

# Michigan Journal of International Law

---

Volume 10 | Issue 3

---

1989

## Comparison: Japanese and American Plant Closing Laws

Allison Zousmer

*University of Michigan Law School*

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Comparative and Foreign Law Commons](#), [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

---

### Recommended Citation

Allison Zousmer, *Comparison: Japanese and American Plant Closing Laws*, 10 MICH. J. INT'L L. 957 (1989).

Available at: <https://repository.law.umich.edu/mjil/vol10/iss3/9>

This Note is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

## Note, Comparison: Japanese and American Plant Closing Laws

*Allison Zousmer\**

You tell us plant closing legislation is anticompetitive. But every major country besides our own has an advance notice law. Our two most intense competitors, Japan and Germany, treat their workers better than we do.

Representative Dan Rostenkowski<sup>1</sup>

I am convinced this bill will cost jobs and damage our economic growth.

President Ronald Reagan<sup>2</sup>

[T]he fact that Japan has such a broad regulation has not impaired its international competitiveness because the Japanese have built into their overall industrial relations system a variety of features that give it much flexibility.

Senator Spark Matsunaga<sup>3</sup>

In August, 1988, Congress passed the United States' first comprehensive plant closing law: the Worker Adjustment and Retraining Act ("WARN").<sup>4</sup> Throughout the debates, opponents of the law feared that the new law would compromise our already tenuous competitive position in the international economy. They warned that such legislation would destroy the ability of American business to compete with foreign companies, especially those of our chief economic rival, Japan. For proponents of the law, discussion of the Japanese economy served a different purpose. It provided a model of a society where plant closing laws coexist with economic growth.

This successful coexistence seems ironic, since Japan modeled its labor law system after American laws. During the post-World War II occupation, the Allied Command required the Japanese to submit all drafts of potential legislation to them for approval.<sup>5</sup> As a result of this process of Japanese drafting and American amending, Japan became the first industrial country outside America to adopt an unfair labor practice system.<sup>6</sup> Japan also passed labor laws mirroring their American counterparts: guaranteeing the right of unions to organize and act collectively,<sup>7</sup> requiring employers to bargain collectively with worker

---

\* University of Michigan Law School, Class of 1990.

1. 134 CONG. REC. H3550 (daily ed. May 24, 1988) (statement of Rep. Rostenkowski).

2. *Id.* at H3531 (statement of President Reagan).

3. *Id.* at S8866 (daily ed. July 6, 1988) (statement of Sen. Matsunaga).

4. Worker Adjustment and Retraining Act, Pub. L. No. 100-379, 102 Stat. 89 (codified at 29 U.S.C. §§ 2101-2109).

5. W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 18 (1984).

6. *Id.* at 42.

7. *Id.* at 30.

representatives,<sup>8</sup> establishing an administrative agency to interpret labor laws,<sup>9</sup> providing for union security agreements,<sup>10</sup> and prohibiting public employees from striking.<sup>11</sup>

In implementing the new laws, Japan benefitted from the lessons America had learned from the evolution of our labor laws. For example, they included in the statutes prohibitions against yellow dog contracts, which the U.S. Supreme Court had protected until the 1930s.<sup>12</sup> As part of the Allied plan to promote democracy in postwar Japan, General Douglas MacArthur, the Supreme Commander of the Allied Powers, also encouraged the development of labor unions through discussions with Japanese leaders and official memoranda.<sup>13</sup> Thus, the postwar occupation forced the Japanese to adopt labor laws largely paralleling those in America.

With the passage of WARN, however, America appears to be reversing the prior trend by modeling its laws after the Japanese example. WARN guarantees to American workers the same rights that the Japanese plant closing law, articles 19-21 of the Labour Standards Act, have guaranteed to Japanese employees since 1947. Like the Japanese law, WARN focuses on providing workers with advance notice of mass layoffs and plant closings.<sup>14</sup> Since the Japanese law operates within a similar legal framework, in a country which shares our goals of economic growth and development, comparing the Japanese act with the new American law offers insight into the potential impact and operation of the new American act. Differences in the Japanese approach to law and social behavior, however, may limit the validity of such comparisons.

