

# LABOR, LEISURE, AND LAW\*

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*Americans work harder than their counterparts in many other advanced economies. While many predicted that technological progress would eventually make work obsolete, Americans continue to pull long hours. Although stories of worker burnout and “quiet quitting” suggest that this situation is not a good fit for everyone, any problems are largely invisible to the conceptual frameworks that dominate the analysis of law. These frameworks normally assume the goal of maximizing production and often treat the human preference for leisure as a problem to be solved.*

*This Article analyzes the problem of overwork. In doing so, it surfaces legal and policy mechanisms that may be leading workers to choose—or to be forced into—hours that are personally or socially suboptimal. Law and policy can construct market conditions and norms in ways that distort workers’ choices between labor and leisure. Law also often directly encourages a one-size-fits-all approach to work that is not appropriate for all workers. Beyond sharpening an analytical toolkit for understanding problems outside the normal framework of maximizing production, the discussion identifies a range of policy mechanisms that could help address the problem of overwork.*

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## INTRODUCTION

Americans are working too hard. Americans work longer hours than their counterparts in many other advanced economies.<sup>1</sup> While commentators have

1. See, e.g., *Hours Worked*, OECD (2022), <https://data.oecd.org/emp/hours-worked.html> [<https://perma.cc/SU3X-FJYK> (staff-uploaded archive)]; Daniel S. Hamermesh, *Why Do Americans Work Long and Antisocial Hours?*, *WORLD ECON. F.* (Oct. 2, 2014), <https://www.weforum.org/agenda/2014/10/americans-europeans-work-evenings-weekends/> [<https://perma.cc/EAZ5-VZSD> (staff-uploaded archive)] (“Over a year, the average American

long predicted that technological advances would cause a dramatic increase in leisure time,<sup>2</sup> increasing wealth and progress have not resulted in the promised decrease in working hours.<sup>3</sup> This level of work is clearly wearing on a large portion of the population. The popular media is filled with stories about workers burning out,<sup>4</sup> “quiet quitting,”<sup>5</sup> or attempting get-rich-quick schemes in a desperate effort to exit the workforce,<sup>6</sup> and hand-wringing about each

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employee puts in 1,800 hours, which is more than any other wealthy country, even Japan.”). Historically, some economies in East Asia had competed with the United States for the honor of being most overworked. Indeed, Japanese commentators coined the term “karoshi” to refer to “death by overwork.” Elle Hunt, *Japan’s Karoshi Culture Was a Warning. We Didn’t Listen*, WIRED (June 2, 2021, 9:16 AM), <https://www.wired.co.uk/article/karoshi-japan-overwork-culture> [<https://perma.cc/E5JF-H66S> (staff-uploaded, dark archive)]; Makiko Inoue & Megan Specia, *Young Worker Clocked 159 Hours of Overtime in a Month. Then She Died.*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/world/asia/japan-death-overwork.html> [<https://perma.cc/8LCM-R6P6> (staff-uploaded archive)]. Recent data show an average of 1,607 hours of annual labor per worker in Japan, versus 1,804 in the United States. OECD, *supra* note 1.

2. John Maynard Keynes, *Economic Possibilities for Our Grandchildren*, in REVISITING KEYNES: ECONOMIC POSSIBILITIES FOR OUR GRANDCHILDREN 17, 21–23 (Lorenzo Pecchi & Gustavo Piga, eds., 2008).

3. Keith Cowling, Rattanasuda Poolsombat & Philip R. Tomlinson, *Advertising and Labour Supply: Why Do Americans Work Such Long Hours?*, 25 INT’L REV. APPLIED ECON. 283, 283 (2011).

4. Rani Molla, *Burnout Was Supposed to Get Better. It Hasn’t.*, VOX (Oct. 20, 2022, 6:05 AM), <https://www.vox.com/recode/2022/10/20/23413380/burnout-remote-work-economy-quits-slack-future-forum> [<https://perma.cc/DX4X-XSRP> (staff-uploaded, dark archive)]; Tracy Brower, *Burnout Is a Worldwide Problem: 5 Ways Work Must Change*, FORBES (July 24, 2022, 6:00 PM), <https://www.forbes.com/sites/tracybrower/2022/07/24/burnout-is-a-worldwide-problem-5-ways-work-must-change/?sh=51f20f4c6c1e> [<https://perma.cc/UE6A-FMH7> (staff-uploaded, dark archive)]; Claire C. Caruso, *Negative Impacts of Shiftwork and Long Work Hours*, 39 REHAB. NURSING J. 16, 16 (2014).

5. Dain Lee, Jinhyeok Park & Yongseok Shin, *Where Are the Workers? From Great Resignation to Quiet Quitting* 3 (Nat’l Bureau of Econ. Rsch., Working Paper No. 30833, 2023); Cal Newport, *The Year in Quiet Quitting*, NEW YORKER (Dec. 29, 2022), <https://www.newyorker.com/culture/2022-in-review/the-year-in-quiet-quitting> [<https://perma.cc/JC3Z-U6K6> (staff-uploaded, dark archive)]; Anthony C. Klotz & Mark C. Bolino, *When Quiet Quitting Is Worse Than the Real Thing*, HARV. BUS. REV. (Sept. 15, 2022), <https://hbr.org/2022/09/when-quiet-quitting-is-worse-than-the-real-thing> [<https://perma.cc/2MUE-PW8E> (staff-uploaded, dark archive)]. *But see* Derek Thompson, *Quiet Quitting Is a Fake Trend*, ATLANTIC (Sept. 16, 2022, 6:00 AM), <https://www.theatlantic.com/newsletters/archive/2022/09/quiet-quitting-trend-employee-disengagement/671436/> [<https://perma.cc/3CJJ-J4JQ>] (urging that engagement with work increased from 2010 to 2020, and that “quiet quitting” reflects reversion to 2014 levels).

6. Jack Kelly, *Move Over Quiet Quitting, FatFIRE Is the Newest Viral Workplace Trend*, FORBES (Sept. 13, 2022, 11:13 AM), <https://www.forbes.com/sites/jackkelly/2022/09/13/move-over-quiet-quitting-fatfire-is-the-newest-viral-workplace-trend/?sh=2184966f4065> [<https://perma.cc/JU6F-P6BH> (staff-uploaded, dark archive)].

development is a popular pundit staple.<sup>7</sup> Whole social movements have arisen to address related needs: minimalists suggest paring back consumption and freeing up time,<sup>8</sup> degrowth advocates suggest slowing the economy as a whole,<sup>9</sup> financial independence retire early (“FIRE”) adherents suggest saving rapidly and leaving the workforce decades ahead of the norm,<sup>10</sup> and participants in the post-pandemic “great resignation” sought to improve personal satisfaction by reshuffling working arrangements.<sup>11</sup>

Beyond the society-wide phenomena, individual behaviors and incentives suggest that people may be working more than is socially or privately optimal. People systematically overestimate how happy money will make them and underestimate how miserable additional work will make them.<sup>12</sup> Moreover, workers may lack incentives to choose the socially optimal amount of leisure because they do not internalize the full consequences of their choice. Non-work

7. See, e.g., Andy Kessler, *A Nation of Quitters*, WALL ST. J. (Sept. 25, 2022, 12:57 PM), <https://www.wsj.com/articles/a-nation-of-quitters-great-enabling-exodus-working-age-men-parents-stimulus-covid-quit-retirement-bohemian-videogame-11664112795> [https://perma.cc/L4P2-Q5FK (staff-uploaded, dark archive)] (“Here’s my theory: Too many got a taste of not working and liked it. A lot.”).

8. *About the Minimalists*, MINIMALISTS, <https://www.theminimalists.com/about/> [https://perma.cc/6F9F-V29B]; Amber Martin-Woodhead, *Limited, Considered and Sustainable Consumption: The (Non)consumption Practices of UK Minimalists*, 22 J. CONSUMER CULTURE 1012, 1012–13 (2022).

9. Jason Hickel, Giorgos Kallis, Tim Jackson, Daniel W. O’Neill, Juliet B. Schor, Julia K. Steinberger, Peter A. Victor & Diana Ürge-Vorsatz, *Degrowth Can Work — Here’s How Science Can Help*, NATURE (Dec. 12, 2022), <https://www.nature.com/articles/d41586-022-04412-x> [https://perma.cc/6KFG-KM6U] (“Wealthy economies should abandon growth of gross domestic product (GDP) as a goal, scale down destructive and unnecessary forms of production to reduce energy and material use, and focus economic activity around securing human needs and well-being.”); *What is Degrowth?*, DEGROWTH, <https://degrowth.info/en/degrowth> [https://perma.cc/SXW5-EEK5]; Federico Demaria, François Schneider, Filka Sekulova & Joan Martinez-Alier, *What is Degrowth? From an Activist Slogan to a Social Movement*, 22 ENV’T VALUES 191, 191–92 (2013).

10. E.g., Lisa Rabasca Roepe, *Millennials Want To Retire at 50. How To Afford It Is Another Matter*, N.Y. TIMES (Sept. 24, 2022), <https://www.nytimes.com/2022/09/24/business/millennials-retirement.html> [https://perma.cc/G7AB-M3V9 (staff-uploaded, dark archive)].

11. Edward T.A. Fry, *Resigned to the “Great Resignation?”*, 79 J. AM. COLL. CARDIOLOGY 2463, 2464 (2022); Alexander Serenko, *The Great Resignation: The Great Knowledge Exodus or the Onset of the Great Knowledge Revolution?*, 27 J. KNOWLEDGE MGMT. 1042, 1042–45 (2023).

12. See generally Lara B. Aknin, Michael I. Norton & Elizabeth W. Dunn, *From Wealth to Well-Being? Money Matters, but Less than People Think*, 4 J. POSITIVE PSYCH. 523 (2009) (finding that people tend to overestimate the impact of additional income on their happiness).

activities such as raising children,<sup>13</sup> engaging in civic<sup>14</sup> or social activities,<sup>15</sup> and simply resting<sup>16</sup> all have substantial positive externalities that a worker may not consider if they choose to pull more hours. Working harder and spending the

13. There could be meaningful social consequences if people do not have children. See Dan Balz, *A Blinking Light Ahead: Slowing Population Growth Raises Questions About America as a Land with Unlimited Horizons*, WASH. POST (May 9, 2021), [https://www.washingtonpost.com/politics/america-growth-slowing/2021/05/09/3a4b81ba-b032-11eb-ab4c-986555a1c511\\_story.html](https://www.washingtonpost.com/politics/america-growth-slowing/2021/05/09/3a4b81ba-b032-11eb-ab4c-986555a1c511_story.html) [https://perma.cc/PRB2-PLHM (staff-uploaded, dark archive)]. See generally MATTHEW YGLESIAS, ONE BILLION AMERICANS: THE CASE FOR THINKING BIGGER (2020) (arguing for policy interventions aimed at increasing America's population). There can also be profound consequences if parents spend less time with their children—or are distracted, irritated, or exhausted during that time—because of work. See BRYAN E. ROBINSON, CHAINED TO THE DESK: A GUIDEBOOK FOR WORKAHOLICS, THEIR PARTNERS, AND CHILDREN, AND THE CLINICIANS WHO TREAT THEM 123–24 (3d ed. 2014) (discussing studies showing “that children with workaholic fathers carry their psychological scars well into adulthood”); David A. Weisbach & Daniel J. Hemel, *The Legal Envelope Theorem*, 102 B.U. L. REV. 449, 483 & n.123 (2022) (noting that parental leaves might have “positive effects on children’s health and educational outcomes,” and identifying both supportive and contradictory empirical findings); Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 WISC. L. REV. 1189, 1251–52 (“More time at home with children allows parents more time to spend developing their children’s human capital . . . by reading to them, having dinner together, playing games, and so on.”).

14. See LOUIS BRANDEIS, *True Americanism*, in BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 3, 7 (1942) (“Leisure . . . is an essential of successful democracy.”); ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY 15–16 (2000) (stating that there has been a decline in American civic participation and identifying the pressures of time and money as one root cause).

15. For example, supporters of Sabbath or blue laws that prohibited business on Sundays stressed the importance of preserving a special time for workers to step away from the marketplace, rest, and focus on religious and family life. See Tish Harrison Warren, *How To Fight Back Against the Inhumanity of Modern Work*, N.Y. TIMES (Oct. 16, 2022), <https://www.nytimes.com/2022/10/16/opinion/work-rest-sabbath.html> [https://perma.cc/N7GS-YH3T (staff-uploaded, dark archive)]; PHILIP SCHAFF, CHRIST AND CHRISTIANITY 273–74 (1885) (“[T]he weekly day of rest . . . is a powerful check upon secularism and the degrading worship of the almighty dollar, and upon radicalism and licentiousness, which is death to all true freedom.”). See generally CAROLYN CHEN, WORK PRAY CODE: WHEN WORK BECOMES RELIGION IN SILICON VALLEY (2022) (suggesting that employers have deliberately sought to provide spiritual experiences at work as a productivity-enhancing measure, but that these experiences do not offer the civic benefits of organized religion outside the workplace).

16. Fatigue is a major contributor to accidents. See, e.g., *Drowsy Driving*, NHTSA, <https://www.nhtsa.gov/risky-driving/drowsy-driving> [https://perma.cc/H7H7-5HYM (staff-uploaded archive)] (“NHTSA estimates that in 2017, [crashes involving drowsy drivers] led to an estimated 50,000 people injured and nearly 800 deaths. But there is broad agreement across the traffic safety, sleep science, and public health communities that this is an underestimate of the impact of drowsy driving.”); *Working Less Is a Matter of Life and Death*, N.Y. TIMES (May 29, 2021), <https://www.nytimes.com/2021/05/29/opinion/work-hours-us-health.html> [https://perma.cc/PL9N-RCC8 (staff-uploaded, dark archive)] (“Fatigue has been identified as a factor in industrial disasters like the BP oil refinery explosion in Texas City in 2005 and the nuclear accident at Three Mile Island.”).

additional income can also have negative externalities for colleagues<sup>17</sup> and consumers.<sup>18</sup>

The structure of labor markets likely contributes to this problem. Many workers lack meaningful choices, as employers offer only limited options that do not allow workers to strike the balances that would fit their needs and preferences best. The claim that overwork is a real problem does not depend on a claim that all people are systematically working too much, or that the average or typical worker is working too much. Rather, our claim is that there is a meaningful population of Americans who work too much—more than they would like to—because of the manner in which the labor market is constructed. Work today is largely a one-size-fits-all enterprise, with many occupations offering only the choice between full-time employment or none at all. To take an example likely familiar to this audience, newly minted attorneys eager to practice elite corporate law generally must choose between grinding out long hours at a big law firm or abandoning their chosen career path. This may be optimal for many or most workers in the field, or optimal on average, but it is surely not optimal for all workers, and the lack of tailoring is a problem.<sup>19</sup> The

17. See *infra* Section II.C. Most directly, when a worker pulls more hours, their coworkers must also pull more hours to remain competitive when promotion opportunities arise. See, e.g., Seema Jayachandran, *Universal Paternity Leave Needs More Than New Laws for a Push*, N.Y. TIMES (last updated Oct. 18, 2021), <https://www.nytimes.com/2021/06/25/business/paternity-leave-companies-fear.html> [https://perma.cc/HT86-BLA2 (staff-uploaded, dark archive)] (“[The] competition for scarce opportunities for advancement means that workers can be stuck in a kind of arms race, requiring them to be ever-present at work”). At a social level, a refusal to retire among older workers can stall the careers of younger workers and delay social progress. *Id.* (“[O]ne study found that, in Italy, young workers’ careers stalled when a pension change caused senior colleagues to postpone retirement. On a more morbid note, another study found that in Germany, workers enjoyed a salary bump after the unexpected death of co-workers.”); see also Marc Caputo, *You Don’t Have To Die in Your Seat: Democrats Stress Over Aging Members*, POLITICO (June 25, 2021, 4:30 AM), <https://www.politico.com/news/2021/06/25/dems-gerontocracy-florida-aging-members-496203> [https://perma.cc/3FRE-SWT9 (staff-uploaded archive)].

18. See *infra* Section II.C (discussing the problem of positional externalities).

19. This lack of flexibility could curtail other valuable choices. For example, some individuals responded to the increased flexibility created by work-from-home policies to work at multiple jobs at once, allowing them to pursue financial freedom and outside interests without having to become overly invested in success at one company. See Fadeke Adegbuyi, *The Unlikely Cure for Burnout? A Second Job*, WIRED (Sept. 27, 2022, 9:00 AM), <https://www.wired.com/story/overemployment-work/> [https://perma.cc/PH9Q-HA83 (staff-uploaded, dark archive)]; Rachel Feintzeig, *These People Who Work From Home Have a Secret: They Have Two Jobs*, WALL ST. J. (Aug. 13, 2021, 10:55 AM), <https://www.wsj.com/articles/these-people-who-work-from-home-have-a-secret-they-have-two-jobs-11628866529> [https://perma.cc/6F5V-2LAG (staff-uploaded, dark archive)]; cf. Hudson Sessions, Jennifer D. Nahrgang, Manuel J. Vaultont, Raseana Williams & Amy L. Bartels, *Do the Hustle!*

mismatch between some workers who would like to work less and firms (and industries) that do not allow that option leads to some workers dropping out of industries where they would be successful and others working too much.

These phenomena have complex causes.<sup>20</sup> But law and policy—and the markets and norms that they help construct—have played an important role in channeling workers into suboptimal choices. Many laws and regulations encourage firms to adopt a one-size-fits-all model for work,<sup>21</sup> while others enable or fail to check forces that push workers into difficult conditions.<sup>22</sup> By focusing squarely on lack of leisure as a problem, this Article provides a novel analysis that surfaces numerous causes of potential market failure and several policy levers that could be used to move labor-leisure decisions closer to the optimum.<sup>23</sup>

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*Empowerment from Side-Hustles and Its Effects on Full-Time Work Performance*, 64 ACAD. MGMT. J. 235, 235 (2021) (finding that “psychological empowerment from side hustles enriches full-time work performance”).

20. See generally MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Routledge Classics 2001) (1930) (suggesting that cultural and religious attitudes played an important role in the emergence of capitalist institutions). Many Americans may simply *want* to work long hours for cultural or other unproblematic reasons. Indeed, the fact that modern Americans spend more time on parenting than prior generations suggest an intense attitude toward life generally. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 92–94 (1991) [hereinafter SCHOR, *THE OVERWORKED AMERICAN*]. But law and policy can play an important role in shaping these attitudes. Americans may work harder at paid jobs because they are concerned about paying for their children’s college tuition or supporting their children through early milestones like buying a house—concerns that are related to law and policy. See *infra* Part III (discussing how policy can create conditions of artificial scarcity and heightened competition). The same forces can drive Americans to spend more time on parenting children because they believe that their children will find it more difficult to gain acceptance to a top school, that they will graduate into a difficult job market, or that the consequences of failing to join the economic elite will be dire.

21. See *infra* Part III.

22. See *infra* Part II.

23. Relatively little has been written along these lines. For some short analyses in this direction in law journals, see generally Theodore P. Seto, *Does the Income Tax Cause Parents To Spend Too Much Time With Their Children?: Unpacking Mirrlees*, 37 VA. TAX REV. 55 (2017) [hereinafter Seto, *Income Tax*] (describing the labor-leisure substitution hypothesis); Stephen Wall, *Capitalism, Leisure, and the Good Life*, 13 GEO. J.L. & PUB. POL’Y 385 (2015) (explaining capitalism’s anti-leisure bias). Even outside of law journals, the topic appears to be relatively underexamined. Works that do discuss the topic often express alarm at the lack of discussion of the issue. See SCHOR, *THE OVERWORKED AMERICAN*, *supra* note 20, at xviii (“If nothing else, I hope to revive the public discussion on hours of work which died out fifty years ago.”); Daniel S. Hamermesh & Joel B. Slemrod, *The Economics of Workaholism: We Should Not Have Worked on This Paper*, 8 B.E. J. ECON. ANALYSIS & POL’Y 1, 2 (2008) (“We have found only three uses of the term ‘workaholism’ in the published economics literature.”);

This Article also develops an approach that remains uncommon in the analysis of law. The problem of overwork is often rendered invisible because commentators use conceptual frameworks that focus on maximizing monetizable production.<sup>24</sup> Within such a framework, a preference for leisure often registers as a problem to be solved.<sup>25</sup> But this is not the only type of intellectual framework available. Insights from hedonic psychology and welfare analysis offer an alternative path that can be better suited to detect problems.<sup>26</sup> There is also a strong intellectual and cultural tradition of recognizing that non-work activities are an important part of a good life.<sup>27</sup> This Article's analysis is thus an important early step in a broader rethinking of the literature's implicit assumption that maximization is an unalloyed good.<sup>28</sup>

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cf. JULIE L. ROSE, *FREE TIME* 1 (2016) (highlighting that the argument that “citizens must be guaranteed their fair shares of free time” is “absent from contemporary political philosophy”). An important strand of related literature focuses on unpaid work within the home and centers the gender equity issues that can arise when laws and norms encourage one member of the household to focus entirely on paid work outside the home. See, e.g., Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1095 (“[W]orkplace time norms reflect and privilege male ways of living and working, and leave little room for pregnancy, childbirth, or the ongoing care of children. These time norms assume that the standard worker has a stay-at-home partner who manages the non-work aspects of everyday life.”); Yair Listokin, *Taxation and Marriage: A Reappraisal*, 67 TAX L. REV. 185, 189 (2014) (“[H]igh tax rates on secondary earners reinforce stereotyped gender roles, providing a financial incentive for one member of a couple—typically, a woman—to stay at home.”). The analysis here draws on this literature where appropriate, but also diverges in important ways.

24. See *infra* Section I.B; Sanjukta Paul, *On Firms*, 90 U. CHI. L. REV. 579, 609–11 (2023) (describing and critiquing “outputism” in economic analysis of law); John Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 563 (2022).

25. Paul, *supra* note 24, at 610 (noting that analysis has focused on the problem of “shirking—and not overwork”). The economic analysis of corporate law is generally based on principal-agent models, where principals must find disciplinary mechanisms that control agents’ preference for activities like leisure.

26. See *infra* Section IV.D.

27. CHRIS ROJEK, *LEISURE AND CULTURE* 1–4 (2000); Yoshitaka Iwasaki, *Leisure and Quality of Life in an International and Multicultural Context: What Are Major Pathways Linking Leisure to Quality of Life?*, 82 SOC. INDICATORS RSCH. 233, 235 (2007).

28. For recent works suggestive of such a broad rethinking, see generally JESSICA SILBEY, *AGAINST PROGRESS* (2022) (suggesting a reorientation of intellectual property law away from a vision of progress based on increased private returns); MAURICE E. STUCKE & ARIEL EZRACHI, *COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS* (2020) (suggesting that excessive and poorly structured competition may have socially destructive effects); cf. Deven R. Desai & Mark A. Lemley, *Editorial: Scarcity, Regulation, and the Abundance Society*, 7 FRONTIERS RSCH. METRICS AND ANALYTICS 1, 13–14 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9908002/pdf/frma-07-1104460.pdf> [<https://perma.cc/63X9-QQH3> (staff-uploaded archive)] (suggesting that property and tax law should adapt to potential post-scarcity economy).



The resulting analysis has some surprising and fundamental implications. To take just one such example, much of the economic analysis of tax law is centered on the way that income taxes distort choices between labor and leisure: taxing income reduces the incentive to work, which causes people to choose less work and more relaxation.<sup>29</sup> But if law already distorts choices so that people choose to work more than would be optimal, income taxes may push workers in a better direction. The observation that taxes could help *undo* distortions in the choice between labor and leisure also complicates widespread claims in law and economics.<sup>30</sup> Below, we offer many other possibilities for using law to better align the jobs available to workers with those workers' heterogeneous preferences.

