

# The Reliance Interest in Property

Joseph William Singer

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# The Reliance Interest in Property

Joseph William Singer\*

The world has never had a good definition of the word liberty. And the American people just now are much in want of one. We all declare for liberty; but in using the same *word* we do not mean the same *thing*. With some, the word liberty may mean for each man to do as he pleases with himself and the product of his labor; while with others the same word may mean for some men to do as they please with other men, and the product of other men's labor. Here are two, not only different, but incompatible things, called by the same name, liberty. And it follows that each of the things is by the respective parties called by two different and incompatible names, liberty and tyranny.

—Abraham Lincoln<sup>1</sup>

Dependence is the expression of the permanent reciprocity that, because of their needs, exists between most of the members of a group: dependence of the weak on the strong, but also of the strong on the weak; dependence on providers by those who have nothing, and the opposite.

—Albert Memmi<sup>2</sup>

## I. THE PLANT CLOSING PROBLEM

### A. *The Setting*

On April 28, 1982, the United States Steel Company demolished two steel plants at Youngstown, Ohio.<sup>3</sup> The next day, a dramatic photograph in the New York Times showed four huge blast furnaces crumbling to the ground after being blown up by explosive charges.<sup>4</sup> One

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1. Address by President Abraham Lincoln, Sanitary Fair, Baltimore (Apr. 18, 1864), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 748-49 (R. Basler ed. 1946).

2. ALBERT MEMMI, *DEPENDENCE: A SKETCH FOR A PORTRAIT OF THE DEPENDENT* 154 (1984).

3. N.Y. Times, Apr. 29, 1982, at A20, cols. 3-5 (picture caption).

4. *Id.*



plant, the Ohio Works, had been in operation since 1901; the second, the McDonald Works, since 1918. Together, the two plants employed 3,500 workers.<sup>5</sup> After so many years of operation, the plants had become technologically obsolete.<sup>6</sup> The management of the corporation faced a decision whether to modernize the plants<sup>7</sup> or to abandon them and discharge the workers. On November 27, 1979, in a meeting in New York City, the board of directors of U.S. Steel decided to close both plants, along with a dozen other smaller facilities.<sup>8</sup> The effects of that decision would be momentous.<sup>9</sup> As noted by the Court of Appeals for the Sixth Circuit:

For all of the years United States Steel has been operating in Youngstown, it has been a dominant factor in the lives of its thousands of employees and their families, and in the life of the city itself. The contemplated abrupt departure of United States Steel from Youngstown will, of course, have direct impact on 3,500 workers and their families. It will doubtless mean a devastating blow to them, to the business community and to the City of Youngstown itself. While we cannot read the future of Youngstown from this record, what the record does indicate clearly is that we deal with an economic tragedy of major proportion to Youngstown and Ohio's Mahoning Valley.<sup>10</sup>

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5. Local 1330, *United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1265 (6th Cir. 1980).

6. *Id.* at 1265-66. The old U.S. Steel plants made steel in technologically obsolete open hearths which take nine to ten hours to make a batch of steel from raw materials such as iron and limestone. Two modern alternatives exist to open hearths. A basic oxygen furnace or BOP (Basic Oxygen Process) can produce the same quantity of steel in 45 minutes as an open hearth furnace can in nine to 10 hours, and requires less labor. An electric furnace makes steel from scrap rather than raw materials. STAUGHTON LYND, *THE FIGHT AGAINST SHUT-DOWNS: YOUNGSTOWN'S STEEL MILL CLOSINGS* 16-17 (1982).

Changes in technology alone do not render a factory obsolete. Obsolescence can only be understood in context; this context includes the structure of the marketplace, the amount and nature of competition, the legal rules defining internal corporate governance, and the rights of shareholders in relation to the corporation as an entity and legal relations between the corporation and the workers. Old technology is not thought of as obsolete if it is still profitable, although it may be thought of as obsolete if new technologies allow a much higher rate of profit. Profitability as a criterion for technology assumes the existence of a particular structure for economic enterprises and a background set of legal entitlements. Obsolescence is therefore not merely a question of changes in technology but is a question of social policy. See MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* 5 (1984):

Industrial technology does not grow out of a self-contained logic of scientific or technical necessity: which technologies develop and which languish depends crucially on the structure of the markets for the technologies' products; and the structure of the markets depends on such fundamentally political circumstances as rights to property and the distribution of wealth. Machines are as much a mirror as the motor of social development.

7. The evidence seems to indicate that if the plants had been converted from open hearth to electric furnaces, they could have been operated profitably. S. LYND, *supra* note 6, at 17-18.

8. *Id.* at 135-36.

9. A total of 13,000 workers would be affected. *Id.* at 136.

10. *United Steel Workers*, 631 F.2d at 1265.

THE DEMOLITION OF THE FOUR BLAST FURNACES AT THE  
U.S. STEEL MILL IN YOUNGSTOWN, OHIO,  
ON APRIL 28, 1982. UPI/BETTMAN NEWSPHOTOS.



In the face of this crisis, the local union representing the workers at the two plants took a series of actions to prevent the plants from closing and to protect the interests of the workers and the community.<sup>11</sup> These actions included community organizing, picketing, sit-ins at corporate headquarters, contact with public officials in state and local government, attempts to bargain with the company, and finally, legal action.<sup>12</sup> The initial theory of the lawsuit was that the local managers had explicitly promised the workers that the plants would not be closed as long as they were profitable and that the workers had relied on those promises to their detriment by agreeing to changed work practices to increase the plants' profitability and by foregoing opportunities elsewhere.<sup>13</sup> After the lawsuit was filed, the union considered the possibility of buying the plants from the company and even began negotiations with company representatives.<sup>14</sup> On January 31, 1980, however, David

11. See S. LYND, *supra* note 6, at 138-89; TERRY F. BUSS & F. STEVENS REDBURN, SHUT-DOWN AT YOUNGSTOWN: PUBLIC POLICY FOR MASS UNEMPLOYMENT (1983).

12. S. LYND, *supra* note 6, at 131-89.

13. *Id.* at 144; *United Steel Workers*, 631 F.2d at 1269-77.

14. S. LYND, *supra* note 6, at 158-59. Actually, the idea of the steel workers in the Mahoning Valley buying a plant to prevent it from being closed had been suggested several years

Roderick, Chair of the Board of Directors of U.S. Steel, announced to the press that the company would refuse to sell the plants to the union because such a purchase would be subsidized by government loans and would arguably result in unfair competition for U.S. Steel.<sup>15</sup> The company's refusal to consider selling the plant to the union formed the basis of a second set of legal claims against the company in the litigation.<sup>16</sup>

After an initial demonstration of sympathy to the union,<sup>17</sup> the federal district judge, Judge Thomas Lambros, decided that U.S. Steel had no legal obligation to sell the plants to the union and could do whatever it wanted with the property.<sup>18</sup> The Sixth Circuit affirmed this ruling on July 25, 1980.<sup>19</sup> Roughly two years later, the company destroyed the plants.<sup>20</sup>

The property issue addressed by both the district court and the court of appeals was expressed as a choice between the union's right to purchase the plant and the company's freedom to control it.<sup>21</sup> The employees claimed that they had a legal right to buy the plant from the company while the company claimed that it had the legal right to do anything it wanted with the plant, including destroy it, without regard

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earlier (in 1977) when the Campbell Works were closed by the Youngstown Sheet & Tube Company. At a public meeting at the Campbell City Council Chambers on September 25, 1977, a member of the Board of Education, Phil Creno, said, "Why don't we all put up five thousand bucks and buy the damn place?" *Id.* at 26-27.

15. *See id.* at 159. At the same time, Roderick was not shy about asking for (and receiving) millions of dollars worth of government subsidies for U.S. Steel in the form of relaxed environmental controls, import controls, local property tax abatements, federal tax breaks, industrial revenue bonds, and the like. RALPH NADER & WILLIAM TAYLOR, *THE BIG BOYS: POWER AND POSITION IN AMERICAN BUSINESS* 24, 58-59 (1986). U.S. Steel asked for and received local property tax abatements worth tens of millions of dollars from the city of Chicago between 1980 and 1984; Chicago granted these abatements to try to induce the company not to close the South Works steel plant. The plant was almost entirely shut down despite these benefits on March 30, 1984. In 1983 Roderick began negotiations—which later fizzled because of public outrage—to import steel slabs from British Steel, a British corporation that had received billions of dollars of direct government subsidies. *Id.* at 33-34.

16. U.S. Steel's refusal to sell to the union eventually generated two different legal claims. The first claim characterized that refusal as a violation of the federal antitrust laws, 15 U.S.C. §§ 1-36 (1982 & Supp. III 1985). *United Steel Workers*, 631 F.2d at 1282-83. The second claim alleged that the refusal to sell violated a community property right in the union. *Id.* at 1279-82.

17. *Id.* at 1279-80 (quoting district court judge's pretrial hearing statement which suggested limits on U.S. Steel's ability to dispose of the property).

18. Local 1330, *United Steel Workers v. United States Steel Corp.*, 492 F. Supp. 1, 9-10 (N.D. Ohio 1980).

19. *United Steel Workers*, 631 F.2d at 1283 (the Sixth Circuit affirmed the lower court's judgment in all respects, except as to the union's antitrust claim, which it remanded for further proceedings).

20. N.Y. Times, *supra* note 3, at A20, cols. 3-4.

21. *United Steel Workers*, 631 F.2d at 1280. Note that the employees had phrased their claim in much broader terms. The complaint asserted a right to have U.S. Steel assist in the preservation of steelmaking in the community, figure into its cost of closing the plants the cost of rehabilitating the workers and the community, and be restrained from leaving the area in a state of waste, or otherwise assist the community to survive and recover from the adverse affects of the plant closings. *Id.*

to the workers' or the community's interests. To recast the dispute in Hohfeldian terminology:<sup>22</sup> (1) The union claimed both (a) a power to purchase the plant with a correlative liability in the company to have the plant transferred against its will to the union for its fair market price and (b) a right to have the plant not be destroyed with a correlative duty on the company not to destroy the plant if the union sought to exercise its power to purchase. (2) The company claimed both (a) an immunity from having the plant taken away from it involuntarily even with compensation (with a correlative disability in the union to force the company to sell the plant to the union) and (b) a privilege in the company to destroy the plant with the union having no right to legal relief on that account.

### B. *Can Relationships Create Property Rights?*

During the pretrial hearings in the *United Steel Workers* case, Judge Lambros listened to statements of the attorneys representing the union and the company. In the middle of one of those hearings, Judge Lambros delivered a statement charged with emotion.

We are not talking now about a local bakery shop, grocery store, tool and die shop or a body shop in Youngstown that is planning to close and move out. . . .

It's not just a steel company making steel. . . . [S]teel has become an institution in the Mahoning Valley. . . .<sup>23</sup>

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

. . . .

We are talking about an institution, a large corporate institution that is virtually the reason for the existence of that segment of this nation [Youngstown]. Without it, that segment of this nation perhaps suffers, instantly and severely. Whether it becomes a ghost town or not, I don't know. I am not aware of its capability for adapting.

. . . .

But what has happened over the years between U.S. Steel, Youngstown and the inhabitants? Hasn't something come out of that relationship, something that out of which—not reaching for a case on property

22. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); see also Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975. I use Hohfeldian terminology because it highlights the relational aspect of legal rights. Every legal entitlement correlates with a legal exposure in others. Every right in one person entails a potential or actual vulnerability in others. See Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711, 760 (1980) ("For every legal entitlement there is an equal and opposite legal exposure.").

23. LYND, *supra* note 6, at 164.

law or a series of cases but looking at the law as a whole, the Constitution, the whole body of law, not only contract law, but tort, corporations, agency, negotiable instruments—taking a look at the whole body of American law and then sitting back and reflecting on what it seeks to do, and that is to adjust human relationships in keeping with the whole spirit and foundation of the American system of law, to preserve property rights. . . .<sup>24</sup>

The judicial process cannot survive by adhering to the attitudes of the 1800's. My daily function cannot be regulated by those persons that reach into the dungeons of the past and attempt to stranglehold our present day thinking by 1800 [sic] concepts.

Were the framers of our Constitution or the judges of previous decades able to perceive the conditions that we find in America today and the reliance of a whole community and segment of our society on an institution such as the steel industry?

Well, the easy solution is: "Well, we haven't dealt with it in the past. There is no precedent. You have no case. The case is dismissed. Bailiff, call the next case."

Well, the law has to be more than mere mechanical acts. There has to be more than just form. There has to be substance.<sup>25</sup>

It would seem to me that when we take a look at the whole body of American law and the principles we attempt to come out with—and although a legislature has not pronounced any laws with respect to such a property right, that is not to suggest that there will not be a need for such a law in the future dealing with similar situations—it seems to me that a property right has arisen from this lengthy, long-established relationship between United States Steel, the steel industry as an institution, the community in Youngstown, the people in Mahoning County and the Mahoning Valley in having given and devoted their lives to this industry. Perhaps not a property right to the extent that can be remedied by compelling U.S. Steel to remain in Youngstown. But I think the law can recognize the property right to the extent that U.S. Steel cannot leave that Mahoning Valley and the Youngstown area in a state of waste, that it cannot completely abandon its obligation to that community, because certain vested rights have arisen out of this long relationship and institution.<sup>26</sup>

After this demonstration of concern by the judge, the steelworkers amended their complaint to include a claim based on property law along the lines suggested by Judge Lambros.<sup>27</sup> The amended claim read:

52. A property right has arisen from the long-established relation between the community of the 19th Congressional District and Plain-

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24. *United Steel Workers*, 631 F.2d at 1279-80.

25. LYND, *supra* note 6, at 165.

26. *United Steel Workers*, 631 F.2d at 1280.

27. For a history of the idea of a community property right among the workers in Youngstown, see Staughton Lynd, *The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh, 1977-1986* (unpublished manuscript in possession of author).

tiffs, on the one hand, and Defendant, on the other hand, which this Court can enforce.

53. This right, in the nature of an easement, requires that Defendant:

- a. Assist in the preservation of the institution of steel in that community;
- b. Figure into its cost of withdrawing and closing the Ohio and McDonald Works the cost of rehabilitating the community and the workers;
- c. Be restrained from leaving the Mahoning Valley in a state of waste and from abandoning its obligation to that community.<sup>28</sup>

Despite his tentative conclusion that the company should have a continuing legal obligation to the community, Judge Lambros decided that no precedent for such a property right existed and that he lacked the power to create one. He reached this conclusion even though he had earlier defended the power of judges to recognize or create a new property right when social conditions and values had changed to warrant it.<sup>29</sup> He saw the issue as a divergence of the company's moral and legal obligations. This disjunction existed because the federal court lacked the legal authority to change state property law to conform to the dictates of morality:

United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the lifeblood of the community for so many years.

Unfortunately, the mechanism to reach this ideal settlement, to recognize this new property right, is not now in existence in the code of laws of our nation.<sup>30</sup>

The Sixth Circuit also voiced "great sympathy for the community interest" reflected in the union's amended complaint.<sup>31</sup> However, like Judge Lambros, the court concluded that such a property right did not exist, either in legislation or in the common law, and that the court lacked the authority to create it.<sup>32</sup>

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28. *United Steel Workers*, 631 F.2d at 1280.

29. *LYND*, *supra* note 6, at 165.

30. *United Steel Workers*, 631 F.2d at 1266.

31. *Id.* at 1280.

32. Chief Judge Edwards of the Sixth Circuit wrote:

Our problem in dealing with plaintiffs' fourth cause of action is one of authority. Neither in brief nor oral argument have plaintiffs pointed to any constitutional provision contained in either the Constitution of the United States or the Constitution of the State of Ohio, nor any law enacted by the United States Congress or the Legislature of Ohio, nor any case decided by the courts of either of these jurisdictions which would convey authority to this court to require the United States Steel Corporation to continue operations in Youngstown which its officers and Board of Directors had decided to discontinue on the basis of unprofitability.

*Id.* Judge Edwards redefined the property right claimed by the plaintiffs narrowly as the right to force the company to keep operating an unprofitable plant. The plaintiffs asserted a property right that was more flexible than that. The amended complaint spoke of a general "obligation to [the] community" that arose from the "long-established relation" between the

In Part I, I argue that the *United Steel Workers* case was wrongly decided. Judge Lambros' initial intuition about the correct legal result was better than his ultimate disposition. The courts should have recognized the workers' property rights arising out of their relationship with the company. Such a new legally protected interest would place obligations on the company toward the workers and the community to alleviate the social costs of its decision to close the plant. Protection of this reliance interest could take a variety of forms: It could grant the workers the right to buy the plant from the company for its fair market value; it could require the company to review possible modernization proposals to determine the feasibility and profitability of updating the plant; it could give workers access to information held by the company regarding operation of the facility; it could impose obligations on the company to make severance payments to workers and tax payments to the municipality to protect them until new businesses could be established in the community; it could require the company to assist in finding a purchaser for the plant; it could mean other things as well. The goal should be to identify flexible remedies that are appropriate to protect the workers' reliance interests.

Moreover, contrary to the conclusions of the judges in this case, precedent for the creation of property rights of the kind asserted by the union does exist. I do not want to be so disingenuous as to claim that recognition of such entitlements would not constitute a substantial change in the law, but I do want to assert that the legal system contains a variety of doctrines—in torts, property, contracts, family law and in legislative modifications of those common law doctrines—that recognize the sharing or shifting of various property interests in situations that should be viewed as analogous to plant closings. If I am right, the courts had access to enforceable legal rules based on principles that could have been seen as applicable precedent for extension of existing law by creation of this new set of entitlements.<sup>33</sup>

In Part II, I argue that the judges in the *United Steel Workers* case failed to find these precedents and principles in the rules in force because they asked the wrong questions. They wrongly defined the issue as a search for the "owner" of the property. They then assumed that, in the absence of specific doctrinal exceptions to the contrary, owners are allowed to do whatever they want with their property.<sup>34</sup> This ap-

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community and the company. *Id.* It also referred to "[a]ssist[ing] in the preservation of the institution of steel in [the] community." *Id.* Such relief could take a variety of forms.

33. See RONALD DWORKIN, *LAW'S EMPIRE* 255 (1986).

Judges who accept the interpretive ideal of integrity decide hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community. They try to make that complex structure and record the best these can be.

*Id.*

34. The judges implicitly applied a conceptual scheme generally associated with classical legal thought. The classical period in American legal thought lasted roughly from the end of

proach is seriously misleading: Property rights are more often shared than unitary, and rights to use and dispose of property are never absolute. Moreover, this approach takes our attention away from the relations of mutual dependence that develop within industrial enterprises and between those enterprises and the communities in which they are situated. Legitimate reliance on such relationships constitutes a central aspect of our social and economic life—so central that numerous rules in force protect reliance on those relationships. Although both the district court and the court of appeals sympathetically noted the legitimate interests of the workers and the community, and the long term relationships that had developed between U.S. Steel, the workers and the community, the courts deemed those interests irrelevant in defining property entitlements. Consideration of competing interests in access to resources and past reliance on relationships granting such access should be a central component of any legal determination of how to allocate lawful power over those resources.

In Part III, I argue that a wide variety of current legal rules can be justified in terms of an underlying moral principle that I call “the reliance interest in property.” They include, for example, the rules about adverse possession, prescriptive easements, public rights of access to private property, tenants’ rights, equitable division of property on divorce, welfare rights. These currently enforceable doctrines encompass the full range of social relationships, from relations among strangers, between neighbors, among long-term contractual partners in the marketplace, among family members and others in intimate rela-

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the Civil War to World War II. See Robert Gordon, *Legal Thought and Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed. 1983); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980); Elizabeth Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 18 (D. Kairys ed. 1982). Classical legal thinkers sought to develop legal rules that would consolidate, as far as possible, property ownership in the hands of current, individual owners, as a means to further the alienability of property. Gregory Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985); see also Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, in 22 NOMOS: PROPERTY 28 (1980). The model of property ownership was the individual farmowner working *his* own land. (The man was assumed to control his family—his wife and children—in much the same way that he controlled the land.) See Fran Olsen, *The Politics of Family Law*, 2 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 1, 6-12 (1984).) This individualistic view of property ownership—with its attendant image of spheres of absolute discretion within rigidly defined boundaries—contrasted sharply with what were perceived to be remnants of feudal notions of property. Alexander, *supra*, at 1191, 1206-07 (quoting J. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY viii-ix (2d ed. 1895)); see also Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 328-54 (1979). At the same time, however, that this individualistic view of property relationships was being constructed, it was being undermined by the rise of large corporations that fundamentally altered the reality of social and legal relationships regarding property. I contend that the complex of current property relationships is best described and understood, not in terms of individualistic assumptions, but in terms of social and political power relationships. For a history of competing individualistic and communitarian visions of property law in colonial times, see Elizabeth Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635 (1982).



tionships, and finally, between citizens and the government. At crucial points in the development of these relationships—often, but not always, when they break up—the legal system requires a sharing or shifting of property interests from the “owner” to the “non-owner” to protect the more vulnerable party to the relationship. The legal system requires this shift, not because of reliance on specific promises, but because the parties have relied on each other generally and on the continuation of their relationship. Moreover, the more vulnerable party may need access to resources controlled by the more powerful party, and the relationship is such that we consider it fair to place this burden on the more powerful party by redistributing entitlements. I demonstrate that this principle currently exists in the legal system and I explore the different types of interests that I collectively refer to as “reliance.” In each instance, the legal rules reflect a choice between the freedom of the stronger party to do whatever she wants with “her” property and the security of the weaker party who has relied on access to the other’s property in the past or who has relied on the continuation of the relationship.

In Part IV, I address the economics of plant closings as a way of exploring the wisdom of extending legal protection of the reliance interest to this new area. I conclude that the legal system should recognize and protect the reliance interest in the context of plant closings in appropriate cases.

Part V addresses the issue of remedies. Legal means to protect the reliance interest in property in the context of plant closings range from comprehensive plant closing legislation to use of the eminent domain power by municipalities to defining property rights under state common law. I examine criteria that might be used to determine when legal protection of the reliance interest would be appropriate and what the limits to such protection might be.

Finally, in Part VI, I argue that our central concern in defining property rights in the context of plant closings should be to encourage desirable economic change without unnecessary social misery. To a large extent, this means developing institutions that are capable of generating trust among participants within common enterprises. This, in turn, requires us to focus on relations of power and vulnerability in social and economic life in general. We must confront directly questions about the distribution of power and wealth if we want to shape our institutional environment to create conditions of mutual trust.

### C. *Comments on Methodology*

#### 1. *Normative argument.*

In the past, I have criticized the idea that normative argument can proceed on the basis of rational, objective, neutral, and determinate

decision procedures.<sup>35</sup> In contrast, legal doctrine has traditionally proceeded on the assumption that legal reasoning is relatively more objective than political, moral and ideological controversy.<sup>36</sup> Discourse is objective if we expect agreement among rational persons about the terms of the discourse; it is subjective if we expect disagreement.<sup>37</sup> People disagree fundamentally about the proper character and organization of social relations. Thus, the only way to generate more agreement about legal doctrine than about ideological controversy is arbitrarily to exclude from legal discourse consideration of competing social visions. Yet the custodians of legal discourse have never succeeded in doing this, much as they have tried.<sup>38</sup>

Traditional legal theorists<sup>39</sup> have attempted to make legal doctrine appear objective by describing their first premises as based on criteria on which rational persons are in agreement, and by asserting that they possess a method of analysis that can generate conclusions from those premises in a relatively determinate manner. In contrast, I have argued that the first premises of legal doctrine are not based on consensus; instead, the legal rules contain within them competing values that we are uncertain how to reconcile with each other. Moreover, consensus is inadequate as a basis for morality because we all want some way to say that a social practice is horrible even if everyone else thinks it is great. I have further argued that legal and moral argument are far less determinate than has been supposed.<sup>40</sup> When we do have consensus about

35. Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); see also Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. — (1988) (forthcoming).

36. ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 1-4 (1983).

37. See RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 333-42 (1979); Richard Rorty, *Solidarity or Objectivity?*, in *POST-ANALYTIC PHILOSOPHY* 3 (J. Rajchman & C. West eds. 1985); Singer, *The Player and the Cards*, *supra* note 35, at 25-38.

38. I believe it would be a terrible misfortune if they were ever to succeed in this project. The content and character of the legal system should be as controversial as moral and political controversy. See Singer, *Legal Realism Now*, *supra* note 35.

39. I have defined "traditional legal theorists" as persons who seek to maintain the separation of law and politics by describing decision procedures based on rational consensus that purport to generate answers to legal questions. This definition applies to such rights theorists as Rawls and Dworkin and to the law and economics writers (such as Posner) who describe efficiency as a consensus-based criterion. Singer, *The Player and the Cards*, *supra* note 35.

40. It is perhaps inevitable that the indeterminacy thesis is misunderstood. It is a commonplace to react to this claim by asserting that legal rules are more determinate than the theories that justify them and that legal doctrine is necessarily determinate if the application of legal rules is predictable. See, e.g., Donald Brosnan, *Serious but Not Critical*, 60 S. CAL. L. REV. 259, 352-55 (1987); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 354-58 (1986). In reality, everyone agrees that legal rules are often predictable in application (they are determinate in this sense) and that, in every interesting case, lawyers can generate plausible, conventional legal arguments on both sides of the question. These statements correspond to different roles of lawyers and different experiences of how the legal system operates. Rules appear at least partly determinate when lawyers are in the counseling/prediction mode—when they are giving advice to clients about what the courts will do if the case is litigated. Rules appear indeterminate when lawyers are in the advocacy mode—when they are writing briefs to advise the court on which of alternative possible legal rules to apply or whether or not to change the law. This indeterminacy becomes even more dramatic when

first principles, they are usually at such a high level of generality that people will disagree fundamentally about the implications of those principles in specific cases.<sup>41</sup>

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lawyers are engaged in moral and political argument, as when they are giving advice to a legislature, or developing the principles and counterprinciples that should inform and justify the rules in force. Judges justify their rule choices by reference to such criteria; indeterminacy in such principles and policies is an ordinary feature of legal discourse. From a judge's point of view, the rules in force are indeterminate in the sense that the judge could accept the plausible legal arguments on either side offered by the advocates for the parties. At the same time, the judge feels substantially constrained by existing law because she must defend her disposition of the case by reference to it. Although the judge could go either way in all interesting contested cases, she will feel bound to justify her decision in a way that makes it appear to fit with existing practice. Her argument that the result is compatible with existing law must be persuasive to an audience that is likely to be conservative about such matters. Thus, existing doctrine may be highly indeterminate and manipulable, and still impose substantial constraints on the judge. *See generally* Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986). The distinction between advocacy, predictability, and adjudication comes from Karl Llewellyn. KARL LLEWELLYN, *THE BRAMBLE BUSH* 78-82 (1960 ed.).

A second misunderstanding of the indeterminacy claim is that rules are determinate if everyone agrees on what they should be and how to apply them. *See* Lawrence Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 471-72 (1987). The claim is not that all legal rules are controversial but that *if a rule choice is controversial*—if someone wants, for some nonarbitrary reason, to change the law or interpret it in a new way— it is almost always possible to generate plausible legal arguments on both sides of the question. If someone's considered judgment is that an existing rule or a prevailing interpretation of current law is bad (inefficient, unjust, immoral, bad policy), she can almost always construct a plausible, conventional legal argument supporting her interpretation of the law. This does not mean that she will necessarily be able to convince those with power to change the law to share her considered judgment about what the law should be.

The substantive debate is about whether we should understand the law as consensus-based (outside politics) or conflictual (an extension of ordinary politics). A subsidiary debate is about whether the best strategy for legal reform is to describe the legal system as a coherent and logical structure or to emphasize its pliable, political nature. Each of these approaches may recognize the transformative possibilities inherent in the system itself. My own view is that emphasizing the contradictory nature of legal discourse and its political visionary character—its indeterminacy—is the only way to free ourselves from the powerful urge to accept the status quo as inevitable. Viewing the legal system as outside politics and as logically coherent, on the other hand, tends to justify most important aspects of the status quo. I could be wrong about this, but I do not think I am.

41. The traditional model of legal reasoning relies on a fairly clear separation between the subjective and objective spheres of life. In the subjective sphere of life, people are allowed to act based on their personal opinions, which are thought to be arbitrary, nonfoundational, and based on personal predilect. In the objective sphere, we base actions on shared values, values that should theoretically be agreed to by all members of our society. In this view, ethical argument and legal rules must be based on uncontroversial—meaning shared—interests and values in order to be accepted as legitimate by individuals with differing views of the good life. Thus, we expect the legal system to define by objective criteria the boundaries within which citizens are allowed to be subjectively free. Current pragmatists like Rorty and Bernstein have reacted to this division of subjectivity and objectivity by trying to relativize it. They attempt to show that subjective opinions are not completely arbitrary and nonfoundational, and that individual opinions come out of a social and historical context—out of relationships with others—and can be backed up with reasons people give for their beliefs. At the same time, objective truths are not as uncontroversial as they appear to be; at some point, we simply have to choose first principles that cannot be deduced from anything else, and we have a fair amount of conflict in our society (rather than consensus) about what those first principles should be, and how we should reconcile them when they conflict with one another. Thus, contemporary theorists who participate in what is often called “the interpretive turn” seek to develop a form of normative argument that uses interpretation and conversation as meta-

The question, then, is how to make a normative argument while rejecting the assumptions that first principles can be derived from rational consensus and that specific conclusions follow ineluctably from those premises in a determinate manner. Another way to put this is: what forms of persuasive legal and moral argument are left to us after legal realism has destroyed our confidence in the determinacy and objectivity of legal doctrine? How do we make value choices? The answer is to proceed on the basis of intuitions—tested to some extent by social facts and by conversation with others—and to work pragmatically to deal with specific social problems within an established legal tradition.<sup>42</sup> Our intuitions about right and wrong are not merely arbitrary. We can give reasons for them; we can criticize them; and we can change them. People persuade each other, not by demonstrating the logical consequences of shared principles, but by appealing to shared experience.<sup>43</sup> Three approaches are available to legal theorists to do this: (1) the development of a social vision; (2) common law development; and (3) political economy, or cost-benefit analysis informed by values.<sup>44</sup>

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phors to relativize the subjective/objective distinction. It is not the case that either a view is completely arbitrary and without foundation or rational justification or is based on principles that are so uncontroversial that only a mad person would dissent. See Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985). This is part of what I meant when I wrote: "Reasons are emotions; emotions are reasons." Joseph William Singer, *Radical Moderation*, 1985 AM. B. FOUND. RES. J. 329, 343 (reviewing BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984)).

42. See Richard Rorty, *Postmodernist Bourgeois Liberalism*, 80 J. PHIL. 583, 583-85 (objectivity is based upon solidarity with one's community, not timeless reason); see also Rorty, *Solidarity or Objectivity?*, *supra* note 37.

43. See generally Rorty, *Solidarity or Objectivity?*, *supra* note 37 (describing this as the "desire for solidarity," in contrast to the "desire for objectivity"). My view is at once more tragic and more romantic than the view of traditional legal theorists. It is more tragic because I do not suppose general consensus about fundamental value choices to characterize our society. Rather, I understand society as basically conflictual. Disagreement abounds about the proper organization of society and about resolution of legal and political questions. Moreover, we are divided within ourselves. We are beset by contradictory values and we have no way to easily reconcile them or assure ourselves that we have made good choices and acted rightly. At the same time, my view is more romantic than that of traditional legal theorists because I believe moral argument and persuasion to be possible even though we lack decision procedures for moral choice. Traditional theorists believe that the absence of such decision procedures leaves us no legitimate means to make moral choices or to generate agreement about legal rights and ethical responsibilities. Either we have something akin to a legal or moral science that can justify our moral choices, or we have chaos and arbitrariness. Being neither an objectivist nor a nihilist, I believe that persuasion, agreement and legitimate moral life are possible despite the absence of a general theory that is capable of resolving moral questions. This view appears romantic in comparison to traditional legal theory because it assumes that we do not need a metatheory to answer our ethical dilemmas for us; good faith conversation, introspection and solidarity with our community are sufficient to generate legitimate moral commitments, as well as criticism of those commitments.

44. By "social vision," I mean to embrace what is best about rights theory and political philosophy; by "political economy," I mean to embrace what is best about utilitarianism and economics.

## 2. *Social vision*

A social vision, as I use the term here, encompasses three quite different aspects. First, a social vision creates a picture of the social world. That picture gives us our fundamental images about the relations among individuals and between individuals and the community. For example, one can conceptualize society as a natural hierarchical order, or as derived from a social contract among self-interested individuals, or as beset by class struggle. These social images have no necessary normative consequences. One could understand society as based on a social contract among possessive individuals and favor libertarian capitalism (Nozick) or democratic socialism (Rawls). One could understand society as based on class struggle and favor protection and maintenance of those classes (Madison, Aristotle) or abolition of them (Marx).

These social images are nonetheless crucially important. They provide us with a language to discuss social relations. Social vision directs our attention in a particular way; it tells us what is important to see in social life. Adopting a new social vision may redirect our attention to important facts that would otherwise be obscured from our view. By generating a particular picture of social relations, we implicitly identify those aspects of social life that form the crux of our concern.<sup>45</sup>

Second, a social vision may tell us what counts as a relevant contribution to moral discourse. I have in mind something like Richard Rorty's notion of normal discourse. "[N]ormal discourse is that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it."<sup>46</sup> The social vision may establish the terms of the debate.

Third, a social vision may include a normative commitment to a particular form of social life. It may include judgments about how society should be organized and what relationships are good and to be fostered. It is possible to conceive of a social vision as a coherent, internally consistent normative system. However, the kind of social vision I have in mind assumes contradiction rather than consensus; I do not envision creating a general theory of justice that can be used to generate answers (*à la* Rawls and Posner). I make no assumptions that the social vision I will describe here has an internal logical coherence. On the contrary, nothing follows logically from the vision I will elaborate. Whatever coherence it has is emotional, rather than logical. A social vision is therefore rather like a political ideology, such as liberalism, conservatism, libertarianism, or socialism. None of these ideologies is

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45. See, e.g., Joseph Brodley, *Massive Industrial Size, Classical Economics, and the Search for Humanistic Value*, 24 STAN. L. REV. 1155, 1165-67 (1972) (reviewing JOHN MCGEE, IN DEFENSE OF INDUSTRIAL CONCENTRATION (1971)) (explaining how a model of social life determines what facts are deemed relevant).

46. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 320 (1979).

based on a logically coherent theory that can be used to generate all the different normative commitments held by their adherents—though they may claim to have one. Yet those ideological categories are nonetheless meaningful; they describe constellations of positions that are held by groups of people who identify with each other and who see those sets of commitments as representing a defensible form of social life.<sup>47</sup>

### 3. *Common law development*

Two classic articles illustrate this methodology: *The Right to Privacy*, by Louis Brandeis and Samuel Warren<sup>48</sup> and *The Critical Legal Studies Movement*, by Roberto Unger.<sup>49</sup>

In their famous article, Brandeis and Warren argued for the creation of a new legally protected interest in privacy.<sup>50</sup> They started their analysis with a normative question: Should the legal system protect individuals from having private information about them, including their private letters and photographs, published without their consent?<sup>51</sup> Tentatively concluding that the legal rules should protect this right of privacy, they examined the rules in force to see if they could find any doctrinal support for this principle. They analogized this new right of privacy to existing doctrines that protected similar interests. While freely acknowledging that they were arguing for an extension rather than a simple application of current law,<sup>52</sup> they based their argument on principles already existing in the legal system. They argued that while the legal rules in force protected the freedom to publish information and images, this freedom was limited by a variety of doctrines, including copyright laws and laws prohibiting defamation. The legal rules therefore accommodated competing interests in freedom of speech and security of the person. They then argued that the question was *whether* to treat the right of privacy as analogous to existing rules limiting freedom of publication. To answer this question, they identified the policies and principles justifying legal protection of the competing interests. They characterized the copyright laws as justified by the principle that individuals generally have the right to be let alone unless they voluntarily place themselves in the public eye.<sup>53</sup> Brandeis

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47. For a perceptive and nuanced analysis of how rights claims can flow from and express the political and moral aspirations of a social movement group, how rights claims are experienced or perceived in social movement practice, and how rights discourse impacts on social movement practice generally, see Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986). See also Minow, *supra* note 41, at 1867 (explaining how "rights represent articulations—public or private, formal or informal—of claims that people use to persuade others (and themselves) about how they should be treated and about what they should be granted").

48. Louis Brandeis & Samuel Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

49. Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

50. Brandeis & Warren, *supra* note 48.

51. *Id.* at 196-202.

52. *Id.* at 213.

53. *Id.* at 205 ("The protection afforded to thoughts, sentiments, and emotions, ex-

and Warren reinterpreted the existing legal protection created by the copyright statutes in a way that related the values protected by the doctrines of copyright law to the new situation of privacy. They discussed the consequences of expanding protection of emotional interests and the reasons for doing so.

Brandeis and Warren explicitly acknowledged that they were arguing for a change in the law, but that the recognition of a new legally protected interest was justified by changing social values and social conditions and that this process of judicial recognition and creation of new legal rights was an integral part of the common law process.<sup>54</sup> Their article begins:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. Thus, in very early times, the law gave a remedy only for physical interference with life and property, for trespasses *vi et armis*. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life,—the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession—intangible, as well as tangible.<sup>55</sup>

Brandeis and Warren connected their argument for an expansion of legal protection of certain important interests to established legal doctrines by reinterpreting existing law to demonstrate its principles and counterprinciples and arguing for expanded protection of interests already protected to some extent by the rules in force.<sup>56</sup>

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pressed through the medium of writing or of the arts, so far as it consists in preventing publication, is merely an instance of the enforcement of the more general right to be let alone.").

54. See Joseph William Singer, *Catcher in the Rye Jurisprudence*, 35 *RUTGERS L. REV.* 197 (1983) (explaining the constitutive role of judicial activism in private law development); see also DWORKIN, *supra* note 33, at 243.

Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards.

*Id.*

55. Brandeis & Warren, *supra* note 48, at 193, 195-96, 210-11, 213 n.1. For a discussion of the extraordinary expansion of property rights in the nineteenth century, see Kenneth Van-develde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *BUFFALO L. REV.* 325 (1980).

56. Lon Fuller and William Perdue use the same method in their famous article on the reliance interest in contract damages. Lon Fuller & William Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936). They begin by examining existing law to determine

Roberto Unger advocates a vastly expanded doctrinal method which he calls "internal development" or "deviationist doctrine."<sup>57</sup> Like Brandeis and Fuller,<sup>58</sup> Unger asks us to accept two basic approaches to doctrinal development which together comprise the modern pragmatic approach to social theory: policy and morality. First, Unger argues that scholars and judges should concern themselves with the social consequences of the legal rules.<sup>59</sup> In determining what those consequences are, Unger argues, as Brandeis did,<sup>60</sup> that we should use any available empirical disciplines and knowledge that will help us understand what the effects of the rules are likely to be, including the disciplines of economics, political and social science, anthropology, science and history. Second, Unger argues that legal scholars should examine the moral principles underlying the legal rules in force and should be willing "to recognize and develop the disharmonies of the law: the conflicts between principles and counterprinciples that can be found in any body of law. Critical doctrine does this by finding in these disharmonies the elements of broader contests among prescriptive conceptions of society."<sup>61</sup> By examining the competing principles inherent in the legal system and the lines that have been drawn between them, we can get a better sense of the moral dilemmas of social life and how our legal system has resolved those dilemmas in the past. By comparing the principles underlying the legal rules in force to the actual social consequences of those rules, we can observe "conflicts between ruling ideals and established [social] arrangements."<sup>62</sup> In other words, we use the counterprinciples *already existing in the legal system* as a basis for criticism of the principles in the legal system. Like Brandeis, then, Unger

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the purposes it serves and the interests it protects. *Id.* at 52-53. They view legal rights as legally protected interests and they view the role of the courts as determining what interests to protect and the extent of the protection of those interests. They recognize the need to draw lines, moreover, between competing interests. The task then is (1) to identify the interests already protected by the legal system; (2) to identify the principles and policies that justify legal protection of those interests; and (3) to examine both the social consequences of the existing rules and of alternative rules and the principles of justice and morality that justify those rules in order to determine whether the legal system should recognize a new interest or expand protection of interests already protected. This method contrasts sharply with the formalist method that makes legal decisions look like discovery rather than decisionmaking. The goal of doctrinal development is not simply to apply existing rules mechanically to new situations, but to examine the policies and values inherent in the legal system and the social conditions in which the rules will operate, and to consider whether expanded protection of one interest at the expense of another will have desirable social consequences. *See also* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 492-503 (1987) (describing Karl Llewellyn's vision of Grand Style judging).

57. Unger, *supra* note 49, at 576-83.

58. *See* note 56 *supra*.

59. Unger, *supra* note 49, at 578.

60. *See* ROBERT SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 55, 90 (1982) (describing the "Brandeis brief" as "an appellate brief that recited general social facts relevant to the issues of rule making before a court" on the theory that "courts should make appropriate use of any available knowledge of legislative facts").

61. Unger, *supra* note 49, at 578.

62. *Id.* at 580.



argues for an internal critique:<sup>63</sup>

You start from the conflicts between the available ideals of social life in your own social world or legal tradition and their flawed actualizations in present society. You imagine the actualizations transformed, or you transform them in fact, perhaps only by extending an ideal to some area of social life from which it had previously been excluded. Then you revise the ideal conceptions in the light of their new practical embodiments. You might call this process internal development.<sup>64</sup>

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Deviationist doctrine sees its opportunity in the dependence of a social world upon a legally defined formative context that is in turn hostage to a vision of right. In a limited setting and with specific instruments, the practice of expanded doctrine begins all over again the fight over the terms of social life. It is the legal-theoretical concomitant to a social theory that sees transformative possibilities built into the very mechanisms of social stabilization.<sup>65</sup>

Unger's version of legal doctrine differs from that of Brandeis in that it focuses on contradictions within existing doctrine and among principles underlying that doctrine rather than seeing doctrine as a balance of competing policies. The goal is to focus on these contradictions and bring to center stage the suppressed and marginalized doctrines. Moreover, Unger advocates significantly expanding the scope of legal doctrine; implicit in the contradictions in legal doctrine is the contest of social visions and ideologies that characterizes political life.<sup>66</sup>

#### 4. *Political economy*

Economics seems to be taking over the legal academy. Efficiency analysis is everywhere, both in the classroom and the law reviews. Although there is a lot wrong with efficiency analysis,<sup>67</sup> its underlying

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63. See Singer, *The Player and the Cards*, *supra* note 35, at 10 (explaining that an internal critique "is a critique from within, a critique that uses the premises of traditional legal theory against itself").

