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Employment Market Institutions and  
Japanese Working Hours

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## **Employment Market Institutions and Japanese Working Hours**

**Mark D. West\***

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### ABSTRACT

Why do Japanese workers work such long hours? Beginning with a series of cases in the 1950s, Japanese courts drastically curtailed firms' abilities to dismiss workers. As a consequence of the inability to dismiss workers legally, large Japanese firms hired a smaller number of workers than were necessary to fulfill capacity without overtime. Employers rely on the working hours of this undersized cadre of workers, carefully screened to rule out the slothful, as a buffer. In bad times, the size of the work force makes dismissal unnecessary. In good times, workers are forced to work long hours.

While these court decisions led to an increase in working hours in the 1950s, recent laws have led to a decrease. In response to interest group demands of the late 1980s and 1990s, Japan passed legislation that directly limits working hours. At the same time, it liberalized rules regarding temporary employees, allowing those persons to serve as the buffer instead of regular employees. As the statutory working-hour limits and market liberalization have taken effect, working hours have decreased.

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## INTRODUCTION

For most of the past half-century, Japanese workers have put in far more hours than their counterparts in other industrialized countries.<sup>1</sup> While long working hours may help explain Japanese economic success, they also are an inescapable part of the fabric of Japanese society, affecting such basic choices as domicile, marriage, childbirth, and children's education and development.

Various explanations have been offered to explain why Japanese workers appear to work so hard. Some scholars claim that the "lust for labor" is a "unique aspect of Japanese culture."<sup>2</sup> The Japanese work ethic, as the story goes, is firmly embedded in Japanese society.<sup>3</sup> Hierarchical relations and loyalty, grounded in Confucianism or feudalism, make workers work harder for their bosses and not question transfers. Japanese groupism discourages individual workers from selfishly leaving early, and encourages the drawing of a stark line between "permanent" and "non-permanent" employees.<sup>4</sup> Some studies additionally note that the relatively large number of family-owned businesses in Japan can explain long hours, or that long working hours are a tradeoff for early retirement.<sup>5</sup>

More anecdotally, anyone who has spent time working for or with Japanese companies knows the amazing ability that many such firms have to create daytime busy work. Whether due to organizational structure, accepted decision making practices, or some inexplicable residue labeled as "culture," the Japanese workday at many firms seems to be filled with time-

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<sup>1</sup> See, e.g., OECD, OCED Employment Outlook 2000, Chapter 5 (2000).

<sup>2</sup> Bruce E. Kaufman, *The Economics of Labor Markets and Labor Relations* (2d ed. 1986).

<sup>3</sup> See, e.g., Masayuki Nomiyama, *Rodo Jikan: Sono Doko to Kadai* [Trends and Issues of Working Hours] 86 (1989).

<sup>4</sup> See, e.g., James Abegglen, *The Japanese Factory* (1958).

<sup>5</sup> See, e.g., Kazuo Koike, *Understanding Industrial Relations in Modern Japan* 61 (1988); Carl Mosk, *Competition and Cooperation in Japanese Labour Markets* 194 (1995).

consuming meetings, briefings, and approval processes that accomplish little and require employees to work their hardest after sundown. The serious do work at night, and many of the slackers stick around because it's socially appropriate.

Each theory and anecdote is a plausible explanation for long working hours in some cases, and will not attempt to disprove them. In this essay, I want to explore a heretofore overlooked *additional* variable that can offer a much richer account of Japanese working life. And unlike some of the other explanations, this institutional variable can be altered in ways that might improve everyday Japanese life.

I hypothesize that Japanese labor law plays an important role in determining how much people work, especially at large firms that are the focus of this essay. Beginning with a series of cases in the 1950s, Japanese courts regulated the employment market to such an extent that it became practically impossible for most businesses, or at least large ones, to fire workers. As a consequence of the inability to dismiss workers legally, large Japanese firms hired a smaller number of workers than were necessary. Large employers rely on the working hours of this undersized cadre of workers, carefully screened to rule out the slothful, as a buffer. In bad times, the size of the work force makes dismissal unnecessary. In good times, workers are forced to work long hours.

In contrast to these hour-increasing decisions, recent labor statutes helped *reduce* working hours. In the late 1980s and 1990s, interest groups pressed the government for solutions to the working-hour problem. The government responded by passing legislation directly limiting working hours. At the same time, the legislature liberalized rules regarding temporary employees, allowing those persons to serve as the hour buffer. The result is a model in which Japanese workers now work less than their U.S. counterparts.

Labor law is by no means the only causal factor. The institutions that I discuss in this essay are a product of union demands, social and economic forces, international pressure, and many other factors. But labor law, both in the form of cases and statutes, played an important role in mandating results and in homogenizing throughout Japan an otherwise heterogeneous set of working conditions. After the legal changes took place, there could be no social outliers. As Chiaki Moriguchi explains, law “legitimized the practices and consolidated the expectations as social norms.”<sup>6</sup> In so doing, the social forces that led to legal change used law to buttress those same social forces even further.

Recent scholarship has examined the relation between institutions and lifetime employment. Dan Foote provides a probing historical account of the judiciary’s formulation of a “no-dismissal” policy.<sup>7</sup> Ron Gilson and Mark Roe also mention the role of the judiciary, and argue that human capital investment in Japan is better understood through an analysis of the complementary “no-poaching rule” that closed the Japanese external labor market.<sup>8</sup> Instead of focusing on the origins of lifetime employment, I examine the subsidiary effects of the law (and the concomitant inability to contract freely) in the employment market and, by extension, in everyday life. The extent to which the background institutions that I describe influence basic aspects of working life strongly suggests a need for more nuanced, careful examination of employment law structures.

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<sup>6</sup> Chiaki Moriguchi, *The Evolution of Employment Relations in U.S. and Japanese Manufacturing Firms, 1900-1960: A Comparative Historical and Institutional Analysis*, NBER Working Paper 7939, at 65.

<sup>7</sup> Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law: Activism in the Service of – Stability?*, 43 *UCLA L. Rev.* 635 (1996); see also David Kettler & Charles T. Tackney, *Light from a Dead Sun: The Japanese Lifetime Employment System and Weimar Labor Law*, 19 *Comp. Labor L.J.* 1 (1997).

<sup>8</sup> Ronald J. Gilson & Mark J. Roe, *Lifetime Employment: Labor Peace and the Evolution of Japanese Corporate Governance*, 88 *Colum. L. Rev.* 508 (1999).

The essay proceeds as follows. In Part I, I discuss the available quantitative evidence on working hours. Part II sets forth the relevant legal provisions. Part III discusses how the law affects working hours.

## I. WORKING HOUR DATA

Long working hours and grueling conditions were commonplace in pre-war Japan. At the turn of the century, twelve-hour-a-day, six-day-a-week schedules were common. Many workers, especially women, lived in dormitories that were often compared to prisons, resulting in annual turnover rates of sixty percent at some factories.<sup>9</sup>

In 1911, the Factory Law regulated working hours. The Factory Law limited the maximum hours worked each day for women and children to twelve hours, with two days' rest each month, a schedule that could allow over 4,000 working hours per year.<sup>10</sup> It contained no restrictions on working hours for adult males.

By the 1930s, hours decreased slightly. In the mining industry in 1930, an average working day was nine hours, seven minutes, a figure that varies by no more than ten minutes over the course of the decade.<sup>11</sup> Nationwide figures are similar. The Bank of Japan and the Ministry of Labor collected survey data on daily working hours and number of days worked each month for workers at manufacturing firms with more than thirty employees. As Table 1 shows, the number of working hours for the period 1923-1939 is quite large.<sup>12</sup>

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<sup>9</sup> Noshomusho Shokokyoku, *Shokko Jijo* [Work Conditions] 78-79 (1902, reprint ed 1971).