The Article proceeds as follows. Part I offers historical and cultural context for concern about overwork and ties it to contemporary phenomena and movements. It also considers how a limited intellectual and policy toolkit may have led to problems being overlooked, while introducing alternatives including well-being analysis. Part II identifies reasons to suspect a market failure in optimizing the labor-leisure tradeoff. Part III examines laws and regulations that similarly encourage a one-size-fits-all, full-time work model. Part IV turns to policy tools that could be used to recalibrate labor-leisure tradeoffs.

## I. HISTORICAL AND CULTURAL CONTEXT

This part considers the value of leisure. Section I.A demonstrates that significant leisure time has long been recognized as an important part of a good life and surveys some of the longstanding efforts to protect leisure time through public policy. Section I.B considers some of the intellectual and cultural forces that may have led to a distorted view of the value of labor relative to leisure. Section I.C presents evidence that the current balance between leisure and labor is breaking down.

29. See David Gamage, *How Should Governments Promote Distributive Justice?: A Framework for Analyzing the Optimal Choice of Tax Instruments*, 68 TAX L. REV. 1, 4 (2014) ("Often called 'optimal tax theory,' the modern structure of public finance economics was largely engineered around models of labor-to-leisure distortions. In other words, scholars considered individuals reducing their work effort in response to taxation to be a central problem of tax policy."); James A. Mirrlees, *An Exploration in the Theory of Optimum Income Taxation*, 38 REV. ECON. STUD. 175, 176 (1971) (incorporating assumptions about individuals' preference for leisure into "optimal income tax" models). For a critical analysis, see generally Seto, *Income Tax*, *supra* note 23 (describing the labor-leisure substitution hypothesis).

30. See, e.g., Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667–68 (1994) (suggesting that legal rules generally should not be adjusted to redistribute income because of impact on work incentives).

A. *The Value of Leisure*

Many important philosophical traditions recognize that a good life requires time away from commercial endeavors. Aristotle urged that time away from business was necessary, both because rest and play increased productivity and because philosophical contemplation was an important end of life.<sup>31</sup> Classical Hindu thought suggested that a good life required a balance of four pursuits—worldly success (*artha*), pleasure (*kāma*), moral order (*dharma*), and enlightenment (*moksa*)—only one of which related directly to commercial work.<sup>32</sup> Abrahamic religious traditions similarly limit the prioritization of work, with one commandment instructing adherents, “Six days shalt thou labor, and do all thy work; But the seventh day [is] the sabbath of the LORD thy God: [in it] thou shalt not do any work.”<sup>33</sup>

These were not merely abstract intellectual claims. Historically, these philosophical perspectives have found counterparts in the concrete decisions of people who lived at the peripheries of capitalism or in non-capitalist societies. For example, freedmen who won their liberty after the Civil War often sought to be the “master of one’s own time” instead of maximizing income by responding to market incentives and growing cotton.<sup>34</sup> This type of decision was not unique to the freedmen. Several non-capitalist societies appear to have had a “backward-bending supply curve of labor,” so that “when wages rise, workers supply less labor.”<sup>35</sup> Workers in such societies would put in the time

31. ROSE, *supra* note 23, at 31–32; Alex Sager, *Philosophy of Leisure*, in ROUTLEDGE HANDBOOK OF LEISURE STUDIES 5, 6–7 (Tony Blackshaw ed., 2013).

32. PATRICK OLIVELLE, THE ĀŚRAMA SYSTEM: THE HISTORY AND HERMENEUTICS OF A RELIGIOUS INSTITUTION 216–17 (1993).

33. *Exodus* 20:9–10 (King James). *But see Proverbs* 16:27 (Living Bible) (“Idle hands are the devil’s workshop; idle lips are his mouthpiece.”).

34. As Eric Foner has explained:

Rather than choose irrevocably between self-sufficiency and farming for the market, [many freedmen] sought to avoid a complete dependence on either while taking advantage of the opportunities each could offer . . . Here was a definition of economic freedom that corresponded to the traditional republican ideal of a society of autonomous small producers. Thomas Jefferson would have fully appreciated this ambition to be master of one’s own time, free from the coercion of either an arbitrary master or the impersonal marketplace.

ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877 108–09 (Harper Perennial 2014) (1988).

35. SCHOR, THE OVERWORKED AMERICAN, *supra* note 20, at 47. *See generally* WEBER, *supra* note 20 (describing pre-capitalist societies). This may not be an exclusively non-capitalist phenomenon. *See* Rachel Premack, *Washington Lawmakers Still Believe There’s a Truck Driver Shortage*, FREIGHT

required to earn their customary income but were uninterested in exchanging more free time for more money.<sup>36</sup> As Max Weber argued,

A man does not “by nature” wish to earn more and more money, but simply to live as he is accustomed to live and to earn as much as is necessary for that purpose. Wherever modern capitalism has begun its work of increasing the productivity of human labour by increasing its intensity, it has encountered the immensely stubborn resistance of this leading trait of pre-capitalistic labour.<sup>37</sup>

Over time, technological and market developments have changed the calculus for workers and made leisure less attractive. Technological advances have increased productivity, increasing the value of working time. Advances have also increased the capacity for long hours, including by making it easier to work at night or in inclement weather. And workers in earlier societies may have had little use for additional income, as they had no way to productively deploy any surplus. In the past, there were fewer consumer goods available to purchase<sup>38</sup> and fewer safe ways to save or invest.<sup>39</sup>

But social and political choices have exerted force on workers’ decisions as well. Laws and norms played an important role—at first by supporting decisions to limit work and later by crushing them. Holidays provide a simple example of support. Ancient and medieval societies set aside large portions of the year for rest.<sup>40</sup> Law and policy would later play the opposite role. During Europe’s transition to capitalism, governments often intervened to protect employer

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WAVES (Nov. 8, 2022), <https://www.freightwaves.com/news/washington-lawmakers-still-believe-theres-a-truck-driver-shortage> [<https://perma.cc/F3QK-B8BH>] (quoting American Trucking Associations Chief Economist Bob Costello) (“[A]lmost forty percent of truckload carriers reported to ATA that increases in pay last year resulted in drivers choosing to drive less, make the same amount of money and be home more often.”); Gary S. Becker & Luis Rayo, *Why Keynes Underestimated Consumption and Overestimated Leisure for the Long Run*, in REVISITING KEYNES: ECONOMIC POSSIBILITIES FOR OUR GRANDCHILDREN, *supra* note 2, at 179, 180–81 (suggesting that British gentlemen and wealthy citizens of the Gulf States exhibit similar behaviors).

36. SCHOR, THE OVERWORKED AMERICAN, *supra* note 20, at 47.

37. WEBER, *supra* note 20, at 24.

38. SCHOR, THE OVERWORKED AMERICAN, *supra* note 20, at 47 (“[C]onsumerism was limited—both by the unavailability of goods and by the absence of a middle class with discretionary income.”); Becker & Rayo, *supra* note 35, at 182 (suggesting that modern workers have chosen less leisure because of the availability of “revolutionary goods” that are “greatly desired”).

39. Cf. MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 22–32 (2017) (noting that freedmen in the American South had few safe places to save money, and describing the collapse of the Freedmen’s Savings and Trust Company); FONER, *supra* note 34, at 531–32 (same).

40. SCHOR, THE OVERWORKED AMERICAN, *supra* note 20, at 6, 47.

interests and pressure workers to put in more hours.<sup>41</sup> Jim Crow in the American South was not only a program of social or legal disempowerment: it was also a program of economic disempowerment designed to deny the freedmen the ability to make their own choices about how much of their labor should be devoted to what purposes.<sup>42</sup>

Historically, the labor movement pushed back on these efforts. At least until World War II, labor organizers and progressive reformers in the United States strenuously advocated for limits on working hours.<sup>43</sup> The effort gained traction during the New Deal, when many reformers believed that limitations would help reduce unemployment—if every worker put in fewer hours, employers would be forced to hire more of them.<sup>44</sup> Although much of the energy was diverted into support for retirement programs,<sup>45</sup> some of these ideas found limited expression in the industrial codes issued by the National Recovery Administration, and in the Fair Labor Standards Act (“FLSA”),<sup>46</sup> which is built on the assumption of a forty-hour workweek.<sup>47</sup>

More fundamentally, the architects of the New Deal chose a different path. The Great Depression represented an excess supply of labor: society was failing to use all of the working hours that the population made available, resulting in high unemployment. Many commentators believed that this excess labor supply could be converted into leisure.<sup>48</sup> Indeed, some prominent commentators like John Maynard Keynes believed that this was inevitable in the long run, as society grew so productive that its economic problems were solved.<sup>49</sup> But the Roosevelt Administration instead sought to create new demand for labor by pursuing new civic works and stimulating private businesses.<sup>50</sup> World War II created new demands for productive work. And in

41. *Id.* at 49.

42. See FONER, *supra* note 34, at 524–27; see also Suresh Naidu, *Recruitment Restrictions and Labor Markets: Evidence from the Postbellum U.S. South*, 28 J. LABOR ECON. 413, 438 (2010) (analyzing the use of “anti-enticement laws” to limit the outside options of workers).

43. BENJAMIN KLINE HUNNICUTT, *WORK WITHOUT END: ABANDONING SHORTER HOURS FOR THE RIGHT TO WORK* 1–2 (1988).

44. *Id.* at 147.

45. *Id.* at 210–11.

46. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201–219).

47. HUNNICUTT, *supra* note 43, at 174; see also *infra* Section III.A (discussing provisions of the Fair Labor Standards Act).

48. See *infra* Part II.

49. Keynes, *supra* note 2, at 21–23.

50. HUNNICUTT, *supra* note 43, at 175.

the wake of that conflict, the government committed itself to maximizing production instead of sacrificing surplus in favor of leisure.<sup>51</sup>

The push for limitations on working hours mostly lay dormant in the decades that followed,<sup>52</sup> though important related efforts pressed forward. As advocates seeking to address gender inequality and disability discrimination recognized, public policy largely “assume[s] an ideal worker who will not be pregnant, will not have family responsibilities, and will work a full-time schedule.”<sup>53</sup> This model is a poor fit for anyone other than an able-bodied man in a relationship that incorporates the “traditional division of labor between a breadwinner and a non-career-oriented partner.”<sup>54</sup> The expectation of high working hours can also exclude women from high-paying and high-status professions such as certain specialty fields in medicine.<sup>55</sup> Enactments like the Americans with Disabilities Act of 1990<sup>56</sup> and the Family and Medical Leave Act of 1993 (“FMLA”)<sup>57</sup> sought to address these inequities, though substantial gaps in coverage remain.<sup>58</sup>

More recently, there has been renewed interest in both public and private efforts to expand leisure time. In the public policy realm, the 2022 California State Legislature considered a proposal to define a workweek as thirty-two

51. See Employment Act of 1946 § 2(a), 15 U.S.C. § 1021(a) (“The Congress declares that it is the continuing policy and responsibility of the Federal Government to . . . promote useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and promote full employment and production, [and] increased real income.”).

52. HUNNICUTT, *supra* note 43, at 2–3; SCHOR, *THE OVERWORKED AMERICAN*, *supra* note 20, at 59.

53. Albiston, *supra* note 23, at 1145.

54. *Id.*

55. See, e.g., Melanie Wasserman, *Hours Constraints, Occupational Choice, and Gender: Evidence from Medical Residents*, 90 REV. ECON. STUD. 1535, 1538 (2023) (“[W]omen are more likely to enter a medical specialty after its residency hours are reduced, whereas there is little change in men’s entry behavior.”).

56. Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101 to 12213).

57. Family and Medical Leave Act of 1993, Pub. L. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. §§ 2601 to 2654).

58. See, e.g., Deborah A. Widiss, *Equalizing Parental Leave*, 105 MINN. L. REV. 2175, 2176 (2021) (“The United States is the only developed country that fails to guarantee paid time off work to new parents.”); Catherine Albiston & Lindsey Trimble O’Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 4–5 (“Work and families have changed dramatically, yet the United States continues to organize its work policies and welfare state around an outdated breadwinner/homemaker model. Unlike every other developed country in the world, the United States has no national paid family leave policy, and only a fraction of its workforce has access to unpaid family leave through the twenty-year-old Family and Medical Leave Act (FMLA).”).

hours.<sup>59</sup> If the proposal had been adopted, workers who put in more than thirty-two hours would have been entitled to overtime. Foreign governments have also been active in testing reduced work weeks. During the pandemic years, Japan's government sought to encourage employers to adopt a four-day workweek, Spain's government launched a voluntary thirty-two-hour week experiment, the United Arab Emirates adopted a 4.5-day week, and political leaders in Britain, Finland, and New Zealand floated related policy proposals.<sup>60</sup>

There have also been non-governmental efforts to experiment with new working schedules. One of the demands of the auto workers who went on strike in the fall of 2023 was a thirty-two-hour workweek.<sup>61</sup> A study including researchers at Cambridge University, Boston College, and Oxford University evaluated the impact of a four-day workweek at seventy employers in the United Kingdom and reported no loss of productivity at a majority of the participating employers.<sup>62</sup> Many employers experimented less formally. For example, one Chick-fil-A operator enjoyed favorable results after introducing a

59. A.B. 2932, 2021–2022 Leg., Reg. Sess. (Cal. 2022).

60. Sammy Westfall, *Japan Proposes Four-Day Workweek as Idea Gains Purchase amid Pandemic*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/world/2021/06/24/japan-four-day-work-week/> [https://perma.cc/M4GU-ARZX (staff-uploaded, dark archive)]; Erika Page, Laurent Belsie & Shafi Musaddique, *Four-Day Workweek: Why More Companies Are Taking the Plunge*, CHRISTIAN SCI. MONITOR (Sept. 28, 2022, 9:38 AM), <https://www.csmonitor.com/Business/2022/0928/Four-day-workweek-Why-more-companies-are-taking-the-plunge> [https://perma.cc/6X7L-NFAB].

61. Binyamin Appelbaum, *The Magic Number: 32 Hours a Week*, N.Y. TIMES (Sept. 27, 2023), <https://www.nytimes.com/2023/09/27/opinion/editorials/uaw-strike-workweek-hours.html> [https://perma.cc/YJ5R-36U7 (staff-uploaded, dark archive)].

62. Stefan Ellerbeck, *The World's Biggest Trial of the Four Day Work Week Has Come to an End. These Are the Results*, WORLD ECON. F. (Mar. 10, 2023), <https://www.weforum.org/stories/2023/03/four-day-work-week-uk-trial/> [https://perma.cc/Y7HL-D9BB (staff-uploaded archive)] (“The majority of employers who took part in the project say they’ve seen productivity levels maintained, and improvements in staff retention and well-being.”); Jenny Gross, *4-Day Workweek Brings No Loss of Productivity, Companies in Experiment Say*, N.Y. TIMES (Sept. 22, 2022), <https://www.nytimes.com/2022/09/22/business/four-day-work-week-uk.html> [https://perma.cc/GC4Y-XU28 (staff-uploaded, dark archive)]; Arianne Cohen, *Want a Four-Day Work Week? Show This Research to Your Boss*, BLOOMBERG, <https://www.bloomberg.com/news/articles/2022-11-30/want-a-four-day-work-week-show-this-research-to-your-boss> [https://perma.cc/8BYH-4KE5 (staff-uploaded, dark archive)] (last updated Nov. 30, 2022); see also Juliet B. Schor, *Of Course Workers Want a Four-Day Week. Companies Should Too.*, WALL ST. J. (May 29, 2025, 10:09 AM), <https://www.wsj.com/lifestyle/workplace/of-course-workers-want-a-four-day-week-companies-should-too-0837a0a1?st=XUENve> [https://perma.cc/EEF3-N8SB (staff-uploaded, dark archive)] [hereinafter Schor, *Of Course Workers Want a Four-Day Week*].

three-day workweek.<sup>63</sup> These results built on experiments from before the pandemic, including a pilot program in which Microsoft found that a four-day workweek in Japan increased productivity by forty percent.<sup>64</sup>

#### B. *The Value of Labor*

Despite the persistence of pro-leisure efforts, academic commentary has often emphasized the value of labor instead. There are at least three potential reasons for the imbalance. First, much of economic analysis of law has focused on maximizing production and output. Within such a paradigm, the natural human preference for leisure is a problem to be solved, not an end to be pursued. Second, the academic literature is only now catching up to the existence of behavioral anomalies and market imperfections, having long assumed a world of individuals who efficiently maximize welfare while operating within competitive markets. Within that theoretical construct, long hours might be understood as reflecting the worker's optimal choice for maximizing their well-being. Third, cultural attitudes about the value of hard work may obscure the relevant tradeoffs.

##### 1. The Analytic Focus on Maximizing Production

Much of law and economics has focused on the problem of maximizing production and output. That approach finds expression in one of the most prominent claims of law and economics: that legal rules should be crafted to maximize total wealth, with other priorities addressed through tax and transfer schemes.<sup>65</sup>

63. Parija Kavilanz, *Chick-fil-A Operator Has a Winning Recipe for Employees: Three-Day Workweek*, CNN (Oct. 31, 2022, 4:13 PM), <https://www.cnn.com/2022/10/31/business/chick-fil-a-three-day-workweek-employee-applications> [https://perma.cc/TDS7-QZTG]; Bill Murphy, Jr., *Chick-fil-A Just Introduced a 3-Day Workweek, and People Think It's the Best Idea Ever*, INC. (Oct. 29, 2022), <https://www.inc.com/bill-murphy-jr/chick-fil-a-just-introduced-a-3-day-work-week-people-think-its-best-idea-ever.html> [https://perma.cc/3E3D-KUGH (staff-uploaded archive)]. The Chick-fil-A schedule still included a forty-hour workweek but was hailed as giving workers far more flexibility in organizing their time.

64. Bill Chappell, *4-Day Workweek Boosted Workers' Productivity By 40%, Microsoft Japan Says*, NPR (Nov. 4, 2019, 4:27 PM), <https://www.npr.org/2019/11/04/776163853/microsoft-japan-says-4-day-workweek-boosted-workers-productivity-by-40> [https://perma.cc/PJ8D-YZUF]; Schor, *Of Course Workers Want a Four-Day Week*, *supra* note 62.

65. See Kaplow & Shavell, *supra* note 30, at 667; Herbert Hovenkamp, *Antitrust's Borderline 2* (U. Penn. Inst. for L. & Econ., Research Paper No. 20-44, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3656702](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3656702) (choose "Open PDF in Browser")

This mode of economic thinking has permeated the analysis of law. The results have been most visible in antitrust, where the doctrine largely revolves around the goal of maximizing total output.<sup>66</sup> This principle has been defended with claims that increased production would benefit all constituencies, including workers.<sup>67</sup> But these claims elide difficult questions about how the additional production will be achieved—will workers be given better tools or will they simply be expected to work harder, and will they receive adequate compensation for their increased effort?<sup>68</sup> The problem extends beyond antitrust, including to the cost-benefit analyses that drive much of administrative law.<sup>69</sup>

This mode of thinking is similarly reflected in the very metrics used to measure economic performance and efficiency. Standard measures of macroeconomic performance like gross domestic product (“GDP”) only capture monetizable production. More time away from paid work and a corresponding reduction in consumption would register as a decline in production, akin to a recession. For example, working at a job to earn money, then using that money to buy a sandwich, contributes to GDP. Taking time away from the job and earning less money, then using the time to make a sandwich, does not. The problems with GDP are well understood, and in principle, it is possible to account for many of them.<sup>70</sup> But insensitive GDP measures maintain a powerful hold on the imagination of commentators and policymakers.

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[<https://perma.cc/Z6SD-FDX5>]. It is also a driver of some basic theoretical concepts in economics. *See, e.g.*, GARY BECKER, ECONOMIC THEORY 25 (2007) (suggesting that utility theory is necessary to explain why “consumers prefer more goods to less”).

66. *See* Hovenkamp, *supra* note 65, at 4 (“The consumer welfare principle in antitrust is best understood as pursuing maximum output consistent with sustainable competition.”); Newman, *supra* note 24, at 565 (“Leading treatises, law-school casebooks, *amicus* briefs, and oft-cited journal articles all conclude that antitrust can be boiled down to output effects.” (footnotes omitted)).

67. *E.g.*, Hovenkamp, *supra* note 65, at 4 (“Consumer welfare measured as output serves the customer’s interest in low prices and also in markets that produce as wide a variety of goods and services as competition can offer. It also serves the interest of labor, which is best off when production is highest.”).

68. Paul, *supra* note 24, at 579 (explaining how the existing literature has largely sidestepped questions of how workers will be capable of producing more).

69. *See, e.g.*, John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Welfare as Happiness*, 98 GEO. L.J. 1583, 1628 (2010) [hereinafter Bronsteen et al., *Welfare as Happiness*] (“Cost benefit analysis is based upon the principle that wealth is the best available proxy for welfare . . . . But it may be that welfare is better understood as subjective well-being, as we have argued here.”).

70. Statistics can be (and sometimes are) adjusted to include imputed values for nonmarket transactions. GDP figures normally include imputed rent—the value of the housing enjoyed by people who own their own homes—so that the statistics are indifferent to whether people own or rent.



The same type of problem affects analyses of individual firms. The “efficiency” of a firm and its managers is normally evaluated using their capacity to generate profits for shareholders.<sup>71</sup> Some of the standard metrics used in the corporate governance literature reflect this orientation. For example, studies often use Tobin’s *q*, a ratio between the market value of a firm and the book value of its assets, as a proxy for the value generated by the firm’s management.<sup>72</sup> Because such measures ignore effects on worker well-being, squeezing workers harder will almost always cause the metrics to improve. Importantly, while such steps can create some value for shareholders, they may destroy *more* value for workers and society. But the metrics will not capture that destruction of value.

Admittedly, it can be difficult to do better. If a worker is offered \$10 per hour and works twenty hours, then is offered \$15 per hour and works thirty hours, it is easy to calculate and celebrate the \$250 increase in their earnings. It is harder to measure the actual impact on their welfare, which includes the loss of ten hours of leisure time.<sup>73</sup>

## 2. Behavioral Challenges and Market Imperfection

Until relatively recently, the models that dominated the economic analysis of law were based on hyper-rational beings with perfect knowledge, capable of costlessly processing an infinite amount of relevant information before making a perfect utility-maximizing decision.<sup>74</sup> A worker with these characteristics would reliably select the level of effort that maximized their welfare. Employers would be similarly efficient. If a nontraditional schedule would better maximize production while minimizing worker discomfort (and thus worker demands), employers would reliably find and offer that schedule. Workers and employers

71. See Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 637–38 (2006).

72. See Robert Bartlett & Frank Partnoy, *The Misuse of Tobin’s q*, 73 VAND. L. REV. 353, 357 n.9 (2020) (discussing widespread use of Tobin’s *q* for this purpose); Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 900 n.150 (2005) (stating that Tobin’s *q* is a “standard . . . proxy for firm value”).

73. For one such effort, see John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Well-Being Analysis vs. Cost-Benefit Analysis*, 62 DUKE L.J. 1603, 1624–30 (2013) [hereinafter Bronsteen, *Well-Being Analysis*] (proposing a mechanism for estimating the welfare effects of leisure).

74. E.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1216–18 (2003) (introducing the concept of “bounded rationality” to the analysis of form contracts). See generally Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don’t Want To Invite Homo Economicus To Join Your Board)*, 28 DEL. J. CORP. L. 1 (2003) (introducing behavioral insights to the analysis of corporate governance).

would also reliably find the most valuable matches without enduring transactional costs and frictions.<sup>75</sup> Within this traditional theoretical construct, a worker's schedule would likely reflect the number of hours that generates the most value, both for them and their employer.

