

# OVERWORK AND OVERTIME

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## 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.<sup>1</sup>

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.<sup>2</sup>

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 s[t]ay, then they tell you tomorrow don't come in.<sup>3</sup>

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.<sup>4</sup>

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1. Upton v. JWP Businessland, 682 N.E.2d 1357, 1359 (Mass. 1997).

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).

3. REBEKAH LEVIN & ROBERT GINSBURG, CTR. FOR IMPACT RESEARCH, SWEATSHOPS IN CHICAGO: A SURVEY OF WORKING CONDITIONS IN LOW-INCOME AND IMMIGRANT COMMUNITIES 21 (2000), <http://www.impactresearch.org/documents/sweatshopreport.pdf> (quoting a food packer worker).

4. JILL ANDRESKY 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.<sup>5</sup> Nearly one in three workers regularly works more than forty hours a week while one in five workers clocks over fifty hours a week.<sup>6</sup> More than eighty percent of those who work over fifty hours prefer fewer hours.<sup>7</sup> Although annual work hours declined in all industrialized countries in the last century,<sup>8</sup> 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.<sup>9</sup>

The proportion of American workers who work fifty hours or more per week is among the highest in the industrialized world.<sup>10</sup> In 2000, American workers topped the list for the number of average hours worked per year (1979), outpacing workers in nineteen other industrialized countries.<sup>11</sup> On average, Americans work 350 more hours per year than Europeans.<sup>12</sup> 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

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worker).

5. JAMES T. BOND ET AL., FAMILIES & WORK INST., THE 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE: EXECUTIVE SUMMARY 9 (1998), available at <http://www.familiesandwork.org/summary/nscw.pdf> [hereinafter CHANGING WORKFORCE].

6. LONNIE GOLDEN & HELENE JORGENSEN, ECON. POL. INST., TIME AFTER TIME: MANDATORY OVERTIME IN THE U.S. ECONOMY 1 (2002), [http://www.epinet.org/content.cfm/briefingpapers\\_bp120](http://www.epinet.org/content.cfm/briefingpapers_bp120).

7. Jerry A. Jacobs & Kathleen Gerson, *Who Are the Overworked Americans?*, 56 REV. SOC. ECON. 442, 454 (1998). Specifically, those working between fifty and sixty hours would like to work twelve hours less while those working more than sixty hours want to work twenty hours less. *Id.* A study surveying a representative sample of the nation's labor force concludes that sixty-three percent of all workers prefer to work fewer hours. CHANGING WORKFORCE, *supra* note 5, at 8.

8. Gerhard Bosch, *Working Time: Tendencies and Emerging Issues*, 138 INT'L LABOUR REV. 131, 135 (1999).

9. *Id.* at 135, 138. The United States, United Kingdom, and New Zealand are most notable in the trend toward increased work time. *Id.* at 135. See JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1991) for an in-depth study of the rise in working hours for American workers. It was Schor's study that first ignited alarm about escalating work hours in the United States.

10. Jacobs & Gerson, *supra* note 7, at 449-50; MARC LINDER, THE AUTOCRATICALLY FLEXIBLE WORKPLACE: A HISTORY OF OVERTIME REGULATION IN THE UNITED STATES 7 (2002).

11. LAWRENCE MISHLE ET AL., ECONOMIC POLICY INST., THE STATE OF WORKING AMERICA 423 (Drmonk: M.E. Sharpe 2003); LINDER, *supra* note 10, at 7. Between 1979 and 2000, as most other industrialized countries brought down their average hours worked per year, the United States increased its average hours by thirty-two hours. MISHLE ET AL., *supra*, at 423.

12. Steven Greenhouse, *Running on Empty: So Much Work, So Little Time*, N.Y. TIMES, Sept. 5, 1999, § 4, at 1.

than ever.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> Likewise, union membership does not guarantee protection from compulsory overtime.<sup>18</sup>

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13. MISHELE ET AL., *supra* note 11, at 112. The average family in the United States increased the number of weeks worked per year by nearly twelve weeks between 1969 and 2000; middle- and lower-middle income families added twenty weeks in the same time period, and lower-income families added more than ten weeks between 1979 and 2000. *Id.* at 98. The pattern for annual hours worked per year by families shows similarly large gains. *Id.* at 99. Middle-income families added 660 annual hours between 1979 and 2000, the equivalent of sixteen weeks of full-time work. *Id.* Annual work hours for low-income families grew by 15.9% in the same period. *Id.*; see COUNCIL OF ECON. ADVISERS, *FAMILIES AND THE LABOR MARKET, 1969-1999: ANALYZING THE “TIME CRUNCH”* 4-5 (1999), <http://clinton4.nara.gov/media/pdf/famfinal.pdf> [hereinafter *TIME CRUNCH*] (“All types of families—whether defined by the head’s education level, spouse’s education level, presence of young children, or race or ethnicity of the household head—have experienced substantial increases in hours of paid work from 1969 to 1996.”).

14. See *TIME CRUNCH*, *supra* note 13, at 12-13 (noting that women’s increased hours of paid work have reduced the time that parents spend with children and have placed a special “time crunch” on employed women, “[who] spend over one third less time on child care and household tasks than women without paid jobs, but still have 25 to 30 percent less free time”). The report found that the increased hours of paid work for families from 1969-1996 have resulted in parents having on average twenty-two fewer hours per week to spend with their children. See *id.* at 11-13; see also Deborah L. Rhode, *Balanced Lives*, 102 COLUM. L. REV. 834, 841-43 (2002) (describing women’s unequal or “disproportionate obligations” in the home).

15. See generally TODD D. RAKOFF, *A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002); Rhode, *supra* note 14; Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000); Michael L. Smith, Note, *Mandatory Overtime and Quality of Life in the 1990s*, 21 J. CORP. L. 599 (1996); CHANGING WORKFORCE, *supra* note 5; GOLDEN & JORGENSEN, *supra* note 6.

16. See SCHOR, *supra* note 9, at 72-74 (discussing workers’ struggles to reduce working time in the late 1800s); Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 7-14 (2001) (describing the shorter hours movement in the United States). “[F]rom 1890 onwards, a central demand of the labour movement all over the world was the call for an eight-hour working day . . .” Bosch, *supra* note 8, at 131.

