

THE AUTOCRATICALLY FLEXIBLE WORKPLACE

A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES

Marc Linder

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The Self-Contradictions of an Overtime Penalty/Premium

There was a man who sold spears and shields. Holding up a shield to the people, he cried: “My shields! They are extraordinarily solid—no matter how good the spear, nothing can pierce them.” Then he picked up a spear and shouted: “My spears! They are very sharp—no matter how hard and solid the shield, there is nothing they cannot pierce.”

Those standing on the side listened and snickered. One of them asked him: “So according to what you said, your spears are the sharpest and your shields are the strongest. What happens if your spear is used to pierce your shield?” Disconcerted, the man could not give an answer.¹

In the workingman’s world there is something called an “overtime hog.” The name, a union epithet, refers to the worker who is forever trying to put in overtime. Among the biggest of all headaches shop stewards have is the question of who is going to put in overtime and get its premium pay. These days, it seems, there is not enough overtime to go around. The average in manufacturing industries reaches two to three hours a week or about half an hour a day per worker. So it raises all the dangers of favoritism.

That someone can favor a friend by seeing that he gets overtime work may sound at first like a teacher’s keeping the good boys after school to write on the blackboard one hundred times, “I have been a good boy.”²

An hours law aimed at creating macrosocial norms such as shielding life spheres from the demands of production, preserving workers’ health, or spreading employment must, to be successful, withhold from individual workers the discretion to overwork. In conformity with this collective orientation, absolute maximum hours laws, such as numerous ones protecting children and women³ as well as the general statutes enacted in Alaska in 1917⁴ and in Pennsylvania in 1937,⁵ no more permitted workers to decide for themselves whether to work overtime than minimum wage or occupational health and safety laws permit workers to seek possible short-term benefits for themselves by undercutting standards for

¹*zi xiāng máo dùn*, in *Zhōngguó chéngyǔ xuāncuì* 1:91 (1984), Taken from The Book of Han Fei Zi (3rd century B.C.), this story is the origin of the Chinese idiom (literally “oneself spear shield”), which means to contradict oneself.

²Sebastian de Grazia, *Of Time, Work, and Leisure* 131 (1964 [1962]).

³See below ch. 4.

⁴See below ch.5.

⁵See below ch. 7.

everyone else. In contrast, a purely overtime-premium law like the FLSA is addressed to the employer, who, as arbitrator Harry Shulman recognized, “must determine whether the overtime work is worth the greater cost to him. ... No deterrence is accomplished by leaving the choice with the employee for whom the premium must act as an encouragement rather than as a deterrence.”⁶

As early as the 1880s, New York State’s highest court, in interpreting the state’s virtually meaningless “legal day’s work” statute of 1870—which declared eight hours a day’s work, but admitted “overwork for extra compensation by agreement between employer and employe”⁷—nevertheless recognized: “Any construction which should hold out to the laborer extraordinary inducements to prolong his hours of labor and to shorten those of rest and recreation would directly conflict with the spirit and meaning of this legislation and the benefits intended to be furnished by it.”⁸

The overtime approach differed fundamentally from the aspirations expressed in older labor discourse. At its 1887 annual convention, for example, the AFL had advised strongly against overtime work, which interfered with the eight-hour movement while many workers were unemployed: “It is an instigator of the basest selfishness, a radical violation of union principles....”⁹ In the late nineteenth century, some unions began prohibiting their members from working overtime while other members were unemployed, as well as demanding that employers distribute overtime to the unemployed.¹⁰ Others, like the National Cotton Mule Spinners, did not shy away from “censur[ing] all those who are guilty of working overtime without a protest.”¹¹ The U.S. Industrial Commission reported in 1901 that only a few unions “felt themselves strong enough to forbid overtime absolutely” to their members by means of fines and other sanctions.¹² Similarly,

⁶Ford Motor Co., 11 Lab. Arb. (BNA) 1158, 1159-60 (1948).

⁷1870 N.Y. Laws ch. 385, § 1, at 919.

⁸McCarthy v. Mayor, Aldermen and Commonality of the City of New York, 96 N.Y. 1, 6 (1884). It is unclear what meaning the court attributed to the law since it denied extra payment for hours beyond eight, but at the same time conceded that the law’s “plain and obvious intent was to place control of the hours of labor within the discretion of the employe and give him the privilege at his option of declining to work beyond the time fixed by the statute,” yet nowhere suggested that it would have been willing to countenance the claim that an employer was not entitled to fire a worker who refused to acquiesce in overwork. *Id.*

⁹American Federation of Labor, *History, Encyclopedia, Reference Book* 1:309 (1919) (citing the Report of the Proceedings of the AFL from 1887 at 43, although there is no such page in that report and this passage also appears nowhere else in that publication).

¹⁰*30th Annual Report of the Massachusetts Bureau of Statistics of Labor: March 1900*, at 79 (1900) (Lowell Spinners Union).

