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WORKTIME IN CONTEMPORARY CONTEXT: AMENDING THE FAIR LABOR STANDARDS ACT

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INTRODUCTION

In the fifty years since the end of the Second World War, American productivity has almost tripled.[1] This means that the country could have cut working hours in half and still experienced a significant increase in its standard of living. Today, we could be enjoying a four-hour workday, a two-and-a-half-day workweek, or a six-month paid vacation each year.

Until about the 1970s, it was widely believed that worktime *would* shrink. Experts expected that automation and mechanization would lead to the four-hour day by the 1980s.[2] Boredom was seen as the problem looming in the nation's future.[3] Leisure programs and academic departments of Leisure Studies sprang up to cope with the coming crisis of leisure time.

As we know now, none of this free time materialized. Instead, all the progress created by productivity growth was put toward producing more and better things—a higher material standard of living. Per capita consumption more than doubled, but free time did not increase at all.[4] In fact, working hours began to increase at the end of the 1960s, and have been rising since then.[5]

The most striking thing about the disappearance of leisure has been the failure to realize that it was even occurring. Longer hours were not planned, debated, or "chosen" in any normal sense of the word. They seem to have just "happened." The result is that large

* Director of Studies, Committee on Degrees in Women's Studies, Harvard University. Thanks to Tracy Tefertiller and Karen Greve for research assistance, and to Linda Pedelty for editorial aid. I also appreciate the comments of participants at the Piper lecture, April 1994.

1. COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT OF THE PRESIDENT 348 (1992).

2. Nancy Gibbs, *How America Has Run Out of Time; Workers are Weary, Parents are Frantic and Even Children Haven't a Moment to Spare; Leisure Could Be to the '90s What Money Was to the '80s*, TIME, Apr. 24, 1989, at 58, 59.

3. Reuel Denney, *The Leisure Society*, HARV. BUS. REV., May-June 1959, at 46, 60; *see also* Russell Lynes, *Time on Our Hands*, HARPER'S MAG., July 1958, at 34, *reprinted in* MASS LEISURE 346 (Eric Larrabee & Rolf Meyersohn eds., 1958).

4. JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE 110 (1992).

5. *Id.* at 36.

numbers of working Americans are now feeling overworked, "time poor," and torn between their jobs and families. The nation's worktime legislation, the *Fair Labor Standards Act*,[6] is not up to the task of regulating or governing these changing work patterns and realities. It is minimalist legislation which is in urgent need of reform. In the pages which follow, I discuss the background of the current worktime situation, and then present my suggestions for amending the *Fair Labor Standards Act* ("FLSA").

I. THE RISE OF WORKING HOURS

Contrary to the conventional wisdom, working hours for American employees have been rising in recent decades. In my research with Laura Leete, we found that the average U.S. worker experienced a substantial rise in working hours between 1969 and 1987.[7] Excluding those who are unemployed or underemployed, average annual hours of paid work increased by 138 hours.[8] The increase for women was 287; for men 72.[9] Correcting for the unemployed and underemployed is important, because their inclusion imparts an artificial downward bias to hours measured. This category of worker has grown substantially between 1969 and 1989, when measured at the peak of each business cycle. In 1969, the fraction of the labor force which either had no job or was involuntarily working part-time or part-year was 7.2%.[10] At the latest business cycle peak in 1989 that fraction stood at 14.5%.[11]

Paid worktime presents only a partial picture. This is particularly true in a period such as the recent one, when large shifts in the distribution of work between household and market are occurring. Therefore, we also estimated hours of unpaid work. Over the same period, household hours did not change much on average for those in the labor force, rising 11 hours, although the distribution between men and women changed markedly.[12] Women, in response to rising market hours, reduced their household work by 126 hours.[13] Men increased

6. Fair Labor Standards Act, 29 U.S.C. §§ 201-209 (1989).

7. Laura Leete & Juliet B. Schor, *Assessing the Time-Squeeze Hypothesis: Hours Worked in the United States, 1969-1989*, 33 INDUS. REL. L.J. 25, 31 (1994).

8. *Id.* at 33.

9. *Id.* These figures exclude the unemployed and workers who report they are involuntarily working only part-time or part-year.

10. *Id.* at 32.

11. *Id.*

12. *Id.* at 33.