17. See *infra* Part I.C (discussing overtime and compulsory overtime across the class divide).

18. See Smith, *supra* note 15, at 607-12 (discussing how various collective bargaining agreements have addressed mandatory overtime). Smith reports that approximately thirty percent

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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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of union contracts nationwide address overtime in some manner, and that a representative sampling of collective bargaining agreements from Iowa over the last two decades indicates that many agreements contained no provisions on mandatory overtime. *Id.* at 608. Smith concludes that "[a] given union's lack of bargaining power may result in just as unfavorable an agreement as employer-imposed mandates on at-will workers." *Id.* at 622.

19. See LINDER, *supra* note 10, at 11-13, 29-31 (explaining the contradictory position of organized labor on the issue of overtime as some unions and workers fight to preserve unlimited overtime as a way of boosting earnings while others fight against mandatory overtime and increased hours in the wake of layoffs); GOLDEN & JORGENSEN, *supra* note 6, at 9 (describing trends that weaken the ability of unions to negotiate terms on mandatory overtime).

20. See *infra* Part I.C (discussing the impact of overwork and overtime on workers in various occupations); Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2316-17 (1998) (arguing that because of bureaucratization of all forms of work, employers view all of their employees, including professionals, as subject to the clock). Malamud concludes there is a clear "trend of convergence in the work structure and working conditions of upper-level and ordinary workers" based on working hours, and the assumption that professional work is "noncommodified and nondivisible" must be reexamined. *Id.* at 2319; see also FRASER, *supra* note 4, at 20-24 (describing the long working hours of white collar workers in corporate and high-tech employment as reflective of "an industrial revolution for white-collar workers" that has resulted in "white-collar sweatshops"); Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 564-78 (2004) (describing the commodification of medicine and law through loss of control over hours of work and pace of work as a major source of discontent among professionals); Andrew Ross, *Sweated Labor in Cyberspace*, NEW LAB. FORUM, Spring/Summer 1999, at 47 (likening conditions in the high-tech industry to those in the garment industry); Schultz, *supra* note 15, at 1919 (observing that most workers "are in danger of becoming 'women,' in the sense that they are experiencing the problems and dilemmas that women have traditionally faced with respect to paid work").

21. See Thomas Maier, *Death on the Job: Immigrants at Risk: Blood, Sweat, Tears: Chinese Sweatshop Workers Are Among Most Exploited*, NEWSDAY, July 26, 2001, at A6; Bob Port, *Toil and Tragedy*, DAILY NEWS (N.Y.), July 8, 2001, at 29.

22. See also WASH. ALLIANCE OF TECH. WORKERS, DISPARITIES WITHIN THE DIGITAL WORLD: REALITIES OF THE NEW ECONOMY 11-14 (no date), <http://www.washtech.org/reports/>

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”),<sup>23</sup> with a legislative agenda that will effectuate greater deregulation of overtime.<sup>24</sup> In response, the AFL-CIO has sought to preserve the ability of low- and middle-income families to augment stagnant wages through overtime.<sup>25</sup> 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’

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fordreport/ford\_report.pdf [hereinafter WASHINGTON ALLIANCE] (documenting wage disparities within the information technology industry and arguing that the myth of high wages masks the prevalence of low-wage work in the industry). *See generally* FRASER, *supra* note 4 (documenting the forced long hours, and decreasing salaries and benefits that a variety of professional workers, including high-tech professionals, experience as a consequence of downsizing, layoffs, and workplace re-engineering).

23. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000).

24. The latest overtime regulations promulgated by the U.S. Department of Labor are expected to result in millions of workers being disqualified from the right to premium pay under the exemptions for professional, administrative, and executive employees. *See 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 Ross Eisenbrey, Vice President and Director of Policy, Economic Policy Institute) (summarizing the new definitions and tests for exempt employees that are expected to result in longer hours and less pay for millions of workers, such as chefs and cooks, nursery school teachers, working foremen, and working supervisors); *The Department of Labor’s Overtime Regulations Effect on Small Business: Hearing Before the Subcomm. on Workforce, Empowerment, and Government Programs, H. Comm. on Small Business*, 108th Cong. (2004) (statement of Ross Eisenbrey, Vice President and Director of Policy, Economic Policy Institute) (arguing that the creation of new exemptions for certain occupations and the elimination of certain bright line tests will cause many to lose the right to overtime pay); *infra* notes 164-69 and accompanying text; *see also* LINDER, *supra* note 10, at 14-15 (criticizing Republican proposals to base overtime pay on a two-week eighty-hour work period rather than the current forty-hour work week); David J. Walsh, *The FLSA Comp Time Controversy: Fostering Flexibility or Diminishing Worker Rights?*, 20 BERKELEY J. EMP. & LAB. L. 74, 126-27 (1999) (arguing against the adoption of legislative proposals that would permit employers to substitute compensatory time off for overtime pay). Walsh maintains that “comp time” measures would undermine the overtime requirements of FLSA, invite heavier use of overtime, and result in lower earnings and longer hours. *Id.* at 127.

25. *See* Statement by AFL-CIO President John J. Sweeney on EPI Analysis of Bush Administration Proposed Cuts to Overtime Pay (June 26, 2003) (on file with author), *available at* <http://aflcio.org/mediacenter/PRSptm/pr06262003.cfm> [hereinafter Sweeney Statement].

lives, health, and safety.<sup>26</sup> By all accounts, the premium pay requirement for overtime has failed as a financial deterrent to the growth of jobs with very long hours.<sup>27</sup> Workers caught in a system of compulsory overtime complain of overexertion, rising rates of occupational illnesses, crippling workplace accidents, and ruined health.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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

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

27. See LINDER, *supra* note 10, at 46; RAKOFF, *supra* note 15, at 77; Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157, 168 (1994); Smith, *supra* note 15, at 600.

28. National Mobilization Against SweatShops, It's About TIME!—Campaign for Workers' Health, <http://www.nmass.org/nmass/wcomp/workerscomp.html> (last visited Oct. 23, 2005) [hereinafter It's About TIME!]; John Schwartz, *Always on the Job, Employees Pay with Health*, N.Y. TIMES, Sept. 5, 2004, § 1, at 1; see CLAIRE C. CARUSO ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., OVERTIME AND EXTENDED WORK SHIFTS: RECENT FINDINGS ON ILLNESSES, INJURIES, AND HEALTH BEHAVIORS 27 (2004), <http://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf> (study finding that overtime is associated with poorer health, increased injury rates, greater incidences of illnesses, and increased mortality).