<sup>10</sup> *Kojoho*, Law No. 46 of 1911.

<sup>11</sup> *Nihon Tokei Nenpo* 292 (1949). Average industrial working hours during World War II were even higher; an average working day in 1945 is said to be 11 hours, 14 minutes. *Id.* at 705.

<sup>12</sup> I annualized the daily hours by multiplying average daily hours by days worked and multiplying by twelve. Japanese economists use similar procedures. See, e.g., Koji Ishii, *Rodo Jikan to Nihon Keizai* [Working Hours and the Japanese Economy] 17 (1982).

1923	3252
1924	3286
1925	3231
1926	3205
1927	3168
1928	3196
1929	3169
1930	3058
1931	3037
1932	3087
1933	3147
1934	3186
1935	3191
1936	3203
1937	3219
1938	3236
1939	3224

SOURCES: Rodosho, Rodo Tokei Chingin Maitzuki Chosa [Monthly Labor Survey]; Nichigin, Rodo Tokei [Labor Statistics], various years.

By comparison, in the iron and steel industry in the U.S in 1920, with about two-thirds of blast-furnace workers, and about three-fourths of Bessemer mill workers, working twelve-hour shifts, workers worked an average of 3270 hours annually, roughly equivalent to the Japanese numbers. But by 1926, working hours in that sector had fallen to 2860 annual hours, a figure higher than the U.S. manufacturing average, but still far below the Japanese numbers for the period.<sup>13</sup>

During the Occupation following World War II, the Japanese working hours regime was substantially revised by the 1947 Labor Standards Act (“LSA”).<sup>14</sup> The LSA established a six-day, 48-hour work week, and provided six days of vacation for workers with one year of employment (arts. 32, 32(1), 39(1)). Employers could assign overtime work at time-and-a-quarter pay so long as they entered into a so-called “Article 36 agreement” on overtime with a majority of workers (art. 36).

<sup>13</sup> Martha Ellen Shells, *Collective Choice of Working Conditions: Hours in British and U.S. Iron and Steel, 1890-1923*, 50 *J. Econ. Hist.* 379 (1990).

<sup>14</sup> Rodo Kijunho, Law no. 49 of 1947.

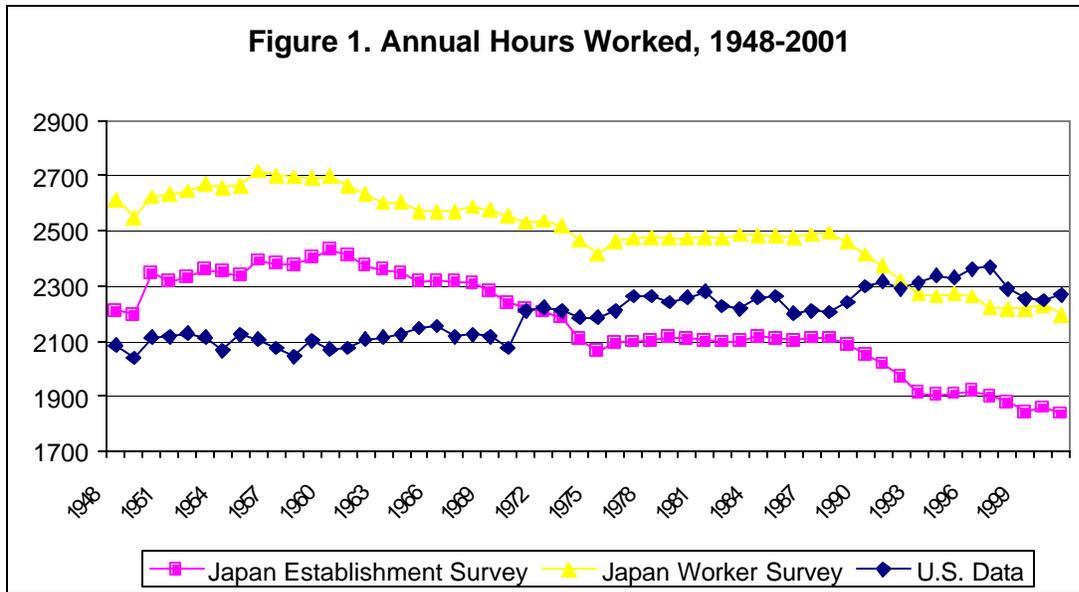
Compared to the grueling hours of the pre-war era, post-war hours were more reasonable, but still remained quite high. Two official sources of data on postwar working hours are available. The Ministry of Labor's Monthly Labor Survey polls 16,700 establishments with more than thirty workers, chosen at random. These figures are usually cited as the authoritative and official numbers, but because survey respondents are businesses and not individuals, the figures may understate the total number of hours worked, especially the total number of unpaid and uncounted "service" overtime hours that are estimated to account for 100 to 200 hours per year in Japan.<sup>15</sup>

By contrast, the Workforce Survey, conducted by the Prime Minister's Office, polls households, not businesses, and therefore might be more accurate in gathering data on actual hours worked. But this survey is conducted only once a year (the third week of December), and workers may exaggerate their actual hours worked. Both measures are routinely cited as accurate. Figure 1 shows the annualized results of both measures since 1948, and for comparison the annualized hours of United States workers according to employee surveys.<sup>16</sup>

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<sup>15</sup> Koji Morioka, *Zangyo oyobi Saabiusu Zangyo no Jittai to Rokiho Kaisei no Hitsuyosei* [Overtime and Service Overtime: The Need for Revision of Working Hour Legislation], 71 *Keizai Kagaku Tsūshin* 14, 14-15 (Nov. 1992).

<sup>16</sup> Current Employment Statistics Survey (1971-2001); Employment and Earnings Survey (1948-1970). Available at <http://laborsta.ilo.org>. Recent studies suggest that in the United States, although reference periods have an impact on data, "independent measures of working time largely corroborate the self-reported measures relied on by the standard surveys." Jerry Jacobs, *Measuring Time at Work: Are Self-Reports Accurate?*, *Monthly Labor Rev.*, Dec. 1998, at 42, 50. Other survey data support the idea that Japanese workers historically work long hours; a 1990 auto industry survey found that Japanese workers work 2,275, while the French and Germans work between 1,650 and 1,750 hours. See Gavan McCormack, *The Emptiness of Japanese Affluence* 80 (1990).



The figure raises four observations. First, Japanese worker-reported data is always higher than employer-reported data. Second, Japanese hours peaked in the early 1960s, declined slightly during the 1970s oil shock period, and declined again in the 1990s. Third, Japanese workers historically work more than their counterparts in the United States. In 1960, they worked, on average, approximately 620 hours more. Finally, by 1993, U.S. employee-reported hours were higher than Japanese employee-reported hours, a result that reflects both increased U.S. reported hours for those workers and decreased Japanese reported hours.

## PART II. LABOR LAW

Japanese working hours are shaped by three specific aspects of Japanese labor law. First, the judicially created doctrine of abusive dismissal protects employee job security, and in turn drastically limits an employer's ability to dismiss a worker. Second, revisions to the Labor Standards Act and the Temporary Measures Law to Promote Reduction in Working Hours<sup>17</sup> in

<sup>17</sup> Rodo Jikan no Tanshuku no Sokushin ni Kansuru Rinji Sochiho, Law No. 90 of 1992; revisions in Law No. 79 of 1993.

1987, 1992, 1993, and 1998 limit the number of hours that employees legally may work. Finally, the enactment of the Worker Dispatching Law<sup>18</sup> in 1985 (effective 1986), and the amendment of that law and the Employment Security Law<sup>19</sup> in 1999 legalized temporary agency employment and liberalized job placement services. While the first factor increased working hours, the latter two helped reduce them.