Reality is more complicated. As the literature is now beginning to reflect, human beings exhibit only bounded rationality: they are unaware of important information about themselves and are unable to process all of the information relevant to their decisions.<sup>76</sup> For example, as we will describe in greater detail below, people appear to overestimate how much happier additional money will make them and to underestimate how much sadder additional working hours will make them.<sup>77</sup> As a result, a worker may choose a high number of hours when fewer hours would make them happier. Employers and managers may also face cognitive limitations in the employment options they are willing to offer workers.

Mainstream economic analysis has also historically assumed that labor markets were reasonably competitive.<sup>78</sup> In a competitive labor market, there are limits to employers' capacity to pressure workers to give up leisure time. An employer that demands more hours would face an exodus of employees to competitors unless it offers offsetting valuable compensation. This would force employers to internalize the costs of their demands of workers, disciplining those demands.

The assumption of competitive labor markets has also recently broken down with the emergence of evidence that many employers enjoy meaningful

75. For a discussion of the literature on matching mechanisms, see generally PAUL MILGROM, *DISCOVERING PRICES: AUCTION DESIGN IN MARKETS WITH COMPLEX CONSTRAINTS* 82–91 (2017) (analyzing how an auction-based system can be used to guide certain complex resource-allocation problems); Alexander S. Kelso, Jr. & Vincent P. Crawford, *Job Matching, Coalition Formation, and Gross Substitutes*, 50 *ECONOMETRICA* 1483 (1982) (studying the outcomes of competitive sorting processes in markets where heterogeneity prevails).

76. See *infra* Section II.B.

77. Hamermesh & Slemrod, *supra* note 23, at 23 (“[I]ndividuals will overestimate their utility from future labor income and underestimate the utility from spending time with friends or relaxing in other ways”); cf. GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* 19–22 (2015) (suggesting that people have failed to increase leisure time as wealth increased because they are subject to behavioral biases that have been successfully exploited by businesses); ROBERT H. FRANK, *LUXURY FEVER: MONEY AND HAPPINESS IN AN ERA OF EXCESS* 3 (1999) (analogizing increasing demand for luxury items to a “virus” that has infected society with “luxury fever”).

78. See Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 *HARV. L. REV.* 536, 541–42 (2018).

power over workers.<sup>79</sup> As discussed below, employers' power in the labor market gives them the ability to pressure workers to give up leisure time without having to pay appropriate compensation.

### 3. Cultural Attitudes Toward Work

Moralistic attitudes about work or laziness may also play an important role in encouraging commentators to overvalue labor relative to leisure. Americans are largely inheritors of the "Protestant work ethic" identified by Max Weber: the belief that hard work is morally praiseworthy and that leisure is morally suspect is deeply ingrained in our culture.<sup>80</sup> These beliefs have real social value and may increase overall material wealth by encouraging individuals to work hard. But like any other set of beliefs, they can short-circuit thinking and lead to bad outcomes if they go unexamined. By prejudicing commentators to believe that leisure is a problem to be solved, these beliefs may prevent careful analysis of the problem of overwork.

The problems are particularly clear when related pathological attitudes are considered. Many people have incorporated racialized ideas about appropriate forms and amounts of leisure, and politicians have responded by seeking to enforce those ideas through law and policy.<sup>81</sup> Some of these attitudes are also gendered. Our culture often sends the message that a man's worth is tied to the income that he generates.<sup>82</sup> This belief limits the possibilities considered by and available to men and women.

These biases may be particularly pronounced amongst commentators who would ordinarily focus on the problem. Successful academics generally *like* their jobs, have ambitious goals, and derive substantial satisfaction from working hard. People who live this way, and are surrounded by colleagues who live the same way, may have difficulty giving appropriate weight to the needs and preferences of those who have a different relationship with their jobs.

79. See *infra* Section II.D.

80. WEBER, *supra* note 20, at xi–xiii.

81. See Regina Austin, "Not Just for the Fun of It!": Governmental Restraints on Black Leisure, Social Inequality, and the Privatization of Public Space, 71 S. CAL. L. REV. 667, 668–89 (1998).

82. See, e.g., Kim Parker & Renee Stepler, *Americans See Men as the Financial Providers, Even as Women's Contributions Grow*, PEW RSCH. CTR. (Sept. 20, 2017), <https://www.pewresearch.org/fact-tank/2017/09/20/americans-see-men-as-the-financial-providers-even-as-womens-contributions-grow/> [<https://perma.cc/U9F7-PCJ4>] ("Roughly seven-in-ten adults (71%) say it is very important for a man to be able to support a family financially to be a good husband or partner. By comparison, 32% say it's very important for a woman to do the same to be a good wife or partner.").

### C. *The Apparent Imbalance*

This section addresses the breakdown of traditional thinking about the labor-leisure tradeoff. At least two lines of evidence suggest that the old approach is no longer a good fit. First, past predictions that workers would have more free time are not bearing fruit. Second, current practices have drawn protests and have been disrupted by the pandemic.

#### 1. Current Practices Are Not Consistent with Predictions.

In 1930, leading economist John Maynard Keynes suggested that the darkening Great Depression was merely a “temporary phase of maladjustment,” in which unemployment was being driven by “our discovery of means of economising the use of labour outrunning the pace at which we can find new uses for labour.”<sup>83</sup> Soon, “man will be faced with his real, his permanent problem—how to use his freedom from pressing economic cares, how to occupy the leisure, which science and compound interest will have won for him, to live wisely and agreeably and well.”<sup>84</sup> Because “everybody will need to do *some* work if he is to be contented,” Keynes suggested that part of the solution would be to have everybody work three hour shifts or a fifteen hour week.<sup>85</sup>

Keynes’s predictions were echoed by others, including by some unlikely voices. In a 1926 speech announcing that the workweek at his company would be cut from six days to five, Henry Ford suggested that the “five day week is not the ultimate, and neither is the eight hour day.”<sup>86</sup> In his view, leisure increased productivity and increased demand for products, and any problems created for the company should be solved through better management.<sup>87</sup> In 1956, then-Vice President Richard Nixon predicted that in the “not too distant future,” Americans could expect a four day work week and a fuller family life.<sup>88</sup>

These predictions have not yet been borne out in the United States. American working hours have essentially stabilized in recent decades, although

83. Keynes, *supra* note 2, at 21.

84. *Id.* at 22.

85. *Id.* at 23.

86. Samuel Crowther, *Henry Ford: Why I Favor Five Days’ Work With Six Days’ Pay*, *WORLD’S WORK*, Oct. 1926, at 613, 616.

87. *Id.* at 613–16.

88. William M. Blair, *Nixon Foresees 4-Day Work Week*, *N.Y. TIMES* (Sept. 23, 1956), <https://timesmachine.nytimes.com/timesmachine/1956/09/23/95810374.html?pageNumber=1> [<https://perma.cc/K9FZ-RYUN> (staff-uploaded, dark archive)].

they have declined on a longer time horizon.<sup>89</sup> But the predictions themselves indicate that prior generations found it inconceivable that their wealthier descendants would put in long hours. The fact that Americans continue to work long hours suggests a serious departure from expectations that is likely to only grow more extreme as economic growth continues.

## 2. The Backlash to Hard Work

Put bluntly, a lot of people hate the time that they spend at their jobs.<sup>90</sup> Even before the COVID-19 pandemic, there were alarming signs of the problem. For example, a Gallup report from 2018 “found that 23% of employees reported feeling burned out at work very often or always, while an additional 44% reported feeling burned out sometimes. That means about two-thirds of full-time workers experience burnout on the job.”<sup>91</sup> The World Health Organization recognized burn-out as an occupational phenomenon in 2019.<sup>92</sup>

This dissatisfaction has inspired several social phenomena aimed at changing the relationship of workers to their jobs. The FIRE movement encourages individuals to dramatically increase their savings with the goal of leaving paid work decades earlier than the norm.<sup>93</sup> Although the ideas have been

89. Charlie Giattino, Esteban Ortiz-Ospina & Max Roser, *Working Hours*, OUR WORLD IN DATA (2020), <https://ourworldindata.org/working-hours> [<https://perma.cc/B5YB-DNRT>]; Tom Fairless, *Europeans Are Working Even Less, and Not by Choice*, WALL ST. J., <https://www.wsj.com/articles/europeans-work-less-short-workweek-employment-pandemic-11657889680> [<https://perma.cc/R2JL-LZ4W> (staff-uploaded, dark archive)] (last updated Feb. 7, 2025) (“The average American worker put in 34½ hours a week last year, a figure that has barely changed over the past two decades . . . . The average European workweek is several hours shorter than it was 20 years ago.”).

90. See, e.g., Seth Stephens-Davidowitz, *The Rich Are Not Who We Think They Are. And Happiness Is Not What We Think It Is, Either.*, N.Y. TIMES (May 14, 2022), <https://www.nytimes.com/2022/05/14/opinion/sunday/rich-happiness-big-data.html> [<https://perma.cc/5YYV-Z5VW> (staff-uploaded, dark archive)] (describing a study finding that “work is the second-most-miserable activity; of 40 activities, only being sick in bed makes people less happy than working.”).

91. Ben Wigert & Sangeeta Agrawal, *Employee Burnout, Part 1: The 5 Main Causes*, GALLUP (July 12, 2018), <https://www.gallup.com/workplace/237059/employee-burnout-part-main-causes.aspx> [<https://perma.cc/46XT-DNEX>].

92. *Burn-out an “Occupational Phenomenon”: International Classification of Diseases*, WORLD HEALTH ORG. (May 28, 2019), <https://www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases> [<https://perma.cc/7PVJ-HLLR>].

93. See, e.g., Steven Kurutz, *How to Retire in Your 30s With \$1 Million in the Bank*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/style/fire-financial-independence-retire-early.html> [<https://perma.cc/Y5UV-UXBL> (staff-uploaded, dark archive)].

circulating for decades,<sup>94</sup> the movement has grown in popularity amongst millennials and in the wake of the pandemic.<sup>95</sup> Other social phenomena appear to target the cultural or moral underpinnings of work. Many young people in China have rebelled against the cultural norm of relentless work and embraced the idea of “lying flat” (*tang ping*): Instead of acceding to escalating demands from employers, they have sought to relax and seek a slower-paced life.<sup>96</sup> American counterparts include the “antiwork” movement, which serves as a forum for anger at overly demanding bosses,<sup>97</sup> and “quiet quitting,” which encourages adherents to limit effort at their jobs.<sup>98</sup> The FIRE movement thus seeks to give followers the financial capacity to set limits on their jobs, while other movements seek to give followers the moral or cultural support needed to take a stand.

94. See generally JOE DOMINGUEZ & VICKI ROBIN, *YOUR MONEY OR YOUR LIFE* (1992) (coining the term “FIRE” to describe the movement in the 1960s).

95. Lisa Gerstner, *The FIRE Movement Is Alive and Well*, Kiplinger (Feb. 24, 2022), <https://www.kiplinger.com/retirement/604262/the-fire-movement-is-alive-and-well> [<https://perma.cc/V8WB-MVAG>]; Kurutz, *supra* note 93 (“Millennials especially have embraced this so-called FIRE movement . . . seeing it as a way out of soul-sucking, time-stealing work and an economy fueled by consumerism.”); Charlotte Cowles, *The Pandemic Forged New FIRE Followers, With a Difference*, N.Y. TIMES (July 14, 2021), <https://www.nytimes.com/2021/07/14/business/financial-independence-retire-early-fire-retirement-savings.html> [<https://perma.cc/YL9E-43XN>] (staff uploaded, dark archive)].

96. Ivana Davidovic, *‘Lying Flat’: Why Some Chinese Are Putting Work Second*, BBC NEWS (Feb. 15, 2022), <https://www.bbc.com/news/business-60353916> [<https://perma.cc/6SA7-TK8Q>]. The movement has curdled into a “let it rot” (*bai lan*) attitude, which suggests simply abandoning financial goals like home ownership because they are too difficult to achieve. Vincent Ni, *The Rise of ‘Bai Lan’: Why China’s Frustrated Youth Are Ready to ‘Let It Rot’*, GUARDIAN (May 25, 2022, 9:33 PM), <https://www.theguardian.com/world/2022/may/26/the-rise-of-bai-lan-why-chinas-frustrated-youth-are-ready-to-let-it-rot> [<https://perma.cc/FN7S-F2XS>].

97. Oliver Whang, *Hating Your Job Is Cool. But Is It a Labor Movement?*, N.Y. TIMES (Feb. 15, 2022), <https://www.nytimes.com/2022/02/15/magazine/antiwork-reddit.html> [<https://perma.cc/V2P7-78WE>] (staff-uploaded, dark archive)].

98. Juliana Kaplan, *Forget Quiet Quitting: Workers Say They’re Acting Their Wage*, BUSINESS INSIDER (Sept. 7, 2022), <https://www.businessinsider.com/forget-quiet-quitting-workers-acting-your-wage-work-life-balance-2022-9> [<https://perma.cc/4GMT-QPJ6>] (staff-uploaded, dark archive)]; Arman Khan, *Act Your Wage: Why More People Are Embracing ‘Quiet Quitting’*, VICE (Sept. 5, 2022, 9:15 AM), <https://www.vice.com/en/article/bvm7mv/why-people-are-quiet-quitting-from-their-work> [<https://perma.cc/P6UA-CWNM>]; Anna Kaplan, *What Is Quiet Quitting? Inside the Work Trend Taking Over TikTok*, TODAY (Aug. 15, 2022, 1:00 PM), <https://www.today.com/money/money/quiet-quitting-work-trend-tiktok-rcna43097> [<https://perma.cc/P5R5-VUF9>]. Although it is sometimes framed less provocatively, the idea of insisting on limits to work has been promoted in a wide variety of publications. See, e.g., Rachel Feintzeig, *How To Escape Your Packed Schedule and Take a Rest from Work*, WALL ST. J. (Nov. 7, 2022), [https://www.wsj.com/articles/how-to-escape-your-packed-schedule-and-take-a-rest-from-work-11667749139?mod=wsjhp\\_columnists\\_pos1](https://www.wsj.com/articles/how-to-escape-your-packed-schedule-and-take-a-rest-from-work-11667749139?mod=wsjhp_columnists_pos1) [<https://perma.cc/L8XC-LTDM>] (staff-uploaded, dark archive)] (“Maybe we need to take a break.”).

Although it is early and the effects of the disruption are still unfolding, the disruption seems to have enabled a broad reevaluation, and many people have decided that the old practices were not working for them.<sup>99</sup> If the old norms represented a true and unique equilibrium, in the sense that fundamental economic forces or personal preferences drove individuals to choose less sleep and more work, any disruption would be expected to be minimal and short-lived. So far, that does not seem to be the case.<sup>100</sup>

## II. THE ECONOMIC FORCES FAVORING WORK

In this part, we begin our exploration of how longer and longer working hours became the norm across so many occupations in the United States. The predominance of longer working hours is undoubtedly due in part to the fact that it is often efficient from the perspective of both employees and employers. In many cases, then, it may represent an optimal solution that should not be disrupted. However, at the same time, there are strong reasons to believe that for at least some workers in some occupations, the number of hours they are working is less than optimal. In some cases, workers may be making mistakes about what will promote their own well-being, opting for longer hours than would be best for them. In other cases, they may be succumbing to collective action problems or other market failures. In still other instances, they may be making the best of the bad hand they were dealt, in the face of market pressures that are tilted against them. The result is an equilibrium in which leisure has taken a decided back seat to labor.

In this part, we describe the economic forces driving workers to work long hours. (In the next part, we will turn our attention to the legal forces.) Before we begin, we are at pains again to state, as we did in the introduction, that our claim is not that most workers are working more than would be best for themselves, or even that the average worker is working too much. Rather, our

99. This is not a purely positive phenomenon. Repeated crises appear to have left many workers deeply discouraged, and perhaps unwilling to invest their self-worth in fragile employment. See Jeanna Smialek, Lydia DePillis & Ben Casselman, *Why Are Middle-Aged Men Missing from the Labor Market?*, N.Y. TIMES (Dec. 2, 2022), <https://www.nytimes.com/2022/12/02/business/economy/job-market-middle-aged-men.html> [<https://perma.cc/JX9E-2UFB> (staff-uploaded, dark archive)] (suggesting that this effect has been particularly pronounced amongst men aged thirty-five to forty-four without higher education).

100. *Id.* (suggesting that employment effects have been most persistent with middle-aged men); Danielle Abril, *Gen Z Workers Demand Flexibility, Don't Want To Be Stuffed in a Cubicle*, WASH. POST (Aug. 11, 2022), <https://www.washingtonpost.com/technology/2022/08/11/gen-z-workforce-hybrid/> [<https://perma.cc/7DXS-4PLN> (staff-uploaded, dark archive)] (suggesting that the pandemic may have durably changed the expectations of workers born between 1997 and 2012).

claim is that a meaningful number of workers are working longer hours than would be ideal for them, and in many cases working longer hours than they would prefer. In case it needs to be said: our claim is not that some people would be better off working shorter hours *for the same salary*. Undoubtedly, many of us would be better off if we could work less and earn the same. Instead, our claim is that some people would be better off working shorter hours for proportionately less income. It is the one-size-fits-all nature of the labor market, in which even people who might prefer shorter hours are shunted into ever greater amounts of work, that constitutes the problem. This is an issue that law has helped to create, as we will demonstrate, and it is one that law should help to solve.

A. *Full-Time Work as Optimal?*

We begin from the perspective of the employing firm. For many businesses, it is likely cheaper and more efficient to hire and train one full-time worker than it would be to do the same with two (or more) part-time workers.<sup>101</sup> Many aspects of employing a worker involve costs that scale with the number of individual workers, rather than the total number of hours worked.<sup>102</sup> Fewer workers means fewer people to train; fewer paychecks and other administrative documents to process; fewer people who might need individual offices or cubicles; and so forth.<sup>103</sup>

It may also be easier for businesses to manage and supervise a smaller number of employees who work longer hours than a larger number of employees who work shorter hours.<sup>104</sup> A smaller number of employees means fewer people whose work must be coordinated with one another, who must be taught each

101. Paula McDonald, Lisa Bradley & Kerry Brown, 'Full-time Is a Given Here': *Part-time Versus Full-time Job Quality*, 20 BRITISH J. MGMT. 143, 143–57 (2009).

102. S. J. Nickell, *Fixed Costs, Employment and Labour Demand over the Cycle*, 45 ECONOMICA 329, 329 (1978).

103. See, e.g., Michael Sainato, *Trader Joe's Workers Upset About a New Work Schedule Policy: 'A Veiled Threat'*, GUARDIAN (Dec. 1, 2022, 6:00 PM), <https://www.theguardian.com/global-development/2022/dec/01/trader-joes-work-schedule-part-time-employees-minimum-days-policy> [<https://perma.cc/B5W5-VQZ6>] (describing Trader Joe's new policy of requiring workers to work at least three days per week, likely because of the administrative costs of scheduling more workers for shorter and fewer working time slots).

104. Pamela Hinds & Cathleen McGrath, *Structures That Work: Social Structure, Work Structure and Coordination Ease in Geographically Distributed Teams*, in PROCEEDINGS OF THE 2006 20TH ANNIVERSARY CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK 343, 343–52 (2006).



new task, and so forth.<sup>105</sup> Even simple coordination objectives might be facilitated by having fewer people working longer hours. If two employees need to meet with one another, it will be easier for them to schedule that meeting if they are both working 9 am–5 pm, five days per week, than if they are each working twenty hours per week on schedules that may not overlap or may overlap only slightly.

Some workers in some industries might also have production functions that are quite lumpy. To use an example close to home, imagine a lawyer in the midst of preparing or trying a large case. The lawyer might not be able to successfully litigate the case if she is working only twenty hours per week—she needs to understand the entire case from top to bottom and cannot hand off bits and pieces of it to other attorneys. Similarly, an engineer leading a team might not be able to do her job effectively if she isn't present at least forty hours per week—the product being created might simply be too complicated for the engineer to successfully oversee if she is working fewer hours. And splitting the labor between two or more employees in any of these cases might be costly for the employer and lead to subpar production by the employees.

If this is correct, and (in at least some cases) full-time work is more efficient for employers than part-time work, even holding constant the total number of hours worked, then employers will of course have a preference for more full-time workers. And this in turn should create a surplus that could be shared with workers, thus increasing their incentives to work longer hours. Whether or not the surplus will in fact be shared in any given context will depend upon the economics of that situation and the relative bargaining power

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105. See generally Gary S. Becker & Kevin M. Murphy, *The Division of Labor, Coordination Costs, and Knowledge*, 107 Q.J. ECON. 1137 (1992) (arguing that the specialization of workers in narrow divisions of labor increases productivity).

of the parties,<sup>106</sup> but there is at least some evidence that workers are paid more to induce them to work longer hours.<sup>107</sup>

Yet it is entirely possible that employers or employees (or both) are overestimating the benefits from full-time work schedules. One source of this overestimation might be a lack of imagination: because the forty-hour week has been standard for so long, employers and employees simply may not consider alternative possibilities to be feasible or worth exploring at scale.<sup>108</sup> Employers may only offer a traditional forty-hour, five-day work schedule even though a different or more flexible schedule would create value. Even if top-level managers or shareholders were open to different arrangements, low-level managers may struggle to juggle complex schedules for their subordinates. And even if enlightened workers and employers exist, they may struggle to find each other or to negotiate the optimal arrangement.

Recent experiences with work-from-home options suggest that employers may have been slow to make changes to full-time work arrangements that could optimize productivity and benefit workers. Videoconferencing technologies have been available for years, but firms were slow to adopt them until lockdowns from COVID made remote work necessary.<sup>109</sup> This is despite the fact that for at least some workers in some industries, working from home increases

106. A lumpy production function may empower workers to demand more of the surplus. After a worker has put in the time, it becomes more expensive for the employer to replace them with a new worker. But lumpy production can also entail a firm-specific investment on the part of workers, which makes them vulnerable to expropriation by the employer. For example, after an attorney has put in 2,000 hours learning a case being handled by their firm, the attorney is in a unique position to demand more pay before putting in more hours. If the firm hires a new attorney, that attorney will not be as productive. At the same time, the firm is in a unique position to resist those demands. If the attorney moves to a new firm that is not handling the same case, the attorney will not be as productive. *See generally* Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387 (1998) (analyzing the firm-employee relationship as one in which the firm grants employees the opportunity to specialize in using critical resources that the firm controls, thus allocating power in a way that creates good incentives for both the firm and employee to maximize value).

107. Albiston, *supra* note 23, at 1105 (“[P]art-time workers earn only about sixty percent of what full-time workers make among workers paid on an hourly basis. Annually, part-time workers make much less than full-time workers on a pro-rata basis, even controlling for age, education, race, organizational size, occupational prestige, tenure with the organization, and whether the worker holds a supervisory position.” (footnotes omitted)).

108. *See* Ania Zbyszewska, *Visions of the Future: Imagining and Anticipating Tomorrow’s Working Hours from the North American Perspective*, in *WORKING TIME: TRENDS AND PROSPECTS IN THE NEW ECONOMY* 58, 59 (Helena Strzeminska & Marek Bednarski eds., 2014).

