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ALLOWING THE FACTORY SHUTDOWN: PROPOSED LEGISLATION AND ITS JUSTIFICATION

ELLEN KELLY*

Effective economic policies which would encourage the progressive development of American industries are essential to the United States economy. These policies, however, must be accompanied by additional legislative efforts that will afford assistance to those victimized by the development process. Among the needed legislative changes are those which would regulate the process of plant closings¹ and compensate workers and communities for economic losses caused by closings. Such legislation has been enacted in a few states² and has been proposed in many more. National legislation has been presented to Congress in several forms but never passed.³

This article proposes national legislation intended to mitigate the effects of a plant closing. The intent of the legislation is to require corporations to account for their business decisions: to treat shutdown costs as they treat start-up costs—as a cost of doing business. It would provide a minimum mechanism to protect workers and communities by requiring a business anticipating a shutdown to provide advance notice and severance payments to the affected workers and community.

A thorough examination of the social and economic impact of plant shutdowns and the current controls on plant closings reveals the necessity of the proposed national plant closing legislation. Part I of this article examines the effects of plant closings on the workers, communities and local institutions, and identifies the various costs associated with a corporation's decision to close a plant. Part II discusses the role of the corporation and illustrates how the requirements of the proposed legislation conform with the corporate function. In Part III, other alternatives to national legislation are

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1. For purposes of this article, plant shutdowns include partial closings and relocations.

2. See *infra* notes 91-98 and accompanying text.

3. See *infra* notes 109-14 and accompanying text.

evaluated. And finally, Part IV demonstrates how this proposal achieves an equitable balance between the needs and values of society and the economic prosperity of the corporation.

I. THE EFFECTS OF PLANT CLOSINGS

The Bureau of Labor Statistics of the United States Department of Labor reported that 11.5 million workers, twenty years of age and over, lost their jobs due to plant shutdowns between January of 1979 and January of 1984.⁴ Of those workers who had been at their jobs for at least three years prior to the shutdown (5.1 million), 60% (3.1 million) were reemployed when surveyed in January of 1984, 25% (1.3 million) were looking for work, and the rest (700,000) had left the labor force.⁵ Forty-five percent of those who were reemployed received lower pay.

Furthermore, of the 5.1 million workers who had been at their jobs for at least three years, nearly half had been displaced from jobs in the manufacturing sector. From an occupational standpoint, operators, fabricators, and laborers figured most prominently among the workers who had been displaced from jobs. According to the Bureau, the higher the skill of the displaced worker, the more likely he was to be reemployed when surveyed. Approximately 75% of workers displaced from managerial and professional jobs were reemployed. In contrast, less than one-half of those who had jobs as handlers, equipment cleaners, helpers, and laborers were reemployed.⁶

A study conducted by the Brookings Institution⁷ further

4. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT ON DISPLACED WORKERS (1984) [hereinafter cited as DISPLACED WORKERS].

5. *Id.* at 1. The Bureau limited the study to those with at least three years of tenure on the jobs they lost so as to focus only on workers who had developed a firm attachment to their job. If a two year cutoff was used, the number of displaced workers would have increased to 6.9 million. A five year cutoff would have lowered the total to 3.2 million. Flaim & Sehgal, *Displaced Workers of 1979-83: How Well did they Fare?*, MONTHLY LAB. REV., June 1985, at 3, 5.

6. DISPLACED WORKERS, *supra* note 4, at 2-3.

7. C. HARRIS, THE MAGNITUDE OF JOB LOSS FROM PLANT CLOSINGS AND THE GENERATION OF REPLACEMENT JOBS: SOME RECENT EVIDENCE (1984). Harris' study estimated 16 million jobs lost between 1976-1982 due to plant closings; almost one-third of these were in the manufacturing sector. In the 1980-1982 period, rates of employment loss due to closings of large manufacturing firms (more than 100 employees) doubled that reported in the previous two years. During this same period large firms in the manufac-

demonstrates the mismatch between the skills of the displaced worker and the requirements of new employment opportunities. According to this study, between 1976 and 1980 high technology manufacturing industries accounted for approximately 42% of the net growth in manufacturing employment and 26% of the employment gains from new manufacturing businesses.⁸ This shift to more technically advanced industry complicates the process of job replacement in the manufacturing sector. Additionally, demographic characteristics of the high technology production workers suggest that new jobs created in these industries may not absorb the blue-collar production workers displaced by declining manufacturing industries.⁹

The inequities in the regional distribution of business closings and business formations¹⁰ and the mismatch between displaced workers and new employment opportunities combine to create adjustment problems for the workers. Although attempts to halt or reverse the reindustrialization of the manufacturing sector may be neither feasible nor desirable, the proposed plant closing legislation provides an adequate remedy.

Loss of employment and financial security, however, is not the only consequence of a plant closing. Also important are the relationships workers have established as a result of working for a company. In many cases, the worker has made a total commitment to the community and the company: He has moved his residence, enrolled his children in school, and has involved himself in the civic affairs of the community. This commitment benefits not only the worker and his family, but also his employer. It "enhances the worker's ability to do his job, encourages loyalty to the company, [and] facili-

turing sector managed to replace only two of every ten jobs lost in plant closings. *Id.* at 9, 10, 17.

8. *Id.* at 16.

9. *Id.* at 17. The Brookings Institution study reported that in two of the fastest growing high technology industries, 35 % of the employees in the electronic computing equipment industry and 40% in the communication equipment industry are women. In contrast, in the steel and automobile industries, women account for less than 15%.

10. According to the study conducted by the Brookings Institution, displaced manufacturing workers are concentrated in the North which has low business formation and job replacement rates. *Id.* at 18. The Bureau of Labor Statistics reported that the large number of workers who have been displaced from their jobs in the East, North Central, and the Middle Atlantic states are less likely than those in other areas to be reemployed. **DISPLACED WORKERS**, *supra* note 4, at 3.

tates the employee's continuing process in learning to do his job effectively."¹¹

Plant shutdowns may also affect the physical and mental health of the displaced workers.¹² Research indicates that displaced workers suffer increased blood pressure, abnormally high cholesterol and blood sugar levels, and higher incidences of heart attacks, ulcers, respiratory diseases, and hyperallergic reactions.¹³ These problems are compounded by the loss of health benefits which usually accompanies the loss of a job for an American worker; fewer than one-third typically have any health insurance.¹⁴ Moreover, studies indicate that the incidence of suicide among workers displaced by plant closings is thirty times the national average.¹⁵ The magnitude of physical and mental problems that result from job losses are only now being assessed. Thus, to simply measure the impact of plant closings upon the workers in terms of unemployment and lost wages may seriously underestimate the total harm the worker and his family may suffer.

The impact of a plant closing, however, is not limited to the worker and his family; the community itself suffers as the effects of the shutdown "ripple through the economy."¹⁶ When a corporation establishes a plant in the community, its presence affects the community in a variety of ways. The community may have to construct more schools and larger water and sewerage facilities, increase personnel and purchase more equipment for police and fire departments, and adjust traffic patterns to accommodate workers commuting to the plant. These efforts, however, are not without re-

11. Kavanagh, *Ethical Issues in Plant Relocation*, BUS. & PROF. ETHICS J., Winter 1982, at 21, 22-36.

12. B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 65 (1982).

13. *Id.* at 33; Ford, *Plant Closing Legislation*, 1983 DET. C.L. REV. 1233.

14. B. BLUESTONE & B. HARRISON, *supra* note 12, at 33. In Europe, most unemployed workers are covered by universal health plans.

15. Baker, *There is a Better Way*, 32 LAB. L.J. 453, 455 (1981). Dr. Harvey Brenner of John Hopkins University found that in 1949-73, unemployment played a major role in several forms of "social trauma." He concluded that a 1% increase in the unemployment rate over a period of six years has been associated with: 37,000 total deaths (including 20,000 cardiovascular deaths), 920 suicides, 650 homicides, 500 deaths from cirrhosis of the liver, 4,000 state mental hospital admissions, and 3,300 state prison admissions. B. BLUESTONE & B. HARRISON, *supra* note 12, at 65.