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.<sup>31</sup> 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.<sup>32</sup> This radical struggle was short-circuited in favor of the enactment of the FLSA,<sup>33</sup> a comparatively modest piece of legislation with hours provisions intended mainly as a work-spreading measure to alleviate unemployment.<sup>34</sup> Prior to the FLSA, an array of state and federal laws imposed ceilings on the maximum work hours for

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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).

33. Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (2000).

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.<sup>35</sup> 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.<sup>36</sup>

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.<sup>37</sup> 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.”<sup>38</sup> 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.<sup>39</sup> The Act contains no provisions that guarantee workers a minimum number of rest days.<sup>40</sup> 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.<sup>41</sup>

The FLSA also contains no safeguards for workers against retaliation for refusing to work overtime, no matter how excessive or unreasonable the

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35. See LINDER, *supra* note 10, at 60-61 (providing examples of federal statutes that place a ceiling on maximum work hours for certain federal employees), and 62-68 (describing state laws that set caps on work hours for women and workers in specific industries); Miller, *supra* note 16, at 15-18 (providing an overview of federal regulation of maximum work hours in the pre-New Deal era, including the codes promulgated by the National Industrial Recovery Administration).

36. See LINDER, *supra* note 10, at 250-51 (explaining that, from its inception, the FLSA was an overtime law rather than a statutory limit on work hours despite broad popular support for the latter); Malamud, *supra* note 20, at 2288 (noting that the various FLSA bills represented a “move from a true maximum hours bill to a bill that permitted unlimited overtime hours” as long as a premium was paid for it); Miller, *supra* note 16, at 14 (arguing that “[t]he FLSA stopped federal progress towards lowering the ceiling on maximum hours, replacing hours limits with financial disincentives such as minimum wage and overtime pay”); Schor, *supra* note 27, at 164 (stating that the FLSA was not a shorter hours bill and that it has contributed to longer hours for American workers).

37. 29 U.S.C. § 207(a)(1) (2000).

38. *Id.* § 213(a)(1).

39. LINDER, *supra* note 10, at 6 (noting that the amount of overtime hours worked could be limited based on the day, week, month, or year).

40. See *id.* for a description of the possible components of a work hours policy.

41. See LINDER, *supra* note 10, at 6 (stating that the legal regime in the United States for regulating work time is “distinctively underdeveloped,” consisting solely of the forty-hour work week as the aspirational norm and the requirement of premium pay for overtime work); RAKOFF, *supra* note 15, at 130 (explaining that in an at-will employment system, “the law at the boundary between work time and family time is simply that the employer’s rules control the situation”).



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.<sup>42</sup> Currently, there is no recognized right to refuse overtime under employment law.<sup>43</sup> Relief is most likely to come, if at all, from either an unemployment insurance claim,<sup>44</sup> which provides income support but not reinstatement, or a collective bargaining agreement, if the worker is covered by one.<sup>45</sup>

*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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> Without the increased work hours of women, lower- and middle-income families would have seen their incomes fall or at best remain stagnant.<sup>49</sup> 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.<sup>50</sup>

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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.

43. See RAKOFF, *supra* note 15, at 144.

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.

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).

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.

47. MISHLE ET AL., *supra* note 11, at 6, 97.

48. *Id.* at 5, 111-12; Greenhouse, *supra* note 12; TIME CRUNCH, *supra* note 13, at 7-9.

49. MISHLE ET AL., *supra* note 11, at 104.

50. *Id.* at 101.

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.<sup>51</sup> Workers today are less likely to receive paid time off than they were thirty years ago.<sup>52</sup> In addition, many workers must forfeit their allotted vacation time because their employers pile too many job responsibilities and demands on them.<sup>53</sup>

Most significant, increased weekly overtime plays a distinctly corrosive role in the phenomenon of overwork.<sup>54</sup> 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.<sup>55</sup> 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."<sup>56</sup> Those who work overtime in these industries clock, on average, almost twelve hours a week over the standard forty hours each week,<sup>57</sup> which is equivalent to nearly six-and-a-half eight-hour days per week.<sup>58</sup>

There has been a long-term upward trend in overtime hours<sup>59</sup> that shows no sign of reversing.<sup>60</sup> Hourly manufacturing workers now work twenty-five percent more overtime than they did ten years ago.<sup>61</sup> Average weekly overtime in

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51. SCHOR, *supra* note 9, at 32-33. Schor estimates that during the 1980s workers received three and a half fewer days each year of paid leave and absences. *Id.* at 32.

52. MISHEL ET AL., *supra* note 11, at 243.

53. GALINSKY ET AL., *supra* note 46, at 8; John Buell, *Vacations, Shopping Sprees, and Work Life*, 62 HUMANIST 40 (2002); Schwartz, *supra* note 28.

54. LINDER, *supra* note 10, at 33 (noting a lawsuit brought by a group of firefighters challenging the "coercive character and corrosive impact" of forced overtime as a violation of the constitutional ban on involuntary servitude).

55. GOLDEN & JORGENSEN, *supra* note 6, at 1. Over twenty-five million Americans work more than forty-nine hours each week, and some work considerably more than that. FRASER, *supra* note 4, at 20. Approximately fifteen million people, comprising twelve percent of the labor force, report working forty-nine to fifty-nine hours each week, and another eleven million, or 8.5%, report working sixty hours or more each week. *Id.* at 20-21.

56. GOLDEN & JORGENSEN, *supra* note 6, at 5; MISHEL ET AL., *supra* note 11, at 239.

57. GOLDEN & JORGENSEN, *supra* note 6, at 5; MISHEL ET AL., *supra* note 11, at 239.

58. MISHEL ET AL., *supra* note 11, at 239.

59. GOLDEN & JORGENSEN, *supra* note 6, at 5; Ron L. Hetrick, *Analyzing the Recent Upward Surge in Overtime Hours*, 123 MONTHLY LAB. REV. 30, 30-31, 33 (2000).

