OVERWORK AND OVERTIME

SHIRLEY LUNG*

INTRODUCTION

There is no clearly established public policy which requires employers to refrain from demanding that their adult employees work long hours. Nor is [there] any public policy directly served by an employee’s refusal to work long hours.¹

The unit is already short staffed on your shift. . . . You are told to work extra hours or one more shift. No one asks you if you have children in school or daycare, if it is a special day for you or a loved one. No one cares, or so it seems, whether working this mandatory overtime will hurt you or your family.²

They won’t let us go unless we have everything finished. So we have to work overtime . . . If we didn’t finish the work even in 10 hours, we stay until 2 a.m. We have to finish the work . . . If one goes, [they say] we’ll all want to go, so they never let us go. If there’s an emergency, they ask for proof . . . If you don’t want to stay, then they tell you tomorrow don’t come in.³

If you make the choice to have a home life, you will be ranked and rated at the bottom. I was willing to work the endless hours, come in on weekends, travel to the ends of the earth. I had no hobbies, no outside interests. If I wasn’t involved with the company, I wasn’t anything.⁴

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* Assistant Professor of Law, City University of New York School of Law; B.A., Cornell University, 1981; J.D., New York University School of Law, 1985. I am indebted to my colleague Ruthann Robson for so generously sharing her wisdom, expertise, insight, excellent judgment, and, of course, her time. Her encouragement and support have helped this Article come to fruition. I would like to thank Julie Lim, Pamela Edwards, and Jenny Rivera for all their support and suggestions. In addition, I am appreciative of the insightful comments made by my colleagues during a presentation of this Article at a CUNY faculty workshop. Their comments about the challenges of organizing professional workers to ally with blue-collar workers were incorporated into Part II of this Article. I express deep gratitude to Amy Taylor and Rita Verga for their excellent research assistance.


2. The Time Has Come to Deal with Mandatory Overtime, CAN NEWSLETTER (Cal. Nurses Ass’n, Oakland, Cal.), 2001 (on file with author) (quoting Kay McVay, President, California Nurses Association).


4. JILL ANDREWSKY FRASER, WHITE-COLLAR SWEATSHOP 158 (2001) (quoting an Intel
The overwhelming majority of workers in the United States have no right to protection from being forced by their employers to work excessive hours. Almost one in five workers is required to work paid or unpaid overtime once or more a week with little or no notice. Nearly one in three workers regularly works more than forty hours a week while one in five workers clocks over fifty hours a week. More than eighty percent of those who work over fifty hours prefer fewer hours. Although annual work hours declined in all industrialized countries in the last century, work hours are now escalating in the United States and a handful of other industrialized countries that, like the United States, are wracked by widening income inequality, stagnant or falling incomes, and deregulation.

The proportion of American workers who work fifty hours or more per week is among the highest in the industrialized world. In 2000, American workers topped the list for the number of average hours worked per year (1979), outpacing workers in nineteen other industrialized countries. On average, Americans work 350 more hours per year than Europeans. Further, working time has intensified for individuals across income, education, and occupation levels. As a result, American families are working more weeks per year and more hours per week.
than ever. 13 This has put both married-couple and single-parent families in a “time crunch,” with women bearing the brunt of these pressures because of their disproportionate responsibilities in the home. 14

Overwork, compulsory overtime, and the lack of control that workers exercise over the boundary between work time and private time are among the most troublesome labor conditions that now assail workers in the United States. 15 In the late nineteenth century, industrial workers who toiled ten hours a day and six days a week in factories, mines, and mills joined an international working class that launched a militant shorter hours movement for the eight-hour day. 16 Today, the epidemic of long hours in the United States is borne by workers across the class divide, whether they stitch garments, drive trucks, clean offices, design software, provide nursing care, or represent clients in court. 17 Likewise, union membership does not guarantee protection from compulsory overtime. 18
Declining membership and some unions’ simultaneous fight to negotiate higher compensation for overtime work has undermined the ability of organized labor to negotiate bans or curbs on employer demands for mandatory overtime hours.\(^\text{19}\)

More than any other labor condition, the issues of compulsory overtime and overwork present a growing “convergence” between workers regardless of their occupation, income, education, race, gender, or citizenship.\(^\text{20}\) Immigrants and other low-wage workers toil excessive hours in traditional sweatshops, such as garment factories and restaurants, and in numerous other industry sectors as well.\(^\text{21}\) At the same time, exposés of “white-collar” and “electronic” sweatshops debunk the glamour of high-tech employment revealing large numbers of higher-paid skilled workers who work upwards of seventy to ninety hours a week under increasingly autocratic conditions.\(^\text{22}\)

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Although diverse groups of workers express increasing dissatisfaction with overwork and compulsory overtime, the Bush administration and Republican Congress have successfully commandeered reform of the Fair Labor Standards Act of 1938 ("FLSA"),\textsuperscript{23} with a legislative agenda that will effectuate greater deregulation of overtime.\textsuperscript{24} In response, the AFL-CIO has sought to preserve the ability of low- and middle-income families to augment stagnant wages through overtime.\textsuperscript{25} Its central theme for mobilizing the public is that the right to overtime compensation must be kept intact.

However, there is an urgent need to expand the national discussion about reform of the FLSA beyond the protection of overtime compensation to tackle the debilitating phenomenon of compulsory overtime and overwork. The current regulatory regime grants employers the unfettered right and power to impose excessive hours of work on employees even when long hours imperil workers’...
lives, health, and safety. By all accounts, the premium pay requirement for overtime has failed as a financial deterrent to the growth of jobs with very long hours. Workers caught in a system of compulsory overtime complain of overexertion, rising rates of occupational illnesses, crippling workplace accidents, and ruined health. Further, the power of employers to require overtime at the expense of workers’ private time is undermining the ability of workers to spend time with their families and to engage in the vital social, community, and civic activities that help create an engaged citizenry. Some scholars call for immediate reform of the FLSA to embrace a fundamental goal that policymakers never adopted at the time of its enactment—namely, ensuring sufficient time for workers to fulfill other important social responsibilities besides work.

This Article will assess the need for workers to claim control over their working hours and will explore the right to refuse overtime as the fundamental first step toward that goal. Part I examines the prevalence of compulsory overtime across the class divide in the context of globalization and a regulatory regime that grants employers the right to compel excessive hours. Part II considers the prospect of unifying workers across classes and occupations over the issue of control of time. Part III examines the efforts of workers who are challenging compulsory overtime and explores whether a statutory right to refuse overtime could meaningfully empower workers to resist employers’ demands for long hours. This Article concludes that breaking down class divisions to organize

26. See infra Part I.A (discussing gaps in the FLSA for protecting workers from forced overtime).


29. See RAKOFF, supra note 15, at 136-41 (arguing that under our current legal regime, the power of employers to demand overtime from workers usually trumps family and other outside responsibilities that workers have). Consequently, “[t]he presumptive rhythm is the rhythm of work, even when the work rhythm is the rhythm of overtime,” id. at 139, and interferes with the multiple social roles that workers should be able to fulfill. Id. at 140. Rakoff cautions, “the demands of the workplace threaten to destroy the balance of life.” Id. at 155; see also Rhode, supra note 14, at 834-35, 846 (positing the need to re-envision policies and cultural values, and to restructure workplaces, to enable workers to achieve “a fuller integration of employment, family, and civic commitments”); Schultz, supra note 15, at 1928-39 (suggesting reforms to make paid work a more satisfying and saner experience for all working people across the spectrum).

30. See RAKOFF, supra note 15, at 68; Malamud, supra note 20, at 2222, 2319-20.
workers to win an absolute right to refuse long hours would be a critical milestone in the larger project of helping workers gain control over the boundaries between work time and non-work time.

I. Compulsory Overtime Across the Class Divide

A. The Right of Employers to Compel Overtime

Undeniably, a legal system that grants employers the right to compel unlimited overtime underpins the ability of employers to extract more from workers. The historic social movement for the eight-hour day sought to bring the issue of working hours within the sphere of worker control. The movement was predicated on the grand vision of safeguarding workers’ non-work time from the demands of employers to ensure that workers would have sufficient leisure time to dedicate to self-development and political participation as citizens. This radical struggle was short-circuited in favor of the enactment of the FLSA, a comparatively modest piece of legislation with hours provisions intended mainly as a work-spreading measure to alleviate unemployment. Prior to the FLSA, an array of state and federal laws imposed ceilings on the maximum work hours for