13. *Id.*

theirs by 67 hours.[14] Total working hours (market hours plus household hours) rose by 161 for women and by 139 for men.[15]

These figures do not incorporate the impact of increases in women's labor force participation. To do that, I have calculated the changes in worktime which occurred between 1969 and 1989, as women shifted from full-time homemaking to full-time paid employment.[16] I have done so by taking a middle income, two-children, husband-wife couple and allowing the wife to change her labor force status.[17] Not surprisingly, the shift from a full-time homemaker to a full-time worker is associated with a very large rise in hours, which is the core of the "work-family" dilemma. In my "typical" family, the mother's hours rise by 814 a year, from 2465 to 3279.[18] This is made up of an increase of 2007 in market hours and a decline of 1193 in household hours (from 2465 hours as a full-time homemaker to 1272 as a "working woman.")[19] The father works 254 extra hours, from 2955 to 3209, which is composed of a 118 hour increase in market hours and a 116 rise in household worktime.[20] The family's total hours rise from 5420 to 6488, a 1068-hour rise. On the basis of a 50-week year, this is just over 21 hours a week, or the equivalent of an extra half-time job.[21] Furthermore, these figures exclude the growth in commuting time and paid time off, which amount to about 25.5 hours a year for employees as a whole.[22]

Since 1989, there are strong indications that worktime continues to rise. Weekly hours have been rising, and now stand at 43.8 for full-time workers[23] as compared to 43.7 in 1989.[24] Manufacturing overtime, at 4.8 hours per week in April 1994, is higher than it has been at any time during which these statistics have been collected.[25] These data are not ideal, because they do not account for changes in the fraction of the year worked, and are not corrected for business cycle-

14. *Id.*
15. *Id.*
16. Laura Leete & Juliet B. Schor, unpublished research on file with author (1989).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Leete & Schor, *supra* note 7, at 33-34.
23. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 41 EMPLOYMENT AND EARNINGS 41 (1994).
24. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 37 EMPLOYMENT AND EARNINGS 199 (1990).
25. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 41 EMPLOYMENT AND EARNINGS 67 (1994).

induced fluctuations. However they are strongly indicative of continuing increases in hours.

A second reason for believing worktime has continued to rise is the rate and impact of "downsizings" across the economy. Downsizings, which consist of reductions in personnel, have proceeded at a rapid pace in recent years. For example, since 1989, rates of workforce reduction among member companies of the American Management Association, who are larger and more heavily involved in manufacturing than is the economy as a whole, have been 35.7% (1989-90), 55.5% (1990-91), 46.1% (1991-92) and 46.6% (1992-93), with the average reduction equalling between 9 and 10% of the workforce.[26] Since January 1988, 69% of this sector has downsized.[27] Although most downsizing studies do not include information on working hours, a 1991 Wyatt Corporation survey of large firms found that only 36% took any steps to eliminate low value-added work,[28] although this number had increased to 58% in its 1993 survey.[29] Sixty-two percent of companies reported adverse effects on "workloads" as a result of these reductions in force.[30] Finally, polls report longer worktimes, as 48% of Americans said in 1992 that they had less leisure time than they had five years earlier.[31]

Rising hours have multiple causes. Women's increased hours of work are of course a primary factor. And sharp declines in wages for hourly workers, particularly men, have played an important role, as workers must increase their hours to maintain a given standard of living. Much of the change is also attributable to employers, who have demanded much more overtime and raised their expectations of what is due to them from employees. A major factor driving employer actions is the payment structure and rising cost of fringe benefits. Because fringe benefits are paid on a per person basis, employers prefer that their existing employees put in long hours, rather than hire additional staff. As medical costs have risen, the cost disadvantage for short-hours workers has increased. Fringe benefits as a fraction of

26. AMERICAN MANAGEMENT ASS'N, 1993 AMA SURVEY ON DOWNSIZING AND ASSISTANCE TO DISPLACED WORKERS: SUMMARY OF KEY FINDINGS 1 (Eric R. Greenberg ed., 1993).

27. *Id.*

28. WYATT COMPANY, RESTRUCTURING: CURE OR COSMETIC SURGERY? RESULTS OF CORPORATE CHANGE IN THE '80S WITH RX'S FOR THE '90S 34 (1991).