60. Barry Bluestone & Stephen Rose, *The Macroeconomics of Work Time*, 56 REV. SOC. ECON. 425, 429-30, 432-33 (1998).

61. GOLDEN & JORGENSEN, *supra* note 6, at 1. In particular, the period between March 1991 and January 1998 witnessed striking growth in overtime for most manufacturing industries, with the largest gains occurring in the motor vehicle, steel, and iron industries. Hetrick, *supra* note 59, at 30-31. Production workers in the manufacturing industry are the only workers whose hours are tracked by the government through the Bureau of Labor Statistics. See LINDER, *supra* note 10, at 32 n.50; GOLDEN & JORGENSEN, *supra* note 6, at 1.

manufacturing escalated in the 1990s from 3.3 hours to a high of 4.9 hours in 1997,<sup>62</sup> representing a forty-eight percent increase in overtime.<sup>63</sup> By the late 1990s weekly overtime had reached its “highest levels since the Bureau of Labor Statistics began collecting such data in 1956.”<sup>64</sup>

The coercive and involuntary nature of excessive overtime aggravates its detrimental impact for many workers.<sup>65</sup> Studies find that workers who exercise some measure of control over their work feel less stressed and overworked.<sup>66</sup> 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.<sup>67</sup>

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.”<sup>68</sup> According to some commentators, the rise in mandatory overtime is commensurate with the rise in overtime hours.<sup>69</sup> 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.”<sup>70</sup> In another study, one-third of workers who performed overtime reported being forced by their employer to do so.<sup>71</sup>

Just as corrosive as compulsory overtime is involuntary overtime. This has been described as “being ‘forced to work voluntary overtime.’”<sup>72</sup> Although not actually threatened with dismissal or other adverse consequences, large groups of workers nonetheless feel “forced” to work overtime because they fear negative

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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).

72. Ann E. Rogers et al., *The Working Hours of Hospital Staff Nurses and Patient Safety*, DATA WATCH, July/Aug. 2004, at 209.

repercussions if they decline longer hours.<sup>73</sup> 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.<sup>74</sup>

Some suggest that American workers have chosen to become a work-and-spend society in which long hours support an ever-expanding consumptive appetite.<sup>75</sup> 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.<sup>76</sup> In fact, nearly half of workers putting in long hours say they would prefer to work fewer hours.<sup>77</sup>

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.<sup>78</sup> 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.<sup>79</sup> Under the banner of

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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. *Id.*

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.” *Id.*

75. See Buell, *supra* note 53 (noting the role of new consumption and materialism in contributing to long hours).

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”).

77. Schultz, *supra* note 15, at 1957; Jacobs & Gerson, *supra* note 7, at 454.

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. *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”).

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.<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> Moreover, lean production is a permanent mainstay of the global economy, and not a short-term strategy for economic downturns.<sup>83</sup>

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.”<sup>84</sup> 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.<sup>85</sup> Downsizing, layoffs, and outsourcing leave remaining full-time workers with increased workloads and harder and longer hours.<sup>86</sup> 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.<sup>87</sup> Afraid of

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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.

82. 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.<sup>88</sup>

Longer hours and forced overtime are critical employer strategies for lowering labor costs.<sup>89</sup> 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.<sup>90</sup> The past two economic recoveries show that businesses deliberately rely on forced overtime as a substitute for hiring new full-time workers.<sup>91</sup> 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."<sup>92</sup> This would have translated into 571,000 full-time jobs.<sup>93</sup>

Wal-Mart, the nation's largest employer,<sup>94</sup> 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,<sup>95</sup> deliberately and permanently understaffs its stores as a formula for ensuring that growth in labor costs lags behind store sales.<sup>96</sup> Inadequate staffing means that more work is piled on each

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*Employment in Greenville, South Carolina*, in CONTINGENT WORK: AMERICAN EMPLOYMENT RELATIONS IN TRANSITION 221, 230-31 (Kathleen Barker & Kathleen Christensen eds., 1998) (describing the insecurity and uncertainty of temporary work).

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").

90. See Smith, *supra* note 15, at 600; Tina Kelley, *Earning It: When Overtime Doesn't Feel So Fine*, N.Y. TIMES, May 31, 1998, § 3, at 10.

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

92. *Id.* at 32.

93. *Id.*

94. LABOR RESEARCH ASS'N, LOW-WAGE NATION 1 (2004), <http://www.laborresearch.org/story2.php/358>.

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

96. See Simon Head, *Inside the Leviathan*, THE NEW YORK REVIEW OF BOOKS, Dec. 16, 2004, at 4-5 (detailing the squeeze on labor through the systematic and permanent understaffing

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

Further, as part of restructuring, some companies continue to hire robustly during and after layoff periods,<sup>99</sup> 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.<sup>100</sup> They are also desirable because employers can easily demand “large amounts of unpaid overtime” from them.<sup>101</sup> Employers perceive young workers as “unfettered” by family responsibilities, and thus more readily compliant with demands for long hours.

### C. Overtime Across the Class Divide

Although “not all overtime is created equal,”<sup>102</sup> 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.<sup>103</sup> Long hours also rank as a main reason fueling an infant technology workers’ union movement.<sup>104</sup> Class action lawsuits brought by managers and other white-collar workers challenging forced unpaid overtime have tripled since 1997.<sup>105</sup> Professionals such as lawyers,<sup>106</sup> nurses,<sup>107</sup> and doctors<sup>108</sup> form part of the growing chorus demanding

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of Wal-Mart stores). Wal-Mart provides its store managers with a preferred budget that would allow for adequate staffing but imposes on managers an actual budget that forces understaffing. *Id.* at 5.

97. *Id.* at 4-5.

98. *Id.* at 4.

99. FRASER, *supra* note 4, at 41.

100. *Id.* at 41, 139.

101. *Id.* at 139; see Laura Vanderkam, *Cities Covet Young Urban Single Professionals*, USA TODAY, Dec. 17, 2003, at 25A; Laura Vanderkam, *White-Collar Sweatshops Batter Young Workers*, USA TODAY, Nov. 26, 2002, at 13A.

102. LINDER, *supra* note 10, at 33 (referring to differences in job conditions between white-collar jobs and factory work).