109. Kim Parker, Juliana Menasce Horowitz & Rachel Minkin, *COVID-19 Pandemic Continues To Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/> [https://perma.cc/3Z4V-H8RD].

productivity because it reduces commute times and decreases overhead for firms that no longer need to pay for as much office space.<sup>110</sup> Similarly, companies have only recently begun to experiment (to good effect) with the idea of a four-day work week,<sup>111</sup> despite the fact that working four days instead of five is not exactly innovative.<sup>112</sup>

### B. *Individual Mis-Wanting*

One might imagine that employees themselves are best positioned to know how much they would like to work. At least in theory, they know how much money they need to purchase the goods and services they desire; they know how they would spend their own non-working hours. Yet in practice, many—or even most—individuals make systematic errors in assessing these types of choices. Begin with the value of income to the employee. There is a substantial literature demonstrating that income is only weakly related to well-being—even large increases in wealth have relatively small effects on well-being.<sup>113</sup> For instance, in 2021 the median American household income was \$70,784<sup>114</sup> and the typical American rates her well-being at 7.4 out of 10.<sup>115</sup> If that typical worker were to triple her income, to approximately \$215,000 per year, her well-being would only rise to approximately 7.52 out of 10.<sup>116</sup> At the same time, there is ample evidence that people tend to overestimate how much additional income will improve their well-being. Respondents to surveys consistently state that they believe that substantial increases in income will make them much better

110. See generally Michael Gibbs, Friederike Mengel & Christoph Siemroth, *Work from Home & Productivity: Evidence from Personnel & Analytics Data on IT Professionals* (U. Chi. Becker Friedman Inst. for Econ., Working Paper No. 2021-56, 2021), <https://bf.uchicago.edu/working-paper/2021-56/> [<https://perma.cc/XXN7-BM4A>] (exploring the benefits and costs of working from home, identifying, among other things, the decrease in commuting time and changes in firm costs depending on the two settings).

111. Kevin J. Delaney, *Is the Four-Day Workweek Finally Within Our Grasp?*, N.Y. TIMES (Nov. 23, 2021), <https://www.nytimes.com/2021/11/23/business/dealbook/four-day-workweek.html> [<https://perma.cc/6D7Z-PCKR> (staff-uploaded, dark archive)].

112. Gross, *supra* note 62.

113. See, e.g., Bronsteen et al., *Welfare as Happiness*, *supra* note 69, at 1600 (“[I]ncreases in wealth are only weakly correlated with feelings of positive affect.”).

114. JESSICA SEMEGA & MELISSA KOLLAR, U.S. CENSUS BUREAU, INCOME IN THE UNITED STATES: 2021, at 2 (2022), <https://www.census.gov/content/dam/Census/library/publications/2022/demo/p60-276.pdf> [<https://perma.cc/4DVG-5XPV>].

115. Bronsteen et al., *Well-Being Analysis*, *supra* note 73, at 1641 (citing Ed Diener & Carol Diener, *Most People Are Happy*, 7 PSYCHOL. SCI. 181, 182 tbl.1 (1996)).

116. The best available evidence seems to be that well-being (measured hedonically) varies with 0.11 times the natural log of income ( $0.11 * \ln(3) = 0.12$  additional points of well-being for the individual who has tripled her income). See *id.* at 1640.

off. They behave as if this were true as well, including making other types of sacrifices—longer commutes, inconvenient moves, etc.—in order to take jobs with higher incomes.<sup>117</sup> These behaviors can be habit-forming. High-income, highly educated people appear to exhibit signs of workaholism, pushing back retirement plans.<sup>118</sup>

The best interpretation of these competing indicators—people believing that money will make them happier, coupled with evidence that it does not—is that individuals make what are known as “affective forecasting errors”: they misestimate how some change in their lives will affect their well-being.<sup>119</sup> As it turns out, there is evidence that people make affective forecasting errors regarding all sorts of life changes.<sup>120</sup> Against this backdrop, errors regarding how much an individual will value additional income are not surprising or atypical.

Indeed, there are good reasons to think that behavioral biases and cognitive limitations are particularly pronounced when workers decide between earning additional income by putting in more hours of work and enjoying additional leisure time. Markets perform the task of figuring out the value of working time; by setting wages and prices, markets allow the worker to translate working time into cash and cash into desired goods and services.<sup>121</sup> The worker does not need to guess at how many streaming services they will be able to subscribe to if they work an additional hour; other market participants will put in the effort to figure out an objective wage and price. By contrast, leisure’s value is personal and is not captured in a relevant market. Workers must decide for themselves how to value an additional hour of time playing with their children or figuring out their purpose in life.<sup>122</sup> That process can be challenging for many individuals.

117. See *id.* at 1612–15 (describing and cataloguing the types of hedonic errors that individuals often make); John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1045–48 (2009) [hereinafter Bronsteen et al., *Happiness and Punishment*] (same).

118. Hamermesh & Slemrod, *supra* note 23, at 20.

119. Bronsteen et al., *Well-Being Analysis*, *supra* note 73, at 1655–57.

120. JOHN BRONSTEEN, CHRISTOPHER BUCCAFUSCO & JONATHAN S. MASUR, *HAPPINESS AND THE LAW* 12–19 (2015).

121. See generally James Heckman, *Shadow Prices, Market Wages, and Labor Supply*, 42 *ECONOMETRICA* 679 (1974) (demonstrating the challenges of valuing even work within the home that is not priced in markets).

122. See ALBERT WENGER, *THE WORLD AFTER CAPITAL* 86 (2021) (“[F]or markets and prices to exist, there have to be multiple buyers (demand) and sellers (supply). There is no demand and supply for you to spend time with your children or to figure out your purpose in life. Capitalism cannot help us allocate attention to anything that is deeply personal.”).

In addition, there is now substantial evidence that material possessions have a smaller impact on individuals' well-being than do experiences, both over the short and longer terms.<sup>123</sup> A vacation will enhance a person's well-being more than a fancy watch or clothes. Perhaps not surprisingly, individuals tend to overestimate how much happier material possessions will make them and underestimate how much happier positive experiences will make them.<sup>124</sup> Of course, income or wealth is typically required for both material possessions and experiences, though some experiences can be quite inexpensive. But one must have leisure time if one is to enjoy pleasurable experiences, which is not necessarily the case for material possessions—consider the watch or clothes mentioned above. Accordingly, a mistaken preference for material goods over experiences will likely reinforce a tendency to work longer hours than is optimal.

While there is evidence that affective forecasting errors—including affective forecasting errors regarding wealth—are common across cultures, it is possible that they are particularly powerful in the United States. Since the beginning of the Republic, Americans have largely been socialized to believe that there is a connection between working hard and being a good citizen or person.<sup>125</sup> Politicians and writers across the political spectrum vigorously expound the view that people who work hard are the ones who deserve to thrive in American society.<sup>126</sup> These comments are not limited to politicians: no less eminent a contemporary thinker than Kim Kardashian has exhorted people to

123. DANIEL GILBERT, *STUMBLING ON HAPPINESS* 46–50 (2006).

124. *See id.* at 46–50.

125. *See, e.g.,* Albiston, *supra* note 23, at 1104 (“[I]n our culture workers are considered ‘productive members of society’ and non-workers are viewed as ‘drains on society.’”); Benjamin Franklin, *Advice to a Young Tradesman*, in GEORGE FISHER, *THE AMERICAN INSTRUCTOR: OR YOUNG MAN’S BEST COMPANION* 375, 375–77 (9th ed. 1748), *reprinted in* 3 *THE PAPERS OF BENJAMIN FRANKLIN* 304–08 (Leonard W. Labaree ed., 1961)), <https://founders.archives.gov/documents/Franklin/01-03-02-0130> [<https://perma.cc/6X6C-8NGF>] (“Remember that Time is Money.”).

126. *See, e.g.,* Gwen Ifill, *The 1992 Campaign; Clinton’s Standard Campaign Speech: A Call for Responsibility*, N.Y. TIMES (Apr. 26, 1992), <https://www.nytimes.com/1992/04/26/us/the-1992-campaign-clinton-s-standard-campaign-speech-a-call-for-responsibility.html> [<https://perma.cc/J9NF-DFSZ> (staff-uploaded, dark archive)] (“The ideal that if you work hard and play by the rules you’ll be rewarded, you’ll do a little better next year than you did last year, your kids will do better than you.”); NBC NEWS, *Clinton: ‘Work Hard and Play by the Rules and You Will Prosper’* (June 13, 2013), <https://www.nbcnews.com/video/clinton-work-hard-and-play-by-the-rules-you-will-prosper-33335875889> [<https://perma.cc/54J3-NALV>] (video of former Secretary of State Hillary Clinton); Chris Cillizza, *Donald Trump Is Obsessed with How Hard He Works*, CNN (Feb. 12, 2019, 6:26 AM), <https://www.cnn.com/2019/02/11/politics/donald-trump-hard-work/index.html> [<https://perma.cc/7Z6E-2R6R>] (quoting President Trump: “Hard work is my personal method for financial success. You can do it too.”).

work harder.<sup>127</sup> A similar set of forces encourages Americans to buy more goods, or to believe that additional consumption will make them happier or more virtuous. Politicians, advertising, and celebrities have all spoken in favor of buying.<sup>128</sup>

These types of affective forecasting errors could extend beyond the individual employee. A working parent might mistakenly assume that putting in more hours and earning more money will create the most happiness for their children, when in fact more family time would lead to more happiness for the children and the parent.<sup>129</sup> The affective forecasting errors could compound one another. The result, again, would be a preference for jobs with longer hours than might otherwise be optimal for many employees.

### C. *Collective Action Problems*

There are at least three collective action problems that could lead to workers pulling longer hours. First, employees compete with each other in ways that can ultimately damage all of them.<sup>130</sup> Employers can deliberately amplify this effect. For example, professional firms in fields like law, finance, accounting, and management consulting generally have junior employees compete against each other in a tournament for coveted partnership positions,

127. Elizabeth Wagmeister, 'Money Always Matters': The Kardashians Tell All About Their New Reality TV Reign, VARIETY (Mar. 9, 2022, 6:00 AM), <https://variety.com/2022/tv/features/kardashians-hulu-kris-kim-khloe-1235198939> [<https://perma.cc/SC8X-RPDT>] (quoting Kim Kardashian: "I have the best advice for women in business . . . Get your fucking ass up and work. It seems like nobody wants to work these days.").

128. See, e.g., Emily Stewart, *How 9/11 Convinced Americans to Buy, Buy, Buy*, VOX (Sept. 9, 2021, 8:00 AM), <https://www.vox.com/the-goods/22662889/september-11-anniversary-bush-spend-economy> [<https://perma.cc/CW4T-YYG7>] (discussing statements by Bush Administration officials and private companies suggesting that consumption was patriotic); Kerry Higgs, *How the World Embraced Consumerism*, BBC (Jan. 20, 2021), <https://www.bbc.com/future/article/20210120-how-the-world-became-consumerist> [<https://perma.cc/JP8X-BLR2>]; *Resources for Freedom, Summary of Volume I of a Report to the President*, in THE PRESIDENT'S MATERIALS POLICY COMMISSION 1 (1952) (suggesting that the conflict with Communist nations demonstrated "the interdependence of moral and material values"). But see Tina Smithers Peckham, *Kim Kardashian Gets Candid About the Perks of Fame: 'Material Things Don't Make Me Happy Anymore'*, ET (Feb. 25, 2018, 9:56 AM), <https://www.etonline.com/kim-kardashian-gets-candid-about-the-perks-of-fame-material-things-dont-make-me-happy-anymore-97064> [<https://perma.cc/DBE2-BLTT>] (quoting Kim Kardashian: "Material things don't make me happy anymore, but experiences do.").

129. See ROBINSON, *supra* note 13, 119–30 (discussing the impact of workaholism on families).

130. See, e.g., Jayachandran, *supra* note 17 ("[T]his competition for scarce opportunities for advancement means that workers can be stuck in a kind of arms race, requiring them to be ever-present at work.").

driving all of them to work harder.<sup>131</sup> The dynamic can be similar to a prisoner's dilemma: the employees would all be better off if they cooperated and kept their hours and effort down, but cooperation is difficult to arrange among so many individuals, particularly if employers create incentives that induce employees to defect.<sup>132</sup> These effects can be exacerbated by the collapse of unions capable of coordinating workers' conduct and advancing their collective interest, and by conditions of labor monopsony that permit employers to meaningfully threaten employees with termination if they don't meet hours expectations.<sup>133</sup>

Second, firms themselves can be caught in a similar dynamic. If a firm in a service industry attempts to protect its workers by limiting the coverage that it offers clients, it will be undercut by competitors who promise that its workers will be available 24/7. Unless a norm is established across the relevant market, firms that promise its workers rest may find themselves unable to compete with firms that promise clients that their workers will not rest.

Third, workers as a group can generate positional externalities.<sup>134</sup> To take a simple example, suppose that there are a limited number of desirable apartments for rent. Some workers take on additional hours and use the extra earnings to bid more for the apartments. In order to submit competitive bids for those apartments, the other workers must take on additional hours and earn more as well. As a result, all workers are pulling more hours, but the additional money they earn is siphoned off in the form of higher rents. This dynamic can be exacerbated by distortions in key markets, such as artificial constraints on the supply of housing or high-quality education.<sup>135</sup>

#### D. *Labor Market Power*

Even workers who can anticipate that they would prefer to work less—and who are able to act on this preference—may find themselves trapped into longer

131. MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 26–32 (1991).

132. For example, suppose that a firm has two employees. The firm announces that if one works longer hours than the other, the person who works harder will receive a bonus which will be deducted from the other person's paycheck. If the bonus is large enough, one will be tempted to defect by pulling more hours, which will induce the other to pull more hours to avoid having a deduction from their paycheck. As a result, they will both work the same, higher level of hours and neither will collect the bonus.

133. See *infra* Section II.D (discussing labor market powers that create longer working hours).

134. See Seto, *Income Tax*, *supra* note 23, at 68–70; Robert H. Frank, *Context Is More Important Than Keynes Realized*, in *REVISITING KEYNES: ECONOMIC POSSIBILITIES FOR OUR GRANDCHILDREN*, *supra* note 2, at 143, 148–50.

135. See *infra* Section II.F.

hours.<sup>136</sup> For instance, a worker might take a job in which they are promised limited hours. But as time goes on, those conditions might begin to erode: the employer might ask the worker to work longer hours, work on weekends, and so forth.

Indeed, this type of strategy might be popular among employers because it is a mechanism by which they can erode employee wages over time. It is very difficult for employers to lower nominal wages, even when the firm has monopsony power, without workers becoming extremely unhappy and quitting or otherwise making life difficult for the firm.<sup>137</sup> This phenomenon is known as “downward nominal wage rigidity,” and even though its exact psychological source is hard to pinpoint, it has been observed repeatedly in many circumstances.<sup>138</sup> But an employer can still find ways to extract more value from its workers without triggering this type of revolt. Instead of lowering pay, employers can demand more work for the same pay (assuming the workers are salaried) or otherwise reduce the quality of working conditions.

Employers can also take advantage of the structure of salaried employment to induce workers to pull longer hours.<sup>139</sup> If an employer sets a wage level and allows the worker to select their number of hours, the worker will pull additional hours until the marginal cost to them of an hour worked rises to equal the wage. If the wage is set to the worker’s marginal revenue product, the result is a socially optimal number of hours worked, as the worker will continue to work until the marginal cost of work equals the marginal benefits. The worker will also reap a surplus, as the wage will exceed the marginal cost of labor for each hour worked.

But if the employer has the power to structure the relationship differently, it may be able to induce the worker to pull more hours at the same effective wage.<sup>140</sup> The employer can select an overall salary and require a set number of hours that exceeds the social optimum. The worker will tolerate the

136. See generally MICHAEL D. YATES, *WORK WORK WORK: LABOR, ALIENATION, AND CLASS STRUGGLE* (2022) (describing the market forces and employer tactics that prevent workers from negotiating to more favorable workplace arrangements).

137. Jonathan S. Masur & Eric A. Posner, *Horizontal Collusion and Parallel Wage-Setting in Labor Markets*, 90 U. CHI. L. REV. 545, 560–62 (2022).

138. See *id.*

139. See generally Aneil Kovvali, *Labor Market Competition and Collaboration* (2025) (unpublished manuscript) (on file with the North Carolina Law Review) (arguing that industries may need mechanisms other than competition to structure production in a way that effectively motivates workers).

140. *Id.*



arrangement as long as the average wage exceeds the average total cost, a higher number of hours at which the worker's surplus has evaporated. In effect, the employer forces the worker to give up some of their surplus from the initial hours by making the worker pull additional hours even as marginal costs to the worker exceed the wage. The point may seem abstract, but it is familiar from high intensity professions. A law firm does not bargain with associates over every marginal hour, allowing the associate to set hours based on marginal costs, but instead sets a salary and expects associates to work a high number of hours as a condition of employment. As the saying goes, "If you don't show up on Saturday, don't bother to come in on Sunday."<sup>141</sup>

Workers could protect themselves from this type of employer pressure in two different ways. First, they could switch jobs to one that offers more favorable working conditions. This might seem trivially easy. But in fact, many workers face severe labor frictions when attempting to change jobs.<sup>142</sup> They may have acquired firm-specific or occupation-specific skills that will not translate well to a new setting.<sup>143</sup> And jobs are not easily and smoothly fungible; they may differ along dimensions like commuting time or other conditions of employment that make other options less attractive. Employees may also come to value the people they work with, and employers may be able to tailor the working environment in other ways to benefit employees, thus persuading them to accept longer hours in exchange for these other benefits.<sup>144</sup>

Second, workers could bargain up front—when they accept a job—over how much they will be required to work. In theory, a perfectly rational worker with full information regarding the labor market and her future preferences

141. See, e.g., Bill Snyder, *Jeffrey Katzenberg: How Failure Makes a Better Leader*, STAN. BUS.: INSIGHTS (Mar. 13, 2018), <https://www.gsb.stanford.edu/insights/jeffrey-katzenberg-how-failure-makes-better-leader> [https://perma.cc/2L7X-2U5W]. For a variation on this comment, see *The Simpsons: Lisa's Rival* (Fox television broadcast Sept. 11, 1994) (Marge: "The plant called and said if you don't come in tomorrow, don't bother coming in Monday." Homer: "Woo-hoo! Four-day weekend!").

142. See Masur & Posner, *supra* note 137, at 555–56 (describing labor market frictions); Sydnee Caldwell & Oren Danieli, *Outside Options in the Labor Market*, 91 REV. ECON. STUD. 3286, 3286–87 (2024) (discussing labor market frictions related to commute times); Nina Roussille & Benjamin Scuderi, Bidding for Talent: Equilibrium Wage Dispersion on a High-Wage Online Job Board 1–6 (July 2023) (unpublished manuscript), <https://www.aeaweb.org/conference/2024/program/paper/ff56GirT> [https://perma.cc/M65T-3CEL] (discussing labor market frictions related to job amenities).

143. Masanori Hashimoto, *Firm-Specific Human Capital as a Shared Investment*, 71 AM. ECON. REV. 475, 475–82 (1981); Margaret M. Blair, *Firm-Specific Human Capital and the Theories of the Firm*, in EMPLOYEES AND CORPORATE GOVERNANCE 58–90 (Margaret M. Blair & Mark J. Roe, eds. 2000).

144. Cf. Roussille & Scuderi, *supra* note 142, at 4–6 (discussing and estimating non-wage amenities offered by firms).

might be able to successfully avail herself of this option. In practice, however, few employees are able to anticipate either the ways or extent to which an employer may try to shift the expectations of their job or their own future preferences. In general, workers do not adequately bargain for workplace protections, future salary increases, or other conditions of employment.<sup>145</sup>

In some sense, this inability to bargain effectively before beginning a job represents another manifestation of the phenomenon of affective forecasting errors described above. When they consider which terms of employment will mean the most to them in the future, and thus which they should bargain over (or privilege when choosing a job), the number of hours worked may not be high on the list.

The collapse of unionization may also play a role in preventing workers from bargaining effectively over the number of hours. When workers are represented by a union, the terms of employment are set by negotiation with union leadership.<sup>146</sup> That means that the terms of employment are set in accordance with the median worker's preferences, expressed through a democratic process. Without a union, terms are set by negotiation with the marginal worker expressing preferences through market transactions. The latter approach may encourage a focus on financial as opposed to other values. For instance, it is possible that marginal workers are more likely to be younger and mobile, with a preference for current income and work.

In addition, unions have the advantage of combining the wisdom of many minds over long time horizons.<sup>147</sup> Even if any given individual worker is unable to anticipate the value of more leisure time over the long run, the union as a whole may be able to do so by aggregating the information held by all of its members. As union membership across the country has diminished, these types of benefits have diminished as well.

As a result, workers may not obtain the optimal amount of leisure by leaving their employer or bargaining up front. These problems will be exacerbated if employers have market power. An employer with market power

145. Evan P. Starr, J.J. Prescott & Norman D. Bishara, *Noncompete Agreements in the U.S. Labor Force*, 64 J.L. & ECON. 53, 53–54 (2021); see also Eric A. Posner, *The Antitrust Challenge to Covenants Not To Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 176–77 (2020).

146. SIMON CLARKE, PETER FAIRBROTHER, MICHAEL BURAWOY & PAVEL KROTOV, WHAT ABOUT THE WORKERS? 91–92 (1993).

147. CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 24 (2008). See generally JAMES SUROWIECKI, THE WISDOM OF CROWDS (2005) (suggesting that a group of individuals can often outperform a single expert in decision-making).

can demand long and undesirable hours without being forced to internalize the cost of those demands by paying higher wages.<sup>148</sup>

Employers' power over workers can generate one countervailing force. When employers have monopsony or oligopsony power, they tend to depress wages below their competitive levels.<sup>149</sup> This, in turn, reduces employment, as fewer workers want to work at these lower wages.<sup>150</sup> That could lead to additional leisure time, as workers substitute leisure for (underpaid) labor.<sup>151</sup> (It is notable that the fact that monopsony may lead to increased consumption of leisure has traditionally been treated as a *problem* by the law and economics literature.)<sup>152</sup> For all the reasons we have explained in this part and will explain in Part III, however, monopsonistic wages will likely lead to fewer workers choosing to work at all, rather than workers remaining in the workforce but reducing their working hours.<sup>153</sup> This will tend to perpetuate the general problem: a one-size-fits-all model for work with hours that are excessive for many workers.

#### E. *Inequality and Precarity*

Inequality and precarity can distort labor-leisure tradeoffs by creating irresistible incentives and depriving individuals of meaningful choices. These

148. Ioana Marinescu & Eric A. Posner, *Why Has Antitrust Law Failed Workers?*, 105 CORNELL L. REV. 1343, 1352–56 (2020); Naidu et al., *supra* note 78, at 549–53; PETER CAPPELLI, *THE NEW DEAL AT WORK: MANAGING THE MARKET-DRIVEN WORKFORCE* 1193 (1999); Daron Acemoglu & Andrew F. Newman, *The Labor Market and Corporate Structure*, 46 EUR. ECON. REV. 1733, 1733–56 (2002); cf. Anil Kovvali, *Countercyclical Corporate Governance*, 101 N.C. L. REV. 141, 151–52, 152 n.29 (2022) (stating that there may be inefficient outcomes when wages do not fulfill their Pigouvian function of forcing firms to internalize costs associated with using worker time).

149. Naidu et al., *supra* note 78, at 538 (“With wages artificially suppressed, qualified workers decline to take jobs, and workers may underinvest in skills and schooling. Many workers exit the workforce and rely on government benefits, including disability benefits, which have become a hidden welfare system.”); see also Alan Manning, *Monopsony in Labor Markets: A Review*, 74 ILR REV. 3, 3–4 (2021) (discussing the impact of monopsony power on wages and employment).