¹¹*30th Annual Report of the Massachusetts Bureau of Statistics of Labor: March 1900*, at 141 (referring to Lowell).

¹²*Reports of the Industrial Commission on Labor Organizations, Labor Disputes, and*

unionists in the early twentieth century saw the need to educate the “‘overtime hogs,’ who have no concern in the organization other than the amount of money in their pay envelopes.”¹³

Behind these demands lay the insight that overtime work enables employers to increase the supply of labor without increasing the supply of laborers so that this artificial oversupply, by increasing the number of unemployed, depresses the wage level of the employed.¹⁴ By 1919, when premium overtime rates had appeared in the contracts of virtually all AFL international unions, the AFL convention declared that overtime work should be discouraged and penalized by demands for double time.¹⁵ A decade later, the convention, which found it contrary to union principles that some workers engaged in avoidable overtime while others were unemployed, recommended the abolition of overtime wherever possible and its use only for reasons beyond the control of management and workers.¹⁶

Looking back at the history of overtime in 1947, labor historian and economist Philip Taft testified at trial in one of the most important FLSA overtime cases that the desire for additional compensation had never been a general principle: “the one predominant feeling—it is a feeling because it is not a worked out intellectual concept—of labor throughout its history, is the fear of unemployment, even in good times; as you examine the conventions of the different unions..., you find this constantly repeated over and over again, that we do not want overtime. We want to reduce the hours of labor to spread the work.”¹⁷ Indeed, at the time Taft was testifying some collective bargaining agreements still instantiated this venerable demand: “Except in cases of emergency, there shall be no regularly scheduled overtime in a classification as long as any employee on the company’s pay roll in that classification who is qualified to perform the work, remains laid off without being given the opportunity of returning to work.”¹⁸ The trial judge

Arbitration, and on Railway Labor XVII-XVIII (57th Cong., 1st Sess., H. Doc. No. 186, 1901).

¹³*Report of the Proceedings of the Thirty-Ninth Annual Convention of the American Federation of Labor* 453 (1919) (executive council quoting delegate Tracy, Cal. State Fed. of Labor).

¹⁴Karl Marx, *Zur Kritik der politischen Ökonomie (Manuskript 1861-1863)*, in II:3.6 Karl Marx [and] Friedrich Engels, *Gesamtausgabe (MEGA)* 1910 (1982).

¹⁵*Report of the Proceedings of the Thirty-Ninth Annual Convention of the American Federation of Labor* 450-51, 454 (1919).

¹⁶*Report of the Proceedings of the Forty-Ninth Annual Convention of the American Federation of Labor* 378 (1929).

¹⁷Testimony of Prof. Philip Taft, Transcript of Record at 346-47, *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446 (1947). Taft stressed that economists did not accept the underlying view that the amount of labor is limited. *Id.* at 329.

¹⁸BLS, *Collective Bargaining Provisions: Hours of Work, Overtime Pay, Shift Operations* 66 (Bull. No. 908-18, 1950).

even adopted Taft's position as a finding of fact: "The purpose of the demand of organized labor in American industry for penalty compensation for overtime was...prompted by the laborers' desire for a shorter work day, and was not generally intended as a method of increasing earnings."¹⁹

For decades unions, with varying degrees of success, had included overtime penalties in collective bargaining agreements to discourage employers from working employees overlong hours where they could not be prohibited outright.²⁰ Fewer contracts imposed absolute bans or requirements that each instance of overtime be authorized by the union.²¹ At early-twentieth-century congressional hearings on bills to prohibit overtime (except for emergencies) and mandate the eight-hour day on government works, union leaders were interrogated by employers' spokesmen as to why they sought by legislation what they themselves did not include in their own private-sector contracts. Unionists repeatedly testified that their contracts permitted overtime only in "extraordinary emergencies," which in some instances only the union shop steward was authorized to declare. Under such circumstances, overtime was "almost wiped out" because "[t]here is nobody who cares to pay time and half time." One union official testified in 1904 that his union's entire 800 members did not work a total of even 10 hours' overtime annually.²² Samuel Gompers added that the bill provided for overtime for the gov-

¹⁹Findings of Fact 28 (c), Transcript of Record at 605, Bay Ridge Operating Co.

²⁰E.g., *Report of the Eight-Hour Commission* 481-82 (1918) (on railway unions). For a collection of overtime provisions in collective bargaining agreements from various trades, see Supplemental Memorandum for Defendant in Error 4-6, *Bunting v. Oregon*, 243 U.S. 436 (1917). According to Merle Vincent, "Time and Money," *Survey Graphic* 30(11):621-23, 654-55, at 621-22 (Nov. 1941), time and a half overtime had prevailed in the electrical, cement, paper and pulp, furniture, printing, and machine trades prior to enactment of the FLSA.