103. See *infra* note 170.

104. See Aliza Earnshaw, *Portland Techies Look for Union Label*, THE BUS. J. OF PORTLAND, Oct. 27, 2003, at 2; Elizabeth Millard, *Time for a High-Tech Union?*, E-COMMERCE TIMES, Feb. 11, 2004, <http://www.ecommercetimes.com/story/32823.html>.

105. Laurence Viele, *Overtime Lawsuits by White-Collar Workers Surge*, HOUS. CHRON., May 27, 2004, at 1.

106. See *infra* pp. 71-72.

107. See *infra* p. 71.

108. See Crain, *supra* note 20, 580-87; see also Petition to the Occupational Safety and Health Admin. Requesting that Limits be Placed on Hours Worked by Medical Residents (Apr. 30, 2001), <http://www.citizen.org/publications/release.cfm?ID=6771&secID=1164&catID=126>.

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.<sup>109</sup> 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;<sup>110</sup> forty hours is considered part-time for most of these workers.<sup>111</sup> 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.<sup>112</sup> Sometimes workers are not permitted to take breaks, go to the bathroom, or even get a drink of water without suffering negative repercussions.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup> Undocumented immigrant workers are particularly susceptible to demands for excessive hours.<sup>116</sup> 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](http://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.

116. See CHIRAG MEHTA ET AL., U. OF ILL. AT CHI., CTR. FOR URBAN ECON. DEV., CHICAGO'S UNDOCUMENTED IMMIGRANTS: AN ANALYSIS OF WAGES, WORKING CONDITIONS, AND ECONOMIC CONTRIBUTIONS 29 (2002) (discussing data that suggests a strong correlation between undocumented status and wage and hour violations); Michael J. Wishnie, *The Border Crossed Us: Current Issues in Immigrant Labor*, 28 N.Y.U. REV. L. & SOC. CHANGE 389, 389-90 (2004) (documenting retaliation by sweatshop bosses against immigrant workers through immigration enforcement); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 505-08 (2004) (discussing the unavailability of backpay remedies for undocumented



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.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> In lawsuits against Wal-Mart and other large retailers, workers complain of forced or involuntary unpaid overtime as a systematic practice.<sup>120</sup> 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.<sup>121</sup> Wal-Mart managers are sometimes instructed to erase hours from workers' time records to help the company avoid overtime costs.<sup>122</sup> 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."<sup>123</sup> 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.<sup>124</sup> 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.<sup>125</sup>

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workers who are illegally fired because of their workplace organizing activities).

117. See Break the Chains Alliance, Employer Sanctions Concept Paper (Mar. 7, 2005) (discussing the impact of the employer sanctions provisions of the Immigration Reform and Control Act of 1986 on documented and undocumented workers) (unpublished paper, on file with author).

118. Interview with Michael Lalan, Organizer, Nat'l Mobilization Against SweatShops, in Brooklyn, N.Y. (Mar. 4, 2005).

119. See Bhatnagna, *supra* note 89, at 246-56; Steven Greenhouse, *U.S. Jury Cites Unpaid Work at Wal-Mart*, N.Y. TIMES, Dec. 20, 2002, at A26.

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

121. Head, *supra* note 96, at 5; Greenhouse, *supra* note 119; see Murr, *supra* note 120.

122. Greenhouse, *supra* note 119.

123. See Murr, *supra* note 120.

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.*

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-waged workers unscathed. Class status and privilege have not insulated professionals, executives, or administrators from excessive hours of work, forced overtime, or uncompensated overtime.<sup>126</sup> Some economists suggest that professionals and managers are among those most likely to work excessively long work weeks<sup>127</sup> and the longest hours.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup>

Salaried managers and executives report that the long hours they work “make them feel more like production workers on an assembly line.”<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> The workplaces of professionals can be

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cards. *Id.*

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).

127. Philip L. Rones et al., *Trends in Hours of Work in the United States*, in *WORKING TIME IN COMPARATIVE PERSPECTIVE* 45, 56 (Ging Wong & Garnett Picot eds., 2001).

128. Mary Williams Walsh, *As Hot Economy Pushes Up Overtime, Fatigue Becomes a Labor Issue*, N.Y. TIMES, Sept. 17, 2000, § 1, at 32.

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.<sup>134</sup>

For example, it is widely documented that nurses are often forced against their will to work long overtime shifts,<sup>135</sup> including double shifts,<sup>136</sup> and as a result their overtime hours are notoriously excessive.<sup>137</sup> 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.<sup>138</sup> 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.<sup>139</sup> 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.<sup>140</sup>

Lawyers, too, face heightening pressure for longer hours due to restructuring and “corporatization.”<sup>141</sup> Like hospitals, large law firms have adopted restructuring and profit maximizing strategies that emphasize efficiency and productivity.<sup>142</sup> Demands for greater productivity and longer hours come in the

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134. See generally FRASER, *supra* note 9.

135. See Kristin M. Mannino, Note, *The Nursing Shortage: Contributing Factors, Risk Implications, and Legislative Efforts to Combat the Shortage*, 15 LOY. CONSUMER L. REV. 143, 147 (2003); Shannon Peeples, Note, *The Current Nursing Shortage: Will the Registered Nurse Safe Staffing Act Help?*, 72 UMKC L. REV. 809, 813 (2004); Monte Fried, Commentary, *Will “Safe Nursing and Patient Care Act” Improve Medical Care?*, THE DAILY RECORD (Baltimore, Md.), Aug. 8, 2003, at 1; Rogers et al., *supra* note 72, at 209.

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.

140. Fried, *supra* note 135; Rogers et al., *supra* note 72, at 209; Susan Trossman, *Fighting the Clock: Nurses Take on Mandatory Overtime*, NURSING WORLD, May/June 1998, <http://nursingworld.org/tan/98Mayjun/ot.htm>.