31. See Malamud, supra note 20, at 2223.
32. See LINDER, supra note 10, at 24-31 (contrasting the collectivist goals of the shorter hours movement with the individualistic “family values” approach of contemporary labor unions); Malamud, supra note 20, at 2223 (listing major goals of the shorter hours movement as protecting workers’ health and safety, decreasing unemployment, increasing workers’ leisure time for social and political development, and establishing worker control over the industrial process through control of work hours); Miller, supra note 16, at 7, 10-14 (providing an overview of the shorter hours movement in the United States).
34. See Malamud, supra note 20, at 2223 (stating that work-spreading was the principal goal of the New Deal’s policy on hours, and positing that pre-New Deal and New Deal legislation never embraced the shorter hours movement’s goals of increasing leisure time and worker control over time). Malamud argues that FLSA should be unmoored from its work-spreading goal to embrace the goals of increasing leisure time for workers so that workers can “function simultaneously as workers, parents, and citizens.” Id. at 2319; see also LINDER, supra note 10, at 60 (explaining that according to one interpretation, the defeat of Senator Hugo Black’s thirty-hour work week bill in favor of the FLSA’s overtime provisions signaled that “the forces advocating increased production and employment [had] prevailed over the continuing campaign for shorter hours”); RAKOFF, supra note 15, at 68 (suggesting that the rationale for the FLSA “must be reconstructed” to establish a legal limit on working time to ensure time is available for other important social roles and activities). Although Rakoff seems to be in agreement with Malamud’s proposition that the FLSA’s original goals did not include setting a limit on work time to enable workers to achieve a proper balance of time for work and non-work activities, he questions whether the FLSA provisions on overtime were intended principally to alleviate unemployment. He argues instead that the goals of the FLSA, as shown by Congress’s legal justifications for the Act’s limits on contractual freedom, were to curb oppressive working conditions and unfair competition. Id. at 65-66.
various groups of workers.\textsuperscript{35} The FLSA represented a paradigm shift by halting federal progress toward reducing the ceiling on maximum work hours in favor of permitting employers to require unlimited overtime hours if they were willing to pay for it.\textsuperscript{36}

The FLSA regulates merely two aspects of working hours—it establishes the forty-hour work week as the norm, and it requires premium pay of one and one-half the rate of regular pay for any hour worked in excess of forty hours a week.\textsuperscript{37} The Act excludes various groups of workers from the overtime premium pay requirements, most notably those who are “employed in a bona fide executive, administrative, or professional capacity.”\textsuperscript{38} Strikingly, the Act fails to provide workers with any affirmative protection from being compelled to work excessive hours against their will. The Act neither limits the length of the workday or week through caps, nor regulates the number of overtime hours that a worker can be forced to work.\textsuperscript{39} The Act contains no provisions that guarantee workers a minimum number of rest days.\textsuperscript{40} In addition, the Act does not carve out a role, even a small one, for workers in making overtime determinations. Decisions about whether overtime work is needed, the amount of overtime, and the scheduling of overtime are relegated to the managerial prerogative of the employer.\textsuperscript{41}

The FLSA also contains no safeguards for workers against retaliation for refusing to work overtime, no matter how excessive or unreasonable the
employer’s demand. Workers have no recourse under the FLSA if they are fired, demoted, reassigned, or otherwise punished for declining overtime. Workers also have little chance of obtaining relief through wrongful discharge claims because courts narrowly construe the exceptions to the at-will employment doctrine.\textsuperscript{42} Currently, there is no recognized right to refuse overtime under employment law.\textsuperscript{43} Relief is most likely to come, if at all, from either an unemployment insurance claim,\textsuperscript{44} which provides income support but not reinstatement, or a collective bargaining agreement, if the worker is covered by one.\textsuperscript{45}

\textbf{B. The Structural Context of Overwork and Overtime}

With the steep rise in annual work hours for individuals and families, more than half of American workers report feeling overworked, overwhelmed by the amount of work they have to do, and/or lacking in time to reflect upon the work they are doing.\textsuperscript{46} Overwork is attributable to several trends. First, the climb in annual family work hours since 1979 has coincided with an era of stagnant and falling wages.\textsuperscript{47} Annual family work hours have swelled primarily because unprecedented numbers of women have entered the full-time workforce, and those who were already in the workforce have taken on increased hours of work to boost family incomes.\textsuperscript{48} Without the increased work hours of women, lower- and middle-income families would have seen their incomes fall or at best remain stagnant.\textsuperscript{49} African American and Latino families, whose average hours of work grew faster than white families throughout the 1980s and 1990s, would have been especially hard hit.\textsuperscript{50}

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\item \textsuperscript{42} See Rakoff, supra note 15, at 136-37, 144. The main exceptions to the at-will doctrine are the implied contract exception (limiting discharges when an implied promise of continued employment exists); the public policy exception (typically protecting workers who are terminated for refusing to commit an unlawful act, exercising a statutory right, or performing a public duty); and the implied covenant of good faith and fair dealing exception (balancing an employer’s right to discharge against a worker’s interest in his/her employment and the public’s interest in striking a balance between these competing interests). Smith, supra note 15, at 603-06.
\item \textsuperscript{43} See Rakoff, supra note 15, at 144.
\item \textsuperscript{44} See id. at 139-40; Smith, supra note 15, at 617. Both authors agree that workers receive more favorable treatment in unemployment insurance cases than in wrongful discharge cases on the issue of right to refuse mandatory overtime.
\item \textsuperscript{45} See Rakoff, supra note 15, at 137-39, 142-44 (arguing that when arbitrators interpret collective bargaining agreements on the issue of mandatory overtime, they balance the reasonableness of the employer’s demands against that of the worker’s refusal to work overtime, and often the balance falls in favor of the employer).
\item \textsuperscript{46} Ellen Galinsky Et Al., Families & Work Inst., Feeling Overworked: When Work Becomes Too Much 2 (2001); Jacobs & Gerson, supra note 7, at 450-51, 453.
\item \textsuperscript{47} Mishel Et Al., supra note 11, at 6, 97.
\item \textsuperscript{48} Id. at 5, 111-12; Greenhouse, supra note 12; Time Crunch, supra note 13, at 7-9.
\item \textsuperscript{49} Mishel Et Al., supra note 11, at 104.
\item \textsuperscript{50} Id. at 101.
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To a lesser degree, but of growing importance, workers are receiving less paid time off from work. Corporate restructuring has resulted in dwindling benefit packages that provide fewer paid vacation, holiday, and sick days. Workers today are less likely to receive paid time off than they were thirty years ago. In addition, many workers must forfeit their allotted vacation time because their employers pile too many job responsibilities and demands on them.

Most significant, increased weekly overtime plays a distinctly corrosive role in the phenomenon of overwork. Workers are not only working more weeks per year, but also longer days and work weeks. Almost one-third of workers work more than forty hours per week, and one-fifth work more than fifty hours per week. In “agriculture, mining, manufacturing, transportation, communication, and some professional services, more than 25% of all employees reported that they [regularly] work at more than forty hours per week . . . , and often considerably more.” Those who work overtime in these industries clock, on average, almost twelve hours a week over the standard forty hours each week, which is equivalent to nearly six-and-a-half eight-hour days per week.

There has been a long-term upward trend in overtime hours that shows no sign of reversing. Hourly manufacturing workers now work twenty-five percent more overtime than they did ten years ago. Average weekly overtime in
manufacturing escalated in the 1990s from 3.3 hours to a high of 4.9 hours in 1997, representing a forty-eight percent increase in overtime. By the late 1990s weekly overtime had reached its “highest levels since the Bureau of Labor Statistics began collecting such data in 1956.”

The coercive and involuntary nature of excessive overtime aggravates its detrimental impact for many workers. Studies find that workers who exercise some measure of control over their work feel less stressed and overworked. Yet, with compulsory or involuntary overtime, decisions about whether overtime hours are needed, how much overtime, and when overtime is to be performed, lie outside the control of most workers.

Compulsory, mandatory, or forced overtime is usually defined as hours worked in excess of forty hours per week “that the employer makes compulsory with the threat of job loss or the threat of other reprisals such as demotion or assignment to unattractive tasks or work shifts.” According to some commentators, the rise in mandatory overtime is commensurate with the rise in overtime hours. In one of the few statistical studies on mandatory overtime, forty-five percent of workers surveyed reported that overtime was “mostly up to their employer.” In another study, one-third of workers who performed overtime reported being forced by their employer to do so.

