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Worker Dislocation: Who Bears The Burden? A Comparative Study of Social Values in Five Countries

Clyde W. Summers*

A pervasive phenomenon in modern industrial societies is the instability of employment. Production methods are replaced by new processes requiring different skills; robots replace human hands; computers replace human competency. Demands for popular products shrink or disappear as new or substitute products push into the market. Viable production facilities are transferred to new owners who may have new workforces. Outmoded plants are closed and new plants are opened, often at new locations with new employees. Marginal enterprises are downsized and unprofitable enterprises are driven out of business. All of these changes are accentuated by slumps in the business cycle, leaving workers stranded without jobs.¹

Dislocation of workers is inescapable in anything other than a closed and regimented society which prefers stagnation to increased living standards. Inventions and competition would create irresistible pressures for rapid change even in a closed and self-sufficient society, and such economic isolation does not exist in today’s world. Free trade and free movement of capital make control of these changes impossible. New shipyards in Japan forced the closing of shipyards in Britain, Germany, and Sweden, and

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were in turn closed after even newer shipyards were opened in Taiwan. Modern steel mills in developing countries compelled restructuring of the steel industry in developed countries. Auto assembly plants moved from Michigan to the Mexican maquiladoras, leaving lifetime auto workers without jobs. Textile and garment manufacturing in Hong Kong and Singapore displaced hundreds of thousands of workers in the United States and Western Europe. All of this occurred before the North American Free Trade Agreement (NAFTA) and the General Agreement on Tariffs and Trade (GATT).

Instability of employment, often in the form of mass dislocation, is a painful fact of our modern market economy, beyond the reach of any country to prevent or even influence significantly. Indeed, for a country to prosper it must embrace and accelerate changes which introduce new products and increase production. These changes, however, with their dislocation of workers, inevitably bring substantial personal and social costs. The costs must be borne either by the workers, the employer, or by society in general. How we distribute those costs implicitly expresses our social values, and may in the long run affect our readiness and ability to absorb those changes rather than to attempt to resist them.

My first purpose here is to compare how these costs and burdens are distributed in five industrial societies in order to see the variety of ways in which this problem is confronted. For this purpose, I compare the distribution of burdens in the United States with that in the United Kingdom, Germany, Sweden, and Japan.

My second purpose is to identify and articulate the implicit social values expressed by the way the costs or burdens are distributed. My goal is to sharpen our perception of how the United States allocates these burdens in comparison with other countries and to make us more aware of the social values implicit—but seldom articulated or questioned—in our distribution of these burdens.

I. WORKERS, EMPLOYERS, SOCIETY?

An analysis of how the burdens of worker dislocation are distributed between workers, employees, and society must begin with an examination of the legal rules and practices concerning dismissal of employees, whether individual discharges or collective terminations. In the United States we have two distinct labor markets governed by two quite different sets of rules: the individual
labor market governed by the common law, and the collective labor market governed by collective agreements. Collective agreements currently cover less than fifteen percent of private sector employees. More than eighty-five percent of private sector workers have no union and are not protected by collective agreement; thus, they are subject to common law labor rules.

The basic common law rule in the United States is a relic of the nineteenth century: All employment is at will unless a specific contractual provision provides to the contrary. Except for occasional managerial and professional employees, there is seldom such a contract; all others are employees at will. Employment at will means exactly that. An employee may be dismissed at any time for any reason, or for no reason. The courts have developed three exceptions to this rule which give individual employees limited protection. First, contractual protection may be found in employee handbooks provided by employers, but this protection may be undercut by provisions disclaiming that the handbook is intended to create any contract rights. The second exception involves discharges that violate public policy. Such discharges may make the employer liable in tort, but courts generally recognize liability based only upon public policies enacted by legislative bodies. Finally, a few states hold that discharge without cause of employees with many years of service may violate the implied covenant of good faith and fair dealing. However, this covenant is not generally recognized. These three exceptions apply only in cases of


6 Note, Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931 (1983); Specter & Finkin, supra note 4, at 579-600.

7 Henry H. Perrit, Jr., Implied Covenant: Anachronism or Augur, 20 Seton Hall L. Rev. 683 (1990); Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980); Specter & Finkin, supra note 4, at 601-06.
individual dismissals; they have never been applied in cases of collective dismissals.

Employment at will in the United States also allows dismissal without notice or severance pay. An employer may give any or all of its employees the "weekend farewell," notifying them on Friday that they are terminated as of the end of the day. One department store simply posted a notice on its locked doors on Monday that the store was being sold to another company and all employees were terminated. The management of a college called members of its staff to a meeting in an auditorium, told them they were immediately dismissed, and prohibited them from going back to their workplaces. Another more ingenious employer that had decided to close its plant sounded a fire alarm and, when all of its employees were out, locked the gates and announced that all employees were terminated. A small dent has been made in this practice of closing a plant or operation without notice by the Workers Adjustment Retraining Notification Act\(^8\) (WARN) passed in 1988. WARN provides that employers of 100 or more employees must give sixty days notice of a closing that will result in a layoff of one-third of the workforce or of fifty or more employees. WARN does not, however, require severance pay, and a number of exceptions substantially limit the statute's application. In addition, the employer's liability is limited to back pay for the required notice period and a civil penalty of $500 per day. WARN has had only spotty observation and enforcement to date.\(^9\)

In simplest terms, eighty-five percent of private sector employees have only fragmentary protection from arbitrary individual dismissal and essentially no protection from collective dismissals. In cases of plant closings or mass dismissals, employees seldom have a right to notice and have no right to severance pay. The employer bears none of the burden of mass dislocation; instead, the burden is placed entirely on the employees.

That burden is transferred in part to public funds through state unemployment compensation systems; on the average, however, employees recover only thirty-five to forty percent of their back wages.\(^10\) The payments continue for only six months, except in areas of high unemployment where payments may be extended to one year.\(^11\) The unemployment compensation funds are support-

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10 Economic Adjustment, supra note 1, app. A at 4.
11 U.S. DEPT OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS
ed by payroll taxes, and since the tax varies in many states with experience ratings, dismissals may increase an employer’s tax in future years. But in cases of plant closings there may be no future years, and when a mass dismissal occurs, the maximum tax rate may still leave most or all of the burden on the state fund supported by taxes on other employers. The net effect is that the pre-dominant weight of the financial burden falls on the dislocated worker, with most of the rest borne by society through social payments. The employers who are actually responsible for the burden bear little responsibility.

Workers covered by collective agreements have little more protection against mass dismissals. Almost all collective agreements include provisions prohibiting discharge without “just cause,” with the determination of whether just cause existed ultimately determined by an arbitrator. The remedy is customarily reinstatement with back pay. Just cause clauses, however, protect only against arbitrary individual discharges. They provide no protection against collective layoffs or dismissals for economic reasons. Few collective agreements require employers to give notice of layoff or collective dismissal of longer than three days, and almost none requires notice of more than fifteen days. Only forty percent of collective agreements provide for severance pay, and the amount of such pay seldom exceeds one week for each year of service and is commonly limited to eight weeks pay.

In cases of plant closings or technological changes that result in mass layoffs or dismissals, the employer is not legally required to notify or consult with the union. In the words of the Supreme Court, these decisions “go to the core of entrepreneurial control,” and management can ignore the interests of the employees dislocated in such cases. If the enterprise is transferred to another employer, the employees have no right to continued employment, for the successor has no obligations under the collective agreement. The successor may simply refuse to hire any or all of

13 Id. at 60:181.
14 Id. at 53:2.
the old employees and may replace them with an entirely new workforce, even though the operations of the enterprise remain unchanged.\textsuperscript{17}

Seniority provisions give the employees as a group no protection against dislocation. They require that reductions in the workforce be made according to seniority, but they serve only to identify who shall work in the remaining jobs. They provide job security to the senior employees at the expense of the junior employees. These provisions place no limits on the employer's freedom to determine how many shall work and to terminate those not wanted.

Seniority provisions may fail to preserve even the remaining jobs within the enterprise for the senior employees. Seniority gives employees a right only to jobs within their seniority units, and an enterprise may have several separate seniority units. When one plant closes, an employee may have no claim to a vacancy in another plant of the same employer because seniority is commonly limited to single plants. Even departments in the same plant may be separate seniority units so that employees may be dismissed from one department while others are being hired off the street to fill vacancies in another.\textsuperscript{18}

Collective agreements can, of course, provide employees greater protection against dislocation. For example, collective agreements in the automobile industry provide guarantees of employment to present employees, require the employers to transfer dismissed workers to other plants, and to provide training or make other provisions for dismissed employees.\textsuperscript{19} Most employers, however, refuse to include such provisions in collective agreements. Provisions could also be included to require an employer, on transferring the business, to obligate the successor to assume the collective agreement; this, however, is rarely done.