64. Unger, *supra* note 49, at 579-80, 583.

65. *Id.* at 583.

66. This image therefore differs from Brandeis' image of judges as technical experts in social policy who can utilize the sociological data of the Brandeis brief to make balanced policy decisions. Rather than assuming consensus on goals and expertise on technical means to achieve those goals as Brandeis does, Unger makes ideological controversy central to doctrinal development. It is possible to interpret Unger as arguing that the legal system contains within itself competing coherent social visions; each of the competing social visions provides us with a unique form of social life. One could also understand Unger not to be claiming that these competing social visions form coherent logical wholes from which we can deduce the details of different social systems and legal structures. Each of the competing social visions may contain contradictory principles within itself. A possessive individualist vision still must contend with the contradiction between freedom of action and security; a vision of participatory democracy must still contend with the problem of defining what constitutes abuse of power and what types of centralization are necessary or desirable. I understand him to be taking the second position.

67. I have criticized efficiency analysis. See Singer, *supra* note 41; Singer, *Legal Realism*

normative basis has an intuitive appeal. Just about everyone thinks that knowing the costs and benefits of adopting one legal regime over another gives us information that helps us in making the rule choice. Controversy arises when we differ about (1) what counts as a cost and a benefit; (2) how to value costs and benefits (is willingness to pay really the only legitimate way to do this?); (3) how confident we can be that we have accurately measured costs and benefits; (4) whether social wealth or efficiency is a good or a poor measure of social utility; (5) whether efficiency analysis is simply the wrong language for discussing certain moral and legal issues (do we really want to say that slavery is wrong because it is inefficient, or would it be better to be able to say that it is evil?); (6) the extent to which efficiency is indeterminate in the absence of value judgments about how to proceed with the analysis; and (7) the extent to which values other than efficiency should guide our choices among alternative legal regimes.

Efficiency analysis is popular, in my view, because it attempts to "reestablish[] the lawyer as the scientist with a norm-free calculus."<sup>68</sup> I have no interest in furthering this project. Economic analysis, however, can help structure inquiries about the likely consequences of alternative legal rules if it is combined with empirical studies that provide actual information about the real world. It is also possible to use economic analysis in a way that recognizes its indeterminacy and the political value judgments that must be made to give the analysis a normative content. Recognizing the need for such value judgments does not reduce the utility of economic analysis; on the contrary, it is the only way to make it useful.<sup>69</sup>

## II. SOCIAL VISION: RELIANCE ON RELATIONSHIPS

Independence? That's middle class blasphemy. We are all dependent on one another, every soul of us on earth.

—George Bernard Shaw<sup>70</sup>

*Now, supra* note 35. For more comprehensive critiques, see Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3 (1975); Lucian Bebchuk, *The Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice?*, 8 HOFSTRA L. REV. 671 (1980); RONALD DWORKIN, *Is Wealth a Value?*, in A MATTER OF PRINCIPLE 237 (1985); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979); Mark Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of "Law and Economics"*, 33 J. LEG. EDUC. 274 (1983); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Kennedy & Michelman, *supra* note 22; Arthur Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974); Frank Michelman, *Ethics, Economics, and the Law of Property*, in 24 NOMOS: ETHICS, ECONOMICS, AND THE LAW 3 (1982); Warren Samuels, *Maximization of Wealth as Justice: An Essay on Posnerian Law and Economics as Policy Analysis*, 60 TEX. L. REV. 147 (1981); Pierre Schlag, *An Appreciative Comment on Coases's The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919.

68. David Gray Carlson, *Reforming the Efficiency Criterion: Comments on Some Recent Suggestions*, 8 CARDOZO L. REV. 39 (1986).

69. Michelman, *supra* note 67, at 3.

70. GEORGE BERNARD SHAW, *PYGMALION: A ROMANCE IN FIVE ACTS* (1931) (Act 5).

In this State, we do not set people adrift because they are the victims of misfortune. We take care of each other.

—New Jersey Supreme Court  
Justice Morris Pashman<sup>71</sup>

#### A. *The Free Market Model*

The *United Steel Workers* case posed two legal questions related to property rights: (1) did the workers have any power to control the use or disposition of the factories? (2) upon closing the plants, did the corporation have any obligations to the workers beyond those agreed to in the collective bargaining agreement? The judges addressed these issues by asking a particular set of questions that set the terms of the debate. These questions presupposed a particular vision of social relationships. The assumptions underlying the questions fundamentally shaped the courts' understanding of existing law; they caused the judges to make specific presumptions about the legal distribution of power in the marketplace. If the judges had asked a different series of questions and had a different model of social relations, they would have found precedents that they missed or marginalized. In this section I develop the court's implicit model of society and legal rules about the marketplace, which I will call the "free market model." I then explain what is wrong with this paradigm, and propose a different way to conceptualize market relations. This alternative model—the "social relations approach"<sup>72</sup>—highlights aspects of social life and legal doctrine that are suppressed in the free market model and which I think should be brought to center stage.

The judges asked two central questions: (1) who owns the plant? and (2) what promises did the corporation make? These questions reveal a great deal about the social vision implicit in the judges' conceptualization of the problem because the questions create presumptions. The judges presumed that in the absence of specific doctrinal exceptions, owners can do what they like with their property unless they have made promises to the contrary. The judges further presumed that people have no obligations to act affirmatively to help others unless they have promised to do so or unless they fall within a narrow set of special relationships creating affirmative duties.

This construction of the problem rests on a social vision and a form of legal consciousness that reinforce each other. The social vision divides the world into the public sphere of the state and the private sphere of society, with society subdivided into the spheres of the mar-

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71. *New Jersey Ass'n for Retarded Citizens v. New Jersey Dep't of Human Servs.*, 89 N.J. 234, 252, 445 A.2d 704, 713 (1982).

72. See Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 127 (1987).

ket and the family.<sup>73</sup> The social problem of plant closings and industrial relations fits into the private sphere of the market. The imagery behind this categorization has a core and a periphery. It places the market at the center of the picture and marginalizes both the state and the family. Both the public sphere of state regulation and the sphere of the family are treated as peripheral and supplementary.<sup>74</sup> In this picture, the market is an area of freedom and autonomy, while both the state and the family appear as areas of regulation or altruistic obligation. This social vision correlates with a form of legal consciousness: Within the market realm, legal obligations are generally negative duties not to harm others; positive obligations to help others ordinarily arise only as the result of voluntary promises. State regulation enforces the negative obligations (through tort law or legislation) and the voluntary agreements. In this model, the family is the only area of social life in which affirmative obligations arise out of relationships.

The market itself contains a core of possessive individualism with a periphery of altruistic obligation.<sup>75</sup> The core of possessive individualism is based on a particular model of private property and freedom of contract.<sup>76</sup> This model contains several features. First, as Gregory Alexander explains, it "exhibits a strong preference for a consolidated form of property interests."<sup>77</sup> Alexander means that the legal rules seek "to concentrate in a single legal entity, usually an individual person, the relevant rights, privileges, and powers for possessing, using, and transferring discrete assets."<sup>78</sup> In other words, the presumption is that the legal rules identify a single owner of all valued resources and that that owner has the legal power to control those resources to the exclusion of others. Second, there is a general presumption in favor of free use of property. Owners are generally allowed to do what they like with their property—including destroy it if they wish—even if their use interferes with the interests of others. Limits to freedom of action are narrowly defined and exceptional. This presumption promotes a policy

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73. Frances Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497, 1520-25 (1983). The public/private distinction reproduces itself within the private sphere in a complicated way. Initially, the family appears more private than the marketplace; it is the area of intimacy, of refuge from outside control. At the same time, the market appears more private than the family; we regulate family relationships heavily because they are of such central moral concern, but we expect the marketplace generally to be the domain of free competition and individualism where people are allowed to do as they please in furthering their self-interests. *Id.*

74. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1007-08 (1984); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1288-89 (1984).

75. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1728-31 (1976).

76. *Cf.* Kennedy & Michelman, *supra* note 22, at 713-14 (arguing that all efficiency theories are based on specific assumptions about human behavior).

77. Alexander, *supra* note 34, at 1189 n.1; *see also* Donahue, *supra* note 34, at 28; Michelman, *supra* note 67, at 3-6.

78. Alexander, *supra* note 34, at 1189 n.1.

of autonomy and self-reliance.<sup>79</sup> Third, the free market model “promotes individual freedom of disposition as the basic mechanism for allocation.”<sup>80</sup> Property owners are generally free to decide when and to whom to convey their property. This means that property owners have the legal power to transfer or share their property on terms chosen by them and that they are immune from having their property interests transferred to others against their will.<sup>81</sup> This presumption furthers the policy of free alienability of property in competitive markets.<sup>82</sup> Fourth, people are free to make agreements regarding access to property or exchange of entitlements, and those agreements will be enforced in accordance with their terms. This presumption furthers a particular vision of freedom of contract that emphasizes self-determination and facilitation of private arrangements without regulation of the agreements for fairness or equality of bargaining power.<sup>83</sup>

This core of individualism is supplemented by a periphery of altruistic rules that requires market participants to share gains and losses with others with whom they have established market relationships. The peripheral rules also regulate the use and disposition of resources and the terms of agreements relating to property interests and other market relationships. These rules include, for example, compulsory contract terms imposing obligations on landlords toward tenants, insurers toward insureds, and employers toward employees. In these cases, the rules in force require citizens to look out, not for themselves, but for the interests of others with whom they establish relations of mutual dependence.<sup>84</sup> The court barely acknowledges this periphery in its discussion of property rights.<sup>85</sup> By assuming that the corporation is free to use and dispose of its assets at will, the court fails to acknowledge the existence of legal rules granting non-owners access to property owned by others with whom they have established long-term relationships.

The legal realist attack on individualistic property and contract the-

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79. Kennedy, *supra* note 75, at 1728-31; see also William Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 9-11 (1985); William Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1433-1435 (1986).

80. Alexander, *supra* note 34, at 1189 n.1.

81. Michelman, *supra* note 67, at 20.

82. Alexander, *supra* note 34, at 1191 (“Anglo-American lawyers have long identified the lifting of restraints on alienation as the major defining characteristic of a liberal commercial society as opposed to a feudal one. Along with liberty of contract, free alienation is one of the keystones of the twin policies of promoting individual autonomy and free exchange in competitive markets.”) It is of course true that the policy of promoting alienability requires us sometimes to defer to individual decisions to disaggregate property rights and sometimes to limit those individual decisions by requiring property rights to be consolidated. *Id.*; Michelman, *supra* note 67.

83. Kennedy, *supra* note 75, at 1735-36.

84. See DUNCAN KENNEDY, FORM AND SUBSTANCE IN PRIVATE LAW ADJUDICATION 1685, 1713-37 (1976) (explaining the existence of altruistic rules in the legal system).

85. Local 1330, *United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264, 1279-82 (6th Cir. 1980).

ory fatally undermined the coherence of the free market model.<sup>86</sup> Yet the model has a life of its own and continues to dominate legal discourse. Nevertheless, in the twentieth century, both torts and contracts have changed in ways that reintroduce or expand altruistic or communal obligations to share both gains and losses. To the extent those fields are still understood to have a core of individualism surrounded by a periphery of altruism, the line between the core and the periphery is no longer clear. Moreover, to sophisticated thinkers, the absence of a general theory to separate the core from the periphery undermines the meaningfulness of the distinction. In the absence of a metatheory, neither torts nor contracts seems to have a core anymore; rather, every doctrinal issue recreates the contest between the competing social visions of individualism and altruism.<sup>87</sup> Torts is characterized by a contest between the relatively more individualistic negligence principle and the relatively more altruistic strict liability principle. Contracts is characterized by a contest between the individualistic assent principle and the altruistic principles of reliance, good faith, unconscionability, and remedies for unjust results of unequal bargaining power.

Property, on the other hand, remains, to a large extent, captive of the free market model based on the fundamental policy of promoting the free alienability of property by concentrating power over that alienation in the hands of existing owners.<sup>88</sup> It is nonetheless true that numerous legal doctrines require redistribution of property interests when people have relied on relationships of mutual dependence. It is my purpose to bring property law into the twentieth century by describing the counterprinciple of reliance. While this will do no more than bring property law into line with torts and contracts, the effect should be to reconceptualize property law as everywhere reproducing the fundamental conflict between the alienability principle and the reliance principle.<sup>89</sup> My goal is to bring to consciousness the peripheral doc-

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86. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470 (1923); John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Oliver Wendell Holmes, Jr., *Privilege, Malice and Intent*, 8 HARV. L. REV. 1 (1894); Hohfeld, *supra* note 22; Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918).

87. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974); Kennedy, *supra* note 75, at 1732-40; Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981).

88. The glaring exception is landlord-tenant law. See notes 223-226 *infra* and accompanying text.

89. See P.S. ATIYAH, *ESSAYS ON CONTRACT* 86-92 (1986) (describing the choice between the autonomy principle and the reliance principle in contract law). The contradictions within the alienability principle have been cogently explored. See Alexander, *supra* note 34; Donahue, *supra* note 34. The classical legal thinkers "acknowledged that the policy favoring alienability was an exercise of state power restricting the scope of individual freedom of alienation. While they did reconceive of property law as a mechanism for the exercise of private will, they also recognized that individual intent was subject to limitations that the state might prescribe in pursuit of broader interests of the community." Alexander, *supra* note 34, at 1223. The classical penchant for conceptualism meant that theorists of the period believed that the gen-

trines and principles of property law that the free market social vision has marginalized and suppressed.

B. *What is Wrong with Free Market Assumptions*

1. *The confusing search for the "owner"*

Blackstone defined property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe."<sup>90</sup> We still carry in our heads an image of the "owner" as a person who has ultimate control over the disposition of a thing or a set of resources. Yet this image never has been more than partially correct.<sup>91</sup> Much of the first-year property course in law schools is devoted to examining ways in which property interests can be shared or divided up. It is old-fashioned, misleading and unproductive to identify a single "owner" of valued resources when control of those resources has been divided by law or contract among several interested parties. It is, in fact, a form of transcendental nonsense.<sup>92</sup>

Staughton Lynd reports that at a community meeting in Youngstown, Ohio, concerning a threatened plant closing, a steelworker cried out, "Those are our jobs!" Another worker answered him, "But it's their mill."<sup>93</sup> I want to argue that people who think this way are wrong. In part, I mean to emphasize that "Who owns the mill?" is a hard, not an easy, question to answer; I also mean to call attention to the fact that even if it is "their mill," they do not necessarily have the legal power to use it in a way that destroys a community. But I mean something more fundamental than either of these things. I want to argue that phrasing the problem as "identifying the owner" is fundamentally wrong. It is simply not the right question. To assume that we can know who prop-

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eral policy of alienability could be used as a premise from which specific rules could be deduced. *Id.* at 1231.

90. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*2.

91. See generally Vandeveld, *supra* note 55 (describing the development of modern property law).

92. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 820 (1935).

[I]n every field of law we . . . find the same habit of ignoring practical questions of value or of positive fact and taking refuge in 'legal problems' which can always be answered by manipulating legal concepts in certain approved ways. In every field of law we . . . find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. *Corporate entity, property rights, fair value, and due process* are such concepts. So too are *title, contract, conspiracy, malice, proximate cause*, and all the rest of the magic 'solving words' of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormitive principle.

*Id.*

93. Lynd, *supra* note 27.

erty owners are, and to assume that once we have identified them their rights follow as a matter of course, is to assume what needs to be decided.<sup>94</sup>

Property interests can be divided in various ways, including: (1) over time (current versus future interests); (2) into co-ownership (joint tenancy, tenancy in common, partnership, corporations); (3) into leases (landlord/tenant relations); (4) into trusts (trustee/beneficiary); (5) into easements and covenants; and (6) into mortgages (mortgagor/mortgagee). Who owns the property in these cases? The landlord or the tenant? The trustee or the beneficiary? The mortgagor or the mortgagee? *The question is meaningless.* Just as the landlord, life tenant, defeasible fee owner, trustee, and fee simple owner may be "owners" of property, so may tenants, reversioners, trust beneficiaries, holders of future interests, and owners of easements.<sup>95</sup> There are even cases in which it is difficult to identify *anyone* as the owner. Who owns a university? The board of trustees? The graduates? The students?

When several parties share legal rights in property, any identification of a single person as the "owner" is likely to be both arbitrary and misleading. It is arbitrary because we could just as easily identify someone else as the owner. It is misleading because it denies the existence of joint interests and the need to determine the legal relations among all the persons with legally protected interests in the property. The "owner's" rights are limited by the rights of others with entitlements in the property. Identifying the owner does not tell us who these other people are or what their rights are.

We ask who the owner is because we need to resolve a specific question of how to allocate control of resources among all the parties with legally protected interests in access to those resources. Can the company blow up the plant when the workers want to buy it? To answer this question by looking for the owner is like asking how many angels can dance on the head of a pin.<sup>96</sup> It is a species of conceptualism; to say the company can blow up the plant *because* it owns it states a conclusion rather than a premise. It does not give us a *reason* to allocate rights between the workers and the company in this way. Both the workers and the managers have legal rights of access to the plant that arise from their relationships with each other and with others. The real issue is how to allocate those entitlements among the managers, the shareholders and the workers. We decide who wins the dispute on grounds of policy and morality, and then we *call* that person the owner.<sup>97</sup>

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94. See Vandavelde, *supra* note 55 (arguing that the concept of property is a legal invention and that the term does not imply any particular set of rights).

95. See generally Victoria A. Judson, *Defining Property Rights: The Constitutionality of Protecting Tenants from Condominium Conversion*, 18 HARV. C.R.-C.L. L. REV. 179 (1983) (arguing that both landlords and tenants have property rights in leased property).

96. Cf. Cohen, *supra* note 92, at 810-11 (arguing that the question "where is a corporation" is meaningless).

97. See generally John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924) (arguing



In the context of plant closings, the search for the owner of the plant is particularly inappropriate. No person or set of persons resembles the fee simple owner of a homestead. We identify the owner as the corporate entity only for the sake of convenience. It is useful for some purposes to conceptualize the corporation as an individual.<sup>98</sup> But the reality is that corporate ownership provides a complicated legal mechanism for joint ownership and control of business property by large groups of people. If the corporation owns the plant, who owns the corporation? The answer is that the shareholders own it; they choose the board of directors which chooses management which operates the corporation in the interests of the shareholder/owners by maximizing profits.

While it is true shareholders nominally elect the board of directors, the separation of ownership and control first noted by Berle and Means<sup>99</sup> constitutes a fundamental shift in industrial organization and in the definition and allocation of property rights. Under most state incorporation statutes, shareholders are legally disempowered from doing anything other than electing the board of directors, getting access to information relevant to the profitability of the company, receiving dividends at the discretion of the board, and transferring their shares. Their only legitimate interest is profit maximization; shareholder requests for corporate information designed to achieve other goals may be disallowed.<sup>100</sup> Shareholders do not occupy the position of the traditional fee simple owner or the traditional owner of a cotenancy interest. They are free only to try to change the board of directors, but the law presumes that their sole interest in doing so is to maximize their profits. The extreme freedom that owners have to determine the purposes for which they will use their property—or even whether they will use it productively at all—is missing. Rather, the shareholder's powers are strictly subordinated to the interests of the corporation which is controlled by management.

Both state incorporation laws and the charters of specific corporations define a complex set of powers divided carefully between shareholders and management and among shareholders themselves. Federal

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that laws are not derived from legal principles; legal principles are derived by weighing the consequence of potential laws). *See also* Wiseman, *supra* note 56, at 493-494 (discussing Llewellyn's criticism of the use of the word "title" since it did not necessarily bear any relation to the legal problem that it was intended to solve).

98. *See* Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 223 (1985).

99. ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). When this book was first published in 1932, it created such a furor that its publication was stopped. A second publisher reissued it in 1933. Later reprints were also issued and the book was revised in 1967. For an interesting discussion of the controversy surrounding its first publication, see Adolf A. Berle, *Modern Functions of the Corporate System*, 62 COLUM. L. REV. 433, 434 (1962).

100. *State ex rel. Pillsbury v. Honeywell, Inc.*, 291 Minn. 322, 326-28, 191 N.W.2d 406, 410 (1971) (en banc).

and state labor laws further divide power between management and labor. This complex of legal relationships is heavily regulated and there is no one who resembles a fee simple owner or even a tenant in common. Stock may be traded but the new shareholder does not immediately get the right to go in and use the factory owned by the corporation; her powers as an "owner" are regulated and limited. The identification of a single owner of corporate property fits badly the modern reality.<sup>101</sup> As Berle and Means noted in 1932:

The independent worker who entered the factory became a wage laborer surrendering the direction of his labor to his industrial master. The property owner who invests in a modern corporation so far surrenders his wealth to those in control of the corporation that he has exchanged the position of independent owner for one in which he may become merely recipient of the wages of capital.<sup>102</sup>

This picture is even more true today than it was in 1932. Today, the assumption that shareholders choose directors who choose management is false as a description of what happens in most big corporations. In reality, shareholders usually defer to management decisions; moreover, managers ordinarily choose directors rather than the reverse. Management dominates the board of directors to an extraordinary degree. To a large extent, management runs the show.<sup>103</sup> Of course, there are constraints on management. Nonetheless, the dominant figures in the control of corporate activity are the managers.<sup>104</sup>

The image of the corporation as the fee simple owner of its own property is an image that has outlived its usefulness. A better paradigm would focus on the industrial relations between and among the thousands of persons who participate in the ongoing affairs of the business or who depend on its success. These persons include management, shareholders, workers and their families, suppliers, and government entities. The rights of these thousands of persons are only partly governed by contract. The business constitutes a network of

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101. See generally Berle, *supra* note 99, at 435-46 (describing the separation of ownership and control in the modern corporation).

102. BERLE & MEANS, *supra* note 99, at 3.

103. EDWARD S. HERMAN, CORPORATE CONTROL, CORPORATE POWER 14, 23, 27-48 (1981); see also Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403, 1411-20, 1428 (1985) (stockholders do not have the power to direct management activities); MARTIN CARNOY & DEREK SHEARER, ECONOMIC DEMOCRACY: THE CHALLENGE OF THE 1980s, at 252 (1980). As Clyde Summers writes: "The board does not make decisions; it ratifies decisions made by management. The board does not formulate objectives or policies; it follows those developed by the executive officers of the company." Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 J. COMP. CORP. L. & SEC. REG. 155, 173 (1982).

104. In recent years, corporate raiders have reasserted some amount of control over management by threatening or engaging in corporate takeovers. See John Coffee, *Shareholders versus Managers: The Strain in the Corporate Web*, 85 MICH. L. REV. 1, 3-5 (1986). This does not change the fact that the manner in which shareholders control corporations is heavily circumscribed by the limited rights accorded to shareholders. Moreover, corporate raiders represent a small percentage of existing stockholders, and it is not obvious that their activities are always in the long-run interests of stockholders as a group.

ongoing relationships. The factory is a locus for this network.<sup>105</sup>

Rather than ask who owns the property, we should ask who has a right to say something about the use or disposition of the property. If we ask this question, it turns out that *in every case* we will identify more than one person because property rights in corporate enterprises are *always* shared. Given this fact, the proper normative question then is how to allocate power among the persons with legally protected interests in the property.

## 2. *Property law as accommodation between freedom and security.*

We are interested in identifying a single person as the owner because we assume that, with certain exceptions, the owner prevails in a dispute with the nonowner. In other words, we presume that owners control and use their property as they see fit until we are convinced otherwise. This image creates a core and a periphery. The core is an area of freedom for the "owner"; the periphery limits the owner's freedom to protect the interests of others. It is time to deconstruct this core/periphery structure.

The core image of ownership is that of consolidated rights: Everything that is not expressly prohibited to the owner is allowed. This is a nice image; it has the ring of freedom about it. The problem with it is that free use may harm others, including other property owners. We limit free use of property to protect the legitimate interests of the community.<sup>106</sup> It is not true that owners are allowed to do whatever they want with their property. Moreover, it has *never* been true. We could just as easily say: People are not allowed to harm others unless they have a privilege to do so.<sup>107</sup> This statement puts the peripheral image of limits to free use and disposition at center stage and free use at the periphery. The point is that neither of these presumptions furthers our analysis of the real issue: how to adjust the competing interests of the parties to freedom and security.

Property law is filled with limits on free use and disposition.<sup>108</sup> The

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105. See Oscar Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1198-99 (1984) (partially quoting Mason, *The Apologetics of "Managerialism,"* 31 J. BUS. 1, 7 (1958) (arguing that the problem of corporate governance involves "creating a mechanism to insure that corporate management does right by labor, suppliers, customers, and owners while simultaneously serving the public interests"))).

106. See John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 41.

107. See Holmes, *supra* note 86, at 1-6; JOHN STUART MILL, ON LIBERTY 70-86 (D. Spritz ed. 1975) (1859).

108. See Vandavelde, *supra* note 55, at 357-67. Property rules limit what owners can do with their property (building codes, nuisance law, law of easements, covenants, servitudes, licenses, profits, defeasible fees, law of waste, water rights, zoning, environmental protection statutes). They identify who owns the property in cases of conflicting claims (recording statutes, the estate system, rules about future interests, rules of interpretation such as the presumption against forfeitures and the doctrine of worthier title, rules about deeds, remedies for breach of warranty, statute of frauds). The freedom owners have to exclude others from their property is substantially limited by rules that require them to allow others access to their

rules of property law place substantial limits on the freedom of owners to do what they want with their property to protect the legitimate interests of others. This is the province of nuisance law: Property owners must not use their property unreasonably in ways that substantially interfere with their neighbors' use and enjoyment of their property.<sup>109</sup> *Sic utere tuo ut alienum non laedas*: use your property so as not to injure the rights (legitimate interests) of others.

In addition to rules limiting freedom of use of property, property law places substantial limits on the power of property owners to dispose of their property as they see fit. If property owners were perfectly free to determine who the future owners of their property would be, they could tie up property for long periods of time and remove it from easy transfer in the marketplace. The legal rules grant property owners a certain amount of power to determine future owners through rules about wills and through the estate system. For example, the current rules allow a property owner to devise a house to her husband for life, remainder to their children.<sup>110</sup> Life estates are extremely unmarketable because the life tenant can only convey what he owns and others will usually be unwilling to buy an interest in property that will terminate automatically when the seller dies. Allowing testators to make such a devise therefore restricts the freedom of future owners substantially; moreover the will of the grantor is felt long after death because the courts will enforce a transfer of the property to the children when the husband dies. Other principles limit freedom of disposition. The rule against perpetuities prohibits future interests that vest too remotely.<sup>111</sup> The purpose of the rule is to promote the alienability of property.<sup>112</sup>

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property (public accommodation laws, antidiscrimination laws and fair housing statutes, common carrier obligations to the public, free speech access to shopping centers or universities under state constitutional law, public policy exception to trespass law, the incomplete defense of necessity). Property rules limit the freedom of owners to determine who will own property in the future (the rule against perpetuities, rule against restraints on alienation, rule against creation of new estates, procedures for drafting valid wills, statutory forced shares, the public trust doctrine). Property owners do not have complete immunity from having their property taken away from them without their consent; many rules define circumstances under which property may be transferred involuntarily (recording statutes, title registration, adverse possession, prescriptive easements, implied easements, marital property statutes, constructive trusts, eminent domain law). Property rules regulate both the manner in which rights in a specific piece of property may be shared among several owners and the relationships among the co-owners (licenses, easements, covenants, rights of joint owners, future interests, law of waste, options to purchase, leases, condominiums and cooperatives, corporations, partnerships, trusts).

109. ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 7.2, at 414 (1984). More specific rules govern the rights of support (lateral and subjacent) and rights of access to light and air. Property owners have an absolute obligation not to undermine the support for their neighbors' land in its natural condition. *Id.* § 7.3, at 418-19. Building codes in many states also require those excavating or building on their property to support structures on neighboring property. *See, e.g.*, Mass. Admin. Code tit. 780 §§ 1301.0 et seq., 1305.0 et seq., 1307.0 et seq., 1312.0 et seq.

110. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 109, § 2.11, at 66-67.

111. *See generally id.* §§ 3.17-22, at 136-53.

112. *Id.* § 3.17, at 137. Of course, the actual effect of property rules on alienability is a

Thus legal rules limit the power of grantors to determine who the future owners of their property will be; these limits protect both the interests of future grantees in controlling their property and the interest of society generally in the relatively free transfer of real property in the marketplace. The rules about the estate system therefore accommodate competing interests of grantors and grantees.<sup>113</sup>

Legal rules also do not completely immunize property owners from having their property taken away from them involuntarily. Eminent domain law is the most striking example. Other examples include adverse possession, prescriptive easements, recording statutes, implied easements, easements by necessity, easements by estoppel, marital property statutes, partition, constructive trusts, rent control laws, housing codes, and environmental regulation. These sets of rules define circumstances in which an owner may lose her property, or may lose specific sets of property rights, to specific other persons against the owner's will.

Because property law regulates the use and disposition of property, it is simply not the case that we have finished our analysis once we have identified the "owner" of the property. We have merely restated the problem. The real issue is adjusting the relationships among the parties. As Chief Justice Weintraub wrote in *State v. Shack*:

This process involves not only the accommodation between the right of the owner and the interests of the general public in his use of his property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property.

. . . . We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between [them].<sup>114</sup>

Answering the question of whether the company can blow up the plant when the workers want to buy it should depend not on a presumption that the "owner" wins, but on a "fair adjustment of the competing needs of the parties" to the relationship.

Our questions should revolve around the particular problem that concerns us: the closing of industrial plants and the devastating effects such closings have on overlapping communities of persons who have relied on those plants. We want a pragmatic approach that focuses on the need to do something about a concrete, historically situated social problem. We want to ask a combination of normative and empirical

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complicated empirical question. Allowing future interests to be created and restrictive covenants to be imposed on land may actually increase its alienability either by increasing its value or by protecting the interests of the grantor and, therefore, making the sale more likely. The covenant that burdens the servient estate benefits the dominant estate.

113. See generally Alexander, *supra* note 34 (discussion of the law of trusts in the nineteenth century).

114. *State v. Shack*, 58 N.J. 297, 306-07, 277 A.2d 369, 373-74 (1971).

questions: What are the social effects of plant closings and what causes them? What should we do about them? What values should inform our inquiry? What responsibilities should people have to each other in these situations of mutual dependence? Who is most vulnerable and what are their needs? Who has the power to decide these questions?

3. *The myth of the free market.*

a. The myth of consent.

Plant closings create enormous human suffering, and the people who are victimized by plant closings complain bitterly about their predicament. The evidence, moreover, seems to indicate that this suffering is almost entirely unnecessary and avoidable; indeed, it serves no useful social purpose.<sup>115</sup> Why is nothing done about it? People who oppose plant closing regulation generally give two types of answers to this question. The first answer is a consequentialist argument; the second is a normative argument about economic liberty. The consequentialist argument maintains that any regulation of plant closings will simply make things worse rather than better; it will hurt the very people the regulators are trying to help.<sup>116</sup> The problem we are trying to address involves creating jobs for people and organizing the economy in a way that will satisfy human needs. The free market operates efficiently to do this; and plant closings are part of the process of allocating investment efficiently and maximizing social wealth. Interfering with plant closings prevents the market from working its magic. Therefore, plant closings are part of the solution rather than part of the problem. It is true that plant closings create hardships for workers, but they are perfectly able to protect themselves by bargaining for protection in contract negotiations. Any further regulation of the terms of employment contracts will interfere with the workers' freedom to make the necessary trade-offs in whatever manner they prefer. Thus, there is no need for special government policies to help workers.<sup>117</sup> I will not an-

115. Joint Report of Labor Union Study Tour Participants, *Economic Dislocation: Plant Closings, Plant Relocations and Plant Conversion 9-20* (United Automobile, Aerospace and Agricultural Implement Workers of America, United Steelworkers of America, International Association of Machinists and Aerospace Workers) (May 1, 1979) (on file with the *Stanford Law Review*) (describing how plant closings in Sweden are accomplished without the harms suffered by workers in the United States).

116. This is known as the "landlord-will-raise-the-rent" argument. Any regulation of lease terms (through housing codes or an implied warranty of habitability) will ultimately hurt tenants because landlords will respond by raising the rent and reducing other services and because marginal landlords will leave the market, thereby reducing the supply of housing which will further increase rents. See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 604-09 (1982). For responses to this argument, see text accompanying notes 360-375 *infra*.

117. Richard B. McKenzie, *Consequences of Relocation Restrictions*, in DEINDUSTRIALIZATION AND PLANT CLOSURE 153 (P. Staudohar & H. Brown eds. 1987); Richard B. McKenzie, *Summary Remarks*, in PLANT CLOSINGS: PUBLIC OR PRIVATE CHOICES? 309 (R. McKenzie ed. 1984).

swer this argument here, but will address it in my later discussion of the political economy of plant closings.<sup>118</sup>

The second argument gives a normative spin to the social vision of the free market. Plants are owned by someone, and owners have the right to determine what they will do with their property. If workers want to interfere with managerial discretion—if they want to control someone else's property—let them bargain for such rights in contract negotiations. In the absence of such voluntarily assumed obligations, owners should be free to do as they please with their property. Any interference with freedom of contract and free property use or transfer is an infringement on economic liberty. The work of Richard McKenzie, the most vocal academic critic of plant closing regulation, epitomizes this view of the world:

The right of entrepreneurs to use their capital assets is part and parcel of a truly free society; the centralization of authority to determine where and under what circumstances firms should invest leads to the concentration of economic power in the hands of the people who run government. Private rights to move, to invest, to buy, to sell are social devices for the dispersion of economic power.<sup>119</sup>

Plant closing regulation therefore decreases the economic liberty of both workers and entrepreneurs (managers and investors) by transferring decision-making power away from them to government officials.

Many political liberals similarly rely on the free market model as the core of their social vision. Whether based on rights theories (Dworkin<sup>120</sup>) or economic theories (Calabresi<sup>121</sup> and Ackerman<sup>122</sup>), liberals often preserve the free market system as the core image and justify governmental regulation of the market by reference to the concept of "market failure"<sup>123</sup> or to cases where "unequal bargaining power" vitiates consent.<sup>124</sup> Thus their core images relate to the free market even though they support extensive government regulation of the market.<sup>125</sup>

What these arguments share is the attempt to legitimate the mass of our social, economic, and institutional practices by reference to the myth of the free market. The ultimate effect of this project is to make the great bulk of market transactions appear to be the result of free consent.<sup>126</sup>

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118. See text accompanying notes 314-375 *infra*.

119. McKenzie, *Consequences of Relocation Restrictions*, *supra* note 117, at 211-12.

120. RONALD M. DWORIN, A MATTER OF PRINCIPLE 181-213 (1985).

121. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

122. BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

123. *Id.*; Jeffrey D. Hedlund, *An Economic Case for Mandatory Bargaining over Partial Termination and Plant Relocation Decisions*, 95 YALE L.J. 949 (1986); *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980) (student author).

124. Dawson, *supra* note 86.

125. Kennedy, *supra* note 116, at 614-24.

126. *Id.* at 620-24.

Ideologies are powerful and persistent. Perhaps the most tenacious ideology in the American legal culture is the myth of the free market. Undermined by the rise of giant corporations, shaken by the Great Depression, regulated by the New Deal, civil rights, environmental, and labor laws, thoroughly trashed by the legal realists throughout the twentieth century, the myth persists and flourishes. The myth extols the rightness, the simplicity, and the liberty embodied in a system of private property and freedom of contract.

According to the free market model, people are free to enter the marketplace and structure their own activities free from governmental control and private coercion. In this picture of the world, the government is not fundamentally implicated in the processes and outcomes of the marketplace or social life. Instead, the government merely facilitates private transactions entered into freely. Society is composed of individuals, busily pursuing happiness. Sometimes those individuals voluntarily join forces to maximize their welfare by aggregating their wealth or efforts. Since everyone has the right to participate in these organized efforts, it is impossible for any organization to achieve power permanently over the lives of other citizens. Every person is free to leave an organization and join another or compete on her own. Every powerful organization is met by countervailing powers. No individual or organization can dominate such a world. Competition insures that individuals always have choices and that power is met by power. No one and no group can permanently get the upper hand. The market is an arena of freedom, not coercion.

The market is also a world where hard work is rewarded and no one has a fixed social status; a world where wealth abounds because the incentives to produce it are unlimited and assured; a world where people get what they want if they are willing to work for it. If people are unhappy, they have only themselves to blame: Wealth and power are there for the taking. Once they have acquired property through honest labor or genius, they are secure in the knowledge that others cannot take their property or damage it (even slightly) against their will and that they can use their property as they see fit. They can develop it, they can preserve it from development; they can keep it, they can sell it; they can give it away, they can leave it to their children; they can even destroy it. It is *theirs* to control; no one else can touch it without their consent.

The free market model describes the market as an area of social life immune from both governmental control and private coercion. This vision relies on a fundamental distinction between the public sphere of state control and the private sphere of individual freedom.<sup>127</sup> It identi-

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127. Gerald E. Frug, *Property and Power: Hartog on the Legal History of New York City*, 1984 AM. B. FOUND. RES. J. 673, 678-87 (reviewing HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983)).



fies maximization of private freedom (and minimization of government control) as the paradigm of a free society.

b. Economic liberty.

What is wrong with this story of the free market?<sup>128</sup> To begin with, this paradigm fails to address the difficult question of what we mean by economic liberty. Liberty means freedom to act, as long as one's actions are compatible with a like freedom for others.<sup>129</sup> Liberty means freedom from having the government tell us what to do (public coercion) and freedom from having our neighbors harm us or take our property or services against our wishes (private coercion). Traditional social contract theory is premised on the notion that one purpose of government is to protect people from the domination by others that could happen in the state of nature. The free market is not the state of nature; by definition, it requires collective coercion to protect property rights and personal security and to enforce agreements. The image of a private sphere of free market activity with minimal government regulation still requires a certain amount of regulation. This compels us to define limits on freedom of action necessary to make us secure from harm; those limits are constituted by property and contract rights. The project of achieving economic liberty thus requires us to define those rights. And this is not an easy thing to do.

Property and contracts rights are not self-defining. In allocating them, we must often choose between competing principles: between title and possession, between contract and reliance, between freedom and security, between voluntariness and duress. There is simply no way to derive logically the inherent meaning either of contract or of property because each contains within it an accommodation between the contradictory claims of freedom and security. Every entitlement implies a correlative vulnerability of others. This is the Hohfeldian lesson: For every benefit there is a cost; for every entitlement, there is a correlative exposure. To the extent I have a liberty to act, you are exposed to potential harm; to the extent I have a right to security, your liberty to act is limited. The image of absolute freedom and absolute security underlying the myth of the free market is a false description of

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128. My argument here is based on the brilliant analysis of Robert Hale. See ROBERT L. HALE, *FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER* (1952); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Hale, *supra* note 86; Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); Robert L. Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209 (1922); Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920); see also Kennedy & Michelman, *supra* note 22 (refuting several arguments about the virtues of private property and freedom of contract); Michelman, *supra* note 67 (arguing that the presumptive efficiency thesis does not demonstrate that a property rights system based on competition and freedom of contract will necessarily be superior to another legal regime); Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, 27 U. MIAMI L. REV. 261 (1973).

129. Mill, *supra* note 107, at 70-86.

social reality and of the rules in force. It ultimately proves incoherent and self-refuting as an ethical goal.<sup>130</sup>

Because all legal rights protect some interests at the expense of other competing interests, we must choose whom to protect and whom to leave vulnerable. Property and contract rights do not define themselves for us. We cannot define them without reference to controversial political and moral commitments.

c. Indeterminacy of freedom of contract.

In a freedom of contract system, people are free to make whatever agreements they wish. They are also free not to agree; other people cannot force them to agree against their will. Freedom of contract therefore requires us to enforce voluntary agreements in accordance with their terms, and to refuse to enforce agreements that are the result of coercion by one party over the other. We must make judgments about which agreements are sufficiently voluntary to enforce and which are illegitimate impositions of power by one party over the other.<sup>131</sup> We could define duress narrowly to include only physical duress (arm twisting) or physical threats (gun to the head);<sup>132</sup> or we could define it more broadly to include economic duress caused by unequal bargaining power.<sup>133</sup> There is no purely logical answer to this question.

Suppose that you have fallen into a deep pit filled with poisonous snakes. I come along and observe you in the pit. I am not responsible for your predicament and have no legal duty to help you.<sup>134</sup> I offer to sell you a ladder in exchange for half your future earnings. You agree to buy; I agree to sell. It is a Pareto superior exchange; you are happier with your life and half your future earnings than the alternative; I am happier as well with this outcome. Is the contract voluntary? There is no simple answer to this question. You obviously felt forced to agree; you paid an awful lot for the ladder. But you also benefited substan-

130. We have competing notions of both individual freedom and governmental power. As Professor Frug argues, we view private property rights as alternately good and bad, as exercises of legitimate freedom and as coercive acts that need to be controlled in the interest of security or social welfare. In like fashion, we sometimes view governmental power as legitimate regulation to promote the public welfare and sometimes as illegitimate and oppressive interference with individual liberty. See Frug, *supra* note 127, at 678-87.

131. Jay Feinman, *Contract After the Fall*, 39 STAN. L. REV. 1537, 1543-46 (1987) (reviewing HUGH COLLINS, *THE LAW OF CONTRACT* (1986)); Frug, *supra* note 74, at 1364; Kennedy, *supra* note 116, at 568-70, 580-83; Aviam Soifer, *Status, Contract, and Promises Unkept*, 96 YALE L.J. 1916, 1924-33, 1944 (1987).