### A. *Dismissal*

Japanese statutes historically provide few limits on employee dismissal. The Civil Code (art. 627) states that if parties to a contract have not provided otherwise, either party may terminate the contract on two weeks' notice. The LSA (art. 19) prohibits the dismissal of workers who are recuperating from work-related injuries and women on maternity leave – but virtually no one else. The LSA also extends the notice period in the employment context from two weeks to thirty days (art. 10), except when a worker is dismissed, according to Section 20, with cause. It is not the LSA, but the judiciary, relying in part on this exception and in part on a Constitutionally guaranteed right to work (art. 27), that places substantial limits on dismissal. After examining individual dismissal and group dismissal, I discuss the court's role in the larger labor process, and then turn to exceptions to the rules that results from that role.

1. *Individual Dismissal.* Beginning in 1950, district courts interpreted the dismissal provision, Section 20 of the LSA, to require just cause for dismissal.<sup>20</sup> As Dan Foote puts it,

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<sup>18</sup> Rodosha Hakenho, law No. 88 of 1985.

<sup>19</sup> Shokugyo Anteiho, law no. 141 of 1947.

<sup>20</sup> Iwata v. Tokyo Seimei Hoken Sogo Gaisha, Tokyo D.C., 1-2 Rominshu 230 (May 8, 1950).

“[t]he position is that, regardless of the language of Section 20, there is an implied requirement that discharges be supported by just cause; discharges without just cause are deemed invalid.”<sup>21</sup>

In the early 1950s, courts expanded the just cause analysis to adopt an “abuse of rights” approach, holding that dismissals that abuse employee rights were illegal. By employing an abuse of rights approach – an approach with statutory justification in a general Civil Code provision (art. 1) to the effect that “no abuse of rights shall be permitted” – courts fashioned a much more subjective approach to determining the legality of dismissals.<sup>22</sup>

The subjective abuse of rights analysis has led to a much more stringent approach to employee dismissals. The Supreme Court’s decision in the 1977 *Kochi Broadcasting* case is instructive and typical.<sup>23</sup> In that case, a radio station dismissed an announcer after he overslept twice in a two-week period. In some jobs, such a lapse might not be significant, but in this case, the particular announcer’s slumber prevented him from reading the 6 a.m. news; if anyone needs to be up at 6, this is the guy. The announcer then tried to cover up his error. In finding that the dismissal was an abuse of the employer’s right to dismiss, the court noted that although the oversights damaged the “social credit of the company,” plaintiff apologized in both cases, and that “the dead air time was not so long.” As for the cover-up, the Court held that he was “not to be strongly blamed,” because it came “as a result of his awkward position because of his repeated mistakes in a short period.”

This abuse of rights analysis pervades employee dismissal jurisprudence. Courts have found dismissals to be abusive in cases in which an employee makes several serious

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<sup>21</sup> Foote, *supra* note 7, at 643.

<sup>22</sup> The court’s position was by no means preordained. Among academics, there was much debate about management’s right to dismiss employees. Some of the leading employment law treatises of the time favored free dismissal rights for management. See Mitsutoshi Azuma, *Kaiko* [Dismissal] (1956); Takashi Yonezu, *Kaikokenron* [Dismissal Rights], in Sengo Rodoho Gakusetsushi [A History of Labor Law Scholarship] 657 (Tsuneki Momii ed. 1996).

bookkeeping errors and engages in personal phone conversations during working hours,<sup>24</sup> and when a salesman enters a coffee shop in the middle of the day.<sup>25</sup> As the Supreme Court explains, “If, under the specific circumstances of the case, the dismissal is unduly unreasonable so that it is not appropriate based on the common sense of society, the dismissal will be void.”<sup>26</sup> As the “common sense of society” is determined by giving great weight to facts favorable to employees, the result is an extremely restrictive set of restrictions on dismissal.

In 2003, many of these common law principles were codified. The LSA was revised to state that dismissal must be based on “reasonable grounds” and must be acceptable “in light of social norms.”<sup>27</sup> If the standard is not met, dismissal constitutes an abuse of right. While caselaw has yet to emerge, it seems likely that the relevant “social norms” will be those that have been shaped and buttressed by fifty years of common law cases.<sup>28</sup>

*2. Group Dismissal.* Again without explicit statutory support, courts have established a four-prong test for determining the legitimacy of economically motivated group dismissals. First, an employer must show a genuine need to reduce the size of the workforce. While some courts only require a high degree of business difficulty, others have allowed firms to dismiss only if the failure to dismiss would “inevitably lead to bankruptcy.”<sup>29</sup> Second, courts require employers to show that the necessary personnel reduction can be accomplished only by dismissal, and not by

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<sup>23</sup> Shioda v. Kochi Broadcasting Co., Supreme Court, 258 Rodo Hanrei 17 (Jan. 31, 1977).

<sup>24</sup> A v. Seiko Kagaku, Tokyo D. Ct., 617 Hanrei Jiho 72 (Nov. 20, 1967).

<sup>25</sup> Taguchi v. Takahashi Building K.K., Osaka D. Ct., 617 Hanrei Jiho 92 (Oct 9, 1970).

<sup>26</sup> Shioda v. Kochi Broadcasting Co., Supreme Court, 258 Rodo Hanrei 17 (Jan. 31, 1977).

<sup>27</sup> Rodo Kijunho no Ichibu o Kaisei Suru Horitsu [Law to Revise the LSA], Law no. 104 of 2003.

<sup>28</sup> Significantly, earlier drafts stating that “employers have a right to dismiss their employees” were opposed by the Japan Federation of Bar Associations and labor groups as too broad. The provision was removed, but the Japan Communist Part voted against the revisions nonetheless. See Revised Labour Standards Law Enacted, Japan Labor Bulletin, Sept. 2003, at 5.

<sup>29</sup> Kazuo Sugeno, Japanese Labor Law 408 (1992).

other means, such as transfers or layoffs. Third, the selection of workers to be dismissed must be fair and reasonable. Finally, the procedures for dismissal must be proper.<sup>30</sup>

The 1990 *Sanyo Electric Company* case<sup>31</sup> provides insights into the workings of the rule. In *Sanyo*, as a result of economic hardship brought on by the rising yen, trade friction, and competition from cheap imports, the defendant company dismissed 1,200 staff members. The Osaka district court noted that the business environment was bad, and that some sort of measures may have been necessary. But the court nonetheless noted that “the company as a whole would have had enough reserve capital to endure the situation,” and that the company should have “made every effort” to clarify which persons truly needed to be eliminated, and even then, they should have been given the option of voluntary resignation. Because the defendant did not make “sufficient effort to examine ways to avoid dismissal,” the dismissals were deemed invalid.

The doctrine is applied quite broadly. It extends to fixed-term contract employees, as courts have long held that the renewal of fixed-term contracts on a regular basis may create a “regular employment” relation.<sup>32</sup> In 1991, the Osaka High Court went a step further, reversing the District Court to hold that the dismissal doctrine applied to a one-year contract that had never been renewed, despite the company’s financial distress and the fact that the employee in question was not very competent.<sup>33</sup>

3. *The Court’s Role.* Scholars have proposed various theories to explain the role of the judiciary in the dismissal context. Dan Foote argues that the courts, in response to cases brought

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<sup>30</sup> See, e.g., Kazuo Sugeno, *Rodoho* 450-53 (5<sup>th</sup> ed. 1999). For cases applying the standard, see *Ikeda v. Sanyo Denki K.K.*, Osaka D.Ct., 558 Rodo Hanrei 45 (Feb. 20, 1990); *Hirata v. Hitachi Medico*, Tokyo High Ct., 354 Rodo Hanrei 35 (Dec. 16, 1980).

<sup>31</sup> *Ikeda v. Sanyo Denki K.K.*, Osaka D.Ct., 558 Rodo Hanrei 45 (Feb. 20, 1990).

