
How Fair Are the Fair Labor Standards?

James Bovard

On February 3 President Clinton proposed to raise the federal minimum wage from \$4.25 to \$5.15 an hour. Clinton's proposal is evoking harsh opposition from House Majority Leader Richard Armey (R-Tex.) and a host of economists. With Clinton's campaign to boost the minimum wage in the news, a review of the Fair Labor Standards Act, its effects, and its pretensions is in order.

Chief Justice John Marshall declared in 1820 that "the Constitution stood for the principle that contracts should be inviolable." Today there is a general presumption of the right of politicians and bureaucrats to strike down, prohibit, and nullify private contracts. The early American principle of almost unlimited freedom of contract has now been replaced by the principle of "government knows best." Throughout the 20th century, governments have increasingly preempted individuals' opportunities to build their own lives through their own agreements. Government wage regulations epitomize modern paternalism at its worst.

In 1930 a man could sell his labor to whomev-

er he pleased, on almost any mutually acceptable terms. Now a person can no longer profit from the use of his hands or mind as he chooses, but must conform to hundreds of government decrees on "fair" labor. Since politicians first claimed the power to define fair labor standards, they have constantly expanded their control, continually creating new absurdities and new disruptions of millions of voluntary private contracts.

Destroying Jobs: The (Minimum) Wages of "Fair Labor"

President Franklin D. Roosevelt declared in 1937, "All but the hopeless reactionary will agree that to conserve our primary resources of manpower, government must have some control over maximum hours, minimum wages, the evil of child labor, and the exploitation of unorganized labor." The 1938 Fair Labor Standards Act (FLSA) sought to "conserve our primary resources of manpower," but in fact drove hundreds of thousands of people out of the workforce in order to rig higher wages for other workers. Though the national unemployment rate was 18 percent, the federal government tried forcibly to drive up wages by political command—as if employers were more likely to hire people at

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higher wages than at lower wages. The FLSA mandated a twenty-five cent an hour minimum wage and time-and-a-half pay for any work done over 40 hours a week. The original minimum wage law was enacted in part to decrease the advantage that low-wage southern factories had over northern factories; Rep. John Dent of Pennsylvania later explained, "We had to do something; we were losing all of our jobs to the South." The new wage law devastated Puerto Rico; as economist Benjamin Anderson noted, "Immense unemployment resulted there through the sheer inability of important industries to pay the twenty-five cents an hour."

Congress raised the minimum wage in nominal terms by 46 percent between 1977 and 1981; a federal commission estimated that the minimum wage hikes resulted in the loss of 644,000 jobs, including jobs that were not created. The National Bureau of Economic Research estimated that minimum wage hikes in 1980 and 1981 reduced the employment of minimum wage

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workers by 3 to 4 percent. A 1983 General Accounting Office report entitled "Minimum Wage Policy Questions Persist" found "virtually total agreement that employment is lower than it would have been if no minimum wage existed Teenage workers have greater job losses, relative to their share of the population or the employed work force, than adults."

The current minimum wage effectively prohibits people from working unless their labor is worth at least \$4.25 an hour. Government schools routinely fail to prepare people for work, and then government regulations ban them from the job market because their labor is not as valuable as politicians think it should be. To decree a minimum wage without guaranteeing everyone a job is simply to knock the bottom rung off the economic ladder. President Carter's Minimum Wage Study Commission noted that "an explicit purpose of the minimum wage was, and is, to

protect adult workers from low wage competition from youth." One person's freedom to work is destroyed so that someone else can get an extra quarter or half-dollar an hour. Finis Welch, a professor of economics at Texas A&M University, has described the minimum wage as "a tax from the poor to the poor" whereby some low-wage workers increase their earnings while others lose all their earnings. In a March 21, 1977 editorial, the *New York Times* opined, "Organized labor favors a high minimum wage because that reduces management's resistance to union recruiting. Where cheap alternative sources of labor are eliminated, high-priced union labor no longer looks so bad to a company's managers."

Congress last voted to raise the minimum wage in 1989—from \$3.35 to \$4.25 an hour. A 1991 National Restaurant Association survey found that, as a result, 44 percent of restaurants were forced to reduce the number of employee hours worked, and 42 percent reduced the number of people employed. Professor Welch estimated that the 1989 increase in minimum wages reduced teenage employment by roughly 240,000 jobs.