²¹Testimony of Prof. Philip Taft, Transcript of Record at 329-30, Bay Ridge Operating Co. A few minutes later, however Taft testified that "there is no union contract that I know—there may be some—that explicitly prohibits work beyond a certain time, because there may be a job that is in the middle, you may spoil materials, you may require the filling of an order. ... I know of no single contract where it is absolutely prohibited, and that certainly would be a very foolish clause...." *Id.* at 357, 384. In fact, a BLS study of overtime provisions in collective bargaining agreements in force at precisely the time of Taft's testimony offered examples of absolute bans. BLS, *Collective Bargaining Provisions: Hours of Work; Overtime Pay; Shift Operations* 64 (Bull. No. 908-18, 1950). Similarly, the economist Solomon Barkin, who at the time was research director for the Textile Workers Organizing Committee, testified in 1938 at a trial testing the constitutionality of a Pennsylvania maximum-hours statute that "the great majority" of union contracts did not prohibit overtime; yet a few seconds earlier he had stated that "we have many . . . collective agreements . . . which specifically prohibit such over-time to any of the workers, in order to permit others to put up such work." Record at 863a-864a, *Holgate Bros. Co. v. Bashore*, 331 Pa. 255 (1938).

²²*Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor*, 58th Cong. 418 (1904) (testimony of Herman Schulteis, Knights of Labor, and Milford Spohn, chairman, legis, comm., Central Labor Union, Washington,

ernment “in cases of emergency, of war, flood, and so forth; while with the employer we can make no such provisions, because the employer has no war.”²³

In the early twentieth century unions protested against overtime work out of collective-compulsory principle. Gompers repeatedly declared to congressional committees considering a ban on overtime work on government works that “we want no overtime. We want no man to have even the opportunity of overtime...unless there be an extraordinary emergency....”²⁴ When a Congressman asked him whether unions were opposed to workers’ “having the privilege of working overtime for extra pay,” Gompers rejected the premise; instead, he urged enactment of “a law to prevent the employers of labor either directly or indirectly making conditions such as to compel the workmen to work more than eight hours a day by any species of inducement that shall have the general tendency to increase the hours of labor.”²⁵

The building trades unions had, going back to the middle of the nineteenth century, bargained for time and a half or double time to regulate overtime as part of the overriding purpose of equalizing their members’ work opportunities.²⁶ Unions sometimes reinforced this approach by giving overtime work only to their unemployed members or by prohibiting members from working overtime for any firm other than their regular-hours employer. Employers’ skepticism toward the claim that construction unions were merely trying to protect the standard work-week was based on the counterclaim that building deadlines made overtime an ongoing necessity.²⁷ Indeed, employers insisted not only that employees in general and construction workers in particular “covet” overtime,²⁸ but that unions insisted on premium overtime rates not to discourage overtime work, but “[f]or the simple reason that they can get it.”²⁹

However, the whole point of penalty overtime rates was turned on its head

D.C.).

²³*Hours of Labor for Workmen, Mechanics, etc., Employed upon Public Works of the United States: Hearings Before the House Committee on Labor*, 56th Cong. 1st Sess. 413 (1900).

²⁴*Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor*, 58th Cong. 458 (1904).

²⁵*Eight Hours for Labor on Government Work: Hearings Before the House Committee on Labor*, 57th Cong., 1st Sess. 91 (1902) (colloquy with Rep. William Warnock).

²⁶For the example of London masons in 1853, see M. Bienefeld, *Working Hours in British Industry: An Economic History* 85 (1972).

²⁷William Haber, *Industrial Relations in the Building Trades* 228-30 (1930).

²⁸*H.R. 15651: Eight Hours for Laborers on Government Work: Hearings Before Subcommittee No. 1, House Committee on Labor* 31 (60th Cong., 1908) (testimony of Joseph Richardson, D.C. Bldg. Trades Employers Assoc.).

²⁹*H.R. 15651: Eight Hours for Laborers on Government Work* at 148 (testimony of W. Post, vice president of Post and McCord, largest steel erector in the United States).

in the nineteenth century as employers came to accept shorter standard work-weeks in return for overtime work. For example, among construction workers in Britain in the second half of the nineteenth century: "Overtime was converted from a disincentive on the employer to an incentive for the men."³⁰ Consequently, "where there were no restrictions on overtime work the determination of the hours of work was in effect returned to the individual bargain where each individual's leisure was purchasable at some premium rate of pay. Thus the overtime rate became one of the means through which the employer could undermine the union attempts to restrict supply. Ironically the unions had originally pressed for its introduction as part of their effort to restrict supply." Instead of deterring employers from overworking employees, premium rates became "a means of inducing employees to spend longer hours at work."³¹ For example, the British machinists union (Amalgamated Society of Engineers), which had sought to ban systematic overtime, but in 1851-52 had lost a major strike over it (and piecework and other issues) against employers determined to thwart union efforts to interfere with their entrepreneurial decision to use their expensive capital equipment more intensively,³² by 1874 saw no remedy for it; by the beginning of the twentieth century the union had deleted the term from its vocabulary as it was constrained to accept collective bargaining agreements that not only permitted up to 40 overtime hours per month, but included "urgency and emergency" clauses that could be interpreted broadly enough "to make overtime practically unlimited."³³