The end result is that under most collective agreements, the employer's burden is little more than it would be if no collective


\textsuperscript{18} COLLECTIVE BARGAINING NEGOT. & CONT. (BNA) ¶ 75:11 (1992).

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agreement was in effect. The employer need not make an effort to mitigate or avoid dislocation. It is free to decide how many employees to dismiss and when. The employer is free to determine how much notice or severance pay it will give. It can move operators to other locations, free of seniority obligations, and terminate employees at an old location with no obligation to offer available jobs at the new location to the dislocated employees. It can sell the plant, and neither the employer nor its successor has any obligation to avoid dislocation by keeping employees in their jobs.

The way burdens of dislocation due to industrial change are distributed in the United States can be summarized in simple terms. Whether under employment at will or under most collective agreements, the employer bears little burden either in financial costs or freedom of operation. Except for the possible increase in its unemployment tax rate, the employer can be indifferent to the consequences of its actions on its employees. The major burden is borne by the dislocated workers in their loss of jobs and loss of income. Their financial loss is mitigated only in minor part by societal support through unemployment compensation, which amounts only to forty percent of a dismissed employee’s lost wages for a six month period.

A. United Kingdom

The British system of job security fundamentally differs from the American system. First, the British system has repudiated the common law doctrine of employment at will; all employees are now statutorily protected from unfair dismissal by the Employment Protection (Consolidation) Act of 1978. Any individual who is dismissed may appeal to an industrial tribunal on grounds of substantive or procedural unfairness. The broad standard of “fairness” requires only that the employer act reasonably in determining whether sufficient grounds for dismissal exist. This is “determined in accordance with equity and [the] substantial merits of the case.” Unlike arbitrators in the United States, the industrial tri-


bunal does not determine whether the employee's conduct provided just cause for the dismissal. Indeed, the tribunal does not determine whether the employee in fact engaged in misconduct. Instead, the tribunal determines only whether the employer reasonably believed that the employee engaged in misconduct, and whether the employer's resultant action was procedurally and substantially "within the range of reasonable responses" or within the "band of reasonableness." Although the statute provides for reinstatement, it is ordered in less than one percent of the cases, and the median monetary award is equivalent to about eight weeks of pay for the average manual worker.

The Act prohibiting unfair dismissal provides no protection from layoffs or terminations for economic reasons. The statute allows dismissal in cases of "commercial necessity" or for "sound business reasons," and the tribunal is not permitted to examine the subjective business discretion of the employer. In the words of the Employment Appeals Tribunal, "there could not and cannot be any investigation into the rights and wrongs of the declared redundancy."

The second significant difference from the American system is that British employers have various statutory obligations to give advance notice of dismissal. Whether dismissed for personal or economic reasons, employees not covered by a collective agreement must be given advance notice. This notice requirement ranges from one week for those employed for one month or more to twelve weeks for those who have been employed for twelve years or more. In addition, the employer must give those being dismissed two days off with pay to look for other work. Collective dismissals require additional advance notice. European Community Directive No. 75/129 on Collective Redundancies, implemented

22 Bob Hepple, Great Britain, in EMPLOYMENT SECURITY, LAW AND PRACTICE at 161, 166 (Roger Blanpain & Tadashi Hanami eds., 1994) [hereinafter EMPLOYMENT SECURITY].
25 Employment Protection Act, 1975, § 49 (Eng.).
26 Id. § 31.
27 See Roger Blanpain & Chris Engels, The European Communities, in EMPLOYMENT SECURITY, supra note 22, at 43, 43.
by the Employment Protection Act of 1975, requires that the employees’ representative be notified thirty to ninety days in advance of the decision to make a collective dismissal, and that the Department of Employment be notified thirty days in advance of such planned dismissal. The notice period thus is extended potentially to 114 days. Since the employer is required to provide continued employment during the notice period, the employee has substantial time to seek another job.

The third significant difference from the American system is that under Directive No. 75/129, the British employer is required to consult with the employees' representative before making decisions on collective dismissals. The employer must inform the employees' representative of the reasons for the projected dismissal, the number and categories of workers to be dismissed, the period over which the dismissal will be made, and the criteria for selecting the workers to be dismissed. The employer must do more than simply give the employees' representative an opportunity to comment; it must "consult with the workers' representatives with a view to reaching an agreement"—a very strong form of consultation which approaches the duty to bargain in good faith. This duty to consult with the union has added significance because the Industrial Code of Practice places an obligation on the employer to offer employees other suitable employment, stop recruiting, reduce overtime, and retire employees entitled to pensions.

The fourth difference from the American system is that in cases of collective dismissals that come within the definition of redundancies, the British employer is obligated to make redundancy or severance payments to the dismissed employees. These lump sum payments are scaled on the basis of age, length of service, and earnings. The payments range from one week to thirty weeks, with a weekly maximum of 205 pounds and a cumulative total of

28 Now Trade Union and Labor Relations (Consolidation) Act, 1992, §§ 188-198 (Eng.).
30 See generally Bercusson, supra note 24, at 311. For the legal affect of this code, see Employment Protection Act, 1975, sched. 17, ¶ 4(1) (Eng.); Anderman, Labour Law, supra note 21, at 157-58, 163.
6,150 pounds. Unions frequently negotiate for amounts above the minimum, and employers may offer individual employees more to encourage them to elect voluntary redundancy. When redundancy payments were introduced in 1965, the government rebated to the employer one-half of the redundancy paid. Presently, however, the entire cost is borne by the employer.

The fifth difference from the American system is that British employers are also bound by the European Community Directive on Transfer of Undertakings, Directive No. 77/187. This Directive ensures that the contract of employment and employment itself continue unchanged when a going enterprise is transferred. The individual contract of employment binds the successor employer to the extent that the employer can neither dismiss nor replace employees nor change the terms and conditions of their employment solely because of the transfer. Employees can be dismissed only for economic, technical, or organizational reasons resulting from changes in the workplace. The successor must also continue to observe the terms and conditions of employment on the same terms applicable to the transferor. Both the transferor and the transferee must inform the employees' representative of the reason for the transfer, its legal, economic, and social implications for the employees, and the measures envisaged for the employees. The transferor and transferee must consult in good time with the employees' representative on any measures relating to the employees with a view to seeking an agreement.

This Directive applies to transfers in any form, whether by sale of assets, sale of shares, or otherwise, so long as there is substantial continuation of the business activity and a retention of its functional identity. The satisfaction of these conditions is determined not by legal formalities, but by consideration of all the facts and circumstances surrounding the transaction.

In Britain, dismissed employees are entitled to unemployment compensation which consists of a flat rate plus an earnings-related supplement, which together represent about sixty percent of average annual wage. The employer's tax is not experience rated as in the United States, so the dismissal adds no burden to the responsible employer.

31 Employment Protection (Consolidation) Act, 1978, sched. 4 (Eng.).
32 HEFFLE & FREDMAN, supra note 20, at 176.
33 See generally Blanpain & Engels, supra note 27, at 43.
34 The specific British legal rules implementing the Directive are elaborated upon in ANDERMAN, LABOUR LAW, supra note 21, at 165-70.
It is evident that in Britain, in contrast to the United States, an employer responsible for a mass dislocation of workers bears a significant portion of the burden associated with that dislocation. Notice periods require the employer to continue employment for a substantial period up to nearly four months. The employer must negotiate with the employees' representative not only to reduce the number and impact of the dismissal by reducing overtime, but also to reduce the number dismissed and to find other suitable jobs in the enterprise. In addition, the employer is required to bear the substantial burden of severance pay.

At the same time, the shock and burden of dislocation on the workers is significantly less in Great Britain than in the United States. Employees are guaranteed a period of notice of up to sixteen weeks so that they may seek other work, start a business, or make other adjustments. Their severance award may amount to as much as thirty weeks' pay. Like American workers, British workers will receive unemployment compensation, but in a somewhat larger amount, and for ten months instead of six.

In short, in Britain, the burden of dislocation falls much more heavily on the employer and much less heavily on the dismissed worker. The burden on social funds through unemployment compensation is somewhat heavier because of the larger benefits.

B. Germany

Job security in Germany, as in the United Kingdom, is provided by law, and unlike in the United States is not dependent on the collective agreement. Additional protections may be provided by the collective agreement, but these are not of major importance.

The German dismissal statute declares dismissals which are "socially unjustified" legally void. The underlying premise of the statute, as contrasted with the American doctrine of employment at will, is that an employee has a right to continued employment. It can be terminated only upon the employer's
showing of "social justification." This premise, which views job security as a legal right, shapes the legal and social response to worker dislocation.