Prior to World War II, *giri*, an informal and personal set of social rules, dictated Japanese behavior.<sup>15</sup> Although very similar laws govern Japanese society, the Japanese system of social customs overrides the written law, and therefore restricts the effect such laws actually have. As a result of these differences, Americans cannot transplant successful Japanese labor laws to our society and expect the same optimistic results. Japanese labor relations, however, do provide a model for America by proving that, through cooperation and creativity, business and labor can work together to increase productivity. Expecting the Japanese to supply specific answers to industrial problems, how-

---

8. *Id.* at 39.

9. *Id.* at 42.

10. *Id.* at 37.

11. *Id.* at 43.

12. Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 9 EMPLOYEE REL. L.J. 629, 631 (1984).

13. W. GOULD, *supra* note 5, at 18.

14. Labour Standards Act, arts. 19-21 (1947).

15. Duff, *supra* note 12, at 631.

ever, can only lead to disillusionment in an American society grounded in different values and traditions.

This Note analyzes the American and Japanese approaches to plant closings and discusses to what extent the American government can apply the successful Japanese approach to its own labor relations system. The first part examines the specific provisions of the two nations' laws. Second, it illustrates how the divergent social rules and historical backgrounds influence the operation of the plant closing laws in both nations. Part three explores the impact and applicability of Japanese labor policies to American industrial practices. The Note concludes that although the Japanese provide a general model for a labor management system which combines cooperation and economic development, cultural and historical differences prevent a transplanted Japanese approach from attaining the same results in the United States.

## THE LEGAL FRAMEWORK

### *The Japanese Law*

The Labour Standards Act of 1947 was part of the Allied postwar legislation imposed upon the new Japanese government.<sup>16</sup> Articles 19-21 of the Act require Japanese companies to give thirty days advance notice of plant closings and mass layoffs to workers whenever personnel cuts cannot be attributed to worker conduct.<sup>17</sup> This includes the discharge of even a single employee. If a company fails to give all "permanent workers" this protection, the law requires payment of wages for each day without notice.<sup>18</sup> The definition of permanent workers under article 21 excludes those employed on a day-to-day basis, those employed for less than two months, seasonal workers employed for less than four months, and workers on probation. The practical impact of excluding temporary workers means that eighty per cent of the workforce falls outside of the Act.<sup>19</sup> The law lifts restrictions upon discharge "where it has become impossible to continue a business on account of natural disaster, emergency or other unavoidable reason."<sup>20</sup> An employer can also avoid the notice requirement by

---

16. Since the Americans enacted plant closing laws in 1988 and the Europeans in the late 1960s, the Japanese probably proposed this law and the Allies approved it.

17. Labour Standards Act, *supra* note 14.

18. *Id.*

19. *Id.* Part-time employees are a subset, not synonymous with temporary employees. Temporary employment is a form of "second class" employment in contrast with the privileged status of permanent employment. Permanent employment is limited to men, and usually only exists in large corporations. Note, *Worker Participation In Japan: The Temporary Employee and Enterprise Unionism*, 7 COMP. LAB. L. 365, 374 (1986).

20. 6 Z. KITAGAWA, *DOING BUSINESS IN JAPAN* § 1.03(10)(b)(ii) (1987).

paying employees daily wages for the thirty day period in lieu of notifying them. The Japanese law does not contain damage provisions.

### *The American Law*

Like the Japanese law, WARN requires employers to give advance notice to employees before mass layoffs or plant closings. WARN follows the Japanese example of excluding temporary or part-time employees. The definition of part-time employee includes those workers employed for less than six of the twelve months immediately preceding the dismissal, or working less than an average of twenty hours per week.<sup>21</sup>

Both acts also contain similar exceptions to their coverage for inevitable economic or natural catastrophes. Exceptions exist for closings caused by unforeseeable business circumstances and "natural disasters, such as flood, earthquake, or drought."<sup>22</sup> Under the faltering companies exception, an employer may reduce the notification period if, at the time mandated for notification, he was seeking capital which he believed would have postponed or averted the shutdown. The Act excuses the employer from the duty to notify in these circumstances if doing so would have jeopardized his effort to save the business.<sup>23</sup> Finally, WARN exempts from the notification requirement layoffs involving a strike or lockout not intended to violate the Act and closings or layoffs resulting from the completion of a temporary project, when the workers knew at the time of hiring that the work would be temporary.<sup>24</sup> Although falling within an exclusion relieves the company of the sixty day notice requirement, WARN demands that an employer still give "as much notice as is practicable," as well as a brief statement of the basis for reducing the notification period.<sup>25</sup>