16. B. BLUESTONE & B. HARRISON, *supra* note 12, at 67.

ward since such local institutions, schools, businesses, and agencies prosper as a result of that company's presence.¹⁷

But when the company closes, shocks reverberate throughout the community. Local businesses dependent upon the company or its employees are faced with bankruptcy. These bankruptcies, in turn, may lead to layoffs in other industries as suppliers lose contracts and retail stores lose customers.¹⁸ Moreover, the community and the taxpayers are left with more employees and infrastructure than they need, with cost burdens far outweighing revenue.¹⁹ These problems, in turn, lead to increased demands for public assistance, and just when social services are most needed, payroll, property, and income tax revenue losses undermine the ability of local government to respond.²⁰ Consequently, what begins as a "behind-closed-doors company decision" to close a particular production facility ends up affecting the entire community. By the time all of these "ripple effects" spread throughout the local economy, workers and families far removed from the closed plant can be affected, often with dramatic consequences.²¹

Finally, plant closings clearly take a toll on the unions. A widespread shutdown not only weakens organized labor, as union members who lose their jobs go elsewhere to nonunion jobs, but may also weaken the union's ability to organize and bargain with other companies in the same community.²² Un-

17. Kavanagh, *supra* note 11, at 24.

18. B. BLUESTONE & B. HARRISON, *supra* note 12, at 33.

19. Kavanagh, *supra* note 11, at 23.

20. Ford, *supra* note 13, at 1222. In the fall of 1977, the Lykes Corporation closed its steel mills in Youngstown, Ohio, thus placing 4,500 steelworkers in the unemployment lines. Studies estimated that in the first 39 months following the shutdown, the communities around Youngstown would lose \$8 million in taxes, the county would lose another \$1 million, and the state would lose up to \$8 million. Property taxes in Campbell (the actual location of the plant) were increased more than 25% in one year, and schools faced a substantial deficit. INVESTOR RESPONSIBILITY RESEARCH CENTER, INC., PROXY ISSUES REPORT: PLANT CLOSINGS; at E-11, E-12 (March 20, 1984) [hereinafter cited as PROXY ISSUES REPORT].

In 1982, unemployment in the area was 23%, as compared with a national average of 9.7%. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 156 (1984). In addition, the crisis intervention center in the valley reported receiving 7,800 calls for help in two months, including reports of wife beatings, alcoholism, child abuse, and suicide threats. PROXY ISSUES REPORT, *supra* note 20, at E-12.

21. B. BLUESTONE & B. HARRISON, *supra* note 12, at 67.

22. Carroll, *Managing Public Affairs When Business Closes Down: Social Responsibility and Management Actions*, CALIF. MGMT. REV., Winter 1984, at

ions also contend that large conglomerates are able to use the increasing mobility of capital to undermine the strength and breadth of unions by using the threat of a plant closing to extract concessions from them.²³

II. THE OBLIGATIONS OF THE CORPORATION

The proposed legislation requires that a corporation planning a shutdown provide advance notice and severance pay to the affected workers and community. Before assessing the specific provisions required by this legislation, however, it is first necessary to establish whether these obligations imposed on a corporation fall within the parameters of the corporate role.²⁴ Secondly, once it is demonstrated that the obligations exist, the mode by which the obligations are imposed (in this case, government intervention), must be justified.

A. *The Laissez-Faire Framework*

The traditional role of business encompasses two essential elements: (i) the production of goods and services (ii) done with the intention of making a profit.²⁵ It is problematic, however, to evaluate the corporation's obligations in fulfilling this role.

Advocates of laissez-faire capitalism define a corporation's duty as the maximization of profits for shareholders.²⁶ As Milton Friedman asserts, a corporation has but one function: "to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical customs."²⁷ For Friedman,

125, 128.

23. *Id.*

[General Motors] began a concerted effort to circumvent the union's strength by locating new plants in what are primarily right-to-work states . . . [B]etween 1975-1980, GM opened a total of 14 new plants, with eight located in the deep South and one in Mexico. Nine of the U.S. plants were situated in right-to-work states. This permitted GM to effectively use the threat of shifting production to its non-union shops as a bargaining lever in its union negotiations.

PROXY ISSUES REPORT, *supra* note 20, at E-12.

24. N. BOWIE, *BUSINESS ETHICS* 18 (1982).

25. Camenisch, *Business Ethics: On Getting to the Heart of the Matter* in *BUSINESS, RELIGION, AND ETHICS* 195, 198 (D. Jones ed. 1982).

26. N. BOWIE, *supra* note 24, at 18.

27. M. Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. Times, Sept. 12, 1970, Magazine, at 33, reprinted in *ETHICAL*

"ethical customs" mean the honesty and integrity required for the market mechanism to function.²⁸ These customs do not include incorporating human and social values into economic decision-making.²⁹ In fact, as Friedman concludes, a corporation has only one *social responsibility*: "to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engage in open and free competition, without deception or fraud."³⁰

This principle of *laissez-faire*³¹ and its built-in profit motive remain deeply entrenched in our economic framework.³² From Adam Smith's "invisible hand"³³ to today, many economists have contended that the best way to overcome scarcity and maximize personal freedom is to rely on the "individual's pursuit of self interest in a private property system regulated by the force of market competition, in which the government acts as the neutral umpire of the rules of the economic game."³⁴

B. Moral Consensus

Today, however, it is no longer feasible to depend on the utilitarian convergence of business interest and social values à la Smith's "invisible hand."³⁵ Although at one time society may have accepted the market mechanism as the key to relat-

ISSUES IN BUSINESS: A PHILOSOPHICAL APPROACH 191-97 (1979).

28. THE JUDEO-CHRISTIAN VISION AND THE MODERN CORPORATION 250 (O. Williams & J. Houck eds. 1982) [hereinafter cited as THE JUDEO-CHRISTIAN VISION].

29. M. Friedman, *The Social Responsibility of Business*, in ETHICAL THEORY AND BUSINESS 81 (1983).

30. M. FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962).

31. Strict *laissez-faire* capitalism is the doctrine that the self-regulating market economy should operate with only minimal government interference. Such an extreme capitalist position is widely regarded as obsolete today. Wogaman, *The Case for Laissez Faire Capitalism: A Protestant Viewpoint*, in BUSINESS, RELIGION, AND ETHICS, *supra* note 25, at 99.

32. *Id.* at 106.

33. According to Adam Smith, a man strives toward selfish gain but while doing so is led by an "unseen hand" to contribute toward the common good. "By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good." A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 423 (E. Cannan ed. 1937).

34. Wilber & Jameson, *Goals of a Christian Economy and the Future of the Corporation*, in THE JUDEO-CHRISTIAN VISION, *supra* note 28, at 203, 205.

35. THE JUDEO-CHRISTIAN VISION, *supra* note 28, at 251.

ing managerial obligations to human welfare, that general consensus has shifted. Pollution control illustrates this shift. Prior to the mid-1960's, pollution was a noncontroversial, if not irrelevant issue; increase in production without regard for externalities took priority.³⁶ But once society gained a certain level of wealth, pollution became a focal issue in public debate, one demanding solutions. Such public reaction demonstrates a continual redefining of a corporation's responsibilities and reflects the shift of the general moral consensus.³⁷ In view of this evolution, it would be naive to suggest that business remains a self-contained and self-sufficient entity which can define its own goals and functions independently of the society's goals and needs.³⁸ Indeed, for the past decade, it has become popular for corporations to espouse a socially responsible philosophy.³⁹ The recurring theme of reports on corporate social responsibility is that a business, as a social institution, must "take into account" both the economic and social needs of the society in which it functions.⁴⁰

36. R. BENNE, *THE ETHICS OF DEMOCRATIC CAPITALISM: A MORAL RE-ASSESSMENT* 192 (1982).

37. A. BUONO & L. NICHOLS, *CORPORATE POLICY, VALUES AND SOCIAL RESPONSIBILITY* 1-29 (1985); J. HARGREAVES & J. DAUMAN, *BUSINESS SURVIVAL AND SOCIAL CHANGE*, at xiii-xv, 1-14 (1975). See generally R. ACKERMAN, *THE SOCIAL CHALLENGE TO BUSINESS* (1975); J. FENDROCK, *MANAGING IN TIME OF RADICAL CHANGE* (1971).