132. See, e.g., Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 953-55 (1984).

133. See Dawson, *supra* note 86.

134. I am assuming we are in a state that does not impose a duty to rescue a stranger in distress. Cf. VT. STAT. ANN. tit. 12, § 519(a) (1973) ("A person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.").

tially by the deal. Is the contract fair? The terms are onerous for you, but so was the alternative. We could, consistent with a regime of freedom of contract, enforce this contract (because it was the result of voluntary choice and was mutually beneficial) or not enforce it (because it was the result of coerced choice and its terms are unconscionable).

A free market system also encompasses goals other than freedom of contract, and we may need to limit freedom of contract to achieve these goals. For example, we sometimes refuse to enforce anti-competitive covenants to achieve the goal of preserving economic competition. We refuse to enforce racially discriminatory covenants to promote equal access to real property. We refuse to enforce certain future interests to promote the goal of increasing the alienability of property in the marketplace. The goals of competition, alienability, and equal access to property are part of our conception of what a free market system means. Yet all of them require limits to freedom of contract. Again, there is no easy way to determine what the goals of a free market system should be, or how we should resolve conflicts between the principle of freedom of contract and competing principles.

d. Circularity of defining property by reference to bargains.

The opponents of plant closing regulation argue that if the workers wanted a right to buy the plant upon closing, they should have bargained for this right in their contract; in the absence of such an agreement, the workers cannot have this right. This argument is flawed for two reasons. First, the argument is unconvincing until we have answered the question of whether the circumstances of the agreement accord with our ideals of freedom of contract: Was the bargaining power between the parties sufficiently equal to be enforced as a voluntary agreement or was it sufficiently unequal to constitute an illegitimate imposition of terms by the company on the workers?

Second, it is circular to define property rights by reference to bargains. Whatever bargain is agreed to by the parties will be a function of their relative bargaining power. Their bargaining power, in turn, is a function of their relative property rights. The assignment of the property entitlements determines the relative bargaining power of the parties which then determines what they agree to in the contract. What people agree to in their contracts is part of what determines what property rights they have. We cannot define property rights purely by reference to bargains because bargains are a function of property rights. Bargains determine property rights, but property rights also determine what bargains are made. There is no purely logical starting point to the analysis. We need some independent criterion of justice (other than freedom of contract) to determine what the initial distribution of property rights should be.

## e. Property as delegation of sovereign power.

I have argued that property and contract rights are not self-defining. But the problem is even worse than this. It is impossible to describe accurately a free market system by reference to the idea of minimizing government intrusion on private freedom in the marketplace. Even in a laissez-faire system, the government is fundamentally implicated in the most minute details of every market transaction. The legal realists taught us that both property and contract rights can be understood as delegations of sovereign power.<sup>135</sup> The definition and enforcement of entitlements necessarily entails application of public power. When the state enforces contracts, it coerces individuals to comply with their commitments rather than leaving them free to make new arrangements that are more beneficial to them. When the state refuses to enforce contracts, it prevents powerful individuals from binding vulnerable persons.<sup>136</sup> When the state enforces property rights, it enables the owner to exclude others from access to her property. When the state refuses to enforce property rights, it delegates to non-owners the power to take what they need from owners.

Property and contract rights are powers delegated by the state; they assign decision-making power.<sup>137</sup> These rights determine the relative bargaining power of the parties to voluntary transactions. There is therefore no such thing as a private sphere removed from state regulation. In the midst of every transaction sits the state, determining the balance of power between the parties, and hence the result of the bargain. There is no question then of deference to a private bargain; no bargains are purely private. There is no core to our social or legal system that can be fruitfully conceptualized as an unregulated sphere of free property use and free exchange. Every individual action is inherently social; every act is both free and coerced.<sup>138</sup> As Hale tried to

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135. Cohen, *The Basis of Contract*, *supra* note 86; Cohen, *Property and Sovereignty*, *supra* note 86; Hale, *supra* note 86.

136. P.S. ATIYAH, *supra* note 89, at 133. Atiyah further states:  
*[A]ll contract law is distributive . . . . No matter what the rules of contract law may be, the result is, in a sense, redistributive . . . . [T]he enforcement of executory contracts itself presupposes an initial distribution of entitlements that is part of the very structure of contract law . . . . The truth is, it seems to me, that the enforcement of executory contracts is only justifiable on the assumption that we have already distributed a property-like entitlement to the promisee; the promisee is entitled to the benefit of the promise, and the promisor is not entitled to change his mind. Without that initial distribution of entitlements, there is no case for enforcing executory contracts.*

*Id.*

137. C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 742-44 (1986); Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion through Economic Power*, 100 U. PA. L. REV. 933, 934-36, 942-43 (1952); Cohen, *The Basis of Contract*, *supra* note 86; Cohen, *Property and Sovereignty*, *supra* note 86.

138. Dalton, *supra* note 74; Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1982) ("The core ideological function served by the public/private distinction is to deny that the practices comprising the private sphere of life—the worlds of

teach us, every transaction takes place against a background of property rights. And the definition, allocation, and enforcement of those entitlements represent social decisions about the distribution of power and welfare. No transaction is undertaken outside this sphere of publicly delegated power; the public sphere defines and allocates the entitlements that are exchanged in the private sphere. At the core of any private action is an allocation of power determined by the state.<sup>139</sup>

It is not the case that everyone in our society has equal access to wealth and power or that opportunities in the marketplace are even roughly equal. It is also not the case that these inequalities primarily result from differences in individual talent or efforts. To a large extent, the inequalities present in the economic system are the result of the legal allocation of entitlements. The question, then, is not whether or not to regulate. The question is what kind of regulation we are going to have: What distribution of power we want to establish in the market; what interests we want the market to protect; what consequences we want the market to foster. The free market model is indeterminate. There is no such thing as a single "free market"; we must choose

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business, education and culture, the community, and the family—are inextricably linked to and at least partially constituted by politics and law.”).

139. This point is so important, and so often forgotten, that it is worthwhile repeating at length Hale's elegant argument that the market constitutes a regulatory system that distributes decision-making power. Hale writes:

[P]articular rights and duties are created at the initiative of private individuals. But they are created (or modified or extinguished) by virtue of the power of mutual coercion (in the form of pre-existing rights) vested by the ordinary law in the two contracting parties. It will not do to say that the party to a contract is a voluntary agent merely. He makes the contract in order to acquire certain legal rights he does not now possess, or to escape certain legal obligations with which he is now burdened. Were his liberty not restricted by these obligations imposed on him by the law and enforced in the ordinary courts, he might never submit himself to the new obligations of the contract. Thus in a sense each party to the contract, by the threat to call on the government to enforce his power over the liberty of the other, *imposes* the terms of the contract on the other. When the rights and privileges which one party possesses are vastly superior in strategic importance to those possessed by the other (when the restraints on his liberty, in other words, are vastly less burdensome than those on the liberty of the other), the other party may in effect be compelled to submit by contract to almost any terms imposed by the stronger party. That is, the weaker party, whose previous legal restrictions are intolerable, may incur new restrictions as the price of escape from the old. For instance, if a single employing company owns all the land in a town and all the local food supplies, any property-less inhabitant, without even the price of a railroad ticket, is at the outset under a legal duty (enforceable in the courts) to refrain from eating or from lodging under a roof. This duty he is manifestly compelled by necessity to escape; but he cannot escape without obtaining the consent of the company. That consent may perhaps be obtainable only by contracting to submit to rules made by the company, any subsequent violation of which will be an unlawful breach of contract, of which the courts will take cognizance. Under such extreme circumstances it is literally true that the company can make rules which the inhabitants will be forced by the governmental authorities to obey—rules which, in their legal effects, are indistinguishable from governmental acts.

Hale, *supra* note 128, at 452-53.

among alternative possible market structures.<sup>140</sup>

C. *Property as Social Relations*

1. *Understanding the world.*<sup>141</sup>

a. Reliance on relationships of mutual dependence.

The free market model describes the world in terms of possessive individualism.<sup>142</sup> This paradigm is derived from the traditional social contract theory of Hobbes and Locke. It pictures the world as made up of autonomous individuals. These individuals are understood as fundamentally separate from each other; they are alone in the world. They are basically self-interested, and their interests conflict. To protect themselves from each other, they band together to form the state. Once this system is set up, obligations have two main sources: commands of the state and voluntary agreements. Initially, the state allocates property rights and determines how they may be otherwise acquired. It also defines legally protected personal interests of security through tort law. After this initial definition and allocation of entitlements, individuals exercise their property rights or rights of personal freedom, limited only by the duty not to infringe on someone else's rights. Any further obligations are voluntarily assumed by agreement.

In this paradigm, rights are clearly defined at decision points: first, when the state defines personal rights of security and allocates property rights, and second, when people exchange services or property through voluntary agreement. Any obligation that cannot be traced to a full-fledged private contract or a clearly defined state obligation is seen as anomalous.<sup>143</sup> This paradigm therefore understands individuals as connected to each other legally in only two ways: through the universal

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140. ROBERT REICH, *TALES OF A NEW AMERICA* 222-232 (1987); Frug, *supra* note 74, at 1365 ("There is no such thing as 'the free market.' There are only alternative possible markets, each of which restrains as well as enhances human freedom."). In a brilliant essay, Jeremy Paul explains why the state necessarily engages in distributive activity when it defines property rights. See Jeremy Paul, *Searching for the Status Quo*, 7 *CARDOZO L. REV.* 743, 746-74 (1986); see also Anthony Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980).

141. "The philosophers have only interpreted the world, in various ways; the point, however, is to change it." KARL MARX, *Theses on Feuerbach*, in 5 *COLLECTED WORKS OF KARL MARX AND FREDERICK ENGELS* 8 (1976 ed.).

142. See generally C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

143. Unger, *supra* note 36, at 37. As Unger explains:

For another thing, lawyers still believe obligations to arise primarily from either perfected acts of will (such as the fully formalized, bilateral executory contract) or the unilateral imposition of a duty by the state. Although a large and growing body of legal rights and ideas recognizes, under names such as the reliance interest, legally protected relationships that fail to fit these two categories, these relationships remain anomalous from the standpoint of our basic legal thinking about the sources of obligation.

*Id.* at 81; see also Jay Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 *WIS. L. REV.* 1373.

community of the state or through private agreements. The more fluid relationships of connection are banished to the realm of the family.

In contrast, the social relations approach “assumes that there is a basic connectedness between people, instead of assuming that autonomy is the prior and essential dimension of personhood.”<sup>144</sup> If we see people as situated in relation to others, rather than as isolated and autonomous, our understanding of social life changes, and with it, our understanding of the source of legal obligations. In this view, people are never completely alone. They are situated in a complicated network of relations with others. Rather than relating to others either through the universal community of the state or through individual decisions to contract, people relate to each other in a range of ways. We can understand social relationships as comprising a spectrum, from relations among strangers, to relations among neighbors, to continuing relations in the market, to intimate relations in the family.<sup>145</sup> This understanding of social relations relativizes the distinction between autonomy and community. We do not relate to others only through the mechanism of the whole community or through agreements between autonomous individuals. Rather, we can relate to others in ways that do not fit either of these polar categories, but through the more fluid, ongoing relationships of give and take that are characteristic of relations in the family and in associations.

Understanding people as situated in a spectrum of relationships with others allows us also to relativize the distinction between state coercion and private contractual freedom. This understanding therefore changes our understanding of the source of legal obligations. Many of the legal developments of the twentieth century can be described as recognition of obligations that emerge over time out of relationships of interdependence. These entitlements are neither fully articulated initially by clear state-imposed obligations nor by fully-executed and complete contracts. Rather, these obligations often are imposed to protect the interests of individuals in relying on the continuation of important relationships of interdependence.<sup>146</sup> Moreover, these obligations are not created only at magic moments when decisions are made by the state or by contracting parties; instead, they may change as the relation between the parties changes. As Roberto Unger explains:

The dominant approach to contract problems assumes that obligations have two main sources: the unilateral imposition of a duty by the state (as in many forms of tort liability) and the articulated agreement in full conformity to the established procedures for contracting. Contract theory treats any additional source, including relations of interdepen-

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144. Minow, *supra* note 72, at 127; Cornell, *supra* note 41.

145. Martha Minow, *Many Silent Worlds*, 9 W. NEW ENG. L. REV. 197 (1987).

146. Cf. Peter Linzer, *The Decline of Assent: At-Will Employment as a Case Study of the Breakdown of Private Law Theory*, 20 GA. L. REV. 323 (1986) (describing modifications of at-will contracts so as to legitimate employees' reliance on their jobs).

dence, as either an uncertain penumbra of the articulated agreement or an equitable qualification to the basic principles of the law. The theory of rights that fits this view of the sources of obligation is one that sees an entitlement as designing a zone of discretionary action whose limits are set at the moment of the initial definition of the entitlement. . .

The countervision depends upon very different premises. It implies that obligations do arise primarily from relationships of mutual dependence that have been only incompletely shaped by government-imposed duties or explicit and perfected bargains. The situations in which either of these shaping factors operates alone to generate obligations are, on this alternative view, merely the extremes of a spectrum. Toward the centre of this spectrum, deliberate agreement and state-made or state-recognized duties become less important, though they never disappear entirely. The closer a situation is to the center, the more clearly do rights acquire a two-staged definition: the initial, tentative definition of any entitlement must now be completed. Here the boundaries are drawn and redrawn in context according to judgments of both the expectations generated by interdependence and the impact that a particular exercise might have upon other parties to the relation or upon the relation itself.<sup>147</sup>

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147. Unger, *supra* note 36, at 80, 81; *see also* Robert Gordon, *Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565 (describing the notion of relational contracts developed by Stewart Macaulay and Ian Macneil); Wallace Lightsey, *A Critique of the Promise Model of Contract*, 26 WM. & MARY L. REV. 45, 66-69 (1984) (arguing for a two-stage model of contract obligations, starting with the initial, tentative definition of mutual rights and obligations and moving to the "continual adjustment of the relationship to unanticipated circumstances that occur as the future unfolds"); Linzer, *supra* note 146. For the original discussions of relational contracts, *see* IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN ENQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); Ian Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483; Ian Macneil, *Values in Contract: Internal and External*, 78 NW. U.L. REV. 340 (1983); Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978); Ian Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 1691 (1974); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963); Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 L. & SOC'Y REV. 507 (1977). *See also* Gideon Gottlieb, *Relationism: Legal Theory for a Relational Society*, 50 U. CHI. L. REV. 567 (1983).

*See also* RONALD DWORKIN, *supra* note 33, at 197. Dworkin states:

Even associations we consider mainly consensual, like friendship, are not formed in one act of deliberate contractual commitment, the way one joins a club, but instead develop through a series of choices and events that are never seen, one by one, as carrying a commitment of that kind.

We have friends to whom we owe obligations in virtue of a shared history, but it would be perverse to describe this as a history of *assuming* obligations. On the contrary, it is a history of events and acts that *attract* obligations, and we are rarely even aware that we are entering upon any special status as the story unfolds. People become self-conscious about the obligations of friendship in the normal case only when some situation requires them to honor these obligations, or when they have grown weary of or embarrassed by the friendship, and then it is too late to reject them without betrayal. Other forms of association that carry special responsibilities—of academic collegueship, for example—are even less a matter of free choice: someone can become my colleague even though I voted against his appointment.

The notion that contract rights change over the course of a long term relationship in response to unforeseen events is recognized by courts that allow reformation of long-term contracts to adjust the relations between the parties when one party faces a substantial un-



In summary, the free market model contains the following features: (1) It encourages us to see people as autonomous individuals; (2) It limits the types of social relationships that are relevant to legal analysis by focusing on voluntary agreements and entitlements defined *a priori* by the state; (3) It characterizes rights as fully articulated at specific decision points—when the state allocates property rights and defines personal rights of security initially, and when individuals enter into contracts; (4) It focuses our attention on two questions: (a) who is the owner? and (b) what did the corporation promise? In contrast, the social relations approach directs our attention in the following ways: (1) It encourages us to see people as situated in various relationships with others that continue over time; (2) It describes social relations as comprising a spectrum from short-lived relations among strangers to continuing relations in the market to intimate relations in the family; (3) It comprehends rights as emerging out of understandings that develop over the course of relationships rather than as being fully articulated at clear decision points; (4) It encourages us to ask various questions about the relationship between the parties. By refocusing our attention, the social relations approach allows us to understand industrial enterprises in new ways. This, in turn, allows us to ask new questions when faced with plant closings.

b. New questions about plant closings.

In 1937, Leon Green wrote an article for the *New Republic* about the sit-down strikes.<sup>148</sup> His analysis tracked his theory that the modern market system should be understood in terms of the need to protect various relational interests.<sup>149</sup> These are “the interests a person may have in his *relations with other persons*.”<sup>150</sup> He wrote:

The industrial relation in its initial or formative state is the result of a contractual nexus between the two parental organisms of industry—those who supply its property-capital on the one hand and those who supply its service-capital on the other. But as in the case of family, corporate, partnership, carrier, and all other important relations, the slender tie of the initial contract is overgrown by a network of tissue,

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foreseen loss that is not its fault. *See, e.g.,* Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) (ordering reformation of a long-term requirements contract when seller’s nonlabor production costs rose greatly beyond foreseeable limits of risk).

For an argument that long-term contracts should not be adjusted when conditions change, see Clayton Gillette, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, 69 MINN. L. REV. 521 (1985).

148. Leon Green, *The Case For the Sit-Down Strike*, 90 THE NEW REPUBLIC 199 (1937).

149. Leon Green, *Basic Concepts: Persons, Property, Relations* 24 A.B.A. J. 65 (1938); Leon Green, *Relational Interests*, 29 ILL. L. REV. 460 (1934) (on family relations); Leon Green, *Relational Interests*, 29 ILL. L. REV. 1041 (1935) (on trade relations); Leon Green, *Relational Interests*, 30 ILL. L. REV. 1 (1935) (on commercial relations); Leon Green, *Relational Interests*, 30 ILL. L. REV. 314 (1935) (on professional and political relations); Leon Green, *Relational Interests*, 31 ILL. L. REV. 35 (1936) (on general social relations).

150. Green, *Basic Concepts*, *supra* note 149, at 65.

nerves and tendons, as it were, which gives the relation its significance. The respective rights, duties, privileges and immunities of the parties to the industrial relation are too numerous to recite here, but they are well known.

Both participating groups have contributed heavily to the joint enterprise of industry. The contributions of those who make up the corporate organization on the one hand are visualized in plant, machinery, raw materials and the like. They can be seen, recorded and valued in dollars. We call them property. On the other side are hundreds of personalities who have spent years training their hands and senses to specialized skills; who have set up habitations conveniently located to their work; who have become obligated to families and for the facilities necessary for maintaining them; who have ordered their lives and developed disciplines; all to the end that the properties essential to industry may be operated for the profit of the owner group and for their own livelihoods. Their outlays are not so visible, nor so easily measured in dollars, but in gross they may equal or even exceed the contributions of the other group. Both groups are joint adventurers, as it were, in industrial enterprise. Both have and necessarily must have a voice in the matters of common concern. Both must have protection adequate to their interests as against the world at large as well as against the undue demands of each other.<sup>151</sup>

Green argued that the company should be understood as a common enterprise. He further argued that the law should recognize and protect the ongoing relation between management and labor. This relation is not fully articulated by the agreement between the parties. Expectations develop during the relationship that are legitimate. Because these expectations have developed, the relation must be regulated to prevent the more powerful party—the corporation—from using its superior bargaining power in ways that illegitimately threaten the interests of workers relying on continuation of the relationship.

The right to fire is an incident of the simplest form of contract, that of employment at the will of both parties; it has no place in a relation which is based upon infinitely more than mere contract. A wife cannot fire her husband, a parent his child, a corporate stockholder other stockholders, one partner another member of the firm, an insurer the insured, a carrier its passengers, with impunity. Neither can an employer fire his employees *en masse*. These other relations are at best only analogous, but they give point. All institutions built upon relational interests of the groups concerned must submit to the obligations which have grown up around the particular relation, and if it is to be destroyed it must be done subject to such obligations.<sup>152</sup>

151. Green, *supra* note 148, at 199.

152. *Id.* at 200; see also Adolf Berle, *Constitutional Limitations on Corporate Activity—Protection of Personal Rights From Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952) (arguing that corporations are delegated governing power by the state and that power should be limited to protect the legitimate interests of individuals); cf. Wolfgang Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957) (describing how corporations are repositories of sovereign power).

The relational approach shifts our attention from asking "Who is the owner?" to the question "What relationships have been established?" The shift is partly a shift from focusing on the relation between the owner and the resources owned to the relation between the owner and non-owners who have benefited from the resources. But more important, the shift is from a perspective that focuses on the owner as an isolated individual whose presumptive control of the resource is absolute within her sphere of power to a perspective that understands individuals to be in a continuing relation to each other as part of a common enterprise. Rights are not limited to the initial allocation of property entitlements or the agreement of the parties, but emerge and change over the course of the relationship.

The relational idea forces us to turn our attention to facts that would otherwise be obscured. It allows us to take seriously Judge Lambros's intuition that property rights should be recognized from the long-standing relation between U. S. Steel, its workers, and the town. Rather than seeing the corporation and the workers in isolation, and assuming that the corporation has absolute freedom to dispose of "its" property as it sees fit, in the absence of a clear contractual obligation to the contrary, we can see the corporation and the workers as together having established and relied on long-standing relations with each other in creating a common enterprise. The rights of the members of the common enterprise cannot be fully articulated by reference to ownership rights defined *a priori* or by the explicit terms of written contracts. If workers are considered to be part of the corporation, rather than factors of production or hired hands, our analysis of property rights changes. As Clyde Summers explains:

[T]he corporation is more than the shareholders and includes the employees. If the corporation is conceived in relatively narrow terms as an operating institution combining all factors of production to conduct an on-going business, then the employees who provide the labor are as much members of that enterprise as the shareholders who provide the capital. Indeed, the employees may have made a much greater investment in the enterprise by their years of service, may have much less ability to withdraw, and may have a greater stake in the future of the enterprise than many of the stockholders.<sup>153</sup>

This image allows us to consider the moral character of that relationship and the obligations that should be imposed on the more powerful party to protect the interests of the more vulnerable party. It allows us to address as a legal matter the question that Lambros ultimately treated as non-legal, as a matter of morality. The relational idea does not tell us what to do, but it helps us define the issue of the case in a way that does not exclude consideration of the legitimate obligations of powerful parties to their partners in common enterprises.<sup>154</sup>

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153. Summers, *supra* note 103, at 170.

154. Cf. Daniel Farber & John Matheson, *Beyond Promissory Estoppel: Contract Law and the*

Legal obligations are imposed on parties to relationships even though the parties did not agree to such obligations and even though such obligations were not clearly defined by the state at the start of the relationship. These obligations are imposed for a wide variety of reasons. As Unger has written:

The circumstances suitable for [the] application [of an intermediate standard between total devotion to community and complete self-centeredness] might be selected on the basis of features that would include expressed intent, induced or even unwarranted trust in fact, disparity of power manifest in one party's greater vulnerability to harm, and the continuing character of the contractual relationship.<sup>155</sup>

As Peter Linzer explains:

I believe that the traditional approaches to tort, contract and property are wrong, and that private law is a relatively seamless area in which the society, speaking primarily through the courts, assigns rights and duties based on relationships among people and firms, in light of many factors, among them the particular community needs, the needs of the parties themselves, their relative power, fairness among them *and* their assent.<sup>156</sup>

Thus, we should ask a series of questions about the ongoing relations among the parties to the common enterprise. What relations have been established? What expectations have been generated on both sides by continuation of the relationship?<sup>157</sup> To what extent should those expectations be protected? What was the explicit agreement between the parties? What is the distribution of power in that relationship? What alternatives do the parties have open to them? How have the parties relied on continuation of the relationship? How have the parties contributed to the joint enterprise? What are the consequences of giving complete control of the property to the putative owner or limiting the corporation's obligations to those agreed to in

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"*Invisible Handshake*", 52 U. CHI. L. REV. 903 (1985). The relational perspective differs from the approach taken by Farber and Matheson which argues that promises made in furtherance of economic activities should be enforced whether or not there is detrimental reliance. Rather than focusing on the union's reliance on a specific promise, I focus on the union's reliance on the ongoing relationship within the common enterprise.

155. Unger, *supra* note 36, at 83-34; *see also* Linzer, *supra* note 146.

156. Linzer, *supra* note 146, at 326-27 (footnotes omitted) (emphasis in original). Linzer further explains:

In a sense I am calling for a return to common law creativity. When people deal informally with one another, conscious assent is often non-existent, except perhaps when the parties start to deal with each other. Terms may not even be discussed; people just do not think in terms of rules in many relationships. Yet the parties have expectations and they each contribute to the relationship. Traditional notions of contract and property greatly favor the economically dominant party, even though a strong case can be made that all contributors to an enterprise deserve some security and some share of the enterprise itself. The focus [should be] on the relationship as a firm with the members' rights depending on communal notions of fairness . . . .

*Id.* at 425.

157. These questions can only be partly answered by reference to the contract between the parties.

the contract? What are the consequences of imposing greater obligations on the corporation toward the workers? What moral obligations should the more powerful party have in this context to protect the more vulnerable party?

2. *Changing the world: The social responsibilities of property ownership.*

So far, I have described the social relations approach as a way to understand and describe social life better. It allows us to see relationships that are obscured in the free market model, and to focus on legal obligations that do not fit the paradigm of ownership and contract. I now shift to a more explicitly normative argument. I argue that property rights in the context of plant closings should be defined and allocated partly with two goals in mind. The first goal is allowing market participants real freedom to fashion their relationships within joint enterprises. The second goal is protecting vulnerable persons in times of crisis. These two policies should be added to our overall concern for maximizing the general welfare by encouraging efficient operation of the market to satisfy human needs.

John Cribbet has recently noted that "private property may encompass a wide range of societal responsibilities."<sup>158</sup> Recent developments in property law have shown a marked "increase in the social responsibilities of the land owner and a corresponding decrease in the owner's rights."<sup>159</sup> He concludes: "All landowners hold their interests for the benefit of posterity as well as for their own use. Landowners are thus trustees for the future, and society, as a whole, has a stake in whether the landowner wastes land or uses it wisely."<sup>160</sup>

The legal rules in force contain numerous doctrines requiring owners to take into account the interests of others when they decide how to use their property. Examples include the obligations of landlords to tenants, the obligation of present owners not to injure future owners by committing waste, the obligations of trustees towards beneficiaries, the obligations of riparian owners to use their property consistent with the public trust, the fiduciary obligations of partners toward each other, the fiduciary obligations of directors and managers to stockholders, the duty of good faith performance in contract law.

Owners of valuable social assets hold them partly for their own benefit and partly in trust for the community and for others with whom they establish continuing relationships. Owners should not be allowed

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158. Cribbet, *supra* note 106, at 4. Cribbet discusses a wide range of doctrines to illustrate this point, including landlord/tenant law, vendor/purchaser law, nuisance law, air and solar rights, water and environmental rights, eminent domain, and police power controls.

159. *Id.* at 6.

160. *Id.* at 40; *see also id.* at 41 ("There is no absolute property, *i.e.*, property that is freed from taking into consideration the interest of the community, and history has taken care to inculcate this truth into all peoples.") (quoting RUDOLPH VON JHERING, *DER GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* (4th ed. 1878)); *see also* Fred Strasser, *Just Whose Land Is It—Anyway?*, 9 Nat'l L.J., Dec. 22, 1986, at 1, col. 3.

to waste valuable social resources.<sup>161</sup> The corporation should not be allowed to waste property which has been relied upon by members of the common enterprise; such property is held in trust for the benefit of the common enterprise and especially for the benefit of the more vulnerable parties to the relationship. This conception of property allows us to shift the discussion in a way that focuses on the moral and policy concerns that led Judge Lambros to consider creation of the community property right.

Bruce Ackerman has argued that property owners have a moral obligation when they enter continuing relations of dependence to "refrain from weaving the larger social injustice of the maldistribution of income into the fabric of [their lives], as [they] do when [they] embark upon . . . continuing relationship[s]. . . ."<sup>162</sup> Focusing on landlord/tenant law, Ackerman argues that landlords have a moral obligation to maintain their rental property in a habitable condition for the benefit of tenants with whom they establish personal or market relationships. "[I]t is relatively easy to understand, I think, why a moral man living in an unjust society would, *at a minimum*, personally seek to refrain from entering into long-lasting relationships which epitomize the larger social injustices surrounding him, *at least where refraining does not exacerbate the condition of the impoverished*."<sup>163</sup> In a dialogue that is worth repeating at length, Ackerman explains:

*Landlord*: I am only minding my own business; if you don't like this freezing, rat-infested apartment then either pay a higher rent or look for another place to live; I am not forcing anything upon you.

*Tenant*: This is true, but in a just society I would be able to afford a decent home.

*Landlord*: You might be right; but this is an argument better addressed to the legislature, which can enact a generous cash grant plan raised out of general revenue. Why am I responsible for the world's ills?

*Tenant*: Both you and I are perfectly aware that the legislature will not within the foreseeable future grant me my fair share of the national income. How long can you escape from any responsibility to act as if the world were justly organized?

*Landlord*: Even if I conceded that, given the failure of our social institutions to achieve social justice, I had an obligation to act *as if* justice were achieved, that's an awfully vague formula. What kind of practical maxim for conduct can you propose?

*Tenant*: Act so that in none of your ongoing relationships you permit another human being to exist under conditions which constitute a seri-

161. An owner of a famous painting—Picasso's *Guernica*, say, or the *Mona Lisa*—holds the painting in trust for humankind and would commit a grave wrong if the picture were destroyed or altered. A bill has recently been introduced in the United States Senate to prevent the unnecessary destruction or alteration of copyrighted works of art. S. 2796, 99th Cong., 2d Sess. (1986).

162. Bruce Ackerman, *Regulating Slum Housing Markets On Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *YALE L.J.* 1093, 1171 (1971).

163. *Id.* at 1172 (emphasis in original).

ous affront to his dignity as a person. . . . The easiest way [to know which relationships violate this maxim and which do not] is to imagine whether, if you were in my position, you would consider living in this apartment to be not merely inconvenient, but as making it virtually impossible to engage in many of those activities which make living a valuable experience.

*Landlord:* Perhaps I can see how this principle applies here. But I am still unclear why I owe you this duty simply because I have rented you an apartment. Why don't I have a similar duty to share my wealth with any passerby who demonstrates to me that he is in dire need?

*Tenant:* Well, of course, a *saint* would respond to the cry of the passerby in the same way as he would to the indignation of his indigent tenant. But there is a difference, nevertheless, between the two cases. You, as a slum landlord, are making disregard for human personality a *fixture in your life*, an aspect of one of the fundamental activities in which you engage. And while I do not demand that you be a saint, I do assert that at the very least you should refrain from weaving the larger social injustice of the maldistribution of income into the fabric of your life, as you do when you embark upon this continuing relationship with me.

*Landlord:* But where will this straight-laced moralism get you in the long run? For your argument permits me to wash my hands of our continuing relationship simply by abandoning the property. This will only worsen your position since the remaining landlords will thereby be enabled to charge even higher prices for their awful apartments. Moralism is unprofitable not only for me, but for you.

*Tenant:* I don't believe you. If you want to wash your hands of this relationship, you would rather sell out at a depressed price to someone else who would fulfill the code rather than abandon entirely. But even if you do abandon, I am told that the state is supporting code enforcement with a special housing subsidy, so I won't be worse off anyway. Morality may not pay for you; but it pays for me. And you shouldn't complain that you find morality somewhat unprofitable, at least financially. Isn't that what morality is all about?<sup>164</sup>

If we accept the view of corporations as common enterprises, and if we accept the idea that owners of property have social obligations to the community and to those with whom they establish continuing relations of mutual dependence, then we can begin to talk about a new social vision that can orient our decisions about the social responsibilities of property owners. This social vision of property law will center on the image of *protecting reliance on relationships constituting common enterprises*. As a normative matter, we must therefore determine what responsibilities property owners should have to the community at large and to vulnerable persons with whom the owners have established continuing relationships. What values should inform our construction of these relationships?

Professor Radin has argued that we should make a fundamental

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164. *Id.* at 1170-72 (footnotes omitted).

moral distinction between personal and fungible property.<sup>165</sup> Fungible property is held for its exchange value; we value it because of our ability to use it to acquire goods or services of equal value. Personal property is held not primarily for its exchange value but because it is necessary to our sense of ourselves as persons and because of our emotional commitment to the relationships such property makes possible. She further argues that personal property should be granted greater protection than fungible property, and that we must make moral judgments about which sorts of resources should be classified as personal property.<sup>166</sup>

In the context of plant closings, Radin would ask us to make moral judgments about the quality and importance of the relative interests of the company and the workers. The company is interested in plants for investment purposes—to make money. Plants are interchangeable from the point of view of corporate management; in Radin's terms, they are fungible. But from the standpoint of the workers and the community members, plants are not fungible. It is not the case that all jobs are equally good. Workers have an interest in remaining in their homes and in their jobs and using the skills they have acquired over many years of service to the company. They may be interested in maintaining work relations with others in the company—to continue working in the common enterprise. The workers are interested in their homes, their jobs, and in continuing the relationships that give them a sense of security and identity.

In a conflict between the workers' personal reliance interest in property and the company's fungible investment interest in controlling or destroying the plant, the workers' interest should prevail. This choice holds so long as it is sensible from an economic standpoint to encourage continued use of the plant and the range of legal alternatives open to the workers is not sufficient to protect their reliance interests.

I have argued that we should understand property as social relations, rather than through the lens of the free market model. Industrial enterprises comprise ongoing relationships of mutual dependence among all the members of the joint enterprise. The social relations approach asks us to be sensitive to the power inequalities within those relationships; some members of the common enterprise are more vulnerable than others. These inequalities are not natural; they are the direct result of the allocation of power determined by the assignment of

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165. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-60 (1982).

166. See Leslie Bender, *The Takings Clause: Principles or Politics?*, 34 BUFFALO L. REV. 735, 816-29 (1985) (arguing that the public use requirement of the takings clause should be interpreted politically to allow egalitarian redistribution of property from the rich to the poor and should not allow takings that create unnecessary social misery by redistributing property from the poor and disempowered to the rich and powerful or that otherwise destroy community interests); Judson, *supra* note 95, at 212-30 (contrasting the investment interests of landlords with the reliance interests of tenants); Radin, *supra* note 165; see also Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFFAIRS 350 (1986).



legal entitlements. We should focus on the various ways in which vulnerable persons rely on relationships of mutual dependence. This perspective will give us a deeper understanding of how the legal system regulates economic life.

I have further argued that we should be committed to defining the social obligations of property owners toward the community at large and to those with whom the owner establishes continuing relations of mutual dependence. Those obligations are not fully specified in advance through pre-existing duties or contractual provisions, but emerge and change over the course of the relationship, as dependencies and legitimate expectations develop on the part of the more vulnerable party to the relationship.

If we take this view of property law, and ask the questions about reliance on relationships that it suggests, we will see and understand legal doctrine in ways that the judges in the *United Steel Workers* case did not. Because the social relations approach directs our attention in new ways, it allows us to redescribe property law in terms of the reliance principle. That is the next step in the story.

### III. LEGAL DOCTRINE: PROTECTION OF THE RELIANCE INTEREST

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

—New Jersey Supreme Court  
Chief Justice Joseph Weintraub<sup>167</sup>

Human beings need all the relatives they can get—as possible donors or receivers not necessarily of love, but of common decency.

—Kurt Vonnegut<sup>168</sup>

All of the following legal rules involve claims to a right of access to valuable resources putatively controlled by others. In each case, a choice must be made between the right of access and the right to exclude—or some accommodation must be made to protect each of the competing interests to some extent. All of these situations involve long term social *relationships* of different kinds—between strangers, among neighbors, among family members, among businesses, between landlords and tenants, between businesses and members of the public, be-

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167. *State v. Shack*, 58 N.J. 297, 303, 277 A.2d 369, 372 (1971).

168. KURT VONNEGUT, *SLAPSTICK, OR LONESOME NO MORE!* 5 (1976).

tween citizens and government entities. They involve various sorts of *interests* in obtaining access to valuable resources purportedly controlled by others—interests in shelter, in rights of way, in free speech, in access to a minimum income, in bodily security, in jobs, in recreation. In some of these cases, the claimant has relied on access to the property in the past and may have become dependent on this access. The legal rules often grant the non-owner immunity from having such access revoked when the non-owner has legitimately relied on a relationship with the owner that made such access possible. In other cases, the claimant has relied generally on a relationship of mutual dependence with the putative owner. In these cases, the claimant relies on access to the property in a different sense: If access is denied, the claimant will suffer harm or be denied freedoms or benefits available to other members of the community. In other words, the claimant *needs* access to the property, and the prior relationship is such that we may deem it proper to impose this obligation on the stronger party.

The legal system sometimes protects the more vulnerable party to the relationship by recognizing and protecting her reliance interest in property and limiting protection of the stronger party's interests. In those cases, the legal system defines property rights to accommodate the conflicting interests. At other times, the legal system refuses to protect the reliance interest of the non-owner and confers exclusive control on the owner. Important consequences follow the definition of property rights: To a large extent, the legal rules about access to property determine the social distribution of wealth, power, and prestige.

The legal system often imposes mutual obligations on persons who enter relationships of mutual dependence. This is true not only in family relationships but in market relationships, too, as in the landlord/tenant relationship. Thus the legal system often requires property rights to be shared from the very beginning of the relationship. Moreover, at crucial points in the development of social relationships—often, but not always, when the relationship breaks up—the legal system requires a further sharing or shifting of property interests to protect the more vulnerable party. This happens, not because the parties have relied on specific promises to their detriment,<sup>169</sup> but because the parties have relied on each other generally and on the continuation of their particular kind of relationship. I will demonstrate that this principle is pervasive in our legal system and well-established in both common law and statutory regulation,<sup>170</sup> and that recognition of this

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169. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979) (discussing promise which reasonably induces action or forbearance). For an argument that courts often enforce promises made in the furtherance of economic activities whether or not there has been any detrimental reliance, see Farber & Matheson, *supra* note 154.

170. It may seem out of place to consider statutes in conjunction with common law rules. After all, they have very different sources—the legislature and the courts—and we have developed ideas about the different institutional roles of these actors in the legal system. See generally HENRY MELVIN HART & ALBERT M. SACKS, *THE LEGAL PROCESS* (1958); Lon L. Fuller,

principle has been expanding rather than contracting in recent years.

A. *Relations Among Strangers and Neighbors*

1. *Doctrines creating a right of access because of reliance.*

It may seem odd to treat relations among strangers and neighbors together. After all, neighbors may have a close relationship with each other, or at least know each other's names and have some dealings with each other. We think of strangers as people that have no prior dealings with each other; indeed, they have no relationship of any sort other than perhaps being members of the same community. But relations among strangers and neighbors are alike in one way: our legal system imposes various obligations toward others, whether or not we have met them and whether or not we have agreed to those obligations. More specifically, the legal system contains a wide variety of property rules requiring that access to certain resources be shared among persons even in the absence of agreement. Some of those rules require rights of access to shift after a period of shared use; others define circumstances in which private property must be kept open to non-owners all along.

a. Sharing or shifting of property ownership.

*Adverse possession and prescriptive easements.* According to the doctrine of adverse possession, property owners lose their property to a possessor of that property if the possession has been sufficiently open and longstanding and without the owner's permission.<sup>171</sup> Adverse posses-

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*The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978). *But see* Singer, *supra* note 54. Nonetheless, there are compelling reasons to treat statutes and common law rules together. First, the distinction between statutes and common law rules is not as clear as many suppose it to be. For example, the statute of frauds obviously had its origins in a statute, but is treated by judges and law professors alike as an integral part of the common law. Its interpretation and application are influenced by centuries of judicial elaboration. Exceptions to it have been created by judges and are justified by the same kinds of arguments used in common law adjudication. The same is true for statutes of limitations. Recording statutes also are replete with judicially created exceptions to enforcement; for example, judges determined that a deed that is recorded and otherwise satisfies the recording statute will be ignored if it is out of the chain of title. This rule is justified for pragmatic reasons to limit the costs of a title search; these are the same sorts of reasons that influence common law development.

Second, statutes and common law doctrines interact with each other in complicated ways; each influences the development of the other. Building codes helped give a basis for the implied warranty of habitability, a common law doctrine. *See* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970). The Uniform Commercial Code has had an enormous impact on the common law of contracts. At the same time, creation of the common law doctrine of the implied warranty of habitability helped influence the passage of rent control and condominium conversion laws by changing prevailing conceptions of property ownership. For a further defense of the wisdom of treating statutes and common law doctrines together, *see* Kennedy, *supra* note 116.

171. The adverse possessor becomes the rightful owner of the property if (1) she has "actually possessed" the property in a manner that has been (2) open and notorious, (3) continuous, (4) exclusive, (5) for a period of time defined by the statute of limitations, and (6) "adverse," meaning generally, without permission, (and possibly with a "claim of right" and

sion has been justified by a variety of moral and economic reasons.<sup>172</sup> One reason is to protect the possessor's reliance interest.<sup>173</sup> In the usual case, both parties have acted under a mistake about the true boundaries of their property.<sup>174</sup> The "true owner"<sup>175</sup> has allowed<sup>176</sup> the possessor to take control of a piece of the owner's property. By effectively acquiescing to possession by another for a substantial period of time, the true owner has generated expectations in the "adverse possessor" about the true owner's intentions regarding the property. Wittingly or unwittingly, the owner conveys a message to the possessor that the owner has abandoned the property.

The true owner and the adverse possessor have therefore developed a kind of relationship.<sup>177</sup> The possessor comes to expect and may have come to rely on the fact that the true owner will not interfere with the possessor's use of the property. If the adverse possessor were to be ousted from the property, she would experience a loss. The adverse possessor's interests grow stronger over time as she develops legitimate<sup>178</sup> expectations that the true owner will continue to allow her to

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in "good faith"). R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 109, § 11.7, at 758.

