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THE OVERWORKED CANADIAN?

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INTRODUCTION

Juliet Schor's paper, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*,[1] builds upon and carries forward the themes and arguments developed at length in her widely read and admired book *The Overworked American*.[2] The paper does this by enlarging upon a specific set of proposals suggested in that book for reform of the *Fair Labor Standards Act*.[3] My role in commenting upon this paper is to bring to bear the perspectives of a Canadian labor lawyer. Thus I am an outsider in two senses: first, as a lawyer commenting upon the work of an economist; and second, as a Canadian commenting on American data and proposals for legal reform. There is danger in asking outsiders to comment upon domestic affairs. It is reported that an American news reporter once asked Ghandi what he thought of Western civilization. Ghandi is reported to have replied that he thought it would be a very good idea. I will not be as bold as Ghandi in my assessment and will simply attempt to bring to bear Canadian experience and Canadian law as a focus for comparison. I will also offer some general comments on an idea fundamental to Schor's paper—that is, the idea that meaningful workplace reform can be achieved through general statutes such as the *Fair Labor Standards Act*.

I do think it is extremely important to see Schor's paper on the *Fair Labor Standards Act* as a specific addendum to the work contained in her book. For this reason I intend to review the basic structural arguments of the larger work prior to setting out the specific proposals for law reform contained in the paper. Then I will draw attention to Canadian parallels to, or divergencies from, the empirical and legal realities Schor describes. The concluding section will address the general issue of the efficacy of the sort of reform which Schor proposes.

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1. Juliet B. Schor, *Worktime in Contemporary Context: Amending the Fair Labor Standards Act*, 70 CHI.-KENT L. REV. 157 (1995).

2. JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE (1992) [hereinafter OVERWORKED AMERICAN].

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

I. THE OVERWORKED AMERICAN—THE GENERAL STRUCTURE OF SCHOR'S ARGUMENT

Schor's book is a great read. It hits home for many of us because it speaks to something we all know to be true and perhaps especially those of us who work in the legal profession. Our profession is struggling with an addiction to long hours of work and the impact of that reality upon the lives of lawyers, especially young lawyers, and even more especially young women and those thinking of raising a family. Many of us are directly or indirectly familiar with this professional reality. What Schor shows us is that this world is a very common one, not only to those of us in the legal profession, but to those in the workforce in general.

As I see it, the book has the following three part structure. First, through an impressive empirical analysis the book gives detailed shape to the intuition we all share, that our jobs are beginning to crowd out the rest of our lives. The central claim here is that over the past 20 years the amount of time Americans have spent at the job has risen steadily contrary to expectations, theory, and experience elsewhere.[4] The most startling figure is that between 1969 and 1987 full-time employees increased their working time, on average, by 163 hours per year, *or more than one more month per year*.[5] While there has been some increase in the hours which each full-time labor force participant has worked per week, much of the increase is due to the fact that more weeks are being worked per year.[6] The other key empirical points made by Schor in the book are, for our purposes, two-fold. This increase in working hours for those actually working in paid employment on a full-time basis comes at a time when we have continuing high unemployment and underemployment.[7] This double phenomenon of a large number of people underemployed or unemployed at the same time as we have an increasing number of hours for those employed, is the most stark presentation of the problem which Schor is addressing. The third key empirical point which Schor makes is really the ace up her sleeve. She notes that in a 1985 survey about one-third of the working population would trade *existing* income—that is, take a drop in pay—in order to attain shorter hours.[8] This is a re-

4. The key numbers appear in Tables 2.1 and 2.2 of the book. OVERWORKED AMERICAN, *supra* note 2, at 29-30.
5. *Id.* at 29.
6. *Id.*
7. *Id.* at 39.
8. *Id.* at 129.

markable statistic. But then Schor goes a great deal further. Relying upon important research often overlooked by economists, she re-establishes that there is a striking difference between what people are willing to give up to get something, as opposed to what future gains they are willing to forego to get the same thing. The idea here is that if you ask people not what percentage of their current pay they are willing to give up for shorter hours, but rather what they would forego in terms of future earnings, one comes up with some truly remarkable figures. Schor reports that 84% of the population would like to trade off some or all of their future income for additional free time.[9] Nearly half said that they would trade all of a 10% pay raise for more free time.[10] These are very interesting numbers indeed.

The second component of the book, and the project of the book, is to explain these phenomena. This is the theoretical and ethical center of the book, and here Schor makes considerable advances. Schor deploys technical, and sometimes technical/legal arguments, but more importantly, she stakes out some very broad theoretical claims about the imperatives of capitalism in modern consumer society to explain the empirical reality she has revealed. It is surely one of the great accomplishments of Schor's work that the author is able to deal both at the level of technical detail and, at the same time, at a broad theoretical level with legal, psychological, and sociological as well as numerous economic literatures.

The third fundamental element in the structure of the book is a set of proposals for a way out of the bind in which we find ourselves. This takes the form of a number of specific proposals for legal and social reform.