The requirement of "social justification" applies equally to individual dismissals for personal reasons and collective dismissals for economic reasons. Social justification for individual discharges roughly parallels "just cause" under American collective agreements, with the burden on the employer to show justification. Disputes as to justification are resolved by the labor courts. These courts give somewhat less protection than American arbitrators, and discharged employees seldom seek or are awarded reinstatement. However, because the employer must consult with the works council (the employees' elected representatives in the plant) before dismissal, the effective protection is much the same because the employer is much less likely to dismiss an employee when it knows in advance that the union will object.

Collective dismissals for economic reasons must also be socially justified; the employer must prove the details of the economic situation and the necessity for reducing the workforce. In practice, however, this does not significantly limit the employer's freedom to restructure the enterprise, relocate or close plants, or reduce the number of employees, for the labor courts will not second-guess the employer's economic decision so long as it appears to be made in good faith. There are, however, two important limitations.

First, the employer, in selecting which employees are to be dismissed must take "social aspects" into account. These include age, length of employment, marital status, family responsibilities, ability to find other work, and other factors in the social situation. In general, the principle is that those who would suffer most from dismissal should be the last to go; the focus is on the social justice to the individual.
Second, and most important, a dismissal is socially unjustified if another job is available in the enterprise, even in another location, which the employee can fill with reasonable schooling or training provided by the employer. If a plant or operation is moved to a new location, the employees are entitled to move with the work.  

Third, dismissals, though socially justified, may be void if the employer fails to give the required notices. In all dismissals, whether individual or collective, the employer must first consult with the works council. The employer must inform the works council of who is to be dismissed, the reason for the dismissal and the date, and all other information needed by the works council to determine the appropriateness of the employer’s action. If the works council declares a reservation or objects, which it does in only fourteen percent of the cases, the employer can still dismiss. In many such cases, however, the works council’s action will lead the employer to withdraw the dismissal.

After the works council has been consulted, each individual to be dismissed must be given written notice. The minimum notice period is four weeks for all employees who have passed the probation period of six months, and ranges from two months for employees with six years of service to eight months for those with twenty years of service. In cases of misconduct, or where there are other urgent reasons, including severe economic circumstances which make it intolerable to continue the employment relation, employees may be dismissed without notice.

In cases of collective dismissals in firms of more than twenty employees, after consulting with the works council, the employer must notify the State Labor Exchange at least thirty days before the dismissals take effect. The Labor Exchange has the power to delay the dismissals for up to two months, but may order short time work during that period to reduce the burden on the employers.

45 Weiss, supra note 41, at 146.
44 Weiss, supra note 37, at 89.
45 Id.
47 Weiss, supra note 41, at 145-46.
48 Id. at 148-49.
The unique and significant instrument in the German system for dealing with worker dislocation is the "social plan." If an employer with twenty or more employees plans a change which will materially disadvantage a substantial portion of the workforce, such as restructuring jobs, introducing new production processes, closing part or all of a plant, or transferring operations, the works council must be informed "in full and good time." The employer and works council are to work out a "compromise of interests" for accomplishing the change; if they are unable to reach an agreement, the works council can enforce a "social plan" by submitting the dispute to an arbitration committee for a binding decision.

The social plan can cover all aspects of adjusting the workforce: timing and stages of the change; transferring employees to other work or locations, including retraining and moving or travel expenses; supplementing reduced earnings; providing early retirement for older workers; identifying surplus workers to be dismissed; and assisting employees in finding jobs in other companies within the concern or in unrelated companies.

The most important part of the social plan is determining severance pay for each worker who is to be dismissed. Severance pay is generally based on length of service, age, and rate of pay. The works council also considers the financial resources of the employer. In a financially healthy enterprise, severance pay may be equivalent to one year’s pay for an older employee with fifteen years service or one month’s pay for a younger employee with two years of service. In a financially weak enterprise, the severance pay may be less than half that amount, since one consideration in determining severance pay is what amount the employer can afford to pay and still continue operations.
Employer poverty, however, does not excuse the obligation to develop a social plan and pay severance pay. The arbitration decisions reflect a strong social sense that employees should receive some compensation, however meager, for dislocation from their job. There is also an accepted view that an enterprise unable to pay such compensation will not long survive in any case, and the employees have a claim to share in the assets.

In Germany, as in the United Kingdom, employees are protected if the enterprise is transferred, for the Directive on Transfer of Undertakings is equally applicable. The employer must inform and consult with the works council prior to the transfer, and individual employment rights and collective bargaining agreements continue unbroken. The length of service used in measuring the right to notice or severance pay includes the combined employment both before and after the transfer.

Unemployment compensation for dismissed workers is substantially better in Germany than in either the United States or the United Kingdom. Benefits are normally sixty-eight percent of net pay for a one year period. However, those over fifty years of age can draw benefits for twenty-six months and those over age fifty-four for thirty-two months. Thus, employees who have not yet reached fifty-eight and are dismissed can collect unemployment compensation until sixty and then take early retirement with full benefits. Retirement benefits until the normal retirement age of sixty-three must be paid by the employer. The unemployment compensation is paid from a fund provided by equal contributions from employers and employees and is not experience rated.

The German system, based on the premise that an employee has a right to continued employment, provides employees substantially greater protection against dislocation than the system in the United Kingdom. Notice of dismissal gives the employee more than double the time to seek other work or start a business. The Labor Court will inquire into the justification for economic dismissals and will require, in particular, that the dismissed employp--

53 Even bankruptcy will not prevent responsibility for developing a social plan. See generally VOLKMAR GESSNER & KONSTANZE PLETT, DER SOZIALPLÄNE IM KONKURS-UNTERNEHMEN (1982).
54 ABRAHAM & HOUSEMAN, supra note 52, at 24.
ees be offered available jobs in the enterprise and that they receive some education and training to qualify for these jobs. Social plans give dislocated employees significant benefits in getting relocated to other jobs and also provide severance pay substantially greater than redundancy payments in Britain.

All of these benefits reduce the burden of dislocation on the employees and shift it to the employers. The employers' freedom of action is significantly circumscribed: the ability to close down operations is delayed by requirements of notice, the Labor Exchange can postpone action for two months, and the employer is required to consult with the works council. The employer must transfer and train employees for available jobs in the enterprise and, under a social plan, may be required to help employees get relocated in other enterprises. In addition, the employer may have heavy financial obligations for severance pay.

In short, substantially more of the burden of dislocation is shifted from the employees to the employer in Germany than in Britain. Also, because the benefits in Germany are more than double those in Britain, unemployment compensation shifts more of the burden from the employees to social funds.

C. Sweden

Until 1974, Swedish workers had no legally protected job security—employment was at will. Although almost all workers were covered by collective agreements, until the 1960s few agreements included protections against dismissal; the Swedish Employers' Federation insisted that all agreements by its members provide that "the employer is entitled to direct and distribute the work, to hire and dismiss workers at will and to employ workers whether organized or not." This historical pattern was turned upside down by legislation in the 1970s.58

The Employment Security Act of 1974 was based on the policy that the employer has a social responsibility for employees and that employees have a certain right to continued employment.59 It provides that all dismissals, both individual and collective, must be based on "objective cause." These words, as applied by the

57 See generally Axel Adlercreutz, Sweden, in 11 INTERNATIONAL ENCYCLOPAEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS (Roger Blanpain ed., 1990) [hereinafter INTERNATIONAL ENCYCLOPAEDIA].
58 Summers, supra note 3, at 515-17.
59 Adlercreutz, supra note 57, at 112.
Labor Court, give individual employees who are dismissed for personal reasons somewhat greater protection than that given by arbitrators under "just cause" clauses in American collective agreements.\footnote{Id. at 113-14. See generally LARS LUNNING, ANSTÄLLNINGSSKYDD (1984).}

Shortage of work counts as an "objective cause," and the Labor Court's inquiry is limited to whether there really is a shortage or merely a pretext. The employer, however, retains control over the business decisions of the number of employees needed and with what qualifications.\footnote{Adlercreutz, supra note 57, at 113-14.}

An employee cannot be dismissed for lack of work if the employer has other available work for which the employee is qualified. The employer must investigate whether a transfer is possible and make its best effort to find a suitable job, including some restructuring of the job duties to fit the employee's ability.\footnote{A. Victorin, Sweden, in RESTRUCTURING, supra note 29, at 85, 90.} The employer is required to train the transferred employee, but only to the extent it would train a newly hired employee. However, government subsidies are available for employers who provide in-plant training for available work.\footnote{Id. at 91.}