Courts may order employers violating WARN to pay displaced workers lost wages, and the local community a maximum of \$500, for each day the employer failed to notify within the statutory sixty day period.<sup>26</sup> WARN authorizes a court to decrease these damages "in its discretion" if an employer proves that it acted in good faith, and had "reasonable grounds" to believe that it had not violated the Act.<sup>27</sup> Although Japanese employers have the option of paying wages in lieu of giving notice, both alternatives satisfy the goal of fair treatment and compensation.

---

21. 29 U.S.C. § 2101(a)(8) (1982).

22. *Id.* § 2102(b)(2)(b).

23. *Id.* § 2102(b).

24. *Id.* § 2103(1,2).

25. *Id.* § 2102(b)(3). Since WARN became effective on February 4, 1989, the courts have not yet had an opportunity to interpret how much notice is "practicable."

26. *Id.* § 2104.

27. *Id.* § 2104(a)(4).

Despite the major similarities between the two acts, three substantive differences between the two laws also exist: the definition of personnel cuts, the definition of employees, and the scope of notification. For instance, the Japanese law encompasses all personnel cuts, including the dismissal of a single employee, for which worker conduct does not cause the dismissal, aside from cases falling under the exceptions for unforeseeable natural or economic catastrophe. WARN application, however, depends on the size of the company and the number of employees losing their jobs.

WARN only covers businesses employing 100 or more employees (excluding part-time employees) or those employing 100 or more employees working at least 4,000 hours per week in the aggregate.<sup>28</sup> The law limits the definition of "plant closings" to situations where at least fifty or more employees lose their positions within a thirty day period, and where a "single site of employment, or one or more facilities or operating units within a single site of employment" closes down temporarily or permanently.<sup>29</sup> A "mass layoff" occurs only when a company dismisses at least one third of the workers at a single site, causing at least fifty employees to lose their jobs, or when 500 employees at a particular site lose their jobs.<sup>30</sup>

The second way in which the application of the two laws differs arises from the divergent categories of employees covered by the Act. WARN simply excludes part-time and recently hired employees. The Japanese concept of temporary workers, a set of second class citizens which includes women, employees of small firms, and certain types of jobs, excludes eighty per cent of the workforce from the law's protection.<sup>31</sup> Workers considered "temporary" employees in Japanese society do not change this classification by years of service since the categories depend more on the type of position and employer than on years of employment. This represents a substantial contrast to the American approach which only excludes employees who have worked comparatively few hours for the company. In many circumstances, however, Japanese employers treat temporary employees just as they do permanent workers, despite the exclusion of temporary workers from the Act.

Third, the American law requires employers to provide notice to affected unions or non-unionized employees, the state "dislocated worker unit," and the chief elected official of the community where the closing or layoff occurs.<sup>32</sup> These requirements reflect the American experience with actual plant closings and their potential impact on the

---

28. *Id.* § 2101(a)(1).

29. *Id.* § 2101(a)(2).

30. *Id.* § 2101(a)(3).

31. Note, *supra* note 19, at 374.

32. 29 U.S.C. § 2102(a) (1982).

community. The Japanese law does not require notice to the corresponding government agencies. The administration of the Act, which mandates that the District Labour Standards Bureau certify the closing, ensures that the government is informed of and involved in the closing.

Both laws differ from their European and Canadian counterparts, which require more comprehensive and coordinated training and job placement.<sup>33</sup> Unlike the European and Canadian approaches, which involve extensive coordination and government involvement, Japanese and American laws reflect a more laissez-faire approach to plant closings. Despite differences in the two laws, they share the same scope and the same limited purpose of notifying workers before job displacement. The Japanese enforcement of the Labour Standards Act, however, requiring government involvement in the decision to close the plant, shows that Japanese social laws dictate intervention and coordination of discharges.