38. Those who argue that business should be permitted to define its own goals and purposes, independently of societal interests, and thus allow businesses unilateral and arbitrary control over plant closings must reconcile why business should be granted a latitude that is denied to other major sectors of society, i.e., the political, educational, legal, medical. Such a position cannot be defended by a distinction between the public and private sector because much of education and the legal and medical professions are not confined to the public sector. Camenisch, *supra* note 25, at 195, 204.

39. Gatewood & Carroll, *The Anatomy of Corporate Social Response: The Rely, Firestone 500, and Pinto Cases*, 24 BUS. HORIZONS 9 (1981). See also ERNST & ERNST, *SOCIAL RESPONSIBILITY DISCLOSURE, 1978 SURVEY* (1978).

40. Company management must consistently demonstrate a superior talent for keeping profit and growth objectives as first priorities. However, it also must have enough breadth to recognize that enlightened self-interest requires the company to fill any reasonable expectation placed upon it by the community and the various concerned publics. Keeping priorities straight and maintaining the sense of civic responsibility will achieve important secondary objectives of the firm. Profitability and growth go hand in hand with fair treatment of employees, of direct customers, of consumers, and of the community.

E. Harness, *Views on Corporate Responsibility*, quoted in Gatewood & Carroll, *supra* note 39, at 9 (at which time Mr. Harness was serving as Chairman of the Board for Proctor & Gamble).

Due to the changing perceptions — of both the public and the corporate entity — on the matter of corporate responsibility, it is reasonable to expect a business to incorporate into its decision-making process the obligation to mitigate the impact of a plant shutdown upon the workers and community.

Undoubtedly, advocates of laissez-faire capitalism, such as Milton Friedman, would reject the idea that a corporation facing a shutdown should provide advance notice and severance pay as part of its social responsibilities. But even admitting for the sake of argument that the idea of corporate social responsibility is nonsensical, it is possible that the proposed obligations still bind. For example, no one would maintain that a corporation has no obligation to pay its debts, even if its "exclusive" duty is only to make as much money as possible.⁴¹ The obligation of a corporation, as defined by Milton Friedman, explicitly admits an obligation to "stay within the rules of the game." These "rules" comprise not only specific positive laws but also the moral constraints that constitute an "implied contract with society."⁴² One condition of this "implied contract" is the obligation of property owners to use their property in a way consistent with society's welfare.⁴³

C. *The Obligations of Property Owners*

Clearly, in our system, the recognized legal owners of a factory are the shareholders.⁴⁴ They have invested their money and incurred risks with the expectation of profit. It would follow, then, that as legal property owners, the shareholders have the right to dictate the manner in which their investment is utilized, namely to maximize profits.⁴⁵

Ownership, however, is not and never has been construed as an "absolute" right in the owned property.⁴⁶ Irre-

41. Kavanagh, *Ethical Issues in Plant Relocation*, in *ETHICAL THEORY AND BUSINESS*, *supra* note 29, at 106, 112.

42. Bowie, *Changing the Rules*, in *ETHICAL THEORY AND BUSINESS*, *supra* note 29, at 103-06. See also *MANAGING THE SOCIALLY RESPONSIBLE CORPORATION* 3-5 (M. Anshen ed. 1974).

43. *Id.*

44. In this article, it is assumed that the shareholders, as owners of the factories, dictate the management of their property by their election of the Board of Directors, whom in turn, appoint the management.

45. Kavanagh, *supra* note 11, at 28-29. See also N. BOWIE, *supra* note 24, at 21.

46. N. BOWIE, *supra* note 24, at 21; Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE* 107, 144 (A. Guest ed. 1961). Ownership rights

spective of the importance of private property in a capitalist economy, property owners (in this case, shareholders) do not possess an absolute right to do what they want with their property.⁴⁷ One of the implicit moral rules in any use of property is the obligation captured in the legal maxim *sic utere*: "use that which is yours in such a way that you do not injure another."⁴⁸ Thus, even if the only explicit obligation of a corporation is to make a profit, it cannot avoid the implicit obligation to avoid harm to others in the use of its property and to account for any injury its actions cause, however unintentional.⁴⁹ As demonstrated in Part I of this article, a company which has solidly established itself in the community would clearly injure others if it decided to terminate or relocate its business. Although the company may not in-

to property have traditionally been subject to the legitimate claims of others as illustrated by the prohibition of harmful uses of one's property, and the liability of property to execution of a debt, taxation, or expropriation by the public authority. *Id.* at 144-45.

47. In refuting an absolute property right in owners, Bowie distinguishes three premises: first, that businesses should be privately owned; second, that business decisions usually should be private; and third, that business owners can do whatever they want with their property. Bowie finds the first and second premises morally acceptable, but he finds the third premise morally objectionable because it is grounded in a principle of absolute ownership. N. BOWIE, *supra* note 24, at 21.

48. Kavanagh, *supra* note 11, at 25. That property not be used to harm another is a principle underlying the Millian labor theory (the use of property that represents a loss to someone other than the owner is not justified) and utility theories (prohibiting property uses which have a net disutility). L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 111 (1977). Honore developed 10 "standard incidents of ownership" necessary to the "concept of ownership." These encompass: the right to possess, the right to manage, the right to use, the right to the capital, the right to the income of the thing, the right to security, the right of transmissibility and absence of term, *the prohibition of harmful use*, and liability to execution. Honore, *supra* note 46, at 112-24. As to the prohibition of harmful use, Honore states:

An owner's liberty to use and manage the thing owned as he chooses is in mature systems of law, as in primitive systems, subject to the condition that uses harmful to other members of society are forbidden

I may use my car freely but not in order to run my neighbour down, or to demolish his gate These and similar limitations on the use of things are so familiar and so obviously essential to the existence of an orderly community that they are not often thought of as incidents of ownership; yet, without them "ownership" would be a destructive force.

Id. at 123.

49. Kavanagh, *supra* note 41, at 113.

tend harm, but may only desire to capitalize on more efficient means of production, it nonetheless disrupts a dependency between itself and its community and workers. To close shop, without accounting for the resulting harm, clearly falls beyond the morally permissible obligations of ownership. Therefore, the traditional notion of *sic utere* should properly be interpreted to include the harm caused by plant shutdowns.

D. Fairness

Ownership and the use of one's property (in this case the right of a factory owner to shut down a factory without taking mitigating action) is also constrained by fundamental notions of fairness. The general idea of fairness is that anyone who chooses to involve himself in a cooperative activity must do his share and is entitled to expect the same of others involved in the activity.⁵⁰ A company which closes a plant and disregards the effects of its action is behaving unfairly toward its employees and the community.⁵¹

In an employer-employee relationship, there is a reasonably just cooperative arrangement between the parties as to the conditions of the job; the primary *quid pro quo* is the employer's fair day's pay for the employee's fair day's work. Both parties, however, also have legitimate expectations which are not expressed in the *quid pro quo* relationship. The employer expects the worker to make a commitment to his job which entails not only loyalty to the company but a continuing process in learning to perform his job effectively. And no one would question that a safe workplace is within the worker's legitimate expectation.⁵² Arguably, basic notions of fairness suggest that if a corporation expects a commitment from the workers, and indeed benefits from such commitment,⁵³ it is reasonable for the worker to expect that the company will not suddenly shut down and "pack its bags" without at least providing advance notice and severance pay to those affected.

E. Externalities

That a company planning a shutdown is not free to ig-

50. J. RAWLS, A THEORY OF JUSTICE 343 (1971).

51. Kavanagh, *supra* note 41, at 111.

52. *Id.*

53. See *supra* note 11 and accompanying text.

nore the consequences (the social costs) of its action is also supported by an analysis of externality costs: "By locating and operating a manufacturing plant (or a similar job-creating operation) in a community, a company produces certain externalities, affecting both the workers and the community, which are pertinent to the relocation issue."⁵⁴ The term "externalities" refers to the unintended side effects which a business produces along with its intended product.⁵⁵ But not for the existence of the business, the side effects would not exist. Many of these externalities (by-products) of the business represent costs borne by society although they are produced by businesses.⁵⁶ Unless businesses are held accountable for such costs of operating, however unintended the costs may be, a distorted view of the benefits of the competitive business enterprise results.