The FLSA originally applied mainly to factories and manufacturing work, but since 1938 the law has been extended. The Labor Department's Office of Wages and Hours determines whether employers are in compliance with the FLSA. Some organizations have been dragged through bureaucratic hell trying to understand and comply with federal wage and hour requirements.

Members of the National Association of Private Residential Resources, primarily group homes serving the mentally retarded, have struggled since 1987 to comply with conflicting federal rulings on whether group homes must pay residential employees for the time they spend sleeping. The Department of Labor tentatively ruled in 1988 that group homes would not have to pay workers for the time they spent sleeping, as long as the employees were sleeping in "private quarters in a home-like environment." Naturally, this spawned numerous disputes over the definition of a "home-like environment." In a 1988 wage and hour memorandum, the Labor Department warned group homes that "the amenities and quarters must be suitable for long-term residence by individuals and must be similar to those found in a typical private residence or apartment, rather than those found in . . . short-term

facilities for travelers." According to Hyman Richman, a former Labor Department wage and hour investigator who now serves as a private consultant, "One inspector in Maryland insisted that 'living facilities' meant a separate bedroom, kitchen, living room, and bathroom—and that was the minimum." The Labor Department also decreed that employees must get at least five hours of sleep each night. If a worker in a group home is up for more than three hours during the night dealing with an emergency, the employer cannot simply allow the worker to sleep in the next morning; instead, the employee must be paid both for the hours spent sleeping and working. A Nebraska regional mental retardation services board was ordered in 1990 to pay \$300,000 in retroactive pay for sleep time to workers. (The amount of retroactive pay was sharply reduced by an appeals court.) Lawsuits against group homes for violations of the vague and continually changing Labor Department rulings on sleep time have disrupted nonprofit organizations struggling to provide better care to the mentally retarded.

An expansive interpretation of the minimum wage law almost shut down one of the nation's most efficient and successful rehabilitation programs. In 1990 the Labor Department announced that the Salvation Army, a religious organization, would be required to pay minimum wages to alcoholics, drug addicts, and others engaged in a rehabilitation program that involved refurbishing furniture and other work-therapy activities. Instead of a salary, the Salvation Army provides its 70,000 clients a year with food, shelter, spiritual counseling, and pocket change in return for their efforts. Labor Department officials decided that since some of the Salvation Army's refurbished furniture crosses state lines before being sold, its clients were engaged in interstate commerce and thus must receive minimum wages and overtime pay. Salvation Army officials warned that they would be forced to close down most of their assistance programs if forced to pay the minimum wage. Many Salvation Army clients have extremely low productivity, and the program could not afford to pay minimum wages for subminimal work. Naturally, Labor Department officials had neither jobs nor rehabilitation programs to offer the thousands of people who would have been ejected from Salvation Army programs. Labor Department officials backed down after a public