29. WYATT COMPANY, BEST PRACTICES IN CORPORATE RESTRUCTURING: WYATT'S 1993 SURVEY OF CORPORATE RESTRUCTURING 30 (1993). Fifty-eight percent of firms took steps to eliminate low value-added work, as opposed to thirty-six percent in the 1991 survey.

30. *Id.* at 37.

31. Geoffrey Godbey & Alan Graefe, *Rapid Growth in Rushin' Americans*, AMERICAN DEMOGRAPHICS, Apr. 1993, at 26, 27.

wages and salaries stood at 39.1% in 1992, up from 21.5% in 1965.[32] Throughout both the recession and the recovery, companies have been simultaneously laying off workers and increasing working hours for those who are still employed.

Long working hours are associated with stress and workplace injuries. The International Labour Office estimated that job stress currently costs the United States $200 billion a year and that stress is "one of the most serious health issues of the twentieth century."[33] Automobile factories in the U.S., which have very high overtime hours, experienced a 460% rise in injuries between 1985 and 1991.[34]

The rise in worktime has also led to a pervasive conflict between work and family. In a wide-ranging 1991 poll by the Gallup Organization, nearly two-thirds of working parents said they felt they spent too little time with their children.[35] More than one-third (34%) of all workers reported experiencing "a great deal" or "quite a lot" of "conflict between the demands of work and family or personal relationships."[36] When asked which realm "suffers more" when work-family conflicts arise, 77% of all workers responded that family/relationships suffer more.[37] Just under one-fifth of workers reported that the demands and pressures of their job have seriously affected their marriages/romantic relationships;[38] and 15% say their relationships with their children have also been so affected.[39] Just under one-third (32%) of working adults said they spend too much time on the job.[40] Americans are increasingly feeling the time squeeze, as the fraction of the population which "always feels rushed" has risen to 38%.[41] For those with children, it stands at 43%, and for working mothers, at 64%.[42]

32. UNITED STATES CHAMBER OF COMMERCE, 1993 EMPLOYEE BENEFITS REPORT 33 (1994).

33. INTERNATIONAL LABOUR OFFICE, WORLD LABOUR REPORT 1993, at 65-67 (1993).

34. UNITED AUTO WORKERS NEW DIRECTIONS MOVEMENT, LEAFLET, FORCED OVERTIME: KILLING THE AMERICAN DREAM (1994). In April 1994, motor vehicle and car bodies production and nonsupervisory workers averaged 8.7 overtime hours weekly. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 41 EMPLOYMENT & EARNINGS 108 (1994).

35. Larry Hugick & Jennifer Leonard, Gallup Poll, *Mirror of America — Role of Work; Job Dissatisfaction Grows: 'Moonlighting' on the Rise*, 56 GALLUP POLL NEWS SERVICE, Sept. 2, 1991.

36. *Id.* at 6.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 8.

41. Godbey & Graefe, *supra* note 31, at 26.

42. *Id.*

II. THE FAIR LABOR STANDARDS ACT: HISTORICAL CONTEXT

Market forces cannot solve the problem of long working hours in the United States. A "market" in hours can hardly be said to exist, as a majority of workers report that they have limited ability to change their hours. For example, in the Panel Survey of Income Dynamics, among male employees who are heads of households, aged 25-54 and paid by the hour, only 15% reported that they had the freedom to adjust their hours upward and downward.[43] Although economists have paid very little attention to this issue, among those studies which have been done, none supports the idea of free choice in hours. They all find evidence of substantial constraints on employees.[44] Furthermore, there are deep structural barriers to shorter hours, which need to be addressed by regulatory and legislative reform. These include the financing of medical insurance, the payment structure of fringe benefits, and the incentive effects associated with paying employees by salary, which I discuss below. For these reasons, reform of the FLSA has become an urgent task.