<sup>32</sup> See, e.g., *Toshiba Electric Co. v. Maeda*, Supreme Court, 28-5 Minshu 927 (Jul. 22, 1974); *Ikeda v. Sanyo Denki K.K.*, Osaka D.Ct., 558 Rodo Hanrei 45 (Feb. 20, 1990).

<sup>33</sup> *Tonomizu v. Ryushin Taxi K.K.*, Osaka High Ct., 581 Rodo Hanrei 36 (Jan. 16, 1991).

by workers, *created* norms.<sup>34</sup> Foote argues that despite the image of judicial inactivity in Japan, employment rules are created not by statute or administrative guidance, but by courts, and express an overall theme of maintenance of stability in relationships. Subsequent scholars argue that “judges’ doctrinal adjustments do not stand in isolation from the activities that shape and reshape employment relations, such as employee-labor relations, advocacy lawyering, and foreign legal influences.”<sup>35</sup> Signs that the Tokyo District Court attempted to relax the four-pronged test in 1999 and 2000, a move not followed by other regional courts but occurring precisely the time in which restructuring of employment relations became critical to economic turnaround,<sup>36</sup> further suggests a lack of judicial isolation.

The historical evidence strongly suggests that courts were not enforcing longstanding preexisting social norms, as lifetime employment was simply not present in prewar Japan.<sup>37</sup> Beyond that observation, the more precise relation between judicial policy and exogenous factors is difficult to entangle. Gilson and Roe’s theory that the courts “enforced the post-War practice as it developed . . . buttress[ing] the post-War lifetime employment norm by raising the costs to any firm that wanted to change the deal”<sup>38</sup> does not take a stance on the issue, and has been

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<sup>34</sup> Foote, *supra* note 7.

<sup>35</sup> Kettler & Tackney, *supra* note 7, at 3-5.

<sup>36</sup> Satoshi Nishitani, *Seiri Kaiko Hanrei no Hoseisakuteki Kino* [The Legislative Function of Group Dismissal Cases], 1221 *Jurisuto* 29, 31-32 (2002).

<sup>37</sup> See, e.g., Sheldon Garon, *The State and Labor in Modern Japan* (1987); Andrew Gordon, *The Evolution of Labor Relations in Japan: Heavy Industry, 1853-1955* (1985). One theory posits that Japanese judges enforced the no-dismissal rule in no small part due to their personal experiences. As one Japanese judge explains, Japanese judges were the Japanese “intelligentsia” immediately after the war, yet their salaries were quite low, so low that they “could not buy enough food to eat.” The no-dismissal policy thus reflected a sort of solidarity with workers. Koji Tanabe, *Rodo Funso to Saiban* [Cases and Labor Disputes] 310-11 (1965).

<sup>38</sup> Gilson & Roe, *supra* note 8, at 526.

adopted by labor historians.<sup>39</sup> Whatever the precise cause, it is clear that judicially created rules on employment forced compliance and diffused employment practices throughout the country.

4. *Exceptions: Acceptable Dismissals.* Courts are said to have enforced a labor-management bargain: in exchange for job security, workers received a lack of power to controvert management on many other relevant and important issues.<sup>40</sup> In accordance with the bargain, courts allow firings, creating exceptions to the strict dismissal policy when workers oppose management on labor-related issues. One such issue is overtime work. In the Supreme Court's 1991 *Hitachi* decision,<sup>41</sup> the Court affirmed the validity of a dismissal of an employee who declined a request to work overtime. In *Hitachi*, a plant union had entered into an Article 36 agreement with management to allow overtime. The employee had previously been insubordinate, and in this particular instance the overtime requested was not the result of a booming economy, but was necessary to correct errors that arose from the employee's prior negligence. The Court held that the overtime provision was a result of the management-labor bargain, and that the company thus was authorized to request overtime work.

The decision is significant both as an exception to the general rules regarding dismissal, and in light of the fact that it seems to go against prevailing social pressure. As for the former, the Court simply upheld the preexisting labor-management bargain: job security for control. As for the latter, at the time of the Court's decision, working hours had become a significant social issue. The Court's decision here, as well as other judicially created exceptions, appears to

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<sup>39</sup> See, e.g., Andrew Gordon, *The Wages of Affluence: Labor and Management in Postwar Japan* 184 (1997) (noting that courts gave "legal force to what was concurrently taking root as an implicit customary bargain"); Moriguchi, *supra* note 6, at 65 (courts "legitimized" and "consolidated" the practice).

<sup>40</sup> The bargain may be rational, as workers are risk averse and prefer job insurance, or, as Kazuo Koike, Masahiko Aoki, and Yoshiro Miwa have all separately argued to some degree, they may receive additional rents as the controlling group of the firm. Kazuo Koike, *Understanding Industrial Relations in Modern Japan* (1988); Yoshiro Miwa, *Firms and Industrial Organization in Japan* 205 (1996); Masahiko Aoki, *Information, Incentives, and Bargaining in the Japanese Economy* (1988).

oppose social trends in the name of protecting the existing bargain, suggesting support for the judicial activism argument.<sup>42</sup>

### B. Statutory Working Hours Reductions

By the 1960s, the consequences of extreme working hours were evident. Japanese workers were beginning to notice that despite having one of the most productive economies in the world, workers enjoyed relatively few of the productivity gains in the form of working time reductions. Although the “death from overwork” (*karoshi*) syndrome was not to become a major social issue until the early 1980s, health-related problems ostensibly caused by overwork had begun to appear.<sup>43</sup>

In the early 1970s, the Ministry of Labor attempted to reduce working hours through informal regulation.<sup>44</sup> In 1976, the Central Labor Standards Council formally recommended a reduction in working hours, but argued that because of the diversity of working practices and industries, continued informal regulation was preferable to direct legal regulation.<sup>45</sup> The Ministry of Labor continued to hold the position that workhour reductions were best achieved through negotiations between management and labor, and that the Ministry’s role was simply to

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<sup>41</sup> Tanaka v. Hitachi Seisakusho, Supreme Court, 594 Rodo Hanrei 7 (Nov. 28, 1991).

<sup>42</sup> Courts have upheld the bargain in several other contexts that create exceptions to the no-dismissal rule. Employees may be dismissed if they oppose a transfer. Sasaki v. Kowa, Nagoya D. Ct. 31-2 Rominshu 372 (Mar. 26, 1980); Ishiguro v. Nippon Stainless Steel Co., Niigata D.Ct., 485 Rodo Hanrei 43 (Oct. 1986). The refusal to accept certain modifications to working conditions may also lead to dismissal. Yoshikawa v. Shuhoku Bus Co., Supreme Court, 22 Minshu 3459 (Dec. 25, 1968); Nagai v. Aerotransport (The Scandanavian Airlines Services Case), Tokyo D. Ct., 1526 Hanrei Jiho 35 (Apr. 13, 1995). In short, while courts have uniformly enforced the no-dismissal rule in the general case, they have permitted dismissal in cases in which workers attempt to renege on the labor-management bargain.

<sup>43</sup> See, e.g., Note, Kaiulani Eileen Sumi Kidani, Japanese Corporate Warriors in Pursuit of a Legal Remedy: The Story of Karoshi, or “Death From Overwork” in Japan, 21 U. Haw. L. Rev. 169 (1999).

<sup>44</sup> See Ikuo Kume, Gyosei Kikan no Jiritsusei to Noryoku (Autonomy and Capacity of the State Agency: A Study of Work Hours Reduction Policy in Japan), Kobe Hogaku Nenpo 225, 241-55 (Vol. 6, 1990).

<sup>45</sup> See Ikuo Kume, Disparaged Success: Labor Politics in Postwar Japan 198 (1998).

facilitate such negotiations.<sup>46</sup> But by 1980, the Ministry had reversed course, leading to four important developments.