Historically, this insight that overtime premiums would make workers complicit in undermining their class's own standards even inspired state court judges to deny the overtime compensation claims of workers who had complied with employers' requests to work more than the maximum number of hours in states with statutes that absolutely prohibited and criminalized employment beyond a certain number of hours. In the best-known such case, decided under a Utah statute, the state supreme court upheld the trial judge's ruling:

"Had the employe the right to waive this protection, both for himself and the state, it can readily be seen that it rests entirely with him to abrogate the operation of the law, and to cause it to become a dead letter. He may make the period of employment eight, ten, twelve or any greater number of hours, at his option, with the result that the conditions re-

³⁰Richard Price, *Masters, Unions and Men: Work Control in Building and the Rise of Labour 1830-1914*, at 146 (1980).

³¹Bienefeld, *Working Hours in British Industry* at 209.

³²Keith Burgess, *The Origins of British Industrial Relations: The Nineteenth Century Experience* 18-25, 28, 35 (1975).

³³James Jefferys, *The Story of the Engineers, 1800-1945*, at 36, 90, 148, 158 (quotes) (n.d. [1945]).

lating to the period of employment in mines and mills would now exist as before enactment of this law—a matter purely of contract between the parties.”³⁴

Even under statutes not interpreted to hold workers criminally co-liable for their violation, courts denied compensation on the grounds that granting recovery would permit them to gain from thwarting the enforcement of a benevolent public policy.³⁵

In contrast, union officials in the latter part of the twentieth century who concede that “where people want to voluntarily work overtime, that’s their determination to make,”³⁶ have abandoned the mandatory classwide principle that they would never consider yielding with regard to minimum wages or health and safety regulations. With the loss of the deterrent value of the overtime penalty and its degeneration into a mere entitlement to a modest premium for overwork, many current defenders of the overtime premium advocate its retention on the grounds of its efficacy in preserving living standards, especially for low-paid workers.³⁷ Such friends of labor are unaware that the argument was long ago a favorite among labor’s enemies, who, cloaking it with ostensibly anti-paternalistic arguments on behalf of their workers, used it to attack unions’ advocacy of eight-hour laws banning overtime work.

For example, at the beginning of the twentieth century, when mine and metals employers in Colorado succeeded in thwarting the will of the vast majority of the electorate, which had voted in favor of an eight-hours law, one of the arguments used by the chairman of the board of the powerful Colorado Fuel and Iron Company to oppose it was the alleged injustice it did to miners, who would have been deprived of the opportunity to work overtime so that they could earn enough

³⁴Short v. Bullion-Beck & Champion Mining Co., 57 P. 720, 721 (Utah 1899).

³⁵Lewis v. Ferrari, 34 Cal.App.2d Supp. 767 (App. Dept. San Diego Cty., 1939); Martinez v. Johnson, 119 P.2d 880 (Nev. 1941).

³⁶[California] Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime* 1:18 (William Robertson, exec. sec’y-treas., Los Angeles County Federation of Labor).

³⁷In an almost comical misunderstanding of the point of the FLSA overtime provision, a popular expose of the fast-food industry rebuked these employers for letting so few of their employees “qualify for overtime....” Instead: “By hiring a large number of crew members for each restaurant...and employing them for fewer than forty hours a week whenever possible, the chains keep their labor costs to a bare minimum.” Eric Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal* 73-74 (2001). The author appears to be unaware of the fact that shorter hours for a larger number of workers is precisely the intended result of the financial deterrent of the overtime penalty. Oddly, the author, who details several illegal methods used by these chains to deprive workers of the overtime they do work, fails to mention one of the principal scams—shifting all overtime work to so-called assistant managers, who are then misclassified as “exempt” from overtime protection. 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).

money to educate their sons and elevate them to higher social positions.³⁸ At the same time, a representative of the Bethlehem and United States Steel companies, attributing the meteoric rise of some managers to the college educations that they had been able to finance with overtime earnings, went so far as to assert before Congress in 1902 that the ban on overtime work in a proposed eight-hour law for workers on government works was actually designed

to prevent such careers.... It is to compel men to remain on the same dead level, to prevent men from having the opportunity to rise above their fellow-men. That is the purpose, the direct purpose...of the bill. It is to say to one man of somewhat superior natural ability, "You shall not go faster than your brother who has not the mental capacity that you have. ... If you have more muscle, you must not be permitted to exert it."³⁹