150. Manning, *supra* note 149, at 11–12.

151. Richard S. Markovits, *The Causes and Policy Significance of Pareto Resource Misallocation: A Checklist for Micro-Economic Policy Analysis*, 28 STAN. L. REV. 1, 28 (1975). Workers may choose too much leisure because the wages they are offered do not equal their marginal productivity, because “the price of most goods other than leisure exceeds their marginal cost.” *Id.*

152. See *id.*

153. For example, monopsony conditions are endemic in healthcare, and nurses are both overworked and quitting in large numbers. See generally Daniel Sullivan, *Monopsony Power in the Market for Nurses*, 32 J.L. & ECON. S135 (1989) (finding that this can drive a vicious cycle: nurses who are able to leave do, meaning that the remaining workers are desperate and vulnerable to further exploitation by their employers).

forces are present at every socioeconomic level, though they can have different consequences. In this section, we describe three ways in which employees' precarious labor situations can lead them to work longer hours than would be ideal for them.

First, most white-collar professionals work at jobs with tournament structures.<sup>154</sup> For example, although associate attorneys at big law firms are well compensated relative to the broader society, their pay has stagnated over time, and they are underpaid relative to their productivity.<sup>155</sup> Yet law firms seem to have little difficulty inducing associates to work extremely long hours, even at the expense of associates' health and well-being. One explanation is that associates are competing with each other for the chance at promotion to partner. This prospect motivates them to pull long hours during the years leading up to the partnership decision. This type of tournament is present at a broad range of professional firms, including finance, accounting, and consulting, and has been offered as an explanation for extremely high CEO pay at other types of firms.<sup>156</sup>

This tournament structure depends on numerous forces, but the heart of the mechanism is inequality.<sup>157</sup> The low-ranked members play the game because they perceive that high-ranked members enjoy outsized rewards. If everyone received equal pay, there would be no reason to put in the extra hours.

This structure can be welfare reducing if it takes advantage of behavioral foibles. People have a tendency to overestimate their own abilities and to underestimate the role of luck in their lives.<sup>158</sup> If associates systematically

154. See, e.g., GALANTER & PALAY, *supra* note 131, at 2–4. See generally ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* (1995) (explaining how competitive forces impact economic markets and income distribution).

155. See Masur & Posner, *supra* note 137, at 571 (collecting evidence and suggesting that low associate pay is the result of horizontal collusion amongst law firms). This type of tournament structure can mitigate one of the concerns with labor cartels and monopsony: that it reduces incentives for people to work hard.

156. See, e.g., Usha R. Rodrigues, *Tournament of Managers: Lessons from the Academic Leadership Market*, 43 J. CORP. L. 537, 554–57 (2018).

157. Richard B. Freeman, *Why Do We Work More Than Keynes Expected?*, in *REVISITING KEYNES: ECONOMIC POSSIBILITIES FOR OUR GRANDCHILDREN*, *supra* note 2, at 135, 138 (“If everyone is paid more or less the same, there is little pecuniary reason to put in more hours to gain a promotion or otherwise advance at work. By contrast, if pay varies greatly, there is a sizable incentive to do what it takes to climb up the earnings distribution, including putting in long hours. Empirically, advanced countries with higher inequality exhibit greater hours worked and a greater desire by the population to work more hours.”).

158. See generally Anat Bracha & Donald J. Brown, *Affective Decision Making: A Theory of Optimism Bias*, 75 GAMES & ECON. BEHAV. 67 (2012) (explaining optimism bias in the context of the labor market).

overestimate their personal chance at making partner, they will work too hard. It can also be welfare reducing if it changes worker preferences. Associates at law firms are trained in more than the law: they are trained to want the lives that partners lead.<sup>159</sup> Prior to the pandemic, cocktail parties at partners' homes and dinners at fancy restaurants were mainstays of law firm life. Associates develop "golden handcuffs," in which they become locked into high mortgage payments and regular expenditures and are thus unable to escape to less intense roles.<sup>160</sup>

Tournaments also play a role at the level of industries. For example, only a few technology startup firms break through to profitability.<sup>161</sup> Employees of technology startups often expect to share in their firm's eventual success because of their equity stakes, and thus are induced to put in long hours.<sup>162</sup> This can also be welfare reducing. Behavioral foibles can again cause workers to overestimate the likelihood of their firm's success and work too many hours.<sup>163</sup> And startup employees may lack adequate reliable information to assess their employer's prospects.<sup>164</sup> An engineer may put in long hours believing that they are working at the next Alphabet only to find out later that they had wasted their time at another WeWork. Again, inequality is a key driver of the dynamic. The system works best in motivating employees if employees are dazzled by the billions collected by the handful of winners.

Second, "fractal" inequality heightens incentives across the economy.<sup>165</sup> Like a fractal design, the pattern of inequality looks the same even as one zooms

159. Cf. Seto, *Income Tax*, *supra* note 23, at 67–69 (arguing that due to interdependent or relative preferences, exposure to a higher income family reduces welfare and creates pressure to generate additional income); Theodore P. Seto, *Modeling the Welfare Effects of Advertising: Preference-Shifting Deadweight Loss*, 75 TAX L. REV. 55, 83 fig. 14, 84 fig. 15 (2021) (suggesting that advertising can shift consumer preferences, thus transferring value from consumers to producers and creating deadweight losses).

160. See generally Sukanya Sengupta, Keith Whitfield & Bob McNabb, *Employee Share Ownership and Performance: Golden Path or Golden Handcuffs?*, 18 INT'L J. HUM. RES. MGMT. 1507 (2007) (suggesting correlations between competitive work environments, employee commitment, and turnover rates).

161. See, e.g., Elizabeth Pollman, *Startup Failure*, 73 DUKE L.J. 327, 329–30 (2023).

162. See generally Brian J. Broughman & Matthew T. Wansley, *Risk-Seeking Governance*, 76 VAND. L. REV. 1299 (2023) (analyzing incentive effects of equity stakes).

163. See generally Tali Sharot, *The Optimism Bias*, 21 CURRENT BIOLOGY R941 (2011) (highlighting the possibility that human learning mechanisms can mis-predict future occurrences).

164. See Elizabeth Pollman, *Private Company Lies*, 109 GEO. L.J. 353, 382 (2020).

165. See, e.g., Annie Lowrey, *Even Among the Richest of the Rich, Fortunes Diverge*, N.Y. TIMES (Feb. 10, 2014), <https://www.nytimes.com/2014/02/11/your-money/even-among-the-richest-of-the-rich->

in: the top 10% control much more wealth than the average, but the top 1% control much more wealth than the average member of the top 10%, the top 0.1% control much more wealth than the average member of top 1%, and so on.<sup>166</sup> This distribution of wealth creates an enormous incentive to work hard and advance. Everyone is frantic to make it to the next rung up because of the outsized rewards of that status, and everyone is terrified of falling to the next rung down because of the outsized rewards that they already enjoy. These desires and fears can be a powerful inducement to trade time away for additional income, particularly if individuals overestimate the likelihood of moving up or down the socioeconomic ladder.<sup>167</sup>

Third, workers at the bottom of the economic ladder may have no choice but to put in additional hours to sustain themselves. As Weber wrote at the turn of the last century, instead of seeking to induce workers to put in more effort by paying them more, capitalists have sought

to force the worker by reduction of his wage-rates to work harder to earn the same amount than he did before. . . . For centuries it was an article of faith, that low wages were productive, i.e. that they increased the

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fortunes-diverge.html [https://perma.cc/5EGD-YARG] (staff-uploaded, dark archive) (last modified June 9, 2025); PAUL KRUGMAN, PEDDLING PROSPERITY: ECONOMIC SENSE AND NONSENSE IN THE AGE OF DIMINISHED EXPECTATIONS 148 (1994) (“[G]rowth in inequality in the United States is ‘fractal’: one sees growth not just between groups but within groups. For example, lawyers have seen their earnings rise compared with factory workers; but the best-paid lawyers have also outperformed the average lawyer, by a substantial amount.”). This structure is consistent with Pareto’s law on the distribution of incomes. *See generally* Benoit Mandelbrot, *The Pareto-Lévy Law and the Distribution of Income*, 1 INT’L ECON. REV. 79 (1960) (providing a theoretical basis for applying Pareto’s law to measures of economic quantities, including income distribution).

166. Frank Pasquale, *Access to Medicine in an Era of Fractal Inequality*, 19 ANNALS HEALTH L. 269, 276 (2009).

167. *See* Alberto Alesina, Stefanie Stantcheva & Edoardo Teso, *Intergenerational Mobility and Preferences for Redistribution*, 108 AM. ECON. REV. 521, 522–23 (2018) (“Americans are more optimistic than Europeans about intergenerational mobility, and they are over-optimistic relative to actual mobility in the United States, especially about the probability of a child from a family in the bottom quintile making it to the top quintile: the ‘American dream.’ We show that, paradoxically, optimism is particularly high in US states where actual mobility is particularly low.”); *Americans Overestimate Social Mobility in Their Country*, ECONOMIST (Feb. 14, 2018), <https://www.economist.com/graphic-detail/2018/02/14/americans-overestimate-social-mobility-in-their-country> [https://perma.cc/XP7A-HVR9] (“An American born to a household in the bottom 20% of earnings . . . only has a 7.8% chance of reaching the top 20% when they grow up. Americans surveyed thought the probability was 11.7%.”).

material results of labour so that . . . the people only work because and so long as they are poor.<sup>168</sup>

Various features of the modern American economy enhance the desperation of this class of workers. For example, members of the working poor often face unfair conditions that make it difficult for them to achieve stability in housing or in sourcing food.<sup>169</sup> Instead of taking responsibility for ensuring that the working poor are sheltered and fed, policymakers have encouraged the working poor to borrow money for rent and food.<sup>170</sup> This strategy might prevent widespread homelessness and starvation, but it also leaves workers vulnerable to employer discipline: they must earn enough to cover interest payments.<sup>171</sup>

While the problem is most acute for the most impoverished citizens, it is also present for a broad swath of the middle class. At the very bottom of the socioeconomic ladder, the concept of “need” has a literal meaning, as it involves necessities like shelter, food, and medical care. But at higher socioeconomic levels, “need” may have a more expansive meaning and encompass superior housing and higher education for children.<sup>172</sup> These goods may only be available at distorted prices,<sup>173</sup> and even reasonable substitutes can be extremely expensive for the middle class.<sup>174</sup> And again, access to credit has taken the place

168. WEBER, *supra* note 20, at 24. Weber wrote with remarkable insight about the limits of this strategy, suggesting that it requires a large reserve army of unemployed workers prepared to step into any vacated job. *Id.* at 24–25. He also observed that these conditions could reduce long-term productivity as enterprises take on more workers instead of using existing workers more effectively. *Id.* at 25.

169. See generally, e.g., BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2001) (recounting lessons from the author’s experimentation in surviving on the minimum wage); MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016) (following eight families through the process of eviction).

170. See Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1101–02 (2019); Vijay Raghavan, *Shifting Burdens at the Fringe*, 102 B.U. L. REV. 1301, 1305 (2022) (“[T]he cost of credit and access to credit are ways of financing the private disbursement of public obligations.”).

171. It can also leave them vulnerable to predatory schemes that do little to enhance their wealth or welfare. See Jonathan Macey, *Fair Credit Markets: Using Household Balance Sheets to Promote Consumer Welfare*, 100 TEX. L. REV. 683, 687 (2022).

172. See generally AMERICAN COMPASS, FAILING ON PURPOSE SURVEY (2021), <https://americancompass.org/failing-on-purpose-survey-part-1/> [https://perma.cc/SRT5-FJUH] (presenting data showing that parents greatly value an education for their children not merely to advance their careers, but to prepare them to build decent lives in their communities).

173. See *infra* Section II.F.

174. For example, Section II.F *infra* takes aim at the expense of a Yale education. But even tuition at an excellent state school such as Indiana University is not cheap; in-state tuition stands at approximately \$12,000, while out-of-state tuition is approximately a healthy \$42,000. *How Much Does*

of social provision. For example, student loans are treated as a substitute for adequate subsidies for higher education.

For present purposes, the key observation is that inequality and precarity can cause people to work too hard. But it is worth noting that inequality and precarity are also inherently bad. Policymakers have sometimes chosen to tolerate—or even consciously drive up—inequality and precarity in order to press people to work harder.<sup>175</sup> The analysis here suggests that the price is not worth paying.

#### F. *Distortions in Other Markets*

A worker's decision regarding how many hours to work will depend on wages set in the labor market. But it will also depend on prices and conditions set by surrounding markets. If supply is artificially constrained and prices are artificially inflated in a market that is important to consumers, it will influence their decisions about how hard to work.

Distortions in other markets could lead to workers pulling more hours for two reasons. First, increased prices make workers poorer. Standing alone, this income effect would cause most workers to work harder: at lower levels of income, a marginal dollar of income has a relatively large impact on satisfaction, making additional work for more pay a relatively attractive proposition. But this income effect could be balanced by a substitution effect that would cause workers to increase leisure. In that case, wages would decline in real terms, making work less attractive relative to leisure.<sup>176</sup> The question of which effect predominates is ultimately empirical, and may vary for each worker.<sup>177</sup>

Second, if a worker has some minimum concept of what it takes to lead a decent life, such as expectations for housing or a child's education, they are likely to work as hard as is necessary to achieve that decent life. As a result,

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*It Cost to Attend IU Bloomington?*, IND. UNIV. BLOOMINGTON, STUDENT CENT., <https://studentcentral.indiana.edu/cost-of-iu/index.html> [<https://perma.cc/M2EL-FXSK> (staff-uploaded archive)]. This sum is a fraction of Yale's tuition, but it is still a lot of money for a working- or middle-class family.

175. This was a stated or implicit rationale for the Reagan and Trump tax cuts, and it is a basic motivation behind the Federal Reserve's decision to increase interest rates to cool a tight labor market.

176. See Markovits, *supra* note 151, at 28 (explaining that workers may choose more leisure if the wages they are offered do not equal their marginal productivity because "the price of most goods other than leisure exceeds their marginal cost").

177. For a discussion of similar income and substitution effects in the context of tax policy, see CONG. BUDGET OFF., *HOW THE SUPPLY OF LABOR RESPONDS TO CHANGES IN FISCAL POLICY* 1–7 (2012), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/43674-laborsupplyfiscalsupply.pdf> [<https://perma.cc/7JR8-GXNB>].



distortions in the market for housing or education could lead to distortions in labor-leisure decisions.<sup>178</sup>

A full exploration of the constraints on the supply of housing and higher education would be beyond the scope of this Article. But there is strong evidence that there are artificial constraints. In housing, a large number of community groups and local jurisdictions have placed legal barriers on the construction of affordable (or any) homes. Critics have referred to this as the “Not In My Backyard” or “NIMBY” movement, suggesting that it has racist or classist dimensions<sup>179</sup> and protects the interests of relatively wealthy incumbent homeowners against everyone else.<sup>180</sup> Regardless of their motivations, legal barriers to construction do seem to stymie housing development, contributing to a shortage of housing and distorting prices.<sup>181</sup> In order to afford acceptable housing, workers must pull more hours.<sup>182</sup>

178. There is at least some evidence of this effect in the opposite direction. Public support for housing appears to cause an increase in leisure. See Brian A. Jacob & Jens Ludwig, *The Effects of Housing Assistance on Labor Supply: Evidence from a Voucher Lottery*, 102 AM. ECON. REV. 272, 274 (2012) (“Our reduced-form estimates suggest that for working-age, able-bodied adults, [housing] voucher use reduces quarterly employment rates by nearly 4 percentage points (6 percent) and quarterly earnings by \$329 (10 percent).”); Edgar O. Olsen, Catherine A. Tyler, Jonathan W. King & Paul E. Carrillo, *The Effects of Different Types of Housing Assistance on Earnings and Employment*, 8 CITYSCAPE 163, 165 (2005), <https://www.huduser.gov/periodicals/cityscape/vol8num2/ch8.pdf> [<https://perma.cc/35QV-8HX9>] (“[A]ll types of housing assistance have substantial disincentive effects on market work.”).

179. See WILLIAM A. FISCHER, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION 201 (2015) (“Zoning could . . . be used to reduce potential contact between races, or between high- and low-income people, by the superficially neutral expedient of insisting on large lots and single-family homes in residential districts.”). See generally LISA BELKIN, SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION (1999) (describing the fight to build public housing in Yonkers).

180. See Erin Griffith, *The Summer of NIMBY in Silicon Valley’s Poshest Town*, N.Y. TIMES (last updated Sept. 29, 2022), <https://www.nytimes.com/2022/08/12/technology/nimby-housing-siliconvalley-atherton.html> [<https://perma.cc/V6EZ-FFQC> (staff-uploaded, dark archive)].

181. See *id.*; JIM PARROTT & MARK ZANDI, OVERCOMING THE NATION’S DAUNTING HOUSING SUPPLY SHORTAGE 4 (2021), [https://www.urban.org/sites/default/files/publication/103940/overcoming-the-nations-daunting-housing-supply-shortage\\_0.pdf](https://www.urban.org/sites/default/files/publication/103940/overcoming-the-nations-daunting-housing-supply-shortage_0.pdf) [<https://perma.cc/6GDD-ULRN> (staff-uploaded archive)] (describing the “sheer number” of local regulations that have the effect of impeding the provision of affordable housing, “[f]rom zoning that restricts multifamily development or dense single-family development, to prohibitive permitting and developing fees”).

182. Workers may also be forced to live farther from their jobs and commute longer distances. See PARROTT & ZANDI, *supra* note 181, at 6 (“Affordability is . . . forcing low-income workers to live farther away from their work, requiring long and costly commutes and reducing productivity.”). Commuting time does not have the salutary benefits of true leisure. But long commutes may operate as a tax on labor that encourages workers to work less. See Weisbach & Hemel, *supra* note 13, at 485–86.

Many Americans also consider their children's education to be a nonnegotiable element of a good life. This plainly has an impact on housing decisions because access to a decent primary and secondary education can depend on living in the right neighborhood.<sup>183</sup> But it can also be a consideration as parents prepare for their children's higher education. For example, Yale's undergraduate tuition is currently \$69,900;<sup>184</sup> Yale Law School's tuition is currently \$76,636.<sup>185</sup>

Schools like Yale are also famously selective: the college accepted only 4.46% of applicants in a recent cycle,<sup>186</sup> and the law school accepted only 5.62%.<sup>187</sup> But these daunting headline figures are completely arbitrary and artificial. It is implausible that Yale would offer a worse education if it were 10% larger. The artificial scarcity of an education at Yale—and at essentially every institution like Yale<sup>188</sup>—creates enormous anxiety and encourages many families to save heavily and undertake costly preparations. This drives up families' perceived need for income and encourages parents to prioritize earnings.<sup>189</sup>

This kind of distortion may increase in importance as the economy grows, and it can relate to other sources of distortion. As societies solve the physical problems associated with production, companies will increasingly endeavor to manufacture scarcity by creating and defending desirable brands. In a sense, luxury brands like Moët Hennessy Louis Vuitton are engaged in the same enterprise as Yale: they limit production of a good, then convince the public of

183. See generally LaToya Baldwin Clark, *Stealing Education*, 68 UCLA L. REV. 566 (2021) (describing the legal penalties for “stealing” a quality education by falsifying residence).

184. *Tuition and Fees*, YALE UNIV. (2025), <https://student-accounts.yale.edu/tuition-and-fees> [<https://perma.cc/FD75-MZB2>].

185. *Student Budget & Cost of Attendance*, YALE L. SCH. (2025), <https://law.yale.edu/admissions/cost-financial-aid/cost-attendance> [<https://perma.cc/YNP2-SPDV>].

186. Jordan Fitzgerald, *Yale Admits 2,234 Students, Acceptance Rate Shrinks to 4.46 Percent*, YALE DAILY NEWS (Mar. 31, 2022, 7:15 PM), <https://yaledailynews.com/blog/2022/03/31/yale-admits-2234-students-acceptance-rate-shrinks-to-4-46-percent/> [<https://perma.cc/P8FZ-MLEV>].

187. *Statistical Profile of the Class of 2027*, YALE L. SCH., <https://law.yale.edu/admissions/profiles-statistics> [<https://perma.cc/BFC8-5NE9>] (last modified Apr. 26, 2025).

188. Although it is rarely thought of as a cartel, the behavior of leading universities arguably has that character. The resulting reduction in supply and increase in cost have welfare effects that are similar to an antitrust conspiracy. Indeed, a lawsuit alleging that various top universities actually violated antitrust law by coordinating financial aid packages recently survived a motion to dismiss. See *Carbone v. Brown Univ.*, 621 F. Supp. 3d 878, 894 (N.D. Ill. 2022).

189. It can also encourage intensive forms of parenting in which parents and children spend long hours working to boost performance and achievement. See WILLIAM DERESIEWICZ, *EXCELLENT SHEEP: THE MISEDUCATION OF THE AMERICAN ELITE AND THE WAY TO A MEANINGFUL LIFE* 8–10 (2014) (collecting evidence of a mental health crisis at elite colleges and suggesting that it is the result of an education and upbringing that stresses success to the exclusion of all other values).

the need to purchase that good at inflated prices. As companies have perfected the art of advertising, they have increasingly found ways to distort consumer—and thus worker—choices by changing their understanding of what is necessary to lead a decent life.<sup>190</sup>

### III. HOW LAW FAVORS LONGER WORK

The previous Part detailed the economic and structural forces that propel workers toward working longer hours. In this part, we turn our attention to law. As we will explain, a wide variety of laws create strong incentives for workers to work longer hours and for businesses to offer jobs that require longer hours.

Section A identifies laws that create incentives for employees to work longer hours. Section B then turns to laws that create incentives for employers to create jobs requiring longer hours of work.

#### A. *Legal Rules That Encourage Work*

A variety of legal rules across a variety of legal areas create incentives for workers to work longer hours. In many cases, we suspect that these rules were devised with the typical American worker in mind—that is, they were centered around full-time work because the modal American worker worked full time. Indeed, in many cases these rules were enacted to constrain the work week to forty hours, rather than the longer working periods that some employers demanded.<sup>191</sup> We do not necessarily disagree with these rules or the rationale behind their design. The result of these provisions, however, has been to create a one-size-fits-all model for work that may operate to the disadvantage of workers who would prefer a different arrangement. In addition, many of these rules contain sharp cutoffs or other discontinuities that can strongly affect incentives at the margin, often in ways that workers may not be able to account for.

*Earned Income Tax Credit (“EITC”).* The EITC may be the most effective and broad-based antipoverty measure in the United States. The EITC is a refundable tax credit available to lower-income workers who accrue earned income, which operates to provide them with additional income at the end of the year. In part because it is automatic—a taxpayer does not need to register for the EITC, she need only claim it when she files her tax returns—the rate of

190. See *supra* Section I.A.

191. Scott D. Miller, *Revitalizing the FLSA*, 19 HOFSTRA LAB. & EMP. L.J. 1, 7–25 (2001).

uptake on the EITC is quite high, and it has been very successful at lifting individuals and families out of poverty.<sup>192</sup>

The very fact that the EITC is the main mechanism in the United States for providing cash assistance to needy families is evidence of the focus placed on work and the way in which the law can reify this focus. Unlike a universal basic income or simple cash transfers to people living in poverty, the EITC requires a recipient to work and earn income in order to receive cash assistance. The EITC thus increases incentives for people to work by increasing their effective hourly wage.

The EITC is not precisely linear: it provides maximum value to the recipient when she earns approximately \$15,000 per year (the exact figure varies based on the number of dependents that the wage-earner is supporting), and then less value as the employee's salary increases past that threshold.<sup>193</sup> Accordingly, there are some domains of hours worked and wages earned where the EITC creates incentives for employees to work additional hours, and some domains in which it provides incentives for employees not to work additional hours. In the net, the best available empirical evidence seems to indicate that while the EITC has been effective at spurring employment, in the sense that it has encouraged more people to work, it has relatively little effect on the number of hours a person will work conditional on them being employed.<sup>194</sup>

*Retirement Benefits Laws.* The federal programs meant to incentivize saving for retirement all operate through employment. Social Security, the most widespread federal retirement savings program, is based around employment income. The most commonly used retirement savings vehicles, tax-advantaged 401(k) and 403(b) plans, must be offered and sponsored by employers.