172. See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 Nw. U.L. REV. 1122, 1126-37 (1985).

173. *Id.* at 1131. Other reasons generally given include limiting the availability of claims based on stale evidence, quieting titles to property, encouraging true owners to bring legal action or otherwise to assert an interest in their property when it is being used by another without their permission. *Id.* at 1128-33. Justifications based on quieting title to land are confusing and unpersuasive; the rules could just as easily quiet title by confirming ownership in the record title holder rather than the adverse possessor. If the goal is simply to establish who the owner is, it does not matter which claimant prevails. The justification for shifting ownership to the adverse possessor must lie elsewhere.

174. Nonetheless, the same rules apply even when the adverse possessor knowingly occupies land owned by another. *But see* Richard H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U.L.Q. 331 (1983) (discussing unsuccessful adverse possession claims where the claimants' possessions were knowing trespasses rather than honest mistakes). For a typology of typical adverse possession cases and a convincing analysis of the moral basis of adverse possession in reliance, see Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U.L.Q. 739, 746 (1987).

175. The phrase is Merrill's. See Merrill, *supra* note 172, at 1125.

176. Terminology is difficult here. The rules disallow a claim based on adverse possession if the owner has explicitly given the possessor permission to use the property; at the same time, the rules allow a claim when the true owner has failed to protect her property interest either by explicitly giving permission to the possessor or by taking legal action to evict the possessor. Thus, the owner has "allowed" the possessor to possess the property not by giving her a license, but by failing to do what she is legally required to do to not lose her ownership rights.

177. It may seem odd to think of the true owner and the adverse possessor as being in a relationship since they have entered into no agreement with each other and may never have spoken to each other. Nonetheless, it is a relationship in the sense that each has acted in a way that has had the predictable effect of generating expectations in the other party. They are, moreover, in a relationship because the legal rules treat their interaction as one with legal consequences. Use of someone else's property when that person has a right to exclude the trespasser affects the legally protected interests of the owner whether or not the parties have ever interacted.

178. Determining whether those expectations are legitimate is, of course, the whole point. Expectations are to some extent (but not completely) dependent on what the legal

control the property. In other words, she may rely on continued access, both in the sense of relying on use of the land itself and relying on the relationship that makes such access possible.

In contrast, the true owner's interests grow less important over time. The possessor has come to expect continued access to the property, and the true owner has fed those expectations by her actions (or her failure to act). It is morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party.<sup>179</sup> The legal steps necessary to protect the true owner's interests are relatively clear, so she could have protected her own property interests if she had wanted to do so.<sup>180</sup> The true owner

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rules are. Thus, the adverse possession rules themselves create enforceable expectations in the adverse possessor because they provide for property rights to shift to the adverse possessor under defined circumstances. However, expectations may develop that are legitimate and worthy of legal protection even in the absence of prior specific legal rules giving parties a right to expect certain things. See Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986).

179. Again, Holmes explains:

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.

Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897); see also Radin, *Time, Possession, and Alienation*, *supra* note 174, at 748-50.

180. A major problem with this standard moral argument is that it shifts without adequate explanation from an argument for altruism and caring on the part of the true owner to an argument for individualism and self-reliance. See Kennedy, *supra* note 75. The altruistic argument is that the true owner should look out for the interests of the adverse possessor; she should not allow a relation of dependence to be established and then break it off, even when the relation has not been voluntarily agreed to (for example, with permissive use) but has arisen because the true owner failed to break it off by evicting the possessor or otherwise asserting her property interests. The individualist argument is that the true owner can take care of her own interests, and to the extent she did not know what she was legally required to do to prevent loss of her property, she should have found out. Thus, the true owner is in the position of being expected both to look out for her own interests and to look out for the interests of the possessor, while the possessor not only is entitled to look out for her own interests alone (even to the extent of intentionally and wrongfully trespassing on the true owner's property for many years) but expects the true owner to look out for her interests, as well. This is not necessarily a contradiction. It simply means that we may be moved by a more complex moral argument which mediates between the ethics of self-reliance and caring in this situation, and involves a decision on our part about how the true owner should behave even when the adverse possessor is acting wrongfully. This more complex moral argument may even involve consideration of general social goals, like efficiency and redistribution. Although the morality of individualism contradicts the morality of altruism, it is possible for us to choose between them in specific instances. We can make these choices even though we have no non-contradictory metatheory that tells us when to be altruistic and when to be individualistic. There is nothing contradictory about making a choice; we have simply acted in the presence of indeterminate competing values. Further, it is important to remember that each morality contains the other within it. Individualism is not tantamount to the state of nature,

has in some sense abandoned her property by allowing it to be possessed by another.

As time goes on, the adverse possessor's reliance interests are likely to become increasingly substantial. At the same time, those interests are relatively precarious since the true owner retains the legal right to exclude her if the true owner discovers the mistake. The adverse possessor is therefore vulnerable to losing her access to the property. On the other hand, the true owner's interests seem less substantial over time, as the true owner continues to acquiesce in use of her property by another.<sup>181</sup> After the true owner has acquiesced in the adverse use for

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but includes some minimal duties to look out for others; if altruism required complete self-denial, no one would be able to do anything for anyone else because no one would accept the help. *See id.*

181. Richard Posner has expressed this argument in economic terms. The economic argument for adverse possession is that the rules draw the proper line between the interests of the true owner and those of the adverse possessor such that legal control of the property is granted to the person to whom it is most valuable. Posner explains:

Over time, a person becomes attached to property that he regards as his own, and the deprivation of the property would be wrenching. Over the same time, a person loses attachment to property that he regards as no longer his own, and the restoration of the property would cause only moderate pleasure. This is a point about diminishing marginal utility of income. The adverse possessor would experience the deprivation of the property as a diminution in *his* wealth; the original owner would experience the restoration of the property as an increase in his wealth. If they have the same wealth, then probably their combined utility will be greater if the adverse possessor is allowed to keep the property.

RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.10, at 70 (3d ed. 1986). This simple argument is flawed. First, all we know is that ouster of the adverse possessor would cause the adverse possessor to experience a loss and the true owner to experience a gain. We know nothing about their relative magnitudes. The "decreasing marginal utility of income" has little to do with it. Even if the wealth of the parties is the same, it is not the case that every bit of wealth is fungible such that the loss experienced by the adverse possessor will necessarily be greater than the gain experienced by the true owner. The adverse possessor may have been using the strip of property simply as a grassy border between the two parcels, while the true owner might have been agonizing about how to widen her driveway so that it could accommodate her second car. In this case, despite the decreasing marginal utility of money, the loss experienced by the adverse possessor is less than the gain that would be experienced by the true owner.

Second, the owner and possessor may be poor enough that the decreasing marginal utility has not set in yet. If you need a lot of things, it may be possible for you to rank order them in perfect sequence from those you desire most to those you desire least; but then again, this may be fanciful.

Third, it is a heroic assumption to make the wealth of the parties equal. To justify the general rule about adverse possession by using such an assumption makes it appear that in most cases, relative wealth will not be an issue. But there is no reason to believe that this will be the case. The true owner could be a low income homeowner and the adverse possessor could be the city transit system. There is no way to tell which of the parties is wealthier than the other. In Posner's own terms, the question is not an abstract comparison of relative utility, but of willingness and ability to pay. Even though the adverse possessor might experience the loss as substantial, she might be willing to pay less than the true owner would ask to transfer the property to her. Posner seems to assume that the relevant prices are the adverse possessor's asking price and the true owner's offer price to get the property back. It is true that this calculation is more likely to come out with the property staying with the adverse possessor, but again, the result is indeterminate; it depends not only on their relative reliance interests in the property, but also on their relative wealth. It therefore seems that the economic argument is indeterminate without being supplemented by controversial assumptions

a long enough period of time, the statute of limitations intervenes to protect the interests of the party who is more vulnerable—the adverse possessor. The rules protect the more vulnerable party to the relationship by shifting ownership from the true owner to the adverse possessor.<sup>182</sup> The adverse possessor gains title to the property without any legal obligation to compensate the true owner for the loss of her property.<sup>183</sup>

The rules about prescriptive easements are similar to the rules about adverse possession. The chief difference is that the true owner loses not the entire property but the right to prevent another from using her property in a specific way.<sup>184</sup> This can be understood in terms of the reliance interest. The right transferred from the true owner to the trespasser is not the entire set of ownership rights in the property but merely the right to use the property in the specific way in which the non-owner has used the property. The extent of the rights that are transferred depends on the extent of the adverse use. If the adverse use is specific, an easement is created; if it is general, all ownership rights shift. The extent of the adverse use determines the legitimate expectations of the possessor or user. This is because the adverse claimant relies on the particular kind of relationship that has been established between the parties. Thus the non-owner's reliance interest is protected only to the extent that the non-owner has come to rely on the true owner's acquiescence.

In the case of both adverse possession and prescriptive easements,

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about the desires of the parties and their relative wealth. What seems ultimately to justify adverse possession doctrine then is the moral argument about protecting the reliance interests of the long-standing user.

182. Theoretically, this happens automatically. In practice, most adverse possessors who want to establish ownership will have to sue the true owner and anyone else who might claim an interest in the property to “quiet title” to the property. The resulting judgment will enable the property to be more easily conveyed to others and used as collateral for loans. Such a judgment might also result from a suit by the true owner to eject the adverse possessors, in which the plaintiff owner loses when the defendant proves ownership by adverse possession. In the absence of such a judgment, it may be difficult to sell, mortgage, or lease the property because several of the elements of adverse possession are difficult to prove.

183. The possessor's reliance interest is protected for both moral and economic reasons. It would be immoral to allow the true owner to claim an interest after the possessor has come to rely on the true owner's staying away. The adverse possessor, moreover, may have developed emotional or other attachments to the property. See Radin, *supra* note 165; Radin, *supra* note 174, at 748-50. Alternatively, the adverse possessor may have come to depend on access to the property and may even plan her activity with such access in mind. In a letter to William James, Oliver Wendell Holmes explained:

I say that truth, friendship, and the statute of limitations have a common root in time.

The true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life.

Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in 2 RALPH PERRY, *THE THOUGHT AND CHARACTER OF WILLIAM JAMES* 461-62 (1935), reprinted in PAUL GOLDSTEIN, *REAL PROPERTY* 24-25 (1984).

184. R. CUNNINGHAM, W. STOECK & D. WHITMAN, *supra* note 109, § 8.7, at 451. Note that American jurisdictions have not recognized the right to acquire negative easements by prescription. JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* 1003 (1981).

rules in force shift property interests from the owner to the non-owner without compensation to protect the reliance interests of the non-owner. The non-owner has relied both on access to the property itself and on the true owner's long-standing acquiescence in the adverse use. In other words, the rules protect the non-owner's reliance on her relationship with the owner that made access to the land possible. The legal system shifts the property interests or requires that they be shared to protect the legitimate interests of the more vulnerable party to the relationship and to achieve general social goals of encouraging the right kind and amount of economic activity.

*Easements by estoppel and necessity.* The doctrines of licenses,<sup>185</sup> adverse possession,<sup>186</sup> and prescriptive easements<sup>187</sup> treat permission by the owner to enter real property as an exercise of property rights in three ways. First, granting access constitutes an exercise of the right to exclude or admit. Second, the owner normally retains a power to revoke the license at any time. Third, by giving the non-owner permission to use the property, the owner obtains an immunity from losing her ownership rights to the non-owner through adverse possession or prescription, no matter how long the non-owner uses the property and no matter how much the non-owner comes to rely on access to the property.<sup>188</sup>

The doctrine of easement by estoppel<sup>189</sup> gives a powerful counterexample in which permission is treated as a waiver of property rights rather than an exercise of them. This doctrine is illustrated by the case of *Stoner v. Zucker*,<sup>190</sup> in which the plaintiff owner gave a license to defendants to construct a ditch on the land. Plaintiff knew that the defendants intended to use the ditch to transport water from a river next to plaintiff's property to defendants' adjacent lands. Defendants built the ditch and spent more than \$7000—a considerable sum in 1899. One year later, the owner of the land revoked the license and asked the defendants to stop using the ditch and to stop entering the property to repair it. When defendants continued to do so, the owner sued them for trespass and asked for an injunction ordering them to desist.<sup>191</sup>

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185. Licenses are revocable permissions to enter or use real property. See R. CUNNINGHAM, W. STOEBCUK & D. WHITMAN, *supra* note 109, § 8.1, at 437.

186. See notes 162-164 *supra* and accompanying text.

187. See note 166 *supra* and accompanying text.

188. This statement must be substantially qualified by the rules about easements created by estoppel, discussed next in the text.

189. See R. CUNNINGHAM, W. STOEBCUK & D. WHITMAN, *supra* note 109, § 8.8, at 456-57.

190. 148 Cal. 516, 83 P. 808 (1906).

191. *Id.* at 517, 83 P. at 809. The court recognized that licenses were ordinarily revocable at will. Plaintiff's attorneys argued that therefore the defendants could have had no legitimate expectations, based on existing law, that the license would not be revoked, or that they would have any rights if it were revoked. Defendants were not deceived or defrauded by the plaintiffs since they did not have a legal right to permanent use of plaintiff's land; they should have known that they did not have an easement, but only a license, and that licenses are revocable at will. The fact that the property owner may be acting immorally is irrelevant. Thus, the defendants' decision to spend an enormous sum of money based on a revocable



The court held that

where a licensee has entered under a parol license and has expended money, or its equivalent in labor, in the execution of the license, the license becomes irrevocable, the licensee will have a right of entry upon the lands of the licensor for the purpose of maintaining his structures or, in general, his rights under his license, and the license will continue for so long a time as the nature of it calls for.<sup>192</sup>

We now have a principle and a counterprinciple. The rule that licenses are revocable at will is matched by an exception or competing rule that makes licenses irrevocable if revocation would be unfair to the non-owner. This competing principle treats permission to use real property as a partial waiver of the owner's right to exclude. Once the owner has given a non-owner permission to use the property in a certain way, and the owner knows or should know that the non-owner is going to expend labor and money in activity on the owner's property in reliance on the permission, then the owner will not be allowed to interfere with the non-owner's right of access for whatever period is deemed fair.<sup>193</sup>

The doctrine of easement by estoppel demonstrates that, in appropriate circumstances, an owner of private property who grants access to her property to a non-owner will be held to have waived the legal power to revoke that access. The licensee not only has a right of access, but is also immune from having that access taken away by the licensor. As in the case of adverse possession and prescriptive easements, one argument justifying this doctrine is that the legal rules should protect the ordinary expectations of the licensee by granting her a legal right to continue to rely on access to the property in the future.<sup>194</sup> The doctrine states that the licensee has a right to expect continued access to

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permission meant that they voluntarily assumed the risk that the license would be revoked; to the extent that the defendants acted foolishly, the court should not protect them from their own mistake. *Id.* at 518, 83 P. at 809.

The Supreme Court of California rejected this argument. Justice Henshaw explained that, even though licenses were normally terminable at will, if the licensee expended a considerable sum in reliance on the continuation of the license, the license would be deemed irrevocable. Justice Henshaw restated the legal principle that "it would be to countenance a fraud upon the part of the licensor if he were allowed, after expenditure of money by the licensees upon the faith of the license, to cut short by revocation the natural term of its continuance and existence, and that under the doctrine of estoppel, the licensor would not be allowed to do this." *Id.* at 519, 83 P. at 809-10.

192. *Id.* at 520, 83 P. at 810.

193. R. CUNNINGHAM, W. STOEBOCK & D. WHITMAN, *supra* note 109, § 8.8, at 456-58.

194. The 1944 Restatement of Property carefully limits this principle to cases in which there is an explicit agreement or understanding between the parties that access will be allowed for a specific period of time. Section 519 provides that a

licensee . . . who has made expenditures of capital or labor in the exercise of his license in reasonable reliance upon representations by the licensor as to the duration of the license, is privileged to continue the use permitted by the license to the extent reasonably necessary to realize upon his expenditures.

RESTATEMENT OF PROPERTY § 519(4) (1944). Comment e to that section explains that the doctrine does not apply "where the licensee was in no way misled as to the possible duration of the license. If the licensee knows that his license is at the will of the licensor he cannot raise

the property when the property owner should have known that the non-owner would want such access. It is immoral for the owner to revoke the license when she should have known that the non-owner was relying to her detriment on continued access to the property. In appropriate circumstances, the legal rules treat a voluntary grant of a revocable license also as compelling the owner to grant the non-owner a legal immunity from having the license revoked. The rules do this to protect the licensee's interest in relying on continued access to the property.

The doctrine of easement by necessity grants to a landlocked parcel rights of access across remaining land of the grantor to reach a public way.<sup>195</sup> Under this doctrine, the buyer relies on a right of way across neighboring land both in the sense that the buyer needs such access and in the sense that the buyer needs a relationship with the grantor that makes such access possible. It is ordinarily the intent of the parties to grant such an easement; no one would buy a landlocked parcel without access to it. But the legal system awards access even if it was not intended by the parties.<sup>196</sup> This might happen, for example, when the buyer has a license to go across other neighboring land not owned by the grantor, and that license is later revoked. The legal rules protect the more vulnerable party's ability to get to her own property by creating an easement over the remaining land of the grantor.

The doctrines of adverse possession, prescriptive easements, easement by estoppel and easement by necessity all stand for the same proposition: Where a non-owner of property comes to rely upon access to property, the law sometimes recognizes the non-owner's vulnerability and shifts some or all of the property rights from the title owner to the non-owner. The rules in force therefore protect the non-owner's reliance on her relationship with the owner that made access to the land possible.

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an estoppel by acting upon his own guess as to the probable duration of the license." *Id.* § 519(4) comment e.

However, the principle in *Stoner v. Zucker* is broader than this and extends to situations in which the owner, if she had thought about it, would have understood that the licensee expected to have access to the property for an extended period of time. See also R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 109, § 8.8 (explaining that under the estoppel theory the licensee is entitled to continue using the property in the way permitted by the grantor because the grantee must have understood an easement to have been granted). By granting a license on which the owner knows the non-owner will rely to make significant investments of money and labor, the property owner is giving mixed messages. The non-owner intends to rely on access for some time to come and the owner should know that the non-owner would not spend all that money if she did not expect to have continued access. Thus the licensee relies on the owner's good faith. By agreeing to the license, the owner conveys the impression that she will not assert her legal right to revoke the license.

195. The two parcels must have at one time belonged to a common grantor, the right of access must be necessary, not merely convenient, and the necessity must exist at the moment the parcels are separated. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 8.5.

196. See, e.g., *Cushman Virginia Corp. v. Barnes*, 204 Va. 245, 250-51, 129 S.E.2d 633, 638 (1963).

## b. Group rights of access.

*Custom.* I have discussed so far cases in which one property owner loses some or all of her property rights to another individual in order to protect the reliance interests of the non-owner. The rules in force also contain principles requiring property rights to shift from one large group of property owners to a large group of non-owners. The first example is the doctrine of custom. In *State ex rel. Thornton v. Hay*,<sup>197</sup> the Oregon Supreme Court held that after long years of use, the public had acquired an easement to use for recreational purposes coastal beaches that were previously owned by private owners.<sup>198</sup>

The doctrine of custom protects reliance interests in the same way as the rules of adverse possession and prescriptive easements. The public has relied both on access to the property in the past and on the private owners' acquiescence in allowing such access. At some point, the reliance interests of the non-owners are granted protection by the legal system even though those interests may conflict with the interests of the private property owners.<sup>199</sup> As with adverse possession and easement by estoppel, the legal system treats owner acquiescence in access to their property by non-owners as a waiver of the owner's property rights. These rules define circumstances in which continued use by the non-owner converts a right to exclude into a right of access; the owner's property right is transferred or shifted to non-owners.

The doctrine of custom protects several types of reliance. First, by enforcing a longstanding practice, the doctrine protects public expectations of continued access to beaches for recreational purposes. Second, in creating public rights of access to private beaches, the doctrine both fulfills needs of the public and promotes equal access to recrea-

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197. 254 Or. 584, 462 P.2d 671 (1969).

198. The case involved a conflict between members of the public who claimed a right of access to the privately owned beaches and the private owners of resorts who wanted to be able to exclude everyone but paying customers from the beaches abutting their property. The state legislature had passed a statute declaring that (1) the public had "made frequent and uninterrupted use" of private beaches and had therefore acquired public easements to continue that use and (2) the state retained sovereignty over these beaches for the benefit of the public. OR. REV. STAT. § 390.610 (1967). If this statute were construed to take property rights from individual owners and transfer those rights to the public, the statute would unconstitutionally take property without just compensation. To uphold the statute, the court had to declare that the legislature had not created any new rights but had simply recognized a common law rule that had impliedly limited the rights of the beach owners all along. The court invoked the common law doctrine of custom rather than the rules about prescriptive easements because (1) it would be difficult or impossible to show continuous use by large numbers of individuals and (2) those individuals would only acquire rights for themselves and not others.

199. In one sense, the doctrine of custom combines the rules of adverse possession with the doctrine of easement by estoppel. It does this by refusing to address the question of whether or not public use of private beaches had been permissive. The right of access by the public rests simply on the fact that the public had come to exercise such access and to assume that such access would remain available. The presence or absence of permission by individual property owners is irrelevant.

tion.<sup>200</sup> Thus the doctrine rests not only on the longstanding practice of public access but also on the public policy of making such access available uniformly along the shoreline.

*The public trust doctrine.* The importance of need and distributional considerations in fashioning public rights of access to beaches is further supported by the public trust doctrine.<sup>201</sup> The public trust doctrine was adopted in California and New Jersey as the doctrinal basis for requiring public rights of access to private beaches.<sup>202</sup> Under this doctrine, the state retains ownership and ultimate control over specific natural resources, including land, that are so valuable that the legislature is deprived by the state constitution of the power to give up public rights to those resources by alienating those interests. "The public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people."<sup>203</sup> The state has a fiduciary relationship with the public and is obligated to ensure that lands subject to the public trust doctrine remain available for use by the public. In holding that the public had a right of access to private beaches, the New Jersey Supreme Court specifically refused to rely on the doctrine of custom because this would make public rights contingent on plaintiffs being able to prove in court that members of the public had used the beaches generally for recreational purposes, and because the rights so acquired would be limited to the historical uses of the property. The court concluded that the public should have a right of access to the property whether or not it had used the private property in the past for recreational purposes. Moreover, the permissible uses should not be limited to the historical uses but should change and expand over time as social conditions, needs and values change.<sup>204</sup>

The public trust doctrine rests on a different interpretation of the reliance interest than the preceding doctrines. Rather than protecting past reliance on access to the property, the public trust doctrine preserves public rights of access to private property that the public *needs at the present time*.<sup>205</sup> The public trust doctrine therefore stands for the

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200. The court argues that "[o]cean-front lands from the northern to the southern border of the state ought to be treated uniformly." 462 P.2d 676. The court does not rigorously require proof of access on each parcel of beachfront property. This could mean that the court believed that expectations of access to all beachfront property were generated by access to a significant number of parcels. At the same time, the court appears to be making a policy judgment about the utility of requiring that such access be provided uniformly across the state.

201. A concurring opinion in *State ex rel. Thornton v. Hay*, 254 Or. at 601, 462 P.2d at 679, mentions the public trust doctrine as a second possible basis for the court's decision.

202. See *City of Berkeley v. Superior Court*, 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, cert. denied, 449 U.S. 840 (1980); *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. 306, 471 A.2d 355, cert. denied, 469 U.S. 821 (1984).

203. *Matthews v. Bay Head Improvement Ass'n*, 95 N.J. at 312, 471 A.2d at 358.

204. *Id.* at 326, 471 A.2d at 365.

205. "It has been said that '[h]ealth, recreation and sports are encompassed in and intimately related to the general welfare of a well-balanced state. . . . Extension of the public

proposition that private property owners may not control their property in ways that interfere with legitimate public interests in obtaining access to their property for certain valued needs. Property rights to exclude or to control property must be curtailed to protect the legitimate interests of the citizens of the state and to further the general welfare. The public relies on the creation or continuation of social and legal relationships between property owners and non-owners which protect the rights of the public in continued access to those resources. The doctrine also prevents private owners from wasting valuable resources needed by the public.<sup>206</sup>

c. Public rights of access to private property.

In addition to custom and the public trust doctrine, the legal system contains a variety of other rules granting members of the public rights of access to private property. In these cases, non-owners have a right of access to property based on need or on some other important public policy. For example, owners have no right to exclude non-owners from their property when access to that property is necessary to prevent serious harm to them or to others. Thus a non-owner has the legal right to enter property to save her own life or that of another.<sup>207</sup>

Property owners also have obligations to allow access to their property when they have previously opened their property to others. For example, in the famous case of *State v. Shack*,<sup>208</sup> the court held that a farmowner could not prevent migrant farmworkers living on his property from receiving visitors in the privacy of their dwellings, especially when those visitors were providing them with medical and legal services.<sup>209</sup> The court held that once the farmowner had opened his prop-

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trust doctrine to include bathing, swimming and other shore activities is consonant with and furthers the general welfare." *Id.* at 321, 471 A.2d at 363.

206. Another example is the law of oil and gas. The law prohibits the wasteful extracting of oil and gas. *See also* *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.*, 155 Ind. 461, 57 N.E. 912 (1900) (prohibiting landowner from using pumps to extract gas so as to introduce saltwater into the pool, destroying the value of the remaining gas); *Vandevelde*, *supra* note 55, at 356-57.

207. RESTATEMENT (SECOND) OF TORTS § 197 (1965); CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 7.1, at 414; WILLIAM L. PROSSER AND W. PAGE KEETON, *THE LAW OF TORTS* § 24, at 147-48 (5th ed. 1984). The necessity defense is incomplete in the sense that, although the non-owner is not liable for trespass, she may be liable for harm done to the owner's property in the course of exercising her privilege to enter the property. *See* RESTATEMENT (SECOND) OF TORTS § 197(2) (1965).

208. 58 N.J. 297, 277 A.2d 369 (1971).

209. 58 N.J. at 307-08, 277 A.2d at 374. In that case, a health worker for the Southwest Citizens Organization for Poverty Elimination and an attorney for the Camden Regional Legal Services office entered private property to provide migrant farmworkers employed and housed there with medical and legal assistance. The farmer who owned the property insisted that he would allow them to meet with the individual farmworkers they sought only if they did so in his presence in his office. They claimed the legal right to meet with the farmworkers in the privacy of their living quarters and without the owner's supervision. The owner had them arrested for trespass, and they were later convicted.

In overturning the convictions, the New Jersey Supreme Court held that the farmer's

erty to migrant farmworkers, he effectively waived part of his right to exclude non-owners from his property. The court therefore created a public policy exception to the right to exclude under trespass doctrine. The court defined the question as how to achieve a "fair adjustment of the competing needs of the parties, in the light of the realities of the relationships between [them]."<sup>210</sup> The court noted that the rights of owners and non-owners were not static.<sup>211</sup> The legal system had accommodated conflicting interests of owners and non-owners in different ways over time, and should continue to adjust as new needs and values arose.<sup>212</sup> The right of access in this case rested on the needs of the farmworkers and their relative vulnerability. "[T]he employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens."<sup>213</sup>

The rules in force also create a right of reasonable access to certain businesses that serve the public.<sup>214</sup> Entities which have been subject to this obligation are common carriers, innkeepers, telegraph and telephone companies, and gas and electric companies.<sup>215</sup> This right of reasonable access has been substantially widened by the recent case of *Uston v. Resorts International Hotel, Inc.*<sup>216</sup> Relying on *State v. Shack*, the New Jersey Supreme Court extended the right of reasonable access to all places open to the public. Justice Pashman wrote: "[W]hen property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. . . . Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use."<sup>217</sup> The right to exclude is therefore limited by a

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right to exclude was limited by competing rights in the farmworkers to receive guests. The reach of the decision was not clear, but the court also suggested that the farmworkers should have the right to entertain friends, to receive members of the press, and to engage on the property in whatever activities were necessary to a dignified life. The right of access, moreover, was nondisclaimable.

210. 58 N.J. at 307, 277 A.2d at 374.

211. 58 N.J. at 305, 277 A.2d at 373.

212. 58 N.J. at 305-06, 277 A.2d at 373 (quoting 5 POWELL, REAL PROPERTY § 746, at 494-96).

213. 58 N.J. at 308, 277 A.2d at 374.

214. Section 191 of the Second Restatement of Torts provides that a "patron of a public utility is privileged, at reasonable times and in a reasonable manner, to be upon any part of the land in the possession of the utility which is provided for the use of the public or necessary for their enjoyment of its facilities." RESTATEMENT (SECOND) OF TORTS § 191 (1965). For the purpose of this privilege, public utilities are defined as persons or associations "carrying on an enterprise for the accommodation of the public, the members of which as such are entitled as of right to use its facilities." RESTATEMENT (SECOND) OF TORTS § 191 comment a (1965). This definition is, of course, circular. It does not define what "accommodation of the public" means, and then states that members of the public have a right of access to places of this type when they "are entitled as of right to use [their] facilities." This restates the issue: the question is whether or not the public has a right of access to these facilities.

215. See *Uston v. Resorts Int'l Hotel, Inc.*, 89 N.J. 163, 173, 445 A.2d 370, 375 (1982).

216. 89 N.J. 163, 445 A.2d 370 (1982).

217. 89 N.J. at 173, 445 A.2d at 375.

competing right of reasonable access. What constitutes a good reason for excluding members of the public is to be determined on a case by case basis.<sup>218</sup> The very fact that the owner had opened the property to the public constituted a partial waiver of the owner's right to exclude people unreasonably.<sup>219</sup>

d. Linkage requirements.

Many municipalities place conditions on the development of property. For example, San Francisco compels developers of downtown property to help fund low-income housing, day-care centers, job-training programs, mass-transit improvements, and open space as conditions for granting permits to build. Municipalities thereby link development with payment of fees to satisfy specific community needs.<sup>220</sup>

Linkage requirements rest on the assumption that development of property in a city directly creates new needs for housing, mass transit and day care. At the same time, developers need to be able to sell or lease the property they develop to businesses who in turn will need employees who will need housing and mass transit and day care. Linkage requirements therefore make the right to develop property conditional on mitigating the externalities of that development.

Linkage requirements impinge on the property interests of the developer by limiting the developer's freedom of action and by making development more expensive. These requirements redistribute property rights from developers to non-owners. At the same time, they act

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218. 89 N.J. at 174, 445 A.2d at 375.

219. Property owners who open their property to the public also have obligations not to discriminate in housing or public accommodations on the basis of race, color, religion or national origin. Federal civil rights statutes prohibit discrimination in public accommodations and in the housing market on the basis of race, color, religion or national origin. 42 U.S.C. § 2000a (Civil Rights Act of 1964); 42 U.S.C. § 3601 (Fair Housing Act of 1968). State law may also prohibit discrimination on the basis of sex. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West 1985).

Several state constitutions have been interpreted to provide a public right of access to privately owned shopping centers or universities for free speech purposes. *See* *Robins v. Pruneyard Shopping Center*, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), *aff'd*, 447 U.S. 74 (1980) (California constitution protects access to shopping center for leafletting); *Batchelder v. Allied Stores Int'l, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983) (access to shopping centers by public for purpose of getting signatures for petitions to place candidate on ballot is protected by state constitution); *Commonwealth v. Tate*, 495 Pa. 158, 432 A.2d 1382 (1981) (university); *State v. Schmid*, 84 N.J. 535, 423 A.2d 615 (1980) (state constitution protects distribution of political materials at private university); *Aldewood Assoc. v. Washington Envtl. Council*, 96 Wash. 2d 230, 635 P.2d 108 (1981) (state constitution protects right of access to shopping centers to obtain signatures for initiative petition). Thus, the law often limits the right to exclude when property owners open their property to the public; by so doing, owners waive the right to exclude non-owners for reasons that violate public policy.

220. Strasser, *supra* note 160. Other cities, including Boston, Chicago, Denver, Hartford, New York, and Washington, D.C., are also considering similar projects. *Id.* at 8, col. 1. Such requirements are constitutional if there is a substantial relationship between the requirement and the contemplated land use such that it is not unfair to place this burden on the individual owner. *See* *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146-47 (1987).

as implied limits on property ownership; no one has the right to use property in a way that adversely affects legitimate interests of others. This is especially true when development of that property itself creates new needs. Linkage requirements make property use conditional on satisfying needs of non-owners that are both generated and affected by that development. In this way, the law explicitly recognizes the mutual dependence of persons within the community.

2. *Summary: reliance and the right of access*

The right of property owners to exclude others from their property is not absolute. Non-owners acquire rights of access or control from owners in a variety of circumstances. These circumstances range from situations in which the owner has voluntarily permitted or acquiesced in having her property used by others to situations in which non-owners are entitled to access to satisfy their needs whether or not they have had such access in the past. Certain rights of access are permanent and implied limits on property rights all along (public trust doctrine; necessity); other rights come into being after a period of reliance by the non-owner (adverse possession, prescriptive easements, easements by estoppel); and still other rights are imposed on private property owners once they open their property to the public (public right of reasonable access to private property; public utilities; free speech access to shopping centers; civil rights statutes). When an owner permits others access to her property, the legal rules sometimes treat this permission as an exercise of property rights that protects the owner from losing those rights in the future (adverse possession); and sometimes treats permission as a partial or total waiver of the right to exclude or the right to control the property (easements by estoppel; easements by necessity; public rights of access). The rules in force also recognize the interdependence of persons in the community by sometimes prohibiting owners of valuable resources from wasting them or otherwise making them unavailable to the public (the public trust doctrine). They also recognize the mutual dependence of persons in the community by forcing owners to contribute to alleviating the external consequences of their land use decisions (nuisance; linkage requirements).

These doctrines provide relevant precedent for the property right described by Judge Lambros in the *United Steel Workers* case. In that case he noted the interdependence that had developed among the workers, the company and the communities in which U.S. Steel established its factories. In a variety of circumstances, property rights are shared or shifted to non-owners when they have relied on relationships of mutual dependence that made access to such property available in the past. Moreover, property is held subject to various public rights of access both to prevent waste and to fulfill fundamental needs of the community.



## B. *Relations in the Marketplace*

In the preceding section, I discussed a series of legal doctrines that governs situations in which competing claimants to property are strangers to each other. By "strangers" I mean that they did not have a pre-existing relationship that either amounted to or resembled an enforceable agreement. I argued that strangers in fact can "relate" to each other by acquiescing in shared use or by providing explicit permission to individuals or the public at large short of an enforceable contract. Those legal doctrines sometimes require control of private property to be shared between "owners" and others or to shift from owners to non-owners when non-owners rely in various ways on access to the property.

In this section, I shift to market relationships in which the competing claimants to property have entered into various types of enforceable contracts. These relationships are governed by a variety of legal rules that take the form of compulsory contract terms.<sup>221</sup> These nondisclaimable terms define the distribution of property rights between the parties in ways that protect various interests of the more vulnerable party in relying either on the continuation of the relationship generally or on access to the property specifically. These terms are intended to protect the party with less bargaining power by redistributing entitlements from the stronger to the weaker party once the relationship of dependence has been created.<sup>222</sup>

### 1. *Landlord/tenant relations*

#### a. Implied warranty of habitability

Most states now imply a nondisclaimable warranty of habitability in all residential leases either through interpretation of housing codes or common law.<sup>223</sup> Landlords are legally obligated to maintain apartments "in a habitable condition."<sup>224</sup> The growth of this doctrine has radically altered landlord/tenant law. It is now well-accepted that material violations of the implied warranty of habitability constitute a breach of the lease and therefore relieve the tenant of the obligation to pay rent while those violations continue. Breach of the warranty may also entitle the tenant to a partial reduction or total waiver of rent pay-

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221. See Kennedy, *supra* note 116.

222. Whether these terms in fact work to help the weaker party, or work to help some persons and hurt others, or hurt everyone intended to be benefited, is a complicated empirical question. See Kennedy, *supra* note 67.

223. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, §§ 6.37-6.40. The major issue in early cases under housing codes was whether violation of the housing code by the landlord gave the tenant the right to stop paying rent or whether the violation could be redressed, and the code enforced, only by administrative action initiated by building inspectors. See *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. App. 1968).

224. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

ments for that period.<sup>225</sup> Violation of the implied warranty also constitutes a defense to a claim for possession; a landlord who is breaching the warranty cannot evict a tenant who stops paying rent.<sup>226</sup> With limited exceptions,<sup>227</sup> the implied warranty is nondisclaimable by the parties.<sup>228</sup> The implied warranty of habitability allocates property rights between landlords and tenants during the course of their relationship. Because the warranty is nondisclaimable, it defines the range within which the parties are free to bargain. Moreover, by giving the tenant the power to call on state or local officials to force the landlord to comply with the warranty, the law assigns to the tenant substantial powers to control the use of the property during the lease term.

By giving the tenant immunity from being evicted and by allowing the tenant to possess the property for free (or for a reduced rent) when the warranty has been breached, the law limits the landlord's right to exclude by determining the terms on which the tenant will occupy the premises; it transfers from the landlord to the tenant part of the landlord's right to possess the property. *The doctrine therefore redistributes property rights from the landlord to the tenant.*<sup>229</sup>

The warranty goes even further in redistributing property entitlements through the retaliatory eviction doctrine. The landlord may try to avoid the obligation to maintain the building by taking the apartment unit off the rental market and not renting it to anyone. However, the legal rules prevent the landlord from doing this unless the landlord goes out of the rental business entirely or can demonstrate that the property is in such bad shape that it is financially impossible for the repairs to be made to bring it up to code.<sup>230</sup> Thus, the landlord cannot refuse to make the repairs, cannot evict the tenant, and must allow the tenant to possess the property with reduced rental payments or with none at all. Both the right to control the use of the property and the right to possess the property have been substantially transferred from the landlord to the tenant.

What reliance interests are protected by this set of rules? The landlord knows that the tenant wants to rent a dwelling fit for human habitation; by renting the dwelling, the landlord conveys a message to the tenant that the dwelling is fit and that it will continue to be fit. Because the landlord should know that this is what tenants expect, she

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225. *Id.* at 1082-83; CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 6.43.

226. *Robinson v. Diamond Housing Corp.*, 463 F.2d 853, 865 (D.C. Cir. 1972), CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 6.38.

227. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 6.40.

228. *Id.*

229. Whether or not the warranty also redistributes wealth is a much more complicated question. Landlords may or may not be able to pass along the increased costs of the warranty by raising the rent or reducing services. For a discussion of the economic effects of compulsory terms such as warranties or rent control, see Kennedy, *supra* note 116, at 604-09; Radin, *Residential Rent Control*, *supra* note 166.

230. *Robinson v. Diamond Hous. Corp.*, 463 F.2d 853, 865-67 (D.C. Cir. 1972).

should also know that entering the lease agreement constitutes an implied promise to maintain the premises. Moreover, if the landlord knows what the current law is, she will understand that by entering the lease, she is agreeing to assume the obligations imposed by the warranty of habitability and the housing code. Thus, enforcing the warranty may protect the tenant's reliance on the landlord's implied promise to maintain the premises.<sup>231</sup>

Although enforcing the implied warranty may protect the will of both parties, in most cases, the warranty is imposed against the will of the landlord. If the tenants were rich enough to induce the landlords to maintain the premises, it would be profitable for landlords to do so, and, in the absence of market failure or irrational landlord behavior, they would provide the warranty gladly. Landlords appear to be quite willing to provide even luxury housing—for a price. Those who favor a warranty of habitability believe that tenants need or deserve a fit place to live and do not have sufficient resources relative to landlords to get what they need. It also represents a judgment that either landlords will not be able to pass along the cost of the warranty to tenants or that the tenants who are priced out of the market or affected by reduced supply of housing will be protected in some other way. It is a distributive judgment because the warranty seeks to transfer resources from landlords to tenants—to help the tenants get something for nothing.<sup>232</sup> It is a

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231. Protecting detrimental reliance on a promise is, of course, the basis of § 90 of the Second Restatement of Contracts. This principle is most clearly applicable in property law in the case of specific performance of purchase and sale agreements that do not conform to the requirements of the Statute of Frauds. Ordinarily, a contract for the sale of land will not be enforced unless it is in writing and if the writing contains the vital elements of the transaction sufficient to satisfy the Statute of Frauds. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 10.1. However, the courts have created an exception to the Statute of Frauds, *see* RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981). "A contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement." RESTATEMENT (SECOND) OF CONTRACTS § 129 (1981), quoted in *Hickey v. Green*, 14 Mass. App. Ct. 671, 673, 442 N.E.2d 37, 38 (1982) (enforcing an oral promise to convey property when there was no dispute about the existence of the oral promise and the buyers had made arrangements to sell their home in reliance on the promise).

This doctrine demonstrates quite vividly one form of the reliance interest in property: reliance on a promise. The parties create a relationship in the marketplace based on a set of promises. The buyer relies on the seller's promise—which forms the basis of their relationship—and changes position because of it. The seller breaks off the relationship by refusing to go through with the sale. At that point, the legal system will force the seller to transfer the ownership of the property to the buyer against the seller's will for the compensation agreed upon by the parties. The legal rules require a transfer of property from one party to another to protect the interests of the buyers in relying on the relationship based on the agreement. Specific performance is ordered, transferring property ownership from the seller to the buyer because damages were thought to be insufficient.

232. Whether or not enforcement of the warranty will in fact redistribute resources from rich landlords to poor tenants is a complicated empirical question. Landlords may or may not be rich relative to tenants; rents may or may not rise in response to the warranty, depending on the elasticity of supply and demand and the extent of competition for rental housing; the

judgment based on need because housing is such an important part of human life, and the financial inability of tenants to induce landlords to provide adequate housing leaves them in a state of unconscionable vulnerability.<sup>233</sup>

b. Just cause eviction statutes and condominium conversion ordinances.