Just as corrosive as compulsory overtime is involuntary overtime. This has been described as “being ‘forced to work voluntary overtime.’” Although not actually threatened with dismissal or other adverse consequences, large groups of workers nonetheless feel “forced” to work overtime because they fear negative

62. GOLDEN & JORGENSEN, supra note 6, at 5; Hetrick, supra note 59, at 33.
63. Hetrick, supra note 59, at 33.
64. LINDER, supra note 10, at 32; see GOLDEN & JORGENSEN, supra note 6, at 1.
65. LINDER, supra note 10, at 33; Smith, supra note 15, at 601; see GALINSKY ET AL., supra note 46, at 3 (citing statistics showing that workers who have less control over their work time and schedules feel more overworked); CARUSO ET AL., supra note 28, at 28 (finding that mandated or involuntary overtime placed workers at greater risk for sleep disorders, poor recovery, burnout, and family-related stress).
66. GALINSKY ET AL., supra note 46, at 7; Schwartz, supra note 28, at 22.
67. See Lonnie Golden, Flexible Work Schedules: What are We Trading Off to Get Them?, 124 MONTHLY LAB. REV. 50, 52 (2001) (observing that the daily and weekly scheduling of work are usually outside the control of workers and may often conflict with the time slots that workers need to fulfill other responsibilities and commitments).
68. GOLDEN & JORGENSEN, supra note 6, at 2.
69. Id. at 7; see Smith, supra note 15, at 601-02 (explaining that an important component of the “overtime boom” consists of mandatory overtime).
70. GOLDEN & JORGENSEN, supra note 6, at 5 (citing the 1977 Quality of Employment Survey of the University of Michigan).
71. Id. at 7 (citing a 1999 study by Cornell University’s Institute for Workplace Studies).
repercussions if they decline longer hours.\textsuperscript{73} Although there are no studies measuring the prevalence of involuntary overtime, commentators indicate that it is widespread because job insecurity places intense pressure on workers to work whatever hours are necessary to handle the heavy workloads assigned to them.\textsuperscript{74}

Some suggest that American workers have chosen to become a work-and-spend society in which long hours support an ever-expanding consumptive appetite.\textsuperscript{75} The issue of choice, even for middle- and upper-middle class Americans, underplays the structural reasons that account for the pandemic nature of excessive hours of work.\textsuperscript{76} In fact, nearly half of workers putting in long hours say they would prefer to work fewer hours.\textsuperscript{77}

Increased work occurs in the context of global economic processes in which employers and government embrace longer hours and forced overtime as a policy choice.\textsuperscript{78} The reorganization of work through corporate restructuring, which accelerated in the 1990s, has created a workforce of insecure workers who are either overworked, underworked, or unemployed.\textsuperscript{79} Under the banner of

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\item \textsuperscript{73} See Schwartz, supra note 28, at 22 (attributing increased working hours to workplaces ruled by “the work ethic of fear”); Golden & Jorgensen, supra note 6, at 7-8 (noting that nearly one in five workers reported working more overtime than they prefer). As an example, sixty percent of nurses surveyed in one study “reported being ‘forced to work voluntary overtime’” even though they were not actually threatened with termination or disciplinary proceedings. Rogers et al., supra note 72, at 209. Nurses stated that there would be repercussions for refusing extra hours or that, although overtime was voluntary, they felt as though it was required. \textit{Id.}
\item \textsuperscript{74} Fraser, supra note 4, at 24. Fraser describes the pressure on workers by explaining, “[i]f they want to hold onto their paychecks and benefit packages, if they want to keep rising within the corporate hierarchy, if they still care about their careers, they will put in whatever hours are necessary to handle their workloads.” \textit{Id.}
\item \textsuperscript{75} See Buell, supra note 53 (noting the role of new consumption and materialism in contributing to long hours).
\item \textsuperscript{76} See Jacobs & Gerson, supra note 7, at 455 (suggesting that employers structure employment options and organize work schedules for reasons other than the preferences of their workers); Schor, supra note 27, at 162 (arguing the need for regulatory and legislative reform to address “deep structural barriers to shorter hours”).
\item \textsuperscript{77} Schultz, supra note 15, at 1957; Jacobs & Gerson, supra note 7, at 454.
\item \textsuperscript{78} See Linder, supra note 10, at 5 (explaining that employers and economists view longer hours as the engine that fuels economic growth); Mishel et al., supra note 11, at 424 (noting that European nations, in contrast to the United States, have made an explicit policy choice to take their productivity gains in the form of shorter hours). Further, Mishel concludes that the higher standard of living in the United States as compared to other Organization for Economic Cooperation and Development (OECD) countries results not from greater efficiency but from longer hours. \textit{Id.} at 424-29; see also Jacobs & Gerson, supra note 7, at 449-50 (stating that international comparisons between the United States and other industrialized countries suggest that long working hours “are neither inevitable nor inherent in post-industrial economic development”).
\item \textsuperscript{79} See generally Peter Cappelli, The New Deal at Work: Managing the Market-Driven Workforce (1999) (detailing the impact of restructuring and downsizing on creating massive job insecurity among full-time, contingent, and unemployed workers throughout the
“increasing global competitiveness” and “enhancing productivity,” businesses have instituted systems of “lean” production to pare down.80 This has been achieved through downsizing, massive layoffs, reliance on overtime instead of hiring new workers, the substitution of contingent workers for full-time workers, and the subcontracting of work.81 Employers promote “flexible capitalism” as a means of strengthening their capacity to meet new product and consumer demands, and to adjust to rapidly changing business conditions.82 Moreover, lean production is a permanent mainstay of the global economy, and not a short-term strategy for economic downturns.83

For workers, “flexible capitalism” and “global competitiveness” are euphemisms for being squeezed to work more for less pay. According to noted experts, flexible capitalism is “committed above all else to the idea of reducing fixed labor costs in the name of facilitating newness and change.”84 The creation of an insecure workforce, composed of several tiers of workers in competition with one another, is a fundamental corporate strategy for slashing labor costs.85 Downsizing, layoffs, and outsourcing leave remaining full-time workers with increased workloads and harder and longer hours.86 At the same time, companies increasingly resort to hiring part-timers, temporary workers, and independent contractors, many of whom work fewer hours than they desire.87 Afraid of economy).

80. See Kim Moody & Simone Sagovac, Time Out! The Case for a Shorter Work Week 7-8 (1995) (describing the transition to contingent work and subcontracting as examples of lean production); see also Schultz, supra note 15, at 1920-27 (detailing the workplace structures that constitute the new economic order).

81. See Moody & Sagovac, supra note 80, at 7-8; Schultz, supra note 15, at 1920.


83. See Fraser, supra note 4, at 138 (noting that more job cuts occurred in 1998, a strong growth year for the United States economy, than at any previous point in the 1990s); Louis Uchitelle, Layoff Rate 8.7% Highest Since 80’s, N.Y. Times, Aug. 2, 2004, at C2.

84. Schultz, supra note 15, at 1921-22 (referring to the views of economists Bennett Harrison and Richard Sennett).

85. Moody & Sagovac, supra note 80, at 10, 12; see Miller, supra note 16, at 95-96, 102-05 (describing the impact of worker insecurity as employers “churn” the workplace through layoffs); see also Fraser, supra note 4, at 44 (citing one economist who explains that, in a labor market with many unemployed and underemployed workers, fear is an effective tool for getting workers to perform for less); Washington Alliance, supra note 22, at 20-21 (describing the treatment of contract workers within information technology companies as second-class citizens, and the impact of enforced social distinctions between permanent staff and contract workers).

86. See Fraser, supra note 4, at 38-45 (describing how many employers are simultaneously demanding more work from employees and cutting back on salaries and benefits). Fraser states that companies look for new ways to pare down on staffing “while pushing others to work at paces that once might have seemed unfair or unsustainable.” Id. at 41.

87. This is particularly true of those workers who become temporary workers or part-timers because they are unable to find full-time work. See Fraser, supra note 4, at 140-41 (discussing the growth of contingent work); Jean McAllister, Sisyphus at Work in the Warehouse: Temporary
becoming the casualties in the next round of layoffs, outsourcing, or replacement of full-time jobs with temporary jobs, workers submit to onerous workloads and longer hours at reduced wages.\textsuperscript{88}

Longer hours and forced overtime are critical employer strategies for lowering labor costs.\textsuperscript{89} Employers who compel workers to work overtime avoid the costs associated with keeping a larger full-time staff or hiring new workers—among them, health insurance, paid vacation and sick leave, workers’ compensation, and unemployment insurance.\textsuperscript{90} The past two economic recoveries show that businesses deliberately rely on forced overtime as a substitute for hiring new full-time workers.\textsuperscript{91} Between March 1991 and January 1998, “if employers had hired new workers instead of increasing overtime, nearly twice as many production workers would have been hired.”\textsuperscript{92} This would have translated into 571,000 full-time jobs.\textsuperscript{93}

Wal-Mart, the nation’s largest employer,\textsuperscript{94} pushes reliance on overtime to a new frontier. The global giant, which has gained notoriety for establishing the model for post-industrial low-wage jobs,\textsuperscript{95} deliberately and permanently understaffs its stores as a formula for ensuring that growth in labor costs lags behind store sales.\textsuperscript{96} Inadequate staffing means that more work is piled on each

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88. Fraser, supra note 4, at 42. One economist notes that during the 1980s and 1990s, many profitable companies cut the wages of their existing workforces by twenty to forty percent, and although workers complained, they did not quit. Id. at 44; see Doug Henwood et al., *Toward a Progressive View on Outsourcing*, Nation, Mar. 22, 2004, at 22, 26 (stating that “[a]lmost every employed person you talk to has [a survivor’s tale of] taking on the responsibilities of employees who leave voluntarily or are laid off,” and that this amounts to “working harder and longer for no increase in pay”).

89. See Moody & Sagovac, supra note 80, at 12-14 (explaining the economics of how overtime at time-and-a-half produces more value-added per hour than a new worker does at straight time); see also Ritu Bhatnaga, Dukes v. Wal-Mart as a Catalyst for Social Activism, 19 Berkeley Women’s L.J. 246, 250-51 (2004) (discussing forced unpaid overtime as a part of Wal-Mart’s “highly systematized cost-cutting strategy that effectively suppresses wages and eliminates competition”).