In order to appreciate the specific proposals for reform, however, it is necessary to set out in some greater detail the central arguments Schor sets forth in the second section of the book, that is, the explanation of the phenomenon of the overworked American. I think this central portion of the work is understood best in terms of the following matrix. What Schor has done is to explain both the supply side and the demand side of the increased hours phenomenon. Put more simply, and in language more customary for a labor lawyer, what Schor has done is given us an account of employee thinking and employer thinking which would explain the rise in working hours. Within each of these two sides of the matrix she has offered technical and

9. *Id.*
10. *Id.*

detailed arguments as well as broad theoretical insight. She works both sides of the matrix with equal ability. In the end her central claim is to have revealed the "logic" or "immanent rationality" of the modern U.S. version of capitalism from an employer's point of view, while at the same time unpacking the "logic" or "immanent rationality" of capitalism when combined with North American consumerism, from an employee's point of view. This focus on large and structural issues forces Schor, in the end and correctly so, to confront some of the central dilemmas of modern democratic capitalistic society. The largest of these issues is, in my view, the debate over the proper relationship of politics and the market. That is, what is the proper domain and scope of market ordering, particularly the market for labor? This issue she confronts most bluntly, in what I think is perhaps the key sentence in the book. In attacking certain advocates of pure market ordering, she writes that they "have forgotten that the point of economic success is to make possible a good life. To impair the quality of life *in the name* of economic success is foolhardy."[11] What Schor has put a finger on here is the immortal question posed, among others, by Polanyi in his famous work *The Great Transformation*—is society to be subordinated to the market, or is it to be the other way around?[12]

What then are Schor's contributions in unravelling the "inner logic of capitalism" that would explain the drive for longer hours? The major contributions, as I see them, are as follows. Schor's first and fundamental point is that under capitalism workers do not sell labor, but rather labor power, or time. As she strikingly puts it—time has become a commodity.[13] Her next point is that the labor market is a buyer's market.[14] Economic models assume full employment, yet we endure chronic high levels of unemployment and there are obvious incentives in the system for employers to maintain less than full employment. This produces an "inequality of bargaining power", which employers are able to use, in the absence of countervailing power (in the form of unions, for example), to maintain the drive to longer hours.[15] In a world of unemployment a worker has a strong incentive to keep his or her job because employers have made it more valuable. This is the concept of "employment rent."[16] While the impact of this

11. *Id.* at 154.
12. KARL POLANYI, THE GREAT TRANSFORMATION (1975).
13. OVERWORKED AMERICAN, *supra* note 2, at 139.
14. *Id.* at 39, 71.
15. *Id.* at 126.
16. *Id.*at 65.

high "employment rent" is to increase productivity, there is also a strong incentive to increase workers' hours as opposed to sharing work among others. Schor agrees that sharing work, and thus reducing unemployment, would have the effect of undermining the structural advantage which employers currently enjoy in the labor market. If a move to shorter hours was successful, then the pool of unemployable would be smaller and employers would lose market power. Schor perceives this "powerful consensus among business, government and the economics profession."[17]

In addition to this basic structural point, Schor lists a number of more concrete and current employer incentives to have existing workers work longer hours, rather than hire more workers. Here, Schor points to the role of fringe benefits in assigning longer hours to existing workers as opposed to hiring new workers.[18] Many fringe benefits are paid on a "per person" basis and thus represent a fixed cost. Of particular importance is the cost of health care in the U.S. (as opposed to Canada). She then notes that certain governmentally administered programs have low ceilings on employer contributions so that once a worker works a fixed number of hours no additional employer contributions are demanded.[19] This structures a very significant incentive to increase the hours of existing employees rather than to hire new employees and face the prospect of paying the employer contributions twice instead of once. In addition, other fixed costs, such as training, have a similar impact. The increase of salaried rather than hourly paid employment has expedited an employer's ability to demand and receive longer hours.[20] The "down turn" in the economy in the 1980s led many employers to "downsize", which meant shifting the same amount of work onto fewer people.[21]

I turn now to Schor's analysis of the supply side of the longer hours predicament—that is, the employees' point of view. Schor's first point is that we must keep our eye on other related and important background phenomena. She reminds us first of the drop in real pay which workers in America have suffered, particularly over the decade of the 1980s and second, of the diminution of union power and influence as well as the lack of other political organizations in favor of

17. *Id.* at 76.
18. *Id.* at 66.
19. *Id.*
20. *Id.* at 68.
21. *Id.* at 80.

shorter hours.[22] Her book also develops at length the rise of two income families and the resulting impact upon work in the home.[23] However, Schor's most important contribution comes, in my view, in Chapter 5 which is entitled "The Insidious Cycle of Work-and-Spend."[24] Here we arrive at the spiritual center of the book, if I may put it that way. The central idea here is that happiness must consist in liking what you have, not in aspiring to get what you do not already have. Schor is of the view that there is an insatiable appetite for spending (getting what we haven't got), which is a "specific product of capitalism."[25] Schor further maintains that this insatiable appetite is not a natural instinct. What Schor points to is that the phenomenon of consuming and "keeping up with the Jones' " puts consumers in what game theorists would describe as a "prisoner's dilemma."[26] Everyone would be better off if he or she did not engage in this sort of competitive consumerism. But it is very difficult for any individual to disengage from this rat race. (So too, everyone in the office would be better off if they did not compete with each other for longer hours.) That is, in modern America, the socially optimal is not being obtained by relentless pursuit of self-interest. What is required to solve any prisoner's dilemma are channels of agreement and co-operation.