The weaknesses of the FLSA consist of both what it does and what it does not do. To see how these weaknesses came to be, a bit of history may be useful. The story starts in the early 1920s, with the national discourse on time, work, and money. At that time, the conventional wisdom was that the expanding productivity of the industrial economy was almost inevitably leading to a leisure society.[45] This is because growth was rapidly meeting people's basic material needs. It was thought that once needs were met, people would no longer be willing to work to earn additional income. Trade unionists and social reformers argued that the country should embrace this possibility and actively reduce working hours.[46] Those who believed in "hard work", such as businessmen and economists, worried that stagnation and mass unemployment might be the result of rising productivity.[47]

Of course, there was an alternative to leisure, namely consumerism. Eventually, economists and businessmen began to adopt the

43. SHULAMIT KAHN & KEVIN LANG, CONSTRAINTS ON THE CHOICE OF WORKING HOURS: AGENCY VS. SPECIFIC-CAPITAL 14 (National Bureau of Economic Research Working Paper No. 2238, 1987).

44. For a discussion of this literature, see SCHOR, *supra* note 4, at 210-11 n.41.

45. BENJAMIN KLINE HUNNICUTT, WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK 9-66 (1988); *see also* WILLIAM LEACH, THE LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF A NEW AMERICAN CULTURE (1993); DAVID R. ROEDIGER & PHILIP S. FONER, OUR OWN TIME: A HISTORY OF AMERICAN LABOR AND THE WORKING DAY (1989).

46. HUNNICUTT, *supra* note 45, at 67-146.

47. *Id.* at 37-66.

view that stagnation could be avoided by the creation of new wants and desires.[48] This ideology, which historian Benjamin Hunnicutt has called "the new economic gospel of consumption," rejected the distinction between needs and wants and reasoned that more was always better.[49] These debates clearly delineated the choices among time, work, and money. On the one hand, the nation could use its expanding productive potential to reduce worktime and cultivate a society oriented around free-time activities: education, politics, and public culture. On the other, it could encourage what I have elsewhere called "work-and-spend," an economy of long working hours, high income growth, and high consumption.

When the Depression hit, worktime reduction, or worksharing, became a very popular solution. The 30-hour week was the primary unemployment measure advocated by the American Federation of Labor.[50] Many businessmen also came to accept the need for worksharing on a temporary basis. In the 1932 election campaign, both Roosevelt and Hoover supported hours reductions.[51] In April 1933, the Senate passed Hugo Black's bill mandating a 30-hour week for all firms involved in interstate and foreign commerce.[52] With passage looking certain in the House as well, and business opposition mounting, Roosevelt reversed himself.[53] Thereafter, Roosevelt became strongly opposed to worksharing schemes, in favor of job creation through government employment and expanded private sector output.[54]

Through the years between 1933 and 1938, the pressure from labor grew, and labor used the 30-hour week as its ultimate threat.[55] Although Roosevelt was forced into numerous concessions, he held firm on the hours question.[56] His aim was to forestall radical worksharing legislation. His goal with the FLSA was to protect workers subjected to "starvation wages and intolerable hours"—"the underpaid and the overworked."[57] But, in the words of Benjamin Hun-

48. *Id.* at 42; *see also* GARY S. CROSS, TIME AND MONEY: THE MAKING OF CONSUMER CULTURE (1993).

49. HUNNICUTT, *supra* note 45, at 37-66.

50. *Id.* at 176; *see also* CROSS, *supra* note 48, at 82; ROEDIGER & FONER, *supra* note 45, at 243-56.

51. HUNNICUTT, *supra* note 45, at 150-51.

52. *Id.* at 150-53.

53. *Id.* at 161.

54. *Id.* at 162.

55. *Id.* at 163.

56. *Id.* at 172-73.

57. *Id.* at 246.

nicutt, the passage of the FLSA showed that "the forces behind share the work and the continuation of the progressive shortening of the hours of labor had been routed."[58]

Why was the FLSA not a shorter hours bill? First of all, the bill applied to few industrial workers.[59] The Depression had shortened hours considerably. For example, in 1934, weekly hours in manufacturing had fallen to 35 hours.[60] Second, there were no maximum hours limits, only financial disincentives for employers above 40 hours.[61] The bill contained no provisions for vacations or other time off, nor did it institute any provisions for future reductions in hours in line with productivity growth. The 40-hour standard workweek was set in stone, and has not been altered to this day. Furthermore, at the time of its passage, the bill omitted a very large fraction of the labor force. Although coverage has expanded over time, in 1990 only 67% of wage and salaried employees were covered under the legislation's overtime provisions.[62]

Ultimately, the FLSA contributed to longer, not shorter, hours for American workers. That is because the premium pay provisions became attractive to workers, particularly males. With the 40-hour week enshrined as the norm, and the gender division of labor which prevailed in the postwar era, many men came to strongly desire overtime hours. Economic research has shown that where overtime is frequent, employers reduce the base wage, so that workers do not end up receiving higher wages overall.[63] They merely work longer hours. But this effect has generally not been recognized by workers, who perceive overtime premia as just that.