When a corporation locates an operation in a community, its intention is simply to manufacture and distribute its product. In so doing, however, it produces various unintended but clearly foreseeable results which seriously affect the workers and community in which the company operates. As outlined in Part I of this article, many workers change their lifestyles because of their employment relationship; likewise, the community changes to better support the company. When a major plant discontinues operations, however, an unintended situation arises: the community experiences high unemployment and must support an overbuilt infrastructure with an inadequate financial base.⁵⁷ The company did not intend such a result. Nevertheless, the company caused it. Whether intended or not, these costs are in fact produced by the company in the close-down phase of its business. When a business fails to internalize these externality costs, the market is distorted as the commodities produced are sold at a cost less than their marginal social cost. This represents a divergence between private and social accounting that the market

54. Kavanagh, *supra* note 11, at 23.

55. *Id.* Note that externalities can be either good or bad.

56. N. BOWIE, *supra* note 24, at 23. Common examples include air and water pollution, excessive noise, and unattractive factories. Environmentalists have successfully urged businesses to internalize these externalities by considering them as real although unintended products and incorporating them into the accounting system. Congress has also passed legislation requiring corporations to account for such costs, e.g., pollution controls. Kavanagh, *supra* note 11, at 24, 31.

57. Kavanagh, *supra* note 11, at 24.

fails to register.⁵⁸ Plant closing legislation would provide the necessary corrections to the market by requiring businesses to recognize the costs of a plant shutdown, just as they account for the costs of a plant start-up.

Thus far, this article has supported the thesis that based upon principles of moral consensus, obligations of property owners, fundamental fairness, and an economic theory of externalities, it is within a corporation's realm of obligations to provide advance notice and severance pay to the workers and community affected by a plant shutdown. The following section of this article will justify intervention by the federal government as a means of imposing these duties on the corporation.

III. THE CASE FOR FEDERAL REGULATION

The proposed national legislation would provide workers and the community with a right to be informed in advance of a plant closing and a right to fair compensation (severance pay).⁵⁹ Given our society's prevailing expectation of a "hands-off" government and due to our tendency towards free market capitalism,⁶⁰ any governmental regulation, such as plant

58. J. RAWLS, *supra* note 50, at 268.

59. The provisions proposed in this article are similar to those proposed in the pastoral letter by the National Conference of Catholic Bishops, *Catholic Social Teaching and the U.S. Economy* para. 292 (Second Draft 1985), reprinted in 15 ORIGINS 257 (1985) [hereinafter cited as Second Draft].

The pastoral letter, however, goes farther than the legislation proposed in this article, by suggesting that workers should have the right to approach management with possible alternatives. This provision has been incorporated into previously defeated plant closing legislation. See *infra* pp. 352-53. Opponents of plant closing legislation have heavily criticized this specific provision claiming it would provide an unfair advantage to unions and contradict labor precedent. See *infra* notes 75-76 and accompanying text. Opponents have also asserted that the provision would delay, and sometimes effectively block, management actions. See *Plant Closings and Relocation and the Labor-Management Notification and Consultation Act of 1985, Hearings on H.R. 1616 Before the Labor-Management Relations Subcomm. and the Employment Opportunities Subcomm. of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. 12-17 (1985) (statement of Mark de Bernado, Manager of Labor Law for the U.S. Chamber of Commerce) [hereinafter cited as Chamber of Commerce Report].

60. Wogaman, *supra* note 31, at 100. Some assert, however, that while laissez faire and the free market may be dominant in economic thinking, they are only "myths" in practice:

[The] enduring myth of the unmanaged market [has] sidetracked Americans into endless debate over relative merits of two highly

closing legislation, "must bear the burden of proof" for its existence.⁶¹

It is uncontroverted that a proper function of government is the protection of a person's right not to be unjustifiably harmed.⁶² Serving in this protective function, the government may justifiably restore to the individual his negative right,⁶³ that is, his right not to be harmed, or devise means in which to mitigate the harm caused and compensate the individual for his lost right. When legislation is viewed as restoring a negative right to the owner of such a right, the legislation is justified.

This is the case with the proposed plant closing legislation. The proposed legislation is limited to protecting the worker's negative right not to be harmed through the corporation's use of its property. It does not attempt to give the worker a new, positive right⁶⁴ that he did not previously possess. When viewed from this perspective, the legislation is justified. Additionally, it is justified as the only practical means of protecting the worker and the community, given the lack of viable alternatives.

artificial concepts: the "free market" and "national planning". Either way, government will be actively involved. And though the form of government intervention may be different, the fact of its involvement will be nothing new

[O]ur mythic assumptions lag behind our political reality. Every major industry in America is deeply involved with and dependent on government *No sharp distinction can validly be drawn between private and public sectors within this or any other advanced industrialized country; the economic effects of public policies and corporate decisions are completely intertwined.*

R. REICH, *THE NEXT AMERICAN FRONTIER* 232-33 (1983).

61. Wogaman, *supra* note 31, at 100.

62. Even laissez-faire theorists accept this minimal role of the government. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); L. VON MISES, *LIBERALISM, A SOCIO-ECONOMIC EXPOSITION* 52 (1978) ("[A]s liberals see it, the task of the state consists solely and exclusively in guaranteeing the protection of life, health, liberty and private property against violent attacks.").

63. For a discussion of negative rights (i.e., negative liberty), see I. BERLIN, *TWO CONCEPTS OF LIBERTY* 6-19 (1958) (Negative liberty is defined as the absence of interference within a person's sphere of action). See also I. BERLIN, *FOUR ESSAYS ON LIBERTY* 133-47 (1960); M. Rothbard, *THE ETHICS OF LIBERTY* 215-28 (1983).

64. For positive rights discussion, see *supra* note 63; Block, *Neglect of the Market Place: The Questionable Economics of America's Bishops*, 2 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 125, 142-50 (1986).

A. *Alternatives to National Legislation*

1. Corporate and Union Voluntary Action

An obvious alternative to national legislation would be responsible employer practices. According to the U.S. Chamber of Commerce,⁶⁵ voluntary corporate practices and programs aimed at mitigating the effects of plant closings on workers and communities are growing in number and effectiveness, as are government programs involving economic assistance, retraining, and job replacement.⁶⁶ Nonetheless, the mere fact that the plant closing problem exists demonstrates that employers are unwilling to unilaterally account for their own action.⁶⁷

Critics of national plant closing legislation find an adequate alternative in the marketplace, relying on the bargaining process between the unions and the employer. Such opponents of federal legislation are quick to assert that in a free market, people can contract for virtually anything. They believe, however, that most workers are unwilling to make the wage sacrifice necessary in order to "buy" fifty-two weeks of severance pay.⁶⁸

To rely on the bargaining mechanism, however, is to overlook a majority of the workers. In the United States, union members comprise less than 25% of workers. Thus, without some legislative standards, the large number of unor-

65. See Chamber of Commerce Report, *supra* note 59, at 2.

66. The National Center on Occupational Readjustment, Inc. (NaCOR) has compiled a list of financial and technical assistance programs—both public and private—designed to ease and expedite the adjustment process for displaced workers. See NATIONAL CENTER ON OCCUPATIONAL READJUSTMENT, INC., *MANAGING PLANT CLOSINGS AND OCCUPATIONAL READJUSTMENT: AN EMPLOYER'S GUIDEBOOK* (1984).

67. Some businesses do unilaterally account for their actions, whether it be to avoid adverse effects on internal employee relations or external public relations, or to be responsive to perceived social responsibilities. American Hospital Supply (AHS) provides a useful model of a socially responsive firm. In October 1979, AHS announced its intent to sell its medical manufacturing company of about 275 employees. A meeting was held of all employees to communicate the rationale for the decision. In December 1979, another all-employee meeting was held and it was announced that the business would be gradually phased out. A retention/outplacement program was prepared and explained in detail.