An employee can be dismissed only after notice, except in cases of very serious misconduct where no other solution is available. The minimum notice period for dismissal is one month, which increases according to the age of the employee, not the length of service. For instance, a twenty-five year old employee is entitled to two months' notice, while a forty-five year old employee is entitled to six months' notice.\footnote{Id. at 91.} The purpose of notice is to give an employee time to find other work or to visit the unemployment exchange. During this period, the employee is entitled to time off with pay.\footnote{Employment Protection Act, § 11 (Swed.).}

Before giving an employee notice of dismissal, the employer must inform the union. The minimum period of forewarning in cases of collective dismissal for lack of work is one month. Additionally, under the Codetermination Act of 1976, the employer must negotiate with the union concerning alternatives to dismissal and, if dismissal is granted, how it will be scheduled. These negotiations may take more than a month because they may be moved...
from the local union level to the national level. If no agreement is reached during these negotiations, the employer can implement its decision.\textsuperscript{66}

In addition, the employer must notify the County Employment Board either when negotiations with the union begin or, depending on the number of employees to be affected, two to six months in advance. The purpose of this notice is to enable the Board to make plans for placement or training and for other measures to relocate the dismissed employees. It has the effect of requiring the employer to continue employment and give the employees added time to make adjustments.\textsuperscript{67}

When there is a shortage of work, dismissals are determined by the seniority of employees covered by the collective agreement. Seniority also governs the right to be recalled for available work during the year after dismissal.\textsuperscript{68} This statutory rule may be modified by agreement between the union and the employer. In many cases, the union agrees that senior workers nearing retirement age may be dismissed first, reasoning that those workers will receive unemployment compensation until they are entitled to a pension and, therefore, suffer less than younger employees.\textsuperscript{69}

Dismissed employees obtain a wide range of government support to reduce the consequences of dislocation—generous unemployment compensation is but the beginning. Unemployment benefits amount to about eighty percent of net pay and are payable for 300 days. Employees over fifty-five, however, are entitled to benefits for 450 days,\textsuperscript{70} with early retirement available at age sixty. As a result, those who are dismissed after age fifty-eight suffer no break in social payments.

In addition, the government has numerous programs designed to reestablish the unemployed in the labor market.\textsuperscript{71} Benefits may

\textsuperscript{66} Id. § 29; Victorin, supra note 62, at 90, 95-99.
\textsuperscript{67} Employment Protection Act § 30 (Swed.); Victorin, supra note 62, at 100.
\textsuperscript{68} Employment Protection Act §§ 22-29 (Swed.); Victorin, supra note 62, at 92-95.
\textsuperscript{69} Lena Gonäs, Labor Market Adjustments to Structural Change in Sweden, in LABOR MARKET ADJUSTMENTS TO STRUCTURAL CHANGE AND TECHNOLOGICAL PROGRESS 180, 183 (Eileen Appelbaum & Ronald Schettkat eds., 1990).
be available for unemployed persons to start businesses of their own, the benefits being treated as a substitute for unemployment benefits. Anyone willing to move to an area where jobs are available may obtain a traveling allowance, moving expenses for the family, and a guarantee of housing. The government also operates an extensive retraining program which is available to the unemployed. During the training period, the person receives a stipend corresponding to the unemployment compensation benefit, but the stipend may be extended after the benefits would have expired. Those seeking work are aided by a comprehensive nationwide job placement service, with which employers are required to register all vacancies; these vacancies are then made available to the unemployed on computerized lists.

“Relief work,” which is commonly work in hospitals or local government operations, serves as a safety net. The work is generally available to those whose unemployment benefits have expired. Relief workers customarily work half-time and are paid regular hourly rates. The importance of retraining and relief work is that often as many workers are enrolled in these two programs combined as are collecting regular unemployment compensation.

The most unique feature of the Swedish system in dealing with the problem of worker dislocation is what can only be described as nongovernmental social funds. If employees are temporarily laid off, the employer must continue to pay full wages. The employer, however, is entitled to compensation from a special fund established by collective agreement between the Confederation of Swedish Employers (SAF) and the Swedish Confederation of Trade Unions (LO). The fund is supported by contributions from employers based on payroll and by contributions from the state for each day of layoff. The fund, which covers practically all blue-collar workers, is administered through AMF, a company established by the parties.

Severance pay, financed by employer contributions based on payroll and administered by AMF, is also provided to blue-collar workers by collective agreement between SAF and LO. The amount of severance pay is based on age and length of service, not earnings. It ranges from a minimum of 5,200 Swk ($710) for

72 GINSBURG, supra note 71, at 129-31.
73 Adlercreutz, supra note 57, at 118; Victorin, supra note 62, at 107.
those who are under age forty, to a maximum of 48,950 Swk ($6,653) for those over age sixty.\textsuperscript{74}

Severance pay for salaried employees is paid from a separate fund established by collective agreement between SAF and a cartel of white-collar unions (PTK), again supported by employer contributions based on payroll. The Employment Security Council, created by this agreement, funds a variety of programs to aid dislocated salaried employees. These include subsidies to employees for travel and moving expenses in taking new jobs; education and training for new jobs; payment of salary differentials for up to six months if a new job has a lower salary; training and consultation in starting a business; and grants which cover living costs during the start-up period.\textsuperscript{75}

The Swedish system, in distributing the burdens of dislocations, has two marked characteristics which distinguish it from other systems. First, dislocated employees are given much more help in obtaining new employment than employees in other systems. The extensive programs for education and retraining enable employees to qualify for new jobs as technology advances. Comprehensive listing of vacancies enables them to find jobs for which they can qualify, and travel or moving allowances enable them to relocate to where those jobs are available. Additionally, they can obtain aid in starting businesses of their own. The Swedish system emphasizes using every means to get those dislocated workers reemployed. Second, the major burden of employee protections and benefits is borne through social funds, not placed on the particular employer whose employees are dislocated. The employer must give dislocated employees priority to any vacancies, but the employer is not required to retain any more employees than needed or to transfer an employee who is less qualified than a person who would be hired as a new employee. However, any retraining which may be required is subsidized from social funds. All labor market programs—education, job training, placement, relocation, and relief work—are supported either by public funds or private collective funds provided by employer contributions based on

\textsuperscript{74} B\textsc{j}örklund et al., \textit{supra} note 70, at 119-21. A 50 year old worker receives approximately one month's salary in severance pay. But if he is unemployed, seeking work, and goes through retraining, he may receive an additional amount up to four months' severance pay. \textit{Id.}

payroll. Unlike Germany or Britain, severance pay in Sweden is provided by private social funds, not by the particular employers who have made the dismissals.

D. Japan

Article Twenty-Seven of the Japanese Constitution declares the right to work a fundamental human right. This has been interpreted as placing on the government an obligation to try to provide jobs for anyone willing to work. The law and practice of job security reflects this social principle.

Protection against dismissal, individual or collective, is not the product of legislative action, but of judicial decision. Applying the basic civil law principle of abuse of right, the courts have held that dismissals without an "objectively and socially reasonable cause" are legally void and require reinstatement of the dismissed employees. Under this standard, individual employees dismissed for personal reasons receive substantially more protection than employees under collective agreements in the United States.

The same general standard applies in collective dismissals for economic reasons; reduction in the workforce is justified only if business conditions make dismissal unavoidable. The court, in deciding whether the dismissals are necessary, will examine the business situation in detail. Some courts hold that unavoidability exists only if failure to dismiss will inevitably lead to business failure. More often, findings that dismissals are not necessary are based on contradictory actions of management, such as granting large wage increases, hiring new workers, or paying high dividends.

If reduction in force is necessary, the employer is obligated to use every effort to achieve this reduction without dismissing employees. This includes eliminating overtime, transferring employees within the enterprise, farming out employees to related companies,

\[\text{Source: Tadashi Hanami, Labour Law and Industrial Relations in Japan, 152-69 (1985).}\]
\[\text{Id. at 85.}\]
\[\text{Matsuda, supra note 78, at 184. See also Kazuo Sugeno, Japanese Labor Law 403 (Leo Kanowitz trans., 1992); Douglas Anthony, Japan, in Managing Workforce Reduction, supra note 42, at 91, 118.}\]
\[\text{Sugeno, supra note 79, at 408.}\]
soliciting voluntary retirement, laying off temporarily with pay, and placing employees in a training program. Implicit in these limitations on dismissal is acceptance that workers have a claim to continued employment and that the enterprise should share the burdens imposed by economic conditions and technological changes.

These legal rules reflect in large measure the institution of lifetime employment—a concept which has no explicit legal recognition. While lifetime employment exists in full flower only in large enterprises of 500 or more employees, its underlying principle influences employment practices in many smaller enterprises. The legal rules, however, apply to all employment.