The central point Schor wishes to make is that the supply and demand side merge to produce the phenomenon of longer and unwanted hours of work.[27] The obvious idea here is that employers have incentives to structure longer hours, and also desire consumers for their products. Workers, as consumers, on the other hand, are drawn into the cycle of "work and spend," and as workers have proved unable to establish the collective mechanisms to break out of the resulting spiral toward longer hours. This, it will be recalled, is in the teeth of the data which establishes that a large majority of American workers wish to trade off some or all of their future income for additional free time. When pressed with the obvious question, "why don't employees simply bargain to trade off future earnings for greater free time?" Schor has provided the answer. Employees lack bargaining power and, even if they had it, are locked in a prisoner's dilemma or

22. *Id.*
23. *Id.* at 24-28.
24. *Id.* at 107-38.
25. *Id.* at 117.
26. *Id.* at 124.
27. *Id.* at 121.

collective action problem from which it is difficult for individuals to emerge.

This brings us to the third of Schor's major contributions in which she proposes a variety of ways out of this squirrel cage which we have created for ourselves. It comes as no surprise that the answers to our dilemma consist in altering both the employer (the demand side) and the employee (supply side) incentives to longer hours. It also consists in providing, legislatively, for the collective route out of the prisoner's dilemma she has described. It is this agenda for reform which Schor pursues in her paper on the *Fair Labor Standards Act* (FLSA).[28]

In her paper Schor describes the history of the FLSA and concludes that it was not designed to be and should not be understood as a "shorter hours bill."[29] The Act did not, and does not, establish maximum hours, but rather establishes what was supposed to be a financial disincentive to longer hours—the "time and one-half" overtime premium for hours worked beyond 40 in a week.[30] This bit of legislative engineering backfired, however, as workers (especially men) became "addicted" to the overtime premium.[31]

To get over the basic structural barriers to shorter hours, Schor proposes five specific amendments to the legislation. First, reduce the 40-hour workweek (without loss of pay) and eliminate the time and one-half overtime premium.[32] Second, require employers to permit employees to trade wages for time off.[33] Third, extend coverage of the FLSA to a larger portion of the workforce.[34] Fourth, require a four week paid vacation for all workers.[35] Fifth, create a legal right to free time and choice of hours.[36]

These proposals for legislative reform are not offered in minute detail and some, most clearly the last, are very sketchy proposals. They remain a long way from the drafting stage. Thus, rather than address the proposals inappropriately at a level of detail, I concentrate

28. 29 U.S.C. §§ 201-209.

29. Schor, *supra* note 1, at 164.

30. 29 U.S.C. §§ 201-209.

31. Schor also notes the "mirage" of the overtime premium. In her view, the empirical evidence establishes that when firms and workers come to rely on overtime premiums there is a negative impact on the base rate. Thus, the premium is an illusion in that it comes at the expense of basic wages. OVERWORKED AMERICAN, *supra* note 2, at 144.

32. Schor, *supra* note 1, at 167.

33. *Id.* at 168.

34. *Id.* at 170.

35. *Id.* at 171.

36. *Id.*

on what might be learned at a general level from the Canadian experience with such proposals.

II. THE CANADIAN EXPERIENCE

Canada should provide an interesting point of comparison for Schor's reform agenda. Canada and the United States share legal and economic cultures which are sufficiently similar to make comparisons realistic and meaningful. On the other hand there is sufficient divergence in regulatory policy regarding the labor market to view Canada as something of an experimental laboratory for at least some of Schor's ideas.

I must begin with a technical footnote that under Canada's version of federalism, regulation of labor relations and labor law are primarily and fundamentally matters for the provinces and not for the federal government. While there are broad similarities in the labor laws of the various provinces, particularly regarding collective bargaining law, there are vast differences in details regarding hours of work regulation across the country. As a result it is impossible to give a brief and, at the same time, systematic view of Canadian law.[37] I have instead chosen to use the law of Ontario, Canada's largest, most populated, and disproportionately economically important province as an example. This strategy has the added benefit of letting me speak of the law of the province in which I live and work as a labor law academic. In addition, it is in Ontario that the issue of hours of work has been most studied in ways relevant to the problems which Schor raises.