III. AMENDING THE FLSA

The limitations of the FLSA suggest that amendments will need to be extensive. These changes should be guided by the principles of giving employees choice, forcing employers to act socially responsibly by ensuring an adequate supply of unpaid labor, and creating employment. Changes should also uphold the principle of gender equity and

58. *Id.* at 247.

59. *Id.*

60. Joseph S. Zeisel, *The Workweek in American Industry*, MONTHLY LAB. REV., Jan. 1958, at 23, 25.

61. HUNNICUTT, *supra* note 45, at 209-49.

62. EMPLOYMENT STANDARDS ADMIN., U.S. DEP'T OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT 33 (1993).

63. STEPHEN TREJO, COMPENSATING DIFFERENTIALS AND OVERTIME PAY REGULATION (Dept. of Econ., Univ. of Cal., Santa Barbara Working Paper No. 2089, 1989).

move in the direction of realizing such equity. Let me begin with these principles.

1. *Give employees choice.* The concept of a standard workweek emerged from a system of full-time jobs for men, with an undergirding of full-time homemaking for women. In that system, a common work schedule for men was not unreasonable. However, with a workforce characterized by considerable diversity, legislation based upon a standard or typical workweek is obsolete. Indeed, there is no longer a uniform structure of work, as the fraction of nonagricultural workers on a five-day, 9am-5pm schedule stood at only 50.4% in 1985.[64]

Nor are preferences common across employees. The classic trade union demand for uniform reductions in the working day are no longer the most desirable form of worktime reduction. Many employees would prefer a four-day week, or longer vacations.[65] Any reform should give people more control over both their work schedules and total worktime. Regulatory change should aim to reduce barriers to employee choice of hours. It should also embody work norms that *give people the choice to take care of their own children,* rather than force them to buy marketed child care. Practically speaking, this means something in the neighborhood of a 30-hour week. In egalitarian dual earner families, this would imply total paid work of 60 hours per week, which leaves considerable time for parents to take care of their children.

2. *Ensure an adequate supply of unpaid social labor.* Current trends in unpaid hours reveal rapid decline, as the growing returns and opportunities women are receiving from paid labor undermine the willingness to work without remuneration. Much of our society's unpaid work falls into the category of social or "caring labor," such as parenting, caring for the sick, volunteering in community and civic groups, etc. Simply transferring all this labor to the market is not an optimal solution, due to what economists have called the "paradox of caring labor:" underpayment is a way of attracting those who really "care" and screening out those who are just doing it for the money and who are presumably inferior caregivers.[66] Worktime legislation should recognize the need to maintain caring labor outside the mar-

64. Shirley Smith, *The Growing Diversity of Work Schedules*, MONTHLY LAB. REV., Nov. 1986, at 7, 8.

65. UNITED STATES EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, EXCHANGING EARNINGS FOR LEISURE: FINDINGS OF AN EXPLORATORY NATIONAL SURVEY ON WORK TIME PREFERENCES 72 (1980).

66. For an interesting discussion of these issues, see Nancy Folbre, 'Holding Hands at Midnight': The Paradox of Caring Labor (1994) (unpublished manuscript, on file with author).

ketplace, and penalize those employers whose worktime practices are not compatible with this goal.

In the heated discussion about a "mommy" or "parent track," this larger social issue has been obscured. Who should be responsible for the costs of caring for children and reproducing the labor force? The "parent track" assumes that individuals should be. They are forced to choose between first class jobs (with higher pay, responsibility, promotional tracks, etc.) and second class jobs (lower pay, less upward mobility). By contrast, I would argue that society should bear a significant portion of these caring costs. The "benefits" of raising subsequent generations accrue to everyone, not just parents. When an employer rewards the 60 or 80 hour per week employee and penalizes the 30 or 40 hour one, it is acting socially irresponsibly, because the former are not available to do their fair share of the caring labor without which society cannot be maintained.