## THE SOCIAL FRAMEWORK

### *Japanese Society*

Although the Labour Standards Act only requires employers to notify workers thirty days before layoffs or plant closings, Japanese judicial decisions place further limits on management. Before shutting down operations, the Chief of the District Labour Standards Inspection Bureau must certify the discharge or closing.<sup>34</sup> To obtain certification, the company must prove that it made personnel cuts only as a last resort, that it used fair criteria in determining which employees to dismiss, and that it complied with any collective agreements regarding union consultation or consent.<sup>35</sup> Courts hold discharges which do not conform to these standards void.<sup>36</sup> Although a discharge may remain valid if the court determines that "just cause" existed, a company that fails to obtain certification may be subject to criminal penalties.<sup>37</sup>

Japanese courts impose such restrictions on employers, despite the

---

33. See SUBCOMMITTEE ON THE FOREIGN EXPERIENCE OF THE TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION, SECRETARY OF LABOR'S TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY (1986) (hereinafter FOREIGN SUBCOMMITTEE).

34. According to Kitagawa, courts authorize plant closings only when the employer can prove that they were used as a last resort:

Many courts venture to inquire critically whether personnel cuts were necessary, and there are many decisions which refuse to recognize that personnel cuts were necessary where it was found that the employer failed to make personnel cuts as a last resort, only after all efforts to avoid the same had been of no avail.

KITAGAWA, *supra* note 20, at § 1.03(10)(d)(i).

35. *Id.* § 1.03(10)(d)(i-iii).

36. *Id.*

37. *Id.* § 1.03(10)(b)(ii).

law's silence, because of Japanese social rules and expectations. Before World War II, feudalistic social rules (*giri*) directed Japanese behavior.<sup>38</sup> These rules, centuries old, continue to influence the Japanese in both personal and business relations. "It is well known that age-old paternalistic ideas color both the conduct of business firms and the practical operation of trade unionism in Japan."<sup>39</sup> Because of the homogeneous nature of Japanese society, the traditional social rules are familiar to all, and continue to affect behavior and attitudes even more than the written law.<sup>40</sup>

Professor Hanami, a leading Japanese legal scholar, believes that these customs determine judicial decisions even where they contradict the written law. Hanami explains that "[i]n labour law, custom is especially important because many of the theories and some of the decided cases admit that collective agreements can be made without writing, in spite of the provisions in the Trade Union Law requiring the written form."<sup>41</sup> Japanese judges do not stress *stare decisis* so much as finding workable solutions to problems, which often means following custom as opposed to law.<sup>42</sup>

Japanese society emphasizes cooperation. Because informal rules play such a large role in their society, the Japanese do not stress individual legal rights and do not rely on the law to settle disputes.<sup>43</sup> Instead, parties expect to work internally to resolve their differences.<sup>44</sup> As Noda explains:

Japanese generally conceive of law as an instrument of constraint that the state uses when it wishes to impose its will. Law is thus synonymous with pain or penalty. To an honorable Japanese, the law is something that is undesirable, even detestable, something to keep as far away from as possible . . . . To take someone to court to guarantee the protection of one's own interests, or to be mentioned in court is a shameful thing . . . . In a word, Japanese do not like law.<sup>45</sup>

Overt conflict, such as litigation, will be avoided in Japanese society, which focuses on cooperation and consensus.

The institutional framework of enterprise unionism reinforces this cooperative attitude. Because unions organize within companies rather than within general trades,<sup>46</sup> a close association develops be-

---

38. Duff, *supra* note 12, at 631.

39. *Id.* at 630.

40. *Id.* at 631.

41. *Id.* at 632.

42. *Id.*

43. Special Project Note, *Alternatives to the United States' System of Labor Relations: A Comparative Analysis of Labor Relations Systems in the Federal Republic of Germany, Japan and Sweden*, 41 VAND. L. REV. 627, 644 (1988) [hereinafter Special Project Note].