91. Hetrick, supra note 59, at 32-33.

92. Id. at 32.

93. Id.


95. See id. (explaining the role of Wal-Mart in “defining the new industrial landscape” of low-wage service work in the United States).

worker and store managers are left to squeeze extra hours, often without pay, from workers.\textsuperscript{97} In this way, the cost of labor per unit of output plunges while profit margins climb.\textsuperscript{98}

Further, as part of restructuring, some companies continue to hire robustly during and after layoff periods,\textsuperscript{99} and overtime and longer hours figure importantly in recruitment. Young and less experienced workers are hired to replace older workers because they can be paid lower wages and hired at less costly benefit levels.\textsuperscript{100} They are also desirable because employers can easily demand “large amounts of unpaid overtime” from them.\textsuperscript{101} Employers perceive young workers as “unfettered” by family responsibilities, and thus more readily compliant with demands for long hours.

\section*{C. Overtime Across the Class Divide}

Although “not all overtime is created equal,”\textsuperscript{102} the phenomenon of compulsory overtime is color-blind and class-blind. In the last decade, the issue of mandatory overtime has spawned heated strikes by groups as diverse as nurses, autoworkers, security guards, and communication workers.\textsuperscript{103} Long hours also rank as a main reason fueling an infant technology workers’ union movement.\textsuperscript{104} Class action lawsuits brought by managers and other white-collar workers challenging forced unpaid overtime have tripled since 1997.\textsuperscript{105} Professionals such as lawyers,\textsuperscript{106} nurses,\textsuperscript{107} and doctors\textsuperscript{108} form part of the growing chorus demanding
curbs on excessive hours of work. More than any other labor issue, forced overtime and the lack of control that workers exercise over the boundaries between work and private time can be used to unify workers who might not seem to have much in common.

Sweatshops have been most popularly associated with immigrant workers toiling excessive hours in factories. In contrast to white-collar workers, blue-collar workers were historically viewed as subject to working on the clock, and thus most in need of protection through hours regulation.\(^{109}\) Garment, restaurant, janitorial, and domestic workers, many of whom are female and immigrant workers, are frequently forced to work eighty to ninety hours per week;\(^{110}\) forty hours is considered part-time for most of these workers.\(^{111}\) Adding to the stress of long hours are oppressive practices—such as surveillance, intimidation, harassment, and control of movement—that are aimed at maximizing each worker’s output per unit of time.\(^{112}\) Sometimes workers are not permitted to take breaks, go to the bathroom, or even get a drink of water without suffering negative repercussions.\(^{113}\)

Quite simply, many immigrant workers are faced with the stark choice of complying with required overtime, increased workloads, and frenetic work paces, or being fired.\(^{114}\) Workers are pressured to compete with one another for longer hours to keep their jobs and avoid being replaced by workers who are more compliant with employer demands.\(^{115}\) Undocumented immigrant workers are particularly susceptible to demands for excessive hours.\(^{116}\) The threat of

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109. See Malamud, supra note 20, at 2263-64, 2294 (referring to the differential treatment of various groups of workers under New Deal legislation and its antecedents).

110. See It’s About TIME!, supra note 28 (citing statistics about working hours for immigrant and other workers); Shirley Lung, Exploiting the Joint Employer Doctrine: Providing a Break for Sweatshop Garment Workers, 34 Loy. U. Chi. L.J. 291, 297 (describing long work hours in the garment industry); Levin & Ginsburg, supra note 3, at 21-22 (describing forced overtime and excessive hours of work without breaks by low income and immigrant workers in various industries).

111. It’s About TIME!, supra note 28.

112. See Lung, supra note 110, at 291-92, 297; Levin & Ginsburg, supra note 3, at 22.

113. See Levin & Ginsburg, supra note 3, at 21-22; David Bacon, No Rest for the Weary, Truthout/Perspective, Feb. 25, 2005 (originally published on www.truthout.org) (on file with author).

114. See Levin & Ginsburg, supra note 3, at 34-35.

115. See Lung, supra note 110, at 297, 358 n.47.

deportation, along with the criminalization of their work status, creates a climate of vulnerability that unscrupulous employers use to cheapen labor and extract more work.\footnote{117} At the same time, documented workers, too, are threatened with termination if they refuse poor working conditions—their employers tell them that they can be easily replaced by undocumented workers.\footnote{118}

Publicity surrounding Wal-Mart’s wage-slashing strategies reveals that forced overtime and working off the clock are as pervasive for low-wage service workers in retail as they are for immigrant factory workers.\footnote{119} In lawsuits against Wal-Mart and other large retailers, workers complain of forced or involuntary unpaid overtime as a systematic practice.\footnote{120} Workers explain that they are forced or pressured by managers to clock out after forty hours and to continue working to keep up with the large amount of work that is piled on them because of permanent understaffing.\footnote{121} Wal-Mart managers are sometimes instructed to erase hours from workers’ time records to help the company avoid overtime costs.\footnote{122} Managers at other retailers have their own tactics and euphemisms for squeezing longer hours from workers, such as pressuring “ambitious” hourly workers to “[pay] their dues” or “wheedling” workers to put in “volunteer days” or “free labor days” as part of a “development plan.”\footnote{123} Workers succumb to unpaid overtime because of job insecurity, especially in small communities where there is a scarcity of good jobs and a high premium on being able to hold onto a job.\footnote{124} Job insecurity, the desire to curry favor with managers, and the wish to keep up with one’s co-workers, have led some retail workers to compete for off-the-clock work.\footnote{125}


\footnote{118} Interview with Michael Lalan, Organizer, Nat’l Mobilization Against SweatShops, in Brooklyn, N.Y. (Mar. 4, 2005).


\footnote{120} See Head, supra note 96, at 4-5; Andrew Murr, Pay? How About a Pizza?, NEWSWEEK, Apr. 20, 1998, at 42.

\footnote{121} Head, supra note 96, at 5; Greenhouse, supra note 119; see Murr, supra note 120.

\footnote{122} Greenhouse, supra note 119.

\footnote{123} See Murr, supra note 120.

\footnote{124} See Greenhouse, supra note 119 (referring to testimony by a former Wal-Mart manager stating that he feared losing his job if he took more than forty hours to complete his work and put in for overtime pay). This manager explained, “‘[b]ecause it’s such a small community, jobs aren’t that good there. . . . You held on to your job. I feared losing my job. I feared getting fired.’” Id. A lawyer representing Wal-Mart workers in one class action suit against the giant retailer stated that witnesses at trial testified that the culture at Wal-Mart was such that “if you want to work there a long time, you have to work off the clock.” Id.

\footnote{125} One group of Wal-Mart workers formed “the Over-40 Club,” in which members worked more than forty-hour work weeks and then asked their managers to subtract hours from their time...
The relentless drive by businesses to push down the cost of labor per unit of output has not left white-collar and higher-wage workers unscathed. Class status and privilege have not insulated professionals, executives, or administrators from excessive hours of work, forced overtime, or uncompensated overtime. Some economists suggest that professionals and managers are among those most likely to work excessively long work weeks and the longest hours. In addition, new technologies contribute to a job spillover that further erodes the demarcation between work time and private time as workers spend more of their private time answering work-related voicemails and e-mails. Mounting evidence indicates that white-collar workers today are as commodified as low-wage, unskilled workers, and as powerless to protect their private time from employer demands for excessive hours.

Salaried managers and executives report that the long hours they work “make them feel more like production workers on an assembly line.” The social construction of the white-collar worker as an “ambitious” employee who “volunteers” to work unpaid overtime to “move up” the career ladder, in contrast to the low-paid worker who puts in long hours in a dead-end job, has been used to differentiate overtime based on class status. The overtime hours worked by white-collar workers are not popularly perceived as exploitation. Yet increasingly, “profit-driven management techniques,” bureaucratization, product standardization, and restructuring eliminate professional autonomy and control over hours of work and pace of work. The workplaces of professionals can be

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126. See Fraser, supra note 4, at 20-21 (noting that many of those working excessive hours are white-collar professionals); Rakoff, supra note 15, at 79-80 (concluding that professionals may be in a worse position than non-professionals because there are no disincentives to stop employers from requiring professionals to work excessive hours); Greenhouse, supra note 12 (discussing that salaried workers such as software designers, lawyers, and factory managers are among those working long work weeks); Viele, supra note 105 (explaining that the number of lawsuits brought by white-collar workers challenging forced unpaid overtime are on the rise).


129. See Fraser, supra note 4, at 76-81.

130. See Malamud, supra note 20, at 2305-06 (referring to alternative images of overtime work based on occupation); Keith Cunningham, Note, Father Time: Flexible Work Arrangements and the Law Firm’s Failure of the Family, 53 Stan. L. Rev. 967, 983-84 (2001) (noting that long hours for lawyers are seen as a proxy for dedication and commitment to one’s clients).

131. Walsh, supra note 128.

132. See Malamud, supra note 20, at 2305-06 (describing how one New Deal Wage and Hour administrator fought to overcome the social construction of all white-collar workers as upwardly mobile in arguing against the wholesale exemption of white-collar workers from hours regulation).