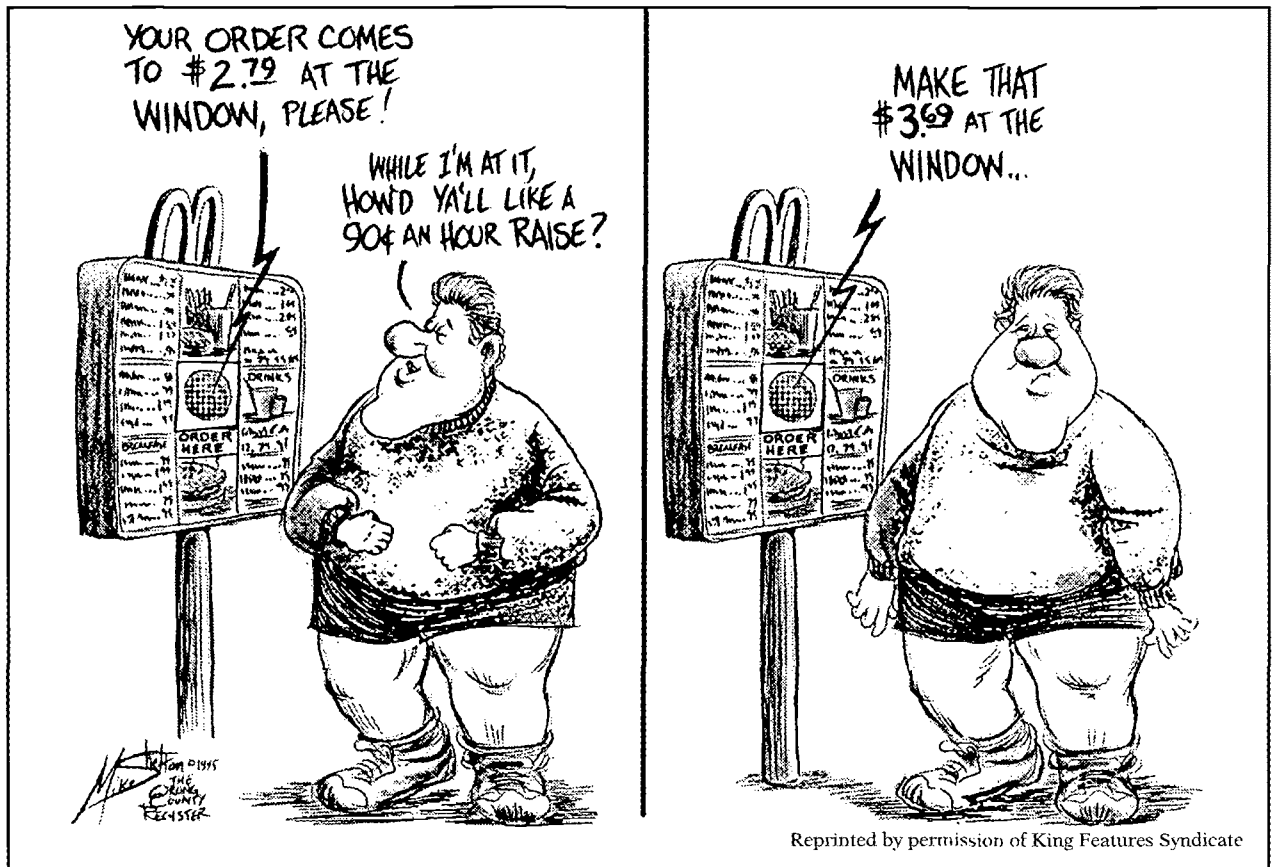
and political uproar in defense of the Salvation Army.

Some local governments make it starkly clear that their control over minimum wages will be draconian. In 1991 the three members of the D.C. Wage-Hour Board held a hearing at which only 12 people spoke, conferred among themselves, and then proclaimed a 70 percent increase in the minimum wage for thousands of clerical, health, and day care workers. The board's proposed increase, from \$4.25 an hour to \$7.25 an hour, would have given D.C. by far the highest minimum wage in the nation. The board did not analyze the possible impact of the wage hike; instead, it relied solely on testimony from groups of workers who insisted that they needed higher wages to meet the rising cost of living. The *Washington Post* reported on November 25, 1991 that after the wage hike was announced, some workers were "terrified that the increase [would] lead to layoffs, transforming a poverty-level wage into no wage at all." In an editorial on March 8

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of that year, the *Post* denounced the decision as a "formula for economic suicide." Lawrence Landry, chairman of the Wage-Hour Board, defended the board's command to raise wages, declaring, "The issue before us is a moral issue, a moral obligation, and a moral imperative—not just an economic or political consideration, or even a pragmatic or managerial concern." Landry apparently perceived the proposed action as an opportunity for moral posturing, rather than a threat to the jobs of thousands of real people. The D.C. case illustrates the danger of allowing bureaucrats or politicians to have arbitrary power over wage rates. Such arbitrary power gives them what they think is a magic wand to raise wages but in reality is a scythe to cut down thousands of private jobs.

The state of Oregon, in a brief to the U.S. Supreme Court defending its 1917 minimum



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wage law, revealed the actual implications of such laws, asserting, "If Simpson [a woman thrown out of work by the Oregon law] cannot be trained to yield output that does pay the cost of her labor, then she can . . . accept the status of

self-reliant and must become wards of the state.