In 1912, a perennial congressional employer-witness against eight-hour bills for federal government works that did not permit overtime work alleged: "On one occasion I declared that I could go before the people of my district and defeat...the Member from that district, if he supported a bill of this character, and that I would make the contest with him over the question whether or not he was in favor of striking down the rights of the American workingman to work overtime for overtime pay, which is the very purpose of this bill."⁴⁰ And on the same occasion, when Congress, after two decades of union urging, enacted such a statute to cover government contracts, *The New York Times* taunted labor: "Overtime is forbidden, although extra pay at higher rates is a boon to the wage-earner. ... Eight hours' work and eight hours' pay are not attractive under the present narrow margins of wages above the cost of living. For some there is no such margin, and any such reduction of pay would be...a calamity for them...."⁴¹

This question was once again prominently raised in 1997 in connection with unsuccessful congressional efforts to enact the so-called Family Friendly Workplace Act, which would have amended the FLSA to empower employers to offer compensatory time off in lieu of premium pay.⁴² The minority Senate Democrats protested the proposal because

the very workers who currently rely most heavily on overtime pay are the employees most

³⁸*A Report on Labor Disturbances in the State of Colorado, from 1880 to 1904*, 58th Cong., 3d Sess., S. Rep. No. 122, at 62 (1905) (quoting John Osgood).

³⁹*Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor*, 57th Cong., 1st Sess. 93 (1902) (testimony of Joseph McCammon).

⁴⁰*Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor*, 62d Cong. 12 (1912) (statement of Daniel Davenport, American Antiboycott Assoc.).

⁴¹"The Eight-Hour Day," *N.Y. Times*, July 2, 1912, at 10:3 (editorial).

⁴²S. 4, 105th Cong., 1st Sess. (1997).

vulnerable to coercion and retaliation by their employer.

Thus, to understand the real world impact of this bill, we must look at the workers who are currently depending on overtime pay to make ends meet. Overwhelmingly, they are working for low wages. [O]ne-fourth of workers earning overtime earn under \$12,000 per year. 44 percent of workers who depend on overtime earn \$16,000 per year or less, and 61 percent earn \$20,000 per year or less. ... These are classic low-wage jobs, where workers need every dollar of pay they can earn. Furthermore, overtime pay makes up a significant percentage of many hourly workers' take-home pay. When they work overtime, manufacturing workers find that an average of nearly 15 percent of their take-home pay is attributable to the extra hours. ... If this bill becomes law, many of them will lose overtime pay that they depend on to pay the rent, buy food, and provide clothing for their children. ...

Millions of those who rely on overtime earn only the minimum wage.⁴³

Wage and Hour Administrators use similarly self-contradictory reasoning. In attacking big business's drive to undermine the 40-hour week and the payment of penalty overtime wages, Maria Echaveste charged: "The issue is not about flexibility.... It's about money. And the net result of change will not be flexibility but the loss of money out of the pockets of workers who need the overtime."⁴⁴ Echaveste correctly unmasked employers' efforts to camouflage their attack on the FLSA as motivated by the desire to lower wage costs, but her ledger-book logic equating money saved and money lost stands the historical struggle over shorter hours on its head. And her successor, T. Michael Kerr, apparently saw no contradiction in explaining the "purpose and importance of overtime pay" to Congress in these terms:

Protecting the integrity of the regular rate is key to ensuring workers overtime rights. An important purpose of the overtime premium pay requirement is to limit the burden of excessive work hours for employees and their families, and to ensure workers are fairly compensated when they are required to work long hours.

For many workers, overtime pay is an important part of their income that helps them make ends meet. ... Average weekly overtime hours have been at or near record levels for much of the 1990s. [O]ver-time hours and overtime pay have become increasingly important to many workers...as the amount of overtime work has trended upward.⁴⁵

Employers, too, have used the same argument to attack legislative efforts to

⁴³S. Rep. No. 11: *Family Friendly Workplace Act*, 105th Cong., 1st Sess. 38-39 (1997).

⁴⁴Saul Friedman, "Time Short for 40-Hour Week? Partisan Clash over OT Rules," *Newsday*, Sept. 4, 1995, at A21 (Lexis) (quoting Maria Echaveste).