44. *Id.*

45. Duff, *supra* note 12, at 637.

46. In Japan, 90% of unions are enterprise, as opposed to industrial or trade unions. These unions represent 33% of the workforce. Note, *supra* note 19, at 378.



tween the union and company leadership. For example, unions have access to meeting rooms, phones, and offices within the plant, and employees serving as union officials remain on the payroll if their union duties do not require their full time attention.<sup>47</sup> Moreover, mechanisms for joint consultation (*roshikyogiseido*) exist within most large plants.<sup>48</sup> The *roshikyogiseido* allows for informal behind-the-scenes discussions of important business decisions, including plant closings and the available alternatives.<sup>49</sup>

The close association of enterprise unions and management also affects the demands unions make and the means they resort to. As the existence of the union and the continuation of employment depend solely on the success of the company, enterprise unions must consider the financial position of their employer in shaping their demands and strategies.<sup>50</sup> As a result, unions in Japan tend to use small strikes to harass and communicate, but because of their own stake in the company's productivity, will seldom engage in strikes designed to damage the enterprise. Japanese react strongly to shame; unions hope that the embarrassment of strikes will bring the necessary results without causing economic harm.<sup>51</sup>

The paternalistic and feudalistic nature of the *giri* also affect the substance of labor institutions and norms. Like feudal lords, Japanese employers feel a paternalistic obligation to provide their employees with much more than wages.

The Japanese see each individual as having economic, social, psychological and spiritual needs, much as we do when we step back and think about it. But Japanese executives assume it is their task to attend to much more of the whole person, and not leave so much to other institutions (such as the government, family or religious ones). And they believe it is only when individuals' needs are well met within the subculture of a corporation that they can largely be freed for productive work that is in larger part outstanding.<sup>52</sup>

Reflecting this belief, Japanese firms offer their workers "a sense of belonging, personal support, welfare and retirement benefits, and increased salary with rank and age."<sup>53</sup>

This paternalism led to the development of the institutions of permanent employment and seniority wages. Fifteen to twenty-five per cent of the firms, usually large corporations, offer lifetime employment

---

47. *Id.* at 380-81.

48. W. GOULD, *supra* note 5, at 12.

49. *Id.*

50. T. HANAMI, *LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN* 49 (1979), reprinted in Duff, *supra* note 12, at 634.

51. Duff, *supra* note 12, at 635-36.

52. R. PASCALE & A. ATHOS, *THE ART OF JAPANESE MANAGEMENT* 132 (1981).

53. E. VOGEL, *JAPAN AS NUMBER ONE* 137 (1979).

security (*shushin koyo*).<sup>54</sup> Those qualifying for permanent employment join a company upon graduating from school and remain until they retire; in return, the employer promotes security through internal training and seniority-based bonuses (*nenko*), which vary with the financial success of the firm.<sup>55</sup> Since only permanent employees may join enterprise unions, collective bargaining agreements sacrifice the interests of temporary employees to guarantee permanent employees' continued security through immunity from dismissals and transfers.<sup>56</sup>

Due to the cooperative and paternalistic nature of Japanese industrial relations, Japanese management strives to avoid discharges. This policy reflects the obligation management feels under the permanent employment system. Since the permanent employment system impedes the ability of discharged employees to find new jobs, and since those who succeed in locating new jobs often lose the benefits of their seniority-based wages, discharges result in severe consequences. In addition to paternal concern and obligations, the shame of discharging employees also motivates Japanese employers to find alternatives. Finally, a strong national spirit drives employers to avoid discharges since increased unemployment could harm the entire economy.

Before Japanese executives shut down plant operations, they explore alternatives. Preferable means of preserving a company's operations include: developing a new product line, decreasing or eliminating the number hired each year directly from the universities, imposing minor salary cuts for workers and large cuts for supervisors, decreasing working hours and/or bonuses, pressuring older workers to retire early (*katatataki*), transferring employees to subsidiaries or subcontractors (*shukko*), and closing the plant for a few days each month while paying employees 90-95% of their regular salaries (*kikyu*).<sup>57</sup> Although Japanese industries implement all of these strategies, companies frequently choose to adjust the level of employment within a firm by intra and inter company transfers and retraining programs supported by government assistance.<sup>58</sup> Through these mechanisms and a social structure stressing cooperation and paternalism, the Japanese avoid the large number of plant closings and layoffs which plague the American economy.<sup>59</sup>

---

54. FOREIGN SUBCOMMITTEE, *supra* note 33, at 3.

55. Note, *supra* note 19, at 366.

56. *Id.* at 374.