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Overtime Outrage

a defective to be segregated for special treatment as a dependent of the state." This statement makes it clear that government cannot stack the deck to benefit some without throwing others out of the game. Minimum wage laws presume that politicians are morally justified in destroying some people's freedom in order to inflate other people's wages. Though politicians are rarely so honest about their intent these days, this is still frequently the essence of labor law—dictating that some people have no right to be

Expansive interpretations of federal wage regulations are increasingly reducing employees' freedom of contract. Federal regulations dictate that if a person is paid by the hour, he must be paid time-and-a-half for any work over 40 hours a week. But if a person is a professional, administrative, or managerial employee paid by salary, he is permitted to reach a mutually agreeable contract with his employer. In August 1944, shortly after the Labor Department began issuing interpretations of the FLSA, one of its bulletins declared that managerial employees "are normally allowed some latitude with respect to time spent at work." But in the early 1990s, Labor Department investigators began imposing much more stringent tests for defining whether someone was an hourly or a professional employee. According to the Labor Department's new interpretation, if a company allows professional employees the option of taking time off without pay during a workday, the professional magically

becomes an hourly employee. If a company allows a single professional to take a part-day leave without pay, then all the company's professionals are automatically reclassified as hourly employees, and the company can be forced to pay retroactive overtime pay for the previous three years. This interpretation invalidated millions of contracts that private companies had voluntarily agreed upon with architects, accountants, and other professionals. It effectively prohibited companies from allowing millions of individuals to take part-day leaves without pay. The Employment Policy Foundation estimated that the total back-pay liabilities of employers could reach \$40 billion.

The Department of Labor's policy is wreaking havoc on corporate personnel policies by reducing the flexibility sought by both workers and managers. Business owner Linda Froehlich described the negative impact of the Department of Labor's actions in an August 7, 1992 *Wall Street Journal* op-ed: "An Ohio company was taken to court by the Department of Labor over a policy designed to accommodate semi-retired employees. Pierce Processing Inc. is a professional engineering consulting firm with 20 employees. It is open 12 hours a day. Engineers used to be able to work any hours they wanted as long as they worked 80 hours in a two-week pay period. If they worked more than 80 hours, they were paid straight overtime for each hour over 80. If they worked fewer than 80 hours, they either would take paid leave or have their pay reduced for each hour under 80. But when the Labor Department got wind of the practice, it forced Pierce Processing to stop it. The department found Pierce in violation because, out of 58,000 total employee hours over a two-year period, 150 hours had been docked. The department claimed that this docking of \$3,450 should result in \$47,000 in overtime expenses. Fortunately, a federal judge allowed Pierce simply to reimburse the employees for the 150 hours (after four years of legal wrangling). The end result is that Pierce now has a policy that requires everyone to either work a full day or take the entire day off." Froehlich complained that the Labor Department's interpretation made it much more difficult for her to hire female professionals, who routinely need more time off for child-care responsibilities. Allowing professional employees to take unpaid time off during the day is extremely popular with employees; it gives them

a chance to take better care of their private affairs and their lives.

Malcolm Pirnie Inc., a New York engineering firm with 400 professional employees, was sued by the Bush administration's Labor Department to pay overtime to its entire workforce because it permitted some employees to take unpaid part-day leaves; a federal court forced the company to shell out \$875,000 in back pay. John Foster, chairman of Malcolm Pirnie Inc., condemned the Labor Department for its "shock" prosecution and said the agency "wanted blood." Foster declared that this was "not a pay-docking issue as some have reported; it is a flexibility issue." Among the practices that proved Malcolm Pirnie's "guilt" was permitting employees time off to attend parent/teacher conferences, to work on dissertations, or to go to the doctor. William J. Kilberg, a former Labor Department solicitor, condemned the courts and the Labor Department: "The end result of these judicial

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interpretations is the civil law equivalent of capital punishment for spitting on the sidewalk."