Even Individual Retirement Accounts ("IRAs"), which are not tied to employers, are typically tied to earned income. Roth IRAs, which allow retirement savings to grow tax-free, require earned income, which in turn requires labor. And traditional IRAs, which do not require earned income, are particularly advantageous because contributions are tax-deductible. The value

192. See generally Hilary W. Hoynes & Ankur J. Patel, *Effective Policy for Reducing Poverty and Inequality? The Earned Income Tax Credit and the Distribution of Income*, 53 J. HUM. RES. 859 (2018) (describing effects of the earned income tax credit); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal for Repair*, 88 N.Y.U. L. REV. 515 (2013) (describing importance of EITC while identifying flaws).

193. TAX POL'Y CTR., WHAT IS THE EARNED INCOME TAX CREDIT?, <https://www.taxpolicycenter.org/briefing-book/what-earned-income-tax-credit> [https://perma.cc/VCM9-47U7] (last updated Jan. 2024).

194. *Id.*

of a tax deduction is itself dependent upon whether the individual has earned income. Here too, as with the EITC, the tethering of retirement savings benefits and labor has the effect of creating incentives for individuals to work more.

Many of these benefits extend to employees who work part-time as well as full-time. The Employee Retirement Income Security Act of 1974 (“ERISA”)<sup>195</sup> gives employees who work at least 1,000 hours per year (approximately twenty hours per week) the ability to participate in employer-sponsored retirement plans.<sup>196</sup> In addition, it requires employers to credit part-time workers who exceed the twenty hours per week threshold with the same retirement benefits—such as the employer’s matching contribution to a 401(k) plan—they provide to full-time workers, pro-rated for the number of hours they work.<sup>197</sup> In other words, a worker who works twenty hours must receive half of the benefit provided to a worker who works forty hours per week. In addition, the related Setting Every Community Up for Retirement Enhancement Act of 2019 (“SECURE Act”)<sup>198</sup> extends these rules regarding retirement plan participation to some part-time employees who have worked at least 500 hours in three consecutive years.<sup>199</sup>

In combination, these provisions could be seen as creating incentives for either part-time or full-time work—but work, one way or another. And given the tendency for employers to offer predominantly full-time positions, they likely tilt many employees toward full-time work who might otherwise work much less.

*Affordable Care Act Insurance Rules.* The Affordable Care Act (“ACA”)<sup>200</sup> mandates that all businesses above a particular size<sup>201</sup> offer health insurance to

195. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, §§ 1001–2008, 88 Stat. 829, 898–994 (1974) (codified as amended in scattered sections of 29 U.S.C.).

196. 29 U.S.C. § 1052(a)(3)(A).

197. U.S. DEP’T. OF LAB., FAQs ABOUT RETIREMENT PLANS AND ERISA 2–3, <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf> [<https://perma.cc/AM5U-8MEV>].

198. Setting Every Community Up for Retirement Enhancement Act of 2019, Pub. L. No. 116-94, 133 Stat. 3137 (2019) (codified as amended in scattered sections of 26 U.S.C.).

199. 26 U.S.C. § 401(k)(2)(D)(ii).

200. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

201. The Department of the Treasury promulgated regulations to define “large employer” status. 26 C.F.R. § 54.4980H-2 (2024). Generally, an employer whose sum of its full-time employees and its “full-time equivalent” employees is greater than fifty qualifies as a “large employer.” *Id.* § 54.4980H-

all employees who work more than thirty hours per week or 130 hours per month.<sup>202</sup> This naturally creates a substantial incentive for employees to work at least thirty hours per week or 130 hours per month—employer-provided insurance can be quite valuable, even compared with the subsidized insurance that employees are able to purchase on the ACA-created marketplaces.

When the ACA was first passed, there was concern that the thirty-hour cliff would discourage businesses from providing full time employment. Some experts predicted that employers would offer more less-than-thirty-hours per week positions and fewer full-time positions to avoid being forced to provide insurance to some of their employees.<sup>203</sup> Indeed, the drafters of the ACA chose thirty hours rather than forty hours as the cutoff to reduce the ability of employers to game the rule by cutting employee hours to thirty-eight or thirty-nine per week.<sup>204</sup> Thus far, empirical evidence is mixed regarding whether the thirty-hour cutoff has caused employers to reduce employee hours below that threshold.<sup>205</sup> This could be interpreted as evidence that having fewer employees working longer hours is more economically efficient for employers. In any event, the likely result of this law is to provide incentives for workers to work longer hours than they otherwise might.

At the same time, the ACA may have also reduced the need for individuals to work (or work full time) by making health insurance outside of employment more affordable. A large percentage of Americans get their health insurance

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2(b)(1). This is interesting because it creates an incentive for borderline employers to stay under the threshold number of full-time employees to avoid the ACA's obligations, thereby disincentivizing hiring marginal full-time employees during the growth phase of a company in which it is close to transitioning to "large employer" status.

202. 26 U.S.C. § 4980H(a)(1); 26 C.F.R. § 54.4980H-3(d)(1)(i).

203. For instance, Representative Christopher H. Smith said in a speech: "This is a dangerous and fundamental change that will result in less hours and lower paychecks, affecting millions of Americans who plan their budget around the traditional 40-hour work week." 160 CONG. REC. E513 (daily ed. Apr. 3, 2014).

204. There does not appear to be any direct evidence. In a 2016 report, the Congressional Research Service wrote that it had "searched the Congressional Record for any statement of intent in the ACA for defining 30 hours or more as full-time for the employer penalty calculation and did not find any direct statement explaining congressional intent." JULIE M. WHITAKER, CONG. RSCH. SERV., R43981, *THE AFFORDABLE CARE ACT'S (ACA) EMPLOYER SHARED RESPONSIBILITY DETERMINATION AND THE POTENTIAL EMPLOYER PENALTY* 7 (2016).

205. See Aparna Mathur, Sita Nataraj Slavov & Michael R. Strain, *Has the Affordable Care Act Increased Part-Time Employment?*, 23 *APPLIED ECON. LETTERS* 222, 225 (2016) (finding no effect); BOWEN GARRETT & ROBERT KAESTNER, *URBAN INST., RECENT EVIDENCE ON THE ACA AND EMPLOYMENT: HAS THE ACA BEEN A JOB KILLER?*, 2 (2015) (finding no effect); William E. Even & David A. Macpherson, *The Affordable Care Act and the Growth of Involuntary Part-Time Employment*, 72 *ILR REV.* 955, 978 (2019) (finding some effect).

through their employer; for many years, this was the only affordable mechanism for obtaining health insurance. The ACA partially decouples insurance from work and thus enables more working-age adults to leave the labor force (or become self-employed) than was possible under prior law. On the whole, empirical evidence regarding the overall labor effects of the ACA is mixed.<sup>206</sup> Accordingly, it seems likely that the labor-incentivizing features of the ACA are at least keeping up with—and perhaps exceeding—the incentives it provides to reduce labor.

*Overtime Rules under the Fair Labor Standards Act.* The FLSA mandates that hourly workers who are in nonmanagerial roles<sup>207</sup> must be paid 1.5 times their normal hourly wage for any hours over forty they work in a given week.<sup>208</sup> For many workers, this rule creates a very strong incentive to try to accrue overtime pay, which can be extremely lucrative. Of course, many employees would probably prefer to work variable hours per week in order to maximize their pay—it is more lucrative to work twenty hours one week and sixty hours the next week in order to earn overtime in that second week—but employers are unlikely to allow this. For many employees, the only route to overtime pay will be to work forty hours per week (or close to it) and wait for an opportunity when an unexpected development forces the employer to have the employee work longer hours. Accordingly, this rule likely pushes some employees toward longer hours than they might otherwise prefer.

At the same time, the rule creates the inverse incentives for employers, who benefit from limiting employees to no more than forty hours per week. It is possible that it even creates incentives for employers to limit their employees to fewer than forty hours per week to create a buffer between the employee's current schedule and the forty-hours-per-week cliff. In all likelihood, however, the main effect of the overtime rule is to encourage employers to cap weekly hours at forty and to encourage some employees to work that many hours to hit that threshold even if they were not otherwise inclined to do so.

206. Bradley T. Heim & Lang Kate Yang, *The Impact of the Affordable Care Act on Self-Employment*, 26 HEALTH ECON. e256, e271–72 (2017).

207. *Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)*, U.S. DEP'T. OF LAB., <https://www.dol.gov/agencies/whd/fact-sheets/17a-overtime> [<https://perma.cc/V8C7-5F2C>] (last updated Sept. 2019).

208. 29 U.S.C. § 207(o)(1); Miller, *supra* note 191, at 30–31 (citing *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 577–78 (1942), *superseded by statute*, Portal-to-Portal Act of 1947, Pub. L. 80-49, ch. 52 (codified as amended at 29 U.S.C. ch. 9)).

*Temporary Aid to Needy Families.* The federal Temporary Aid to Needy Families (“TANF”) program provides cash benefits to families with children living at or near the poverty line.<sup>209</sup> Federal TANF law requires that 50% of families receiving TANF assistance be “engaged in a work activity for at least 30 hours a week” or “20 hours per week for single parents with children under 6.”<sup>210</sup> For families with two working adults, the work requirement is at least 35 hours per week between the two adults.<sup>211</sup> TANF thus creates incentives for employees to work longer hours than they otherwise might in order to qualify for benefits.

TANF is jointly administered with the states, and individual states could choose to impose more stringent work requirements than federal law currently mandates.<sup>212</sup> However, TANF is structured to discourage states from imposing more stringent requirements. To qualify for a block grant of TANF funds, a state must show that a set percentage of families receiving assistance are working or engaged in activities.<sup>213</sup> If a state increases its working hours requirement, and this causes more individuals within the state to fail to meet their working requirement, the state’s block grant may be reduced or even eliminated.<sup>214</sup>

*Medicaid Eligibility.* People who are below or near the poverty line can gain access to free health insurance through Medicaid. Like TANF, Medicaid is a federal program administered through the states, which means that the states can impose requirements—above and beyond federal requirements—regarding whom is eligible to receive Medicaid, though those requirements have been controversial.<sup>215</sup> At present, thirteen states impose work requirements to qualify

209. *Policy Basics: Temporary Assistance for Needy Families*, CTR. ON BUDGET & POL’Y PRIORITIES, <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> [https://perma.cc/E8HE-EJAH] (last updated Mar. 1, 2022).

210. *Id.*

211. *Id.*

212. GENE FALK & PATRICK A. LANDERS, CONG. RSCH. SERV., RL32760, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 7–8 (2024).

213. *Id.*

214. *Id.*

215. Sudhin Thanawala, *Judge Reinstates Work Requirement in Georgia Medicaid Plan*, AP NEWS (Aug. 20, 2022, 12:06 AM), <https://apnews.com/article/health-donald-trump-georgia-medicare-c2bf940d3dcde6c921d5741451eee828> [https://perma.cc/UV9Y-V5NG (staff-uploaded archive)].



for Medicaid.<sup>216</sup> Of the thirteen, nearly all of them require that Medicaid recipients work at least twenty hours per week or eighty hours per month.<sup>217</sup> New Hampshire has the strictest work requirements, at a hundred hours per month.<sup>218</sup> Nine other states have pending requests to institute Medicaid work requirements; the strictest of these would be Alabama's, which would mandate twenty hours per week for anyone who is caring for a child under the age of six and thirty-five hours per week for anyone who is not.<sup>219</sup> The Biden Administration generally disfavored such Medicaid work requirements, possibly limiting their potential impact. The Trump Administration and its allies in Congress plainly have different priorities with respect to Medicaid, and at the time of this writing, it is unclear how this aspect of the program will evolve.<sup>220</sup>

The Medicaid work requirements are intended to force recipients to work who might otherwise not intend to do so, and they may have that effect.<sup>221</sup> In addition, given the structure of the market for labor and the preference among businesses for full-time work, even a twenty-hour work requirement will in practice likely push some employees into longer job hours, closer to (or reaching) full-time labor.

216. Madeline Guth & MaryBeth Musumeci, *An Overview of Medicaid Work Requirements: What Happened Under the Trump and Biden Administrations?*, KAISER FAM. FOUND. (May 3, 2022), <https://www.kff.org/medicaid/issue-brief/an-overview-of-medicaid-work-requirements-what-happened-under-the-trump-and-biden-administrations/> [https://perma.cc/2BAX-A9YR].

217. *Id.*

218. *Id.*

219. *Id.*

220. As of this writing, Republicans in the House of Representatives had approved a bill that would impose new work requirements on Medicaid recipients. See Elizabeth Zhang & Gideon Lukens, *Harsh Work Requirements in House Republican Bill Would Take Away Medicaid Coverage From Millions: State and Congressional District Estimates*, CTR. ON BUDGET & POL'Y PRIORITIES (May 13, 2025), <https://www.cbpp.org/research/health/harsh-work-requirements-in-house-republican-bill-would-take-away-medicaid-coverage> [https://perma.cc/HU97-C3E8 (staff-uploaded archive)]. Speaker Mike Johnson sought to frame the change as being based on moral concepts about the value of work. See Ja'han Jones, *Mike Johnson Claims Medicaid Cuts Are Teaching a 'Moral' Lesson to Young Men*, MSNBC (May 27, 2025, 2:09 PM), <https://www.msnbc.com/top-stories/latest/mike-johnson-medicaid-cuts-manhood-rcna209249> [https://perma.cc/93WM-L87G] (Johnson: "So there's a moral component to what we're doing. And when you make young men work, it's good for them, it's good for their dignity, it's good for their self-worth, and it's good for the community that they live in.").

221. See Sam Whitehead, Phil Galewitz & Katheryn Houghton, *States Push Medicaid Work Rules, But Few Programs Help Enrollees Find Jobs*, NPR (Apr. 15, 2025 11:24 AM), <https://www.npr.org/sections/shots-health-news/2025/04/15/nx-s1-5361491/medicaid-work-requirements> [https://perma.cc/XR3V-DH9V] (noting that requirements can push some Medicaid recipients toward work, but identifying limits to this effect).

*Visa Requirements.* Certain types of work visas require that the visa recipient be employed full time (meaning at least forty hours per week) in order to be eligible for the visa. For instance, the EB-3 visa, which permits “skilled workers” to work in the United States, requires that the visa recipients work full time.<sup>222</sup> This obviously creates a very strong incentive for non-citizen workers who wish to live and work in the United States to take full-time jobs. The United States issued approximately 55,000 EB-3 visas in 2021.<sup>223</sup> This is a relatively small number of people, measured against the entire American work force of roughly 100 million. But the program requirements tend to channel recipients disproportionately into particular industries that rely on high-skilled labor. In addition, the availability of immigrant workers who want full-time jobs creates labor market pressure on non-immigrant workers, who must compete on the same terms. All told, the visa requirements likely push many more than the direct recipients toward full-time work.

*Family and Medical Leave Act.* The FMLA provides covered employees the right to take unpaid leave if they are suffering from a medical illness or taking care of a family member, and requires that the employer offer them their job back at the end of the period of leave.<sup>224</sup> It can be very challenging to exit the workforce for an appreciable amount of time and then reenter the workforce without having to settle for a lower salary or less desirable job. Thus, FMLA protection can be quite valuable, particularly for employees who anticipate having a family member who needs care or needing care themselves.

The FMLA applies only to employees who work 1250 hours in a twelve-month period, which equates to approximately twenty-five hours per week.<sup>225</sup> This provides an inducement for employees to work longer hours (at least to the point of meeting the FMLA minimums) if they believe that FMLA protections will be valuable to them. And because the FMLA imposes minimal costs on employers—they do not have to grant the employees paid leave—it is unlikely to disincentivize employers from offering full-time work.<sup>226</sup>

222. *Employment-Based Immigration: Third Preference EB-3*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3> [https://perma.cc/4EK7-NADG] (last updated Jan. 13, 2025).

223. Veera Korhonen, *Number of EB-3 Immigrant Visas Issued by the U.S. Department of State from FY 2010 to FY 2021*, STATISTA (July 5, 2024), <https://www.statista.com/statistics/536014/eb3-visa-issuances-and-status-adjustments/> [https://perma.cc/Z3C5-5Q69].

224. Jane Waldfogel, *The Impact of the Family and Medical Leave Act*, 18 J. POL’Y ANALYSIS & MGMT. 281, 282 (1999).

225. 29 U.S.C. § 2611(2)(A).

226. See Waldfogel, *supra* note 224, at 299–300 (finding no negative effects from the FMLA on employment of women).

B. *Legal Rules That Encourage Employers to Offer Full-time Employment*

In the section above, we discussed legal rules that create demand among employees for full-time jobs. Though fewer in number, there are also legal rules that operate on the supply side by encouraging employers to offer full-time jobs instead of part-time options. In this section, we describe a few such laws.

*Visa Requirements.* The EB-5 visa program is a mechanism by which wealthy non-citizens can apply for permanent residency in the United States by investing in businesses that create jobs for American workers.<sup>227</sup> The non-citizen must make a commercial investment in the United States and show they either plan to create or preserve ten permanent full-time jobs for U.S. workers.<sup>228</sup> In a typical year, the United States issues approximately 10,000 EB-5 visas, though that number shrank during the pandemic (as permanent residency in the United States became less desirable or less possible).<sup>229</sup> This means that, at least in theory, the EB-5 visa program is generating on the order of 100,000 full-time jobs each year.

*Predictive Scheduling Laws.* In many industries, it has become common for employers to expect workers to be flexible. A worker might be told to be “on call” for certain shifts and instructed to report for work on short notice, or the worker might be given a new schedule each week. These arrangements have been criticized as placing unmanageable burdens on low-income workers, who must struggle to juggle multiple jobs with unpredictable schedules and to make child and family care arrangements with little notice.<sup>230</sup> In response, many states and localities have imposed new restrictions on employers that are intended to force them to internalize some of the cost of the demanded flexibility: employers might be required to post schedules up to fourteen days in advance,

227. *EB-5 Immigrant Investor Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-in-the-united-states/permanent-workers/eb-5-immigrant-investor-program> [https://perma.cc/YTZ9-W6TS] (last updated Mar. 1, 2023).

228. *Id.*

229. Veera Korhonen, *Number of EB-5 Visa Issuances by the U.S. State Department FY 2010 to FY 2021*, STATISTA (July 5, 2024), <https://www.statista.com/statistics/535980/eb5-visa-issuances-and-status-adjustments/> [https://perma.cc/5JFG-GDU5].

230. See, e.g., LINA STEPICK, FED. RES. BANK S.F., SHIFTING HOURS: UNSTABLE WORK SCHEDULING PRACTICES 3–4 (2022); Katherine Guyot & Richard V. Reeves, *Unpredictable Work Hours and Volatile Incomes Are Long-Term Risks for American Workers*, BROOKINGS (Aug. 18, 2020), <https://www.brookings.edu/articles/unpredictable-work-hours-and-volatile-incomes-are-long-term-risks-for-american-workers/> [https://perma.cc/ZBR3-95VD]; Carla M. Ziebertz, Madelon L.M. van Hoof, Debby G. J. Beckers, Wendela E. Hooftman, Michiel A. J. Kompier & Sabine A.E. Geurts, *The Relationship of On-Call Work with Fatigue, Work-Home Interference, and Perceived Performance Difficulties*, 2015 BIOMED RSCH INT’L 1, 9.

or to pay for some portion of hours when they are on call.<sup>231</sup> Although the actual effects of these laws are contested,<sup>232</sup> their architects plainly hope to encourage employers to adopt a mode of employment that is closer to the standardized full-time model.

#### IV. POLICY IMPLICATIONS

This part surveys a range of potential policy interventions that could help address the problem of overwork. The analysis prioritizes breadth over depth of coverage, with the goal of illustrating the range of potential policy implications of our analysis. We examine potential changes to taxes and social spending, changes to laws intended to increase and structure labor market power, new approaches to cost-benefit analysis within regulation, subsidies for leisure or non-work activities, changes to employment regulations, new approaches to the gigification of labor markets, and alterations to corporate disclosures and governance.

##### A. Tax

Tax law is the most natural site for an effort to restore balance between labor and leisure. It has long been understood that income taxes reduce the returns to work, discouraging labor and encouraging leisure.<sup>233</sup> This is normally considered a problem to be solved by lowering tax rates and flattening the rate structure. But if other factors have already distorted the tradeoff between labor and leisure in favor of labor, higher and more progressive income taxes may be an appropriate corrective.<sup>234</sup>

231. U.S. DEP'T LAB. FACT SHEET #56B: STATE AND LOCAL SCHEDULING LAW PENALTIES AND THE REGULAR RATE UNDER THE FAIR LABOR STANDARDS ACT (FLSA) (2019); Catharine Morisset & Lisa Nagele-Piazza, *What Employers Should Know About Predictive Scheduling Laws*, SHRM (July 13, 2022), <https://www.shrm.org/topics-tools/employment-law-compliance/employers-know-predictive-scheduling-laws> [<https://perma.cc/R5E6-L3JP>].

232. See Aaron Yelowitz, *'Fair Schedule' Laws Fail to Deliver for Full-Time Workers*, THE HILL (Feb. 19, 2022, 2:00 PM), <https://thehill.com/blogs/congress-blog/labor/595048-fair-schedule-laws-fail-to-deliver-for-full-time-workers/> [<https://perma.cc/5SES-L9DL> (staff-uploaded archive)] (“[E]mployers must rely on gut instinct to schedule their staff. And, more often than not, their gut tells them not to risk over-staffing. This reality leaves workers with fewer shifts and smaller paychecks. Advocates for predictive scheduling claimed that it would lead to more workers landing full-time schedules with regular shifts, but instead, it resulted in more workers losing shifts and falling from full-time employment to part-time.”).

233. See Gamage, *supra* note 29, at 4; Mirrlees, *supra* note 29, at 175.

234. See Hamermesh & Slemrod, *supra* note 23; Seto, *Income Tax*, *supra* note 23; cf. Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1009 (2001) (“[D]istortions may well counteract one another.”).

While income taxes directly address the tradeoff between labor and leisure, other forms of taxation are worth considering. One possibility is a progressive consumption tax that would directly target the positional externalities that can drive overwork.<sup>235</sup> A progressive consumption tax would target spending instead of income, and it would subject higher levels of consumption to proportionally higher rates. Instead of bidding up the price of luxury assets—and working harder and harder to finance those bids—higher-income individuals would instead find a new equilibrium that decreases the prices of luxury goods, decreases labor effort, and increases overall welfare.

The analysis would also support reversing the Corlett-Hague rule, a principle proposed by two British economists which suggests that tax law should encourage labor and discourage leisure by targeting their complements and substitutes.<sup>236</sup> Corlett-Hague suggests that goods that are complements to leisure—that is, goods that increase the enjoyment of leisure—should be taxed more heavily, while goods that are substitutes for leisure should be taxed less heavily. For example, if cricket matches only enhance the value of leisure time while a nice pair of shoes can be enjoyed in one's office, cricket tickets are more complementary to leisure and should be taxed more heavily: "The tax change will . . . make the consumer work harder . . . . By taxing those goods which are more complementary with leisure, one is to some extent taxing leisure itself."<sup>237</sup>

The analysis here suggests inverting the Corlett-Hague prescription. Policymakers concerned with overwork should tax labor and its complements more heavily, and should seek to subsidize leisure and its complements. For example, tax law might be changed to target normally deductible travel and entertainment expenses or office rents. Expensive first-class travel, excellent business lunches and dinners, and lavish offices make work more pleasant for affluent white-collar workers, and potentially serve as a substitute for real leisure. Tax deductions for leisure complements would work the same way. But

235. See generally Robert H. Frank, *Should Public Policy Respond to Positional Externalities?*, 92 J. PUB. ECON. 1777 (2008) (arguing a progressive consumption tax would "neutralize many of the most costly effects of positional externalities").