3. *Generating Employment.* What is the rationale for getting the government involved in the determination of hours? Standard economic theory holds that the employers and employees should be left to themselves to work out hours arrangements. This view fails to account for both the externalities of the choice of hours and the fact that the "market" in hours is largely absent. I have already noted the impact of long hours on family life and the supply of unpaid labor. A second, compelling issue is the impact of hours on the quantity of unemployment and underemployment. As noted above, the level of unemployment and underemployment in this country has been rising since 1969, measured at business cycle peaks.[67] Throughout the current recovery, long dubbed as "jobless," employers have continued to lay off large numbers of workers, and job creation has lagged behind the experience of previous recoveries. Many types of economic institutions are downsizing—not only large corporations, but also hospitals, governments, and universities. Dramatic technological developments have created tremendous potential for labor-saving innovation, only a fraction of which has been realized. In coming years and decades, we can expect continuing redundancy of labor.

It is theoretically possible to reabsorb all this labor without reducing hours. However, based on both historical experience and an assessment of current obstacles to employment growth (i.e., the abandonment of Keynesianism and the growth of a global economy), I believe it is most unlikely that unemployment can be avoided without

67. Leete & Schor, *supra* note 7, at 32.

worktime reductions. The government should take a strong, affirmative role in facilitating hours reductions, both to create jobs and to improve the quality of life for all workers. This is a far more sensible and environmentally sound approach than encouraging the large increases in production and consumption which would be necessary to keep the labor force fully employed at current levels of hours. With these principles in mind, I suggest the following five amendments and extensions of our worktime legislation.

1. *Reduce the 40-hour standard workweek and eliminate premium pay for overtime.* The 40-hour standard workweek in this country has not been reduced since its institution in 1938. I propose that we begin a phased-in reduction, to achieve the goal of a 32-hour standard by the year 2000. In addition, I propose the abolition of premium pay for overtime and its replacement with a system of compensated time off, or "comp time." At first, compensated time would be granted at a rate of time and a half, although this provision should be scrutinized after some period of time.

Employers' standard objection to a shorter workweek is that it is expensive. However, the case-study evidence shows that a marginally shorter workweek can pay for itself, as a result of a higher pace of work, fewer breaks, fewer sick days, lower absenteeism and turnover, and less personal business on company time.[68] If employers give the "gift" of shorter hours (without cuts in pay), employees respond by working harder.[69] I believe that employer resistance is caused by myopia and conservatism, rather than a serious cost calculus.[70] A gradual reduction to a 32-hour standard is beyond the scope of previous experience, although I do not believe it will be unduly costly, given the potential productivity gains that new technologies offer. The experience of the Kellogg company with a six-hour day shows that productivity can even rise when the workday goes from eight to six hours.[71] Finally, the downward trend in work hours in the industrial-

68. For a summary of case study evidence, see SCHOR, *supra* note 4, at 152-57. *See also* MAUREEN E. MCCARTHY & GAIL S. ROSENBERG, THE W.E. UPJOHN INST. FOR EMPLOYMENT RESEARCH, WORK SHARING: CASE STUDIES (1981).

69. On gift exchange, see George Akerlof, *Labor Contracts as a Partial Gift Exchange*, 97 Q.J. ECON. 543 (1982).

70. For more on this theme, see SCHOR, *supra* note 4, at 154.

71. Benjamin Kline Hunnicutt, The Death of Kellogg's Six-Hour Day: An Aborted Capitalist Vision of Liberation through Management of Work Reduction (undated) (unpublished manuscript, on file with author).

ized nations with which the United States deals suggests we have room to follow suit.[72]

My second suggestion is to abolish premium overtime pay. Premium pay was designed to discourage long hours and create employment, but it has done the opposite, by tying workers and firms into a system of long work weeks. Economic research has shown that base wages adjust (downward) in high overtime firms, so that the statutory premia is in some sense a mirage.[73] With substantial overtime, workers become locked into a cycle of long hours and growing consumption aspirations which is detrimental to their mental and physical health as well as their family lives. While many workers would oppose the abolition of overtime pay, there is anecdotal evidence that after such a change many will find themselves better off and preferring the arrangement.[74]

2. *Require employers to permit employees to trade income for time.* With the exclusion of traditional part-time work, few employers today give employees the opportunity to trade income for time. The key features of a "trading income for time" scheme, which differs from most part-time employment, is that it would allow for varied schedules and would be instituted without penalties in terms of career advancement, responsibilities, and access to benefits. While it is fair, up to a point, to ask employees to make financial sacrifices for shorter hours, penalizing them in terms of their long-term career trajectory is not fair. Long hours are not economically necessary, but culturally entrenched.