Hours of work has been, and is today, an issue of ongoing importance in Ontario and Canada. In 1987, an Ontario Task Force on Hours of Work and Overtime published a lengthy report on this subject.[38]

What is the Canadian reality? Could one write a book entitled the Overworked Canadian? If not, is this attributable in some way to

37. See INNIS CHRISTIE ET AL., EMPLOYMENT LAW IN CANADA 187-427 (2d ed. 1993), for detailed treatment.

38. ONTARIO TASK FORCE ON HOURS OF WORK AND OVERTIME, WORKING TIMES: THE REPORT OF THE ONTARIO TASK FORCE ON HOURS OF WORK AND OVERTIME (1987) [hereinafter ONTARIO TASK FORCE]. The federal government has also established, this year, another task force on hours of work. Its recently released report entitled WORKING TIME AND THE DISTRIBUTION OF WORK does not, in my view, add to or differ from the earlier Ontario Reports data or analysis in a substantial manner. ADVISORY GROUP ON WORKING TIME AND THE DISTRIBUTION OF WORK, REPORT OF THE ADVISORY GROUP ON WORKING TIME AND THE DISTRIBUTION OF WORK (1994).

Canada's different labor law regime regarding hours of work? Does that regime incorporate the sorts of reforms which Schor proposes? The answers to these complex questions require careful development. In what follows I offer a brief and sketchy account of the sort of answers one might expect.

A. The Overworked Canadian?

There is, as I have indicated, anecdotal support, especially among members of the legal profession, for the thesis that Canadians are as overworked as Schor believes their American counterparts to be. But does the Canadian data support the sort of dramatic conclusions drawn by Schor to the effect that over the past 20 years full-time workers in the United States have increased their work load to the tune of one month per year? As far as I can detect there is no systematic support for a Canadian counterpart to Schor's startling conclusion.

The common view in Canada is that by 1960 the "standard workweek" had fallen from 64 hours per week in 1870[39] to 37-40 hours over five days.[40] Almost all reductions in weekly hours occurred by 1960 when the standard workweek levelled off and stabilized. It is the case that while the standard workweek has stabilized, two other phenomena have taken hold. First, during the period since 1960:

> [P]aid holidays and vacation time increased so that standard weekly hours continued to decline at the historical trend rate of about two hours weekly per decade. In other words, the downward trend in hours of work continued its historical decline but simply changed its form, from a declining workweek to increased holiday and vacation time.[41]

39. ONTARIO TASK FORCE, *supra* note 38, at 13.

40. Deborah Sunter & René Morissette, *The Hours People Work*, PERSP. ON LAB. & INCOME, Autumn 1994, at 8.

41. ONTARIO TASK FORCE, *supra* note 38, at 13.

This latter claim is supported by the following table:

TABLE 1[42]
HOLIDAYS AND VACATIONS IN ALL INDUSTRIES
(OFFICE AND NON-OFFICE COMBINED)

Year	Holidays (days per year) weighted average	Vacations (weeks per year) weighted average
1965	8.65	2.93
1966	8.76	2.96
1967	8.75	2.98
1968	8.99	3.03
1969	9.24	3.06
1970	9.47	3.10
1971	9.60	3.18
1972	9.73	3.28
1973	9.87	3.34
1974	9.96	3.41
1975	10.38	3.50
1976	10.53	3.54
1977	10.60	3.59
1978	10.73	3.62
1979	10.86	3.63
1980	10.97	3.71
1981	11.09	4.19
1982	11.10	4.26
1983	11.10	4.29
1984	11.12	4.30
1985	11.09	4.27

Second, while the standard workweek has stabilized, it is true that fewer people are working it. More people are working shorter hours, i.e., part-time, and more people *are* working longer hours. There is in Canada a phenomenon of a "declining middle," that is, a decline in the number of people working the standard workweek and an increase on both sides of that norm. The greatest impact is that caused by workers working *less* than the standard workweek, i.e., part-time workers. In Canada about 60% of jobs created in 1993 were part-time jobs, and since 1975 the number of part-time workers has more than

42. Chan Aw, *A Statistical Supplement to the Standard Hours of Work Study*, LAB. CANADA, Sept. 1986, *reprinted in* PREM BENIMADHU, COMPENSATION RESEARCH CENTRE, HOURS OF WORK: TRENDS AND ATTITUDES IN CANADA 5 (1987).

doubled, representing a shift from 11% to 17% of total employment.[43] However, a lot of part-time work is involuntary. The proportion of part-time workers who would prefer to be full-time has risen from 11% in 1975 to 35% in 1993.[44] The impact of increased part-time employment can be seen in the overall reduction of average hours worked per week as illustrated by the following table:

TABLE 2[45]
AVERAGE ACTUAL HOURS WORKED PER WEEK

Year	Average Hours Worked (all jobs)
1966	39.3
1967	39.1
1968	38.2
1969	37.8
1970	37.3
1971	37.1
1972	37.1
1973	36.9
1974	36.9
1975	36.0
1976	35.4
1977	35.4
1978	35.7
1979	35.7
1980	35.1
1981	34.6
1982	34.4
1983	34.5
1984	34.5
1985	34.8

43. Nathalie Noreau, *Involuntary Part-Timers*, PERSP. ON LAB. & INCOME, Autumn 1994, at 25.

44. *Id.*

45. BENIMADHU, *supra* note 42, at 5; STATISTICS CANADA, LABOUR FORCE ANNUAL AVERAGES: 1975-83, at 279-87 (1984); STATISTICS CANADA, THE LABOUR FORCE: DECEMBER 1984, at 118 (1985); STATISTICS CANADA, THE LABOUR FORCE: DECEMBER 1985, at 112 (1986).