57. VOGEL, *supra* note 53, at 139.

58. FOREIGN SUBCOMMITTEE, *supra* note 33, at 4.

59. Although the Japanese rarely close plants, Americans have not been as successful in avoiding operation shutdowns. Between 1981 and 1986, plant closings and layoffs eliminated the jobs of 10.8 million Americans. TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION, SECRETARY OF LABOR'S TASK FORCE ON ECONOMIC ADJUSTMENT AND WORKER DISLOCATION IN A COMPETITIVE SOCIETY 3 (1986)

*American Society*

Just as America influenced the development of Japanese labor law, foreign examples, particularly English law, also influenced American labor law.<sup>60</sup> Traditionally, the English based their statutes and common law on the master-servant relationship.<sup>61</sup> Under English law, and subsequently under American law, courts presumed a one year employment contract, unless evidence proved that the parties intended otherwise.<sup>62</sup> As English employment relations shifted to the commercial setting, the law extended further protection to workers by imposing notice requirements on masters who wished to terminate servants.<sup>63</sup> At the same time, English attitudes also curtailed the growth of unions in America. The one year presumption of a contract had formerly provided workers with the necessary job security so that unions were not necessary. With the disappearance of the one year presumption, a great imbalance in the worker-employee relation developed. The roots of American management's adversity to unionization dates back to the English, who condemned the concerted activities of workers as "criminal conspiracies."<sup>64</sup>

In the late 1800s, however, American law departed from English precedent with the evolution of the employment-at-will doctrine.<sup>65</sup> This doctrine gave both employers and employees the right to end the employment relationship at any time. This development, which discriminated in practice against the employee class, can be explained by changes in American social and industrial conditions. Industrialization and urbanization impersonalized the traditional master-servant relationship. Many employers no longer felt obligated to guarantee their employees job security.<sup>66</sup> The employment-at-will doctrine facilitated industrialization and maximized profit by allowing businessmen more flexibility to discharge workers in response to the changing economy.<sup>67</sup> A surplus of labor, due to the increasing population, also allowed employers the freedom to discharge and rehire quickly. The employment-at-will doctrine formed the basis of employment relations, resulting in diminished job security for American workers and increased employer control over employees.

Management retained absolute termination authority in American

---

60. Millspaugh, *The Managerial Prerogative in Business Closings*, 19 U. Tol. L. Rev. 1, 3 (1987).

61. *Id.*

62. *Id.*

63. *Id.* at 4.

64. R. SMITH, L. MERRIFIELD, T. ST. ANTOINE, & C. CARVER, *LABOR RELATIONS LAW* 3 (7th ed. 1979).

65. Millspaugh, *supra* note 60, at 4.

66. *Id.* at 5.

67. *Id.* at 6.

labor law until the passage of the National Labor Relations Act ("NLRA") in 1935.<sup>68</sup> The NLRA, in an effort to promote industrial peace and economic stability, sought worker-management interaction and the protection of employees. It guaranteed the right of self-organization, provided mechanisms for workers to negotiate with management, legitimized union security clauses, and instituted grievance procedures. The NLRA, in setting up these procedures, established an adversarial system so that workers' rights could not be co-opted by strong management.

The substantive provisions of the NLRA guaranteed workers the right to act collectively and obligated management to bargain with employees on certain subjects. The Act restricted the right of employers to terminate workers by prohibiting employers from discharging workers who exercised these statutory rights.<sup>69</sup> The Supreme Court repeatedly affirmed, however, that the NLRA did not affect management's prerogative to close plants since this constituted an internal economic decision.<sup>70</sup> As Justice Blackmun wrote for the majority in the landmark case, *First National Maintenance*:

[T]he harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision, and we hold that the decision itself is not part of . . . "terms and conditions" . . . over which Congress has mandated bargaining.<sup>71</sup>

*First National Maintenance* held that the NLRA did not impose on management the duty to bargain over whether to close a plant. Unions, left out of the decision to close the plant, responded by increasing their role in plant closing decisions through contract negotiations regarding the "effects" of shut downs in terms of benefits and advance notice.