Lifetime employment effectively creates two classes of employees. In large employers, seventy percent or more of the employees may be classified as "regular" or permanent employees. The rest may be classified as "temporary," though they may in fact continue for several years under repeatedly renewed short-term contracts. Or some employees may be classified as "part time," even though they regularly work overtime. In addition, employees of subcontractors may perform substantial portions of the work. These nonregular workers may be accurately described as "buffer employees" or "shock absorbers." If reduction of the workforce is unavoidable, these workers are the first ones dismissed. They receive only limited legal protection.

The lifetime employees who remain enjoy maximum protection against dismissal. Overtime work is eliminated, and because substantial overtime is customary, this elimination results in worksharing among lifetime employees with a reduction in pay. Employees are transferred to other jobs or placed in education or training programs. Surplus employees may be farmed out to related companies on a temporary basis, retaining their employment status and salary with any difference in salary made up by their regular employer. Or they may be moved out, becoming regular employees of the second employer. Employers do not use tem-

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81 Id. at 408-09; James A. Orr et al., U.S. Dep't of Labor, United States-Japan Comparative Study of Employment Adjustment 26 (1985); Tadashi A. Hanami, Japan, in Employment Security, supra note 22, at 189, 200.


83 In a recent nationalization program, Nippon Steel permanently transferred 4,000 employees to subsidiaries and affiliates. Nippon will pay the difference in wages until the
porary layoffs without pay, but the plant may be closed for weeks or months with the employees receiving "nonduty pay," which usually amounts to eighty percent of regular pay.\textsuperscript{84}

If all of this is not enough, reductions in the workforce may be achieved by voluntary retirement, with employees collecting lump sum severance or retirement pay, which is usually one month's pay for each year of service.\textsuperscript{85} The employer may solicit "voluntary" retirement with a "tap on the shoulder" and a friendly suggestion that the employee should retire. Among the first to be solicited will be the older workers approaching normal retirement age. Because salary progresses with age, these are the most costly employees and are generally considered the least productive.\textsuperscript{86} Also, they will be entitled to substantial retirement pay, which will ease the termination. The employer will also solicit some younger workers in whom the employer has less invested in training and who, it is reasoned, have the greatest potential for finding other employment. Those solicited will be the ones who are least productive or who are considered to have the least long term potential.

These measures are usually sufficient to avoid dismissal of lifetime employees. After the oil shock in the 1970s, shipbuilding was reduced by fifty percent, but by using these devices no workers were dismissed outright.\textsuperscript{87} During the same period, the steel industry cut back its production thirty percent. The large companies accomplished this with no dismissals, but smaller companies had to resort to some dismissals and early retirement.\textsuperscript{88}

Lifetime employees are dismissed outright only as a last resort. The employer decides who should be dismissed, usually after consulting the union. The employer must establish objectively reasonable standards, including job performance, absenteeism, seniority, and low economic impact on persons below thirty years of age.\textsuperscript{89}

\textsuperscript{84} For a description of this process, see Anthony, supra note 79, at 110-17; Orr et al., supra note 81, at 26, 37-47.
\textsuperscript{85} Orr et al., supra note 81, at 40-41, 44.
\textsuperscript{86} Masanori Hashimoto, The Japanese Labor Market in a Comparative Perspective with the United States 47 (1990).
\textsuperscript{87} Orr et al., supra note 81, at 86-90.
\textsuperscript{88} Id. at 90-93.
\textsuperscript{89} Sugeno, supra note 79, at 409.
The employer can use the multi-factor test to dismiss many of the same employees who would be solicited to retire voluntarily.

The lifetime employment system, or what might be better described as the practice of avoiding dismissal of regular employees, is reinforced by government subsidies through the Employment Stabilization Fund, created to stabilize employment during periods of business fluctuations and restructuring. If any employer closes down temporarily, the Fund reimburses the employer for a substantial portion of the "nonduty pay" for up to seventy-five days—one-half for employers of more than 300, and two-thirds for employers of less than 300. The Fund will also reimburse the employer for educating and training employees and paying them normal wages during periods of business adjustment.90

Only large employers can make use of all of these measures for protecting regular employees from dismissal. Small employers may not have subcontractors who can be terminated or affiliated firms to take "farmed out" or "moved out" employees. They do, however, attempt to protect regular employees by using temporary or part-time employees to the extent possible, and they make greater use than large employers of subsidies for temporary shutdowns.

Employees who are dismissed are entitled to unemployment compensation benefits of sixty to eighty percent of lost wages, depending on earnings. Benefits continue for 90 to 300 days depending on age and length of employment under the system. Workers undergoing vocational training may be given an extension of ninety days and may receive in addition training and lodging allowances. Unemployment compensation and the Employment Stabilization Fund are financed by a tax on payroll shared by the employer and the employees, with subsidies from general taxation.91

In summary, the burden of worker dislocation in Japan rests most heavily on the so-called temporary and part-time workers, who are predominantly women. They are the ones first displaced and have no recourse except unemployment benefits. Little effort is made to preserve their jobs, find them other jobs, or otherwise soften the shock of displacement.92 Lifetime employees bear a

90 Hanami, supra note 76, at 91.
92 Linda N. Edwards, Equal Employment Opportunity in Japan: A View from the West, 41 Indus. & Lab. Rel. Rev. 240 (1988). In part, this is the result of women dropping out
limited burden when the firm reduces overtime and promotes "voluntary" retirement, which comes with substantial severance pay. They may be transferred to another location or "farmed out" to another employer, but bear no loss of earnings or employment status. All possible measures are taken to avoid their dismissal. As a result, they are seldom dismissed.

While the employer has relatively little burden in dismissing temporary and part-time employees, the employer has a very heavy burden in retaining lifetime employees. The employer must attempt to find other jobs for surplus lifetime employees, and if they are "farmed out" must make up the difference between their normal pay and their pay on the substitute job. The employer cannot lay off lifetime employees temporarily, and if the employer closes down temporarily, it must pay one-half or one-third of the "no duty pay." In addition, the employer is under heavy social pressure and moral obligation, as well as legal obligation, to retain regular employees even though they may not be needed and to dismiss them only when the cost is too heavy to bear. If dismissal is unavoidable, the employer must provide a substantial lump sum severance payment.

The burden borne by social funds is less than that in Sweden, but more than that in the other countries. Unemployment benefits are quite generous, and they must be paid to the temporary and part-time workers who have borne the burden of reduced employment. In addition, the social funds pay one-half to two-thirds of the "no duty" wages paid during temporary shut-downs and the same fraction of the regular wages paid employees in education and training programs during periods of dislocation. These latter subsidies reduce the employer's burden of maintaining the principle of lifetime employment by making possible temporary shut-downs when there is insufficient work for regular employees.

E. Summary

The comparison among the five countries as to how the burdens of worker dislocation are distributed between the dislocated worker, the employer, and social funds, can be summarized in rather broad terms.

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93 HANAMI, supra note 76, at 91; Anthony, supra note 79, at 123.
In the United States, the burden is almost wholly on the dislocated worker, and almost none is on the employer. The worker can be, and commonly is, laid off with little or no notice and with no severance pay. The employer has full freedom to act, including temporarily laying off employees when there are only minor fluctuations in business. Even where there is a collective agreement, the employer may have no obligation to give dislocated employees vacant positions or provide any training for vacancies. The United States is the only country in which an employer can close a plant without consulting the employees’ collective representative and have no obligation to the dislocated employees. Social funds lighten the employees’ burden only with meagre unemployment compensation benefits, which are the lowest of the five countries examined, amounting to only half of the benefits in Sweden and Japan.

For Japanese lifetime employees, the distribution of the burden is the polar opposite of that in the United States. Their income may be reduced by loss of overtime, but they are largely immune from dismissal. The employer must exhaust all possibilities of avoiding dismissal through the use of transfers, “farming out,” temporary layoffs with “no duty” pay, and training programs with full pay. Employers retain unneeded employees even though the employers are suffering losses. When, as a last resort, lifetime employees are dismissed, they are paid substantial severance pay. Temporary and part-time workers, however, have little more protection than American employees. Finally, in Japan a larger share of the burden is borne by social funds, with much more substantial unemployment benefits and subsidies for temporary layoffs and training programs.

In Britain and Germany, the burden is shared between the displaced employee and the employer. The employee must be given substantial notice, has a right to transfer to vacant positions, and, when dismissed, may claim severance pay for redundancy in Britain and under a social plan in Germany. All of these protections for employees and the corresponding burdens on employers are somewhat greater in Germany than in Britain, particularly under social plans which may be subject to arbitration. The primary burden on social funds is unemployment compensation, which is more generous in Germany than in Britain.