First, in 1982, the Ministry proposed a revision of the LSA to lower working hours from a 48-hour, 8-day week to a 45-hour, 9-day week. As the debate became a serious public policy issue, labor insisted on a five-day, 40-hour week. Business interests encouraged the Ministry to stay out of the debate,<sup>47</sup> but the Ministry faced additional pressures for reform. Besides pressing labor interests and a growing domestic public sentiment in favor of reform, the international community had begun to point to excessive Japanese working hours as a possible cause of Japan's growing trade surplus.<sup>48</sup> By linking domestic and international agendas, the labor-influenced Ministry was able to submit a working-hours reduction bill to the Diet in 1987.<sup>49</sup> The bill, a revision of the LSA, was a compromise between labor interests, who continued to insist on a 40-hour week, and managerial interests, who continued to oppose any reduction at all.<sup>50</sup> The LSA was amended to establish the 40-hour rule in principle, but through the Supplementary Provisions of the LSA, the 40-hour rule was set as a "goal" to be phased in incrementally. The Supplementary Provisions called for the reduction of hours by Cabinet Order "in stages, considering workers' welfare, working hour trends, and other circumstances" (arts. 131-2). As a result, the baseline standard was 46 hours for the first three years after the amendments took effect in April 1988.<sup>51</sup>

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<sup>46</sup> Nomiya, *supra* note 3, at 20-24.

<sup>47</sup> See, e.g., Toshiyuki Hiraga, *Kaisei Rodo Kijunho* [Revised Labor Standards Act] 114-15 (1987).

<sup>48</sup> Nomiya, *supra* note 3, at 124.

<sup>49</sup> Some scholars argue that the change in the form of legislation as opposed to some other more informal means was necessitated by international pressure. See Kiyoshi Sasakegawa, *Chusho Kigyo to Rodo Mondai* [Small- and Medium-Sized Businesses and Labor Problems] 130 (1996).

<sup>50</sup> Daniel H. Foote, *Law as an Agent of Change? Governmental Efforts to Reduce Working Hours in Japan*, in *Japan: Economic Success and Legal System* 251, 268 (Harold Baum ed., 1997).

<sup>51</sup> Foote, *supra* note 50, at 269-70.

Second, beginning in 1991, the Ministry of Labor took further steps to reduce working hours, by proposing that regional Labor Standards Offices, through consultation with local Labor Standards Councils, be given the authority further to reduce working hours to an “appropriate” level. The bill, named the Temporary Measures Law Concerning the Promotion of Reduction in Working Hours,<sup>52</sup> was approved on a fast track, on June 19, 1992, and included explicit language that the Ministry of Labor “shall strive to consider the view of the workers” (art 8(5)).

Third, in 1993, under further pressure from domestic and international concerns, the Diet passed a further set of amendments to the LSA and the Temporary Measures Law. Over the opposition of managerial interest groups, the 1993 legislation successfully established for the first time a 40-hour, 5-day week, subject to certain exceptions and incremental implementation plans. Thus, by 1993, the 40-hour week, subject to overtime at 125% pay and various other exceptions, had become the legally mandated norm.

Finally, in September 1998, in a large-scale overhaul of the LSA, the Diet amended the LSA to provide that the Minister of Health, Labor and Welfare may limit overtime hours. The Minister did so, providing a maximum of 360 such hours per year.<sup>53</sup>

### *C. Temporary Employees*

Before the Employment Security Act of 1947, “labor bosses” who farmed out employees to work at client companies for low pay often created hazardous and unfair working conditions

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<sup>52</sup> Rodo Jikan no Tanshuku no Sokushin ni Kansuru Rinji Sochiho, Law no. 90 of 1992.

<sup>53</sup> Rodosho Kokuji [Notification of Ministry of Labor] no. 54 (Dec. 28, 1998). Additional measures changed working hours for women. Before 1998, the LSA (art. 64-2) limited women’s overtime work to 6 hours a week and 150 hours a year, and prohibited work on weekends and holidays. 1998 amendments (art. 133) made the system applicable upon the worker’s request in certain situations. That system expired in March 2002, and was replaced by more gender-neutral amendments to the Child and Family Care Leave Law. Under that law, among other things, male and female workers with family responsibilities are exempt from overtime. See Ryuichi Yamakawa, Labor Law Reform in Japan: A Response to Recent Socio-Economic Changes, 49 Am. J. Comp. L. 627, 638-40 (2001).

for workers.<sup>54</sup> The Employment Security Act sought to regulate the practice by prohibiting “worker dispatching,” the causing of a worker employed by one person to engage in work for another under the direction of the latter (art. 44). The Act also banned most job private placement services. Although *public* placement services existed, and *private* services continued to function with special permission of the Minister of Labor, permission was allowed for only 29 specific occupations, effectively creating a public monopoly over job placement (art. 5). The enactment of the Worker Dispatching Law<sup>55</sup> in 1985 (effective 1986), and the amendment of that law and the Employment Security Law<sup>56</sup> in 1999 substantially liberalized both.

1. *Worker Dispatch*. The dispatching of workers was clearly illegal under the Employment Security Law. But in practice, it flourished underground,<sup>57</sup> and companies attempted to avoid legal issues by contracting with supplying firms for work and allowing the supplying firm to maintain a supervisory role.<sup>58</sup> These practices created issues of employment security and an ambiguity of legal responsibility. In an attempt to protect dispatched workers, the Diet legally recognized them in the Worker Dispatching Law of 1985.

While the Law legalized worker dispatch, it maintained two substantial limits on such work. First, the 1985 Law, through a related Cabinet Order, specifically applied to only sixteen specific forms of work, such as secretarial services, filing, cleaning, machinery operation, and computer programming (arts. 4, 59). A 1999 amendment, enacted to comply with International Labor Organization Convention 181’s negative listing requirement, eliminated the sixteen

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<sup>54</sup> Kazuo Sugeno, *Koyo Shakai no Ho* [Employment Society and Law] 206 (1996)

<sup>55</sup> *Rodosha Hakenho*, law No. 88 of 1985.

<sup>56</sup> *Shokugyo Anteiho*, law no. 141 of 1947.

<sup>57</sup> Shigeru Wakita, *Rodoho no Kisei Kanwa to Kosei Koyo Hosho* [Liberalization of Working Hours and Guaranteeing Fair Work] 81-138 (1995).

<sup>58</sup> Kazuo Sugeno, *Japanese Labor Law* 164 (1991).

categories. The Law now instead lists only the jobs for which dispatched workers may *not* be employed, such as construction, port labor, and medical jobs, but each category is rather broadly crafted.

Second, the Law divides dispatch services into “general” and “specified.” “General” dispatch services are for short-term workers who register with an agency. Although “specified” services are only required to give notice to the Ministry of Labor, “general” services must be formally licensed (arts. 5-7).

2. *Job Placement.* The Employment Security Act prohibited the private taking of applications for employment and acting as a go-between to mediate between employer and employee (art. 5). Because job-placement services fell under that definition just as worker dispatch services did, they were prohibited under the law. The only exception to the rule was a small cadre of placement businesses with specific permission from the Labor Minister to operate in 29 permissible occupations, such as artists, nurses, chefs, pastry cooks, bartenders, interpreters, models, and the most recently added category (1990) of sightseeing bus conductor (art. 4). But in the 1980s and early 1990s, the Japanese labor market began to change. In response to changing demographics, intensified global competition, and a much more fluid work force, policy makers began to consider potential responses.

Amendments to the Employment Security Act, passed in 1999, liberalized private job-placement services in three principal ways. First, it eliminated the general prohibition on such services. Although placement services must still register with the Ministry of Labor, registration

requirements have been eased significantly, and registration terms have been extended from one year to three (art. 32).<sup>59</sup>

Second, like the worker dispatch provisions, the amended law contains only a negative listing of jobs for which private job-placement agencies cannot serve, including security guards, technicians, and a variety of jobs for recent high school graduates. Like the worker dispatch provisions, the negative listings are quite broad.