68. Critics assert that there are costs attached to any uniform requirement and workers may not want to make the trade-off between severance pay and wages or other foregone fringe benefits. R. MCKENZIE, *FUGITIVE INDUSTRY: THE ECONOMICS AND POLITICS OF DEINDUSTRIALIZATION* 18 (1984).

ganized workers can rely only on the largesse of employers.⁶⁹ To require these workers to negotiate individually with the employer ignores the unequal bargaining power that exists between the two parties. Disparity in expertise and alternative financial and employment options contribute to the imbalanced bargaining positions. Workers are not as free as the company. While it may be true that the workers freely chose to take their jobs and that the workers knew or should have known of the risks involved, workers must accept some job just to stay alive. In many instances, their employment options are extremely limited. Moreover, if they can protect their rights only through bargaining, workers, fearful of appearing to concede to an employer's decision to shut down, may hesitate to bargain about termination rights.

Additionally, because an employer has almost packed his bags at the time of disclosure of the decision to shut down, a strike would not be effective, and thus even unions have little power.⁷⁰ Beginning in 1979, however, major unions have become increasingly insistent on stronger provisions dealing with closings.⁷¹ Nonetheless, a Bureau of Labor Statistics survey in 1984 indicated that only about 10% of collective bargaining agreements contained advance notice provisions.⁷²

Equally important, the community and other persons affected by a plant shutdown would have no voice.⁷³ The community's voicelessness is further exacerbated by the increasing trend towards absentee ownership and control of American business.⁷⁴

69. Aaron, *Plant Closings: American and Comparative Perspectives*, 59 CHI. KENT L. REV. 941 (1983).

70. MacNeil, *Plant Closings and Workers' Rights*, 14 OTTAWA L. REV. 1, 17 (1982).

71. For example, in 1980, United Rubber Workers won from B.F. Goodrich the right to prenotification and negotiations over any planned shutdown, along with 24 months of medical and other insurance after a shutdown.

72. Carroll, *supra* note 22, at 635.

73. Ford, *supra* note 13, at 1225.

74. A conglomerate lacking community loyalty and playing an investment game with rules different from those that nonconglomerate companies have traditionally followed can simply write off a line of business, a plant, a work force, or a whole community and can turn its attention elsewhere, leaving others to pick up the pieces.

Id. at 1226.

2. The Courts

Workers and unions have found little redress in the judicial system. In *First National Maintenance Corp. v. NLRB*,⁷⁵ the U.S. Supreme Court held that the employer, although required to bargain in good faith with the unions over the effects of managerial decisions, has no duty to bargain over the decision itself.⁷⁶

In other cases, unions and communities have asserted a moral property right theory, a moral claim to some control over their workplaces, as the basis for a legal right to participate in the decision to close a plant.⁷⁷ John Locke was the architect of this labor theory of property. According to this theory, "property rights are acquired by 'mixing one's labor' with, and thereby adding value to, external objects [H]aving worked on an object and transformed it into a socially valuable commodity gives one some claim to the fruits of one's labor."⁷⁸ Using a form of this argument, workers

75. 452 U.S. 666 (1981). The National Labor Relation Board (NLRB) was established by the National Labor Relation Act (NLRA), which governs the process of collective bargaining in the United States. 29 U.S.C. §§ 151-165 (1982).

The decisions involving plant closings primarily focus on the alleged violation of sections 8(a)(3) and 8(a)(5) of the NLRA. R. MCKENZIE, *supra* note 68, at 125. Section 8(a)(3) prohibits employers from discriminating for purposes of discouraging union membership, that is, to "act with antiunion animus." Section 8(a)(5) requires an employer to bargain with a union over conditions of employment. Where a duty to bargain about a particular matter is found, it is an unfair labor practice under this section for the employer to implement unilaterally a change respecting that matter. *NLRB v. Katz*, 369 U.S. 736 (1962).

76. We conclude that the harm likely to be done to an employer's need to operate freely in deciding whether to shutdown part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision and we hold that the decision itself is not part of . . . terms and conditions . . . over which Congress has mandated bargaining.
452 U.S. at 686 (1981).

77. Lichtenberg, *Workers, Owners, and Factory Closings*, PHIL. & POL., Fall 1984, at 9.

78. *Id.* Locke's labor theory has, however, undergone much attack on his "mixing metaphors" and the self-defeating result of the theory when applied to the ownership of land. In applying Locke's labor theory to the ownership of land, once all land is owned by some subset of the population, those without ownership rights who must work on the land, are denied the "fruits" of their labors by the results of the very arguments proposed by Locke which were supposed to guarantee them. For a more extensive treatment of Locke's labor theory, see L. BECKER, *supra* note 48,

have attempted to claim a property interest in the plant.⁷⁹

Arguments that workers and communities could develop property rights in jobs has received little support in the courts. In *Local 1330, United Steel Workers v. United States Steel Corp.*,⁸⁰ the Sixth Circuit affirmed the district court's decision and said that it would not begin creating property rights on its own accord. The court deferred policy formulation on plant closing issues to legislative responsibility.⁸¹ In sum, al-

at 36-56.

79. This theory of a property right was summarized in *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) by District Judge Lambros, and restated in the Court of Appeals opinion:

Everything that has happened in the Mahoning Valley has been happening for many years. Schools have been built, roads have been built. Expansion that has taken place is because of steel. And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: steel.

[I]t seems to me that a property right has arisen from this lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry. Perhaps not a property right to the extent that can be remedied by compelling U.S. Steel to remain in Youngstown. But I think the law can recognize the property right to the extent that U.S. Steel cannot leave that Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community because certain vested rights have arisen out of this long relationship and institution.

631 F.2d 1264, 1279-80 (1980).

80. 631 F.2d 1264 (1980). Local unions, a congressman, individual steelworkers, and a coalition of steelworkers and clergy filed a suit against the U.S. Steel Corporation seeking an order to keep the plants open or requiring the corporation to sell the facilities to the union. In delivering the lower court opinion, District Judge Lambros, after originally restraining the corporation from ceasing operations, entered a formal opinion holding the plant had become unprofitable and denied all relief to the plaintiffs. *Local 1330, United Steel Workers v. United States Steel Corp.*, 492 F. Supp. 1, 10 (N.D. Ohio 1980). The Court of Appeals affirmed the lower court's decision allowing U.S. Steel to cease its operations. 631 F.2d at 1282-83.

81. In dismissing the property claim, Judge Lambros commented: This Court has spent many hours searching for a way to cut to the heart of the economic reality—that obsolescence and market forces demand the close of the Mahoning Valley plants, and yet the lives of 3500 workers and their families and the supporting Youngstown community cannot be dismissed as inconsequential. United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the com-

though some collective agreements have provided adequate

munity for so many years.

Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation. At this moment, proposals for legislative redress of economic relocation like the situation before us are pending on Capitol Hill However, this Court is not a legislative body and can not make laws where none exist—only those remedies prescribed in the statutes or by virtue of precedent of prior case law can be given cognizance. In these terms this Court can determine no legal basis for the finding of a property right.

492 F. Supp. at 10.

Other emerging theories have been asserted by workers and/or communities opposed to plant closings:

(1) Breach of contract and promissory estoppel. In the *U.S. Steel* case quoted above, employees also claimed breach of contract and promissory estoppel with respect to the employer's alleged promises to keep the plant open if employees made it profitable. The court denied the claims on the grounds that (i) the alleged promises were made by one who lacked authority, (ii) the statements were too vague to indicate a clear promise, and (iii) the plants failed to become profitable.

In *Abbington v. Dayton Malliable, Inc.*, 561 F. Supp. 1290, 1298 (S.D. Ohio 1983) the court held that employer statements intended to bolster employee enthusiasm and congratulate employees for their efforts to keep the plant operational did not constitute promises under the doctrine of promissory estoppel. However, in *Local 461, IUE v. Singer Co.*, 540 F. Supp. 442 (D.N.J. 1982), the court enforced an employer's promise to invest \$2 million in modernizing its plant in exchange for certain employee "give-backs." When the employer failed to perform the promised investment, the court ordered it to pay money damages to the employees in the amount of the value of the "give-backs" or \$2 million, whichever was greater.