133. Crain, supra note 20, at 555-58, 560-61.
as autocratic as those of low-waged service or manufacturing workers.  

For example, it is widely documented that nurses are often forced against their will to work long overtime shifts, including double shifts, and as a result their overtime hours are notoriously excessive. Reliance on mandatory overtime by hospitals emerged as a cost-cutting measure when restructuring and mergers in healthcare reform in the 1990s led hospitals to downsize their staff of registered nurses. This restructuring resulted in severe and permanent understaffing, which hospitals covered by forcing nurses to work mandatory overtime and by using unlicensed personnel who were supervised by nurses. Nurses are threatened with being fired, subjected to disciplinary proceedings, or losing their licenses under the charge of patient abandonment if they refuse to stay past their regular shift or come into work on their day off.

Lawyers, too, face heightening pressure for longer hours due to restructuring and “corporatization.” Like hospitals, large law firms have adopted restructuring and profit maximizing strategies that emphasize efficiency and productivity. Demands for greater productivity and longer hours come in the

134. See generally FRASER, supra note 9.
136. See Rogers et al., supra note 72, at 207.
137. See The Time Has Come to Deal with Mandatory Overtime, supra note 2 (nurses complaining of sixteen-, twenty-, or twenty-eight-hour shifts and longer).
138. Peeples, supra note 135, at 813.
139. Id. at 809, 813. Residents and interns also suffer from downsizing and restructuring. See Crain, supra note 20, at 583-84. As hospitals reduce staffing levels, residents and interns are forced to shoulder the responsibilities once performed by lesser-skilled staff, adding to hours that are already notoriously long. See id. at 586-87.
141. See Crain, supra note 20, at 570-75 (discussing the impact of corporatization, bureaucratization, and restructuring on dramatically increasing billable hour requirements and the attendant undermining of lawyer autonomy and control over time); Cunningham, supra note 130, at 979-80 (discussing the impact of increased billable hour requirements on lawyer discontent about having no leisure time). Traditionally, long hours have been strongly embedded in the work culture of law firms as a sign of full commitment to both the firm and one’s clients. Id. at 983-85. Managing partners in large firms view lawyers who are on part-time schedules as “slackers,” and law firm culture “rewards quantity of time at the office.” Id. Some observers suggest that this is worsening as large law firms are organized more like the corporations that they represent. See Crain, supra note 20, at 570-71.
142. Crain, supra note 20, at 570-71.
form of dramatic increases in billable hour requirements. The billable hour measurement is the most significant instrument that large firms wield to control and measure lawyer output and to quantify the revenue-generating potential of each lawyer. Just as importantly, the billable hour serves as a check on efficiency—since there are upper limits on what a client can be billed—and thus operates to intensify the pace of work. Unprecedented salary hikes for first-year associates in 2000 exacerbated the pressure on billable hours to an extreme. In the wake of these hikes, and despite the most generous compensation packages in history, associates expressed widespread discontent with their long hours and with not having time for themselves or their families. The inability to carve a life outside of work is the primary reason that lawyers have the highest job dissatisfaction rate among most professionals.

The information technology industry is perhaps most emblematic of the converging work conditions between high-wage white-collar and low-wage factory workers. While the public is largely unaware of the “dirtier” side of the industry, the processes of creating and manufacturing new technologies entail forced or involuntary overtime, long hours, declining wages, and job insecurity throughout the chain of production. At the bottom are low-wage women and immigrant workers who assemble computer microchips in semi-conductor and electronic assembly operations under conditions similar to those of garment workers. Higher up the chain are programmers, web developers, systems analysts, and software designers who inhabit increasingly harsh work environments that offer fewer rewards for more work.

Faced with the continual threat of overseas outsourcing, importation of foreign workers, and replacement by contract workers, “permatemps,” and replacement by contract workers, “permatemps,”

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143. Id. at 571-72; Cunningham, supra note 130, at 980-81.
144. Crain, supra note 20, at 571-73. The billable hour is also used in accounting and consulting firms to help companies “identify those professionals who fail to work long enough” or fail to bring in sufficient revenue. Fraser, supra note 4, at 23-24.
145. Cunningham, supra note 130, at 979-80. Law firms have sought to contain the mushrooming costs of associate salaries by contracting out legal work to cheaper lawyers or using paralegals. Crain, supra note 20, at 573-74, 577-78. These practices further undermine professional autonomy and institutionalize a super-hierarchy of permanent associates, non-equity partners, contract lawyers, and legal temps. Id. at 574.
146. Cunningham, supra note 130, at 980 & n.76.
147. Id. at 969-70, 980.
148. See Ross, supra note 20, at 48-49, 52.
149. See id. at 49-52. Ross uses the phrase “chain of high tech production” to refer to the hierarchy of workers involved in producing new information technologies, ranging from those who sit at the top of the chain, such as software designers, to those at the bottom engaged in the manufacture and assemblage of products. Id. at 50-51.
150. See id. at 50-52.
151. Id. at 49-50; Fraser, supra note 4, at 141.
152. Overseas outsourcing of software jobs and the importation of foreign workers, both of which exert a stiff downward pressure on wages and benefits and upward pressure on hours, are
other contingent workers, skilled hi-tech workers are pressed to work excessive hours at declining wages. The norms in the technology sector are such that a twelve-hour workday is seen as “lightweight” and seventy- to ninety-plus hour work weeks are typical. Workers in the industry often choose longer hours, not to outshine everybody else, but simply to keep up and not be left behind. Similar to low-wage workers in traditional sweatshops, high-tech workers endure frenetic work paces, often without breaks, because of workloads that are too heavy for the deadlines given.

Ironically, new advances in information technology provide employers with greater tools for disciplining and maximizing control over technology and other white-collar workers. Utilizing the concept of “theft of time,” which refers to the “misuse of the employer’s time and property” by workers, employers justify the proliferation of electronic monitoring of e-mails, computer work, and phone calls. To supervise each worker’s activity, automated time-and-attendance video display systems track in-and-out times, enabling an employer to know when someone logs onto a computer, takes a break, or leaves the office. These systems also compute the number of hours worked as well as individual and group levels of productivity.

The trend of compulsory overtime, longer hours, and overwork across the class divide is likely to worsen with regulatory changes spearheaded by a Republican administration. New overtime regulations issued by the U.S.
Department of Labor in 2004 expand the definitions of exempt executive, professional, and administrative employees, and loosen what it means to be paid on a salary basis. Organized labor, former Labor Department officials, and other critics of the new regulations warn that these changes will permit employers to classify many employees as exempt who formerly were entitled to the FLSA’s protection of time-and-a-half overtime pay. By reducing the cost of overtime, the “de facto elimination” of the right to overtime pay for many workers will invite heavier use of forced overtime by employers, leading to longer hours for greater numbers of workers. As employers are freed from paying for overtime, they will impose more of it, and millions of workers will experience less pay and increased hours of work simultaneously.

II. CLASS-BASED TENSIONS ABOUT OVERTIME

Although workers actively organize around the issue of mandatory overtime, there currently is no mass social movement advocating shorter work


164. See supra note 24; Final Rule on Overtime Pay: Hearing Before the Subcomm. on Labor, Health and Human Services, Education of the S. Comm. on Appropriations, 108th Cong. (2004) (statement of Tammy D. McCutchen, Administrator, Wage and Hour Division Employment Standards Administration, U.S. Dep’t of Labor) (explaining that the new definition of being paid on a salary basis will enable employers to classify many workers as exempt who did not meet the old definition). McCutchen also maintains that the new regulations will widen exemptions for team leaders, low-level managers and assistants, computer professionals, funeral directors, chefs, and financial service workers. Id. at 1-3, 4-9.

165. See Sweeney Statement, supra note 25.


167. See supra note 24.

168. See ROSS EISENBREY & JARED BERNSTEIN, ELIMINATING THE RIGHT TO OVERTIME PAY: DEPARTMENT OF LABOR PROPOSAL MEANS LOWER PAY, LONGER HOURS FOR MILLIONS OF WORKERS 13 (2003) (concluding that employers will schedule more overtime work if they are not required to pay the overtime premium); cf. Walsh, supra note 24, at 102 (concluding that proposals to permit employers to substitute compensatory time for overtime pay would reduce the cost of overtime and lead to more extensive reliance on overtime by employers).


170. See MOODY & SAGOVAC, supra note 80, at 5-7 (describing successful strikes in 1994 over long working hours by UAW auto workers and Teamsters truckers); Michael H. Cimini, Boeing-Machinists Accord, Monthly Lab. Rev., Feb. 1, 1990, at 56 (describing that after a seven-week work stoppage by 57,000 workers, Boeing agreed to reduce mandatory overtime and to increase premium pay to double after 160 hours of overtime in one quarter); Andy Hibberd, Workers Demand More Family Time, Derby Evening Telegraph (United Kingdom), May 29, 2004, at 5 (noting that Toyota auto workers complain about company’s decision to drop plans for a ‘three-
hours or greater worker control over working time. Specific unions have waged heated strikes over the issue of overtime in the last decade on behalf of workers in particular occupations. These separate struggles have succeeded in catapulting the phenomena of forced overtime and overwork into public view. However, no overarching themes unify the stances of specific unions and groups of workers, nor are attempts made to forge the individual struggles into a larger response. The struggles remain individualized disputes in which protections are won for limited groups of workers.