Under the common law, landlords may evict tenants at will at any time for any reason.<sup>234</sup> Tenants from month to month may be evicted at any time for any reason with one month's notice.<sup>235</sup> Landlords may also refuse for any reason to renew the leases of tenants who have one year leases.<sup>236</sup> Several states have modified these rules by passing statutes providing that certain classes of landlords can evict tenants only if they can show a good reason to do so.<sup>237</sup> For example, the New Jersey legislature passed a statute that gives ten valid reasons to evict a tenant or to refuse to renew a residential lease.<sup>238</sup> Those reasons include (1) failure to pay rent, (2) destruction of the rental property, (3) disturbance of neighbors, (4) breach of covenants in the lease, and (5) refusal by the tenant to accept reasonable changes of substance in the lease terms.<sup>239</sup> The statute prohibits eviction for any other reason and its provisions are nondisclaimable. One valid reason *not* included in this particular statute is that the landlord wants to move into the apartment or wants a member of her family to be able to do so.<sup>240</sup> Thus, in *Stamboulos v. McKee*,<sup>241</sup> a New Jersey appellate court held that a landlord had no power to evict a tenant even though one of the landlords intended to occupy the unit personally. The court explained that the purpose of the statute was to prevent tenants from being "unfairly and arbitrarily ousted from housing quarters in which they have been com-

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supply of housing may or may not go down, again depending on market elasticity and competition; the people (both landlords and tenants) priced out of the market may or may not be poor in relation to those left in the market and may or may not have alternative ways of earning money or finding a decent home. See Kennedy, *supra* note 116.

233. For a justification of redistributing resources from landlord to tenant, see Ackerman, *Regulating Slum Housing Markets*, *supra* note 162, at 1169-73. See also Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C.L. REV. 503 (1982); text accompanying notes 162-164 *supra*.

234. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 6.73. About half the states have statutes requiring advance notice to terminate a tenancy at will.

235. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 6.72. The notice period varies from state to state. *Id.*

236. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 6.71.

237. See Glendon, *supra* note 235, at 540-44.

238. N.J. STAT. ANN. § 2A:18-61.1 (West Supp. 1987). The statute excludes owner-occupied premises with not more than two rental units. See also MASS. ANN. LAWS Selected Spec. L. ch. 59, § 1 (Law. Co-Op. 1979) (applicable only to apartments under rent control).

239. N.J. STAT. ANN. § 2A:18-61.1(a)-(c), -(e), -(i).

240. In contrast, the Massachusetts statute allows eviction if the landlord "seeks to recover possession in good faith for use and occupancy of himself" or his immediate family members. MASS. ANN. LAWS, Spec. L. ch. 59, § 1 (Law Co-Op. 1979).

241. 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975).

fortable and where they have not caused any problems.”<sup>242</sup> Further, in *Puttrich v. Smith*,<sup>243</sup> the court held that under the terms of the statute, the landlord was not entitled to evict the tenants even though the landlord intended to use the property for his own business.

Just cause eviction statutes allocate property rights between landlords and tenants and thereby regulate their competing interests in controlling the property. They force landlords to substantially relinquish their right to determine who will possess the property to the tenant, who has the right to possess the property permanently unless just cause for eviction can be shown. They therefore transfer from the landlord to the tenant one strand in the traditional bundle of property rights.<sup>244</sup>

Just cause eviction statutes protect the tenant's reliance interests in the property in the following way. The landlord and the tenant create a long-term relationship. The tenant comes to rely both on access to the property and on continuation of her relationship with the landlord which makes such access possible.<sup>245</sup> Moreover, the tenant establishes a home in the apartment.<sup>246</sup> She not only needs *some* place to live in, but she needs *this* place. People develop strong emotional attachments to the place itself and the memories it embodies for them. They may become attached to the community and develop ties to friends and local institutions. As Victoria Judson has written, “The spectre of being forced from one's home is the paradigm of the evils of autocratic and totalitarian government. Protection against such disruption and uprooting is fundamental to our concept of liberty as embodied in the fourth amendment, as well as in the takings clause.”<sup>247</sup> Just cause eviction statutes give tenants some protection from having to leave their homes.

The landlord's interest in the apartment, on the other hand, is an investment interest.<sup>248</sup> Just cause eviction statutes protect the personal

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242. 134 N.J. Super. at 572, 342 A.2d at 531 (quoting statement attached to 1974 N.J. Laws 49).

243. *Puttrich v. Smith*, 170 N.J. Super. 572, 574, 407 A.2d 842, 843 (App. Div. 1979).

244. Of course, after the statute is passed, landlords know that any future leases will contain the just-cause eviction statute as an implied term. With this understanding, the statute will not involuntarily transfer property interests in that sense; people can choose whether or not to become landlords. Since the provisions of the statute are, however, nondisclaimable, it in fact creates a status; if people choose to enter into the landlord-tenant relationship, the property interests must be divided up in this particular way. This regulatory statute therefore operates like the estate system, which allows people to sell real property and to create future interests, but limits the number and kinds of estates that can be created.

245. The tenant needs the apartment because the existing legal rules allocating property ownership and defining what ownership entails leave the tenant with no place to live; if the tenant is not already an owner, she cannot live anywhere unless she can get the owner to agree to give her access to the property. The law does not compel owners to rent property to homeless persons. Thus, the tenant's need for housing is created to a large extent by the law of property which excludes the tenant from all existing houses.

246. See *Stamboulos v. McKee*, 134 N.J. Super. 567, 342 A.2d 529 (App. Div. 1975).

247. *Judson*, *supra* note 95, at 218 (footnotes omitted).

248. *Id.* at 222-26.

reliance interest in maintaining a home over the fungible investment interest. The interests protected by allowing people to stay in their homes are crucial to living a fulfilled life; moreover, the landlord can continue to make money while those interests are protected.<sup>249</sup>

Condominium conversion ordinances similarly limit the power of landlords to evict tenants who want to remain in their homes. They may require that tenants be given the first option to purchase; they may require a notice period; they may require indemnification to existing tenants; or they may prohibit conversion entirely for a class of tenants (poor or elderly) or for all tenants in the municipality.<sup>250</sup> Massachusetts has enacted a statute that grants all tenants a right of first refusal to purchase their apartments if their building is converted into a condominium. The statute gives tenants a nondisclaimable right to have notice of the intent to convert the building and a right to buy the unit "on terms and conditions which are substantially the same as or more favorable than those which the owner extends to the public generally" for a 90-day period following notice of the intent to convert.<sup>251</sup> Like just cause eviction statutes, condominium conversion ordinances transfer property interests from the owner to the tenant by regulating the manner in which control of the property is allocated between them. Both just cause eviction statutes and condominium conversion ordinances convert a temporary right to possess the property into a close-to-permanent right to possess the property. They do this by granting the tenant a legal immunity from having the right to possess the property taken away by the landlord. These rules therefore protect the tenant's reliance interest in maintaining her home over the owner's investment interest.<sup>252</sup>

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249. See Radin, *Residential Rent Control*, *supra* note 166, at 359-68. To the extent that the landlord wants to move into the apartment herself, the New Jersey statute protects the tenant's interest in maintaining an existing home over the landlord's interest in establishing a new home, again to protect the tenant's reliance on existing arrangements. See *id.*

250. For example, the town of Brookline, Massachusetts passed an ordinance that prohibited landlords from recovering possession of a rental unit for the purpose of condominium conversion if the tenant had occupied the unit "continuously since the time before the recording of the master condominium deed." *Loeterman v. Town of Brookline*, 524 F. Supp. 1325, 1327 (D. Mass. 1981), *cert. before judgment denied*, 456 U.S. 906 (1982), *vacated as moot*, 709 F.2d 116 (1st Cir. 1983). The ordinance, in effect, gives the tenant a life tenancy in the property (as long as the tenant pays rent): The owner may recover possession only for the use of herself or her family. *Id.* An ordinance in Cambridge, Massachusetts similarly protects tenants from being evicted from their rent-controlled units for the purpose of converting the unit to condominium ownership. *Flynn v. City of Cambridge*, 388 Mass. 152, 418 N.E.2d 335 (1981).

251. 1983 Mass. Acts, ch. 527 § 1 et. seq., Reprinted as Addendum to MASS. GEN. LAWS ANN. ch. 183A § 1 (West 1987 Supp.).

252. See generally Blair Cameron Stone, *Community, Home, and the Residential Tenant*, 134 U. PA. L. REV. 627 (1986) (student author) (describing reliance interests in the home). They also protect the interests of existing tenants in their current homes over the interests of outsiders seeking to establish a new home in the apartment. See Radin, *Residential Rent Control*, *supra* note 166, at 361.

2. *Rights of homeowners against lenders.*
  - a. The nondisclaimable right of redemption in mortgages and installment land contracts.

When most people buy houses, they borrow money from a bank which takes a mortgage on the property as security for repayment of the loan. When a homeowner defaults on mortgage payments, the lender is entitled to foreclose on the property to satisfy the unpaid portion of the loan. When this happens, the homeowner loses the property and gets from the foreclosure sale only the proceeds above the unpaid amount of loan. Mortgage foreclosure statutes protect the interests of the borrower by prohibiting the mortgagee from asserting its security interest in the property without notice and a public sale. These statutes also allow the homeowner/mortgagor to retain the property if the unpaid loan is paid off prior to the foreclosure sale. The right to retain the property by paying off the loan is called the "equity of redemption." These provisions of mortgage foreclosure statutes are normally nondisclaimable.<sup>253</sup>

Some states apply their mortgage foreclosure statutes only to transactions deemed to be "mortgages." In those states, homeowners are entitled to enter into financing arrangements in which they are not protected by foreclosure statutes. These alternative arrangements are called "installment land contracts."<sup>254</sup> An installment land contract may provide for loss of the property immediately upon default of any loan payment rather than after a public sale, may give the homeowner no right to redeem the mortgage by paying off the unpaid loan, and may allow the lender to retain proceeds of any sale above the amount of the unpaid debt.

Other states prohibit installment land contracts entirely. In those states all arrangements that are functionally equivalent to mortgages are governed by the foreclosure statute. This statute is therefore a nondisclaimable term in all real estate financing contracts. This is done either by interpreting the statute to apply to all real estate financings<sup>255</sup> or by holding that loss of the property or loss of proceeds of the sale above the unpaid debt constitutes an illegal forfeiture under contract law.<sup>256</sup>

The states that prohibit land installment contracts protect all homeowners to some extent from losing their homes when they default on their mortgage payments. By implying the foreclosure statute into all

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253. See GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 1.1-1.4 (2d ed. 1985).

254. See *id.* § 3.26-3.37.

255. See *Mid-State Inv. Corp. v. O'Steen*, 133 So. 2d 455 (Fla. Dist. Ct. App.), *cert. denied*, 136 So. 2d 349 (Fla. 1961).

256. See, e.g., *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974); *Sebastian v. Floyd*, 585 S.W.2d 381 (Ky. 1979); *Koenig v. Van Reken*, 89 Mich. App. 102, 279 N.W.2d 590 (1979).

contracts embodying real estate financing arrangements, these states redistribute property rights between mortgagors (homeowners) and mortgagees (banks). Making this a compulsory contract term may override the intent of the parties. The owner, for example, may prefer a lower interest rate and lower level of protection for her equity in the building under the installment land contract to the combination of a higher interest rate and greater protection provided by a mortgage.

The right of redemption protects the interest of the homeowner in keeping her home. Abolishing the installment land contract may price some homebuyers out of the market altogether. At the same time, treating all real estate financing as a mortgage protects those who have been able to afford a home with this higher interest rate from losing the property they have already acquired. Thus extending the right of redemption to all financing arrangements protects the homeowner's reliance interest in the home over the lender's investment interest in the property (while still protecting that interest substantially through foreclosure) and over the interests of those who would be able to afford to buy at the lower interest rate.

The homeowner's reliance interests are similar to those of tenants protected by condominium conversion ordinances or by just cause eviction statutes. The homeowner "relies" on continued access to the property for the same reasons anyone wants to continue to live in her home. To the extent the foreclosure statute is read into installment land contracts, the legal rules protect the more vulnerable party to the relationship from her own mistake in agreeing to a contractual term that would result in the loss of her home or equity in the property.<sup>257</sup>

#### b. Mortgage moratorium laws.

During the Great Depression, some states passed laws protecting homeowners from foreclosure. Such statutes have been discussed recently as possible responses to the mass of farm foreclosures afflicting the country. In *Home Building & Loan Association v. Blaisdell*,<sup>258</sup> the Supreme Court upheld the 1933 Minnesota Mortgage Moratorium Law which temporarily authorized courts to extend periods of redemption—the time during which the homeowner (the mortgagor) could pay off the loan to the mortgagee without being subject to a foreclosure sale.

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257. See Kennedy, *supra* note 116. It is important to remember, as well, that the equity of redemption itself was a judicial construct of the equity courts which mitigated the hardship of strict enforcement of mortgage arrangements which resulted in forfeiture of any interest the mortgagor may have had in the property. See NELSON & WHITMAN, *supra* note 253, at § 1.3. By creating the equity of redemption, the equity courts regulated the substantive terms of mortgage contracts to protect the reliance interests of the mortgagor.

258. 290 U.S. 398 (1934). A mortgage moratorium statute is currently on the books in Iowa. IOWA CODE § 654.15. A section of the statute applies in cases of economic emergency. IOWA CODE § 654.15(2). Governor Terry Branstad declared an economic emergency on October 1, 1985, triggering the operation of that section of the statute. *Bank of Craig, Craig, Missouri v. Hughes*, 398 N.W.2d 216, 218 (Iowa Ct. App. 1986).



The effect of the statute was to invalidate or modify contractual provisions in mortgages entered into before the statute was passed.

The purpose of the mortgage moratorium laws was obviously to protect homeowners from losing their homes and to protect businesses from losing their property during a period of economic depression. The interests of families in retaining their homes and businesses in retaining their operations were thought to outweigh the interests of lenders in timely payment of debts by resort to sale of the property.<sup>259</sup>

The homeowner and the lender develop a relationship based on contract. Mortgage moratorium laws redefine both the terms of the mortgage contract and the respective property rights of the homeowner and the lender. They do this to protect the party to the relationship thought to be more vulnerable—the homeowner—from losing access to the property. Once the relationship is created, the statute allows the courts to grant to the homeowner a temporary immunity from having the property taken away. Because the lender is disabled from foreclosing on the property, the law takes away from the lender its contractually agreed-upon power to force a sale to satisfy the unpaid debt. *This represents a transfer of property rights without compensation from the lender to the homeowner.*

### 3. *Property in jobs: employment at will and just cause termination.*

Traditionally, an employer could fire an employee at will at any time for any reason, just as the employee could quit at any time for any reason.<sup>260</sup> However, this rule has been substantially changed in recent years by courts that have protected employees' interests in retaining their jobs. Some courts have imposed tort obligations on employers not to fire employees for activity that is protected by public policy.<sup>261</sup> Other courts have implied into employment at will contracts a nondis-

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259. Chief Justice Hughes wrote:

[T]here has been a growing appreciation of public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare. The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very bases of individual opportunity. . . . [T]he question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends.

290 U.S. at 442.

260. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 100, 364 N.E.2d 1251, 1255 (1977); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

261. *E.g.*, *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980) (Food, Drug & Cosmetic Act compliance); *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978) (workers' compensation claim); *Frampton v. Central Ind. Gas. Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (workers' compensation claim); *DeRose v. Putnam Management Co., Inc.*, 398 Mass. 205, 496 N.E.2d 428 (1986) (refusal to commit perjury); *Nees v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (jury duty); *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E.2d 270 (1978) (consumer credit law compliance).

claimable obligation of good faith and fair dealing.<sup>262</sup> Under this doctrine, an employer may only fire an employee if the employer is not motivated by “bad faith or malice or . . . retaliation.”<sup>263</sup> These courts have sought to balance “the employer’s interest in running his business . . . against the interest of the employee in maintaining his employment, and the public’s interest in maintaining a proper balance between the two.”<sup>264</sup>

Forbidding the employer to fire an employee at will without a good reason—or at least not for a bad reason—substantially interferes with the property rights of the employer. Initially, the employer is under no legal obligation to hire anyone in particular or to hire anyone at all. The employee is under no general legal obligation to work. However, as Robert Hale notes, both the employer and the employee need what the other has a legal right to withhold.<sup>265</sup> The employee may own no property and cannot make a living without agreeing to work for someone who does. The employer cannot put her property to use without convincing others to join with her in a group project to produce a product or service. The employer thus would not give the employee permission to have access to the employer’s property unless the employee agreed to the employer’s terms. Forcing the employer to include a just cause requirement as compulsory term in the at will employment contract forces the employer to grant access to her property on terms with which she would rather not agree. It therefore transfers from the employer to the employee part of the owner’s right to exclude.

Granting employees at will a minimal amount of job security could be interpreted as granting those employees a property interest in their jobs.<sup>266</sup> This property interest is a Hohfeldian immunity from loss of the right to work and to receive agreed upon wages. If this interest is enforceable by injunction, the employee thus has both a right of access to the employer’s business property and a right to tax a portion of the earnings of the business as compensation for the employee’s contribution to the productive enterprise. If the interest is protected only by damages, the employer’s right to control her property is limited by the

262. *Fortune v. National Cash Register Co.*, 373 Mass. 96, 364 N.E.2d 1251, 1255-56 (1977); *Monge v. Beebe Rubber Co.*, 114 N.H. 130, 316 A.2d 549 (1974); *Cloutier v. Great Atl. & Pac. Tea Co.*, 121 N.H. 915, 436 A.2d 1140 (1981).

263. *Monge v. Beebe Rubber*, 114 N.H. at 133, 316 A.2d at 551.

264. *Id.*

265. See generally ROBERT HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWERS, *supra* note 128; Hale, *supra* note 86; Hale, *Bargaining, Duress and Economic Liberty*, *supra* note 128; Kennedy & Michelman, *supra* note 22; Mensch, *supra* note 87.

266. See Donald H.J. Hermann & Yvonne S. Sor, *Property Rights in One’s Job: The Case for Limiting Employment-at-Will*, 24 ARIZ. L. REV. 763 (1982); Philip J. Levine, *Towards a Property Right in Employment*, 22 BUFFALO L. REV. 1081 (1973) (student author); James H. Looney, *Expected Continued Employment as a Protected Property Right*, 22 LOY. L. REV. 884 (1974) (student author); Gary Minda, *The Common Law of Employment At-Will in New York: The Paralysis of Nineteenth Century Doctrine*, 36 SYRACUSE L. REV. 939, 1019 (1985).

duty to pay damages in lieu of complying with the good faith or public policy requirement.

Although the employer and the employee enter into a relationship of mutual dependence, they are not equally powerful. The employee is often more vulnerable than the employer because the legal rules generally protect the employer's power to govern access to the property. The just cause termination doctrine protects the more vulnerable party to the relationship by transferring from the employer to the employee a limited part of the employer's property rights. It makes little difference whether one views this transfer as happening at the moment the employer tries to end the relationship (the attempted firing) or at the beginning of the relationship (when the employee is hired). In either case, the doctrine determines the distribution of power between the parties over access to the property. The transfer of this limited set of property interests from the employer to the employee protects the reliance interests of the more vulnerable party. Those interests include the employee's interest in relying on access to work to be able to make a living. The employee also wants not to have to acquire new skills, move, or undergo the substantial psychological and monetary costs of a job search. The personal costs of unemployment have been well documented.<sup>267</sup> The employee may have developed relationships with others at the workplace that would be disrupted by unjustified termination. As with just cause eviction statutes, the interest that is protected is not only need for work in the abstract, but for continued access to this particular job.

The employer's interests, on the other hand, are related to the ability to freely govern the workplace and to make money. These sovereignty and investment interests are intended to be protected to a large extent by the just cause termination doctrine, which does not radically alter labor relations law. The doctrine is potentially radical in that what constitutes a just cause to terminate could be interpreted so narrowly that employees could use the doctrine to fundamentally alter the distribution of power between employers and employees. As it is, the doctrine protects in a limited way the employee's interest in relying on continued access to a particular job. By coercively altering the distribution of property rights, the just cause termination doctrine protects the interests of the more vulnerable person in relying on the continuation of important relationships.<sup>268</sup>

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267. See, e.g., BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA: PLANT CLOSINGS, COMMUNITY ABANDONMENT, AND THE DISMANTLING OF BASIC INDUSTRY* 49-66 (1982); *The Unemployment Crisis Facing Older Americans: Hearing Before House Select Committee on Aging*, 97th Cong., 2d Sess., Oct. 8, 1982 (Comm. Pub. No. 97-367), at 33-41 (statement of Paula Rayman, Professor of Sociology, Brandeis University) (unemployment causes massive effects on individual financial, physical and mental health).

268. Another example of compulsory contract terms comprising property rights are the rights of franchisees. Many courts will protect the franchisee's reliance interests by refusing to allow the franchisor to end a franchise arbitrarily. See, e.g., *Shell Oil Co. v. Marinello*, 63

#### 4. *The duty to act.*

The general rule is that people have no duty to act to help strangers in distress. There is therefore generally no liability for nonfeasance.<sup>269</sup> The common law rules, however, impose a duty to act to help others when a special relationship exists between the parties. This special relationship may be a family relationship (parent/child, husband/wife), a contractual relationship (employer/employee) or a business relationship short of contract (common carriers and innkeepers/customers). The legal rules in force impose affirmative obligations to act to help others when a relationship has been established between the parties in which the party who needs help is more vulnerable or dependent on the other. For example, parents must aid their children, common carriers and innkeepers must aid their patrons, and employers must aid their employees.<sup>270</sup> In addition, the current rule seems to be that if a defendant has acted, even innocently, in a way that places the plaintiff in a position of jeopardy, then the defendant has a duty to act to help the plaintiff.<sup>271</sup>

The duty to act principle, although not directly involving property law, is analogous to the doctrines discussed above regarding the reliance interest in property. The duty to act can be understood as an affirmative obligation that arises in the context of important relationships on the part of the more powerful party to take steps to help the more vulnerable party. As Prosser explains:

During the last century, liability for "nonfeasance" has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relationships have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.

The largest single group upon whom the duty of affirmative conduct has been imposed are the owners and occupiers of land . . . .<sup>272</sup>

This duty can be understood in terms of the reliance interest. The parties have developed a relationship. This relationship is not an equal one; one of the parties is more powerful than the other. Moreover, this inequality of power is created to a large extent by the law governing the

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N.J. 402, 307 A.2d 598 (1973), *cert. denied*, 415 U.S. 920 (1974) (requiring good cause to terminate the franchise); *Bak-A-Lum Corp. v. Alcoa Bldg. Prod., Inc.*, 69 N.J. 123, 351 A.2d 349 (1976) (requiring reasonable notice period to terminate franchise).

269. PROSSER & KEETON, *supra* note 207 § 56, at 373.

270. *Id.* at 383.

271. *Id.* at 378.

272. *Id.* at 373-74 (citations omitted).

rights of the parties with respect to each other; the more powerful party is more powerful because the legal rules *grant* her this power and the more vulnerable party is more vulnerable because the legal rules make her dependent on access to resources controlled by the other. The more vulnerable party has become dependent on the more powerful party over the course of their relationship and has developed expectations about the continuation of the relationship and about her ability to continue relying on the more powerful party. Further, the more powerful party has voluntarily taken actions to create the relationship of dependence, along with creating expectations in the more vulnerable party about the continuation of the relationship. Because this relationship of dependence has developed, and because it is to a large extent created by the legal system, the legal system places obligations on the more powerful party to look out for the interests of the vulnerable party.

5. *Notice requirements and the doctrine of abandonment.*

In various circumstances, the legal system requires notice to be provided before terminating a market relationship on which the other party has relied. Notice is required even though the relationship is otherwise terminable at will by either of the parties. For example, both landlords and tenants are obligated to give one month's notice to terminate a month-to-month tenancy.<sup>273</sup> Franchisors may be required to provide reasonable notice to the franchisee before terminating the franchise.<sup>274</sup>

Notice is also required to terminate professional relationships between physicians and patients and between attorneys and clients. The Model Code of Professional Responsibility provides that a lawyer "shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, [and] delivering to the client all papers and property to which the client is entitled."<sup>275</sup> Attorneys are subject to professional discipline for violating this provision of the ethical code. Similarly, once the physician-patient relationship is established, the physician is obligated to attend to the patient as long as care is required or until the relationship is ended by consent of the parties. Withdrawal by a physician without giving a patient reasonable time to secure alternate care may constitute abandonment and may subject the physician to liability for damages proximately caused by the abandonment.<sup>276</sup> Professionals are subject

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273. *See, e.g.*, MASS. GEN. L. ANN. ch. 186, §§ 12, 13, 15A (1981).

274. *See, e.g.*, *Bak-A-Lum Corp. v. Alcoa Bldg. Prod., Inc.*, 69 N.J. 123, 351 A.2d 349 (1976) (requiring reasonable notice period to terminate franchise).

275. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-110(A)(2)(1979).

276. *Mucci v. Houghton*, 89 Iowa 608, 57 N.W. 305 (1894); *Groce v. Myers*, 224 N.C.

to affirmative obligations that go far beyond the terms of any agreement they may have made with the client.

In all these instances, notice is required to enable the person who has relied on the continuation of the relationship to make whatever arrangements are necessary to protect her interests. This also means that services must continue to be provided during the notice period: landlords must continue to maintain the premises; franchisors must continue to comply with their contractual obligations; doctors and lawyers must continue to provide professional services to their clients. These obligations are imposed in the context of relationships of unequal power. Franchisees and tenants are thought to be vulnerable in relation to franchisors and landlords, and in special need of protection against termination without adequate notice. In the case of professional relationships, the client is especially dependent on the skill and care of the professional, who in turn is held to a high degree of responsibility to provide this care until other arrangements can be made to protect the client's interests. The requirement of notice and the doctrine of abandonment protect the interests of the more vulnerable person in relying on continuation of the relationship.

6. *Summary: compulsory contract terms*

In a variety of instances, compulsory contract terms are implied into agreements that force the parties to share property rights in ways that protect the ability of the more vulnerable party to rely either on continuation of the relationship itself or upon continued access to property putatively owned by the more powerful party. These compulsory terms require property rights to be shared between the parties both during the course of their relationship and at the moment the more powerful party seeks to end the relationship. In these cases, the legal rules grant the more vulnerable party (the "non-owner") a partial or total immunity from having access to the property taken away by the "owner." They therefore redistribute property rights from the owner to the non-owner to protect the legitimate interests of the more vulnerable party in relying on access to those resources and the relationships that such access makes possible. Those relationships and resources include the right to remain in one's home with one's family and in the community with one's friends, and to enjoy continued access to work and the relations that one's workplace makes possible.

C. *Intimate Relationships*

1. *Marriage and its breakup.*

When a married couple gets divorced, the courts have jurisdiction

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165, 29 S.E.2d 553 (1944); *Ricks v. Budge*, 91 Utah 307, 64 P.2d 208 (1937); *Gray v. Davidson*, 15 Wash. 2d 257, 130 P.2d 341 (1942).

to divide up their property between them. This is true both in community property states and in states with equitable distribution statutes.<sup>277</sup> Community property states generally do this mechanically by requiring an equal division of property acquired during the marriage.<sup>278</sup> Equitable distribution states apply various standards to determine how to divide up marital property when the parties cannot agree between themselves.<sup>279</sup> Professor Judith Areen has identified five such principles: (1) *fault* (using marital assets to punish the spouse who caused the breakup); (2) *need* (minimal support for necessities of food, clothing, shelter, medical care); (3) *status* (support sufficient to maintain the lifestyle shared during the marriage); (4) *rehabilitation* (support sufficient to allow the more needy spouse to attain marketable skills such that support will no longer be needed); and (5) *contribution* (treating the marriage as a partnership to which both parties have contributed and awarding the more needy spouse the share of the assets of the joint enterprise that she has earned).<sup>280</sup>

All these principles protect the interests of the parties in relying on a relationship of mutual dependence. Both husband and wife undertake a commitment to take care of each other when they marry.<sup>281</sup> They usually share what they have with each other and they come to rely on each other, on the continuation of their relationship, and possibly on access to resources owned or controlled by the other. When the relationship ends, equitable distribution law protects the parties' reliance on the relationship in two ways.

First, one person is often more vulnerable than the other. The more vulnerable person is usually the one who did not have access to the marketplace, or who had access only to lower paying jobs,<sup>282</sup> or who was less wealthy. Since both parties depended on each other and relied on the continuation of the relationship, it is right for the parties to share their wealth in a way that protects the more vulnerable person.<sup>283</sup>

Second, both parties have earned portions of the marital assets by

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277. JUDITH AREEN, *CASES AND MATERIALS ON FAMILY LAW* 591-95 (2d ed. 1985).

278. *Id.* at 595-96.

279. *Id.* at 593-95.

280. *Id.* at 593-94.

281. This undertaking is voluntary in one way and involuntary in another. It is voluntary because people know this is what marriage involves and they choose to enter the relationship with those obligations—and rewards—in mind. But it is coerced and involuntary in the sense that these mutual obligations of support are imposed by the state and are usually nondisclaimable. You can choose whether or not to get married, but once you do you may be heavily regulated by the state, and the potential for regulation increases dramatically when you decide to break up the relationship. Separation agreements are enforced only if they do not violate public policy and are otherwise fair. Likewise, antenuptial agreements are sometimes upheld by the courts.

282. Women on the average earn roughly 60 to 64% of what men earn. See Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1779 n.191, 1780 n.193 (1986).

283. See, e.g., *Mahoney v. Mahoney*, 91 N.J. 488, 453 A.2d 527 (1982); *O'Brien v.*

their joint efforts. The marriage was a joint enterprise in which each helped the other and had a right to expect reciprocal help. One person may have had access to the marketplace and a salary; the other may not have had such access but may have contributed unpaid labor to the joint community. Both parties have relied on each other and been dependent on each other in different ways. Under the contribution principle, they have each *earned* a right to a share of the resources earned by either of them over the course of their relationship.<sup>284</sup> This view of marriage as a partnership<sup>285</sup> is premised on the view that services rendered by each of the parties are useful to both of them whether or not those activities are remunerated in the marketplace.

## 2. *Unmarried partners.*

Ever since *Marvin v. Marvin*,<sup>286</sup> some states have allowed something akin to equitable distribution of property in cases in which an unmarried couple breaks up.<sup>287</sup> In *Marvin*, the court relied on the fiction of an express oral contract, but recognized that other remedies might be available as well.<sup>288</sup> The language of the opinion focuses on the relationship itself. Justice Tobriner remarked on "the prevalence of nonmarital relationships in modern society. . . . We are aware that many young couples live together without the solemnization of marriage, in order to make sure that they can successfully later undertake marriage."<sup>289</sup> In the absence of an express agreement, the courts should look to the "fulfillment of the reasonable expectations of the parties" and should examine the conduct of the parties to find an "implied agreement of partnership or joint venture or some other tacit understanding between the parties."<sup>290</sup>

The focus on the relationship itself, rather than any supposed agreement between the parties, is even clearer in the recent case of *Pickens v.*

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O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (Ct. App. 1985); Haugan v. Haugan, 117 Wis.2d 200, 343 N.W.2d 796 (1984).

284. How much each of the parties has "earned" is a difficult question. Some states measure the rights of the nonworking spouse by the market value of services provided or on the basis of opportunity costs. AREEN, *supra* note 277, at 594. If the stay-at-home spouse is the woman, either of these approaches is likely to severely undervalue the wife's contribution to the marriage. This is because services performed in the home, and work done by women generally in the economy, is paid far less than comparable work performed by men.

285. See, e.g., Mahoney, 91 N.J. at 500, 453 A.2d at 533; O'Brien, 66 N.Y.2d at 576, 489 N.E.2d at 712, 498 N.Y.S.2d at 743.

286. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

287. See, e.g., *In re Marriage of Lindsey*, 101 Wash. 2d 299, 678 P.2d 328 (1984); Davis v. Misiano, 373 Mass. 261, 366 N.E.2d 754 (1977). *But see* Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (knowingly unmarried cohabitants prohibited by public policy from enforcing mutual property rights).

288. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The court appeared to seize on the contract characterization in order to get around the statutory prohibition against common law marriage, although it also recognized other possibilities for property division.

289. *Id.* at 683, 557 P.2d at 122.

290. *Id.* at 684, 557 P.2d at 122 (citations omitted).



*Pickens*.<sup>291</sup> In that case, the court ordered an equitable distribution of property between two people who had lived together as a couple for many years after being divorced. The court did not focus on the existence of an oral agreement or even an implied in fact agreement discerned from the conduct of the parties. Instead, Justice Robertson focused on the reliance aspect of the relationship itself. "Where parties such as these live together in what must at least be acknowledged to be a partnership and where, through their joint efforts, real property or personal property, or both, are accumulated, an equitable division of such property will be ordered upon the permanent breakup and separation."<sup>292</sup>

This doctrine appears to be based solely on the state's definition of the proper moral attributes of these relationships. In *Marvin*, Justice Tobriner waffled on the issue; he made the case appear to rest on the will of the parties, although he focused on the nature of the relationship. Justice Robertson focuses completely on the relationship and holds that when people enter into relations of mutual dependence of this sort, and the relationship ends, the state will simply force them to share the property accumulated over the course of the relationship through their joint efforts. This will be done to protect the interests of the parties in relying on each other and on the continuation of their relationship. And what is equitable under the circumstances must be determined in light of the contributions of the parties, their reasonable expectations, and the relative vulnerability they will face now that they can no longer rely on each other.

### 3. *Inheritance and intimate relations.*

If someone dies with a valid will, her property will be divided among the persons she designated according to her wishes. However, many states protect surviving spouses by allowing them to choose to renounce their spouse's will and take a forced share of the decedent's estate if the decedent left her less.<sup>293</sup> These statutes are designed to protect a widower or widow who has relied on access to property owned by the deceased spouse when the decedent does not leave a sufficient portion of her property to the survivor.

The surviving spouse may be in a position of vulnerability relative to the decedent, whose will would otherwise be enforced. The surviving spouse is thought to deserve a portion of the decedent's property both because of reliance on the relationship and because the survivor contributed to the joint efforts of the marriage; moreover, this interest outweighs the decedent's interest in disposing of all of her property as she

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291. 490 So. 2d 872 (Miss. 1986).

292. *Id.* at 875-76.

293. CUNNINGHAM, STOEBUCK & WHITMAN, *supra* note 109, § 2.14, at 81.

sees fit.<sup>294</sup> Thus, property is forcibly transferred without compensation to the surviving spouse from the decedent's estate (or from whomever would have gotten the property under the will). This forced transfer of property rights protects the reliance interests of a vulnerable person at a time of crisis.

D. *Reliance on the State*

1. *Due process: jobs and welfare as property.*

The due process clause of the fourteenth amendment prohibits state governments from taking property from their citizens without certain procedural protections. For example, states may not cut off welfare payments because of suspected ineligibility for benefits without prior notice and a hearing.<sup>295</sup> States may not fire people from government jobs without adequate procedures (for example, prior notice and a hearing) when they have a state law based expectation of job tenure.<sup>296</sup>

The states set up economic systems through their definition of the rules of contracts, property, torts, commercial transactions, family law. They do this partly by statute and partly by common law rulings by judges. The legal/economic systems in place in the United States effectively deny to some people access to resources needed to make a living. The result of these economic and legal arrangements is that some people find themselves in a position of extraordinary vulnerability—a vulnerability created by the legal system.<sup>297</sup> The states respond to this state of affairs by making some provision to help poor persons take care of themselves and their families when the marketplace fails.

When a state sets up a welfare program, it creates a set of relationships between the state and welfare recipients. Welfare recipients rely on the continuation of the relationship, and they rely on the resources to which they are legally entitled under the welfare program. Recipients are dependent both on the continued largess of the government (the relationship) and on the resources themselves. This reliance interest is particularly powerful. "For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical

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294. Of course, there is no general prohibition against giving away your property during your lifetime through a trust or otherwise. See, e.g., 2 UNIFORM PROBATE CODE PRACTICE MANUAL 564 (1977). But people are unlikely to give away all their property during their lifetime because they need and want it when they are still alive.

295. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

296. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); see also *Arnett v. Kennedy*, 416 U.S. 134 (1974).

297. "We have come to recognize that forces not within the control of the poor contribute to their poverty." *Goldberg v. Kelly*, 397 U.S. at 265; see also *Right to Choose v. Byrne*, 91 N.J. 287, 328, 450 A.2d 925, 946 (1982) (Pashman, J., concurring in part and dissenting in part) ("[I]t is simply not true that the actions of the state have played no role in creating the poverty in which one-seventh of our citizens are now mired. The state defines and enforces property rights, creates the economic climate in which private enterprise operates, and in myriads of ways effects the economy of the state and the wealth or poverty of its citizens."). See generally Cohen, *Property and Sovereignty*, *supra* note 86.

care.”<sup>298</sup> Because of the dependent relationship, the lack of alternatives, the state-created legitimate expectations on which recipients come to rely, and because recipients must satisfy basic human needs, the legal system effectively shifts rights in the benefits—the property—to the recipients, at least for a time. The recipients are entitled to receive the benefits even if the state suspects that they are no longer eligible, until they can be given notice that the benefits might terminate and undergo a hearing to determine continued eligibility.

Government jobs may similarly be treated as property on which employees rely. A job provides not only access to resources but also access to a means of life, a way to participate in society. When actions have been taken by officials that create sufficiently strong expectations that the employer/employee relationship will continue, the job is treated as a property interest. The employee is entitled to rely on the continuation of the relationship, and on access to the means of making a living. Thus the job may not be taken away from the employee without procedural safeguards. “It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.”<sup>299</sup>

## 2. *The right to shelter.*

### a. Exclusionary zoning.

Many municipalities promulgate zoning laws that have the effect of excluding poor and moderate income people from the community. These laws make it prohibitively expensive or illegal for builders to build property that could profitably be leased to lower income persons. They do this by imposing requirements such as lot size or by limiting development to single family housing that is not realistically available to poor persons.<sup>300</sup> Several states have outlawed such exclusionary zoning either by statute<sup>301</sup> or through interpretation of the state constitution.<sup>302</sup> The leading case in this area is the *Mount Laurel* decision in New Jersey.<sup>303</sup>

The *Mount Laurel* doctrine prohibits the municipality from excluding low and moderate income outsiders who want to move into the community. It takes away from resident owners the right to exclude and transfers to outsiders a limited right of access to property in the town. The doctrine benefits non-owners (outsiders) by providing a realistic chance

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298. *Goldberg v. Kelly*, 397 U.S. at 264.

299. *Roth*, 408 U.S. at 577.

300. *Southern Burlington County NAACP v. Mount Laurel (Mount Laurel I)*, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975); *Southern Burlington County NAACP v. Mount Laurel (Mount Laurel II)*, 92 N.J. 158, 456 A.2d 390 (1983).

301. See Low and Moderate Income Housing Act, MASS. ANN. LAWS ch. 40B, §§ 20-23 (Law. Co-op. 1983) (the Anti-Snob Zoning Statute).

302. See *Mount Laurel I*, 67 N.J. 151; *Mount Laurel II*, 92 N.J. 158.

303. *Id.*

of obtaining affordable housing in the community. Like the legal doctrines providing a public right of access to private property, the *Mount Laurel* doctrine limits the power of property owners to control their property. Like those doctrines, it creates a right of access to accommodate fundamental human needs.<sup>304</sup>

Exclusionary zoning legally segregates poor persons into municipalities that have not enacted such exclusionary practices. These municipalities face higher burdens because of the combination of a lower tax base and a greater need for services. By segregating low income persons into a few poor urban areas, exclusionary communities are able to externalize onto those other communities the costs and effects of poverty. In this way, exclusionary zoning laws affect outside communities adversely. The *Mount Laurel* doctrine prevents municipalities from so externalizing the costs of poverty. Like linkage requirements, it thereby recognizes the interdependence of persons in different communities.

b. Homeless people.

The New York Constitution has been interpreted to provide a fundamental right to housing both for poor individuals and for poor families with children.<sup>305</sup> In some cases the constitution has been held to place affirmative obligations on the state to provide housing for homeless persons.<sup>306</sup> Homeless persons have the right to call upon the state for help in obtaining a decent place to live. Although property law initially delegates to others the right to exclude homeless persons in need of housing, the constitutional guarantee of shelter redefines property rights to guarantee that the community will make available to everyone a decent home. The law thus gives poor persons an enforceable claim on social resources to satisfy a fundamental need. The constitutional right to shelter redistributes property; the state collects taxes from citizens and uses a portion of those taxes to obtain and provide housing for the homeless. Just as property owners rely on non-owners to respect their property rights, homeless persons rely on the community to provide them with property rights.

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304. In declaring exclusionary zoning unconstitutional the *Mount Laurel* court declared: "There cannot be the slightest doubt that shelter, along with food, are the most basic human needs." *Mount Laurel I*, 67 N.J. at 178, 336 A.2d at 727.

305. N.Y. CONST. art. XVII § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); *McCain v. Koch*, 517 N.Y.S.2d 918, 70 N.Y.2d 109, 511 N.E.2d 62 (Ct. App. 1987). For a general discussion of the rights of homeless people, see James Langdon II & Mark Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & Soc. PROBS. 305 (1985).

306. N.Y. CONST. art. XVII § 1; see also *Lee v. Smith*, 43 N.Y.2d 453, 402 N.Y.S.2d 351, 373 N.E.2d 247 (1977); *Wilkins v. Perales*, 128 Misc. 2d 265, 487 N.Y.S.2d 961 (1985).

E. *Summary: The Reliance Interest in Property*

In the *United Steel Workers* case, Judge Lambros eloquently described the interdependence that had developed among the workers, the company and the communities in which U.S. Steel established its factories. He further argued that “*it seems to me that a property right has arisen from this lengthy, long-established relationship . . .*”<sup>307</sup> Judge Lambros was right to have this intuition; he was wrong to think that there was no law to support him. In a variety of circumstances, property rights are shared or shifted to non-owners when they have relied on relationships of mutual dependence that made access to such property available in the past. Moreover, property is held subject to various public rights of access both to prevent waste and to fulfill fundamental needs of the community.