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.<sup>143</sup> 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.<sup>144</sup> 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.<sup>145</sup> 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.<sup>146</sup> The inability to carve a life outside of work is the primary reason that lawyers have the highest job dissatisfaction rate among most professionals.<sup>147</sup>

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,<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> 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.<sup>151</sup>

Faced with the continual threat of overseas outsourcing, importation of foreign workers,<sup>152</sup> and replacement by contract workers, “permatemps,”<sup>153</sup> and

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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.<sup>154</sup> 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.<sup>155</sup> Workers in the industry often choose longer hours, not to outshine everybody else, but simply to keep up and not be left behind.<sup>156</sup> 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.<sup>157</sup>

Ironically, new advances in information technology provide employers with greater tools for disciplining and maximizing control over technology and other white-collar workers.<sup>158</sup> Utilizing the concept of “theft of time,” which refers to the “misuse of the employer’s time and property” by workers,<sup>159</sup> employers justify the proliferation of electronic monitoring of e-mails, computer work, and phone calls.<sup>160</sup> 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.<sup>161</sup> These systems also compute the number of hours worked as well as individual and group levels of productivity.<sup>162</sup>

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.

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integrally linked to employer demands for longer hours. *See* Earnshaw, *supra* note 104. According to high-tech union organizers, “employers prefer H-1B workers because they will put in longer hours than U.S. citizens, because they fear being deported.” *Id.*

153. “Permatemp” refers to temps or contract workers who are hired for long periods of time, sometimes even years, in the same job but who are nonetheless treated by the employing firm as contingent workers. FRASER, *supra* note 4, at 141.

154. *See id.* at 137-40 (describing the impact of restructuring on working conditions in the high-tech industry).

155. *Id.* at 22.

156. *See id.* (quoting a software professional explaining the intense peer pressure to keep apace with co-workers’ long working hours).

157. *See* BBC News Talking Point, *Hi-Tech Workplaces: No Better Than Factories?* (Nov. 29, 2002), [http://news.bbc.co.uk/1/hi/talking\\_point/2519577.stm](http://news.bbc.co.uk/1/hi/talking_point/2519577.stm) (compiling comments of high-tech workers from across the world which resonate common themes such as compulsory or involuntary long hours, increased workloads due to reduced staffing, unpaid overtime, and job insecurity).

158. *See* FRASER, *supra* note 4, at 87-89; Laureen Snider, *Theft of Time: Disciplining Through Science and Law*, 40 OSGOODE HALL L.J. 89, 101-03 (2002).

159. Snider, *supra* note 158, at 90, 97. Snider notes that it is ironic that employers have made so much of workers’ theft of time when employers “are increasingly stealing time from employees” through the practice of unpaid compulsory overtime. *Id.* at 109-10.

160. *Id.* at 103; FRASER, *supra* note 4, at 89.

161. Snider, *supra* note 158, at 103; FRASER, *supra* note 4, at 88-89.

162. Snider, *supra* note 158, at 103.

Department of Labor in 2004 expand the definitions of exempt executive,<sup>163</sup> professional, and administrative employees, and loosen what it means to be paid on a salary basis.<sup>164</sup> Organized labor,<sup>165</sup> former Labor Department officials,<sup>166</sup> and other critics of the new regulations<sup>167</sup> 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.<sup>168</sup> 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.<sup>169</sup>

## II. CLASS-BASED TENSIONS ABOUT OVERTIME

Although workers actively organize around the issue of mandatory overtime,<sup>170</sup> there currently is no mass social movement advocating shorter work

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163. See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. § 541 (2004).

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.

166. Ross Eisenbrey, *Millions to Lose Overtime Pay*, THE MONTANA STANDARD, Aug. 17, 2004, reprinted in ECONOMIC POLICY INSTITUTE, VIEWPOINTS, Sept. 10, 2004, [http://www.epinet.org/congent.cfm/webfeatures\\_viewpoints\\_OT\\_pay\\_loss](http://www.epinet.org/congent.cfm/webfeatures_viewpoints_OT_pay_loss).

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).

169. EISENBREY & BERNSTEIN, *supra* note 168, at 13.

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.<sup>171</sup> 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.<sup>172</sup>

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.<sup>173</sup> 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.<sup>174</sup> As long as these assumptions remain

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shift pattern,” which workers welcomed as a step to reduce compulsory overtime and weekend shifts); M. Paul Jackson & Pamela C. Turfa, *OT Issue Tests Many Industries*, THE WILKES-BARRE TIMES LEADER (Pa.), Feb. 23, 2003, at 2 (describing health-care union’s national campaign to eliminate forced overtime for employees who provide direct patient care); Kelley, *supra* note 90 (describing overtime and uncompensated overtime work as the workplace conflict of the 1990s); Jim Ritter, *Doc’s Hours Hazardous to Your Health? Some Want Government to Limit the Tough Work Schedule of Residents*, CHI. SUN-TIMES, July 31, 2001, at 6 (describing groups’ petition to OSHA to limit residents’ work weeks to eighty hours to protect residents’ health and patient safety); Kalpana Srinivasan, *Verizon Reaches Tentative Contract with Unions*, AMARILLO GLOBE-NEWS, Aug. 21, 2000, available at [http://www.amarillonet.com/stories/082100/usn\\_union.shtml](http://www.amarillonet.com/stories/082100/usn_union.shtml) (describing agreement reached after a two-week strike over mandatory overtime and the shifting of work to cheaper labor); Anne Trafton, *Pilgrim Security, Union Not Talking*, THE PATRIOT LEDGER (Quincy, Mass.), Aug. 7, 2003, at 9 (describing that security guards at a nuclear power plant rejected their security contractor’s mandatory overtime policy and voted to authorize a strike if the dispute was not settled); Wyatt Andrews, *Mandatory Overtime: It’s the Law!* (CBS News Broadcast Aug. 31, 2000), <http://www.cbsnews.com/stories/2000/08/31/eveningnews> (reporting that telephone workers staged a strike over mandatory fifty-three-hour work weeks for four weeks in a row, and noting that mandatory overtime has been a prime issue in almost every recent major strike in 2000).

171. Miller, *supra* note 16, at 4.

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.<sup>175</sup> White-collar workers derived class status, identity, and privilege in distinguishing themselves from manufacturing and service workers who “punched the clock.”<sup>176</sup> In the view of white-collar workers, shorter hours and government regulation of their work time undermined professional class status.<sup>177</sup> 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.<sup>178</sup>

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.<sup>179</sup> Specifically, professionals may cling to their class status,<sup>180</sup> 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.<sup>181</sup>

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*Id.* at 2224. Consequently, they did not organize to seek protection from long working hours. *Id.* at 2232; *see also* Crain, *supra* note 20, at 561 (stating that a core aspect of the social class and professional identity of white-collar workers is that as “masters of their time,” they do not punch time cards and have control over their work schedules because their work requires judgment and discretion).