⁴⁵*The Treatment of Stock Options and Employee Investment Opportunities Under the Fair Labor Standards Act: Hearing Before the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce*, 106th Cong., 2d Sess. 40 (2000) (written statement of T. Michael Kerr).

put an end to mandatory overtime. As the Ford Motor Company informed the California Senate Committee on Industrial Relations a quarter-century ago: “in the automotive industry, a substantial number of employes [sic] look upon overtime pay as being an integral part of their paycheck or earning capacity. Indeed, our experience at Ford is that substantially all of our overtime grievances are submitted by employes who believe that they have been improperly denied overtime as opposed to protesting the fact that if it is scheduled, they were required to work.”⁴⁶

A labor arbitrator dealing with a grievance over an employer’s failure to equalize the distribution of overtime also reproduced the self-contradiction. Thus he observed that the FLSA premium-rate provision was “designed to maintain economic stability, create jobs, and protect the well being of employees.” But at the same time he stressed: “Many employees prize the opportunity to add to their income by working overtime. Indeed the possibility of earning such extra income has come to be regarded as a vital ingredient of the whole employment package and is often featured as such in company recruitment advertisements.”⁴⁷

Nor is the attitude confined to the United States. A Canadian historian skeptical of the “new economic paradigm” of the global marketplace that “Canada embraced” in the wake of the “economic disaster” of the early 1990s and that treated people as commodities, nevertheless viewed overtime work as a perquisite: “Recovery began when laid-off workers, jarred by the new Employment Insurance rules, accepted minimum-wage jobs without benefits, seniority, or overtime.”⁴⁸

Even a resolutely pro-labor economist who has untiringly defended the FLSA against employer attacks, loses sight of logic in asserting: “When an employer insists on long hours per week, the costs spill over onto family and parenting time, student time, leisure, and volunteer time. In a sense, the overtime premium makes employers bear more of the social spillover costs imposed by their own hours decisions.”⁴⁹ It is unclear what “sense” Lonnie Golden can mean since no matter how much money the premium redistributes from the employer to the overtime worker, it cannot restore to the worker the lost time that he will never

⁴⁶[California] Senate Committee on Industrial Relations, *Interim Hearing on AB 1295—Mandatory Overtime: Appendices* at 225, 227 (statement of Halton Axtell, industrial relations manager, Ford Motor Co. San Jose assembly plant).

⁴⁷American Enka Corp., 52 Lab. Arb. (BNA) 882, 884 (1969).

⁴⁸Desmond Morton, “Strains of Affluence 1945-1996,” in *The Illustrated History of Canada* 467-570, at 569 (Craig Brown ed. 2000 [1987]).

⁴⁹Lonnie Golden, “Family Friend or Foe? Working Time, Flexibility, and the Fair Labor Standards Act,” at 7 (Economic Policy Institute Briefing Paper, 1997). Golden repeats the argument in Lonnie Golden, “Working Time and the Impact of Policy Institutions: Reforming the Overtime Hours Law and Regulation,” *Rev. of Social Economics* 56(4):522-41 at 535 (Winter 1998).

be able to devote to these nonproduction activities.

Regardless of whether reliance on overtime premiums is a rational means of raising the annual incomes of low-wage workers, it is irreconcilable with using the statutory overtime penalty to discourage excessive working hours and fostering work sharing. In the context of an unprincipled Democratic opposition to Republican efforts to dismantle the New Deal's skeletal labor-protective system, promoting the overlong workweeks that the labor movement struggled for decades to abolish no longer even provoke demands for an explanation as to why the traditional goals of shorter hours and work sharing should be sacrificed for marginal increases in weekly wages that tendentially depress hourly wage rates.

Evidence of the perverse result of relying on overtime to bolster low-waged workers' incomes is provided by numerous BLS surveys showing that a below-average proportion of labor union members work overtime, but an above-average proportion are paid premium overtime when they do work long weeks. In May 1978, for example, 23.2 percent of blue-collar unionists worked 41 hours a week or more compared with 31.4 percent of nonunionists, while 83.3 percent of unionists but only 62.4 percent of nonunionists received premium pay. Among construction wage and salary workers, 13.2 percent of unionists and 27.5 percent of nonunionists worked overtime, while 73.6 percent of unionists and only 50.1 percent of nonunionists were paid overtime premiums. In manufacturing, the corresponding figures were 23.4 and 30.3 percent, and 88.7 and 56.3 percent, respectively.⁵⁰ On average, employees of establishments imposing overtime do not receive compensatory higher straight-time wages, but union workers do.⁵¹

Female piece-rate bookbinders in London in 1877 were neither the first nor last workers to learn the Sisyphean lesson that, as one of the factory inspectors' reports noted, "if overtime were continued for a few weeks together their earnings would soon fall to about the same amount as when they worked the regular hours."⁵² Although workers "reap no permanent advantage" from long hours, premium pay, as nineteenth-century trade unionists gradually learned, instead of discouraging overtime work, "stimulated the men in various trades to desire it."⁵³

The fundamental defect in unions' and Democrats' current rhetoric—and it

⁵⁰BLS, *Long Hours and Premium Pay, May 1978*, supp. tab. C at A-8 (Spec. Lab. Force Rep. 226, 1979). For similar data for 1977, see BLS, *Long Hours and Premium Pay, May 1977*, supp. tab. E at A-6 (Spec. Lab. Force Rep. 214, 1978). See also Stephen Trejo, "Overtime Pay, Overtime Hours, and Labor Unions," *J. Lab. Econ.* 11(2):253-78 (1993).