In Sweden, the burden of dislocation is shifted heavily from the particular employer to social funds, both public and private. The employee is entitled to substantial notice, and the employer
must attempt to make other work available, and there is limited severance pay. Public and private social funds provide severance pay, financial support for relocation and reduction of earnings in other jobs, aid in starting a business, extensive job training and education programs, and a variety of other aids toward reemployment. All of this is undergirded by unemployment benefits, which replace eighty percent of earnings for up to nearly three years.

II. DISTRIBUTION OF THE EMPLOYEE'S BURDEN

The Japanese system, with its gulf between regular or lifetime employees and the so-called temporary or part-time employees, calls our attention to a second level of allocation. To the extent that the burden of dislocation is placed on the dislocated employees, who among the workforce bears that burden?

In Japan, the heavy burden of dislocation and unemployment is placed on those outside the lifetime employment system—the temporary and part-time employees who serve as a buffer to protect the job security of lifetime employees. Currently, these are predominately women, who are largely excluded from lifetime employment. A second and smaller group consists of those selected by the employer to "voluntarily" retire or who are compelled to retire—predominately older workers over age fifty.94

In the United States, the burden is distributed among employees in quite a different way. If there is a collective agreement, seniority generally controls and the burden falls most heavily on younger workers. However, in major restructuring, plant relocations, or plant closings, the burden falls on all those whose operations are closed down, for there is generally no seniority rights in other operations or in a relocated plant. In those cases, the heavier burden is again on the older workers who lose more seniority and who will find it more difficult to get other jobs.

94 Those who are retired do not leave the labor market. They normally continue working, sometimes at the same job, but at substantially less pay and with no job security. HASHIMOTO, supra note 86, at 50. Measures to promote employment of middle aged and older workers include a quota system for hiring older workers and various subsidies for their employment. HANAMI, supra note 76, at 92; Erin E. Lynch, Late Life Crisis: A Comparative Analysis of Social Insurance Schemes for Retirees of Japan, Germany and The United States, 14 COMP. LAB. L.J. 339, 351-353 (1993). Seventy-three percent of firms have programs for continued employment of retired employees. Seventy-five percent of workers over 60 remain in the labor force and 56.5% of those over 70. The Employment of Older Workers in Japan and Policies to Promote It, JAPAN LAB. BULL., Dec. 1994, at 5.
If there is no collective agreement, the employer decides who shall go and has the freedom to be completely arbitrary in layoff decisions, so long as it does not violate laws prohibiting discrimination against minorities, women, and older workers. In practice, the general principle of seniority is loosely followed so the pattern is not significantly different from that under a collective agreement, except that employees who are considered poor workers may be the first to be laid off.

Swedish law, with statutory seniority, allocates the burden among employees in much the same way as the American system. However, statutory seniority can, and often is, varied by collective agreement, depriving those over fifty-eight of seniority and forcing them into early retirement. As a result, the heavier burden falls on the oldest and youngest workers.

In Germany, dismissal is not based strictly on seniority but also on social considerations, which take into account a variety of factors including productivity and family responsibilities. The use of multiple factors with no established weight of relative importance gives the employer a free hand in selecting those to be dismissed. With productivity and family responsibilities among the prescribed factors, the employer can favor the younger and middle-aged workers over older workers who are considered less productive and who no longer have children to support. The works council usually does not object to the employer’s choice. This tendency is encouraged by the availability of unemployment benefits for those fifty-eight years of age until they reach early retirement at age sixty.

Superimposed on the rights under the dismissal law are the benefits of the social plan, with the primary benefit being a lump sum severance payment ranging from one month to two years’ pay. The amount of the payment is based almost entirely on a combination of wages, length of service and age (up to age sixty), and is payable regardless of whether the employee finds another job. Younger employees, particularly those under age thirty, receive small benefits, and if they remain unemployed for a substantial period may suffer an economic loss. Employees who are sixty or over receive nothing, have little chance of finding a job, and are forced into retirement. The large payments go to the middle aged employees of long service whose experience makes them most employable. They may enjoy a net gain.

The British Employment Protection Act provides no standard for selecting the employees in collective dismissals, leaving the
employer free to choose so long as the selection is reasonable. Collective agreements generally provide for last-in-first-out, and redundancy payments are scaled by age and length of service, placing the heavier burden on younger employees. Workers of long service who are able to find other employment and older workers approaching retirement may, with the combination of redundancy payments and unemployment benefits, find redundancy attractive. Employers often supplement the payment to obtain voluntary redundancy of older employees, thereby reducing the dismissal of younger employees. The end result, however, is that the burden of involuntary termination falls more heavily on the younger workers.

Worksharing may significantly change the distribution of the burden among employees by reducing or avoiding dismissals. Worksharing takes several forms and may be encouraged or discouraged by payments from social funds. In Japan, worksharing takes the form of elimination of overtime and reduction of bonuses. Substantial overtime is customary, partly because the small overtime premium provides little disincentive and partly because it deliberately provides "a sort of invisible work force" which serves as a cushion for business fluctuations. Bonuses, averaging about one third of regular pay, provide an additional cushion. Temporary shutdowns are also used to avoid dismissals and to distribute the burden equally. The substantial subsidy from social funds encourages this worksharing method.

In Germany, worksharing takes the form of "short time," working less than the normal work week, and is used to a significant degree in situations of economic crisis. The government

95 The overtime premium is only one-third, and overtime payments are not included in calculating the semi-annual bonus. Where the bonus amounts to one-third of regular pay, the pay for overtime hours is the same as for a regular bonus. Where the bonus is greater, as it often is, overtime hours cost less than regular hours.

96 Suwa, supra note 78, at 32.

97 Kazutoshi Koshiro, Bonus Payments and Wage Flexibility in Japan, in LABOR MARKET FLEXIBILITY, supra note 19, at 45, 49-50; HASHIMOTO, supra note 86, at 84.

98 ABRAHAM & HOUSEMAN, supra note 52, at 86-91; Weiss, supra note 41, at 146-47. The 1994 metal working agreement allows works councils to reduce work to 30 hours as an alternative to redundancies. This has avoided an estimated 50,000 redundancies. Worksharing for 500,000 Engineering Employees, EUR. INDUS. REL. REV., Oct. 1994, at 6. Coal mining adopted a four-day week to save 10,000 jobs. Four-Day Week to be Introduced in Mining Company, EUR. INDUS. REL. REV., Jan. 1994, at 8. The steel industry instituted a 35 hour week to save jobs. 35 Hour Week Brought Forward in Steel, EUR. INDUS. REL. REV., May 1994, at 6. As of the end of 1992, prior to the institution of these short times, 500,000 workers were on short times.
encourages this worksharing method by paying unemployment benefits in proportion to the short time. In Sweden, temporary layoffs are prohibited, and the employer must pay full wages or dismiss the employee. However, employers may institute short time, pay the employees full pay, and obtain reimbursement for a limited time in an amount equal to unemployment benefits.

The United States has no consistent pattern. Unemployment compensation laws in some states discourage reduced work weeks. For example, employees who earn any money on four days during the week may be denied benefits for that week. Additionally, employees earning more than a certain amount receive reduced benefits. Other states provide pro rata benefits for short work weeks. Unions almost uniformly oppose worksharing, even when employees receive pro rata unemployment benefits. Senior workers claim that their seniority entitles them to all of the available work. In nonunion establishments, the practice varies with some using short work weeks while others do not.

III. IMPLICIT SOCIAL VALUES

The preceding discussion has mapped out the differences in the way these five countries distribute the burden of worker dislocation. We now come to the elusive question of why these differences exist. The distribution of these burdens is largely a matter of social choice. To answer the question “why,” we must search out the implicit social values which underlie or are expressed by the different choices. This can give us a better understanding of the other societies, but also a deeper insight into the values of our own society. These values are seldom explicit, are often deeply buried, and may not be entirely consistent in their complexity. We may easily misunderstand the values implicit in another society of which we have limited knowledge and less experience. We may also misperceive the implicit values in our own society because our closeness dulls our awareness and distorts our view. To obtain the full value of comparison, however, requires that we try; the following are tentative conclusions drawn from the descriptions presented.


100 ABRAHAM & HOUSEMAN, supra note 52, at 134-39.
A. The Right in a Job

The statement that employees have "property rights" in their jobs simply expresses the reality that society places such value on a worker's security in his job that it will protect him from being deprived of it unnecessarily.

American law denies the existence of any property right in a job; under employment at will, an employee may be deprived of her job without notice and without cause. Labor is a commodity, and the worker is simply a seller of that commodity, hour by hour, day by day, with no right to continued employment. Recent judicial incursions in this doctrine betray dissatisfaction and signal an effort by some judges to find a legally protected interest, but employment at will remains the dominant doctrine in the law.