Third, the 1999 legislation deregulated placement fees. Prior to the amendments, private services could only charge the amounts listed in an official schedule, up to a maximum of 10.1% of six months' wages (art. 24). The amended law maintains maximum fees, but allows fees to differ from those listed in the schedule.

### PART III. EFFECTS

Recall the data on postwar working hours presented in Part I. Those data roughly correlate with the institutions discussed in Part II: hours rise and remain high following court decisions limiting dismissal, and fall through the 1980s and 1990s with the introduction of statutory working hour limits and liberalization of the market for temporary employees. In this part, I show how the three sets of legal institutions discussed in Part II – dismissal rules, working hour reductions, and rules regarding temporary employees – combine with economic and social factors to effect change in Japanese working hours.

#### *A. Dismissal*

1. *Non-dismissal rules.* Scholars of the Japanese employment system have long noted the tendency of Japanese firms to substitute variable for fixed employment costs by hiring fewer

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<sup>59</sup> See Jun'ichiro Mawatari, *Shokugyo Anteiho Kaisei no Igi to Mondaiten* [The Significance and Problems of the Employment Security Act], 1173 *Jurisuto* 33, 35 (2000). Under the new rules, placement workers can be licensed for

workers and moderating their hours.<sup>60</sup> What they have not yet done is make the subsequent link to the role of legal institutions in creating the need or incentives for the buffer.

Part II showed that the judicially created non-dismissal policy, whether a result of judicial activism or merely a reflection and subsequent distribution of a developing bargained norm, substantially limits the ability of employers legally to dismiss employees. As a result of the inability to dismiss, employers have historically been unable to vary the number of employees with the workload. Employees thus face two options. If they hire too many workers, those workers might be busy in good times, but they will be idle in bad times, and, unable to dismiss them, employers will be forced to internalize their costs. If they hire too few workers, this smaller cadre will force lower internalized costs in bad times, but will have to work many more hours in good times. Employers in Japan historically have chosen the latter option, and as a result, workers are forced to work extremely long hours during period of need. If they refuse, in accordance with the non-dismissal bargain, they can be fired.

Recent overtime data tend to support the claim. In 1989, when the Japanese economy was booming, annual overtime for companies with more than 500 workers was 246 hours. After the bubble burst, 1993 average overtime was 153 hours.<sup>61</sup> As Yasuo Suwa explains:

Overtime work functions as a sort of invisible work force which will minimise the number of surplus employees during business downturns. . . . Total work hours in Japan, in fact, tend to be quite responsive to business fluctuations: they become longer during business booms and shorter in recession.<sup>62</sup>

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all occupations with three years' experience.

<sup>60</sup> See, e.g., Clair Brown et al., *Work and Pay in the United States and Japan* 194 (1997).

<sup>61</sup> Yoshio Higuchi, *Trends in Japanese Labor Markets*, in *Japanese Labour and Management in Transition* 27, 34 (Mari Sako & Hiroki Sato ed., 1997); see also Michio Nitta, *Employment Relations after the Collapse of the Bubble Economy*, in 2 *The Political Economy of Japanese Society* 267, 275 (Junji Banno ed. 1998); Christoph Deutschmann, *The Worker Bee Syndrome in Japan: An Analysis of Working-Time Practices*, in *Working Time in Transition: The Political Economy of Working Hours in Industrial Nations* 189, 191 (Karl Hinrichs et al., eds. 1991).

<sup>62</sup> Yasuo Suwa, *Flexibility and Security in Employment: The Japanese Case*, 6 *Int'l J. Comp. Labour L. & Indust. Rel.* 229, 251-52 (1990).

For this system to work, employers must exercise intense scrutiny at the hiring stage to find hard workers and weed out lemons. This is exactly what Japanese employers do. Companies “exercise great care in their initial hiring decisions,” even to the point of hiring private investigators.<sup>63</sup> Of course, the evidence of future hard work available to Japanese employers at the time of the initial employment decision may not be as reliable as, for instance, billable hours in a law firm at the time of the partnership decision.<sup>64</sup> Although many companies do not rely heavily on university grades (almost universally acknowledged in Japan as a relative time of rest) in making hiring decisions, they do rely heavily on which university an applicant attended, thus using the entrance examination as a sort of proxy for hard work, and rely quite heavily on grades from high schools for applicants without a university education.<sup>65</sup>

Employees also self-select for hard work. Just as hard-working young lawyers flock to large law firms that demand high billable hours, so, too, do young Japanese workers join firms that suit their workstyle. If these young workers decide that the workplace is not for them, evidence suggests that they leave the firm; for males in their twenties, turnover rates at Japanese firms are 20 to 25%.<sup>66</sup>

Lazy workers not cut out for large firms have three primary options. First, they can quit and work for small firms, which are not subject to the non-dismissal bargain. While large firms ordinarily cannot meet the “genuine need” standard necessary to lay off workers, small firms can more easily do so. Second, they can continue in their sloth until their employer

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<sup>63</sup> Foote, *supra* note 7, at 654.

<sup>64</sup> See Renee M. Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 *Am. Econ. Rev.* 329 (1996).

<sup>65</sup> James E. Rosenbaum & Takehiko Kariya, *From High School to Work: Market and Institutional Mechanisms in Japan*, 94 *Am. J. Soc.* 1334 (1989).

<sup>66</sup> Kazuo Koike, *Human Resource Development and Labor-Management Relations*, in 1 *The Political Economy of Japan* 289, 296 (Kozo Yamamura & Yasukichi Yasuba eds. 1987).

transfers them to a small-firm subsidiary or otherwise related firm, which can fire them.<sup>67</sup> Third, in a few cases, they stick around as “*madogiwazoku*,” literally, window-gazers who show up for work every day and are not terminated – in large part because of the difficulty of dismissal.

2. *Anti-Poaching Rules.* Recall again the postwar data from Part I. Hours are high during the postwar growth period, and fall during the energy crisis and following the bursting of the economic bubble. What prevents employees from leaving during good times such as the postwar growth period to go to firms with shorter hours? What keeps them at firms during bad times?

One possible answer is the court-butressed non-dismissal bargain under which employees normally cannot be fired (unless they don't submit to overtime). The uniform application of the bargain among large forms ensures that employees would be no better off at other firms.

But as Gilson and Roe note, a historically closed external labor market also plays an important role in shaping Japanese labor practices.<sup>68</sup> Gilson and Roe see the closed external labor market, or “no-poaching rule” that mitigates labor mobility, as a product of several factors: managerial fear of worker demoralization from the hiring of outsiders, managerial fear of retaliation from other firms that would led to labor strife, and perhaps even policies of the Japanese government.<sup>69</sup> As for the latter, Gilson and Roe cite no direct evidence of government involvement, but, theorizing from government desire for workplace stability, informal

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<sup>67</sup> As James Lincoln and Christina Ahmadjian note, “[e]stablishments with more than 100 employees [transfer] male employees out at 2-3 times the rate of smaller organizations.” James R. Lincoln & Christina Ahmadjian, Shukko (Employee Transfers) and Tacit Knowledge Exchange in Japanese Supply Networks: The Electronics Case, in Knowledge Emergence: Social, Technical, and Evolutionary Dimensions of Knowledge Creation 10 (Ikujiro Nonaka & Toshihiro Nishiguchi eds. 2000). The bursting of the bubble economy led to the creation of many affiliate firms and subsequent transfer of employees. Many of these workers were eventually dismissed as the economy tanked. Wakita, *supra* note 57, at 159.

<sup>68</sup> Gilson & Roe, *supra* note 8.

enforcement in other areas, and what they call illegality of head-hunting activities, suggest a relation and call for further investigation.