Let us try for a restatement of the doctrine of the reliance interest in property. It would look something like this:

*Restatement (Third) of Property § 90: The Reliance Interest in Property* <sup>308</sup>

(1) When owners grant rights of access to their property to others, they are not unconditionally free to revoke such access. Non-owners who have relied on a relationship with the owner that made such access possible in the past may be granted partial or total immunity from having such access revoked when this is necessary to achieve justice.

(2) When people create relations of mutual dependence involving joint efforts, and the relationship ends, property rights (access to or control of valued resources) must be redistributed (shared or shifted) among the parties to protect the legitimate interests of the more vulnerable persons.

(3) Property rights are redistributed from owners to non-owners:

(a) to protect the interests of the more vulnerable persons in reasonably relying on the continuation of the relationship;

(b) to distribute resources earned by the more vulnerable party for contributions to joint efforts; and

(c) to fulfill needs of the more vulnerable persons.

I have described a wide range of legal rules that effectively redistribute property rights in long-term relationships to protect the more vulnerable party who has relied on the relationship or on access to the property. These rules grant the more vulnerable party immunity from having access to property denied or revoked when she has legitimately relied on the relationship of mutual dependence. I want to recognize the reliance interest in property in the sense of *seeing* it in the legal rules and social practice (bringing to consciousness a suppressed principle), and in the sense of understanding reliance by vulnerable persons on relationships with others as legitimate and good, as a proper goal of

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307. *Local 1330, United Steel Workers of Am. v. United States Steel Corp.*, 631 F.2d 1264, 1280 (6th Cir. 1980).

308. In deference to RESTATEMENT (SECOND) OF CONTRACTS § 90 (1979).

social life, and as worthy of legal protection.<sup>309</sup>

Traditionally, the concept of reliance has been limited to describing legal protection of the interest in relying on promises.<sup>310</sup> But reliance on promises is only one form of the more general practice of reliance on relationships. The distinction between enforcement of promises and protection of reliance is not obvious. Patrick Atiyah has argued that even when the legal system enforces promises, it is almost always actually protecting reliance. We ordinarily do not enforce promises for their own sake. We enforce promises because they create expectations that figure into our conduct: We change our behavior based on our trust that promises will be fulfilled; we act with promises in mind; *we rely on them*.<sup>311</sup> It is the unusual case when promises are enforced in the absence of any reliance at all on the part of the promisee.<sup>312</sup>

Promises create one kind of relationship; other types of relationships are as important as relationships based on promises. Promises create legitimate expectations on which people rely, but promises are not the only things that induce expectations or reliance. Expectations can arise from various types of relationships. As Atiyah notes: “[M]any forms of reliance-based liability arise, or would arise even in the absence of a promise. The party relying may be relying, not on a promise, but on other words, or mere conduct. Such reliance is a commonplace

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309. It matters very little whether the reliance interest in property is conceptualized as a doctrine of property law, contracts, torts, trusts, labor law, corporate law, or anything else. The divisions between these areas of the law exist merely for convenience, and it seems that rigid categorization hampers analysis. A more unified analysis of entitlements is useful, as the law and economics writers have convincingly demonstrated. At the same time, it is useful to see how the same doctrine fits into all the above categories. Doing this leads us to consider the rich articulation of values in each of these fields—trusts and corporate law make us think about fiduciary obligations of managers of property; contracts makes us think about the voluntariness or duress of agreements, about reasonable reliance and unjust enrichment, about obligations of good faith and fair dealing and the regulation of unequal bargaining power and unconscionable terms; torts makes us think about deterrence of socially harmful conduct, about compensation and loss-spreading, and the divergence between social and private costs of activities; property law makes us think about the regulation of ownership interests to promote social goals (including dispersion of ownership, alienability, and public rights of access), and regulation of crucial social resources such as housing in order to assure access to basic human needs and to protect vulnerable persons.

However one classifies the reliance interest in property, we know that it involves the definition of legal relationships among persons regarding access to valued resources. To some extent, the legal rules delegate to individuals (or to groups such as corporations and unions) the power to bargain among themselves to determine the distribution of wealth generated by their joint activities. To a large extent, however, the rules described here regulate the distribution of wealth and power among people in civil society. They define, moreover, the appropriate and moral kinds of relationships we think people should establish with each other. The point is to address these questions about distribution and morality directly, without worrying about whether we are really discussing a doctrine of contract law or property law. In either case, it is clear that we are regulating relationships by defining the distribution of wealth and power.

310. See generally Feinman, *supra* note 143; Jay Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Fuller & Purdue, *supra* note 56.

311. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 3-4 (1979).

312. Ordinarily, the promisee will have at least refrained from making other alternative arrangements in reliance on the promise.

in modern societies and often gives rise to liabilities even in the absence of a promise.”<sup>313</sup> I would like to relativize the distinction between reliance on promises and reliance on other types of relationships: Reliance on a promise is merely a polar extreme of more general phenomena that comprise a spectrum.

The reliance interest in property is already well-established in our legal system. Why was it so difficult for the judges and the lawyers for the parties to see? I believe that the doctrines described in this section are marginalized in our consciousness because they do not fit easily into the free market model. In contrast, the social relations approach brings these doctrines to the forefront of our attention by asking us to understand social life in terms of ongoing relationships. When we see social relations in this way, we can recognize the extent to which people in fact rely on their relationships with others and the extent to which the legal system protects that reliance. The legal system recognizes affirmative obligations that grow out of relationships over time, and it does not confine such obligations to those formally agreed to by the parties.

#### IV. THE POLITICAL ECONOMY OF PLANT CLOSINGS

Bargaining power would be different were it not that the law endows some with rights that are more advantageous than those with which it endows others. It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining. . . . With different rules as to the assignment of property rights . . . we could have just as strict a protection of each person's property rights, and just as little government interference with freedom of contract, but a very different pattern of economic relationships. Moreover, by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have—freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.

—Robert Hale<sup>314</sup>

Traditional notions of contract and property greatly favor the economically dominant party, even though a strong case can be made that all

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313. P.S. ATIVAH, *supra* note 311, at 2. This argument has also been made by Lon Fuller. Where by his actions toward *B*, *A* has (whatever his actual intentions may have been) given *B* reasonably to understand that he (*A*) will in the future in similar situations act in a similar manner, and *B* has, in some substantial way, prudently adjusted his affairs to the expectation that *A* will in the future act in accordance with this expectation, then *A* is bound to follow the pattern set by his past actions toward *B*. This creates an obligation by *A* to *B*. If the pattern of interaction followed by *A* and *B* spreads through the relevant community, a rule of general customary law will have been created.

P.S. ATIVAH, *supra* note 89, at 85 (quoting Fuller).

314. Hale, *Bargaining, Duress and Economic Liberty*, *supra* note 128, at 627-28.

contributors to an enterprise deserve some security and some share of the enterprise itself. The focus [should be] on the relationship as a firm with the members' rights depending on communal notions of fairness. . . . [P]eople who contribute to a relationship are owed something beyond a salary or other compensation that can terminate at the will of the owner.

—Peter Linzer<sup>315</sup>

#### A. *The Politics in Economics*

When should the legal system protect the reliance interest in property in the context of plant closings? How should it be protected? I have already argued that we should have a normative commitment to recognizing social obligations of property ownership to protect fundamental needs of the community. The most wealthy and powerful owners—the large corporations that control economic life in a community—should have the greatest obligations. I have also argued that the legal system should protect the more vulnerable party to a long-lasting relationship when that person has relied on the relationship. This moral obligation is especially powerful when the relationship itself was premised partly on the parties' satisfying each other's needs.

Protecting the reliance interest in property in the context of plant closings would require us to regulate the industrial relation between managers and workers. This poses several additional questions. What types of regulation should be imposed? What consequences will that regulation have? Will it interfere in the ability of workers and managers to come to arrangements that are mutually beneficial, and thereby make them both worse off rather than better off? What will be the social consequences of this regulation? Who will it hurt and who will it benefit? How do we measure the costs and benefits of different types of regulation and how do we compare them to the costs and benefits of not regulating plant closings? Will regulation increase or decrease the general welfare? What moral obligations should corporations have toward their employees regardless of the effects of those obligations on allocative efficiency?

The free market model relied on by the judges in the *United Steel Workers* case is based on an economic theory as well as a social vision. This theory is a version of utilitarianism; the central question is “how can we maximize the sum total of individual satisfaction?”

I want to offer a competing view.<sup>316</sup> Because the social relations approach sees people as situated in relationships rather than as autono-

315. Linzer, *supra* note 146, at 425-426.

316. I believe the social relations approach provides a better account of the liberal ideal of regulating property and contract to protect vulnerable persons than does the standard argument about regulation of unequal bargaining power. See Kennedy, *supra* note 116.



mous individuals, the central economic question is “what kind of society do we want to create and what kinds of relationships should we foster?” This question broadens our view; it asks us to pay attention not only to maximization of individual satisfaction, but to the market and social structures within which individual freedom is situated. It asks us to consider how we want to structure the contours of those relationships.<sup>317</sup>

Individual satisfaction is important; indeed, it is central. But we cannot decide what arrangements maximize individual satisfaction simply by asking what agreements people would make in the absence of transaction costs. This is because whatever agreements they would make would differ depending on their relative bargaining power. Bargaining power is a function of the legal definition and allocation of property and contract rights. Those rights represent decisions about the distribution of wealth and power. We therefore cannot judge which market structures best satisfy human needs without simultaneously making normative judgments about the types of human relationships that we want to foster.

It is impossible to separate economic analysis from politics. Economic analysis must include political choices about how to measure costs and benefits, and choices about how to structure the institutions within which human beings will engage in their activities and develop their conceptions of their interests. To make economic analysis a useful way to develop policy recommendations, we must consider these questions in conjunction with a normative commitment to a form of social life. In developing this social vision, we must allow people to have freedom to develop various kinds of relationships without intrusion by the state; at the same time, we must make judgments both about the kinds of relationships we want to foster and the kinds of relationships that require regulation to prevent oppression. Cost/benefit analysis only makes sense in conjunction with judgments of this sort. This insight can, perhaps, shed some light on the current debates about economic analysis of law.

Everyone acknowledges that markets can fail. There is a standard debate in the legal academic community about externalities.<sup>318</sup> This is my understanding of it. First, the conservatives argue that the free market generally maximizes the general welfare through the market’s invisible hand. Profits and the price mechanism generally allocate re-

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317. See REICH, *supra* note 140; see also BRUCE ACKERMAN, RECONSTRUCTING AMERICAN LAW, 94 (1984) (arguing that “freedom of contract makes legal sense for us within an institutional framework that guarantees individual contractors a fair share of economic power no less than political and civil rights”); David Schweickart, *Plant Relocations: A Philosophical Reflection*, 16 REV. RADICAL POL. ECON. 32, 35-41 (1984) (arguing that the definition of property rights determines the structure of the market).

318. Calabresi & Melamed, *supra* note 121; Kennedy, *supra* note 67; *Efficiency and a Rule of “Free Contract”: A Critique of Two Models of Law and Economics*, 97 HARV. L. REV. 978 (1984) (student author).

sources efficiently. In response, the liberals argue that when private and social costs diverge, the market may allocate resources inefficiently. Thus, the legal system could further the goal of allocating resources efficiently by creating liability rules that force companies to internalize their external costs.

The conservatives answer by invoking the Coase Theorem:<sup>319</sup> There is no way to determine, in an unproblematic way, what is a cost of what. Joint costs arise because competing market activities may clash; the homeowner who wants clean air is externalizing the costs of homeownership on the polluting factory, just as surely as the polluting factory is externalizing its costs on the homeowner. Moreover, in the absence of transaction costs, liability rules will not affect allocative efficiency, since affected parties will simply bargain with each other to redistribute entitlements to achieve efficient results. Conservatives who seek to decrease regulation of market activity limit the situations in which transaction costs are thought to be serious.<sup>320</sup> The liberals respond by seeing transaction costs everywhere. They focus on imperfect information, moralisms, and other kinds of third-party effects, as well as bargaining impediments such as holdout, agency, and freeloader problems. The conservatives then reply by developing models of how to increase efficiency in the face of uncertainty about how all these arguments play out. Who is in the best position to make the cost-benefit determination? The conservatives also point to the idea of administrative costs. They argue that the costs of litigation, and of second-guessing business decisions may outweigh any social benefits of regulation.

Finally, conservatives argue that any attempts to alleviate negative externalities by judicial redefinition of common law rules is bound to fail. A company would simply pass along the cost of the regulation to its consumers or its workers or shareholders. So the very people liberals are trying to help will be the ones hurt by the decision. The uncertainty and costs caused by substantial regulation of business decisions may decrease incentives and hence investment so substantially that regulation does more harm than good. The liberals respond to this set of arguments by acknowledging that reforms may have unintended, counterproductive consequences. But they argue that this is not always the case, and we can distinguish situations when this is the case from those in which it is not the case. They argue, furthermore, that the question of who is the best decisionmaker in the presence of uncertainty fails to acknowledge that determinations of efficiency are always relative to background entitlements. Thus, the question of efficiency cannot be divorced from fundamental questions about the distribution

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319. See Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

320. The one major exception is that conservatives argue that the non-market, hierarchical, command organization of the firm is efficient because it facilitates coordination of activities and efficiently processes information and reduces agency costs associated with contractual relations and the market.

of wealth and power that determine who is in the best position—courts versus corporate managers—to make the relevant cost-benefit calculus. Efficiency is relative to power and power is determined by the legal rules defining property, contract and tort obligations. Analysis of what transactions would occur in the absence of impediments to those transactions gets mixed up with fundamental questions of how to distribute decision-making power before the efficiency analysis even gets off the ground.

The crux of the liberal/conservative debate seems to be a difference of opinion about how strong the presumption should be, in the face of uncertainty, that property owners (or their representatives—corporate managers) are the best judges of what will maximize the general welfare. On this issue, I contend that the liberals are right and the conservatives are wrong. In situations like plant closings, where the number of people affected by the corporate action is substantial and the social effects are enormous, there is simply no good reason to presume that what is good for the corporation is good for the community. The divergence between private costs and social costs in this kind of situation is enormous, and there is no reason to believe that transactions will occur that remedy the situation. Determinations of efficiency, moreover, are always relative to background entitlements that must be justified on other grounds. We have good reasons of equality, democracy, community, as well as efficiency, to redefine property rights to redistribute power from corporate managers to workers and their communities.

The difference of opinion between liberals and conservatives could be explained as a disagreement about facts. After all, the language of economic analysis asks us to make only one relatively uncontroversial value judgment—that satisfying human wants is a good thing. The analysis then proceeds to ask what set of rules will maximize satisfaction of human wants. Conservatives tend to ask: “What would people agree to in the absence of transaction costs?” Liberals ask: “What would people agree to if they had relatively equal bargaining power?” The goal in either case appears to be giving people what they want.<sup>321</sup>

It is impossible to answer either of these questions without making moral and political judgments. To answer the conservative question adequately, we must decide what rules to hold constant while we do the analysis. If we allow too many rules to be considered at once, efficiency analysis becomes indeterminate; it becomes a matter of bargaining about the fundamental terms of social life.<sup>322</sup> And yet, if we hold everything constant but the one rule in question, we have biased the analysis

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321. Kennedy, *supra* note 116, at 603-604. By using the “willingness to pay” criterion, efficiency analysis attempts to find out what people want, given their budget constraints. This added assumption helps to figure out what relative preferences are, given the fact of scarcity; it forces people to make the hard choices necessary to determine what they really want.

322. Kennedy, *supra* note 67, at 422-43.

in favor of the status quo. To answer the liberal question, we must make moral and political judgments about the meaning of power, and the relation between process and outcome. We must determine what outcomes are sufficiently inequitable for us to conclude that the parties were not sufficiently equal in power to defer to the terms of their bargain. Judgments about the legitimacy of the bargaining process therefore become bound up with judgments about the fairness of the outcome.

It is obvious, in addition, that liberals and conservatives disagree about more than what people want. They fundamentally disagree about what people *should* want. More precisely, they disagree about the kind of society we should create. They disagree about how to distribute power and wealth between governments and citizens, between corporations and consumers, between owners and non-owners, between managers and workers. Economic analysis takes place in the context of political judgments of this sort. It is with this factor in mind that I canvas the economic arguments about regulating plant closings.

B. *The Economic Argument Against Protecting the Reliance Interest in Property*

1. *The free market argument.*

To focus the economic discussion, I will address two issues. First, in the absence of contractual obligations, should the company have an obligation to sell the plant to the workers rather than destroy it? Second, should the company have an obligation to make severance payments to employees upon closing the plant?<sup>323</sup> I argue, first, that the standard economic arguments supporting deregulation of property are based on empirical assertions about the effects of different regulatory regimes. Those assertions are either tautological (and therefore non-falsifiable) or they are contestable. My purpose is to convince readers that there is no good reason to presume that free alienability and use of property will maximize the general welfare. Instead, economic analysis supports a mixture of regulation and deregulation; that is a major reason why current legal rules about property use and ownership substantially limit the power of owners to control absolutely the resources allocated to them by the legal system.

Second, economic analysis cannot be done without simultaneously making a series of value judgments about the proper and just distribution of power and wealth in the market system. I will identify the implicit value choices in the free market economic analysis and argue that they define "wealth maximization" in a way that is wrongly biased toward concentration of economic power in the hands of corporate man-

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323. The purpose of severance payments is to supplement unemployment insurance and protect workers while they are looking for a new job or otherwise adjusting to the plant closing.

agers. Moreover, these value choices fail to adequately protect social interests in equality, community, democracy and reliance on continuing relationships.

The chief tenet of the free market argument<sup>324</sup> is that the goal of the legal system should be to maximize the general welfare.<sup>325</sup> Rules creating property and contract entitlements establish the framework within which individuals can engage in productive activity in the marketplace with the assurance that their efforts will benefit them personally. Those rules give individuals freedom to do what they want to do and security from having their efforts undermined by others.

In the absence of countervailing considerations, or when the facts are uncertain or hard to determine, it is reasonable to presume that the general welfare (or social wealth) will be maximized if we establish the following rights: (1) *Individual rights to exclude*: All resources should be owned by someone and ownership should be concentrated in the hands of individual persons who have the right to determine the conditions under which others will have access to the property; (2) *Liberty to use the property*: Owners should be allowed to do whatever they want with their property free from governmental control and should not have to account to others about their decisions about what they do with the property; (3) *Power to transfer the property and immunity from loss of the property*: Owners alone should have the power to determine whether, and to whom, they will sell their property; and (4) *Freedom of contract*: Labor contracts should be enforced in accordance with their terms. These four criteria will generally ensure that property is allocated to its most productive use which in turn will maximize social wealth. This argument can be conveniently divided into a series of arguments about property and a series of arguments about contracts.

## 2. *The property argument.*

*Maximizing social wealth.* Social wealth will be maximized if property is controlled by the persons who value it most highly. Value is determined by willingness and ability to pay for property. Thus property should be controlled by the person who would pay the most to purchase it. In the absence of significant transaction costs, we can as-

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324. This discussion is largely taken from Posner's most recent version of his treatise on law and economics, *supra* note 181, and from McKenzie's discussion of plant closings, *see* MCKENZIE, PLANT CLOSINGS, *supra* note 117.

325. Maximizing social wealth is different from maximizing social utility. As Richard Posner and most other law and economics theorists define it, social wealth is measured by willingness and ability to pay. Thus Posner recognizes that in particular cases, the wealth maximizing result may actually decrease social utility. *See* POSNER, *supra* note 181, at 11-12. Posner claims, however, that wealth maximization will maximize social utility in the long run. RICHARD POSNER, THE ECONOMICS OF JUSTICE 101-02 (2d ed. 1983). According to Dworkin, wealth maximization is simply not a plausible criterion of justice. Dworkin, *supra* note 67, at 237.

sume that whoever owns property values it the most; if they did not value it the most, then whoever did would buy it from them.

*Free use of property.* Individuals seek to maximize their satisfaction. Individuals, moreover, are the best judges of what will do this. If property owners are free to decide what to do with resources under their legal control, they will be able to maximize their satisfaction. If the legal rules interfere with their ability to decide what to do with their property, those rules will decrease individual satisfaction and therefore the general welfare. We will therefore maximize social wealth if we let property owners use their property as they see fit. It is true that this freedom of action must be limited to protect the legitimate security interests of non-owners or neighbors; regulation of property use should be enforced to prevent harm (through nuisance law or building codes or the like). But affirmative obligations to use property in a way that benefits others should be limited to those contractual obligations voluntarily accepted by the property owner. Destruction of the plant by the company does not directly harm anyone else. Thus, the company should be able to deal with its property as it sees fit. The company has no affirmative obligation not to destroy the plant unless it has voluntarily given up its right to destroy it.

*Free transfer and immunity from losing the property involuntarily.* The Board of Directors of U.S. Steel wants to maximize the satisfaction of the shareholders by maximizing company profits. The Board must have done a cost/benefit analysis to determine the relative advantages and disadvantages of destroying the plants and selling them to the workers. If U.S. Steel wants to destroy the plants rather than sell them to the workers, it is presumably because the company (and its shareholders) are better off in dollar terms when the property is destroyed than when it is transferred. If the workers really valued the plants more than the company, they would offer the company enough money to induce it to sell. It is probable that at some price, the company would be better off selling the plants than destroying them. Since the workers have not offered the company more than the company would ask to sell the plants, the company values the property more than they do. A forced transfer would therefore decrease social wealth because it would transfer the property to a user who valued it less. It is therefore inefficient to prohibit the company from destroying the plants.

*Investment incentives.* Forcing a sale of the plant to the workers will channel investment in a way that is inefficient. First, the plant has been closed either because it is unprofitable or because other investments are more profitable. For the legal rules to encourage continued investment in an industry that is relatively less profitable than alternative investments is to prevent the competitive marketplace from working to allocate resources efficiently. If the court prevents the company from selling the property to another buyer, or from using the property for

another purpose itself, it will be preventing the most efficient result from emerging by requiring a forced transfer.

Second, when the company closes the plant, it is either going to open a new plant somewhere else or channel its investment in some different way. Any regulation that would prevent the movement of capital might help one city but would hurt another. Since operation in the other city or investment of capital there would be more profitable than continued investment in the city where the plant is closing, the end result is a decrease in social wealth (or, at any rate, an impediment to wealth maximization).

Third, requiring the company to sell the plant or transfer it to the workers will increase the company's costs of operations. We want to encourage capital mobility; we want investment to travel to its most profitable and, therefore, productive use. Imposing obligations on the company to protect the workers' reliance interests will discourage investment. Thus, the strategy will ultimately be self-defeating.

Fourth, in a federal system, if one state places higher obligations on companies than other states, those other states will win out in the marketplace for capital investment. Thus the economy of the state that is trying to help the workers will only end up by destroying incentives for investment and make everyone in the state worse off.

*Redistribution of wealth to workers cannot be achieved by protecting the reliance interest in property.* If the reliance interest is recognized, companies will simply respond as they would to a tax. Recognition of this new right in the workers represents a loss of property rights for the company. It will compensate for the loss by decreasing wages or benefits or raising prices of its products or otherwise passing the cost along to workers and consumers. Thus, the people intended to be benefited will be hurt. The only way to prevent this is to introduce national planning or price controls, but this kind of planning will distort incentives and prevent the market from efficiently allocating investment. The end result will be stagnation and general lack of investment. The effort at redistributing property rights will simply decrease total social wealth and make everyone worse off.

### 3. *The free contract argument.*

*Freedom of contract.* The court should enforce contracts in accordance with their terms. To imply a term into the collective bargaining agreement can only reduce efficiency. Voluntary agreements are Pareto efficient since they make both parties better off without hurting anyone else. If the terms of contracts are regulated, people are prevented from making exchanges that benefit both sides. Compulsory contract terms therefore reduce social wealth.<sup>326</sup>

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326. For a recent argument to this effect, see Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J.L. & PUB. POL'Y 107 (1986).

*Externalities are low and we are better off if people take care of themselves.* While it is true that adverse economic circumstances may follow in a community that is the victim of a plant closing, the external effects are likely to be low. Workers get new jobs either in the same community or elsewhere. Legal protection of the reliance interest would interfere with this process of economic adjustment. Because workers take care of themselves by re-entering the marketplace, the external effects of the plant closing are temporary and are corrected by normal market functioning. To the extent that workers need money to tide them over, unemployment insurance and bargained-for severance payments are already available.

*Ex ante compensation.* To the extent that workers are vulnerable to plant closings, they will have exacted a premium from the company to compensate them for the risks involved in job termination. There is no need for the court to impose obligations on the company to provide unbargained for severance payments or to require a forced sale. To imply either of these terms into the labor contract gives the workers something they did not bargain for. If it had been worth it to the workers to have severance payments or a right to purchase the plant at the time they entered the collective bargaining agreement, then they would have bargained for these terms by giving up something in exchange. To force a transfer of the plant when the workers did not bargain for a right to purchase gives the workers something for nothing; by taking away the company's property right (to control use and disposition of the plant) the court creates a forced exchange that harms the company. The exchange is therefore not Pareto superior to enforcing the contract as written. Moreover, it is not even potentially Pareto superior. If the workers had more to gain than the company had to lose by a right to purchase the plant, then the workers would have offered the company enough in the way of concessions to induce the company to grant the right to the workers. Since this did not happen, the company would lose more from recognition of the entitlement than the workers would gain. Since the winners from the entitlement could not compensate the losers for what they lose, the term is therefore inefficient and reduces social wealth.

*Ex post efficiency distorts incentives.* It might be plausible to protect the reliance interest if it turned out that the parties had miscalculated the chances of the plant closing and the social costs of closure. In that case, the social costs of allowing the company to destroy the plants might be outweighed by the social benefits of transferring the plant to the workers or the community. Even if this were the case, however, we would ordinarily expect the market to take care of it; the workers would offer the company enough money to induce the company to sell. Since that has not happened, the benefits of the transfer to the workers must be less than the benefits to the company of destroying the plants. Moreover, this kind of ex post determination will distort incentives by chang-



ing the risks of entering the marketplace. The workers and the company will have to guess not only the chances of the plant closing and the value to them of the right to purchase versus the right to destroy in ex ante negotiations, but the chances of their being wrong and having a court step in and force an exchange. The uncertainties of the marketplace are magnified by having a standard that allows creation of a new entitlement in uncertain circumstances. This uncertainty will distort incentives and result in decreased investment and less social wealth. A rigid rule that allows companies to do what they want with their property, unless they have agreed otherwise, maximizes social wealth in the long run, even if it has adverse consequences in some specific cases. Case-by-case adjudication will simply make investment too uncertain.

C. *The Economic Argument For Protecting the Reliance Interest in Property*

1. *Why profitable plants close.*

As an initial matter, it is unclear why a court should even consider forcing a sale of the plant to the workers. Companies normally close only unprofitable plants, and if the plant cannot be operated profitably, what good would it be to the workers? It is important to recognize that companies sometimes close plants that can be operated profitably. This may happen for several reasons.<sup>327</sup>

First, the plant may be owned by a conglomerate that includes different kinds of industries as subsidiaries. The company may be able to maximize its profits by using the earnings of one of its subsidiaries to subsidize operations of the others. This is in fact what happened with the Youngstown Sheet and Tube Company in Youngstown, Ohio, which was taken over by the Lykes Corporation. Lykes used the company's profits to finance capital investment in other subsidiaries.<sup>328</sup> It did this rather than re-invest the profits in the steel industry for modernization of obsolete plants.<sup>329</sup> In another example, the Sheller-Globe Corporation bought in 1974 the Colonial Press in Clinton, Massachusetts. Until the plant was closed in 1977, the Press was charged an average of \$900,000 yearly in corporate overhead costs with little justification. Companies like Youngstown Sheet and Tube and Colonial Press are referred to as "cash cows", said to be "milked" for the benefit of the conglomerate's other operations.<sup>330</sup> Once the company has been milked for a long enough time, it may become unprofitable because its plant has been run down and because it has not been mod-

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327. See BLUESTONE & HARRISON, *supra* note 267, at 6-10.

328. *Id.* at 152.

329. In the decade before the merger, investment in plant and equipment at Youngstown Sheet and Tube averaged \$72 million a year and increased each year at an average rate of \$9.3 million. After the Lykes Corporation bought the steel company, the average yearly investment fell to \$34 million and growth in investment all but stopped. *Id.*

330. *Id.* at 7.

ernized in ways needed to compete with other producers in the industry. Thus, these plants are closed not because they are inherently unprofitable; they are unprofitable because the parent company has decided to *make* them unprofitable by milking them or by failing to modernize them.<sup>331</sup>

Second, a plant may also be closed not because it is unprofitable but because it is not profitable *enough*. The company decides that whatever profit it is making is not enough when it could earn a higher return on capital investment in another industry; the company then exits one industry to enter another.<sup>332</sup>

Third, some plants are closed not because they are inherently unprofitable, but because they are managed badly. Professor Yoshi Tsurumi reports that about 600 failing American factories have been taken over by Japanese companies, who in most cases have been able to turn these plants around in just a few years. American managers have focused almost exclusively on lowering costs of materials and labor as ways to increase productivity and profits. They have sometimes insisted on wage cuts at the same time that they themselves have taken large pay increases.<sup>333</sup> Unions have also contributed to the problems of these factories by insisting on rigid work categories. (Unions legitimately want such categories to protect themselves from the arbitrary power of managers.) In contrast, Japanese managers have pledged to cut their own salaries before they would ask for cuts in workers' salaries. By building more flexibility into production, by providing workers a greater sense of participation and security, and by management's sharing in sacrifices in bad times, Japanese managers have been able to take "failing plants and unproductive and uncooperative workers and turn[] them into rousing successes."<sup>334</sup>

In all these cases, plant managers may be acting rationally to maximize the company's profits by closing the plant. This does not mean, however, that it is *impossible* to operate the plant profitably. Nor does it mean that profit maximization is a proper measure of social welfare.

## 2. Externalities.

### a. Private and social costs.

Plant closings cause substantial externalities, both positive and neg-

331. Parent companies do this when it is, for them, the most profitable use of the company being milked. It is a different question, however, whether what is most profitable for the parent company also maximizes the general welfare.

332. This was the practice of the Sperry Rand Corporation. Genesco set a target goal of 25%. *Id.* at 151-52.

333. Yoshi Tsurumi, *Made in America, Managed by Japan: Explaining the "Japanese Paradox,"* N.Y. Times, Nov. 16, 1986, § 3, at 3, col. 1; see also Perot to Smith: *GM Must Change*, NEWSWEEK, Dec. 15, 1986, at 58, 60 ("I would say the pattern in big companies across this country is to continue to vote for [executive] bonuses long after corporate performance goes through the floor.").

334. See Tsurumi, *supra* note 333.

ative. The company benefits by the closing, as do others if the company transfers its investment to a different economic activity or geographic area. At the same time, many persons other than the parties to the agreement (the workers) are harmed by plant closings. Yet the company may not be legally required to take these negative externalities into account in deciding whether or not to close. If the company is not forced to take into account all the social costs of closing, it may be profitable for the company to close the plant, but the closing may nevertheless produce more social costs than benefits.<sup>335</sup>

Private profits are highly imperfect indicators of what will maximize the general welfare. In *every* plant closing situation, private profit determinations will diverge from social cost/benefit comparisons. If this is true, there is simply no good reason to presume that concentration of economic power in the hands of corporate managers will maximize the general welfare. Private profit is wholly inadequate as a measure of social utility and is even worse as a measure of justice. Substantial regulation of the market is necessary to achieve its own goals of efficiency and satisfaction of human needs.

b. Labor as a fixed cost.

When a factory closes, many workers never find new jobs at all. Others are unemployed for long periods of time.<sup>336</sup> Forty percent of the 88,000 steelworkers who lost their jobs between January 1979 and January 1984 because of plant closings were still looking for work at the end of that period. Twenty-five percent of this group left the work force entirely.<sup>337</sup> Those that find jobs after plant closings often face large reductions in their wages.<sup>338</sup> Steelworkers who found new jobs had a median income 40 per cent below their old wages.<sup>339</sup> These difficulties, moreover, are disproportionately visited on older workers, less educated workers, women and racial minorities.<sup>340</sup>

The long-term loss of jobs and substantial reductions in income and wealth of discharged workers also affect the community at large. The loss of work is felt by the public sector in increased unemployment benefits, increased welfare benefits, and increased need for other sorts of public services. It is felt by society generally in the lost contribution of workers who are not working at all or working at jobs that require less

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335. It is also true that, in exercising its eminent domain power to take a factory that has closed, the city may not take into account the positive externalities of allowing the company to destroy the plant or use it for some other purpose.

336. See also Barry Bluestone, *Deindustrialization and Unemployment in America*, in DEINDUSTRIALIZATION AND PLANT CLOSURE, *supra* note 117, at 3, 5-6; Herbert Hammerman, *Five Case Studies*, *id.* at 75.

337. Paul Flaim & Ellen Sehgal, *Reemployment & Earnings*, in Staudohar & Brown, *supra* note 336, at 101, 127.

338. *Id.* at 101-02; Hammerman, *supra* note 336, at 75.

339. Flaim & Sehgal, *supra* note 337, at 127.

340. Bluestone, *supra* note 336, at 7; Hammerman, *supra* note 336, at 75.

than their full talents. Under current law, the company has no enforceable obligation at the time of the plant closing to account to the community for these costs.<sup>341</sup> The company thus partially externalizes onto the community and the public sector the costs of maintaining these people and their families.

In his classic 1923 work, *Studies in the Economics of Overhead Costs*, J. Maurice Clark argued that for some purposes it made sense to think of labor as an overhead or fixed cost, rather than a variable cost.<sup>342</sup> He argues that from the standpoint of the firm, labor appears to be a variable cost. This is because the amount of labor required varies depending on production levels. The firm will either hire more workers or lay off or fire some of its workers as its production levels change. From the standpoint of society, however, labor may be seen as a fixed cost. Workers must be maintained with necessities—food, clothing, shelter, medical care—whether or not they are working. Moreover, they must be trained and their skills maintained and improved.

There are costs of institutional relief to be borne if maintenance is not met, and much larger losses in productive efficiency. Without attempting to define just where this line comes, we can be quite sure that the laborer does not avoid the cost of maintenance by sleeping on a park bench and living on fifteen cents a day; he deteriorates and both he and the community bear the cost of the deterioration. Thus there is a very large element of maintenance cost, or its equivalent, which goes on whether the laborer is employed or not, and which falls on the laborer if he has reserves to meet it, and on both laborer and community if his reserves are inadequate.<sup>343</sup>

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341. State and federal unemployment laws provide little, if any incentive for employers to internalize the costs of plant closings. Although employers do contribute to unemployment compensation systems, their contributions are a percentage of their total payrolls within a state, with a maximum percentage of 7 to 10%. Therefore, a company that eliminates its workforce within a state ceases contributions to the unemployment fund entirely, and one that drastically reduces its workforce within a state pays a slightly higher rate on a substantially smaller base.

The federal unemployment tax rate is 6% of an employer's total payroll; this tax may be set off up to 90% by a company's contribution to each state's certified unemployment system. Thus, the only fluctuations in a company's federal unemployment tax occur with a change in the size of its payroll or a change in the amount a company contributes to a state fund. 26 U.S.C.A. §§ 3301-3309.

There is little variation in state unemployment systems. See, e.g., MASS. GEN. LAWS ANN. ch. 151A §§ 1-57 (1976 & Supp. 1987); N.Y. LAB. LAW §§ 581-590 (Consol. Supp. 1986); PA. STAT. ANN. tit. 43 §§ 751-920 (Purdon Supp. 1987); MICH. COMP. LAWS ANN. § 421 (West Supp. 1987). State unemployment tax rates consist of two factors: (1) the first is a function of the level of unemployment in the state generally, and (2) the second is a function of the company's individual performance (how many ex-employees are collecting unemployment benefits.) There are also base rates (usually around 5%) and maximum rates (usually 8-10%) that are charged any employer. The second component seems to force companies to take into account the unemployment expenses when deciding to lay off workers. However, as with the federal law, the tax is a percentage of the total payroll. Thus, even with an increased tax (say of 10%) a company that drastically reduces its payroll may only slightly increase its unemployment contributions, if at all.

342. J. MAURICE CLARK, *STUDIES IN THE ECONOMICS OF OVERHEAD COSTS* (1923).

343. *Id.* at 362.

Someone must bear the cost of maintaining the workers, and if the workers cannot do this themselves, they are taken care of by the government. Thus, the company externalizes the costs of providing for workers by displacing this cost onto the public sector and onto the community directly.

Workers need more than subsistence. They need to maintain or improve their level of skill, morale, and productivity. This is necessary both for the workers themselves and for society. If we do not organize the economy in a way that allows workers to remain productive, we are wasting a valuable social asset—productive labor. Yet plant closings currently produce a large class of discouraged workers who stop looking for work. We lack adequate mechanisms to help workers find new jobs in their own communities.

Workers are often not trained for the jobs that do exist. One of the major problems following a plant closing is the mismatch between the skills of workers who lost their jobs and the available jobs to which they could possibly transfer. This mismatch causes a great many workers to remain unemployed for long periods of times or to accept employment in jobs that require no skills. Workers tend to have skills that are specific to the firm or industry in which they were working. This is especially true if they have been working at the firm for a long time and are middle-aged or older. These firm or industry-specific skills are not always transferable. To the extent it is not possible for a worker to get a new job that utilizes her skills, they will be wasted whether the worker remains unemployed or is underemployed.<sup>344</sup>

Workers are not be able to acquire new skills easily for several reasons. They may have an enormous personal investment in the skills they do possess (they “gave their lives to the steel industry”), or they may hope they will still be able to find work in the industry in which they are skilled. They may lack information about available training programs or available jobs. They may not want to leave their community. Moreover, firms may underinvest in training workers with transferable skills because they would not reap the full rewards of paying for this training.<sup>345</sup> Thus, many workers displaced by plant closings are

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344. As Clark wrote in 1923, “Specialized training is like specialized capital—wasted if the possessor shifts his occupation, and partly wasted if he works short of his capacity.” *Id.* at 363.

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Training is an investment, and the maintenance of the minimum standard is a paying investment for the community as a whole, but these have one distinctive peculiarity, since no matter who makes the investment, the result is the private property of the laborer himself. Others may benefit, but they cannot own the thing from which the benefit arises, because they cannot own a human being. Some modicum of training every firm must give its workers, but beyond this minimum lies a wide zone of potentially profitable human investment. If the worker himself can afford the cost, well and good. But if he cannot afford it someone else can, and the community as a whole cannot afford to allow it to be neglected. If capitalists invest funds in training others, the yield may be a high one, but there is no way by which the capitalist can

systematically being shifted from more productive to less productive jobs. This represents a loss of efficiency if the social cost of retraining workers for new jobs is less than the social benefit of this training.<sup>346</sup>

From a social perspective, both individuals and companies may underinvest in retraining when workers lose their jobs as a result of plant closings. If workers were able to get retraining for new jobs and if they were willing to move to other cities or investors were willing to start new businesses in the town where the plant closed, an economic transition could occur that would maintain or increase workers' incomes and produce products that were needed by the community. Most displaced workers, however, do not move, and do not want to move, to other communities.<sup>347</sup> Many communities faced with plant closings find it difficult to attract enough new businesses to make up for the loss.

When we leave workers idle and when we leave plants idle that could profitably produce some needed product, we are wasting useful social resources; we do this both by not using them and by not sufficiently investing in their maintenance and improvement. Allowing the company to externalize these costs onto the workers and the community means that companies may underinvest in employment stability.<sup>348</sup> Because companies are legally entitled to externalize these costs, they have little incentive to organize production in a way that would minimize unemployment. "The result is that those who can do the most to regularize industry do not have the incentive, because they do not bear the worst of the costs of which irregularity is the cause."<sup>349</sup> This situation could be changed by requiring companies to pay generous severance payments to workers laid off by plant closings. If companies are not forced to do this, their comparison of costs and benefits of closing the plant are distorted; private and social costs diverge.

Because of barriers to economic readjustment when plants close, we may be faced with a choice between arranging for the workers to continue operating a plant that is profitable (or which at least covers its variable costs) and having both the plant and the workers idle or underemployed for a substantial period of time. In this case, it may be effi-

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appropriate it. He must in most cases advance the money without tangible security, and such loans are not regarded as business transactions. Hence these investments are peculiarly a matter of community concern."

*Id.* at 362-63.

346. BLUESTONE & HARRISON, *supra* note 267, at 55-61.

347. Only a small percentage of displaced workers move to another city or county to look for work or take a different job. Out of the 5.1 million people who lost jobs from January 1979 to January 1984 and who had worked at their jobs more than three years, only 680,000 moved to a different city or county. Older workers (55 and over) were least likely to move. Flaim & Sehgal, *supra* note 336, at 114, 117.

348. Clark concludes: "[W]hen labor is laid off its cost does not disappear; it changes its form, and a very appreciable part of it comes back to plague the same industry which started the vicious circle by laying off its workers. . . . Thus the overhead cost of labor is a collective burden upon industry in general, but the market does not allocate to each employer the share for which his own enterprise is responsible." Clark, *supra* note 342, at 371-72.

349. *Id.* at 369.

cient for the plant and workers to be occupied rather than idle. Alternatively, the government could help correct these market failures by helping workers find new jobs, retraining the workers, helping them relocate if they want to move, and taking steps to induce new businesses to open up in the town.