The overall "hour glassing" effect of both of these changes (i.e. increased shorter hours (part-time) and increased longer hours) can be grasped from the following table:

TABLE 3[46]
THE DISTRIBUTION OF ACTUAL* WORK TIME, CANADA, 1976-1992

(number of workers in the thousands)

	1976	1985	1990	1992
Part-time (1-29 hours)	1,483	2,101	2,358	2,475
(% of total)	16.9	19.5	20.3	21.4
Full-time (30-49 hours)	6,151	7,051	7,399	7,278
(% of total)	69.9	65.3	63.6	63.0
Full-time (50 or more)	1,164	1,640	1,868	1,801
(% of total)	13.2	15.2	16.1	15.6
Total	8,798	10,792	11,625	11,554
Total Persons**	9,477	11,339	12,248	12,150

* Refers to total of all hours worked at all jobs in reference week, i.e., actual hours worked.
** Total persons includes people working 0 hours in reference week.

These figures are, however, rather crude because the middle category of full-time workers spreads over a large range of 30-49 hours per week. Other and more recent data help quantify the change in the distribution of those working the standard workweek. In 1976, 71% of paid workers put in 35-40 hours per week.[47] But in 1993 this percentage had dropped to 61%.[48] A large portion of this change is attributable to the use of part-time employment as shown in the following table:

46. STATISTICS CANADA, LABOUR FORCE ANNUAL AVERAGES: 1975-1983, at 262 (1984); STATISTICS CANADA, THE LABOUR FORCE: DECEMBER 1985, at 52 (1986); STATISTICS CANADA, THE LABOUR FORCE: DECEMBER 1990, at B-34 (1991); STATISTICS CANADA, THE LABOUR FORCE: DECEMBER 1992, at B-35 (1993).
47. Sunter & Morissette, *supra* note 40, at 10.
48. *Id.*

TABLE 4[49]
DISTRIBUTION OF EMPLOYEES BY USUAL WEEKLY HOURS WORKED AT MAIN JOB, 1976 TO 1993 (SELECTED YEARS)

		Usual Weekly Hours			
		1-34	35-40	41 and over	Average Hours Worked
1976		16	71	13	37.6
	Youths	24	66	10	34.9
	Adult men	4	77	19	41.1
	Adult women	28	66	6	34.1
1981		18	69	12	36.9
	Youths	28	62	10	34.0
	Adult men	4	77	18	40.8
	Adult women	30	64	5	33.6
1984		21	67	13	36.5
	Youths	35	55	9	32.4
	Adult men	5	75	19	40.8
	Adult women	30	64	6	33.6
1989		21	65	14	36.6
	Youths	40	51	10	31.5
	Adult men	5	73	21	41.1
	Adult women	29	63	7	34.2
1993		24	61	14	36.0
	Youths	51	40	8	28.7
	Adult men	8	70	22	40.8
	Adult women	31	61	8	34.0

Source: Labour Force Survey. Note: Youths: 15-24 years; adult men and women: 25 years and over.

As these figures indicate, there has been an increase in the number of people working longer hours among adult men (19% worked 41 hours or more per week in 1976, rising to 22% in 1993) and adult women (an increase from 6% to 8% over the same time period). However, the percentage of adult men and adult women working shorter hours over the same periods also increased.

All of this suggests that the phenomenon of increased hours for full-time employees is comparatively more concentrated among a smaller group of Canadian workers. This rough judgment is substantiated by more detailed findings by the 1987 Ontario Task Force. Data

49. *Id.*

compiled for that Task Force and covering the period 1975-85 is set out in the following table. It should be noted that the prime impetus for the establishment of the Task Force was the notion that high overtime rates could be, with proper redistributive policies, transmuted into lower unemployment rates. As the Task Force put it:

> The immediate impetus for the Task Force was that substantial amounts of overtime appeared to exist at the same time that other workers were unemployed or on layoff, often in the same establishment. There was the hope that restricting the amount of overtime work done by some workers would lead to new-job creation for others.[50]

The Task Force found that the average overtime per worker in Ontario was one hour per week.[51] However, the distribution of this overtime was very uneven and heavily concentrated with most workers working no overtime and 13% of the workforce averaging above 8 hours of overtime per week on a regular basis.[52] The basic data uncovered by the Task Force is reflected in the following table:

TABLE 5[53]
PER CENT OF WORKFORCE AVERAGING SHORT AND LONG HOURS, ONTARIO, 1975-1985

	Per Cent of Workforce Averaging					
Year	1-29 Hours	Over 40 Hours	Over 44 Hours	Over 48 Hours	Average Weekly Hours	Unemployment Rate (%)
1975	14.8	20.6	15.3	9.0	37.1	5.9
1976	15.9	18.8	14.3	8.4	36.5	6.0
1977	16.1	19.4	14.6	8.8	36.6	6.8
1978	14.9	20.5	15.6	9.4	37.2	6.9
1979	15.3	21.1	16.1	9.9	37.4	6.2
1980	16.0	20.3	15.3	9.6	36.9	6.6
1981	17.1	19.7	14.9	9.3	36.4	6.3
1982	18.0	19.0	14.6	9.3	36.3	9.7
1983	17.9	21.1	16.4	10.6	36.6	10.3
1984	17.6	22.2	17.5	11.1	36.8	8.8
1985	17.5	22.6	17.8	11.4	36.9	7.8

Source: Reid (1987a, Table 5 and appendix tables). The original data source was unpublished tabulations from Statistics Canada's Labour Force Survey.

50. ONTARIO TASK FORCE, *supra* note 38, at 1.
51. *Id.* at 5
52. *Id.*
53. *Id.* at 15.

Thus, in 1985, 22.6% of the total workforce averaged more than 41 hours per week, 17.8% more than 44 hours per week, and 11.4% more than 48 hours per week. While the increase in those working longer hours was "pronounced"[54] between 1956 and 1985 (a 20% increase in those working more than 40 hours), the absolute percentages are relatively low—about 1 in 5 workers work more than 40 hours per week. Those who worked longer hours did so regularly. The Task Force found that "[o]verall the bulk of long hours is in the managerial/professional and processing occupations and, to a lesser extent, the sales and service occupations."[55] The managerial/professional group accounted for 38.3% of those working over 40 hours and 44.3% of those working more than 48 hours.[56]

How does this compare with Schor's data? Schor's claims seem to be much more dramatic and profound. She writes that "[i]n 1990 one-fourth of all full-time workers spent forty-nine or more hours on the job each week. Of these, almost half [1/2 of 25% = 12.5%] were at work sixty hours or more."[57]

One difficulty here is that Schor's figures are expressed as percentages of full-time workers. Much of the data I have referred to is not so expressed. However, the Canadian data contained in Table 4 above on the degree of departure from the standard workweek (defined as 37-40 hours per week) indicates that 22% of men work longer hours and 8% of women. Rough estimates from the data from Table 5 indicate that in 1985 about one-half (i.e. 11% or so) of those working longer hours worked fewer than 48 hours, and one-half (11%) more than 48 hours per week. There is no data collected on those working more than 60 hours. Nonetheless, the data would suggest, *prima facie*, that conclusions approximately *one-half as dramatic* as Schor's are justified in Canada. That is, on a rough conversion to consider only full-time workers, 13.8% or so work more than 48 hours in Canada as compared with 25% working 49 hours or more in the United States.

On the other hand, much else about the story which Schor relates concerning American workers is true in Canada. For example, during the 1980s and 1990s "virtually no growth has occurred in the real wages of full-time, full-year workers."[58] But, as we have noticed, va-

54. *Id.* at 14
55. *Id.* at 17.
56. *Id.* at 17, 18 (see chart).
57. OVERWORKED AMERICAN, *supra* note 2, at 30.
58. Sunter & Morissette, *supra* note 40, at 11 (more accurately, the real wages of males dropped and the real wages of females increased resulting in an overall record of no growth).

cation and holiday entitlements have increased during this period.[59] Moonlighting is another phenomenon to which Schor has drawn attention. According to her data in 1989 about 6% of the employed reported two or more jobs, but she adds that the real number is perhaps twice as high when one takes into account the impact on reporting rates of tax evasion, illegal services, and employer disapproval of second jobs.[60] In Canada the numbers seem to be very similar. From 1977-93 the "official" percentage of Canadian workers engaged in moonlighting rose from 2.5% to 5%, one-half of whom are women.[61]

Other aspects of the Canadian reality also fit with Schor's description. Fringe benefits in Canada are, in general, paid on a per person basis and not pro-rated to hours worked. This structure results in the same set of incentives from employers to increase the number of hours of those already working, which Schor notes to be an important contribution to the long hours phenomenon in American life. In addition, social programs in Canada (such as unemployment insurance and workers compensation) which require employer contributions are typically tied to a fixed ceiling per employee. Further, the Ontario Task Force has made the same point as Schor concerning the results of these low ceilings.[62] It must be kept in mind, however, that in Canada health care is not a payroll item. The universal scheme of health care is paid from general government resources.

Perhaps most crucial, in light of what I have to say below, union density rates have not fallen in Canada as precipitously as they have in the United States. Union coverage has fallen everywhere in the United States, including in its "traditional bastions."[63] Current estimates put American union coverage at about 12% of the workforce.[64] By comparison, "there has been virtually no decline in overall union density in Canada in recent years."[65] It remains at about 37%.[66] There has been some debate in Canada about the extent to which significant unionization rates in the public sector mask a decline in the

59. *See supra* p. 182, table 1.