(2) Eminent Domain. Another theory being suggested is that a state or municipality take over a failing plant without the owner's consent to keep it open or prevent it from being moved. A non-industrial example of this occurred recently when the city of Oakland, California attempted to condemn the Oakland Raiders National Football League franchise to prevent its relocation in Los Angeles. *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982). This case may induce local governments to attempt to take over failing plants, particularly for the purpose of reselling them to employees. See 32 Cal. 3d at 77 (Bird, C.J., dissenting).

(3) Antitrust. Opponents to plant closings have attempted to claim antitrust violations in an owner's refusal to sell. In the *U.S. Steel* case, the president of the company claimed he would not sell to a subsidized competitor. 631 F.2d at 1282. The Sixth Circuit, finding some merit in the plaintiff's antitrust claim that U.S. Steel had exercised monopoly power for the purpose of preventing a competitor from entering the steel market, remanded the issue for further proceedings. No further proceedings were held on the antitrust issue because the workers' buy-out effort by that time had collapsed. The court revealed that its own research had produced no authority under the antitrust laws supporting U.S. Steel's refusal to sell to a subsi-

security for employees, so long as (i) three-fourths of the workers remain unorganized and thereby stand in unequal footing to bargain with the employer, and (ii) courts continue to deny workers the right to participate in a shutdown decision, the enactment of some minimum legislation to protect the workers' interests is justified.

3. Federal Assistance

Another alternative proposed in lieu of national legislation governing plant closings is the development of a federal social welfare system⁸² or of community contingency funds⁸³ to cushion workers in the event of a plant closing. Either of these alternatives would spread the cost of the shutdown and dilute the burden on the displaced workers. Both alternatives, however, encourage a total lack of corporate accountability. They provide corporations with no incentive to examine alternatives to a closing. More importantly, welfare does not force the business to internalize its social costs. When a plant closes, it is the management's decision; therefore, the management should be held accountable for the consequences of its actions.⁸⁴

Congressional response to dislocation caused by changes in governmental economic policy may serve as a model for the principle that those whose policy and planning are the cause of economic disruption have a duty to help affected workers adjust to a new economic order.⁸⁵ Through trade policies, the federal government can affect the viability of certain industries. For example, lower tariffs plague many sectors which were once protected in their domestic markets with competition, often causing displacement of workers. Since reduction of tariffs is viewed as beneficial to the entire economy, the displacement caused by lower trade tariffs is not borne by the workers alone.⁸⁶ The U.S. Trade Act of 1974⁸⁷ provides Trade Adjustment Assistance to these workers.⁸⁸

dized competitor. *Id.*

82. MacNeil, *supra* note 70, at 2.

83. R. McKENZIE, *supra* note 68, at 97.

84. MacNeil, *supra* note 70, at 51.

85. *Id.* at 50.

86. *Id.*

87. 19 U.S.C.A. § 2251 (West 1980 & Supp. 1985).

88. To be eligible for trade adjustment assistance, the Department of Labor must find: (i) that a significant number or proportion of the workers in the facility have become or are threatened to become displaced, (ii)

Plant closings differ from trade adjustment in that the employer rather than the government pays the benefits. In both situations, however, the one that caused the disruption pays.⁸⁹ When the government reduces tariffs causing worker displacement, the government pays because lower tariffs benefit the country as a whole and equitably spread the losses incurred. Similarly, when a company decides that closing a plant benefits the company as a whole, it should also ensure that the losses are equitably spread and not permit them to fall primarily on the employees. Just as legislation could prevent domestic losses by continuing a high tariff policy, it could also limit the losses suffered by employees by restricting the company's right to close down. That, however, may not produce the overall best result for the economy since it costs a business less to assist employees than it costs the government to prevent the change.⁹⁰

4. State Legislation

Many states have introduced some form of plant closing legislation. A mere five states have enacted legislation: Maine, Wisconsin, South Carolina, Connecticut, and Massachusetts.⁹¹ Although state plant closing legislation is constitutional,⁹² it provides an insufficient remedy for those affected by a plant shutdown.

Maine's legislation⁹³ requires any employer of more than 100 persons that proposes to close or relocate outside of the state, to notify employees sixty days in advance of such planned action. Failure to notify results in a maximum fine of \$500. In addition to this notice, the employer is required to pay the affected workers a lump sum equal to one week's pay for each year of service. This severance provision does not

that the company's sales or production have decreased absolutely; and (iii) that the increases of imports competitive with the company's produce "contributed importantly" to the displacements (or threats thereof) and to the decline in sales or production. *Id.* § 2272 (1980).

89. MacNeil, *supra* note 70, at 51.

90. *Id.*

91. Additionally, two cities have enacted some form of plant closing ordinances: Philadelphia, Pennsylvania and Vacaville, California.

92. State plant closing laws raise federal preemption, commerce clause, and contract clause issues. For a constitutional analysis of state legislation, see Comment, *The Constitutional Aspects of Restricting Business Closures*, 14 PAC. L.J. 275 (1983). See also Note, *A Legal, Economic, and Normative Analysis of National Plant Closing Legislation*, 11 J. LEGIS. 348 (1984).

93. ME. REV. STAT. ANN. tit. 26, § 625B (Supp. 1985).

apply when: (i) relocation or termination of an establishment is necessitated by a physical calamity; (ii) the affected worker takes a job at the relocated site; or (iii) the affected worker has been employed at the establishment for less than three years.

The Wisconsin legislation⁹⁴ requires every employer in the state employing 100 or more persons to give sixty days notice prior to closings, mergers, or relocations. The penalty imposed for violation of this notice requirement is a maximum fine of \$50 for each terminated employee.

In South Carolina, the statute regulating plant closings⁹⁵ applies only to those employers who require an employee to give notice before quitting a job. These employers must notify employees of a plant shutdown at least two weeks in advance or provide the same advance notification they demand from their employees. Shutdowns or temporary cessations of work due to machinery breakdowns or to some act of God or the public enemy are exempted from these provisions.

The Connecticut plant closing statute⁹⁶ requires employers of 100 or more persons who close or relocate their establishments to continue to pay existing group health insurance for each affected employee and dependents for up to ninety days. Massachusetts enacted a new plant closing law⁹⁷ that encourages, but does not require, employers to give ninety days advance notice of closings and to provide severance packages to protect workers affected by the closings. Although compliance is voluntary, the law provides that employers financed, insured or subsidized by quasi-public state agencies "shall agree to accept" the voluntary "social compact."⁹⁸

On close examination, these statutes are only minimally effective. The nominal fines imposed by the Maine and Wisconsin statutes have little deterrent effect. Although the fines imposed by the South Carolina statute are somewhat steeper, they are hardly severe. The notice requirements, especially the sixty days required by Maine and Wisconsin, enable state authorities and unions to pressure employers to discuss their plans and possibly to modify or even abandon them. In South Carolina, however, the notice requirement is much shorter,

94. WIS. STAT. ANN. § 109.07 (West 1976).

95. S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1981).

96. CONN. GEN. STAT. ANN. § 31-510 (West Supp. 1985).

97. MASS. ANN. LAWS ch. 149, § 182 (Michie/Law. Co-op. Supp. 1985).

98. *Id.*

and in any case, an employer can easily bring himself outside the scope of the statute by not requiring employees to give notice of their intentions to quit.⁹⁹

Moreover, despite any limited statutory protection afforded the worker and community, such statutes, when enacted randomly among the states, provide a competitive advantage to those states not enacting such legislation.¹⁰⁰ Consequently, states seeking to attract new firms or industries are unlikely to enact plant closing legislation, even if needed.¹⁰¹ Legislation enacted on a national level would eliminate such disincentives. A national plant closing bill would establish minimum, uniform standards to govern plant shutdowns throughout the country, thereby eliminating any regional competitive advantage.