Three government institutions create the closed market that Gilson and Roe posit: job placement, head-hunting rules, and retirement packages.

a. *Job placement.* It is important to distinguish between job placement services and head-hunting activities. As the leading Japanese practice-oriented treatise explains, “headhunting *per se* is not illegal.”<sup>70</sup> Head-hunting has long been seen as outside the scope of the Employment Security Act, and leading commentators argue that in part because head-hunters do not take applications from job applicants, they are engaged in consulting, and not the sort of job placement services contemplated by the Act.<sup>71</sup> Although some headhunting agencies registered with the Ministry of Labor just as job-placement services did, others did not.<sup>72</sup>

By contrast, job-placement services, as discussed above, historically have been regulated tightly by the Ministry of Labor through the occupational category and licensing requirements of the Employment Security Act. Private licenses are difficult to obtain, and the widely-available alternative of public placement services has never engaged in poaching, serving instead as search

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<sup>69</sup> Gilson & Roe, *supra* note 8, at 526-28.

<sup>70</sup> Mitsuo Miyamoto et al. eds., *Rodoho Jitsumu Handobukku* [Labor Law Practice Handbook] 45 (2<sup>nd</sup> ed. 2000).

<sup>71</sup> Kazuo Sugeno, *Koyo Shakai no Ho*, *supra* note 58, at 64-5 (1996).

<sup>72</sup> In a 1994 Supreme Court case over fee amounts charged by a head-hunting agency, the Court held that an agency, because it “mediates” relations between employers and employees, was bound by the fee provisions of the Act. *Tokyo Executive Search v. Sakamoto*, Supreme Court, 849 Hanrei Times 269 (April 22, 1994); see Micho Tsuchida, *Rodo Shijo no Ryudoka o Meguru Horitsu Mondai* [Legal Problems of the Fluidization of Labor Markets], 1040 *Jurisuto* 53, 61-62 (1994). The Court’s decision, regarded by many commentators as “too broad,” placed head-hunting fees in legal limbo until the Act’s 1999 liberalization. Sugeno, *supra* note 58, at 66. Head-hunting and “scouting” firms clearly must now register with the Ministry of Labor.

services for the blue-collar unemployed.<sup>73</sup> The lack of job-placement services limits the free flow of labor and buttresses the no-poaching rule.

b. *Head-hunting*. Still, head-hunting rules, as Gilson and Roe indicate, warrant further investigation. Headhunting *might* be illegal depending on how it is carried out.<sup>74</sup> Courts have strictly construed employees' duties of loyalty to restrict poaching. In the *Rakuson* case, for instance, an employee secretly poached most of the company's employees to join the employee's new venture. The Tokyo District Court, which focused not on the employee's status but on his actions, held that such actions, if "beyond reasonable limits," incur tort liability.<sup>75</sup> In other cases, courts have similarly found poaching by *former* employees to give rise to tort liability (but not contract liability) when it exceeds "reasonable limits" or is done in bad faith,<sup>76</sup> and that managers who quit and take employees with them may violate fiduciary duties to the firm.<sup>77</sup> Such limits could help create a closed external market.

c. *Retirement packages*. Japanese firms often pay lump-sum retirement bonuses and severance fees upon an employee's termination, a practice that the Supreme Court views as a combination of reward and deferred wages.<sup>78</sup> Employers routinely insert a standard provision in employee contracts and firm work rules to the effect that the payment will be reduced – perhaps to zero – if the employee competes with the firm after termination. Courts generally only

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<sup>73</sup> See e.g., Tetsu Sano, *Korekara no Kokyo Shokugyo Shokai* [The Future of Public Placement Services], 1173 *Jurisuto* 66 (2000); Takashi Araki, *Changing Japanese Labor Law in Light of Deregulation Drives: A Comparative Analysis*, 36 *Japan Labour Bulletin* 1 (1997).

<sup>74</sup> Miyamoto et al., *supra* note 70, at 45.

<sup>75</sup> *Media Trading Company K.K. v. Rakuson K.K.*, Tokyo D.Ct., 1399 Hanrei Jiho 69 (Feb. 25, 1991).

<sup>76</sup> See Michio Tsuchida, *Rodo Shijo no Ryudoka o meguru Horitsu Mondai* [Legal Problems of the Fluidization of Labor Markets], 1040 *Jurisuto* 53, 60 (1994); Yoshiyuki Tamura, *Rodosha no Tenshoku, Hikinuki to Kigyo no Rieki* [Worker Job Change, Head-Hunting, and Corporate Profits], 1103 *Jurisuto* 106, 109 (1996).

<sup>77</sup> See J. Mark Ramseyer & Minoru Nakatazo, *Japanese Law: An Economic Approach* 114 (1999)(citing *Takuda v. Nihon Setsubi K.K.*, Tokyo D. Ct., 835 *Kin'yu Shoji Hanrei* 23 (Oct. 26, 1989).

<sup>78</sup> *Sanko-sha Case*, Supreme Court, 958 *Rodo Keizai Hanrei Sohuho* 25 (Aug. 9, 1977).

enforce such clauses when the employee acts in bad faith.<sup>79</sup> Although such an approach limits the legal enforceability of the provisions, the vagueness of the standard does little to discourage over-broad provisions.<sup>80</sup>

### *B. Statutory Working Hours*

As the maximum number of hours allowed under the LSA decreased beginning in 1987, average hours worked in Japan began to fall. In fact, working hours fell at a greater rate than any other industrialized nation.<sup>81</sup> Of course, the law may have been as much a reflection of trends as a cause. But statutory revisions are a significant part of the story in explaining the endogenization of working hour norms.

### *C. Temporary Employment Arrangements*

The historical limitations placed on fixed-term contract employees, dispatched workers, and job-placement services have two principal effects on working hours. First, the historical inability of employers to use such non-standard employees as a labor buffer means that permanent, regular employees are forced to perform that function. Second, in addition to the real effects on working hours of regular employees the reliance on labor employees may lead to higher average working hour statistics, as the pool of surveyed workers is less likely to include part-timers than other industrialized countries.

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<sup>79</sup> See, e.g., *Kono v. Chubu Nihon Kokokusha K.K.*, Nagoya H. Ct, 745 Hanrei Times 150 (Aug. 31, 1990)

<sup>80</sup> See Fumiko Obata, *Taishoku Shita Rodosha no Kyogyo Kisei* [Rules for Retired Employees], 1066 *Jurisuto* 120, 122 (1995).

<sup>81</sup> John M. Evans et al., *Trends in Working Hours in OECD Countries*, Labour Market and Social Policy Occasional Paper No. 45, OECD, Feb. 21, 2001, at 23. On institutional changes in the U.S. that lead to hour reductions, see Dora L. Costa, *Hours of Work and the Fair Labor Standards Act: A Study of Retail and Wholesale Trade, 1938-1950*, 53 *Ind. & Labor Relations Rev.* 648 (2000).

In each case, it is likely that the liberalization of such arrangements that began in the mid-1980s contributes to the visible trend of reduced working hours. As more nonstandard employees are hired, working hours are shifted to them from regular workers. And they are being hired – the number of such employees rose from 580,000 in 1994 to 1.75 million in 2001.<sup>82</sup> As those employees constitute a greater portion of the workforce, average hours across the entire workforce decrease.

#### *D. Social Factors*

The legal institutions (working within the marcoeconomic context) that I have described in this essay do not explain the totality of working hours. Worker opinion in Japan, as elsewhere, is heterogeneous.<sup>83</sup> Legal institutions are simply one part of the mix of factors that affect Japanese working life. Social factors also are part of that mix.