Working individuals and families must wrestle with the central question of how to inspire a mass movement that empowers workers to claim control over the basic work week. A crucial starting point is the recognition that the issues of overwork and forced overtime present a unique opportunity to unify workers across class, income, and occupation. Yet, to effectively organize across class and occupation, it is necessary that workers struggle to unpack the class-based assumptions that are used to differentiate the experience of overwork and overtime for different groups of workers. As long as these assumptions remain

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172. In addition, various federal and state legislative proposals have been introduced to curb mandatory overtime. See Golden & Jorgensen, supra note 6, at 10-14. These proposals, most of which only address workers in the health care occupations, have not progressed very far. Id. at 11.

173. See Rakoff, supra note 15, at 155 (stating that restoring the balance of life to workers rests in “control over the basic work week”).

174. See Malamud, supra note 20, at 2224-25 (describing the upward identification of white-collar workers and their stance against working hours regulation). Malamud notes that white-collar workers took it for granted that they had to put in overtime to climb up the occupational ladder.
unexamined, workers will have difficulty appreciating the major degree to which working conditions across the class divide have narrowed.

Class status became a fault line that divided workers over the issue of hours regulation during the New Deal era. \(^{175}\) White-collar workers derived class status, identity, and privilege in distinguishing themselves from manufacturing and service workers who “punched the clock.” \(^{176}\) In the view of white-collar workers, shorter hours and government regulation of their work time undermined professional class status. \(^{177}\) The FLSA exemptions for professional, executive, and administrative workers resulted largely from the desire of policymakers to preserve the class status and professional identity of white-collar workers. \(^{178}\)

The challenge today is whether workers up and down the occupational hierarchy will be able to overcome “identifying upward” to recognize that employers have the right and power to make unlimited demands on the non-work time of all workers. Some might argue that high-wage professionals will refuse to ally with blue-collar workers in order to preserve their occupational allegiances and identity. \(^{179}\) Specifically, professionals may cling to their class status, \(^{180}\) and continue to view their overtime as an investment rather than as exploitation, especially since they derive greater status from their long hours than factory and low-wage service workers. In addition, it is questionable whether professionals even conceptualize their long hours as overtime; the long hours worked by professionals in comfortable offices or homes may differ qualitatively from the long hours of workers who work in dilapidated factories or impersonal retail stores. These potential barriers to organizing across occupation lead some to suggest that unions can succeed in harnessing the discontent of professionals only if they adopt forms of unionism that reinforce professional identity and interests. \(^{181}\)

\(^{175}\) See Malamud, supra note 20, at 2219-22 (explaining that the exemption of executive, administrative, and professional workers from the FLSA’s overtime provisions was the subject of considerable controversy).

\(^{176}\) Id. at 2224.

\(^{177}\) Id. at 2222-25.

\(^{178}\) See id. at 2285-2315 (containing a detailed historical analysis of how the Wage and Hour Administration under the FLSA engaged in class-based line-drawing to determine who was to be covered by hours regulation).

\(^{179}\) See Crain, supra note 20, at 597 (arguing that professional workers are fundamentally unwilling to sacrifice class privilege and status by forming allegiances with the working class); Malamud, supra note 20, at 2224-25 (observing that white-collar workers identifying “upwards with their bosses” is central to the operation of class stratification in the United States).

\(^{180}\) Malamud, supra note 20, at 2317.

\(^{181}\) See Crain, supra note 20, at 601-04 (positing that since traditional unionism does not
appeal to white-collar workers, unions must reconceptualize themselves according to the model of old media unions that focused on "professional/occupational" identity rather than "work-site" identity).

182. See LINDER, supra note 10, at 11 (quoting a worker who asks "[d]o you think you can work just 40 hours a week and still buy a house?").

183. See Crain, supra note 20, at 598 (noting that the working class may be resistant to forming alliances with professionals). Crain refers to a study that found that non-college graduates expressed "a universalistic belief in job entitlement" that clashes with the ethos of individualism espoused by many professionals. Id. at 598-99. Crain also points to the incompatibility between the bread and butter issues pursued by traditional unions representing blue collar workers and the goals of preserving occupational identity. Id. at 599, 602-03.

184. See RAKOFF, supra note 15, at 81-82 (arguing that because many executive, administrative, and professional workers no longer control their time and are subject to commodification, it would be sensible to divide this group, which the FLSA treats as one group, "into smaller groups with different characteristics," and to eliminate the FLSA exemption for some of these workers).

185. See RAKOFF, supra note 15, at 139-41; Schultz, supra note 15, at 1936-38 (suggesting that "work-related rights" as part of a reform agenda addressing the tension between work, family, and civic commitments "can unite us across differences and provide a common foundation for equal citizenship for all").
Further, galvanizing a mass social movement around the issue of work time requires a more radical message than the one now offered by organized labor and some women’s organizations. In opposition to Republican proposals to reform the FLSA overtime provisions, the AFL-CIO and National Organization for Women (NOW) stake their defense of the overtime provisions on protecting the right of working families to overtime compensation.\footnote{See Sweeney Statement, supra note 25; Statement of Linda Chavez-Thompson, AFL-CIO Executive Vice President, on Overtime Pay (June 2003), http://aflcio.org/mediacenter/resources/a-clt-overtime-06-05.cfm; AFL-CIO, What Workers Are Saying (2003), http://www.now.org/issues/economic/061203olol.html; National Organization for Women, Department of Labor Rule Change Undermines Overtime Pay Protections (June 12, 2003) (on file with author); National Organization for Women, Background: “The Family Time Flexibility Act” (May 1, 2003), http://www.now.org/issues/economic/060103Familyflex.html.} They maintain that working families cannot afford to lose overtime pay since they depend on the extra income; therefore, the right to overtime compensation must be preserved.

This position of protecting workers’ overtime rights recognizes the precarious plight of low-wage families and why some workers desire overtime work. Yet, its shortsightedness outweighs its pragmatism. Even by its own logic, this response is fundamentally too narrow because it fails to address the corrosive effect of systematic overtime on straight wages.\footnote{See Schor, supra note 9, at 144 (noting research shows that workers who receive overtime pay earn lower hourly wages as employers “‘undo’ . . . the effect of the overtime premium”); Smith, supra note 15, at 602 (noting empirical evidence that most workers who work mandatory overtime do not receive higher straight time wages than those who work optional overtime). Schor posits that it is probable that wages would rise if overtime work were eliminated. Schor, supra note 9, at 144.} Through the creation of an artificial oversupply of labor, overtime leads to wage depression.\footnote{See Linder, supra note 10, at 43 (explaining that overtime enables employers to increase the labor supply without adding new workers and thus increases the ranks of the unemployed).} The more some workers are overworked, the more others are unemployed. Employers then depress base wages as they pit the overworked against the unemployed.\footnote{Id.; It’s About TIME!, supra note 28.} In addition, as overtime becomes systematic, employers lower the hourly rate of pay to offset the cost of the overtime premium.\footnote{See Linder, supra note 10, at 51-55 (discussing how longer hours produces no long-term permanent economic advantage to workers because employers depress base wages to account for the overtime pay premium); Schor, supra note 27, at 168 (noting that base wages decline in companies that rely on overtime and that the overtime premium “is in some sense a mirage”).} Thus, wages earned in a longer workday may, over the long run, fall below wages earned in a shorter workday.\footnote{See Linder, supra note 10, at 54-55 (citing Samuel Gompers in explaining that longer hours may mean lower wages).} In these ways, overtime contributes to the maintenance of low-wage jobs and produces little permanent economic advantage for many workers.

A message predicated mainly on protecting the right of families to work overtime misses the crux of the problem of overwork. Historically, the overtime
premium has failed as a financial deterrent to longer hours, and employers have instead used the premium to induce workers to work longer hours.\textsuperscript{192} Ironically, powerful corporations once used this same message—protecting the right of working families to improve their standard of living—to defeat the unions’ fight for eight-hour laws that banned overtime work.\textsuperscript{193} Corporations continue to appropriate this message to stave off legislation that would end mandatory overtime.\textsuperscript{194}

\section*{III. CHALLENGING COMPULSORY OVERTIME}

\textit{A. Taking the Lead from Various Workers’ Efforts to Challenge Forced Overtime: The Right to Refuse}

It is worthwhile to examine contemporary worker-led efforts at challenging compulsory overtime to formulate a direction for a mass movement for control of working hours. This Article offers two examples—the National Mobilization Against SweatShops ("NMASS") and the nurses’ movement to win a right to refuse overtime. Both provide examples of workers who organize to address the destructive impact of long hours on the totality of workers’ lives. By calling for a right to refuse overtime, these campaigns seek a shift in the employment relationship that would enable workers to control the boundaries between work time and private time.