A policy of allowing employees to trade income for time can be instituted as a standard "benefit."[75] Employees can be given the opportunity to forego annual raises or reduce current compensation. Options should include shorter daily hours, the "buying" of vacation days, a four-day week, ten-month schedules and sabbaticals. Employers would implement these programs by "costing out" an hour of an employee's time, being sure to include the likely per hour productivity boost which occurs with shorter hours. Outcome-based egalitarian gender policies can be added, such as those which reward men more for certain types of time off e.g., parental leaves.

72. Juliet B. Schor, *Can the North Stop Consumption Growth? Escaping the Cycle of Work and Spend, in* THE NORTH, THE SOUTH AND THE ENVIRONMENT tbl. 1 (Andrew Glyn & V. Bhaskar eds., forthcoming 1995).

73. TREJO, *supra* note 63.

74. SCHOR, *supra* note 4, at 143-44.

75. *See* BARBARA MOORMAN & BARNEY OLMSTED, V-TIME: A NEW WAY TO WORK (1985).

With flexibility on both sides, these kinds of programs can be very successful. The federal government should require all companies to offer these options, and offer tax incentives to companies based on the utilization rate of reduced hours arrangements. Tax incentives should favor job sharing, which is a particularly effective way to create employment. The FLSA should require all employers to offer employees the opportunity to share jobs.

Would people actually take such options? There is growing sentiment among the U.S. population in favor of shorter hours, even at the price of lower incomes. A January-February, 1994 poll conducted by the Pew Foundation found 15% of the population opting for shorter hours and less money, a far larger fraction than in earlier studies.[76] A 1991 poll found 50% of workers saying they would choose the option of an extra day off each week, at the cost of that day's pay.[77] In a poll conducted in July 1994 by the Gallup organization, an unprecedented fraction of people indicated a desire to trade income for time.[78] In response to the statement, "I would take a 20% cut in household income if I or my spouse or partner could work fewer hours," 33% of people "mostly agreed," as compared to 66% who mostly disagreed.[79] Interestingly, responses were within a few percentage points between men and women, among those aged 18-55, between college and non-college educated people, and across marital statuses, with the exception of widows and widowers.[80] Of course, the ability to reduce hours varies by income, but there are clearly significant numbers of Americans who prefer such options.

The social and corporate context in which such changes occur is crucial, both for reasons of competition and status within the workplace, and because consumption is such a social activity. A study of associates at two large law firms confirms this. Sixty-four percent of the associates, whose median work hours are 200 per month, said they would choose to forego a hypothetical 5% wage increase in order to reduce billable and non-billable hours by 5%.[81] Greater numbers said they would take such an option if others were doing it.[82] The social

76. BELDEN & RUSSONELLO, PEW GLOBAL STEWARDSHIP INITIATIVE SURVEY 2 (1994) (unpublished survey, on file with the *Chicago-Kent Law Review*).

77. Carol Hymowitz, *Trading Fat Paychecks for Free Time*, WALL ST. J., Aug. 5, 1991, at B1.

78. Barbara Paulsen, *Work and Play*, HEALTH, Oct. 1994, at 48.

79. *Id.*

80. *Id.*

81. RENÉE M. LANDERS ET AL., RAT RACE REDUX: ADVERSE SELECTION IN THE DETERMINATION OF WORK HOURS tbl. 2 (Massachusetts Institute of Technology Working Paper No. 3638-93, 1993).

82. *Id.* at tbl. 8.

nature of working and spending suggests that centralized intervention from top management and governmental bodies can move us to preferable equilibria which will not be reached with a pure market solution. If there are desirable social reasons for reducing work hours, then public policy to encourage such a reduction is warranted. Certainly the combination of work-family conflict and substantial unemployment and underemployment are important social reasons.