236. See W.J. Corlett & D.C. Hague, *Complementarity and the Excess Burden of Taxation*, 21 REV. ECON. STUD. 21, 21 (1953). For a generalization of this result beyond tax to other tradeoffs and other kinds of legal rules, see Weisbach & Hemel, *supra* note 13, at 473–74.

237. Corlett & Hague, *supra* note 236, at 26.

it might also be pursued through direct subsidies for leisure and its complements.<sup>238</sup>

B. *Social Spending*

A more extensive social safety net would also help correct for distortions that cause excessive working hours. First, various elements of the social safety net speak directly to the choice to work. The availability of Social Security and Medicare makes it possible for many adults to leave work entirely once they reach retirement age. Lowering the eligibility age for these programs would plainly expand the set of individuals able to leave work. Similarly, installing or expanding paid family leave programs would make it possible for a broader range of individuals to step away from work, at least for discrete periods around important life events such as the birth of a child.

Even apart from direct monetary incentives, such changes to the social safety net would send an important cultural message about social priorities.<sup>239</sup> By sending the message that it is normatively desirable to take time off—that duly elected political leaders have chosen to *encourage* that decision—such policies could have a powerful effect on behavior.<sup>240</sup> These effects could endure even if the monetary incentives are later reduced, either because individuals develop more of a taste for leisure or because the economy finds a new, lower-hours equilibrium in which individuals are no longer forced by competition to put in more time.<sup>241</sup>

238. See *infra* Section IV.E. But see Weisbach & Hemel, *supra* note 13, at 486–87 (suggesting that various legal rules and subsidies make leisure more attractive and urging that they be curtailed to increase labor and thus income and tax receipts).

239. Cf. Assar Lindbeck & Sten Nyberg, *Raising Children To Work Hard: Altruism, Work Norms, and Social Insurance*, 121 Q.J. ECON. 1473 (2006) (generous social insurance provisions affect parents' incentives to instill in their children norms regarding hard work and benefit dependency). Legal doctrine reflects the fact that the design of safety net programs can reflect or reinforce cultural norms. See *Califano v. Goldfarb*, 430 U.S. 199, 216–17 (1977) (holding that it is constitutionally impermissible to provide different benefits to widowers as opposed to widows).

240. As one suggestive example, men are substantially more likely to take advantage of paternity leave benefits if they know someone in a position of authority who took the leave. See Josie Cox, *Paternity Leave: The Hidden Barriers Keeping Men at Work*, BBC (July 12, 2021), <https://www.bbc.com/worklife/article/20210712-paternity-leave-the-hidden-barriers-keeping-men-at-work> [<https://perma.cc/P694-DWZR>]; Jayachandran, *supra* note 17 (“Once more workers took leave, the penalty for doing so could be negligible or nonexistent, so more people would take it. Any social stigma attached to taking leave would dissipate, too.”).

241. Jayachandran, *supra* note 17 (suggesting that one plausible explanation for men having reduced earnings after paternity leave is that “after bonding with his children during paternity leave, the father

Second, an expanded social safety net would make individuals less dependent on income and savings for safety and security. A prudent family must prepare for an income earner becoming seriously ill by building enough of a financial cushion to cover the medical expenses while sustaining their standard of living without the benefit of their earnings. Many families simply cannot meet this challenge,<sup>242</sup> but the attempt forces them to maximize earnings at the expense of leisure. And as we suggested above in our discussion of the Earned Income Tax Credit, even the country's poverty alleviation programs are centered around labor.

A more radical intervention such as a universal basic income could have more fundamental effects.<sup>243</sup> In effect, society would send the message that Americans are entitled to a decent standard of living even if they choose not to prioritize paid work. A modest universal basic income is unlikely to inspire an epidemic of quitting.<sup>244</sup> But it could rebalance labor-leisure decisions in a healthy way.

America's brief experience with an expanded child tax credit suggests some of the possibilities. As part of the American Rescue Plan Act of 2021, passed in response to the economic disruptions caused by COVID-19, the federal government temporarily expanded the child tax credit.<sup>245</sup> Although structured as a tax credit, the program delivered aid by "advancing half of the total 2021 credit in six monthly payments" to families with children, and the remaining

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became less focused on his work and put in less effort" but pointing out evidence that other effects are responsible); Tom Ginsburg, Jonathan S. Masur & Richard H. McAdams, *Libertarian Paternalism, Path Dependence, and Temporary Law*, 81 U. CHI. L. REV. 291 (2014) (suggesting that temporary interventions can often be effective in reshaping outcomes).

242. See generally ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2004) (arguing that the fundamental structure of the American economy has shifted in a way that stacks the odds against middle-class families).

243. See, e.g., Desai & Lemley, *supra* note 28, at 13–14 (collecting examples of support and implementations).

244. As Professors Miranda Perry Fleischer and Daniel Hemel have observed, relatively few people buy modest annuities and quit their jobs, and American Indian households receiving casino profits did not noticeably reduce their effort levels. Fleischer & Hemel, *supra* note 13, at 1248–49; see also Miranda Perry Fleischer & Daniel Hemel, *The Architecture of a Basic Income*, 87 U. CHI. L. REV. 625, 670 (2020) (proposing a \$500 per person per month universal basic income, and suggesting that "[i]t strains credulity to think that a substantial number of working-age American adults will leave their jobs to live on an income roughly equivalent to a \$3-an-hour full-time wage"); WENGER, *supra* note 122, at 59 ("People will generally want to earn more than their basic income provides, and the increase in the price of labor will make working more attractive.").

245. See MARGOT L. CRANDALL-HOLLICK, CONG. RSCH. SERV., R46900, *THE EXPANDED CHILD TAX CREDIT FOR 2021: FREQUENTLY ASKED QUESTIONS (FAQs)* 3–5 (2022).

credit was claimed through 2022 tax returns.<sup>246</sup> The program had a broad range of salutary effects. One article described the effects for a struggling family:

While most of the aid went to bills, Mr. Horton cited two breaks from frugal norms that lent the children a boost. One was a trip to Walmart, to quiet their classmates' taunts over their thrift-shop clothes. Another was the family's first vacation—a single night in a state park, where they pitched a borrowed tent and made s'mores. "I saw a happiness in my wife and kids I hadn't seen in a long time," he said. "I felt like father of the year."

At the same time, Mr. Horton acknowledged the payments' end hastened his wife's return to work—a point the program's detractors would emphasize—and that her earnings roughly replaced the lost aid.<sup>247</sup>

Such programs are often described as presenting a tradeoff: it's nice that the Hortons spent time together as a family but bad that the money reduced the adults' working hours. The analysis we have offered here suggests that the seemingly negative impact of reduced working hours should actually be celebrated as helping to restore an appropriate balance between labor and leisure.

### C. *Labor Market Power*

The government could enforce the antitrust laws more aggressively against larger corporations. The more that employers hold labor market power, the more they can dictate terms—including work schedules—to employees, and the more that employees' exit options are reduced. Even aside from the issue of labor market power, employees likely benefit from having more firms in a given market rather than fewer. As the number of potential employers increases, the likelihood that they will provide different labor options—some offering only full-time jobs, others offering a mixture of full- and part-time jobs—increases as well. The antitrust regulators—the Federal Trade Commission and the Department of Justice's Antitrust Division—have not historically emphasized

246. *Id.* at 5.

247. Jason DeParle, *The Expanded Child Tax Credit Is Gone. The Battle Over It Remains.*, N.Y. TIMES (Nov. 25, 2022), <https://www.nytimes.com/2022/11/25/us/politics/child-tax-credit.html> [<https://perma.cc/2FS7-QBWG> (staff-uploaded, dark archive)].



labor-side antitrust,<sup>248</sup> though that is beginning to change.<sup>249</sup> Reduction in employer monopsony and oligopsony power would be a welcome development for workers looking to avoid the trap of overwork.

As an alternative to competition in labor markets, union membership could, in theory, similarly empower workers to make different labor-leisure tradeoffs. By consolidating worker bargaining power, unions counterbalance the labor market power exerted by firms even in heavily concentrated industries. In addition, unions have greater information about worker preferences over time and may be better positioned (and more likely) to bargain for leisure time. Similarly, codetermination, in which workers have a say in firm management and governance, could be a mechanism for workers to arrange for a better balance between labor and leisure.<sup>250</sup>

#### D. *New Approaches to Cost-Benefit Analysis*

Cost-benefit analysis, as it is currently practiced, gives little or no weight to the value of leisure. But it does not have to be this way. Hedonic psychology offers a different path. Instead of relying on preferences, which ultimately depend on individuals' predictions about what would make them happy, analysts can focus on how individuals report feeling in the moment. These reports are likely to be more accurate, because "guessing how you will feel in the future is of course more error-prone than saying how you feel now."<sup>251</sup> Because people appear to systematically underestimate the impact of leisure

248. See generally ERIC A. POSNER, *HOW ANTITRUST FAILED WORKERS* (2021) (arguing that antitrust law has historically neglected labor market harms and advocating for stronger enforcement to protect workers); Naidu et al., *supra* note 78, at 539–40 (2018) ("Although product market concentration and labor market concentration are both covered by antitrust law, product market concentration has historically received a significant amount of attention from researchers and government officials, while labor market concentration has received hardly any attention at all.").

249. See, e.g., Exec. Order No. 14036, 86 Fed. Reg. 36987, 36987, 36989 (July 9, 2021) (noting that "[c]onsolidation has increased the power of corporate employers," and ordering a whole-of-government approach to increasing competition); Non-Compete Clause Rule, 16 C.F.R. § 910.2 (2025) (proposing a ban on non-compete agreements between workers and employers, and noting their anti-competitive effects).

250. Simon Jäger, Shakked Noy & Benjamin Schoefer, *What Does Codetermination Do?*, 75 ILR REV. 857, 860 (2022). See *infra* Section IV.H.2. A codetermination scheme in corporate law is likely to be more effective if labor law is developed and enforced in a way that empowers unions. See Leo E. Strine, Jr., Aneil Kovvali & Oluwatomi O. Williams, *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1389–92 (2022).

251. Bronsteen et al., *Well-Being Analysis*, *supra* note 73, at 1615.

time on their well-being,<sup>252</sup> this type of analysis is likely to improve overall welfare by correcting the imbalance between labor and leisure.

Analysts can also deploy models that are more in line with observed human behavior. Professors Daniel S. Hamermesh and Joel Slemrod have presented evidence that high-income, highly educated individuals are often affected by an addiction to work.<sup>253</sup> Their model considers how that workaholism can have negative spillover effects on co-workers and families.<sup>254</sup> Professor Theodore P. Seto has updated economic models to reflect how advertising can shift preferences in destructive ways.<sup>255</sup> By analyzing some of the forces that can distort choices between labor and leisure, these approaches can help make sense of the apparent imbalance that exists for many workers.

#### E. *Subsidies for Non-Work Activities*

Policymakers could support non-work activities with direct subsidies, thereby encouraging individuals to choose more leisure. Although it may sound fanciful, government subsidies for leisure are commonplace. Governments spend heavily to support the arts,<sup>256</sup> to build and maintain parks,<sup>257</sup> to support libraries and museums,<sup>258</sup> and to attract and support local sports teams.<sup>259</sup> Governments also indirectly support many of these activities through tax policy

252. See Akin et al., *supra* note 12, at 526 (highlighting the “discrepancy between people’s drive for money” and the relationship between money and happiness).

253. Hamermesh & Slemrod, *supra* note 23, at 6.

254. *Id.* (“[Workaholism] may involve significant spillovers to co-workers and spouses that amplify its effects”).

255. Seto, *Income Tax*, *supra* note 159, at 83 fig. 14, 84 fig. 15.

256. The National Endowment for the Arts has an annual budget of over \$150 million, and supports a range of cultural endeavors. *Statement by the National Endowment for the Arts on President’s Fiscal Year 2025 Budget*, NAT’L ENDOWMENT ARTS (March 11, 2024), <https://www.arts.gov/news/press-releases/2024/statement-national-endowment-arts-presidents-fiscal-year-2025-budget> [<https://perma.cc/2QJE-SDGN>] (noting that the 2025 budget was \$210.1 million, which was \$3 million more than 2024).

257. Beth Gazley, Yuan Daniel Cheng & Chantalle Lafontant, *Charitable Support for US National and State Parks Through the Lens of Coproduction and Government Failure Theories*, 9 NONPROFIT POL’Y F. 1, 2 (2018).

258. See generally Rosemary Clarke, *Government Policy and Art Museums in the United Kingdom*, in THE ECONOMICS OF ART MUSEUMS 271 (Martin Feldstein ed., 1991) (providing a sketch of the past and current United Kingdom policies on supporting art museums and the art market generally).

259. See generally Yair Galily, Fany Yuval & Michael Bar-Eli, *Municipal Subsidiary Policy Toward Professional Sports Teams: A Democratic Deficit in the Local Government*, 32 INT’L J. SOCIO. & SOC. POL’Y 431 (2012) (discussing government support of privately owned sports teams).

by allowing wealthy individuals to deduct charitable contributions that support these endeavors.<sup>260</sup>

Government support for liberal arts education might also be considered a subsidy for leisure. Many aspects of liberal arts education are valued by potential employers: philosophy majors do quite well on the job market.<sup>261</sup> But to the extent that liberal arts are *not* valuable in the job market, they may be valuable in rebalancing society toward leisure. An education of that type is itself a form of leisure activity, as it is pursued without a commercial purpose. It can also enhance appreciation of leisure—visiting an art museum is more fun if you know something about art—thus shaping later decisions trading off labor and leisure. Increasing support for these activities could help encourage leisure.<sup>262</sup>

This type of intervention has other desirable qualities. Culture, parks, and liberal arts education have externalities and long-term benefits that are difficult to foresee. Government support could help bring production up toward socially optimal levels. The intervention could also help address the problem of overwork without directly targeting the benefits of hard work. Instead of seeking to directly reduce the wealth generated from economic activity, subsidies for non-work activities might redirect some of that wealth toward increasing the value of leisure.

Governments can also support leisure time by helping to coordinate time off. Leisure time is generally more enjoyable when it can be shared—if friends and family are free at the same time, it greatly expands the range and depth of activities that are available. Blue laws forbidding certain business activities on Sundays can have this effect,<sup>263</sup> as do statutory holidays.<sup>264</sup> If policymakers

260. I.R.C. § 170 (permitting tax deductions for charitable contributions); see Vada Waters Lindsey, *The Charitable Contribution Deduction: A Historical Review and a Look to the Future*, 81 NEB. L. REV. 1056, 1058 (2003); Gazley et al., *supra* note 257, at 1–2.

261. See Farai Chideya, *Philosophers Don't Get Much Respect, But Their Earnings Don't Suck*, FIVE THIRTY EIGHT (Nov. 11, 2015, 2:43 PM), <https://fivethirtyeight.com/features/philosophers-dont-get-much-respect-but-their-earnings-dont-suck/> [<https://perma.cc/YC37-2TDB>] (“Bar none, philosophy majors have the highest salary growth trajectory from entry to mid-career.”).

262. It could also shape choices about which leisure activities individuals pursue. See JOHN DEWEY, *DEMOCRACY AND EDUCATION* 205 (1916) (“If education does not afford opportunity for wholesome recreation and train capacity for seeking and finding it, the suppressed instincts find all sorts of illicit outlets, sometimes overt, sometimes confined to indulgence of the imagination.”).

263. See *McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (approving blue laws on the ground that they served the secular purpose of providing a uniform day of rest that allows all workers to participate in the community and shared recreation).

264. SCHOR, *THE OVERWORKED AMERICAN*, *supra* note 20, at 46–49.

wanted to encourage workers to take more time off, they could simply recognize a larger number of state or federal holidays.

Government measures to encourage time off could have ancillary benefits. Bankers in sensitive positions are required to take two continuous weeks off every year; the requirement makes it more difficult for them to perpetrate a fraud, because any fraud would likely be detected in their absence.<sup>265</sup> Even absent the potential for fraud, such leaves would force organizations to develop a deeper bench and improve their resilience. This additional resilience would be a side benefit to policies that aim to allow for time off.

#### F. *Employment Regulation*

Lawmakers could consider closing or reducing the exclusions to wage and hour laws in the FLSA. Under current law, only hourly employees are entitled to 1.5 times their usual wages when they work more than forty hours per week. Salaried and managerial employees do not receive time-and-a-half wages for overtime.<sup>266</sup> This exception has some justification, as there are costs involved in tracking employee hours, and some workers (and many employers) undoubtedly prefer the flexibility created by the FLSA exemption.<sup>267</sup> But the exception contributes to a system in which employers routinely require salaried workers to work more than forty hours per week, irrespective of what workers' expectations might have been when they accepted their jobs.<sup>268</sup> It is worth revisiting this exception because of the pressure it creates for ever greater amounts of labor. For instance, the exception could be limited to workers

265. *Required Absences from Sensitive Positions*, FED. RES. BANK OF N.Y., CIRCULAR NO. 10923, REQUIRED ABSENCES FROM SENSITIVE POSITIONS (1997), <https://www.newyorkfed.org/banking/circulars/10923.html> [<https://perma.cc/9VKH-8NKC>] (“[T]he organization should, with few exceptions, require that employees in sensitive key positions, such as trading and wire transfer, not be allowed to transact or otherwise carry out, either physically or through electronic access, their assigned duties for a minimum of two consecutive weeks. The prescribed period of absence should be of sufficient duration to allow pending transactions to clear. It should also require that an individual’s daily work be processed by another employee during the individual’s absence.”).

266. See *supra* Section III.A. Other exclusions can create similar problems. For example, gig workers are often treated as independent contractors as opposed to employees, and are thus unable to claim the full benefits of FLSA protection. See Eric A. Posner, *The Economic Basis of the Independent Contractor/Employee Distinction*, 100 TEX. L. REV. 353, 379–80 (2021) [hereinafter Posner, *Economic Basis*] (noting that certain employment protections, including overtime regulation under the FLSA, may not apply to gig workers).

267. Christine Jolls, *Fairness, Minimum Wage Law, and Employee Benefits*, 77 N.Y.U. L. REV. 47, 66–67 (2002) (describing the legal and economic costs of tracking minimum wage, including record keeping, the commodification of work, and potential impact on employer-employee trust).

268. See *supra* Section II.D.

making over a particular salary. Or the law could require employers to pay overtime wages when even salaried workers work more than forty-five hours per week, or work more than forty hours per week for three consecutive weeks, or some such threshold. Policymakers should also police misclassification and other strategies to defeat these regulations.<sup>269</sup>

Of course, expanding overtime protections to additional workers might perversely create incentives for those workers to attempt to work longer hours to obtain the higher wages associated with overtime. However, these incentives will be weaker for salaried employees than for employees earning hourly wages, who generally earn less money overall and thus value the additional pay more. In addition, if the implied hourly wage of a salaried worker is higher, the employer will have even stronger incentives not to allow that worker to work overtime. Accordingly, we suspect in the net that narrowing these exceptions would reduce labor and increase leisure.

One could easily imagine other leisure-encouraging changes to employment law. It is a remarkable fact of American law that the only workers who are so much as strongly encouraged to take vacation time each year are high-level bank executives, and only because regulators believe that taking vacation time makes it harder to perpetuate ongoing banking fraud.<sup>270</sup> American workers could be entitled to mandatory paid vacation time each year, as is common in other countries and often proposed (but never enacted at the federal level) in the United States.<sup>271</sup> The FMLA could also be amended to provide more generous leave to employees who need time away from work for medical or family care reasons. Here, too, the United States is an outlier: many other

269. See Posner, *Economic Basis*, *supra* note 266 (discussing the misclassification debate surrounding independent contractors and employees). There is also evidence that employers systematically inflate titles in an effort to dupe workers into believing that they are managers who are ineligible for overtime payments. See Lauren Cohen, Umit Gurun & N. Bugra Ozel, Too Many Managers: The Strategic Use of Titles to Avoid Overtime Payments 40 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30826, 2025) (presenting results suggesting "widespread usage by firms of false managerial roles and titles to avoid making overtime payments to labor").

270. See Kimberly D. Krawiec, *The Return of the Rogue*, 51 ARIZ. L. REV. 127, 171–72 (2009).

271. See Abigail Mansfield, *Mandatory Paid Vacation and Mental Health Leave for All Employees: Better for the Economy, Employers and Employees*, 50 U. BALT. L.F. 12, 12 (2019) ("The United States is the only developed country in the world that does not legally require employers to offer paid leave for employees.").

similarly situated countries require employers to offer paid parental leave by law and have more generous medical leave policies.<sup>272</sup>

The debate surrounding these types of laws typically centers on the tradeoff between gains to workers from more generous leave policies and the efficiency loss to businesses (and the economy in general) from additional paid time off. This tradeoff is real. Nevertheless, there are reasons to believe that we—both policymakers and individual employees—overestimate the value of work and productivity and underestimate the value of leisure to human well-being.<sup>273</sup> Reorienting American employment law to focus more on leisure—even modestly, or at the margins—might pay meaningful dividends.

### G. Gigification

The “gig” economy may offer another solution to the pressures that encourage workers to work an inefficient number of hours. In a standard employment relationship, the employer pays a worker for a block of time and the worker is subject to the employer’s direction and supervision. In the gig economy, workers contract to perform well-specified and discrete short-term tasks.<sup>274</sup> A driver might be *employed* by a car service, and be paid ten dollars per hour, forty hours per week to ferry customers in accordance with a dispatcher’s instructions. Or the driver might log in to an app like Uber or Lyft and accept gigs—opportunities to ferry particular customers at set prices—for as long or as short a period as they would like.

Backers of the gig economy stress its flexibility.<sup>275</sup> A worker is free to limit their hours as long as they can afford the reduction in earnings. As a result, gig economy workers can avoid some of the forces that encourage a forty-hour

272. See Widiss, *supra* note 58, at 2176 (“The United States is the only developed country that fails to guarantee paid time off work to new parents.”). See generally Zoe Aitken, Cameryn C. Garrett, Belinda Hewitt, Louise Keogh, Jane S. Hocking & Anne M. Kavanagh, *The Maternal Health Outcomes of Paid Maternity Leave: A Systematic Review*, 130 SOC. SCI. & MED. 32 (2015) (presenting data on maternity leave laws across the world).

273. See *supra* Part I; see *supra* Section II.A; see, e.g., Jenna Stearns, *The Effects of Paid Maternity Leave: Evidence from Temporary Disability Insurance*, 43 J. OF HEALTH ECON. 85, 99 (2015) (reporting data on the effect of maternity leave programs on infant and parental health).

274. Gig Economy Tax Center, IRS, <https://www.irs.gov/businesses/gig-economy-tax-center> [<https://perma.cc/9WX3-9R3G>]; see also Posner, *Economic Basis*, *supra* note 266, at 353.

275. See, e.g., *Drive When You Want, Make What You Need*, UBER, <https://www.uber.com/us/en/u/flexibility/> [<https://perma.cc/B9SZ-7SXX> (staff-uploaded archive)]. Critics charge that it is a shell game that allows enterprises to evade regulations intended to protect workers from exploitation. See V.B. Dubal, *The Drive to Precarity: A Political History of Work, Regulation, & Labor Advocacy in San Francisco’s Taxi & Uber Economies*, 38 BERKELEY J. EMP. & LAB. L. 73, 134 (2017); see, e.g., Posner, *Economic Basis*, *supra* note 266, at 353–54 & nn. 3–4 (collecting examples).

workweek regardless of circumstance.<sup>276</sup> Both the enterprise and the worker have reduced incentives to tilt the worker's balance between labor and leisure.