Critics of national legislation assert that such legislation would place the United States at a disadvantage in the world market.¹⁰² Supporters of this legislation, however, are quick to point to other industrialized countries, such as West Germany, Sweden, Great Britain, Canada, France, and the Netherlands, which have already enacted such legislation. As a member of West Germany's largest trade union stated: "We haven't repealed the laws of capitalism. The market forces causing many plant closings are fundamentally irresistible. When you have to jump out of a burning building, however, it is better to land in a fireman's net."¹⁰³

Although these other European countries may not have moved any farther than the United States to "put out the fire," they have certainly constructed a much better safety net.¹⁰⁴ Indeed, as far back as 1966, it was recognized that "[t]he United States is the only industrialized country that permits the closings of large plants without notice."¹⁰⁵

99. Aaron, *supra* note 69, at 950.

100. R. MCKENZIE, *supra* note 68, at 89.

101. Millspaugh, *The Campaign for Plant Closing Laws in the United States: An Assessment*, 5 CORP. L.REV. 291, 303 (1982). The situation where some states enact plant closing legislation and some do not is analogous to the case of the "prisoner's dilemma." See J. RAWLS, *supra* note 50, at 269-70.

102. Millspaugh, *supra* note 101 *passim*.

103. JOINT REPORT OF LABOR UNION STUDY TOUR PARTICIPANTS, ECONOMIC DISIPATION: PLANT CLOSINGS, PLANT RELOCATIONS AND PLANT CONVERSIONS 22 (1979) [hereinafter cited as JOINT REPORT].

104. *Id.*

105. *Report of the National Commission on Technology, Automation, and Economic Progress*, 1 TECH. & AMER. ECON. 67 (1966), cited in Aaron, *supra* note 69, at 966.

Reference to the European model may frighten rather than convince American employers of the necessity of federal plant closing legislation. The proposed legislation acknowledges that the European legislation is the product of economic, social, and political cultures profoundly different from our own.¹⁰⁶ Indeed, what works in those countries need not, and probably cannot, work in the United States.¹⁰⁷ Nonetheless, it remains that private businesses in Western Europe, including subsidiaries and affiliates of many American firms which have invested heavily over the last thirty years, have found that they can survive and indeed profit while operating under such laws.¹⁰⁸ In view of the inadequate alternatives that have been proposed, government intervention via national legislation is necessary.

IV. FEDERAL LEGISLATION

A. *Previous Legislation*

National legislative remedies governing plant closing have been vigorously pursued in Congress since 1979. The centerpiece of this legislative movement was the National Employment Priorities Act of 1979.¹⁰⁹ Features of this bill were also incorporated into other proposed remedies: the Employee and Community Stabilization Act of 1979,¹¹⁰ the Employment Maintenance Act of 1980,¹¹¹ the Corporate Democracy (or Governance) Act of 1980,¹¹² the National Em-

106. Aaron, *supra* note 69, at 964.

107. The following practices and policies are unlikely to work in the United States: (i) selectively nationalizing "key industries"; (ii) requiring employers to negotiate the decision to close a plant with workers and community representatives, a requirement currently in force in West Germany; (iii) providing federal funds for public enterprises that can replace closed private companies as practiced in Sweden; and (iv) requiring firms to have their investment and disinvestment plans submitted to some government board for approval, as required in West Germany. R. MCKENZIE, *supra* note 68, at 13.

108. *Joint Report, supra* note 103, at 4.

109. H.R. 5040, 96th Cong., 1st Sess. (1979); S. 1608, 96th Cong., 1st Sess. (1979). This bill was first introduced into the Senate by then Senator Walter Mondale (D-Minn.) and now is sponsored by Senator Donald Riegle (D-Mich.). In the House, the chief supporter is Representative William Ford (D-Mich.).

110. S. 1609, 96th Cong., 1st Sess. (1979) (introduced by former Senator Harrison Williams (D-N.J.)).

111. S. 2400, 96th Cong., 2nd Sess. (1980) (introduced by Senator Howard Metzenbaum (D-Ohio)).

112. H.R. 7010, 96th Cong., 2nd Sess. (1980) (introduced by Benja-

ployment Priorities Act of 1983,¹¹³ and most recently, the Labor-Management Notification and Consultation Act of 1985.¹¹⁴ Although these legislative efforts have been thwarted, the number of co-sponsors for this legislation has increased in successive terms of Congress. Bills have emerged from committees where they were once buried, and more proposals are under serious consideration. Although limited, these gradual successes indicate a relentless movement toward the eventual enactment of some form of plant closing legislation.

The critics continually contend that any legislation is economically inefficient. Economists, such as Richard McKenzie,¹¹⁵ have specifically criticized plant closing legislation as a dangerous infringement upon capital mobility that will hamper the efficiency of the market. They assert that keeping inefficient and uncompetitive plants open will only intensify and delay the need for restructuring the economy.¹¹⁶ Legislation would force a company to produce inefficiently, resulting in higher prices for the consumer in the short run and loss of sales and solvency in the long run.¹¹⁷ Moreover, these economists argue that penalizing firms for reallocating investment in the most efficient way will not only penalize the ultimate consumer, but also will reduce the ability of the market to create economic opportunities for workers in the future.¹¹⁸

The proposed legislation recognizes the validity of this economic argument. If enacted, it would not prohibit a company from closing nor would it restrict the ability of a business to disinvest; it would only require notice and severance pay. It does not increase either worker or government participation in the fundamental business decision-making.

min Rosenthal (D-N.Y.)).

113. H.R. 2847, 98th Cong., 1st Sess. (1983), 129 Cong. Rec. H2528 (1983).

114. H.R. 1616, 99th Cong., 1st Sess. (1985) (introduced by Representatives William D. Ford (D-Mich.), Silvio Conte (R-Mass.), and William Clay (D-Mo.)).

115. Richard B. McKenzie, currently Professor of Economics at Clemson University and Senior Fellow at the Heritage Foundation, is the author and editor of numerous books, including *Plant Closings: Public or Private Choices* (1982) and *Restrictions on Business Mobility: A Study in Political Rhetoric and Economic Reality* (1979).

116. R. McKENZIE, *supra* note 68, at 83-108.

117. Chamber of Commerce Report, *supra* note 59, at 12.

118. A. Aboud & S. Schram, *An Overview of Plant Closing Legislation and Issues*, in KEY ISSUES: PLANT CLOSING LEGISLATION 40 (A. Aboud ed. 1984).

Opponents have also criticized previous plant closing bills for being drafted without adequate employer input. They contend that these remedies are "one-sided and appear somewhat adversarial . . . [T]hey work to right an array of perceived worker disenfranchisements and to neutralize the arbitrary, insensitive, powerful employer. The flow of standards, liability and penalties is clearly one directional. This imbalance is most pronounced."¹¹⁹ Legislation that requires only notice and severance pay works a fair compromise between the workers' rights and the economic well-being of the employer. It does not require the employer to act "beyond the call of duty"; it demands only that he internalize all costs related to the operation of his business—and such costs include those of closing or relocating a plant.

B. *Proposed Legislation*

The proposed legislation would apply to any industry or commercial facility which employs 100 or more persons and has operated in its present location (or within 100 miles) for three years. It contains two major provisions: (i) advance notice, and (ii) severance pay. These provisions only apply to a business that has operated in its location for at least three years because such a business has established its presence in the community, and thus, has incurred greater obligations.