⁵¹Ronald Ehrenberg and Paul Schumann, "Compensating Wage Differentials for Mandatory Overtime" *Econ. Inquiry* 22:460-78 (Oct. 1984).

⁵²*Reports of the Inspectors of Factories for the Half-Year Ending 31st October 1877*, at 14 (C.-2001, 1878).

⁵³George Howell, *Trade Unionism: New and Old* 79, 78 (1891).

is mere rhetoric devoid of any principle or theory—to combat efforts by employers and Republicans to undermine the 40-hour week lies in the wholesale adoption of their opponents' individualist-consensual framework. Two centuries of union campaigns have demonstrated that regulation of the length of the workday or workweek cannot be based on worker or employer voluntarism; on the contrary, the very existence of normal working hours presupposes collective-compulsory principles embedded in collective bargaining agreements or statutes.

As Sidney and Beatrice Webb explained a century ago, the failure to proceed along such lines results in an inexorable drift toward longer hours, if not lower wage rates. The history of British union agreements regarding overtime work in the nineteenth century, which bears startling resemblances to the late-twentieth-century experience in the United States, revealed that when the employer had been deprived of the unilateral power to extend the working day as he wished, he insisted, "in conceding a customary fixed working day," that workers accommodate him with respect to emergencies and sudden rush orders by working beyond the usual hours. Unable to refute this claim, union leaders turned the concession into "a source of extra wages" for their members by negotiating for higher time and a quarter or time and a half rates:

This arrangement appeared a reasonable compromise, advantageous to both parties. The employers gained the elasticity they declared to be necessary to the profitable carrying on of their business.... The workmen...were recompensed by a higher rate of payment for the disturbance of their customary arrangement of life, and the extra strain of continuing work in a tired state. The concession involved a deviation from the Normal Day, but the exaction of extra rates would...restrict overtime to real emergencies. ...

Further experience of these extra rates for overtime work has convinced nearly all Trade Unionists that they afford the smallest degree of protection to the Normal Day, whilst they are productive of evil consequences to both parties. In spite of the extra rates, employers have...adopted the practice of systematically working their men for one or two hours a day overtime, for months at a stretch, and, in some cases, even all the year round. ... The result is that the long hours become customary, and subject to alteration at the will of the employer. Nor has the individual workman any genuine choice. ...

Whilst the practice of systematic overtime deprives the workman of any control over his hours of labor, the Trade Unionists are beginning to realise that it insidiously affects also the rate of wages. If there is any truth in the economists' assumption that it is the customary standard of life of each class of workers which, in the long run, subtly determines their average weekly earnings, systematic overtime, if paid for as an extra, must...tend to lower the rate per hour. That frequent opportunities are afforded for working overtime is...often given by employers as an excuse for paying a low rate of weekly wages. Where payment is made by the piece, it is usually impossible...to distinguish between "time" and "overtime," and in such cases a promise of systematic overtime, enabling the men to make up their total earnings to the old standard, is a common inducement to them to submit to a reduction of their piecework rates. But the timeworker is...as much at the mercy of the employer as the pieceworker. The promise of "time and a quar-

ter” for the extra hours is a powerful temptation to the stronger men to acquiesce in a reduction of the Standard Rate of payment for the normal working day.

Moreover, when bad times come, and the demand for a particular kind of labor falls off, there is an almost irreversible tendency for the amount of overtime to increase. The employers see in it a chance of reducing the cost of production by spreading the heavy items of rent, interest on machinery, and office charges over more hours of work. The workmen are tempted to make up, by extra labor, their drooping weekly earnings. Exactly at the moment when the community needs...ten per cent less work from its...building operatives, a large number of these are pressed and tempted to give ten per cent more work—to the end that nearly twenty per cent of the trade can find no employment whatever! ... Even the employers are now beginning to object to the arrangement. They feel that it is unbusinesslike to pay higher rates for tired work.⁵⁴

Significantly, the Webbs gave a similar cautionary account of statutory hours regulation. When Parliament extended the ten-hours regime from textile and allied industries to other factories and workshops. it failed to retain the scheme of rigidly fixed uniform hours: “Endeavours were made, by sanctioning overtime under certain conditions,...to meet the varying circumstances of different industries.” The result, they reported, was that the “overtime regulations hailed as one of the sensible advantages of the Act of 1878, have gone far to neutralise any regulation of hours at all.” In the end, overtime seldom remained the exception that the law contemplated.⁵⁵

The same analysis was accepted by trade unionists in the United States. Writing in 1903, John Mitchell, the president of the United Mine Workers, stressed that it was “absolutely essential to regulate the question of overtime” in order to limit working hours:

The ideal of an agreement upon the working day should be to limit its length to a reasonable number of hours, while at the same permitting the employer in cases of emergency to keep his men at work for a longer period. It has been shown in practice, however, that where overtime is paid for at the same rate as ordinary time, so-called emergencies multiply, overtime is resorted to systematically, and the normal working day is broken down. The men who have thus secured an eight-hour day find that they are regularly working eight hours per day plus, say, two hours overtime, and after a few years, they may receive for their ten hours no more, if not actually less, than formerly for their eight hours of work. To remedy this evil and to avert this peril, trade unionists have in many cases been obliged to charge for overtime at a considerably higher rate, such as time and a quarter, time and a half, or double time. This is fair to the wage earner, since the last hour of work

⁵⁴Sidney Webb and Beatrice Webb, *Industrial Democracy* 344-47 (new ed. 1920 [1897]).