60. OVERWORKED AMERICAN, *supra* note 2, at 31.

61. Gary L. Cohen, *Ever More Moonlighters*, PERSP. ON LAB. & INCOME, Autumn 1994, at 31.

62. ONTARIO TASK FORCE, *supra* note 38, at 77-78.

63. PAUL C. WEILER, GOVERNING THE WORKPLACE 9 (1990).

64. Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 758 (1994).

65. *See* Noah Meltz & Anil Verma, *Developments in Industrial Relations and Human Resource Practices in Canada: An Update from the 1980s*, *in* EMPLOYMENT RELATIONS IN A CHANGING WORLD ECONOMY (Thomas A. Kochan et al. eds., forthcoming 1994) (manuscript at 4, on file with author).

66. *Id.* at 17.

private sector rates. While it is true that private sector union density has declined in Canada, this decline was "much less precipitous" than that in the United States.[67]

B. Canadian Law

Thus, while Canada and the United States share many common phenomena in their labor market features, there are differences. For our purposes, the most significant difference is that, at least at first glance, while there has been an increase in long hours worked in Canada, it does not seem to have been as dramatic as in the United States. Can this difference be attributed to Canadian law or other differences in Canadian labor market regulation?

First and foremost, Ontario law *does*, unlike American law, provide for a statutory maximum number of hours of work.[68] The *Employment Standards Act*'s predecessor legislation was the *Factories Act of 1884*, which limited hours of work for women and youth to ten hours a day and sixty hours a week.[69] In 1941, the *Hours of Work and Vacation With Pay Act* reduced the maximum number of hours for all employees to eight a day and forty-eight a week.[70] This is the statutory maximum which remains the law in Ontario. The statutory maximum number of hours a day and the number of hours a week is made legislatively concrete by, among other things, expressly creating for all workers the individual right to refuse hours over eight a day and forty-eight a week.[71] Flexibility for employers and workers was built into the system, however, through what has evolved into a complex system of permits issued by the administrative agency charged with the task of implementing and enforcing the legislation, the Employment Standards Branch of the Ministry of Labor.[72] There are three types of permits—annual permits allowing 100 excess hours of work for each worker in a year which are issued virtually "automatically;"[73] industry permits for certain industries usually operating on a twenty-four "hour round-the-clock' basis;[74] and special permits for extraordinary situations.[75] The permits, however, merely allow the worker and the em-

67. *Id.*
68. Employment Standards Act, R.S.O., ch. E.14 (1990) (Can.), *as amended.*
69. *See generally* ONTARIO TASK FORCE, *supra* note 38, at 24.
70. *Id.*
71. *Id.*
72. *Id.* at 27.
73. *Id.* at 25.
74. *Id.* at 36.
75. *Id.* at 37.

ployer to agree to longer hours—the employee still has the right to refuse hours beyond eight a day and forty-eight a week.

Ontario does have an overtime premium of time and one-half. This premium is payable after forty-four hours a week, and not per day.[76] Ontario also requires annual two week vacations with pay for all workers[77] and by statute provides for eight paid statutory holidays.[78]

The administration of the *Employment Standards Act*,[79] which contains these entitlements and sets out the administrative procedure for their enforcement is, from the employee's point of view, "cost free." Investigators from the Employment Standards Branch investigate and carry forward employee complaints. Court enforcement is not part of the Canadian system.

Canada has thus enacted some of the reforms suggested by Schor. I am not suggesting that Canada has enacted any of the particular reforms that Schor has just outlined in her paper on the *Fair Labor Standards Act*. Indeed, I do not think that Canada has enacted any of these proposals in the exact form in which she suggests. The point is, however, that Canada has some significant differences in its labor law regarding hours of work and these differences address some of the general problems Schor raises in her work. Most dramatically, in Canada, there is a statutory right to refuse longer hours.

It may be tempting, then, to attribute the difference in the Canadian experience to these differences in Canadian employment standards law. Furthermore, a thrust of Schor's paper is that by rewriting general labor market statutes, such as the *Fair Labor Standards Act* in America, or the *Employment Standards Act* in Ontario, one can achieve workplace reform of the sort Schor is promoting. This is not an obvious proposition.

Let me explain these remarks which are directed to the general thrust of Schor's reform proposals, not to their detail. The question, which is central to Schor's reform proposals, is whether life in the workplace can be improved to any great extent through the passage of amendments to the *Fair Labor Standards Act* or such statutes.

The first problem is that such statutes are well known for their incomplete coverage. The Ontario Task Force noted that only one-

76. R.S.O., ch. E.14, § 17.
77. *Id.* § 28.
78. *Id.* § 25.
79. *Id.* §§ 59-75.

half of those working overtime hours were covered by the Ontario legislation.[80] Indeed, this is one of Schor's major points about the need for reform of the legislation. Its coverage should be greatly expanded to cover more of those who are working long hours. But even if these reforms were undertaken, we would still be left with a more fundamental dilemma of workplace regulation.