The Labor Policy Association reported that "some Labor Department regional offices are literally going through the phone book, randomly selecting unsuspecting small companies that perform hourly work (such as accounting and engineering consulting firms) and assessing fines or threatening costly legal action." For the vast majority of firms investigated, the Labor Department had not received any complaints from the firms' employees; instead, the Labor Department simply went out to rack up enforcement numbers. The more fines the Labor Department imposes for fair labor violations, the more the agency appears to be protecting the public.

Many small businesses warned that the Labor Department's ruling could bankrupt them. Dan Yager, an attorney for the Labor Policy

Association, declared, "A lot of people now are sitting on a powder keg of liability. A large company could be liable for \$200 million, \$300 million [in back overtime pay]."

Federal wage laws spawn frequent court battles with contradictory outcomes. The U.S. Court of Appeals for the Seventh Circuit ruled in May 1993 that Chicago police officers are entitled to sue for overtime pay for the time they spend eating lunch, while a federal district court in Kansas ruled that paramedics were not entitled to overtime pay for meal periods. Federal courts have also ruled that some convicts must be paid the minimum wage for work they perform in prison. Despite the professional pretensions of modern journalism, reporters have sued their newspapers, denying that they are professionals and thus claiming a right to overtime compensation. The Labor Department is cracking down on major accounting firms, forcing them to treat accountants as if they were wage slaves, when they are actually slaving away on salary to

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become partners. In 1993 Congress considered imposing minimum wage and overtime requirements on foreign employees who work on cruise ships that visit U.S. ports. This measure would have disrupted the cruise industry and destroyed up to four thousand U.S. jobs in onshore support services for cruise ships.

Terminating Teenage Employment

The FLSA also restricts teenagers' right to work. While newspaper headlines proclaim "Child Labor Violations Widespread," little attention is paid to the actual violations. In the Washington, D.C. area, one pizza shop operator was found guilty because he allowed 17-year-olds to deliver pizza, which the Labor Department considers a "hazardous job" for young people. The Labor Department launched a highly publicized investigation of the Food Lion grocery chain in 1992 for child labor violations; Food Lion representatives

claimed that Labor Department officials had told them that "90 percent of the violations relating to hazardous conditions involved workers under the age of 18 'putting cardboard into nonoperating bailers.'" On April 20, 1992 the *Washington Post* reported: "Inspectors sometimes find dozens of violations in a single community. A crackdown in the Ocean City-Rehoboth Beach area in August [1991] turned up 182 minors illegally employed in more than 30 businesses, including gas stations, hotels, and T-shirt and novelty shops." But what is the danger in allowing teenagers to sell T-shirts in an ocean resort area during the summertime?

Child labor laws provide an opportunity for ambitious politicians to get their faces on the evening news. In March 1990 Secretary of Labor Elizabeth Dole received widespread acclaim for her suit alleging that Burger King had thousands of violations of child labor laws at its 755 franchises in the United States. Dole piously declared, "This action serves as a notice to employers that we will not hesitate to use available legal processes, in addition to investigative efforts, to protect America's children." One of Burger King's major violations was to allow 14- and 15-year-olds to work after 7 P.M.

In a March 27, 1990 *Wall Street Journal* column, Tim Ferguson observed that "according to 1988 Census data, 90,000 youths age 15 and under have dropped out of school. This is the cohort of youngsters subject to the tightest child-labor restrictions. Among 16- and 17-year-olds . . . the dropout total is about half a million." Many companies, including Burger King and Hardee's, responded to the Labor Department's national crackdown by ceasing to employ anyone under the age of 16. Nationwide, the crackdown contributed to a decrease of over one million teenagers holding jobs between 1988 and 1990. Government officials treat working teenagers as if their paychecks were simply a luxury, as if government officials should have unlimited discretion to determine whether teenagers will be allowed to work. In 1993 Rep. Tom Lantos (D-Calif.) proposed a deceptively titled bill called The Young American Workers' Bill of Rights, a bill to restrict the number of hours 16- and 17-year-olds are allowed to work.