American ambivalence toward this social value is apparent from the nearly universal presence in collective agreements of protection against unjust discharge and seniority provisions, which give employees a vested interest in their jobs. In the collective bargaining sector, this is viewed as more than a property right, but as a right to industrial life, with discharge being characterized by workers as "capital punishment." Collective bargaining, however, covers only one-eighth of the private sector; employers, even those who have collective agreements, vigorously oppose any legal protection, and proposed legislation lacks effective political support.

The value of workers being secure in their jobs is recognized in all of the other countries discussed. For example, the German dismissal statute proceeds from the premise that an employee has a legal right to continued employment and that the employer can dismiss only on a showing of "social justification." In Britain, prior to 1970, employment was at will, subject only to reasonable notice. This was so repugnant to the workers' sense of justice that strikes were regularly used to assert job rights. The Employment Protection Act sought to meet this problem by legally protecting the workers' right not to be unfairly dismissed, thereby ratifying the workers' view of property rights in a job. Even Japanese temporary workers are protected from unreasonable dismissal. A property right in a job is implicit in the right of a redundant employee to transfer to a vacant position in the enterprise, even though that may require training and readjustment of job duties. This right is recognized in various forms in each of the other three countries.
It does not exist in American law and has only limited recognition in collective agreements.

Severance pay is also an implicit recognition of a property right in a job. Under German social plans, severance pay is scaled to the length of service, and the employee is entitled to the full amount even though she has another job waiting and suffers no loss of earnings. The rationalization is that the severance payments compensate for being separated from the job and that this property right becomes more valuable with longer service. British redundancy payment and Japanese severance or retirement pay are also scaled to the length of service, not loss of earnings—implicitly treating the job as a property right of increasing value. Because the right to continued employment is socially valued, the employee is entitled to pay for severance from the job. Again, this value gets scant recognition in the United States, even under collective agreements.

B. The Right to Work

Sweden goes beyond mere protection of the right to continue in a present job; it views the right to work, the right to be a productive member of society, as an affirmative social right. The articulate social policy is to avoid the psychological and social costs of workers not having productive work.¹⁰¹ Severance pay is not used to compensate dislocated employees for loss of their jobs. Rather, resources are directed primarily toward getting workers reemployed. Large amounts of social funds support extensive education and training programs for the unemployed, services enabling them to locate and qualify for new jobs, loans to help them start their own businesses, and relocation subsidies to enable them to move to new jobs. "Relief work," or public service jobs, is provided for those entering the labor market or otherwise unable to find other jobs. Paying unemployment benefits for not working is a last resort. Sweden spends two and a half percent of its GNP on its labor market policies—more than any other country and ten times that spent by the United States.

¹⁰¹ "As one Swedish official has observed, 'Swedes are not particularly religious, but one thing we do hold almost sacred is everybody's right to work.' . . . But full employment is not viewed solely in economic terms . . . . The goal is to enable everyone to live as a normal a life as possible and 'to reduce the risk of isolation, loneliness and alienation.' Work is considered the key to a normal life. In short, a job is considered a basic right." Ginsburg, supra note 71, at 122-23.
The Japanese Constitution declares the right to work as a fundamental human right. This has been interpreted as placing on the government an affirmative obligation to provide jobs for anyone willing to work. This principle stated constitutionally, however, seems to have played little explicit role in shaping Japanese social policy, perhaps because the low rate of unemployment has enabled dislocated employees to find other work. Germany places emphasis on job training for dislocated workers, though substantially less emphasis than Sweden. The motivation, however, seems to be primarily economic, such as alleviating the wage loss, reducing the costs of unemployment benefits, and increasing production, rather than the importance of work for the fulfillment of the individual.

In the United States, social policy focuses almost entirely on providing the dislocated worker with minimal financial support until she can find another job. Job training programs, though numerous, are transitory and provide training for only a small fragment of the unemployed. The emphasis has been heavily on those seeking to enter the labor market, with nearly no attention to those displaced by technological or economic developments.\textsuperscript{102} The focus has been on the individual's obligation to find work, not on society's obligation to provide work. The right to have work has no effective recognition as a social value in the United States.

C. Employer's Right to Control

In the United States the employment at will doctrine gives the employer unbounded right to control the employment relationship. In the area of job security, the law has placed few limits on this right other than prohibiting discrimination on the basis of race, creed, nationality, sex, age, and disability. The employer is free to reduce the workforce and decide who shall be dismissed. The employer can displace one worker with another, dismissing those working and hiring new employees from the street: The employer can dismiss employees while requiring others to work overtime. The employer can restructure the workforce, eliminate departments, and close or relocate plants. Collective agreements,

where they exist, place significant limits on employer control. However, some decisions, like plant closures, are legally protected management prerogatives. Employer control is the dominant social value in the area of job security in the United States.

Employment at will doctrine is in sharp contrast to established principles in each of the other countries where it has been explicitly rejected. In those countries, employers cannot dismiss without just cause, hire from the street while dismissing employees potentially qualified to do the work, or dismiss employees while others work overtime. In Britain, Germany, and Sweden, employers are not limited in deciding what operations to conduct or how many employees are needed, but they are limited in dismissing employees when work is available and in selecting who can be dismissed if that dismissal is unavoidable. In Japan, and to a lesser extent in Germany and Sweden, the court may inquire into whether the dismissals are economically necessary. Employer control is a limited social value, overridden by the employee’s right in the job.

D. Employer’s Social Responsibility

Closely related to the employer’s right to control is the question to what extent the employer has a social responsibility for its employees. At one end of the spectrum is the American view, legally expressed in the employment at will doctrine. Law treats labor as a commodity traded on the market with no continuing obligations of the employer to its employees. The employer has no substantial legal obligation beyond providing a safe place to work and paying for the work performed. Collective agreements do not significantly change this relationship because employment remains an arms’ length transaction. To be sure, many American employers recognize some social responsibility toward their employees, but the law provides no protection from the competitive pressure of those who assume no social responsibility. The dominant operative value is that employers bear no social responsibility for their employees.

At the other end of the spectrum is the Japanese employers’ sense of compelling obligation to its permanent employees. It provides various buffers which will protect permanent employees’ jobs and keep them on the payroll even though they may not all be needed. Lifetime employees are not viewed as sellers of labor, but as full members of the enterprises for whom the employer has a
Employment is a symbiotic relationship with all employees members of the "family." The Japanese system, however, embraces contradictory values when dealing with subcontractors, temporary and part-time employees. They are not considered members of the family and are used and discarded by the employer to provide job security for lifetime employees. Toward them, the employer owes little or no responsibility.

The German social plan reflects a clear contrast to the American view. The social plan imposes major responsibility on employers for displaced employees. In addition to severance pay, the employer is legally obligated to offer displaced employees other jobs available anywhere in the enterprise and may be required to train them for available jobs, help pay the costs of relocation, and, for a period, compensate for the difference in earnings which may result. Employer responsibility for its employees stems from the social conception embedded in German labor law, not unlike that in Japan, that employees are not sellers of labor but members of the enterprise to whom the enterprise has continuing responsibility.

Swedish legal provisions impose limited obligations on employers to cushion the blows of dislocation. There is no legally required severance pay but only a requirement that the employer give the employee an opportunity to take any other available job in the enterprise. However, Swedish employers have assumed other responsibilities for displaced employees through security funds created by agreement with the unions and supported by employer contributions. These funds acknowledge the collective responsibility of employers for their displaced employees, distributing the costs among the employers rather than leaving it on the particular employers and employees where the dislocation occurs.

E. Fairness

Employment at will in the United States denies that employers have any obligation of fairness. In the classic judicial statement, an employer may dismiss an employee "for good cause, for no cause, or even for cause morally wrong." Other countries explicitly reject

103 See, e.g., Tadashi Hanami, Security of Employment in Japanese Labor Law, 15 INDUS. L.J. 461, 462 (1992) ("both parties to the employment contract regard their relationship as something more than a mere exchange of wage and labour; it is viewed as a long term personal relationship").
104 HASHIMOTO, supra note 86, at 68.
the basic American rule. This does not mean that American employers lack any sense of moral obligation to be fair to their employees, but the great majority insist on the right to be unfair. The failure to repudiate this view, either by legislation or by acceptance of collective bargaining, betrays the fact that the United States puts a higher social value on employer prerogatives than on employees’ right to fairness. The other countries show a reverse priority of social values.

Under collective agreements in the United States and generally in the other four countries, individual dismissals are subjected to the test of fairness. Except in the United Kingdom, the conception of fairness is substantially the same. The English test is not based on objective fairness to the employee, but on the good faith and subjective fairness of the employer. The focus is not on what the employee in fact did, but on what the employer reasonably believed she did. The social value given priority is the law’s fairness to the employer, not the employer’s fairness to the employee.