But any optimism must be tempered for at least four reasons. First, not every job can be broken down into gigs. Indeed, one reason for the prevalence of the employment relationship is that it can be difficult to specify what tasks will be needed in advance.<sup>277</sup> As a result, the transaction costs involved in sourcing labor on a task-by-task basis can become unmanageable, and it becomes necessary for firms to hire employees and then direct and supervise them. This again suggests a relationship between the type of task and the incentive to push workers into long hours.<sup>278</sup> Repetitive and mechanical tasks—the kind that are readily converted into gigs—can be handled by a large number of workers pulling a small number of hours, and enterprises have no reason to push any particular worker handling such tasks to pull an inordinate number of hours. But many jobs in the economy do not have this character.

One important caveat is that technological improvements can shift the equilibrium.<sup>279</sup> If a task is made more mechanical, easier to monitor, or easier to contract over, it will be easier to convert it into a gig. In other words, development can drive down the transaction costs that would otherwise push firms to hire an employee (and then press that employee to work long hours) instead of contracting with a group of gig workers.

Second, gig workers can only reduce hours if they are able to earn an adequate income on a reduced schedule. History suggests reasons for pessimism. For example, piece work systems, in which some textile workers were paid for their output, failed to afford workers meaningful freedom to scale back hours because the rates were so low.<sup>280</sup> Deploying the tools of “scientific management,” employers could also measure the capacity of their workers and set rates to squeeze out the maximum performance.<sup>281</sup> These problems have obvious echoes today, as firms like Uber are criticized for paying exceedingly low rates and making extensive use of the data they collect on drivers and customers.<sup>282</sup> That said, the evidence on driver pay is equivocal, with some

276. See *supra* Part II.

277. See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 391–93 (1937).

278. See *supra* notes 103–05 and accompanying text.

279. See Orly Lobel, *The Law of the Platform*, 101 *MINN. L. REV.* 87, 106–12 (2016).

280. SCHOR, *THE OVERWORKED AMERICAN*, *supra* note 20, at 56–59.

281. *Id.* at 58–59.

282. See Noam Scheiber, *How Uber Uses Psychological Tricks to Push Its Drivers' Buttons*, *N.Y. TIMES* (Apr. 2, 2017), <https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers->

prominent economists suggesting that Uber offers drivers an attractive value proposition.<sup>283</sup>

Third, the role of technological intermediaries like Uber can complicate the optimistic account of the gig economy. As middlemen, such companies are in a position to capture a substantial percentage of the value of the transactions, increasing the likelihood that low rates will force workers to take on additional hours. Such firms may also have an incentive to pressure workers in periods when workers are in short supply.<sup>284</sup> Still, this threat might be mitigated by competition or new ownership structures.<sup>285</sup>

Finally, running a relatively small number of gigs may not bring the same benefits as working a relatively small number of hours at a typical job. Leisure time is more valuable when it is predictable and stress free; its value can also be enhanced when individuals are part of a community, which a healthy workplace can provide. Without those features, workers lack the ability to get the most out of their time off. But the gig economy is not designed to produce stability or community. As former Labor Secretary Robert Reich put it,

Can you imagine if this turns into a Mechanical Turk economy, where everyone is doing piecework at all odd hours, and no one knows when the next job will come, and how much it will pay? What kind of private

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psychological-tricks.html [https://perma.cc/533U-N8SY (staff-uploaded, dark archive)] (Uber uses “psychological inducements and other techniques unearthed by social science to influence when, where and how long drivers work”); Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUM. L. REV. 1929, 1946–50 (2023).

283. See Lobel, *supra* note 279, at 131 (citing Jonathan V. Hall & Alan B. Krueger, *An Analysis of the Labor Market for Uber’s Driver-Partners in the United States*, Nat’l Bureau Econ. Rsch., Working Paper 22843, 2016)) (discussing a study by Princeton economist Alan B. Krueger suggesting that “Uber drivers work fewer hours and earn more per hour than traditional taxi drivers, even accounting for their expenses”). Krueger’s analysis has since come under heavy criticism due to Krueger’s financial relationship with Uber. See Doug Henwood, *The Best Economists Uber Could Buy*, NATION (July 22, 2022), <https://www.thenation.com/article/society/uber-leak-economists/> [https://perma.cc/6VVF-K3RJ].

284. See Scheiber, *supra* note 282.

285. See Kate Conger, *A Worker-Owned Cooperative Tries To Compete with Uber and Lyft*, N.Y. TIMES, <https://www.nytimes.com/2021/05/28/technology/nyc-uber-lyft-the-drivers-cooperative.html> [https://perma.cc/TV2E-34N5 (staff-uploaded, dark archive)] (last updated Oct. 21, 2021) (“[D]issatisfied drivers and labor advocates are forming worker-owned cooperatives in an attempt to take back some of the money—and power—in the gig economy.”).



lives can we possibly have, what kind of relationships, what kind of families?<sup>286</sup>

That said, it is always possible that surrounding conditions will push the gig economy in a healthy direction, or that gig workers will find new ways to form communities and advocate for their interests.<sup>287</sup>

#### H. *ESG Disclosures and Stakeholderism*

Policymakers might also encourage companies to pay greater attention to environmental, social, and governance (“ESG”) issues, and to advance the interests of workers as corporate stakeholders. In some respects, this approach is the opposite of gigification. Gigification disaggregates jobs into tasks, potentially permitting workers to select a package that meets their preferences by enhancing their ability to exit specific tasks and obtain what they want. The ESG and stakeholderism mechanisms proposed here are more centered on loyalty and voice. They foster a tighter connection between a worker and employer, and encourage employers to offer packages that fit worker preferences better.

##### 1. Better Matching of Preferences on Leisure

If employers offered clear disclosures regarding leave policies and the treatment of their employees, prospective employees would find it easier to identify firms that are aligned with their expectations. This would help investors as well. Investors are already interested in human capital management issues because a firm’s approach to its workforce has direct implications for the resilience and long term health of the company.<sup>288</sup> Thoughtful disclosures on worker treatment would help investors get a better sense of whether a company’s workers are likely to be loyal in the face of adverse events, and whether the firm or industry is operating at a sustainable pace.<sup>289</sup> A broader

286. Lobel, *supra* note 279, at 130 (quoting Farhad Manjoo, *Uber’s Business Model Could Change Your Work*, N.Y. TIMES (Jan. 28, 2015), <https://www.nytimes.com/2015/01/29/technology/personaltech/uber-a-rising-business-model.html> [<https://perma.cc/D48G-7NZ3> (staff-uploaded, dark archive)]).

287. See Lobel, *supra* note 279, at 137–38 (“[T]he platform may also be an opportunity to connect workers to each other and organize in ways that were not previously available.”).

288. See George S. Georgiev, *The Human Capital Management Movement in U.S. Corporate Law*, 95 TUL. L. REV. 639, 644–45 (2021).

289. For example, Amazon’s employment practices churn through hundreds of thousands of workers each year. The company is increasingly unable to find enough workers who have not previously

securities law paradigm that focused on protecting workers and other constituencies separate from investors would make the case for such disclosures even more straightforward.<sup>290</sup>

Of course, worker-focused disclosures could also be mandated by employment regulation or through private ordering. Several states and localities have adopted pay transparency laws that are intended to force companies to disclose information about pay ranges to prospective employees.<sup>291</sup> Although employers today often make promises about work-life balance when recruiting, a mandatory regime that punished falsehoods might improve the process.<sup>292</sup> Industry groups can also encourage customized disclosures that create an information-rich environment for prospective employees. For example, savvy law students can draw rich inferences about law firms from data available through the National Association for Law Placement and other sources: the ratio of partners to associates at a law firm can send powerful signals about how an associate's time is likely to be deployed; certain practice specialties require attorneys to burn through long hours while others require unpredictable hours; and profits per attorney can suggest the hours that attorneys are expected to pull.<sup>293</sup> Firms can also send indirect messages. A robust and formal paternity leave policy can be a powerful signal of informal attitudes toward maternity leaves. Expanded disclosures on a broad range of issues can thus help workers find jobs that are a good fit for them.

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been fired to meet its hiring needs. See Jodi Kantor, Karen Weise & Grace Ashford, *The Amazon That Customers Don't See*, N.Y. TIMES (June 15, 2021), <https://www.nytimes.com/2021/06/15/briefing/amazon-warehouse-investigation.html> [<https://perma.cc/897U-H589> (staff-uploaded, dark archive)] ("With the high churn, multiple current and former Amazon executives fear there simply will not be enough workers. In the more remote towns where Amazon based its early U.S. operations, it burned through local labor pools and needed to bus people in.").

290. See Ann M. Lipton, *Not Everything Is About Investors: The Case for Mandatory Stakeholder Disclosure*, 37 YALE J. REG. 499, 503 (2020).

291. See *A Running List of States and Localities that Require Employers to Disclose Pay or Pay Ranges*, HR DRIVE, <https://www.hrdrive.com/news/pay-transparency-law-tracker-states-that-require-employers-to-post-pay-range-or-wage-range/622542/> [<https://perma.cc/CPH5-MS2X>] (last updated Apr. 30, 2025); Jennifer Liu, *Here Are All the New Salary Transparency Laws Going Into Effect in 2023*, CNBC (Dec. 29, 2022, 9:45 AM), <https://www.cnbc.com/2022/12/29/new-salary-transparency-laws-going-into-effect-in-2023.html> [<https://perma.cc/CA9A-27M7>].

292. See Lindsay Ellis, *Bosses Promise Jobs with a Coveted Perk: Boundaries*, WALL ST. J., <https://www.wsj.com/articles/jobs-quiet-quitting-work-life-balance-boundaries-11663556326> [<https://perma.cc/3HSU-YEFF> (staff-uploaded, dark archive)] (last updated Sept. 29, 2022, 5:10 PM) (noting that "[s]ome bosses may fail to live up to" "[p]romises of balance" in job postings).

293. See generally *NALP Directory of Legal Employers*, NAT'L ASS'N FOR L. PLACEMENT, <https://www.nalpdirectory.com/> [<https://perma.cc/2KY8-GNDG> (staff-uploaded archive)] (providing a search directory with filters to gain insights into law firms).

## 2. Changing Employer Behavior

Better matching may drive improvements if many workers prefer low hours and flexibility, so that employers who demand long hours and high effort are forced to pay to obtain it. In effect, employers would be forced to internalize the costs of the requirements that they impose on employees. That in turn should result in employers making fewer and more thoughtful demands of their employees.

There is at least some evidence that a majority of workers have these preferences. For example, even famously-demanding businesses like investment banks have been forced to dial back in recent years in the face of employee complaints.<sup>294</sup>

More fundamental implementations could have deeper impacts. For example, in codetermination systems, corporate boards include representatives of workers as well as shareholders.<sup>295</sup> The resulting corporate decisions would be more likely to take account of worker preferences. This can include preferences for lighter and more stable schedules, which directly impact leisure time. And it can include preferences for job security, which indirectly impact leisure time by removing the threat that workers who demand rest will be removed by managers.

## 3. Changing Worker Behavior

ESG disclosures and stakeholderism could also drive more fundamental changes. Disclosure of the full range of environmental and social harms generated by a company can change its workers' attitudes toward the company.<sup>296</sup> Workers might rationally decide to invest less time and capital in for-profit enterprises if they realize that those activities cannot be reconciled

294. Alexandra Steigrad, *Goldman CEO Says He'll Try To Get Exhausted, 100-Hour-a-Week Workers Saturdays Off*, N.Y. POST (Mar. 22, 2021, 5:43 PM), <https://nypost.com/2021/03/22/goldman-ceo-tells-exhausted-workers-hell-try-to-give-them-saturdays-off/> [https://perma.cc/T7XZ-53XV] (describing Goldman Sachs's reinstatement of the "Saturday rule" limiting work from 9 p.m. on Friday to 9 a.m. on Sunday); Andrew Ross Sorkin, Jason Karaian, Lauren Hirsch, Ephrat Livni & Sarah Kessler, *How Much Work Is Too Much Work?*, N.Y. TIMES, <https://www.nytimes.com/2021/03/19/business/dealbook/goldman-sachs-work-hours.html> [https://perma.cc/B2K4-BJ7Z] (staff-uploaded, dark archive)] (last updated June 10, 2021) (describing efforts by first year analysts at Goldman Sachs to demand better working conditions).

295. For a discussion of codetermination and surrounding worker-supporting reforms, see Strine et al., *supra* note 250, at 1327–32.

296. See generally Hajin Kim, *Expecting Corporate Prosociality*, 53 J. LEGAL STUD. 267 (2024) (describing how stakeholder expectations regarding a corporation's posture toward ESG can influence the behavior of those stakeholders).

with moral commitments, or that it would be more efficient to use their time differently.<sup>297</sup> Realizing that an employer is contributing to an environmental or social problem may not be enough to drive an employee to quit, or even to demand changes or higher wages. But it may be enough to diminish the employee's enthusiasm for the enterprise, and to encourage them to cultivate interests, activities, and sources of self-worth outside of paid work.

The potential for expanded disclosure on ESG topics to discourage overwork is likely to vary across businesses and workers. A high-status worker whose skills are in demand is probably more likely to scrutinize publicly available information about a firm. They can be choosy in labor market decisions, and they have good economic reasons to worry about entangling their valuable human capital with the reputation of their employer.<sup>298</sup> Such workers may not be typical, but the demand for their skills gives them an outsized impact with employers. Lower-status workers are less likely to scrutinize company disclosures, but there may be exceptions. For example, Amazon and meat processing companies took pains to stress the measures they took to protect their workforces from COVID-19.<sup>299</sup> Standardizing these disclosures and imposing real consequences for lies would only strengthen the salutary effects.

#### 4. Changing the Nature of Work

Such steps can also support deeper changes in the nature of work, in which workers have the opportunity to pursue projects that are meaningful to them. As businesses and corporate governance scholarship increasingly recognize,

297. Cf. Saul Levmore, *Least-Cost Altruists and ESG Firms*, 77 BUS. LAW. 713, 718 (2022).

298. For example, some journalists and commentators have been reluctant to join or continue with Fox News. See, e.g., David Folkenflik, *2 Fox News Commentators Resign Over Tucker Carlson Series on the Jan. 6 Siege*, NPR (Nov. 22, 2021, 12:06 PM), <https://www.npr.org/2021/11/21/1052837157/fox-resignations-tucker-carlson-patriot-purge-documentary> [<https://perma.cc/Z2L7-CA8C>]; Michael M. Grynbaum, *Chris Wallace Says Life at Fox News Became 'Unsustainable'*, N.Y. TIMES, <https://www.nytimes.com/2022/03/27/business/media/chris-wallace-cnn-fox-news.html> [<https://perma.cc/RM2Z-A56X> (staff-uploaded, dark archive)] (last updated Mar. 28, 2022). Others have been reluctant to work in the tobacco industry. See, e.g., Mike Daube & Simon Chapman, *The Problem with Selling a Lethal Product: You Just Can't Get the Staff*, GUARDIAN (July 12, 2016), <https://www.theguardian.com/commentisfree/2016/jul/13/the-problem-with-selling-a-lethal-product-you-just-cant-get-the-staff> [<https://perma.cc/GU3U-A44P>] (collecting examples of tobacco company disclosures highlighting the difficulty of hiring qualified talent); Ron Ashkenas, *Would You Work for a Tobacco Company?*, HARV. BUS. REV. (Nov. 21, 2013), <https://hbr.org/2013/11/would-you-work-for-a-tobacco-company> [<https://perma.cc/6G5M-8JTR>].

299. See, e.g., *Amazon's COVID-19 Blog*, AMAZON, <https://www.aboutamazon.com/news/company-news/amazons-covid-19-blog-updates-on-how-were-responding-to-the-crisis> [<https://perma.cc/2GAG-PZX3>] (last updated Aug. 19, 2022).

there has been a generational shift in attitudes. Instead of embracing relentless value maximization in their activities as investors, consumers, or workers, younger generations have increasingly demanded that their investments, purchases, and jobs reflect their moral beliefs and priorities.<sup>300</sup>

This might entail giving workers greater autonomy and opportunities for creativity within a standard for profit enterprise.<sup>301</sup> For example, technology companies like Google often grant engineers time to pursue side projects.<sup>302</sup> Or it might entail giving workers opportunities to pursue projects with charitable goals.<sup>303</sup> Attorneys at big law firms often take on pro bono projects such as representing indigent clients; the cases create opportunities for junior attorneys to take on leadership roles or gain experience in high-stakes events like hearings. And it might entail empowering employees within the firm's structure, allowing them to pursue activism during their working hours that they would ordinarily engage in during off hours.

These changes can operate as a substitute for leisure. In effect, firms would function more like civic organizations and provide many of the same externalities.<sup>304</sup> And they can serve as a complement for leisure because they make leisure more rewarding: a person who leaves the office energized and upbeat can use their off hours differently from a person who leaves the office

300. See, e.g., Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation: Strong Stakeholders, Weak Managers*, 28 STAN. J.L., BUS., & FIN. 255, 275–95 (2023); Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CALIF. L. REV. 1243, 1291–1303 (2020); M. Todd Henderson & Anup Malani, *Corporate Philanthropy and the Market for Altruism*, 109 COLUM. L. REV. 571, 613–21 (2009) (quantifying altruistic economic behavior by consumers, workers, and investors).

301. See DEWEY, *supra* note 262, at 304 (modern machines make leisure and contemplation “possible even while one is at work,” eroding the Platonic distinction between work and leisure); Joy Beatty & William R. Torbert, *Yin and Yang: The Relationship of Leisure and Work*, in ROUTLEDGE HANDBOOK OF LEISURE STUDIES 468, 474 (Tony Blackshaw, ed. 2013) (“Even routine, monotonous work can be reframed by workers to include aspects of leisure and play. . . . It can also provide a venue to experience sustainable involvement and development that is intrinsically motivating – similar to leisure.”).

302. See Ryan Tate, *Google Couldn't Kill 20 Percent Time Even if It Wanted To*, WIRED (Aug. 21, 2013), <https://www.wired.com/2013/08/20-percent-time-will-never-die/> [<https://perma.cc/X4MD-JMN2>].

303. See Henderson & Malani, *supra* note 300, at 627.

304. See *id.* at 573–77 (contrasting production of altruism within for-profit firms with the production of altruism by not-for-profit organizations); see BRANDEIS, *supra* note 14, at 7 (discussing externalities associated with individuals spending leisure time on civic activities).

exhausted and demoralized.<sup>305</sup> While the effect on the number of hours of unpaid work would be ambiguous, the change would help meet the same needs as leisure.

Law and policy can help encourage this type of change. The trend would be enhanced by increasing worker power within organizations,<sup>306</sup> requiring expanded ESG disclosures,<sup>307</sup> empowering ESG-focused investors,<sup>308</sup> and using the tax code to encourage altruistic activities at work.<sup>309</sup> More direct interventions are also possible: the government could mandate that firms must provide opportunities for workers to pursue this kind of activity. The New York State Bar's efforts to encourage attorneys to engage in pro bono activities may be a prototype for this type of mandate.<sup>310</sup> Even if these efforts have small direct economic effects on the calculus for businesses, they can create a set of expectations and a culture in which work is meaningful and serves many of the functions of leisure.

### CONCLUSION

After his acquisition of Twitter (now X), Elon Musk told the company's remaining employees that "[i]n an increasingly competitive world, we will need to be extremely hard core . . . . This will mean working long hours at high intensity. Only exceptional performance will constitute a passing grade."<sup>311</sup> Employees were told that they could either opt in to this regime or be

305. See DEWEY, *supra* note 262, at 240 ("Where something approaching drudgery or the need of fulfilling externally imposed tasks exists, the demand for play persists, but tends to be perverted. . . . So in leisure time, there is an imperious demand for their stimulation by any kind of means; gambling, drink, etc., may be resorted to. Or, in less extreme cases, there is recourse to idle amusement; to anything which passes time with immediate agreeableness.").

306. Raghuram G. Rajan & Luigi Zingales, *Power in a Theory of the Firm*, 113 Q.J. ECON. 387, 418 (1998).

307. E.g., Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 928 (2019).

308. Kyoko Sakuma-Keck & Manuel Hensmans, *A Motivation Puzzle: Can Investors Change Corporate Behavior by Conforming to ESG Pressures?*, in INSTITUTIONAL INVESTORS' POWER TO CHANGE CORPORATE BEHAVIOR: INTERNATIONAL PERSPECTIVES 367, 369 (2013).

309. Henderson & Malani, *supra* note 300, at 576–77 (taxes may be impeding the development of efficient modes of producing altruism).

310. See N.Y. Comp. Codes. R. & Regs. tit. 22, § 520.16 (requiring most applicants for admission to the New York State Bar to complete fifty hours of supervised pro bono service); § 118.1(e)(15) (requiring attorneys who renew their registration to anonymously report pro bono services).

311. Kate Conger, *Elon Musk Gives Twitter Employees a Deadline to Stay or Leave*, N.Y. TIMES (Nov. 16, 2022), <https://www.nytimes.com/2022/11/16/technology/elon-musk-twitter-employee-deadline.html> [https://perma.cc/7SY4-64FM (staff-uploaded, dark archive)].

terminated.<sup>312</sup> The statement is risible in the context of a social media company, where the main change since Musk's acquisition seems to be a reduction in the labor invested in content moderation.<sup>313</sup> But Musk's attitude sheds useful light on the structure of the American labor market. Maybe Twitter is not the place for workers seeking a labor-leisure balance other than "extremely hard core," but there should be some such places—and in the modern economy, there are too few.

There are many reasons for this mismatch between what would be best for those workers who don't want to be extremely hardcore and the jobs available to them. Workers likely overestimate the benefits to themselves of greater labor and greater income and underestimate the benefits of greater leisure time. But in many contexts employees are also trapped into working longer hours by financial precarity, a lack of labor market power, and the collective action problems that characterize a predominantly non-unionized workforce. Law also plays a meaningful role in constructing the labor-leisure tradeoff for American workers. It both encourages employees to work longer hours and encourages businesses to offer jobs that require longer hours. The result is a one-size-fits-all equilibrium where employees are shunted into jobs with ever-longer hours, even though many would benefit from other arrangements.

It does not have to be this way. American law could be reoriented to reshape the options that employees face when choosing between labor and leisure. Institutions could arise—or in the case of unions, be reinvigorated—to help workers see and realize the benefits to be gained from working less. The focus on productivity and output could be replaced by a focus on well-being. Perhaps, within our lifetime, we will have the opportunity to address what John Maynard Keynes predicted would be our "permanent problem": "how to occupy the leisure, which science and compound interest will have won . . . to live wisely and agreeably and well."<sup>314</sup>

312. *Id.*

313. It has had darker implications in the context of the federal government, where Musk's messaging as leader of the "Department of Government Efficiency" has served to denigrate and remove civil servants. See Brian Schwartz & Scott Patterson, *Musk Says Federal Workers Must Detail 'What They Got Done'—or Risk Losing Job*, WALL ST. J., <https://www.wsj.com/politics/policy/musk-says-federal-workers-must-detail-what-they-got-done-or-risk-losing-job-5eaba57a> [https://perma.cc/3TDP-RRPP (staff-uploaded, dark archive)] (last updated Feb. 23, 2025, 11:00 AM); Eileen Sullivan, *For Federal Workers, Musk's Chain Saw Still Reverberates*, N.Y. TIMES (May 29, 2025), <https://www.nytimes.com/2025/05/29/us/politics/federal-workers-musk-doge.html> [https://perma.cc/VKQ3-N5XD (staff-uploaded, dark archive)].

314. KEYNES, *supra* note 2, at 22.