Recent empirical evidence offers support for the importance of social factors. Relying on German and U.S. survey data, Linda Bell and Richard Freeman found a possible explanation for differences in hours worked: stated simply, some people just like to work.<sup>84</sup> Might Japanese workers work long hours because of preference, or because norms prevent complaining?<sup>85</sup> Stated more broadly in the context of this essay's claims, perhaps the legal institutions discussed herein have no direct causal force, but instead are merely superfluous reflections of societal

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<sup>82</sup> Revised Worker Dispatching Law Passed, Japan Labor Bulletin, Aug. 2003, at 4.

<sup>83</sup> See, e.g., Keiichi Kuwahara, *Nihonjin no Rodo Jikan* [Japanese Working Hours] 145 (1979).

<sup>84</sup> Linda A. Bell & Richard B. Freeman, *The Incentive for Working Hard: Explaining Hours Worked Differences in the U.S. and Germany*, NBER Working Paper 8051 (Dec. 2000); see also Linda Bell and Richard Freeman, *Why Do Americans and Germans Work Different Hours?*, in *Institutional Frameworks and Labor Market Performance: Comparative Views on the U.S. and German Economies* 101 (Friedrich Buttler et al. eds. 1995).

<sup>85</sup> See Teruyuki Higa & Karen Lupardus, *Why Don't Workers Claim All Their Overtime*, in *Japan: Why it Works, Why It Doesn't* 91 (James Mak et al. eds. 1998).

preferences, or bargains between management and labor,<sup>86</sup> some of the effects of which might be seen even in the absence of law.

This argument is important. Although sociocultural factors might be difficult to quantify and “prove” precisely, the lack of evidence does not disprove the fact that such forces might nevertheless be at work. I offer one argument and two pieces of evidence in response.

First, social factors, in particular underlying norms (in this case, acceptability long hours) that lead to judicial and legislative change, are unlikely to be unanimous. The expression of norms in the form of legislation or judicial opinions has the effect of standardizing existing practices among groups that might otherwise not follow the norm. Although some groups might still disobey the law just as they would disobey norms, legal and financial penalties offer disincentives in addition to existing social sanctions against such behavior.

In the case of working hours, labor law, through sanctions against dismissal, creates a universal need for workers in large firms to work long hours. Of course, law does not supply the motivation for hard work; some workers work hard because they like it, some because others do, some because they do not want to be transferred to less prestigious positions or ultimately fired, and, for that matter, some because they prefer work to their families. The selection and self-selection processes of hiring at Japanese firms help ensure that workers are properly sorted to fill the legally induced need.

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<sup>86</sup> Despite their activism in the 1950s and 1960s, labor unions in Japan have been relatively quiet for the past four decades. Some commentators view this silence as a sign of weakness; labor’s voice is fragmented, while the voice of business is unified. See T.J. Pempel & Keiichi Tsunekawa, *Corporatism Without Labor? The Japanese Anomaly*, in *Trends Toward Corporatist Intermediation* 231 (Philippe C. Schmitter & Gerhard Lehmbruch ed., 1979). Others view the silence as a sign of power; labor’s alignment with the ruling Liberal Democratic Party mitigates the need for exercise of voice. See Sheldon Garon, *The State and Labor in Modern Japan* 243 (1987). Union organization rates have fallen from 35% in the 1960s to below 24% in recent years. See Kazuo Sugeno & Yasuo Suwa, *Labour Law Issues in a Changing Labour Market*, in *Japanese Labour and Management in Transition* 53, 62 (Mari Sako & Hiroki Sato ed., 1997).

Second, survey data at least tentatively suggest that the working-hour effects of the dismissal rules are not a universal expression of Japanese preferences. When asked by the *Yomiuri Shinbun*, one of Japan's national newspapers, "Why do you think working hours in Japan have not become shorter?," 17 percent responded that "Japanese people love to work," and 23% responded that "employees feel guilty if they leave work earlier than others." But the largest group, 57 percent, responded that "large workload" was the cause.<sup>87</sup> In another survey by the Prime Minister's Office, workers who used only one of their five allotted vacation days in a year were asked why they had not taken vacation time. The most common reason given was not directly culture-based, but the simple realization that "later I'd just be busier," (25.7%), and the second most common reason was that the worker had "planned to save the time for illness or urgent matters" (17.8%). A similar survey by the Tokyo Chamber of Commerce found 36% of respondents, the largest group, stated the former answer,<sup>88</sup> and another by the Ministry of Labor found 38.2% with such an answer (and 22.9% saying that the workplace was simply not conducive to vacation).<sup>89</sup>

Third, the experience of Japanese workers in subsidiaries of Japanese companies in the United States often differs dramatically from that of Japanese workers in firms in Japan. Workers in U.S. subsidiaries do not have lifetime employment commitments, and frequently are

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<sup>87</sup> Yomiuri Shinbun Poll, May 30, 1993, available at the Roper Center for Public Opinion Research, University of Connecticut.

<sup>88</sup> See Takeshi Fujimoto, *Nihon no Rodosha* [Japanese Workers] 71 (1990).

<sup>89</sup> Koji Ishii, *Rodo Jikan to Nihon Keizai* [Working Hours and the Japanese Economy] (1982). Might Japanese workers simply be more loyal? Relying on other survey evidence, the most detailed study of Japanese and American comparative labor practices finds that "the pattern of differences in organizational commitment and job satisfaction between Japanese and U.S. employees runs strongly counter to the behavioral evidence of a highly committed Japanese labor force. The organizational commitment of the Japanese is either equal to or slightly lower, and their job satisfaction is far lower, than that of our American sample. . . ." James R. Lincoln & Arne L. Kalleberg, *Culture, Commitment, and Control: A Study of Work Organization and Work in the United States and Japan* (1990). This evidence suggests that company loyalty does not explain the entire picture.

laid off.<sup>90</sup> Many Japanese workers dread a return to Japan after an overseas posting, as working hours outside of Japan, where subsidiaries tend to be more adequately staffed, are not as grueling.<sup>91</sup> The only particular scrutiny adopted in hiring at U.S. subsidiaries appears to be cover attempts to screen potential union members, not detailed background investigations.<sup>92</sup>

One likely explanation for the differences between U.S. and Japanese practices might be culture. Japanese subsidiaries in the United States might adopt U.S. cultural practices, even if their management is Japanese. I find this explanation to be unlikely in many cases, especially given frequent turnover of Japanese management, many of whom have neither time nor inclination to “Americanize.” Instead, the differences in practice suggest that the institutional argument has considerable predictive power. A more likely reason why Japanese-run institutions in U.S. differ so apparently from Japanese-run institutions in Japan is that those in the United States function under the influence of U.S. institutions. Japanese labor laws only apply in Japan, and Japanese subsidiaries in the U.S. accordingly look more like U.S. firms.

None of these arguments regarding the role social factors is dispositive, nor are they intended to be. Social factors matter. Social factors drive legal change. But at least in the context of working hours, the evidence suggests that law is an important part of the mix.

## CONCLUSION

Law historically has made working life difficult in Japan. Workers work extremely long hours for a variety of reasons, but in part because institutions prevent worker dismissal in bad times and because other labor buffer options are limited. But two silver linings exist. First,

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<sup>90</sup> Duane Kujawa, *Japanese Multinationals in the United States* (1986)

<sup>91</sup> See, e.g., Yoshi Noguchi, *Dropping Out of Tokyo's Rat Race*, *N.Y. Times*, Mar. 1, 1992, at C11.

dismissal rules provide workers with job security in many situations. Second, recent changes in laws governing working hours and temporary employees suggest that one of the benefits of a booming economy -- reduced working hours -- might be attainable through legal reform. In each case, social forces play powerful roles, but only through careful analysis of legal institutions can the underlying relation, and potential ways of improving Japanese working life through better institutional design, be understood.

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<sup>92</sup> See Gregory M. Saltzman, *Job Applicant Screening by a Japanese Transplant: A Union-Avoidance Tactic*, 49 *Ind. & Labor Relations Rev.* 88 (1995).