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 2224-25.

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



Similar challenges of identification abound for low-wage manufacturing, service, and retail workers. These workers may cling to their class assumption that if they advance up the occupational ladder, the problems of forced overtime and overwork will disappear as they acquire higher status and earn higher incomes. In fact, many low-wage workers may view organizing for shorter hours as incompatible with their interests since long hours may be their main source of mobility.<sup>182</sup> Forming alliances with higher-paid professionals may also feel “unnatural” because of the economic disparities between workers based on occupation and the accompanying assumption that white-collar workers exercise control and choice over their work hours.<sup>183</sup>

It is necessary to challenge these class-based constructions of overwork, overtime, and working hours in order to uncover the common ground between workers with respect to control of time. Many workers are socialized to subscribe to certain class distinctions that may no longer correspond to reality because of the phenomenon of overwork.<sup>184</sup> The converging work conditions across occupation due to overwork and forced overtime present a unique opportunity to expose the common relationship of most workers to capital—namely, that the multiple social responsibilities that workers should be able to fulfill are subordinated to the rhythm of work as defined by employers.<sup>185</sup> In contrast, the goals of traditional unionism—securing improved economic terms such as higher wages and benefits—do not bear the same promise for sustaining alliances between higher-waged and low-wage workers. Tackling class tensions about working hours is a complex undertaking, but has the potential to bring together diverse groups of workers to advance a common agenda of claiming control over work and private time.

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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.<sup>186</sup> 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.<sup>187</sup> Through the creation of an artificial oversupply of labor, overtime leads to wage depression.<sup>188</sup> The more some workers are overworked, the more others are unemployed. Employers then depress base wages as they pit the overworked against the unemployed.<sup>189</sup> In addition, as overtime becomes systematic, employers lower the hourly rate of pay to offset the cost of the overtime premium.<sup>190</sup> Thus, wages earned in a longer workday may, over the long run, fall below wages earned in a shorter workday.<sup>191</sup> 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

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186. 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-lct-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>.

187. 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.

188. 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).

189. *Id.*; It's About TIME!, *supra* note 28.

190. 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").

191. See LINDER, *supra* note 10, at 54-55 (citing Samuel Gompers in explaining that longer hours may mean lower wages).

premium has failed as a financial deterrent to longer hours, and employers have instead used the premium to induce workers to work longer hours.<sup>192</sup> 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.<sup>193</sup> Corporations continue to appropriate this message to stave off legislation that would end mandatory overtime.<sup>194</sup>

### III. CHALLENGING COMPULSORY OVERTIME

#### *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.

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.”<sup>195</sup> In 2001, NMASS, in conjunction with another independent workers’ center,<sup>196</sup> 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.<sup>197</sup>

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.<sup>198</sup>

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192. *Id.* at 46. Linder analyzes the “devolution” of the overtime premium from a deterrent to longer hours to an inducement to work longer hours. *Id.* at 44-47.

193. *Id.* at 47-48.

194. *See id.* at 49-50 (noting the statement of a Ford industrial relations manager professing concern that autoworkers rely on overtime pay).

195. Nat’l Mobilization Against SweatShops, *About NMASS*, <http://www.nmass.org/nmass/about.html> (last visited Oct. 23, 2005) [hereinafter *About NMASS*].

196. The Chinese Staff and Workers Association is a twenty-six-year-old workers’ center based in the Chinese communities of New York City whose membership is composed of immigrant workers of all trades, particularly garment, restaurant, and construction.

197. *See* It’s About TIME!, *supra* note 28.

198. *Id.*

However, workers very quickly identified long hours and overwork as deadly problems that they wished to address.<sup>199</sup> 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.<sup>200</sup> The campaign emphasizes that long hours exacerbate the occupational health hazards of workers in jobs that are already high-risk.<sup>201</sup> 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.<sup>202</sup> Foreign-born workers have an appreciably higher chance of dying on the job than native-born workers.<sup>203</sup>

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.<sup>204</sup> Long hours, chronic stress, and burnout often leads to strained family relationships; "ties to friends and community [also unravel and disintegrate]."<sup>205</sup> Some families "lose track of [their] children" because they have so little time to spend with them.<sup>206</sup> 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.<sup>207</sup>

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.<sup>208</sup> 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.

201. *See* It's About TIME!, *supra* note 28; Thomas Maier, *Death on the Job, A Group in Danger: Hispanic Immigrants Face Greatest Workplace Risk*, *NEWSDAY*, July 25, 2001, at A7 [hereinafter Maier, *Group in Danger*]; Maier, *supra* note 21; Thomas Maier, *Death on the Job: Immigrants at Risk: Dreams Flourish, Then Perish: Lured by Dollars, Many Immigrants Risk Death in Dangerous Jobs*, *NEWSDAY*, July 22, 2001, at A6 [hereinafter Maier, *Dreams Flourish*]; Port, *supra* note 21.

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.<sup>209</sup> However, extraordinary delays in the adjudication of claims filed with the Workers' Compensation Board<sup>210</sup> often leaves workers with no choice but to continue working until they become too ill to work at all.<sup>211</sup> 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.<sup>212</sup> Its policy advocacy has resulted in members testifying at a Senate subcommittee hearing on workplace safety and health,<sup>213</sup> as well as the introduction of a bill in the New York State Assembly to prohibit mandatory overtime.<sup>214</sup> 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.<sup>215</sup>

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.<sup>216</sup> 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.<sup>217</sup> It's About TIME! also points to the

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209. See It's About TIME!, *supra* note 28.

210. *Id.*

211. See Thomas Maier, *Death on the Job: Paying Injury's Price: Immigrants Rarely Compensated for Workplace Harm*, NEWSDAY, July 24, 2001, at A4.

212. IT'S ABOUT TIME!, RISING FROM OUR HARDSHIP, STOP THE ATTACK ON OUR HEALTH: HUNGER STRIKE, May 6-13, 2003 (on file with author).