The restrictions on child labor do contain exemptions for politically connected industries. Federal law allows 14- and 15-year-olds to work only between 7 A.M. and 7 P.M., except if the

youth gets up at 4:30 A.M. to deliver newspapers. According to the International Association of Circulation Managers, 362,470 people under the age of 18 worked as newspaper carriers in 1990. In 1991 Florida prohibited the employment of minors age 13 or younger, except in the entertainment industry or as pages in the state legislature (a redundant exemption?). According to Washington state law, "A 14-year minimum age is established for employment, except that 12- and 13-year-olds may be employed in the hand harvest of berries, bulbs, and cucumbers and in the hand cultivation of spinach during weeks when school is not in session." The South Dakota legislature judiciously resolved in 1992 that children under the age of 16 would face no limitations on their work hours on nonschool days when they were employed in roguing or detasselling hybrid seedcorn.

Child labor laws received a black eye in 1993 when a Labor Department enforcer warned the Savannah Cardinals baseball team that it must fire Tommy McCoy, a 14-year-old bat boy, because he could not work after 7 P.M. while school is in session or after 9 P.M. during the summer. The team's fans were outraged and announced plans for a "Save Tommy's Job" night. After the Labor Department was sufficiently embarrassed, Labor Secretary Robert Reich announced that the policy was "silly" and decreed that bat boys would be exempt from the federal restrictions. Reich announced, "It is not the intent of the law to deny young teenagers employment opportunities, so long as their health and well-being are not impaired." Reich did not explain how federal enforcement of restrictions on all other industries and occupations did not "deny teenagers employment opportunities."

Not in Your House

In order to guarantee textile workers a "fair" wage, under the authority of the FLSA, government officials prohibit all other Americans from doing certain types of work in their own homes. It is a federal crime for a woman to sit in her own house and sew buttons on a dress for pay. In the early 1940s the federal government banned people from earning money by making knitted outerwear, jewelry, buttons, buckles, gloves, mittens, handkerchiefs, embroideries, and women's garments at home for pay. The restriction was a

bone tossed to the textile unions, which sought to force all knitters, sewers, and stitchers into factories and to get a chunk of their wages under compulsory collective bargaining. The unions claimed to be concerned about the low wages paid to people who worked at home; in reality, they sought to destroy their low-priced labor competition.

The federal government has vigorously enforced the regulations against working at home. In 1979 the government filed an injunction against several Vermont companies that purchased sweaters knitted in private homes; the jobs of over a thousand people, including many retirees working to supplement their Social Security checks, were destroyed. In 1986 Labor Department agents swooped down on North Carolina's Tom Thumb Glove Company and eliminated the jobs of 27 women who had been sewing gloves at home for the company. The Labor Department launched a crackdown in the Dallas-Fort Worth area in 1992 on thousands of

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Vietnamese immigrants struggling to make a living by sewing at home. Tom Ha, vice chairman of the Vietnamese Community of Fort Worth and Vicinity reported that almost 70 percent of the Asian-American homes in the Dallas-Fort Worth area have at least one family member doing contract sewing and that the loss of this work would devastate the families, since many had already spent \$1,500 to \$4,500 to buy their own sewing machines. Mr. Ha noted that a home sewer's average yearly earnings of \$20,000 could account for more than 70 percent of a family's income. Mr. Ha complained: "A lot of people think this with the Labor Department will be the kiss of death. They don't want to apply for food stamps or welfare. They want to work."

Several cities and states impose even more restrictive bans on working at home. In 1991 the city of New York fined two companies \$70,000 for employing 479 Vietnamese immigrants who worked at their homes in the Bronx. A

Pennsylvania company, Overly-Raker Inc., was forced by that state's Department of Labor and Industry to stop using home workers to sew together "soft sculptures of geese, cows, cats." The state government's order destroyed the jobs of about a hundred women, but Helen R. Friedman, director of the Labor Standards Bureau, justified this denial of the freedom of individuals to engage in productive work in their homes, saying, "We work to protect people's rights." In 1991 New Jersey officially prohibited the sewing of any women's or men's apparel at home. Previously, New Jersey had only banned home-sewing of women's apparel, but it judiciously expanded the ban to include men's apparel because some garments, such as sweatsuits, can be worn by both sexes.

Government officials claim to have exemplary motives for prohibiting people from working at home. Lillian Roberts, commissioner of labor for the state of New York, observed, "It is wrong to effectively deny women the right to union wages

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and union protection if they desire them, and it is wrong to keep women in a situation where home duties and work requirements are in conflict." But conditions in factories are far from idyllic: some New York garment factory workers are so desperate for child care that they keep their young children in cardboard boxes next to them on the factory floor.