⁵⁵Webb and Webb, *Industrial Democracy* at 349-50. For the relevant statutory provisions, see Factory and Workshop Act, 1878, 41 Vict. ch. 16, §§ 53-57, at 137, 157-59.

is harder for him than any other, whereas to the employer, who pays most for this last hour, it is the least valuable, since the workman is tired. Theoretically, therefore, the employer will work overtime only in especially good seasons or in emergencies. In actual practice, however, overtime, even when paid for at a higher rate, tends often to become systematic and to lengthen the working day without permanently increasing wages. Consequently, unions have frequently been compelled to prohibit overtime entirely, to limit the maximum amount of overtime per week or month, or to make other provisions that overtime, while serving the employer's purpose, may not be used to break down the standard working day.⁵⁶

Clarity about the self-defeating character of premium overtime compensation was commonplace among unionists in the early twentieth century even in the statutory context. Between 1892 and 1912, when Congress debated an eight-hour law for employees of contractors on government works, union leaders repeatedly urged legislators not to yield to employers' requests to include an overtime provision. Employers alleged that "the chance to work overtime" was a "privilege," which a foreman handed out to workers he "wants to be good to...."⁵⁷ The president of a shipyard representing the National Metal Trades Association and the National Association of Manufacturers (NAM), whose more than 4,000 members employed 1.7 million workers, testified to the Senate Labor Committee that overtime was a "Godsend to tens of thousands of young men who are working." Purporting to speak on behalf of these firms' employees, Wallace Downey declared:

The overtime that is paid to those men upon Friday or Saturday night is in itself so much money that it would seem fabulous were I to mention it. You gentlemen do not hear anything about it, but the wives at home and the children hear about it. The overtime money is a very important part of the man's earnings. His whole year's living is laid out on the basis of his average wages and average time made, and the overtime money he makes is something for his wife to get something extra for herself and her children with.⁵⁸

The president of the AFL, Samuel Gompers, was most vociferous in warning that such payments were dysfunctional for workers. "As a matter of fact," he told the House Labor Committee in 1902:

⁵⁶John Mitchell, *Organized Labor: Its Problems, Purposes, and Ideals and the Present and Future of American Wage Earners* 127-28 (1903).

⁵⁷*Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor*, 62d Cong. 265 (1912) (testimony of R. Bickford, general counsel, Newport News Shipbuilding and Dry Dock Co.).

⁵⁸*Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor*, 62d Cong. 306 (1912) (testimony of Wallace Downey, president, Downey Ship Yard and Marine Co.).

it is not extra pay; that is, only temporarily is it extra pay, for as the hours of labor are increased generally wages fall to the wages earned in the shorter workday.

In other words, I say that for a ten-hour day, and when overtime is practiced, there is an increase of pay to those who have this overtime. When the overtime becomes general, the wages earned in the lengthened day's work is not more, but generally less, than the wages earned in the shorter workday. This is the universal economic law, from which there is absolutely no deviation.⁵⁹

Gompers had also expressed the labor movement's adamant opposition to overtime two years earlier to the U.S. Industrial Commission. Outlining the same reequilibration process, he added that "after a while it happens that overtime—overwork—becomes the rule and is no longer overwork."⁶⁰

A decade later, the president of a machinists union local explained to the Senate Labor Committee that the union negotiated premium overtime provisions in its collective bargaining agreements with private firms "to prevent the manufacturers from using overtime, and not for the sake of getting extra money, because we know very well that if we work overtime continuously, that becomes a new basis for our day's work, and eventually we will have to work a longer time, and that the straight time will become the regular time, for the same old pay."⁶¹

⁵⁹*Eight Hours for Laborers on Government Work: Hearings Before the House Committee on Labor, 57th Cong., 1st Sess. 92 (1902).*

⁶⁰*Report of the Industrial Commission on the Relations and Conditions of Capital and Labor Employed in Manufactures and General Business 7:614 (56th Cong., 2d Sess. H. Doc. No. 495, 1901).*

⁶¹*Eight-Hour Law: Hearings Before the Senate Committee on Education and Labor, 62d Cong. 373 (1912) (testimony of N. Alifas, president District No. 44, Government Employees' International Association of Machinists).*

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