213. See Wishnie, *supra* note 208, at 553.

214. A.B. 8260 2003-04 Reg. Assem. Sess. (N.Y. 2003) (on file with author); see *About NMASS*, *supra* note 195.

215. See Sam Smith, *Mexico Rips Pataki Over Worker Woes*, N.Y. POST, Nov. 28, 2004, at 10; Amended Petition on Labor Law Matters Arising in the United States Submitted to the National Administrative Office (NAO) of Mexico under the North American Agreement on Labor Cooperation (NAALC) (Oct. 31, 2001) (on file with author); Press Release, Nat'l Mobilization Against SweatShops, Mexico Government Cites N.Y. Gov. Pataki and U.S. for Violating NAFTA, Endangering Workers' Health: Pataki Blamed for Failed State Workers' Comp System (Nov. 24, 2004), <http://www.nmass.org/nmass/news/112404NAFTAPressConference.html>.

216. It's about TIME!, *supra* note 28.

217. Nat'l Mobilization Against SweatShops, *Life After College: Sweated in the Office*, SWEATSHOP NATION 7 (2003); Nat'l Mobilization Against SweatShops, *The White-Collar*

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.<sup>218</sup>

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.<sup>219</sup> 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.<sup>220</sup>

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.<sup>221</sup> 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.<sup>222</sup> 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.<sup>223</sup>

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*Sweatshop: Office Workers Fight Back* (2001), <http://www.nmass.org/nmass/office%20workers/whitecollar.html>.

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,<sup>224</sup> 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.<sup>225</sup> 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.<sup>226</sup> Because over ninety percent of the occupation is female,<sup>227</sup> 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.<sup>228</sup>

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.<sup>229</sup> 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

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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.

228. See, e.g., Press Release, California Nurses Association, CNA-Kaiser Bargaining Update RNs Press Mandatory Overtime Ban, Retention Issues as Contract Deadline Nears with HMO Giant (Sept. 5, 2002) (on file with author); *supra* text accompanying note 2.

229. See, e.g., 49 C.F.R. §§ 395.1, 395.3 (2005) (regulating motor carrier work hours); 49 U.S.C. § 21103 (2000) (limiting on duty hours of train employees); 14 C.F.R. § 65.47 (2005) (regulating maximum hours air traffic controllers may work). See LINDER, *supra* note 10, at 377-78, 385-86, for a brief reference to these and similar statutes.

workers,<sup>230</sup> 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.<sup>231</sup>

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.'"<sup>232</sup> 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.<sup>233</sup> 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.<sup>234</sup> It has been suggested that in all likelihood, a right to refuse would be of little use to many workers.<sup>235</sup> First, without sufficient resources for

230. LINDER, *supra* note 10, at 390.

231. *See id.* at 377-78 (noting the difference between "permissive and libertarian" laws that permit needy workers to work longer hours if they choose and "mandatory or coercive" laws that prohibit both employers and workers from eroding hours standards). Linder argues that voluntary overtime, like involuntary overtime, degrades working conditions and other societal norms. *Id.* at 385-87.

232. Trossman, *supra* note 140, at 4.

233. For example, one nurse states, "RNs do not have to be forced to pitch in when a crisis arises. They always volunteer." *Id.* at 5. Even more to the point, another nurse distinguishes between voluntary and forced overtime in this way:

When you plan on overtime, you plan to be rested and have your children or elderly parent cared for . . . . When the supervisor comes to a nurse after a [twelve]-hour shift and states: "[y]our relief is not coming, you have to stay another four or more hours," a cascade of events, not to mention exhaustion, can (affect) your ability to perform your duties.

LINDER, *supra* note 10, at 385.

234. *See* LINDER, *supra* note 10, at 357-77 (describing failed state efforts to legislate a right to refuse); RAKOFF, *supra* note 15, at 146-49 (describing possible difficulties with framing a statutory right to refuse that contains an exception for emergencies and the reasons why workers might not exercise the right to refuse overtime).

235. RAKOFF, *supra* note 15, at 148-49; *see* LINDER, *supra* note 10, at 469-72 (arguing that Canadian provincial laws guaranteeing a right to refuse mandatory overtime have been ineffectual and workers generally have not availed themselves of these protections).



effective enforcement, the creation of new rights is unlikely to yield concrete gains for workers.<sup>236</sup> Second, the fundamental inequality of the employment relationship renders choice and voluntariness inherently problematic, calling into question whether choice constitutes “genuine” choice.<sup>237</sup> Third, many forces that impinge upon the choice to decline longer hours, both economic and cultural, lie outside the control of workers.<sup>238</sup> 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.”<sup>239</sup>

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.<sup>240</sup> 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.<sup>241</sup> Admittedly, a similar danger exists with legislating a right to refuse.<sup>242</sup> 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

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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 CHI.-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,<sup>243</sup> 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<sup>244</sup> 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.<sup>245</sup> In striking down a New York statute that imposed limits on the maximum weekly work hours of bakers, the Supreme Court in *Lochner v. New York*<sup>246</sup> reinforced the view that protecting workers from excessive hours of work constituted a special interest.<sup>247</sup> An absolute right to refuse long hours represents a cultural and legal

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243. See Schor, *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. *Id.*

244. See Smith, *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. *Id.*

245. See *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." *Id.* at 317.

246. 198 U.S. 45 (1905), *overruled in part by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952), and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

247. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 878-79 (stating that the Court's concern in *Lochner* "was that maximum hour legislation was partisan rather than neutral—selfish rather than public-regarding"). The Supreme Court in *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.”<sup>248</sup> The processes of downsizing, lean production, and global competitiveness, all of which have contributed to the growth of compulsory overtime, are not abating.<sup>249</sup> 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.<sup>250</sup> 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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the occupation of a baker.

*Lochner*, 198 U.S. at 57. The Supreme Court thus contributed to splintering the interest of a group of workers in limiting excessive working hours from the interest of the public.

248. Andrews, *supra* note 170.

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

250. See Katrin Benhold, *Love of Leisure, and Europe’s Reasons*, N.Y. TIMES, July 29, 2004, at A10; Mark Landler, *Europe Reluctantly Deciding It Has Less Time for Time Off*, N.Y. TIMES, July 7, 2004, at A1; Carl Bloice, *Left Margin: Less Time Off*, PORTSIDE, July 23, 2004, <http://www.portside.org/showpost.php?postid=493>.