3. *Cover salaried employment under the FLSA.* The exclusion of supervisory workers from the provisions of the FLSA[83] is a major flaw in this legislation. Supervising personnel tend to be salaried, and the fraction of the workforce covered by salaried employment has grown in recent decades, reaching just over 40% of wage and salary employment by the mid-1980s.[84] Salaried workers tend to have especially long hours. In *The Overworked American*, I argued that salaried workers are subject to an "elasticity" in hours. Extra hours are essentially free to the employer, because payment is invariant with respect to hours.[85] The absence of a financial disincentive for long hours is an important reason that employers expect and/or enforce long hours from their salaried employees. In unpublished research I have conducted with Hilary Seo, we found that the average salaried employee has significantly longer annual hours than the average hourly employee, taking into account other factors, such as income and demographic characteristics. Estimates of this differential vary but are as large as 150 hours per year.[86]

In order to solve the problem of long hours among salaried employees, and establish a right to free time for them, I propose that all workers be included in the FLSA. Because the hours of many of these workers are so much higher than 40 hours, I do not propose a uniform standard workweek for them. Instead, I suggest that employers be allowed to exempt the top 20% of their workforce from the 40-hour week standard, but that they be required to designate an alternate standard of weekly and annual hours for this 20%. Job applicants and incumbents must be informed about the standard. Employers would be free to set any standard below 60 hours a week and 2880 hours per year. If employees are needed to work more than

83. 29 U.S.C. § 213(a)(1) (1994).

84. Earl F. Mellor & Steven E. Haugen, *Hourly Paid Workers: Who They Are and What They Earn*, MONTHLY LAB. REV., Feb. 1986, at 20, 21.

85. SCHOR, *supra* note 4, at 68-72.

86. Hilary Seo, Hours Levels, Hours Variation, and Hours Determination (1993) (unpublished undergraduate thesis, Harvard University) (on file with the author).

the standard at some times, they would be eligible for compensated time off in the future. The expectation is that competition among employers would serve to set standards below the hours salaried employees are currently working, on the ground that lack of information about hours expectations currently characterizes the recruiting and promotion process in salaried jobs.

4. *Legislate a four week paid vacation.* U.S. workers lag far behind their counterparts in Western Europe in terms of paid vacation, and even behind Japanese workers when paid holidays are included.[87] In the 1980s, the paid time-off available to the average U.S. worker fell, and the erosion of so-called "permanent employment" in favor of contingent and temporary arrangements is further jeopardizing vacation entitlements.[88] The FLSA should ensure that workers are eligible for vacation time, regardless of their length of service. I propose a system in which all permanent employees, after one year, are eligible for a one-month vacation. For temporary employees, consultants, and other contingent workers, companies should be required to pay a "vacation tax" for each week such people are working for, or rendering services to, the firm. The tax would be paid as a fraction of pay, sufficient to fund a one-month vacation for each eleven months worked. These revenues would be deposited in a vacation bank which would fund paid vacations for contingent workers.

5. *Establish a legal right to free time and choice of hours.* Employees should not be penalized in terms of recruitment, promotion or retention because they may want to reduce their hours. The government needs to guarantee the "right to free time" to its citizens, just as it tries to guarantee equal opportunity. Therefore, companies should be prohibited from discriminating against employees who express a desire to limit their hours (i.e., those employees who refuse to work nights and weekends, and who request job sharing or reduced hours). Promotion, recruitment, and retention should be based on job performance and not hours preferences. Employees who are so discriminated against on these grounds would be entitled to sue their employers in the federal courts.

CONCLUSION

Worktime has been ignored as a public policy issue since the 1930s, when schemes to create jobs through worktime reduction were

87. SCHOR, *supra* note 4, at 32-34, 82.
88. *Id.* at 33-34.

very popular. The "30-hour workweek for 40 hours' pay" proposal which had a real shot at passage was the last shorter hours legislation in this country. The *Fair Labor Standards Act* ended up having the effect of lengthening hours rather than reducing them. And, by ignoring crucial aspects of worktime, such as vacations, it eventually left U.S. workers far behind their counterparts in Western Europe. The Clinton Administration has studiously ignored the worktime issue, despite its campaign refrain that "Americans are working longer for less." Nevertheless, the combination of persistent unemployment and pervasive time deprivation, particularly among families, suggests that a public policy response is long overdue.