891).