Let me begin my description of this dilemma by noting that, for labor lawyers, analysis begins with the insight that there are three legal regimes governing workplace relations. The first regime is the common law of the employment relationship.[81] The second regime is that of collective bargaining. The third regime is that of direct statutory intervention, such as that contained in the *Fair Labor Standards Act* in the United States and the *Employment Standards Act* in Ontario. While from an analytical point of view this "three regimes" analysis is impeccable, it turns out that from a pragmatic "real world" point of view, life is more complicated.

The third regime, the regime of "direct statutory intervention" turns out not to be a regime of labor market regulation at all. Put simply, the *Employment Standards Act* in Ontario is not an independent mechanism for regulating *ongoing* relationships between employers and workers. As the Ontario Task Force put it, "[n]oncompliance with long-hours provisions appears to be prominent in Ontario."[82] This has been attributed to a number of factors. For a labor lawyer, however, one reason is glaringly obvious. Individual workers are not well situated to exercise statutory rights, even the very explicit statutory rights to refuse long hours set out in the Ontario *Employment Standards Act.* They are not in a position to enforce such rights for the very reason that such rights were thought to be legislatively required in the first place. This is not a difficult insight. The belief which underlies enactment of the *Fair Labor Standards Act* and the *Employment Standards Act* is that which animates all of our labor law—the belief that individual workers in most labor markets are not in a position to obtain basic and just workplace entitlements known as

80. ONTARIO TASK FORCE, *supra* note 38, at 5.

81. Here there are large differences between Canadian common law and American common law. Canada has never known, for example, the "at will" doctrine. Employees dismissed without cause are entitled to "reasonable notice" or "pay in lieu" of that notice from their employer. For employees with a few years of seniority, this will amount to several months of salary payment. For employees with some years of seniority, notice periods of one year are extremely common. In cases of extremely lengthy seniority, notice periods of 18-24 months are not known. See CHRISTIE, *supra* note 37, for other important differences.

82. ONTARIO TASK FORCE, *supra* note 38, at 6

"terms and conditions of employment." As controversial as this may appear to some, there is no doubt that as a matter of social reality this is the motivating factor behind such legislation.

But passage of legislation such as the *Employment Standards Act* merely pushes this problem back one stage. The problem now becomes, who will have the power to *enforce* new statutory rights? As it turns out, and not surprisingly, *statutory* rights are, in Canada, most effectively exercised by *unionized* workforces. That is, the "third" regime turns out to be ineffective unless coupled with the second regime of collective bargaining. Unorganized workers overwhelmingly make use of employment standards entitlements only after they have been dismissed from employment. It is for these workers a post-employment set of entitlements. The *Employment Standards Act* is not an ongoing regime of labor market regulation for non-unionized employees while they are employees. This phenomenon is well documented in Canada in connection with a number of statutory regimes and is given its best expression and documentation by Roy Adams in his study of the *Employment Standards Act* in Ontario.[83] As Adams reported, "very few regular employees ever file employment standards grievances . . . . Instead, the great majority of complaints are filed by people who have left the employer against whom the complaint is filed . . . . [T]he Employment Standards Branch is primarily a collection agency."[84] This is true in spite of the strong protection provided by the Act to complaining employees who are the victims of employer retaliation.[85]

The basic lesson is that statutory non-compliance is regular and that statutes are effective only if workers are empowered independently to enforce them. What lessons should we draw from these Canadian conclusions? Given the brevity of the analysis presented here perhaps not more than the notion that more work needs to be done. What is hinted at here is, however, a seemingly large and obvious truth. The labor relations and labor system of a state is a system—a system in which the parts are interrelated, are reinforced by and in return reinforce other parts, and in which the components make sense only when considered in a systemic way. It is *not* an accident that Canada is a country with both the sort of direct statutory entitlements Schor advocates *and* a less moribund collective labor law regime. The

83. Roy J. Adams, *Employment Standards in Ontario: An Industrial Relations Systems Analysis*, 42 REL. INDUSTRIELLES 46 (1987).

84. *Id.* at 51.

85. This protection includes reinstatement.

political culture which creates such statutes is the same culture which has sustained a more vibrant collective labor law reality. And the effectiveness of those statutes depends upon the same forces. And so on. The lights of labor law reform do not turn on to full intensity one at a time. Rather, as one philosopher said, "[l]ight dawns gradually over the whole."[86]

This point must, however, be kept in perspective. More specifically, it is a point which is at least implicit in *The Overworked American*. In fact, one of Schor's main contributions is to emphasize that overwork is a complex social, cultural, and economic problem. It will not be cured by a wave of the legislative pen. This is not to say that reform advocacy of the sort Schor undertakes in her paper is headed in the wrong direction. I do not believe that at all. The point is that such efforts must be seen as part of a larger project. And when law reform is secured, it will not only be a means to social change, but also the result of it.

86. LUDWIG WITTGENSTEIN, ON CERTAINTY ¶ 141 (1969).