\textit{1. NMASS.—}NMASS is a workers’ membership organization founded in 1996 that mobilizes workers and their families around the core theme that “[t]he control of time and the ability to work and live as healthy human beings [is] a fundamental human right.”\textsuperscript{195} In 2001, NMASS, in conjunction with another independent workers’ center,\textsuperscript{196} launched “It’s About TIME! Campaign for Workers’ Health and Safety” ("It’s About TIME!"). This campaign focuses on organizing, policy reform, and media advocacy to publicize how compulsory overtime imperils workers’ health and safety, hurts women and families, and undermines citizenship.\textsuperscript{197}

It’s About TIME! grew out of the efforts of low-wage workers who initially came together to organize around the issue of non-payment of wages.\textsuperscript{198}
However, workers very quickly identified long hours and overwork as deadly problems that they wished to address. At governmental hearings, rallies, public demonstrations, and press conferences, It’s About TIME! members explain how forced overtime, heavy workloads, and frenetic work paces give rise to debilitating repetitive stress injuries, on-the-job accidents, over-exposure to toxic substances, and other dangerous work conditions. The campaign emphasizes that long hours exacerbate the occupational health hazards of workers in jobs that are already high-risk. Not surprisingly, for immigrants and low-wage workers, who perform the heaviest, dirtiest, and most dangerous work, this means crippling illnesses and accidents, ruined health, and even death. Foreign-born workers have an appreciably higher chance of dying on the job than native-born workers.

Members also bring attention to the special hardships of women and children. Educational materials from It’s About TIME! underscore that between putting in long hours at grueling jobs, performing housework, and caring for their children, many women are constantly working. Long hours, chronic stress, and burnout often leads to strained family relationships; “ties to friends and community [also unravel and disintegrate].” Some families “lose track of [their] children” because they have so little time to spend with them. At times, children stop going to school or join gangs because of the lack of parental supervision, or they work and take on family responsibilities when parents become too injured to work.

It’s About TIME! also addresses the wider impact of long hours on workers’ lives by advocating reform of New York State’s workers’ compensation system. For many low-wage workers who are injured because of long hours, the workers’ compensation system is their only avenue for medical care because

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199. Id.
200. See id.; supra notes 28, 65-66 and accompanying text.
202. One organizer of garment and restaurant workers explained, “‘long hours are the No. 1 killer of people.’” Maier, supra note 21.
203. Maier, Dreams Flourish, supra note 201.
204. It’s About TIME!, supra note 28.
205. Id.
206. Id.
207. Id.
208. See Michael J. Wishnie, Immigrant Workers and the Domestic Enforcement of International Labor Rights, 4 U. PA. J. LAB. & EMP. L. 529, 552-53 (2002). The New York workers’ compensation system was established to provide workers who become injured or ill during the course of employment with income support and compensation for medical care. Id. at 552.
they work in jobs without health insurance coverage. However, extraordinary delays in the adjudication of claims filed with the Workers’ Compensation Board often leaves workers with no choice but to continue working until they become too ill to work at all. This typically leads to broken families and a life of pain, poverty, and isolation.

In its short history, It’s About TIME! has gained visibility for these issues. It has organized public demonstrations, including a seven-day hunger strike, to demand a statutory right to refuse mandatory overtime and an end to the long delays in the workers’ compensation system. Its policy advocacy has resulted in members testifying at a Senate subcommittee hearing on workplace safety and health, as well as the introduction of a bill in the New York State Assembly to prohibit mandatory overtime. The campaign recently won a favorable ruling in a petition filed pursuant to the labor side-agreement to the North American Free Trade Agreement (“NAFTA”) that publicized the effects of long hours on workers, and challenged the delays in the workers’ compensation system as a failure of the United States to enforce domestic labor laws.

Lessons can be drawn from It’s About TIME! about popularizing the need for workers to control their time. The campaign has emphasized that its goals revolve around control of time, not just shorter hours. It has waged an aggressive educational and organizing campaign that offers a broad view of the ruinous impact of forced overtime and long hours on workers and their families and communities. It has involved not-yet-injured young workers and students with older injured workers in a program of mutual aid and support to show that these issues cut across age, education, and occupation. Some of the protests organized by It’s About TIME! have been on behalf of recent college graduates who hold white-collar jobs in offices. It’s About TIME! also points to the

209. See It’s About TIME!, supra note 28.
210. Id.
213. See Wishnie, supra note 208, at 553.
216. It’s about TIME!, supra note 28.
causes of long hours by drawing connections between those who are overworked and those who are unemployed or who must work in contingent employment because they cannot find full-time jobs.  

2. Nurses.—As an occupational group, nurses have had the most success in organizing a sustained national movement to end the practice of mandatory overtime. Through strikes or threats of strikes, several nurses’ unions and associations have secured contract language to limit mandatory overtime. Some contracts impose an outright ban on mandatory overtime; others limit the maximum hours in a shift per day, place caps on mandatory overtime hours, or restrict how often a nurse can be required to work overtime in a given period.

Furthermore, the American Nurses Association, state nurses’ associations, and nurses’ unions have organized aggressively for a statutory right to refuse overtime on both the federal and state levels. In 2001, three bills were introduced in Congress to restrict the ability of hospitals and other employers to require nurses to work beyond certain set hours in a workday or in a fourteen-day period. The purpose of these bills was to curb the power of employers to use mandatory overtime to cover staffing shortages as a normal course of business. Under these bills, employers are also prohibited from firing, penalizing, or discriminating against nurses who exercise the right to refuse mandatory overtime. In addition, ten states have enacted laws that provide nurses with varying degrees of protection from forced overtime, and many other states have introduced similar measures.


218. It’s About TIME!, supra note 28.
219. See LINDER, supra note 10, at 390.
220. For a more thorough discussion of contract language won by various nurses’ unions, see Stan Milam, Negotiators Far from a Contract, WIS. ST. J. (Madison, Wis.), Feb. 16, 2004, at D8; Press Release, California Nurses Association, Dameron RNs Ratify New Agreement: Stockton Nurses Win Mandatory Overtime Ban, Economic Gains (Nov. 3, 2000) (on file with author); Press Release, California Nurses Association, No More Mandatory Overtime Long Beach Memorial RNs Reach Agreement (Dec. 8, 2002) (on file with author); Press Release, California Nurses Association, Wage Increases & Ban on Mandatory Overtime Citing Gains, Newly Organized RNs at O’Connor Hospital Ratify New Contract (Sept. 19, 2002) (on file with author); GOLDEN & JORGENSEN, supra note 6, at 10 & n.9; Trossman, supra note 140, at 4-5.
221. See Safe Nursing and Patient Care Act of 2003, H.R. 745, 108th Cong. § 3 (2003); Registered Nurses and Patients Protection Act, H.R. 1289, 107th Cong. § 2 (2001); Patient Care Employees Protection Act, H.R. 1902, 107th Cong. § 2 (2001). As an example of the kinds of protection offered by these bills, the Registered Nurses and Patients Protection Act would amend the FLSA to prohibit employers from requiring any licensed health care employee (not including physicians) to work more than eight hours in any work day or eighty hours in any fourteen-day work period, except in the case of a natural disaster or publicly declared emergency. H.R. 1289, 107th Cong. § 2 (2001).
222. See sources cited, supra note 221.
223. See LINDER, supra note 10, at 379-90, for a detailed discussion of state legislation.
The nurses’ movement for ending mandatory overtime is instructive even though many of these legislative proposals have stalled. Facing a formidable hospital lobby, nurses have waged a highly visible organizing campaign that singles out long hours, overwork, and forced overtime as major job conditions that threaten their personal and professional lives. They frame forced long hours as a public health issue by documenting how requiring already fatigued nurses to work extra shifts imperils patient health and safety. In addition, the various nurses’ associations and unions link the demand to end mandatory overtime to the need for structural changes in the industry that would address chronic understaffing and low nurse-to-patient ratios. Because over ninety percent of the occupation is female, nurses also have added a feminist perspective to these issues by calling attention to how forced overtime and unpredictable long hours with little or no notice undermine their ability as working women to care for their children or sick family members.

To be sure, nurses have successfully garnered political support by capitalizing on the theme of protecting patient health and safety. The regulation of overtime through limits on maximum work hours has been most feasible when public safety is jeopardized by the long hours of a particular occupational group. Protection of the public, rather than the health and safety of workers themselves, is the paramount concern of such legislation. Consequently, some argue that the nurses’ movement to gain a right to refuse fails to establish a precedent for other

limiting forced overtime for nurses in Maine, Oregon, Washington, Minnesota, and New Jersey. Connecticut, California, Maryland, Texas, and West Virginia have also regulated forced overtime for nurses. See GOLDEN & JORGENSEN, supra note 6, at 11-14, for a summary of state legislation limiting forced overtime for nurses, health care professionals, and other workers.

224. See LINDER, supra note 10, at 381-83, 386-89, for a description of the role of hospital and health care facility lobbyists in the passage of state laws restricting mandatory overtime for nurses in Maine and New Jersey.

225. See Anna Burger, Op-Ed., As I See It: Forced Overtime is Causing Medical Errors, PATRIOT-NEWS (Harrisburg, Pa.), June 30, 2004, at A13; Fried, supra note 135; Byron Kho, Study: Long Hours for Nurses Make for Poorer Patient Care, More Mistakes, DAILY PENNSYLVANIAN (University of Pennsylvania), July 29, 2004, available at 2004 WL 82208524; Rogers et al., supra note 72, at 206-07. Some studies estimate that approximately 20,000 patients die each year because they receive care in a hospital with overworked nurses. Fried, supra note 135.