The costs of unemployment are not already taken into account in the wage contract. Workers know they may be laid off and may well have attempted to bargain for severance pay or for increased wages to protect them from the risk of being laid off. Workers, however, may tend to underestimate the chances of the plant closing down, and the difficulty they will have finding a new job. If they had known the chances of the plant closing, they might have bargained for different terms. It may be efficient then to imply into the contract the terms they would have agreed to if they had had perfect information. Their failure to bargain for terms that would sufficiently protect their interests shifts some of the costs of maintaining them onto the public sector and the community itself.<sup>350</sup>

In determining the wisdom of a requirement to compel companies to give severance payments to displaced workers or to require the companies in specific cases to transfer the closed plant to the workers, we must compare the costs and benefits of imposing the regulation with the costs and benefits of not imposing it. If companies were required to consider the social effects of unemployment when they decide whether to close the plant, their decisions would be different, as would the bargain reached by the company and the union. At the same time, it is important to consider the positive externalities of allowing the plant to close without placing further obligations on the company. If we create new obligations on companies or transfer property interests from companies to workers, will this interfere in the creation of new investment and stifle economic growth? Whether these obligations would create better or worse investment and employment decisions is a difficult issue whose answer depends on resolving complicated empirical questions. There is, however, no reason to presume that we are most likely to generate optimum economic activity by allowing companies freely to close plants without imposing on them some obligations to account for the external effects of these decisions.

### c. Third party effects

The external impacts of plant closings are enormous. Barry Bluestone and Bennett Harrison have chronicled in detail the social and economic effects of plant closings.<sup>351</sup> These impacts includes losses

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350. Even if the workers would not have agreed to lower wages or to a right to purchase the plant in the event of a plant closing, it still might be efficient to imply these terms into the contract because the workers' failure to bargain for them causes harm to others.

351. BLUESTONE & HARRISON, *supra* note 267; see also Barry Bluestone, *Deindustrialization and the Abandonment of Community*, in COMMUNITY AND CAPITAL IN CONFLICT: PLANT CLOSINGS

visited (a) on individual workers and their families; (b) on the city government and its services to the community; (c) on supporting businesses in the community; and (b) on the community at large.

*Impacts on workers, their families and the community.* I have already discussed the substantial losses inflicted on workers by unemployment and underemployment. Many workers who lose jobs when a plant closes face long term unemployment and large losses in family income and depletion of family wealth. For example, two years after the Lykes Corporation closed the Youngstown Sheet and Tube Company in Youngstown, 15 percent of the 4,100 workers were still unemployed; 35 percent "retired" prematurely; and 20-40 percent took jobs that involved large wage cuts.<sup>352</sup> Unemployment caused by plant closings is, moreover, associated with large adverse impacts on physical and emotional health. Statistics show increases in specific illnesses such as heart disease, ulcers, alcoholism, mental illness, and hypertension. There is also evidence of increases in suicide, homicide, and child and spouse abuse.<sup>353</sup>

*Impacts on city services.* Plant closings often have substantial effects on municipal tax revenues, the main source of funding for local governmental services. After the Youngstown Sheet and Tube closing, it was estimated that the communities around Youngstown would lose up to \$8 million in taxes.<sup>354</sup> Loss of property taxes means that city services suffer, including police and fire protection, schools, and libraries.<sup>355</sup> Income taxes are also lost that would have been paid by employed workers to the city, state, and federal governments. This loss of income tax revenue is occurring at the same time that needs for social services from the government are rising.<sup>356</sup>

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AND JOB LOSS 38 (J. Raines, L. Berson & D. Gracie, eds. 1982) (describing effects of deindustrialization on the economy).

352. Bluestone, *supra* note 351, at 45-46 (citing Linda Snyder Hayes, *Youngstown Bounces Back*, FORTUNE, Dec. 17, 1979, at 102).

353. BLUESTONE & HARRISON, *supra* note 267, at 63-66. National data from 1940-1973 show that

a 1 percent increase in the aggregate unemployment rate sustained over a period of six years has been associated with approximately:

- \* 37,000 total deaths, (including 20,000 cardiovascular deaths)
- \* 920 suicides
- \* 650 homicides
- \* 500 deaths from cirrhosis of the liver
- \* 4,000 state mental hospital admissions
- \* 3,300 state prison admissions.

*Id.* at 65 (citing Harvey Brenner, *Estimating the Social Costs of National Economic Policy: Implications for Mental and Physical Health, and Criminal Aggression*, 94th Cong., 2d Sess. 3, 5-6 (1976) (a study prepared for the Joint Economic Committee)); *see also* Rayman, *supra* note 267.

354. *Id.* at 73 (citing David Moberg, *Shuttered Factories—Shattered Communities*, IN THESE TIMES, June 27, 1979, at 12).

355. Lindsey Gruson, *Steel Towns Discharge Police and Reduce Services Sharply*, N.Y. Times, Oct. 6, 1985, at 1, col. 1 (reporting that many towns have cut municipal services in response to plant closings). Clairton, Pennsylvania laid off its entire 14-member police force and 10-member fire department. *Id.*

356. BLUESTONE & HARRISON, *supra* note 267, at 75.



*Impact on supporting businesses.* Closing a major plant in a locality also adversely affects all the business that relied on provision of goods or services to the company itself or to the workers. The United States Chamber of Commerce has estimated that, on the average, a community loses two service jobs for every three manufacturing jobs that are lost.<sup>357</sup> A study of the Youngstown Sheet and Tube closing estimated that the initial loss of 4,100 jobs would expand to 12,000 to 13,000 total jobs lost.<sup>358</sup>

*Loss of community.* Major plant closings change everything. When job losses are high, the loss to the community is so great that it is hard to calculate in dollar terms. Some losses are not amenable to easy monetization because there are no markets for them. How much do we value the loss of companionship of large groups of workers that have worked together for twenty years? How much do we value the loss of a healthy economic life in the community? How much do we value the sense of security, the sense of belonging to a productive enterprise, the sense of history? How much do we value the costs of alienation, of disillusionment, of loss of dreams?<sup>359</sup>

I do not mean to argue that things should never change; quite the contrary. I do mean to argue that economists generally tend to undervalue these intangible costs of economic transitions. These costs are very real. If we did consider these costs, we might direct our attention to minimizing hardship on the community during the transition to a new economy.

These externalities are unlikely to be taken care of by the marketplace. Transaction costs are likely to be substantial when thousands of people are affected by the decision to close the plant. The costs include the well-known costs of bargaining, of getting together lots of people, and of strategic moves (holdout and freeloader problems). Freeloader problems are likely to be especially high since many community members are likely to hope that the problem will be taken care of by surrender on the workers' part to demands for wage and benefits concessions.

Moreover, it is unlikely that the workers are adequate proxies for all these affected parties. Although the harm to the workers of destroying the plant is substantial, their ability to bargain with the company is limited by their ability to pay the company to induce it to agree to sell. The outcome of bargaining depends substantially on the relative wealth of the parties and the ability of the more vulnerable persons to bribe the more powerful party to give up its right to destroy the plant. Thus,

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357. *Id.* at 69 (citing *Erie Shares Grant to Fight Closings*, *The Daily Times* (Erie, Pa.), Nov. 13, 1980).

358. *Id.* (citing David Moberg, *supra* note 354, at 11).

359. See generally Richard Lewis, *Destruction of Community*, 35 *BUFFALO L. REV.* 365 (1986) (student author) (discussing the effect of urban renewal projects and environmental disasters on American communities and the difficulty of valuing losses in the market and in the political and judicial systems).

including in the bargaining process all the adversely affected parties might very well change the outcome. This is especially so if we value the interests of third parties by their asking prices rather than their offer prices.<sup>360</sup> The price third parties would ask to give up their right to have continued operation of the plant in the community is likely to be much higher than the amount those persons would offer to buy the same right. If we use the asking prices of affected third parties, it is possible that the external costs of allowing the company to destroy the plant would overwhelm its social benefits.

3. *Bargaining power and efficiency.*

The free market argument asserts that any obligations on the company to make unbargained-for severance payments to the workers or to sell the plant to the workers is unlikely to help workers in the long run, if at all. Recognition of these obligations is intended to increase the welfare of the workers either by directly transferring wealth to them from the employer or by increasing their bargaining power in contract negotiations. But the actual result may be quite the opposite. In response to imposition of these obligations, employers and employees may simply bargain around them, even if they are made nondisclaimable. The parties may bargain about other terms of their relationship, including level of employment, job tenure, wages, benefits, and other conditions of employment. Thus, the employer will pass along part of the cost of these obligations onto employees by lowering their wages. Alternatively, it might decrease production and lay off workers.<sup>361</sup> To prevent this from happening, the state would have to regulate *every important provision of the employment contract*. If the state does not do this, then it is not clear that imposition of these obligations will have the intended effect—that is, to give a measure of legal protection to the interests of workers and the community.

This is the familiar “the-landlord-will-raise-the-rent” argument and it is a serious objection to these new entitlements.<sup>362</sup> The conservatives are right to focus attention on it. The argument is, however, more complicated than the simple economic model makes it appear to be. I draw quite different lessons from the argument than the free market enthusiasts.

First, the effects of creating these entitlements are impossible to predict a priori. They depend on the specific labor and product market involved. Whether or not the company can pass on the cost of these new obligations to the workers by lowering their wages or decreasing employment benefits, and whether the company will decrease employ-

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360. Asking prices are often likely to be higher than offer prices. See Kennedy, *supra* note 67; Carlson, *supra* note 68; Kelman, *Consumption Theory*, *supra* note 67, at 678-95.

361. The company's demand curve for labor would shift downward to the left causing lower wages and smaller quantity demanded of labor.

362. See Kennedy, *supra* note 116.

ment and production depends both on the elasticity of supply and demand for labor in the industry and for the company's products and on the competitive structure of the industry and the labor market.<sup>363</sup>

Second, it is true that a new entitlement in the workers may make the workers worse off, in their own view, if it is not fashioned in a way that significantly alters the distribution of power and wealth between management and labor. It may also make workers worse off if it is adopted in isolation from other remedial legal changes that are necessary to make the entitlement effective in protecting the interests of the persons it is intended to protect.

Whether a new entitlement makes workers better off or not depends on how it is defined. If it is defined correctly, it may substantially increase the bargaining power of the workers and enable them to get a better deal than they would otherwise have gotten. The company knows that it will not be able to do whatever it wants with the plant but will have to negotiate with the workers if the company wants to close the plant; it knows it may be forced to convey the plant to the workers. This may give the company a greater incentive to make the plant more profitable, and this greater profitability may wind up helping the workers. The company is no longer the fee simple owner of the property; the workers have a contingent future interest in the property. The situation is therefore similar to the relation between a life tenant and a remainderperson whose relationship is governed by the law of waste. The life tenant has less freedom to use the property than a fee simple owner precisely because property interests have been divided between the life tenant and the remainderperson. The remainderperson has the right to control, to some extent, the use of the property during the life tenant's regime. Depending on how the right is structured, it may increase the bargaining power of workers tremendously.

For example, the right could be exercisable by the workers only if the company announces that it is closing the plant. If the right is structured in this way, the company is likely to bargain with the workers to get them to give up other benefits, especially if the right is nondisclaimable. On the other hand, the right may be defined to give the workers a continuing legal right of access to financial, investment, and other relevant information about the operation of the business, and the ability to exercise the right whenever the company is managing the plant badly or failing to engage in reasonable maintenance and modernization needed to keep the plant competitive. If the entitlement were structured in this second way, providing the workers with a right of entry for waste, it might dramatically shift the balance of power between the workers and the company. The more property interests or powers that are shifted to the workers, the more the company has to contend with a joint owner of the factory. And if property rights in the plant were de-

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363. *Id.*

fined with the specific intention of transferring both bargaining power and wealth from the company to the workers, it would certainly be possible to achieve the desired effects.

This argument emphasizes the fact that efficiency determinations are relative to background entitlements. The "bargain the parties would have agreed to in the absence of transaction costs" is a function of their relative property and contract rights. If we have to radically redefine or redistribute property entitlements to achieve the desired results, so be it. The argument against radical changes in property law is not one based on efficiency, but on politics. The real issue is the legitimate distribution of power and wealth; who is the right decisionmaker about the future of the workplace community—the shareholders, the board of directors, or some combination of management, workers, and the community? It is certainly *possible* to define property interests in a way that will achieve results that will benefit both the workers and the community. It is not necessary for the regulation to take the form of having the court or the legislature draft the entire contract; it is necessary to regulate only in the sense of defining when power over the plant shifts from management to the workers or how power is divided between them at any given time.

The conservatives are correct in reminding us that we have to be careful how we define property rights. It is true that if we do not shift enough power from the management to the workers, then the workers may in fact not be made better off than they would be without the right. Thus recognition of the right to purchase the plant for its fair market value when the company announces it is going to close the plant may or may not be a good way of helping the workers and the community. For the real balance of power to shift in the desired way, more radical changes may be required.

Would redistribution of property rights be efficient? There is no neutral way to answer this question. Efficiency determinations depend on assuming a particular starting place. If we redefine property rights to protect the interests of the workers in relying on access to the plant, then our determination of what is efficient will change. Efficiency determinations are relative both to the distribution of wealth and background entitlements.<sup>364</sup>

This point gains added strength when one considers that reverses in entitlements change who is offering to buy another's entitlements and who is selling their entitlements. This is because asking prices are likely to be higher, and in some cases, much higher, than offer prices. If the company has the right to blow up the plant, the workers must offer the company more than the company will ask to give up its right. The workers' offer price will be limited by their wealth. But if we reverse entitlements and give the workers a right to assert an ownership

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364. Kennedy, *supra* note 67.

interest in the plant when the company wants to close it or when the company fails to manage the plant well, then the company would have to offer the workers more than the workers would ask to give up this right. Because the workers would *own* this right, their wealth would be dramatically higher than if the company had the legal liberty to destroy the plant. Thus the efficiency determination may come out very differently. Under these circumstances, we might conclude that it was efficient for the company not to be able to destroy the plant because it would not be able to bribe the workers to give up their right of security in the plant. This reversal of offer and asking prices may have an enormous impact on the efficiency determination.

This effect would be even more substantial if one were to value third party interests in terms of their asking prices rather than their offer prices. If all the people in the town actually harmed by the plant closing had a right to force a sale of the property to the workers, then the company would have to pay off all these people to induce them not to exercise their rights over the plant. If we use the asking prices of all these people, the efficiency determination looks very different than if we consider what they would pay to induce the company to sell the plant to the workers.

It is of course true that the parties could bargain around any new entitlements granted to the workers. The question then is what their relative bargaining power would or should be when they enter that process. To a large extent, it is contract and property law that will determine their relative bargaining power. If we want to protect the most vulnerable party to the relationship in times of economic stress, we have no alternative but to make them less vulnerable. This means systematically interpreting and changing property and contract principles in ways that effectively redistribute power and wealth to workers. If we do not artificially limit ourselves to examining the consequences of changing one entitlement and no others,<sup>365</sup> it is possible for us to search for the proper structure of property and contract rights that would allow both sufficient flexibility in the marketplace to achieve desirable economic change and would protect those who rely on the continuation of the joint enterprise. That is the challenge for us.

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365. This is the normal procedure of most law and economics writers. They acknowledge that efficiency determinations must take place within the context of background assumptions about the distribution of wealth, allocation of resources, and other background legal entitlements. But they seek to limit counterfactual negotiation to one topic at a time. Thus the hypothetical bargain (what would the parties agree to in the absence of transaction costs) is about a particular entitlement, all other things remaining the same (*ceteris paribus*). But if we ask what would happen if we altered several rules at once, the result, of necessity, becomes indeterminate. Answering our question of which rule will increase social wealth becomes inextricably bound up with normative questions about how we should organize the market contexts within which economic activity is to occur.

D. *Summary: Reliance and the General Welfare*

When a company closes a plant that has been in operation for a substantial period of time and which employs a lot of people, it owes obligations to its workers and to the community. Those obligations may go beyond the terms of its contract with the workers. The company should be legally required to make severance payments to the employees. The workers should also have a right to purchase the plant for its fair market value if they believe they could operate the plant profitably. I come to these conclusions for the following reasons.

*The moral principle of protecting reliance on relationships.* First, and foremost, it is immoral for the company to close the plant without providing for the needs of its employees when the company is capable of providing such help. When a plant closes, the workers are vulnerable to long term unemployment and underemployment, loss of family wealth, and health and family problems. Because the workers are part of the common enterprise, they have earned a right to a measure of protection that may go beyond the terms of their contract. If the company is capable of easing the economic transition for its employees, it has a moral obligation to the workers with whom it has created a long-term relationship; it may not reproduce within the common enterprise relations of injustice that may characterize society as a whole. Thus, the rules of the marketplace should be structured in a way that protects the more vulnerable party to the relationship to some extent when the more powerful party ends the relationship.<sup>366</sup>

*The mutuality of vulnerability.* The moral principle of protecting reliance on relationships is based on the assumption that both parties to the relationship have relied on each other. These relations are ones of *mutual dependence*. This mutuality consists in the fact that each party to the relationship needs what the other offers to their joint enterprise. At the same time, the relationship may not be one of substantive equality. When the relationship ends, each party faces a world in which they can no longer rely on the relationship. If one party wants to end the relationship and the other wants to continue it, this may indicate that one party needs what the relationship offered more than the other does. *But this does not necessarily mean that the party who is relying on the relationship is the most vulnerable.* The company that is seeking to escape the obligations of the relationship may be vulnerable, as well, and may no longer be capable of fulfilling the obligations of the relationship without undue hardship to itself or without injury to others who also rely on the company. Moreover, it may be the case that the workers are relatively

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366. See Wiseman, *supra* note 56, at 505-07 (explaining that Lwellellyn sought both (1) to promulgate rules of commercial practice that incorporated common understandings of customary dealing in the trade to protect the expectations of the parties and, (2) to impose on all merchants standards followed by better merchants as a means to "impose his vision of the fair rule for merchants.").

well off when the plant closes. At the same time, the company may be in rough financial shape such that its very existence is threatened. Further, the stockholders of the company may be dominated by pension funds, charitable foundations, universities, and the like. Imposing obligations on the company may significantly injure these stockholders at the expense of relatively wealthy employees of the company. These stockholders provide benefits to pensioners, students, and low income families. In a case like this, both parties to the relationship are vulnerable, and it is a much harder question who should be obligated to whom.

In making moral choices about the mutual obligations of parties to relationships of mutual dependence, we must, therefore, be sensitive both to the mutuality of this dependence, to the relative vulnerability of the parties during the course of their relationship and at the point when one wants to end the relationship, to the relative ability of the parties to help themselves and the other party in a time of crisis, and to the nuances of the parties' relative power in their relationship. As Hale taught us, each party exercises power, or coercion, over the other. This does not mean that all exercises of power are of equal moral significance or equally legitimate. It does mean that we must carefully assess the competing moral claims of parties to ongoing relationships.

To assess the competing claims of the parties, we must attempt to empathize with each of them, to see the world from each of their perspectives.<sup>367</sup> It is imperative that the moral principle of the reliance interest in property not be applied mechanically. We must ask what it would mean to impose obligations of the company beyond those agreed to in the contract with the workers. To what extent would the company, and vulnerable persons who rely on its financial well-being, be injured by those obligations? And how do those claims compare to the claims of the workers and the community in which the plant is located?

At the same time, we must assess realistically what the legal remedy would mean for the parties to the relationship. If the workers have a right of first refusal to purchase the plant—a legal power to compel a sale of the plant to them for its fair market value—the company may be harmed very little by this legal obligation; it can take the money and reinvest it elsewhere. Moreover, once companies understand that they have obligations to make severance payments to workers when they close plants, they may well adjust to these new obligations in ways that protect the interests of their shareholders and others dependent on them. If, on the other hand, these obligations have significant negative effects on interests of investors, then we may reach a different conclusion about which party is most vulnerable. The reliance interest in property requires us to make realistic judgments of this sort.

*Externalities.* I have argued that the reliance interest in property is

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367. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

the basis of a wide range of currently enforceable legal rules. The difficult question is how to define the extent of this legal obligation in the context of plant closings and the circumstances in which it is fairly applicable. Given this moral starting point, is regulation of plant closings inefficient? Will it decrease social wealth as measured by willingness and ability to pay? Must we sacrifice efficiency to protect the reliance interest? I conclude that regulation will correct the failure of the market to take account of the externalities of plant closings. Such regulation is therefore likely to increase the general welfare as measured by the standard of economic efficiency.

Under current law, companies are free to close plants without taking into account all the social consequences of their decisions. When private and social costs diverge substantially, as they do in every major plant closing, there is no reason to assume that profit-maximizing activity is efficient. The social costs of unregulated plant closings are enormous, including costs of idle plant and equipment, idle labor, health and crime problems, deterioration of public services and secondary businesses. If corporations had to make severance payments to workers when they closed plants, they would take into account, much more than they do now, the social harms caused by their search to maximize profits. In this way their decision to close would more closely approximate an efficient result. At the same time, it is true that regulation of plant closings may prevent substantial positive externalities from emerging. It is not clear whether imposing such obligations on the company would prevent efficient re-allocation of investment.

Ronald Coase argued that there was no objective way to identify who was externalizing costs and who was the victim of those externalities. The polluting factory externalizes the costs of pollution onto homeowners in the area; but it is equally true that if the homeowners object to the pollution, they are externalizing the costs of homeownership onto the factory by making it more difficult or expensive for the factory to use its property. Thus we could as easily argue that, by regulating plant closings, the community and the workers effectively externalize onto the company the costs of economic transitions. Efficiency theorists have concluded from this insight that the only neutral way to determine the balance of costs and benefits was to identify the bargains the parties would have reached in the absence of transaction costs. But this conclusion is unpersuasive for several reasons.

The efficiency determination may be heavily influenced by the initial distribution of entitlements. If we assume that the background rule is that companies have the freedom to close plants with no obligations to make severance payments or sell the plant to the workers when it is closed, our efficiency determination will compare the asking price of the company with the offer price of those who would benefit from such entitlements. On the other hand, if we assume that the rule is the company has such obligations in the absence of agreement to the contrary,



then we must compare the asking price of the workers to give up this right with the offer price of the company to acquire a right to destroy the plant. Moreover, the interests of third parties (family members, supporting businesses, others in the community) may be valued either by their offer prices (the amount they would pay to avoid the harm) or their asking prices (the amount they would ask to give up their right to regulate the plant closing). Since asking prices are more likely to be higher, and in some cases, much higher, than offer prices, the formulation of the cost/benefit calculation may determine the outcome. The starting point for analysis will determine the relative bargaining power of the parties in our hypothetical contract, and hence, the efficient result.

Further, we understand the situation as one of joint costs only if we have no moral reason for preferring the interests of one economic actor over another—in other words, if we refuse to make any value judgments about the rights of the parties. But there is simply no reason for us to accept this methodology. We want jobs and products and homes and we may have to make tradeoffs between these social goods. But it is not the case that we are indifferent as between pollution and clean air. To the extent feasible, we want to live in a society that has a clean environment. Pollution is a disfavored activity relative to home-owning or the creation of jobs. We *want* to make it more expensive and difficult for people to pollute the air and water. On the other hand, we have no interest in making it more difficult for people to live in homes. As between the right to clean air and the right to pollute, we have strong preferences for clean air; it is morally wrong to pollute the environment if jobs and houses can be provided without such pollution. It is true that we are not willing to avoid pollution entirely at *any* cost. But we do strongly want to avoid the social cost of pollution. If this is true, the proper way to do an economic analysis may be to insure that this moral preference is reflected in the cost/benefit analysis by comparing the asking price of the favored activity with the offer price of the disfavored activity. *In other words, our social vision of the society we hope to create can aid us in determining how to value the costs and benefits of alternative arrangements.*

Efficiency analysis is indeterminate in the absence of value judgments about the proper distribution of power in the market. We need a moral commitment to one or another distribution of market power to enable us to value the costs and benefits of alternative arrangements. The reliance interest in property gives us a vocabulary for making moral judgments about this issue. The facts indicate that workers and communities are especially vulnerable when companies close plants. To the extent that we can protect those vulnerable persons without significantly harming the interests of others, we should do so. If we have reasons of justice to protect the more vulnerable party who has relied on a relationship of mutual dependence, we have reason to value costs and benefits in a way that favors the more vulnerable party.

How then do we compare the costs and benefits of not regulating plant closings with the costs and benefits of regulation? What are the long-run effects of regulation and how do they compare to the short term effects of regulation? These questions do not have simple answers. One thing is clear: The *assumption* that the costs of regulation outweigh the benefits is unwarranted. It is based on an unjustified faith in the invisible hand. We have plenty of evidence that the invisible hand carries a big stick; the costs and benefits of shifts in investment are not evenly distributed. The faith that things work out for the best for everyone if we steadfastly refuse to regulate market power is touching, but is nothing more than that. It asks us to ignore real victims in times of crisis. It also asks us to have faith in some version of the "trickle-down" theory. Yet the harm to those victims of not regulating market power may or may not be mitigated by later increases in wealth that return to benefit those same victims.

Our goal should be to facilitate desirable economic change without unnecessary misery. Requiring severance payments to workers makes closing a plant more expensive (and may therefore make a plant close faster than it would otherwise); yet it protects workers and still allows for economic transition. In addition, it allows the company to take into account the benefits of closing the plant and shifting its investment to other areas. Requiring the company to give the workers a first shot at purchasing the plant for its fair market value mitigates the substantial externalities that follow high unemployment. The workers will buy the plant only if it can be operated profitably and if such an arrangement is better for them than any alternative. If the workers are willing to pay the fair market value of the plant, it is likely that the benefits of the forced sale to them and their community outweigh the costs to the company. Such a forced exchange will therefore be wise social policy in the absence of any other remedial legal responses to the plant closing that will better deal with the collapse of the local economy.

*The effects of uncertainty on investment.* The free market ideology claims that shareholders are entitled to returns on their investments because they risked their capital. In the real world, investors are often more secure than workers, and they are secure because they shift many of the risks of investment onto workers and communities by closing plants rather than by bearing the costs of creating profitable and productive enterprises with those workers. It is true that imposing an obligation on the company to sell the plant to the workers will change investment incentives. Uncertainty about this eventuality may have a negative effect on investment. At the same time, the current rules that allow companies to close plants with impunity create a substantial amount of uncertainty *for workers*. Thus, the question is not only whether regulation creates more or less uncertainty, but how that uncertainty is

distributed.<sup>368</sup>

*Redistribution of power and wealth can be achieved if we design legal rules with this goal in mind.* While it is true that workers and managers will bargain around compulsory contract terms, the resulting bargain will vary depending on their relative bargaining power. Relative bargaining power, in turn, depends on how we structure the legal rules governing their relationship. The real question is how to regulate both power and wealth between managers and workers to achieve the desired result of protecting the more vulnerable party to the relationship without stifling desirable economic change. It is possible to come closer to this goal than we currently do. If regulation to achieve desired ends has undesirable consequences, we must ask what other legal responses could respond to those unwanted effects. It is not the case that we are unable to alter the relative power of workers and corporations in the market. The current legal rules create that imbalance of power, and they can be altered to equalize it.

*Ex ante compensation as a function of bargaining power.* The argument that workers are compensated ex ante for being subject to the plant closing by exacting a premium in their contract is flawed. Workers may foolishly sacrifice their long-run well being for higher income in the present. We should protect people from mistakes they will later regret.<sup>369</sup>

There is, moreover, no reason to assume that forcing people to make present decisions about future matters, and holding them to the terms of their contracts, necessarily maximizes wealth in the long-run. As Atiyah explains:

Because the making of a present exchange, if free and voluntary, is so obviously a Pareto-optimal move, it is assumed that the same holds true of agreements to make a future exchange. This is fallacious. People can and do change their minds. Indeed, one obvious reason why parties sometimes fail to perform contracts is that they have changed their minds on the relative value of the benefits to be exchanged.<sup>370</sup>

At the time the contract was made, both parties thought it would benefit them; at the time the defendant wants to renege on the deal, the benefits to the plaintiff of complying with the contract may or may not

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368. See Kennedy & Michelman, *supra* note 22 at 744.

369. Atiyah argues:

Much of [law-and-economics literature] seems over-simplified to the point of unreality. The empirical assumptions made seem often absurdly unreal or just contradicted by experience. Take, for instance, the very fundamental question whether contracting parties are the best judges of their own interests. No doubt this is a reasonable working assumption—indeed, the only possible assumption in a society which is to have any respect for human freedom and dignity; but it is surely to fly in the face of all human experience to treat it as a universal truth. Even reasonably intelligent people like law or economics professors must often find it very difficult to know whether major personal decisions are in their long-run interests . . . .

P.S. ATIYAH, *supra* note 89, at 155.

370. P.S. ATIYAH, *supra* note 89, at 133.

outweigh the costs to the defendant of complying with it. It is therefore an *empirical* question whether enforcing contracts in accord with their terms creates more good than harm. There is no reason to *presume* that enforcement of contracts involving future performance maximizes wealth.<sup>371</sup>

Wages are the result of the relative bargaining power of the company and the workers. Even a strong union that is able to bargain for high wages for its employees is often not sufficiently powerful to protect its employees from a company that abandons a community. It is no answer to say the workers get what they bargained for. Workers lack the power to protect themselves from plant closings when a community is dependent on a single major employer. Nor are they sufficiently powerful to protect themselves from their lack of training for alternate high-paying employment or from the failure of new businesses to move into the community.

*Interstate competition.* Requiring a company to make severance payments to workers does not prevent the company from shifting its investment elsewhere. If the workers buy the factory, the company is perfectly free to take the money and run to another state. It is only if the plant is given to the workers for free or for a price substantially below the best alternative use that property will have been taken from the company in a way that interferes with new investment elsewhere.<sup>372</sup> A worker buyout subsidized by the government will not interfere in the efficient reallocation of investment because the purpose of the government action is to avoid the substantial costs to the community of idle workers and idle capital that will not be remedied by the private sector.

It is true, however, that if one state adopts regulations that are significantly more burdensome on business than other states, it runs the risk of discouraging new investment. For this reason, national legislation is far superior to state by state plant closing regulation. On the other hand, factors other than severance pay and notice requirements

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371. This point is further explained by Cass Sunstein.

In [the free market] view, agreements freely entered into by contracting parties make both sides better off. But that proposition is false. Contracts are not always for the mutual benefit of the parties. We know that people make bad bargains; this is one reason why a system of freedom of contract produces losers as well as winners. And such bargains may be bad not merely in the sense that they turned out to be disadvantageous *ex post*; it may be that the contracting parties have seriously miscalculated the costs and benefits when they entered into the agreement. Sometimes those bad bargains may have disastrous consequences for a long time, and sometimes they can be identified in advance by third parties. Is it so clear that the proper response is always to allow the bargain to go forward and to be enforced in accordance with its terms? Of course, there are usually good reasons not to disturb terms freely agreed to by contracting parties, but the notion that contracts always and inevitably benefit both sides is not such a reason.

Cass Sunstein, *Rights, Minimal Terms, and Solidarity: A Comment*, 51 U. CHI. L. REV. 1041, 1056 (1984).

372. At the same time, determining a fair price for the plant will depend to some extent on our goal of equalizing the power relationship between the workers and the company.

determine where plants are located, and may overwhelm these considerations. If that is the case, state regulation may prevent the harmful externalities of plant closings without undue interference in attracting new investment.

*Efficiency as a function of wealth and other legal entitlements.* Ronald Dworkin has argued that wealth, as measured by willingness and ability to pay, is not, by itself, a social value.<sup>373</sup> He is right about this. We value social wealth because it satisfies human needs. If the market system does not do this, it fails to accomplish its purpose.<sup>374</sup> Thus, the goal of maximizing social utility does not require us to defer to the terms of contracts when we have good reasons to believe that the terms of the contracts are onerous or if the terms are less the result of free choice than of an illegitimate power relationship.

The free market model describes the labor contract as a Pareto superior exchange (in the absence of third-party effects) because each party is better off with the agreement than without it. We presumably increase social wealth to enforce the contract as written. But Robert Hale and Mark Kelman remind us that the parties are better off only in relation to the legally available alternatives.<sup>375</sup> The agreement between the parties is the result not of unconstrained choice, but of the relative power of the parties to withhold from the other party what it needs. Relative withholding power is determined, to a large extent, by the legal definition and allocation of property entitlements. Moreover, it is an odd fact of life that those with more power are able to get better terms and thus increase their power and wealth at the expense of others, which further enables them to get even better terms.

We must therefore define the legitimate contours of the power relationship between the parties in order to judge whether enforcement of the contract as written will increase net welfare or will, instead, increase the concentration of power and wealth in a way that decreases net welfare. Judgments about efficiency therefore become wrapped up in judgments about the proper distribution of power and wealth within corporate enterprises. The agreement between the parties gives us

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373. Dworkin, *supra* note 67.

374.

Derek is poor and sick and miserable, and the book is one of his few comforts. He is willing to sell it for \$2 only because he needs medicine. Amartya is rich and content. He is willing to spend \$3 for the book, which is a very small part of his wealth, on the odd chance that he might someday read it, although he knows that he probably will not. If the tyrant makes the transfer with no compensation, total utility will sharply fall. But wealth, [as measured by willingness to pay] will improve. . . . I ask whether, if the tyrant acts, the situation will be in any way an improvement. I believe it will not. In such circumstances, the fact that goods are in the hands of those who would pay more to have them is as morally irrelevant as the book's being in the hands of the alphabetically prior party. Once social wealth is divorced from utility, at least, it loses all plausibility as a component of value.

*Id.* at 244-45; see also Leff, *supra* note 67, at 478-79 (1974).

375. See Kelman, *supra* note 67.

some evidence of the welfare-maximizing result, but it cannot be conclusive. It is necessarily partial and can be reasonably applied only with further examination of the social results of limiting the corporation's obligations to those it voluntarily assumed in the contract.

Plant closings should be regulated to protect the interests of the workers in relying on their relationship with the company; to make more equal—and therefore more democratic—the power relationship between the workers and the company; to force the corporate managers to take into account the externalities of any decision to close the plant; and to alleviate the social harms caused by the plant closing while allowing desirable economic change to occur.

#### V. DEFINING AN EFFECTIVE REMEDY

If you take a flat map  
 And move wooden blocks upon it strategically,  
 The thing looks well, the blocks behave as they should.  
 The science of war is moving live men like blocks.  
 And getting the blocks into place at a fixed moment.  
 But it takes time to mold your men into blocks  
 And flat maps turn into country where creeks and gullies  
 Hamper your wooden squares. They stick in the brush,  
 They are tired and rest, they straggle after ripe blackberries,  
 And you cannot lift them up in your hand and move them.

—Stephen Vincent Benét<sup>376</sup>

For if those who gave the advice, and those who took it, suffered  
 equally, you would judge more calmly.

—Thucydides<sup>377</sup>

#### A. Remedial Legislation

##### 1. European regulation of plant closings.

Most European countries regulate plant closings heavily. Regulation exists, for example, in Sweden, West Germany, Great Britain, and France.<sup>378</sup> All four countries require prior notification of closings to workers and require employers to negotiate with workers, before closing the plant, about the decision to close.<sup>379</sup> In West Germany, compa-

376. STEPHEN VINCENT BENÉT, *JOHN BROWN'S BODY* 96 (1927).

377. THUCYDIDES, *THE PELOPONNESIAN WAR* 169 (J. Finley trans. 1951).

378. Economic Dislocation, *supra* note 115; BLUESTONE & HARRISON, *supra* note 267, at 237; CARNOY & SHEARER, *supra* note 103, at 265; *see also* Bennett Harrison, *Closure Notification in Western Europe*, in *DEINDUSTRIALIZATION AND PLANT CLOSURE*, *supra* note 117, at 229; Bennett Harrison, *European and American Experience*, in *DEINDUSTRIALIZATION AND PLANT CLOSURE*, *supra* note 117, at 259; Gregory Hooks, *Comparison of the United States, Sweden, and France*, in *DEINDUSTRIALIZATION AND PLANT CLOSURE*, *supra* note 117, at 245; Philip Martin, *Displacement Policies in Europe and Canada*, in *DEINDUSTRIALIZATION AND PLANT CLOSURE*, *supra* note 117, at 237.

379. BLUESTONE & HARRISON, *supra* note 267, at 237. West Germany requires 12 months

nies must report to the local works council their reasons for the contemplated shutdown, supply comprehensive information concerning the economic status of the company, and open their books to the council to allow it to evaluate the companies' claims that the shutdown is required.<sup>380</sup> Moreover, when an employer contemplates a mass dismissal, it is obligated to notify the regional Labor Department in advance. The Labor Department is authorized to delay dismissal for up to two months after notification.<sup>381</sup> In Great Britain, companies need to get permits from the government to build or expand large factories in areas of dense population and high employment. The permit can be denied if the government board determines that the relocation will involve a plant closing in an area of high unemployment.<sup>382</sup> France requires approval of the Inspectorate of Labor for permanent dismissal of workers; since the current government often withholds permission until workers find new jobs, employers have an incentive to help workers find new positions.<sup>383</sup>

Sweden has the most developed set of governmental responses to plant closings. These responses are designed to protect the income of workers, to generate new business and jobs in the area, and to enable workers to transfer to new jobs in the same or a different area by relocation and retraining programs. Like Great Britain and West Germany, Sweden requires advance notification of plant closings to workers and requires companies to negotiate with workers before implementing the decision. The workers have full access to corporate financial information and other data and can hire outside experts to evaluate that information. The company has a duty to bargain about all aspects of the decision, including the timing of the closing and the number of jobs to be eliminated. The amount of notice varies with the impact of the closing; the more jobs involved, the longer the notice required. When more than 101 workers are involved, six months' notice is required. Notice must also be given to individuals once a firm decision to lay them off is made; this additional notice period normally follows the notice to the workers as a group, since the company cannot know which individuals will be laid off before it has negotiated with the union about the overall decision.

Sweden also has a highly developed national employment service.

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notice; Sweden requires six months (for plants with over 100 workers); Belgium, two months. Harrison, *Closure Notification in Western Europe*, *supra* note 378, at 229. Great Britain's 1975 Employment Protection Act requires all public and private employers to give two to three months' notice to workers and to the government Department of Employment. Martin, *supra* note 378, at 237. France requires at least one month's pay or one month's notice to employees with six months' service or more. It also requires approval of the Inspectorate of Labor, which often withholds permission until workers find new jobs. *Id.* at 237-38.

380. BLUESTONE & HARRISON, *supra* note 267, at 237; Economic Dislocation, *supra* note 115, at 22; Harrison, *Closure Notification in Western Europe*, *supra* note 378, at 230.

381. Economic Dislocation, *supra* note 115, at 22.

382. *Id.* at 29.

383. Martin, *supra* note 378, at 238.

All employers are required to list available jobs with the national agency. In the event of mass dismissals, the employment service may move computers and personnel right onto the plant floor to facilitate job placement. People get paid time off to look for new jobs elsewhere. The government pays moving expenses for those who relocate and gives those persons a substantial starting grant as well.

The government also has wage subsidy programs to allow the plant to continue operating for a temporary period. It tries to ease the transition to a new local economy by attracting new business to the area through public subsidies and worker training programs. The government pays the workers while they are undergoing such training. It may also employ people directly on government projects before new private employment is available. The result is that workers' salaries are protected until they can get new jobs, they are retrained for those new jobs, and new jobs are created in the same community.<sup>384</sup> Because of this coordinated set of government programs, economic change occurs without the substantial social dislocation experienced in the United States.

## 2. *National Employment Priorities Act.*

A recent study by the General Accounting Office produced some shocking statistics about the amount of notice provided by most businesses to their employees when plants are closed. Fewer than 20 percent of all employers gave more than 30 days' notice. Thirty-two percent of employers *gave no notice at all*; another 34 percent gave one to 14 days' notice. This means that two-thirds of all employers gave two weeks' notice or less.<sup>385</sup> The median length of the notice was seven days. The study further concluded that, while "most establishments offered their dislocated workers some financial or placement assistance, few offered a comprehensive package that included income maintenance, continued health insurance coverage, counseling, and job search assistance."<sup>386</sup>

Plant closing legislation has been introduced in the United States.<sup>387</sup> The most comprehensive proposed statute is the National

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384. *Id.* at 9-20; see Hooks, *supra* note 378, at 251-53.

385. UNITED STATES GENERAL ACCOUNTING OFFICE, PLANT CLOSINGS: LIMITED ADVANCE NOTICE AND ASSISTANCE PROVIDED DISLOCATED WORKERS 34-39 (GAO/HRD-87-105) (July 1987). The study shows that the number of workers affected was substantial. In 1983 and 1984 closures and permanent layoffs at 16,200 businesses resulted in dislocation of 1.3 million workers. *Id.*

386. *Id.* at 46.

387. See PLANT CLOSING LEGISLATION (A. Aboud ed. 1984); LAWRENCE E. ROTHSTEIN, PLANT CLOSINGS: POWER, POLITICS, AND WORKERS 23-45 (1986); BUREAU OF NATIONAL AFFAIRS EDITORIAL STAFF, LABOR RELATIONS IN AN ECONOMIC RECESSION: JOB LOSSES AND CONCESSION BARGAINING (1982) (both describing recent legislative efforts). Several states and cities have adopted plant closing legislation that may require employers, in certain instances, to give advance notice of the closing. See ME. REV. STAT. ANN. tit. 26, § 625-B(6-A) (West. Supp.



Employment Priorities Act.<sup>388</sup> Congress should pass this bill.<sup>389</sup> It would alleviate some of the grossest negative externalities caused by plant closings while allowing economic change to occur. It would, moreover, have the effect of granting a minimum level of legal protection to the reliance interest in property. The 1985 version of the proposed statute includes the following provisions:

(1) *Notification requirements*: It would require employers to notify workers, the union, local government and the Department of Labor when they intend to lay off more than 100 workers or 15 percent of the

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1986); MASS. ANN. LAWS ch. 149, § 182 (Law. Co-op. Supp. 1987); S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1976); WIS. STAT. ANN. § 109.07 (West Supp. 1987).