In collective dismissals, the different distribution among employees of the burden of dislocation reflects quite different views of fairness. The seniority principle, basing priority rights to jobs on length of service, is considered fair in the United States in both union and nonunion settings; it is legally controlling in Sweden and is given substantial weight in Britain and Germany. However, it may be an equivocal principle under some collective bargaining agreements in the United States, for seniority units may not be employer-wide. For example, a senior employee in one job, department, or plant may be laid off while a junior employee in another job, department, or plant continues working in the collective bargaining setting. Seniority seems less a principle of fundamental fairness than an objective standard easily applied and not subject to arbitrary application.

In Germany, use of strict seniority would be considered unfair. Other factors such as age, family responsibility, ability to find other work, and productivity must be taken into account. Such multiple considerations may appeal to our sense of fairness, but in practice they permit manipulation by the employer with compliance by the works council, leading to concealed favoritism and arbitrary results. However, most Germans apparently consider the use of multiple considerations fair.

The Japanese do not seem to consider unfair the two class system which gives lifetime employees job security at the expense of temporary employees. Nor do they consider unfair the
employers’ practice of selecting lifetime employees for “voluntary” retirement or dismissal based on the employers’ untested judgment as to productivity or future usefulness. Although the Japanese constitution prohibits discrimination on the basis of sex, the Japanese deny lifetime employment to women who are temporarily out of the labor market because of child bearing or child rearing. The Japanese do not consider this practice unfair.

The treatment of older workers marks the biggest difference in what is considered unfair. In the United States, the seniority system tends to give older workers priority even though their productivity has declined. In addition, federal law prohibits discrimination on the basis of age for workers over forty years of age, and there is no mandatory retirement age. In contrast, Japanese lifetime employees are mandatorily retired between ages fifty-five or sixty. If dismissal of lifetime employees becomes necessary, those over the age of fifty or even forty-five are among the first to go. The rationale is that the older workers are more expensive, generally less productive, and that room must be made for promotion of younger workers.

Both Germany and Sweden use early retirement, encouraged by payments from social funds, of workers over the age of fifty-eight to distribute the burden of dislocation. Exceptional concern for older workers in the United States is underlined by the fact that we are the only country which prohibits mandatory retirement. Reduction of the retirement age and use of early retirement are motivated in Germany and Sweden primarily by a concern for younger workers. The objective is to remove older workers from the labor market so as to keep younger workers on the job and to make room for youths to enter the job market. In the United States, the value of providing work for younger workers takes second place to the value of allowing older workers to continue in their jobs.

F. Worker Solidarity

Worksharing as a method of distributing the burden of dislocation is not regularly used in the United States. Unions generally oppose it because it violates the seniority principle. The union view is that the pain of lack of work should not be shared equally

by the employees; the senior employee should work full time and the junior employee should be relegated to unemployment benefits. This lack of solidarity extends to senior employees working overtime when junior employees are laid off.

In Germany, short time is a customary method of adjusting to production cutbacks, and in Japan worksharing is used to the extent of eliminating customary overtime and in temporary shutdowns. In Sweden, worksharing can be used for a limited period but seldom is, apparently because unemployment benefits pay eighty percent of wages so there is less incentive to share the available work. In both Germany and Sweden, overtime is limited to distribute available work. \(^{106}\)

The appeal to solidarity carries little weight with most American workers who have a job. They consider their jobs as belonging to them with no obligation to share with those facing unemployment. Unions reflect the same individualism; proposals to legally limit overtime to reduce unemployment—a common practice in other countries—are dismissed out of hand by most American unions and American workers. In contrast, German unions have recently negotiated reduced work weeks with no increase in pay in order to provide jobs for the unemployed.

G. Public Responsibility for Displaced Workers

Perhaps the most significant comparison of social values is the extent to which the different countries distribute the burdens of worker dislocation broadly through society with public funds. Are the costs of dislocation a social responsibility or the responsibility of the workers and employers directly affected?

It is painfully evident that in the United States the public assumes a smaller portion of the burden of displacement than in any of the other countries studied. The only substantial burden on public funds is unemployment compensation, and these benefits are a smaller portion of lost wages than in any of the other countries. Unemployment benefits in the United States are only forty

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106 In Germany overtime is allowed only to the extent of two hours a day on 30 days in the year. See Weiss, supra note 35, at 67. In Sweden, overtime over 40 hours a week is permitted only in cases of special need and is limited to 48 hours in four successive weeks, for a total of 200 hours overtime each year. Adlercreutz, supra note 57, at 83. In Sweden, unions have urged their members not to work legally allowed overtime so as to help reduce unemployment. Sweden: Labor Market on Overtime, EUR. INDUS. REL. REV., May 1994, at 10. This view is shared by many German unions and work councils. Sengenberger, supra note 35, at 84-85.
percent of lost wages, payable generally for only six months. This compares with roughly sixty percent in Britain for one year, with sixty-five to seventy percent in Japan for periods of eighteen to sixty weeks, with sixty-eight percent in Germany for one year to thirty-two months, and with seventy-five percent for sixty to ninety weeks in Sweden. In addition, public funds in Japan pay one-half or two-thirds of the wages lost to employees due to temporary shutdowns or to being loaned to other employers. In Sweden, employers tax themselves to provide severance pay and aid to dislocated workers. The United States spends only .18% of its GNP on labor market measures such as job training, job placement and worker relocation. This compares with 2.4% of GNP spent by Sweden and substantial amounts spent by Germany and Japan. In addition, Britain, Germany, and Japan have used public funds to help reduce or slow down the closing of major plants or industries so job loss could be absorbed by attrition or so employees could have a longer time to make adjustments.

The underlying premise in the United States is nearly total reliance on the market, leaving the losses from business fluctuations, industrial changes, and technological development where they fall, with only minimal protection of workers from wage loss. The underlying premise in the United States has been baldly stated, "[e]mployment security has traditionally not been viewed as associated with a public purpose." The dominant social value is individualism, which is characterized as:

[T]he belief that the citizen should be free to pursue his or her own self interest so long as that pursuit does not unlawfully prevent others from doing the same. Coupled with this value, is a belief in self-reliance (i.e., that an individual should rely on his or her own efforts to make a living and achieve status in society). Society, in turn, has only minimal responsibility for the well-being of the individual.

In employment, this means nearly total reliance on the market, unchanneled by social control. In contrast, the underlying premise in Sweden is that worker dislocation is a social responsibil-

107 See Wilensky, supra note 105, at 1, 7, 17.
108 Block, supra note 19, at 128.
109 Id. at 129.
110 "There is a general consensus in the United States that the market is the most efficient, and therefore the preferred, mechanism for allocating economic resources." Id. at 130.
ity and that the burden should not be left entirely on those workers directly affected. There is recognition that changes in the market, the introduction of new products, and technological developments inevitably dislocate workers from their existing jobs and require them to find new jobs. Workers have no control over these changes and little ability to foresee or to provide for them. Employers are also often helpless victims. The fruits of these changes are shared by the whole of society; the burdens, therefore, should be shared by the whole of society. Sweden recognizes a dual social responsibility: to distribute the burdens which the market imposes with financial support for dislocated workers, and to help workers to adjust to changing labor market needs with education, job training, job search assistance, and relocation. Germany and Japan, to a lesser extent, accept this social responsibility.

CONCLUSION

O wad some Pow'r the giftie gie us
To see oursels as others see us!
It wad frae monie a blunder free us
An' foolish notion . . .

Comparative labor law studies can enable us to see beyond the legal rules, institutions, and practices and recognize some of the underlying social values which motivate various societies. We can become more sharply aware that values which one society accepts without reflection as natural or inevitable are not shared by other societies. We are forced to recognize that social values which we have become persuaded are economically efficient or essential in our system have been rejected in other systems which are economically viable or even perform more effectively than our own. This forces us to acknowledge that our values are not imposed upon us, but are chosen by us, either thoughtlessly or deliberately.

If we can see ourselves as others see us, the new perspective should challenge us to question whether the values our legal rules and practices express, but our words and minds suppress, are the values we would consciously choose. It might from many a foolish notion free us.

The study here is only of one small segment of our labor law, perhaps no larger than the louse Burns saw on the churchgoer's neck. But it may be equally revealing of much more about us. The study does give us a mirror to see ourselves and some reflection of the fundamental social values we practice though not confess. We see our values expressed in the employment relation—more accurately described in nineteenth century terms as "master and servant." We see ourselves in comparative terms how others must see us. We see the low level of employer responsibility for the employees who produce the goods and the services of the enterprise. We confront our foreshortened sense of social responsibility for the hardships suffered by workers as a by-product of economic change and industrial development, the fruits of which we all share. We might then seriously consider in what direction our moral obligations should move us.
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