226. See Press Release, California Nurses Association, Bill to Ban Mandatory Overtime Clears Senate Panel (Apr. 25, 2001) (on file with author); The Time has Come to Deal with Mandatory Overtime, supra note 2.

227. Mannino, supra note 135, at 147.


workers,230 and that their insistence on the right to work unlimited overtime if they choose is incompatible with the goal of reducing long hours and overwork.231

Regardless, nurses are setting a precedent for other workers by challenging fundamental assumptions about who gets to decide whether a worker must work overtime. Although situated within the occupational context of patient safety, the nurses’ movement for a right to refuse argues the broader principle that the locus of decision-making about long hours should be shifted to workers. As one nurse put it, “mandatory overtime . . . takes away a basic human right. . . . It’s a control issue. Working overtime should be a choice.”232 Nurses stress that they, not supervisors or administrators, should be the ones to decide whether they are physically or mentally able to work additional hours; they know better than anyone else whether longer hours will hurt their patients. Further, nurses make clear that not only should the decision to work overtime belong to them, but also that they can exercise these choices responsibly. Thus, though nurses fight for a right to refuse within a specific occupational context, they are appealing to broader principles about control of time and respect for workers.

B. The Right to Refuse

Some labor advocates express deep skepticism that a right to refuse can truly empower workers.234 It has been suggested that in all likelihood, a right to refuse would be of little use to many workers.235 First, without sufficient resources for
effective enforcement, the creation of new rights is unlikely to yield concrete gains for workers.\(^\text{236}\) Second, the fundamental inequality of the employment relationship renders choice and voluntariness inherently problematic, calling into question whether choice constitutes “genuine” choice.\(^\text{237}\) Third, many forces that impinge upon the choice to decline longer hours, both economic and cultural, lie outside the control of workers.\(^\text{238}\) For instance, some workers are induced to work overtime by economic necessity or the desire to maintain a certain lifestyle. Others who might wish to decline overtime may refrain from doing so because they do not want to be labeled by employers or co-workers as “slackers.”\(^\text{239}\)

For these reasons, some suggest that legislated caps on hours in the form of maximum limits on the workday, workweek, or overtime hours, would be a more potent vehicle for preventing employers and workers alike from eroding work time standards.\(^\text{240}\) However, the Canadian experience with legislated reduction in hours showed that such laws were frequently so riddled with exceptions that they failed to provide meaningful protection.\(^\text{241}\) Admittedly, a similar danger exists with legislating a right to refuse.\(^\text{242}\) The real problem is that without a shift in the way society views how decisions about work time should be made, neither the right to refuse nor caps on hours, purely as legislative reforms, is likely to stem the growth of overwork and forced overtime. Perhaps the most essential undertaking of workers in the debate on work time is to use the crisis of overwork to identify core principles about how work time should be structured and organized.

An absolute right to refuse employer demands for long hours, backed by

\(^{236}\) See Walsh, supra note 24, at 103-06 (citing studies showing substantial employer non-compliance with the FLSA and inadequate enforcement efforts by the Department of Labor).

\(^{237}\) See Belinda M. Smith, *Time Norms in the Workplace: Their Exclusionary Effect and Potential for Change*, 11 Colum. J. Gender & L. 271, 282 (2002) (stating that “[p]ressure from employers along with cultural understandings about the workplace and employment limit worker choices and compel them to work longer hours than many would freely choose”).

\(^{238}\) See RAKOFF, supra note 15, at 149 (stating that when the right conferred is the power to make a voluntary choice, many forces may “overwhelm the law’s effects”).

\(^{239}\) See id. (noting that workers are reluctant to assert their rights under the Family Medical Leave Act because of fear of being perceived as slackers); Cunningham, supra note 130, at 980 (observing that only 2.9% of lawyers work part-time although ninety-four percent of law firms allow part-time schedules). Cunningham states few lawyers choose to work part-time because of “fear of reduced compensation, decreased advancement opportunities, and diminished workplace reputation.” Id. at 980. In particular, lawyers are concerned that senior partners perceive those who work part-time as less committed or dedicated. Id. at 983-84.

\(^{240}\) See LINDER, supra note 10, at 460.

\(^{241}\) See id. at 418-27 (detailing the history of legislative exceptions and a special permit system that enabled employers to depart from the maximum hour standards established by Ontario’s overtime regulation); Brian Alexander Langille, *The Overworked Canadian?*, 70 Cirt.-Kent L. Rev. 173, 189-91 (1994) (summarizing Ontario’s Employment Standards Act and noting that non-compliance by employers is prevalent).

\(^{242}\) RAKOFF, supra note 15, at 147.
protection from discrimination in termination, promotion, recruitment, and retention,\textsuperscript{243} is a core principle that can help empower workers to claim control of time. This principle is most empowering if conceived within a collectivist rather than individualistic framework. Thus, the right to refuse should be seen as a right to control rather than a right to choose. Resting in a single worker, the right to refuse may be equivalent to a right to choose. However, resting in workers as a group, the right to refuse amounts to a right to control.

Most significant, an absolute right to refuse challenges the presumption in our culture and legal system that employers should control time because they can be trusted to reasonably balance their demands for increased output against the needs of workers. By contrast, the presumption continues that workers cannot be counted on to do the same\textsuperscript{244} because workers are too self-interested, irresponsible, and untrustworthy to control the boundaries between work and non-work time. There is a strong tendency both inside and outside of law to equate the preferences of employers with the good of society and to individualize the struggles of workers as the demands of a special interest group.\textsuperscript{245} In striking down a New York statute that imposed limits on the maximum weekly work hours of bakers, the Supreme Court in \textit{Lochner v. New York}\textsuperscript{246} reinforced the view that protecting workers from excessive hours of work constituted a special interest.\textsuperscript{247} An absolute right to refuse long hours represents a cultural and legal

\textsuperscript{243} See Schor, \textit{supra} note 27, at 171 (supporting a legal right to free time and choice of hours without the threat of discrimination in promotion, recruitment, and retention). Schor argues that promotion, recruitment, and retention should be based on performance, not the number of hours worked. \textit{Id.}

\textsuperscript{244} See Smith, \textit{supra} note 237, at 326 (positing that unemployment cases involving work time disputes are essentially about whether the employer or worker should have the power to decide the importance of competing priorities between employer demands and workers’ needs). Smith suggests that much of the unemployment insurance case law reinforces the right of employers to intrude upon workers’ private time, and subscribes to the notion that it is too risky to trust workers to weigh competing demands. \textit{Id.}

\textsuperscript{245} See \textit{id.} at 318 (arguing that a common theme expressed by courts in unemployment insurance cases is that employers are “performing a vital economic function of harnessing labor for production” and “[e]mployers need the freedom, or even have the responsibility, of controlling or regulating their workers in order to run their business and sustain the economy”). Further, the judicial assumption is that workers “would always choose to avoid work if given an opportunity or permission.” \textit{Id.} at 317.


\textsuperscript{247} Cass R. Sunstein, \textit{Lochner’s Legacy}, 87 \textit{COLUM. L. REV.} 873, 878-79 (stating that the Court’s concern in \textit{Lochner} “was that maximum hour legislation was partisan rather than neutral—selfish rather than public-regarding”). The Supreme Court in \textit{Lochner} found that the New York limitation on working hours of bakers involve[d] neither the safety, the morals, nor the welfare, of the public, and that the interest of the public [was] not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in
shift from this belief system and underscores the right of workers to control their time.

Conclusion

Overwork and lack of control of time are problems of huge dimensions. Aptly put by one observer, mandatory “overtime—not wages—is ground zero in the labor wars of this new century.”248 The processes of downsizing, lean production, and global competitiveness, all of which have contributed to the growth of compulsory overtime, are not abating.249 Moreover, overwork and compulsory overtime in the United States has international ramifications and looms over workers across borders. Extolling the United States as the ideal model of a work society, business interests in Germany and France promote longer work hours as the engine for boosting economic growth and productivity.250 European countries with a strong political, cultural, and social norm of safeguarding workers’ leisure time may be poised to reverse that tradition.

These conditions create a unique opportunity for reviving a social movement in the United States that seeks to bring working hours within the sphere of worker control. The phenomenon of overwork and long hours, which is occurring in workplaces that are becoming increasingly autocratic, plagues an ever-widening circle of workers across class, occupation, education, race, sex, and citizenship. Unprecedented numbers of workers find themselves working harder for less, and with little or no time for themselves, their families, or communities. At the same time, long hours through forced overtime helps to maintain low-wages, trapping workers in an endless cycle of overwork and depressed wages. An absolute right to refuse mandatory overtime would be a concrete milestone in the larger project of workers gaining control over the boundaries between work and private time. In turn, greater control of time by workers will facilitate current struggles to increase wages and improve working conditions. Opportunity lies in the challenge of breaking down class divisions to unify diverse groups of workers behind the radical vision that workers should have control of their time.

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249. See supra notes 78-93 and accompanying text.