388. H.R. 1212, 99th Cong., 1st Sess. (1985); H.R. 379, 98th Cong., 1st Sess. (1983). A summary of the 1979 version of this bill was appended to the opinion of the Court of Appeals in the United Steel Workers case. A watered-down plant closing bill was introduced into the Senate on February 19, 1987. The Economic Dislocation and Worker Adjustment Act, S.538, 100th Cong., 1st Sess., would require 90 days' notice for plant closings or layoffs involving 50 to 100 workers; 120 days' notice for layoffs involving 100-500 workers, and 180 days' notice for layoffs involving 500 or more employees. *Id.* § 202(b). Notice would not be required if "unforeseeable business circumstances prevent the employer from withholding such closing or layoff until the end [of the notice] period." *Id.* § 202(c). The bill would further require the employer to "consult in good faith with representatives of the workers before a plant closing or mass layoff," *see id.* § 203, and to provide to the employees "such relevant information as is necessary for the thorough evaluation of the proposal to order a plant closing or mass layoff or for the thorough evaluation of any alternatives or modifications suggested to such proposal." *Id.* § 204. Violation of the notice and bargaining requirements would be punishable by back pay to workers for each day of violation and \$500 a day to the local government. The bill would also establish a Dislocated Worker Unit in the Department of Labor which would provide technical assistance to governments, employers, and workers affected by plant closings, and which would administer demonstration programs designed to respond more adequately to plant closings by retraining and reemployment assistance to dislocated workers. *Id.* §§ 104-106. Unlike the 1985 National Employment Priorities Act, the 1987 version contains no provisions for severance payments or continued tax payments to affected municipalities.

The Senate has passed a version of this bill which would require companies with more than 100 workers to give 60 days' notice before closing a plant or before laying off more than one-third of any work force in excess of 150. Omnibus Trade and Competitiveness Act of 1987, H.R. 3, § 2202 (passed by Senate on June 21, 1987, by a vote of 71 to 27); *see also* Timothy Noah, *A Warning for Workers*, Newsweek, Aug. 24, 1987, at 37. The bill also contains a \$980 million retraining fund for dislocated workers. Stephen Franklin & Merrill Goozner, *Doors Opening to Warnings of Plant Closings*, Chicago Tribune, Aug. 16, 1987, § 4, at 1, col. 1; *see also* Jonathan Rauch, *Plant Closing Law's Political Dynamics*, 19 NAT'L J. 2097 (1987).

The provision of the bill that exempts plant closings that are "unforeseeable" is likely to substantially diminish the utility of the legislation. It is likely to foster a significant amount of litigation about the general standards for determining foreseeability and the application of those standards in specific cases. The possibility of back pay requirements if the company loses a claim that a particular closing was unforeseeable may give companies an incentive to provide the required notice. On the other hand, if the bill is interpreted to require back pay only for the time during which notice should have been provided (the bill would require only "back pay for each day of the violation," *see* § 205(a)(A)(i)), the company may have little incentive (other than avoiding the costs of litigation) to provide notice. This would occur, for example, if the plant were losing money such that its wage bill (the amount it would have to pay for violating the notice requirement) were substantially lower than its total projected losses (net costs of doing business) during the notice period. In such cases, the company might save money by failing to give notice, litigating the issue of foreseeability (and possibly winning on this issue), and facing exposure to liability limited to back pay for the required notice period.

389. *See* Joanne Guinan, *Notice Requirements: Federal Preemption of State and Local Plant Closing Statutes*, 15 FORDHAM L.J. 333 (1985) (arguing for federal plant closing legislation).

work force, whichever is less. Longer notice is required the more workers are laid off. Six months notice is required if less than 100 workers (but more than 15 percent) are involved; 18 months notice is required if from 100 to 500 workers will be affected; two years notice is required if more than 500 workers are affected.

(2) *Investigation by the Department of Labor:* The statute authorizes the Secretary of Labor to investigate the economic reasons for the change of operations, the estimated extent of economic or social loss to employees and local governments, and the feasibility of preventing or minimizing employment losses by modification of product lines and production techniques. The Department would examine recommendations of local governments, unions and others to prevent or alleviate those losses. The Secretary is instructed to issue a public report giving findings and recommendations for action.

(3) *Severance payments:* The act would require businesses to pay workers one year of severance payments equal to 85 percent of their previous weekly salary (or 100 percent if they are participating in approved retraining programs) and to continue their benefits (for example, health insurance). Payments are reduced for outside earnings and are capped at \$25,000 for the year. Relocation assistance is required for transferred employees. The act would also prevent plants from escaping their obligations by selling off plants scheduled for shutdowns.

(4) *Guaranteed transfer of employees:* The act requires companies to offer transfers to workers within three years of the shutdown if comparable employment is available at the company's other facilities to the extent such transfers would be compatible with existing collective bargaining agreements.

(5) *Employee pensions:* Employers would be required to continue coverage under employee benefit plans for a year after the shutdown and would vest pension rights for workers with 5 years of coverage. It would also provide for voluntary early retirement at reduced pensions for workers over 55.

(6) *Federal assistance to employers:* The Department of Labor is authorized to conduct training programs, job placement services, relocation assistance, and job search assistance through existing and new programs after consultation with management and labor.

(7) *Retraining programs:* The Department of Labor is authorized to provide retraining programs to enable employees to perform new tasks to avert plant closings.

(8) *Business subsidies:* Companies intending to change operations may apply for subsidies to prevent employment losses if such subsidies would enable them to operate on an improved economic basis within a reasonable period of time. The Secretary of Labor therefore may grant loans, loan guarantees, and interest subsidies to businesses, as well as technical assistance including research and development of new pro-

duction techniques to create new employment opportunities. The Secretary may also give subsidies to other businesses that may take over the plant being closed or build new plants and thereby create or expand employment opportunities in the area.

(9) *Targeted federal procurement:* The Secretary of Labor would be authorized to issue certificates of procurement credit to companies facing employment losses to enable those companies to obtain government contracts by discounting company bids by 5 percent.

(10) *Assistance to local government:* The Secretary of Labor is authorized to assist local governments affected by plant closings by providing grants, loans, and loan guarantees for social services and to implement public works projects to make the area more attractive to outside investors. Companies closing plants or otherwise reducing employment would be required to pay local governments 85 percent of one year's tax revenue lost by the change in operations. When an operation moves outside the United States, the company shall be liable to the United States for 300 percent of the tax loss from the transfer if the Secretary determines that an economically viable alternative to the transfer existed.

(11) *National Employment Priorities Administration:* The bill would establish a federal agency within the Department of Labor to administer the statute.

#### B. *Eminent Domain*

Communities faced with major plant closings need not wait for legislation, or even changes in common law, to protect themselves. Cities and public authorities should consider using their eminent domain powers to take plants that can be operated profitably and transfer them either to the workers themselves or to third parties who will keep them open.<sup>390</sup> Such a taking would satisfy the public use requirement under the takings clause as long as the government body making the eminent domain decision determined that the taking was reasonably related to

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390. E.g., Gregory Buckley, *Eminent Domain: The Ability of a Community to Retain an Industry in the Face of an Attempted Shut Down or Relocation*, 12 OHIO N.U.L. REV. 231 (1985); Robert J. Weinberg, *The Use of Eminent Domain to Prevent an Industrial Plant Shutdown: The Next Step in an Expanding Power?* 49 ALBANY L. REV. 95 (1984); Charles Gray, *Keeping the Home Team at Home*, 74 CALIF. L. REV. 1329 (1986) (student author) (concerning sports franchises); Jenny Hochstadt, *City of Boston May Use "Eminent Domain" to Stop Closing of Meatpacking Plant*, LABOR NOTES, Mar. 7, 1986, at 7; Clayton P. Gillette & Joseph W. Singer, *Colonial's Plant and Eminent Domain*, Boston Globe, Feb. 23, 1986, at A-25, col. 2; Jay Hornack & Staughton Lynd, *The Steel Valley Authority* (unpublished manuscript on file with author); see also *Steel Valley Auth. v. Workers Switch and Signal Div. (Ct. of Common Pleas of Allegheny County, Pa.)* (Civ. Div. No. 020-EQUITY).

Staughton Lynd has argued that public development authorities would constitute an appropriate institutional vehicle for acquisition of industrial property. See Staughton Lynd, *Towards a Not-For-Profit Economy: Public Development Authorities and Use of Industrial Property*, 22 HARV. C.R.-C.L. L. REV. 13 (1987).

achieving the public purpose of correcting a market failure<sup>391</sup> or otherwise promoting economic development or alleviating economic distress.<sup>392</sup> Nor would it constitute an unconstitutional interference with interstate commerce under the commerce clause.<sup>393</sup> Governments routinely take property by eminent domain and transfer it to private companies to enable them to relocate or expand operations within a state.<sup>394</sup> Businesses actively support such measures. There is no reason why such takings should not be similarly used to benefit dislocated workers.

In the absence of an agreement by the company to sell the plant to the workers, or to some other owner who will continue to operate the plant, the eminent domain power constitutes the best institutional mechanism for forcing such a sale. It would allow all affected persons to participate in the negotiations and political decisionmaking that accompany such a decision: the workers, the union, potential buyers, city officials, expert advisers, possibly state legislators and administrators, and community organizations. Just compensation would be paid to the company, and the city would be unlikely to agree to the taking unless the new owner could fully compensate the city for the cost of acquiring the plant. The new owner would refuse to enter into such an arrangement unless it could in fact operate the facility profitably. The city should carefully review the plans of any potential owner to ensure that

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391. See *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (forced sale of property from landlords to tenants satisfies the public use test because the legislature concluded that the taking corrected the market failure associated with an oligopoly in land ownership); *Berman v. Parker*, 348 U.S. 26 (1954) (upholding use of the eminent domain power for slum clearance and urban renewal when property was transferred from existing private owners to others).

392. *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

393. A California appellate court held that use of the eminent domain power to prevent a sports franchise from moving to another city would have violated the commerce clause. *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 220 Cal. Rptr. 153 (1985), *cert. denied*, 106 S. Ct. 3300 (1986). However, the argument of the court was flawed. A local regulation will be upheld if it does not discriminate against out of state business, does not substantially interfere with the flow of interstate commerce and furthers a legitimate local interest. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); see also Gray, *supra* note 390, at 1343-52; Louis DiFronzo, Jr., *The Use of Eminent Domain to Protect the Community's Reliance Interest in the Football Franchise Free Agency Problem: Is the Commerce Clause a Shutout Defense?* (1987) (student author) (unpublished manuscript on file with the *Stanford Law Review*). Gray argues that taking a business does not discriminate against out of state business; it treats local businesses and out of states the same because it would apply evenhandedly regardless of where the owner comes from. Gray, *supra* note 390, at 1347-48. In a plant closing situation, the local interest in mitigating the externalities of the closing is significant. When the property is taken, moreover, the owner is compensated and is perfectly free to re-invest in another state. *Id.* at 1348-52; see *CTS Corp. v. Dynamics Corp. of Am.*, 107 S. Ct. 1637 (1987) (upholding an Indiana statute that regulated takeovers as not violative of the Commerce Clause even though it might limit the number of successful takeovers).

394. For example, the Commonwealth of Massachusetts recently used its power of eminent domain to obtain a 35-acre site to allow General Motors to build a \$240 million facility on it. Peter Kilborn, *In His State's Success, Dukakis Seeks His Own*, N.Y. Times, Aug. 5, 1987, at 11, col. 1.

the taking would make economic sense. If this is done, there is little likelihood that the taking would cost the city money. At the same time, it would substantially help the city by keeping jobs in the community and maintaining property tax payments. The city may also threaten to use its eminent domain power as a way to force the company to enter into serious negotiations with workers who want to purchase the plant. The possibility that the city might exercise its takings power may make it unnecessary for it to be actually exercised.

C. *Common Law Protection of the Reliance Interest in Property*

1. *Criteria for amount of protection.*

Comprehensive national plant closing legislation and use of the eminent domain power by local governments constitute the best legal mechanisms for protecting the interests of workers in relying on their relationship with the company. At the same time, certain additional changes in common law rules of property, contract, labor and corporate law should be instituted to fully protect those interests. In the absence of legislation, judges should change certain common law rules of property and contract that allow businesses to ignore the workers' reliance interests.

How much legal protection should be given to the reliance interest in property? Various factors enter into any determination of the level of protection. First, the stronger and more established the relationship, the more it should be protected. The longer the plant has been operating in the community, the stronger is the argument for protecting the reliance interest. Increasing length of operation is inevitably associated with increased levels of reliance.

Second, the greater the social need for legal protection of the workers and of the community, the more protection should be given. The argument for protection is stronger when more people are affected by the plant closing, when the closing has a great impact on the community, and when the community has few likely alternative employers.<sup>395</sup>

The plant should continue in operation only if it is feasible to operate the plant profitably, or at least to cover average fixed costs in the short run. If it is economically impossible to operate the plant, it will not do anyone any good to force a transfer of the plant to the workers. However, the economic feasibility may depend on the availability of government subsidies. If the externalities of closing the plant are large, the government (and society) may lose less by operating an otherwise

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395. This argument is controversial because it would grant greater protection to members of large organizations than to small organizations and it discriminates on the basis of length of reliance. It therefore treats small companies as being more private and therefore less subject to regulation, even though reliance and need may be as great for new employees of small companies as for long-term employees of large companies. It seems, however, that other legal means are better suited to protect new employees of smaller companies, such as unemployment insurance or training programs.

unprofitable plant if it can be made "profitable" with an adequate government subsidy. This arrangement may cost society less than allowing the plant to close and paying unemployment insurance and other government benefits.

2. *General compulsory terms.*

Certain obligations should be imposed on companies regardless of the length of operation, the number of employees fired, or the closing's impact on the community. These general compulsory terms represent the minimum level of protection that should be accorded in all cases to workers for their reliance on their continuing relationship with the company. Special obligations should be imposed on the company only in cases where the impact of the closing is substantial and such obligations are necessary to prevent serious economic distress in the community. The legal changes recommended here range from relatively minor obligations to substantial changes in the law. Their desirability depends on their ability to protect the legitimate reliance interests of the workers and to prevent the avoidable social dislocation currently associated with plant closings while allowing desirable economic change to occur.

a. Notice requirements.

All workers should be given reasonable notice of mass dismissals or of a plant closing unless the closing is caused by an unforeseeable event such as a fire. Such a requirement is analogous to the duty to provide reasonable notice of franchise terminations, eviction of tenants by termination of the lease, and termination of professional relationships.<sup>396</sup> What constitutes reasonable notice should be determined from the facts of the case. The more persons being dismissed and the fewer available alternative jobs in the community, the longer the notice period should be. Notice should be sufficient to enable both workers and the community to protect their interests.

b. Right to information.

It is crucial to define workers' reliance rights in a way that transfers enough power to the workers actually to create the desirable effects. If the right is made waivable, for example, the workers may be forced to bargain it away in exchange for minimally satisfactory wages or benefits. This is true even if the right is made compulsory, because the workers may be forced to give up other benefits to compensate the increased risk to the company. The conservatives are perfectly right about this.<sup>397</sup> The entitlement can work, however, if it transfers

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396. See notes 234-244, 274-276 *supra* and accompanying texts.

397. James Atleson has argued that labor law has stayed static while the concentration of power in corporate hands has increased through mergers, the formation of giant conglomer-

enough rights to the workers to actually change the balance of power between the company and the workers.

To make the reliance interest entitlement effective, the workers must have access to financial and other information about the company.<sup>398</sup> If they do not, the company may operate the plant badly for many years, refusing to modernize it or keep up with the competition, or may milk the profits for other operations. It is sometimes possible for workers to discern when this is happening, but sometimes it is not possible without access to information which the company is not now obligated to provide the workers. If the workers cannot get access to financial information, they may find out about the plant closing too late—after it is so expensive to make the plant profitable again that it is too difficult to accomplish. It is commonplace in Europe for workers to have continuing access to information about the company and for the company to provide specific information about the reasons for the plant closing when a decision to terminate is made.<sup>399</sup> Such a right to information is necessary to allow workers to have sufficient advance warning of a possible plant closing. This advance notice will allow both the workers and the community to plan their response to such an economic transition. This right to information has the independent virtue of allowing workers to become more involved in participating in governance of the industrial enterprise.

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ates, and other means. Thus, the relative power of labor has decreased substantially in recent years. To sufficiently protect the legitimate interests of workers, the legal rules must be construed with the explicit goal of actually redistributing power and wealth to the persons who are now more vulnerable to the power of corporations. James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841, 867-71 (1985).

398. See Edward J. Blakely & Philip Shapira, *Industrial Restructuring: Public Policies for Investment in Advanced Industrial Society*, 475 ANNALS 96, 105 (1984), reprinted in DEINDUSTRIALIZATION AND PLANT CLOSURE, *supra* note 336, at 139, 147 ("major corporations should be required to provide ongoing information to their work forces on their corporate strategies, product and regional investment plans, overseas subsidiaries, and future employment plans").

399. In Sweden and Germany, workers first hear about possible plant closings from their representatives on corporate boards of directors. Philip Martin, *Displacement Policies in Europe and Canada*, in DEINDUSTRIALIZATION AND PLANT CLOSURE, *supra* note 336, at 237, 238; see also Clyde Summers, *Worker Participation in Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175, 200 (1984) ("An essential element of the right to participation in the decisions of the enterprise is the right to receive information relevant to those decisions."). Summers further explains:

The Swedish Codetermination Act . . . stands on the premise that management and the employees are partners in the enterprise and that the employees are entitled to participate in decision-making. The employees, as full partners, are entitled to full knowledge of all aspects of the business and to a voice in all of its activities.

*Id.* at 203 (citing R. FAHLBECK, *PRAKTISK ARBETSRÄTT* 43-45 (1981)). The right to information is also protected in West Germany. West German law requires that the employer keep the workers thoroughly informed of the economic and financial situation of the enterprise, the production and investment program and planned organizational changes. Clyde W. Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 AM. J. COMP. L. 367, 382 (1980).

c. Damages for reliance (severance pay).

Any company that closes a plant or otherwise engages in mass dismissal of workers should be required to make reasonable severance payments to employees to help them in the transition to new jobs. Many unions now bargain for such severance payments. Such payments can be considered compensation to workers to protect their legitimate interest in reasonably relying on continuation of their employment relationship with the company. Workers should not, however, be allowed to bargain away such severance pay. They may feel tempted to do so in order to increase wages in the short run.<sup>400</sup> They may underestimate the possibility that the plant will close and the economic needs they will have at that time. Moreover, such payments are necessary to mitigate the third-party effects of the plant closing. Larger payments should be required the longer the employee has been working at the plant, since older workers have a much harder time finding new jobs and getting training for different skills. The National Employment Priorities Act provides some guidelines for determining a reasonable level of damages.

3. *Special obligations.*

a. Right of first refusal.

When a plant employs many workers or is a major employer in the community, the reliance interests of the workers and the community are stronger than would be otherwise. When the impact of a plant closing is extensive, additional remedies may be necessary to protect sufficiently those reliance interests and to force the company to internalize the external effects of its decision. When a plant is a major employer, the employees should be given the first shot at purchasing the plant when the company closes it. The company should therefore be required to meet with the workers and negotiate in good faith about a possible sale of the plant.<sup>401</sup> The workers should also be told about

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400. Maine has adopted a plant closing statute that, in certain instances, requires severance payments to employees. ME. REV. STAT. ANN. tit. 26 § 625-B (Supp. 1986-1987). The statute was recently upheld by the Supreme Court against the claim that it was preempted by federal law, including the National Labor Relations Act (NLRA) and the Employee Retirement Income Security Act of 1974 (ERISA). *Fort Halifax Packing Co., Inc. v. Coyne*, 107 S. Ct. 2211 (1987).

401. In appropriate cases, employee ownership of industrial property has worked in the United States and elsewhere. For excellent discussions of the complicated issues involved in determining what types of ownership and management arrangements work and which do not, see CHRISTOPHER EATON GUNN, *WORKERS' SELF-MANAGEMENT IN THE UNITED STATES* (1984); KEITH BRADLEY & ALAN GELB, *WORKER CAPITALISM: THE NEW INDUSTRIAL RELATIONS* (1983); *WORKER COOPERATIVES IN AMERICA* (R. Jackall & H. Levin eds. 1984); see also LINDA WINTNER, *EMPLOYEE BUYOUTS: AN ALTERNATIVE TO PLANT CLOSINGS* (1983) (explaining how employee buyouts work and the financing techniques that may be available). For an analysis of worker management systems in other countries, see INTERNATIONAL LABOUR OFFICE, *WORKERS PARTICIPATION IN DECISIONS WITHIN UNDERTAKINGS* (1981). There is some evidence that worker ownership and participation in management increases productivity. Corey Rosen & Michale



any other offers for the plant and allowed to meet the price of any other offeror. If the workers are able to make the purchase, the company should be required to transfer the plant to them rather than a third party.

As between the current employees and any third party, the interests of the employees should take precedence in any possible sale. In Professor Radin's terms, the workers' interest is personal in the sense that their lives and identities may be bound up with the plant's continued operation. The workers have a far stronger moral claim to purchase the plant and should prevail over a stranger.

b. Supervised negotiation and forced sale.

The right of first refusal may be ineffective unless the workers can both force a recalcitrant company to negotiate in good faith and actually transfer ownership of the plant to the workers for its fair market value. Fair market value should be determined on the same basis used in eminent domain proceedings. On the request of the workers, the courts should therefore supervise such a negotiation to protect their reliance interests. Such a remedy tracks existing social practice: In many cases, major plant closings are met by enormous activity on the part of many actors, including the workers, the management, city and state officials, state legislators, community organizations, public advocates in the state government (such as the New Jersey Office of the Public Advocate or the attorney general's office), federal officials with the power to grant subsidies or loan guarantees, and alternative buyers for the property. In some cases, these large scale negotiations have resulted in desirable outcomes, including worker takeovers and purchases of the plant by other buyers.

The court can facilitate the bargaining that should take place by supervising such negotiations among all these interested parties. The model for this kind of remedy would be the institutional litigation that has become common involving prisons, hospitals, housing developments, and schools. Supervised negotiation would ensure that bargaining does take place, and that the reliance interests of the workers and the needs of the community are sufficiently protected.

c. Right of entry for waste.

The right to buy the plant may be of little value to workers if the plant is allowed to deteriorate to the point where it would be economi-

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Quarrey, *How Well is Employee Ownership Working?*, HARV. BUS. REV., Sept.-Oct. 1987, at 126, 126-27 (73% of the companies in the sample that established ESOPs—Employee Stock Ownership Plans—significantly improved their performance after they set up their plans). Worker Cooperatives have been especially successful in Mondragon, a town in the Basque provinces in Spain. See Schweikart, *supra* note 317, at 36-38; MARTIN CARNOY & DEREK SHEARER, ECONOMIC DEMOCRACY 149-52 (1980); ROBERT DAHL, A PREFACE TO ECONOMIC DEMOCRACY 123-25, 131-32 (1985).

cally unfeasible to operate it profitably. If the employees can show that the company is managing the plant badly or that the managers have failed to modernize or maintain it, the employees should be allowed to prove in court that the company is committing waste. If they can also show that such waste is likely to lead to a future plant closing which will have substantial effects on the community, they should be allowed to assert a right of entry for waste. This future interest is based on the company's infringement of the workers' reliance interests in the property. In those circumstances, the company should be required to sell the plant to the workers for a fair price. This right would give workers a say in how the enterprise is run, and, thereby, have the added effect of increasing the level of democracy in the firm.

d. Damages for reliance (taxes; retraining).

If a community relies heavily on a particular employer, the company should be required to internalize the external effects of the plant closing by contributing special damages to the workers and to the municipal government. The company should contribute to any necessary retraining of employees for new jobs. It should continue to pay property taxes for the year following the plant closing so that public services will not be unreasonably disrupted. These obligations would force the company to take into account the social effects of its decision and would mitigate the social disruption that otherwise accompanies major plant closings.<sup>402</sup>

D. *The Judicial Role in Defining Property Rights*

Would it have been institutionally appropriate for Judge Lambros to recognize the community property claim in the *United Steel Workers* case? Judge Lambros thought not. Recognizing the claim would have required him to make law rather than apply it. He would have had to recognize a new limit on the company's property rights and vest those rights in the workers. He would also have had to recognize an exception to state corporate law doctrines that require managers to act in the interests of the shareholders and not in the interests of the workers or the community. The fiduciary obligations of the board of directors would have to be redefined or expanded to include the reliance interests of the workers. Judge Lambros also had to face the *Erie* doctrine

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402. Many communities seek redevelopment assistance from departing companies. Chrysler Corp. paid \$14 million to Highland Park, Michigan when it removed 5,000 technical jobs from the Detroit suburb. International Business Machines (IBM) donated a building and \$1.5 million to Greencastle, Indiana when it closed a distribution center, eliminating one-third of the city's jobs. Merrill Goozner, *Cities Win Severance in Plant Shutdowns*, *Chicago Tribune*, May 25, 1987, § 4, at 1, col. 2. After negotiations with the city of Chicago, the Hasbro-Bradley toy company agreed to keep its plant operating for half a year with 100 workers while it retrained and helped find jobs for 580 others laid off from the plant. Steven Greenhouse, *Suit on Toy Plant Ended in Midwest*, *N.Y. Times*, Feb. 2, 1985, § 1, at 42, col. 4.

which required him to apply state property law rather than to do what he considered just.

These barriers to judicial action are substantial. Yet the argument that it was inappropriate for Judge Lambros to recognize the community property claim depends on the assumption that the only legitimate source of authority for such a right would be private contract (free agreement by private parties), a statute, or a common law rule already in effect. For Judge Lambros to take it upon himself to change state common law would represent an exercise of judicial tyranny, usurping both the lawmaking power of the legislature and the freedom of the corporation.

We worry about tyranny. To protect ourselves from the illegitimate use of power, we place limits on the powers of various social actors. We worry about institutional roles because we are concerned about the illegitimate concentration of power in the hands of persons who are not sufficiently accountable to those affected by their decisions. This worry, however, applies not only to judges, but to legislators and corporate managers as well. We therefore have views about the proper distribution of power among corporate managers, judges, and legislatures. By not recognizing the community property claim, Judge Lambros effectively delegated to the Board of Directors of U.S. Steel the power to make a decision that had disastrous consequences for thousands of persons. Why do we not identify this Board as tyrannical? The only reason we do not is because we identify the Board as a private rather than a public actor. It was exercising its property rights, rather than engaging in public coercion.

Judge Lambros believed that he would infringe upon private freedom by recognizing the community property claim. Yet by not recognizing it, he also infringed upon private freedom—the freedom of the workers to rely on a long-standing relationship with U.S. Steel. Judge Lambros felt that he would be acting tyrannically by imposing his will on private actors; so he authorized some private actors (the management of the corporation) to impose their will on thousands of other persons. The lesson of Hobbes and Locke is that we are as concerned about private oppression as we are about public oppression. One reason we created the state was to protect us from being harmed by other persons, and when the state abdicates that responsibility, it allows a private government (the board of directors) to rule in its stead.

Judge Lambros also believed he would be acting tyrannically by making new law and taking on a task properly left to elected officials in the legislature. Yet in ruling for the company, he effectively made law anyway. The workers claimed that they had presented Judge Lambros with a case of first impression; no workers had ever made the community property claim before, and Judge Lambros recognized that the factual situation was different from any previously addressed by any court

in the country. He had to define the allocation of property rights between the company and the workers. It was impossible for the court not to recognize a property right. It had no choice but to grant a property right either to the company or to the workers. He ruled in favor of the company, confirming its claimed property rights and denying the workers' claim. How did he defer to the legislature? The legislature had not spoken on this new question. Nor had any court.

I can think of several reasons why Judge Lambros would understand a ruling for the company as deference to the legislature. First, he knew that a ruling for the workers would be understood as a substantial change in the law and would be controversial.<sup>403</sup> Second, ruling for the company confirmed the existing social practice in which companies have exercised more or less dictatorial control over plant closing decisions. Third, ruling for the company confirmed the existing distribution of power and wealth in the marketplace. None of these reasons seems related to the goal of deference to the legislature. The only way they can be equated with deference is if we assume that the legislature, when faced with any new case, would choose to ratify the existing distribution of power in society. But this assumption is unwarranted. It is politically biased, moreover, toward the status quo. This construction of the proper institutional roles of the courts and the legislature is not neutral. It teaches judges a normative lesson: In cases of first impression, you fulfill your proper institutional role in a democracy only if you further concentrate property rights in the hands of those who already own property.

Yet there is substantial precedent for innovations in common law rules to meet new situations. In *Javins v. First National Realty Corp.*,<sup>404</sup> Judge Skelly Wright revolutionized landlord/tenant law by creating the implied warranty of habitability. He did the right thing. The *United Steel Workers* case could have been the *Javins* of plant-closing law. The problem of judicial deference to legislatures is a complicated one, and this is not the place to elaborate it fully. Nonetheless, Judge Lambros himself gave the argument for judicial activism when he stated that judicial action could not be restricted to the mechanical application of outdated precedent, but had to address substantive issues.<sup>405</sup>

Judge Lambros felt he was applying rather than making law only because he confirmed, rather than altered, the existing distribution of power. This is an inherently conservative definition of lawmaking: It defines judges as passive law-appliers when they support existing systems of private privilege and active lawmakers when they redistribute power more equally. Yet there is nothing passive about such an exer-

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403. In the wake of this ruling, cities have started to consider using their eminent domain power to prevent plants from closing; Pennsylvania set up a public authority just for this purpose.

404. 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970).

405. See text accompanying note 25 *supra*.

cise of public power. Our current definitions of the proper judicial role make judges comfortable in reinforcing private power and hierarchy and uncomfortable when they combat it. In my view, judges act improperly when they fail to protect the vulnerable from the powerful. It is not neutral for judges to use their substantial power to reinforce private hierarchy. Of course, this is an explicitly political definition of the judge's proper institutional role. Yet it is no more political than the traditional definition; the traditional definition merely hides its political bent by defining as restraint the active creation and perpetuation of bastions of private privilege.

But, one may argue, the question is not only one of institutional roles but of competence. What do judges know about business management and economics? Isn't the legislature, with its staff and committees and experts, the appropriate governmental body to protect the needs of the community and the reliance interest in property if such protection is needed? I have two comments to make about this question.

First, the division of labor between the courts and the legislature is more complicated than the question assumes. The courts and the legislature are not fully autonomous entities; they are interdependent, and what each does affects the other. Legislative regulation of leases, for example, preceded changes in the common law definition of the relative property and contract rights of landlords and tenants. Similarly, adoption of the implied warranty of habitability as a matter of common law resulted in subsequent legislation which both implemented and defined the warranty. This illustrates the fact that what the legislature does is partly dependent on what the courts do. Judges control, to some substantial extent, legal ideology about what property ownership means. When judges define property law to impose social responsibilities on property owners, they affect the willingness of the legislature to regulate the uses of property. It may be the case that the legislature has not yet adopted any substantial plant closing regulation. But this does not necessarily mean that, if the court were to interpret the common law in a way that imposed such regulation, the legislature would necessarily repeal such a change by subsequent legislation.

Courts implement social policy, but it is also true that they develop moral principles to govern the proper exercise of power in the marketplace. Judges are experts in such principles, and their statements about the social responsibilities of property ownership are taken seriously by the legislature. We should want judges to incorporate into the law standards of fair dealing and good faith in the marketplace. The legislature also recognizes such principles; what the judges have to say about such standards may substantially affect what the legislature decides to do. It is therefore appropriate for the courts to teach the legislature that property rights are not absolute. Such actions do not usurp the role of the legislature; it is free to correct a judicial mistake. This

does not mean that courts should not worry about their competence to determine the results of changes in the common law. They should. At the same time, the courts have a substantial role to play in developing notions of social justice. The *failure* of courts to protect the reliance interest in property may have as much effect on the legislature as does judicial adoption of new legal protections. Courts influence what the legislature does whether or not judges change the law.

Second, we should be concerned about the institutional roles of *all* the actors in this situation. The relative distribution of authority between the court and the legislature is not the only issue; we should also be concerned about the distribution of authority *between the court and the corporation*. It is true that judges are not experts in business management. *But it is also true that corporate managers are not experts in rules of law*. Corporate managers may be good at determining what is best for the company. But judges have a broader role than that; they must determine what is fair within the employment relationship. They must determine what is good for the community. Judges have better knowledge than corporate managers of the ways in which the legal rules define and govern contract and property rights to protect both freedom and security.

E. *Tactics for Workers and Communities Faced with Plant Closings*

In addition to use of the eminent domain power, a variety of alternative strategies is currently available to workers facing plant closings without any change in existing law. First, the workers should carefully monitor the company's activities to be able to tell as early as possible that a plant may be closed. The earlier the workers learn of this possibility, the greater the chance they can do something about it. Second, in several cases workers have successfully prevented plant closings—or substantially mitigated their effects—by community organizing and political lobbying which led to negotiations among private and public actors interested in the outcome.<sup>406</sup> Third, trustees of workers' pen-

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406. These actors may include company executives, workers, city officials (the mayor, city council members), state officials (the governor, the attorney general, the office of the public advocate, state legislators from the district), federal officials (Congressional representatives, officials from federal agencies empowered to give loan guarantees or subsidies to businesses), community groups, religious groups, churches, and synagogues. This kind of organizing and negotiating occurred at the General Dynamics shipyard in Quincy, Massachusetts and produced a variety of alternatives that could have saved a certain number of jobs. See *Bidding for Quincy Shipyard*, Boston Globe, Oct. 7, 1986, at 16, col. 1 (editorial); David Mehegan, *General Dynamics Turns Down \$25 Million for the Quincy Shipyard*, Boston Globe, Apr. 17, 1987, at 49, col. 4. Arrangements are currently being made for the shipyard to be acquired by the Massachusetts Water Resources Authority, although negotiations continue about the possibility of reserving some portion of the site for shipbuilding. See Jerry Ackerman, *Water Agency to Buy Shipyard*, Boston Globe, Aug. 13, 1987, at 1, col. 1. Whether or not these negotiations are successful, the public discussion and negotiation among private and public actors interested in the retention or creation of jobs and revitalization of the local economy are useful. This kind of organizing also resulted in a successful search for a new buyer of the Morse Cutting Tool plant in New Bedford, Massachusetts when that plant

sion funds should consider using their clout to redirect investment toward preventing unnecessary plant closings. Fourth, a variety of litigation strategies may be successful in mitigating the effects of plant closings. Workers may be able to collect damages for an employer's breach of a specific contractual promise to use its best efforts to keep the plant open.<sup>407</sup> They may also prevail on a claim of promissory estoppel if the workers rely to their detriment on promises made by the company with which the company does not comply.<sup>408</sup> Finally, if the company lies to the workers about its plans to close the plant, they may sue the company for fraud.<sup>409</sup>

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threatened to close. B. Doherty, *The Struggle to Save Morse Cutting Tool* (Arnold M. Dubin Labor Education Center, Southern Massachusetts University and Industrial Services Program of the Commonwealth of Massachusetts (n.d.) (c.1982). The owner of the plant later filed for bankruptcy. In an unusual ruling, the federal bankruptcy court decided on June 12, 1987 that the business should be purchased by a company whose bid for \$8.9 million was \$100,000 lower than the top bid; the second highest bidder prevailed because the bids were so close and because it intended to keep the plant open, saving 375 jobs. See *Ruling Saves Jobs at New Bedford Tool Plant*, N.Y. Times, June 14, 1987, § 1, at 51, col. 4.

407. When the Singer Company closed its plant in Elizabeth, New Jersey, the workers sued the company on the grounds that it had breached an explicit promise in the collective bargaining agreement to spend \$2 million to restructure the plant and use its best efforts to keep the plant open. Local 461 & Dist. III, Int'l Union of Elec., Radio & Mach. Workers v. Singer Co., 540 F. Supp. 442 (D.N.J. 1982). The court ordered the company to pay the workers the greater of \$2 million or the "give-backs" agreed to by the workers in order to induce the company to agree to the contractual provision.

408. In the U.S. Steel case, the workers claimed that they had relied to their detriment on a company promise not to close down the plant if the workers worked harder and the plant became profitable. This claim was accepted as a valid one by Judge Lambros even though the collective bargaining agreement provided that it could be amended only in writing; that the workers could not prove that the plant had become profitable was a major reason they lost.

An innovative legal claim has been brought in a suit by the city of Norwood, Ohio (population 26,000) against General Motors Corporation when it closed a plant that had been operating for 64 years and which had employed 4,200 workers. Complaint, City of Norwood, Ohio v. General Motors Corp. (Ct. Common Pleas, Hamilton County, Ohio, Docket No. A8705920) (filed Aug. 7, 1987). The complaint alleges that the city had undertaken numerous actions over 64 years to aid the company and make it competitive, including building an underpass, vacating several streets and "in general, doing anything that General Motors requested." Moreover, the city had refrained from competing to attract a Japanese auto maker, as some other communities had. The complaint presents several novel theories, as well as the more traditional theory of promissory estoppel. First, the city argues that these actions created implied contractual obligations on the company. Second, the city argues that a fiduciary relationship—"a special and confidential relationship"—existed between the city and the company because of the relative bargaining power of the city and the company: The city was small relative to the company and heavily dependent on the company for jobs and tax revenues. Given this relationship, the company had a "special fiduciary obligation of treating the [city] fairly in the event General Motors desired to terminate and cease that fiduciary relationship." Complaint, ¶ 36. For breaching its implied contract or its fiduciary obligations to the city, the city asks \$318.3 million in damages, including \$56 million in damages for loss of anticipated tax revenues, \$9 million for the cost of maintaining police and fire protection at the abandoned plant, \$2.5 million for the cost of making streets within the plant public again, \$750,000 for the cost of the new overpass the city built at GM's request, and \$250 million in punitive damages. See also *City Sues GM Over Planned Closing of Assembly Plant*, U.P.I., Aug. 8, 1987; *Norwood City Officials Sue GM for Breach of Contract*, U.P.I., Aug. 10, 1987.

409. Such a claim was made in the case of *Carson v. Atari*, Sup. Ct. Santa Clara, Cal. No. 530743 and in the case of *City of Norwood v. General Motors Corp.*, (Ct. Common Pleas, Hamilton County, Ohio, Docket No. A8705920) (filed Aug. 7, 1987). One useful strategy that is unlikely to be successful would be to overturn *First National Maintenance Corp. v. NLRB*, 452 U.S.

## VI. RELIANCE AND VULNERABILITY

It is good to put your life in other people's hands.<sup>410</sup>

What I meant by civilization when I invented it, was simply that people ought not take advantage of weakness.<sup>411</sup>

—T.H. White

I take as a premise that "human society ought to be organized in such a way as to eliminate useless suffering."<sup>412</sup> How then can we foster desirable economic change without destroying communities and creating unnecessary social misery?<sup>413</sup> When people participate in a common enterprise and rely on the continuation of the relationship to satisfy their needs for work, security and companionship, the legal system should protect the reliance of the more vulnerable persons when the more powerful party seeks to end the relationship. The reliance interest in property is already recognized in the legal rules in force, and we have good reasons to extend its application to plant closings. Imposition of this principle would be economically feasible and would mitigate the otherwise uncompensated losses caused by worker dislocation. Creation of this new property right would be a modest contribution toward the effort to curtail the illegitimate concentration of power in the marketplace.

How can we structure the rules of the marketplace in a way that both ensures adequate freedom for market participants and protects those who are most vulnerable to the vicissitudes of economic change? Answering this question requires us to worry about the distribution of power and wealth and the ways in which the legal system both creates and enforces that distribution. It also requires us to devise ways to protect those who are vulnerable in market relationships, especially when their vulnerability is a product of rules devised by those with power—persons other than themselves. Yet, in providing such protection, we want also to enable members of common enterprises to have the freedom to fashion their relationships with each other, to control collectively their destiny.

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666 (1981), which held that companies have no duty to bargain about plant closing decisions, but only the effects of plant closings. See Hedlund, *supra* note 123 (arguing to overrule *First National Maintenance*); WAYNE WENDLING, *THE PLANT CLOSURE DILEMMA: LABOR, LAW, AND BARGAINING* (1984) (arguing to partially overrule *First National Maintenance*); see also FRANCIS O'CONNELL, *PLANT CLOSINGS: WORKER RIGHTS, MANAGEMENT RIGHTS, AND THE LAW* (1986); PHILIP MISCIMARRA, *THE NLRB AND MANAGERIAL DISCRETION: PLANT CLOSINGS, RELOCATIONS, SUBCONTRACTING, AND AUTOMATION* 133-260 (1983) (both explaining current law under the National Labor Relations Act pertaining to plant closings).

410. T.H. WHITE, *THE ONCE AND FUTURE KING* 322 (1966).

411. *Id.* at 365.

412. BARRINGTON MOORE, *REFLECTIONS ON THE CAUSES OF HUMAN MISERY AND UPON CERTAIN PROPOSALS TO ELIMINATE THEM* 5 (1970).

413. For a discussion of this issue, see Michael MacNeil, *Plant Closings and Workers' Rights*, 14 *OTTAWA L. REV.* 1 (1982).



And more important still: What should we do about the millions of persons who are excluded from the market, or whose opportunities are restricted? Those who are excluded may be least powerful of all. They may have no opportunity to develop reliance on a relationship with a common enterprise. If we protect the interests of those within existing common enterprises, will that cause us to neglect those who are so vulnerable that they have not been able to get in the door? To protect reliance on existing relationships, must we forsake the interests of outsiders?

The answer is no. We must combine our concern for associational freedom with our concern for preventing abuses of power by the haves against the have-nots. We can approach this dual goal by asking: What preconditions are necessary for healthy social relationships to develop? Those preconditions are defined by the ends society should have; they embody the form of social life we hope to create.

Property rights allocate power, and we are suspicious of power. Those without power are vulnerable. Thus the relation between power and vulnerability should be at the heart of our analysis of property rights. Rather than asking "who owns the factory?" we should ask "what relationships should we nurture?" We should encourage people to rely on relationships of mutual dependence by making it possible for everyone to form such relationships and by protecting those who are most vulnerable when those relationships end. Property rights can be justified morally within a common enterprise to the extent they allow people to develop relationships that promote conditions of trust.<sup>414</sup> If T. H. White is right about King Arthur's vision of civilization, then we have an obligation to learn what it would take for us to create the kind of society in which we could trust each other enough to place our lives in each other's hands.

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<sup>414</sup>. See Martha Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REFORM 933, 989-1009 (1985) (arguing that decisions about family matters should be based on the extent to which they build conditions for trust); ROBERTO UNGER, *PASSION* 72-74 (1984).