1. Notification

Prenotification requires the employer to notify the workers and community in advance of a planned shutdown or relocation. The proposed notice requirement provides that if 20% of the employees of a "covered establishment" suffer job loss as a result of a transfer or closure, the employer must furnish written notice to the Secretary of Labor, the local government, and the affected workers. Such notice must be not less than six months in advance of the closing or transfer if the number of employees to suffer an employment loss is less than 150, and not less than one year if the number of affected employees is over 150. Additionally, the proposed legislation provides an "escape clause" to employers who would be unable to provide the full required notice. This provision exempts those situations where because of "unavoidable business circumstances," the full six or twelve month notice would obviously be impossible or

119. Millspaugh, *supra* note 101, at 304-05.

counterproductive.¹²⁰

This notice provision serves several purposes. First, it allows workers and the community an opportunity to prepare for and adjust to a plant closing both emotionally and financially. Workers can begin to look or train for a new job with the same employer in the same plant or at another location. Studies indicate that an employee's chance of reemployment is greater while he carries the "employed" label.¹²¹ Second, requiring a company to prenotify may spur that company to reexamine the larger effects of a closing and perhaps reconsider the disinvestment. Finally, advance notice affords the government, community, workers, and union, if involved, the opportunity to evaluate other alternatives. If the plant is closing due to market conditions, for example, advance notice allows the community and workers sufficient time to consider rescuing the existing operation¹²² by developing a plan for a community¹²³ or a worker buyout,¹²⁴ attracting a new busi-

120. Although many businessmen assert that plant closings result from business failures and are unavoidable, research undertaken by Professor Charles Craypo of Cornell University (now at the University of Notre Dame) showed otherwise. Craypo studied 27 facility closings between 1954 and 1983 in the Indiana factory towns of South Bend and Mishawaka. These closings resulted in the loss of nearly 40,000 jobs. In 24 of the 27 cases Craypo studied, business failures or bankruptcy were not a factor in their shutdown. According to Craypo, the key determinant in the incidence of closings and phasedowns was whether absentee owners continued to invest in local plants. Absentee owners closed 23 of the 27 plants, 19 of the plants were relocated elsewhere, and some of the plants were closed for anticompetitive reasons. Locally owned, healthy businesses were acquired by multiplant, absentee owners which closed them in order to concentrate available market share among fewer producers. C. CRAYPO, *COOPERATION AMONG LABOR, MANAGEMENT, AND THE COMMUNITY EXPERIENCES FROM THE DEINDUSTRIALIZATION OF A FACTORY TOWN, SOUTH BEND, INDIANA, 1954-1983* (1984).

121. Carroll, *supra* note 22, at 133.

122. In the case of Chrysler, the federal government provided federal loans which enabled Chrysler to continue operations. See B. BLUESTONE & B. HARRISON, *supra* note 12, at 74.

123. It has been argued that the first obligation of a company to its employees and the community is to attempt to sell the business as a going concern instead of shutting down. Although this may not always be possible, it should be explored. Quite often, a company may find the most promising new buyers of a firm to be residents of the state who possess a long-term stake in the community and are willing to make a strong commitment. Carroll, *supra* note 22, at 131.

124. The National Center for Employee Ownership estimates some 50,000 workers have saved their jobs by taking over companies. In 1983, employees purchased a West Virginia steel mill. The mill, now called National Steel's Weirton mill, is the nation's largest employee-owned enter-

ness to the facility site, or finding a new owner.

Prenotification provides unions not only the time to facilitate the adjustment process, but also the chance to attempt to reverse the decision of the management.¹²⁵ Opponents of prenotification (primarily business) assert, however, that advance notice provides only a marginal benefit to unions and would serve to distort the bargaining process. Such criticism lacks merit. Rather than distorting the bargaining process, such information rationalizes the process—each party understands the goals and limitations of the other. It only becomes distorted when one party has information that the other does not, especially information that would significantly affect the negotiation.¹²⁶

Critics also argue that the notice period would produce problems of workforce morale, worker defection, and a decline in business activity. The latter would be due to the reluctance of financial institutions to grant credit to a corporation that plans to shut down, and the potential loss of customers who would go elsewhere for business. The proposed legislation responds to the problem of maintaining a satisfactory workforce by providing that workers who defect from their place of employment prior to the termination of the notice period forego severance pay.¹²⁷ Given the speed of economic events, no doubt an employer planning a closure will experience a decline in business activity during the notice period. Nonetheless, because it is the employer's action of closing the plant that is the proximate cause of credit problems and customer defection, the employer justly should have to bear the cost.

The prenotification requirement is neither worker biased nor pro-employer. On the contrary, it presents an even-handed and just compromise between the affected parties.

prise as well as its eighth largest producer of steel. Although workers had to take about a 32 percent cut in pay, "32 percent less of \$25 an hour is a whole lot better than 100 percent of nothing." *A Steel Town's Fight for Life*, NEWSWEEK, March 28, 1983, at 49; Carroll, *supra* note 22, at 131-32.

The legislation proposed by this article assumes that the initiative for considering such alternatives, i.e., community and/or worker buyout, government assistance, is not the burden of the company planning to close, but is the burden of the worker, community, and/or government. The company need only to provide advance notice and severance payment to perform its legal duty under this proposed legislation.

125. MacNeil, *supra* note 70, at 41.

126. *Id.* at 24.

127. This provision follows closely similar legislation currently enforced in Great Britain. *Id.* at 42-43.

The prenotification requirement is not transformed to operate as a penalty to the corporation and does not act as a trigger device to a governmental intervention process, as proposed under recently introduced bills.¹²⁸ The decision to close remains within the management's discretion.¹²⁹

2. Severance Pay

In addition to prenotification, the proposed legislation requires employers to make severance payments to employees and the community or local government, and continue health and welfare benefits. Under this provision, any business that relocates 100 or more miles from its original location or terminates business shall be liable to the employees for severance pay at a rate of two months pay for each year of employment in that business. The employer is excused from the severance payment liability if the following conditions exist: (i) the employee quits before the notice period terminates; (ii) the employee has been employed by the business for less than three years; (iii) the employee accepts employment at the new location; or (iv) the termination or relocation of the business is necessitated by an act of God or by a public enemy.

Although severance pay falls short of guaranteeing job security, it does compensate the workers for lost negative rights when a plant closes. It is not just an income maintenance technique; the losses incurred by the worker—increasing with seniority of the employee—are measured by the number of years worked. Thus in the case of a successor employer who provides the employees with the same seniority and benefits, this legislation clearly relieves the initial employer of the obligation.

Additionally, severance payments may act as a market motivator. If the introduction of change into the workplace will result in job losses, one can expect the workers to resist vigorously these changes. But if society is to maintain reasonable standards of living, sufficient rates of production, and economic well-being, industries must continue to adapt to the environment to remain competitive and rid themselves of obsolete equipment; severance payments induce workers' cooperation.¹³⁰ Moreover, severance pay may promote labor mobility by enabling workers to invest in job searching,

128. Such bills include H.R. 2847 and H.R. 1616. See *supra* notes 113-14.

129. See Millsaugh, *supra* note 101 *passim*.

130. MacNeil, *supra* note 70, at 33.

retraining, or relocation, while enticing workers to remain at the job until the end of the notice period. Severance pay serves, at worst, as a disincentive to a worker to look for work, and at best as a means of internalizing the true costs of a shutdown into the decision-making process.

Finally, the legislation requires the business to compensate the community for its losses incurred. A company that transfers or terminates its operations must pay the local community or government agency to which it was liable for taxes an amount equal to 85% of one year's tax revenues lost as the result of the company's actions. When a plant has operated in a community for more than three years, the company has incurred an obligation to the community, much in the same sense as it has to its employees. A *quid pro quo* relationship is present: The community has relied on this company for jobs and taxes, while the company has relied on the community for services. As the worker had an invested interest in the company, so does the community.

CONCLUSION

The proposed national legislation governing plant closings does not prohibit plant closures, nor does it take the decision of whether to close or not from the hands of management. It simply requires that a company account for all the costs of its operations—both intentional and unintentional. It requires that a business, prior to a shutdown, provide advance notice and severance pay to the affected workers and communities.

Shareholders, as legal owners of the corporation, in theory are free to dictate the use of their property. This ownership right, however, is not absolute; it is subject to the legitimate claims of others. The proposed legislation protects the claims of the affected workers and communities and prevents corporations from shielding themselves from their responsibilities through absolute ownership rights.

Government intervention in the private business sector is not without precedent. Through the enactment of national legislation, not only are the effects of a plant shutdown on the workers and communities mitigated, but the socially enlightened companies are enabled to take socially desirable actions without incurring serious competitive disadvantages. Moreover, the indifferent or maleficent corporations are forced to adhere to some minimum requirement of corporate responsibility.