New York City has 40 investigators snooping for violators of the regulations against working at home. According to Robert Armer, director of enforcement of labor standards for New York, "What we do is send out our investigators on surveillance . . . If our investigators identify someone they feel is a likely homemaker, then they merely follow that person to where they may go . . . If it is in a manufacturing area and you see a person carrying a well-worn shopping bag, and particularly if there are several people doing that,

going in, the chances are quite good that it is going to be homework when you get in there."

Though New York cannot protect its citizens against murderers and muggers, the city can afford a battalion of investigators to hunt for women carrying used shopping bags. Armer told the House Education and Labor Committee, "I am very concerned that we are going to increase the lack of payment for unemployment insurance, worker's compensation, Social Security, city, state and federal tax . . . These people are not only engaged in exploiting workers but exploiting everybody else connected to [them] by means of these various programs that they escape." Yet at the same time that the New York City government is cracking down on honest workers, it is also paying welfare to hundreds of thousands of able-bodied adults who are not working.

At a 1989 hearing in Los Angeles, government welfare fraud investigator Donald H. Andres opposed ending the ban on working at home because it would make it easier for welfare recipients to avoid reporting their income. Thus, because some welfare recipients might cheat on their income, all women should be banned from working at home; apparently, everyone's lives must be forcibly restructured for the convenience of government regulators.

Federal and state government restrictions on working at home are becoming more detrimental as new technology vastly increases the number of people who could do some or all of their work at home. In 1985 the AFL-CIO called for expanding the ban to include telecommuting. This would have destroyed millions of potential jobs and insured more-crowded rush hours for tens of millions of Americans. A survey of *Fortune* 500 company managers found that telecommuting boosts productivity and decreases worker turnover. Yet Communications Workers of America president Mort Bahr warned against telecommuting in early 1992: "How do we monitor whether the contract is being enforced? . . . It lends itself to corporate abuse, with the worker being somewhat intimidated—particularly if that worker wants to work at home." According to Bahr, allowing those people who want to work at home to do so somehow exploits them. Bahr may have revealed the true source of his discomfort when he complained in 1984 that allowing telecommuting for telephone operations "certainly would make it virtually impossible for a union

to maintain contact with its members.” Similarly, in late 1991 the Coalition of Labor Union Women issued a booklet on the dangers of working at home. The book (as summarized by *Telecommuting Report*) warned: “Homework makes it hard to develop the kind of solidarity among employees which naturally occurs in a workplace Many home-based computer workers are treated as independent contractors. Independent contractors cannot be organized into unions.”

Conclusion

The name “Fair Labor Standards Act” is typical of the dishonesty of the paternalistic state. The FLSA is basically a blank check allowing political manipulation of the labor markets in order to reward some people by throwing other people out of work. The act contains no definition of “fair labor”; instead, it permits politicians endlessly to manipulate and rig labor markets for political gain. “Fair labor standards” are simply what politicians claim they are in any given week. “Fair labor” policies divide the labor force into political victors and political victims. It would be more accurate to rename the FLSA the “Political Labor Standards Act.”

America is suffering from a vast narrowing of the range of lawful self-interest. This century has seen the proliferation of bureaucratic intrusions into the lives of private citizens—from the hours they work, to the professions they follow, to the transportation they use. There has been a vast increase in political exploitation in the name of

curtailing economic exploitation.

Ironically, the restrictions on freedom of contract under the FLSA have only increased economic exploitation. People almost never petition Congress to restrict their own freedom of contract; rather, one group petitions politicians to restrict someone else’s freedom for its own benefit.

The FLSA restricts opportunity and violates basic morality. Just as no man is entitled to a share of his neighbor’s income, no man is entitled to have his neighbor’s freedom restricted in order to boost his own income. Many restrictions of freedom of contract are based on the triumph of hope over experience, on the belief that politicians and bureaucrats will be more competent, fair, and honest in the future than they have been in the past. We need to recognize the lessons of the past and greatly decrease politicians’ power over contracts in the future.

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