Limitations on management termination authority also came from the states. State courts used themes such as specific considerations of state or local public policy, an implied contract theory of wrongful discharge, and an implied employer covenant of fair dealing or good faith to restrict employer discharge decisions.<sup>72</sup> In addition, the legislatures of eight states enacted plant closing laws.<sup>73</sup> Although these

---

68. Nat'l Labor Relations Act, 49 Stat. 449 (1935), [hereinafter NLRA] (codified as amended at 29 U.S.C. §§ 151-168 (1982)).

69. NLRA § 8, 29 U.S.C. § 158(a) (1982).

70. *First National Maintenance Corp. v. NLRB*, 452 U.S. 66 (1981); *NLRB v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

71. *First National Maintenance Corp.*, 452 U.S. 666, 686 (1981).

72. Millspaugh, *supra* note 60, at 8.

73. Connecticut, Hawaii, Maine, Maryland, Michigan, South Carolina, Tennessee and Wisconsin have enacted plant closing laws. BUREAU OF NAT'L AFFAIRS, PLANT CLOSINGS: THE COMPLETE RESOURCE GUIDE 7 (1988).

laws varied in their language and in their specific provisions, all shared a new common purpose of greater government involvement to promote fairness in the workplace. The willingness of only eight states to enact such laws, however, diminished their impact.

On the national level, Senator Walter Mondale (D-Minn.) and Congressman William Ford (D-Mich.) first proposed comprehensive plant closing legislation as part of the Trade Act of 1974. Congress continued to consider and reject such legislation on an almost annual basis. In 1985, Secretary of Labor William Brock appointed the Task Force on Economic Adjustment and Worker Dislocation. This Task Force recommended, almost unanimously, the adoption of expanded programs for dislocated workers and specifically endorsed advance notification of plant closings. Soon after the issuance of the Brock Report, Congress defeated H.R. 1616, which would have required advance notification and consultation before closing plants, by a vote of 208-203, the closest vote yet.<sup>74</sup>

After years of active debate, Congress finally enacted plant closing legislation in August, 1988. The Senate approved WARN the same day Senate Majority Leader Robert Byrd (D-W. Va.) introduced it as a free standing bill, by a vote of 72-23.<sup>75</sup> WARN subsequently passed the House by a vote of 286-136,<sup>76</sup> signalling overwhelming support for the bill. On August 4, 1988, WARN became law.

Not even the recent passage of WARN, however, demonstrates a complete reversal of the American laissez-faire attitude. The Act took eighteen months to become law. The August enactment came only after President Reagan vetoed the Omnibus Trade and Competitiveness Act (H.R. 3) because of its inclusion of plant closing provisions.<sup>77</sup> In his veto message, the President pleaded with Congress to adopt "labor laws that fit the flexible, fast-paced economy of the 1990s, not restrictive leftovers from the 1930s agenda."<sup>78</sup>

Business leaders also opposed the law as an unwarranted and unnecessary interference with their freedom to operate.

Unions are interested in raising wages and fringe benefits for their members. They know, however, that their ability to do this is restricted by the threat of firms moving to new locations. If business is prevented from moving, the immediate threat of job loss is taken away, and, as a consequence, unions can be expected to increase their demands on

---

74. H.R. 1616, 99th Cong., 1st Sess., 131 CONG. REC. 32, 917-40 (1985).

75. 134 Cong. Rec. S8868 (daily ed. July 6, 1988).

76. 134 Cong. Rec. H550-20 (daily ed. July 13, 1988).

77. H.R. Doc. No. 100-200, 100 Cong., 2d Sess., 134 CONG. REC. H3531 (daily ed. May 24, 1988).

78. 134 CONG. REC. H3532 (daily ed. May 24, 1988) (text of veto message by President Reagan).

employers.<sup>79</sup>

The purpose of these bills is to give politicians and unions property rights in the existing distribution of jobs and business activity. And the exercise of these rights would prevent businesses from moving to more profitable and productive locations. Instead, the firms' assets are kept in place where they can be pillaged by the feather-bedding and antiquated work rules of union shops and forced to pay the bills run up by vote-buying politicians.<sup>80</sup>

These attitudes reflect the traditionally adverse relations of labor and management in American labor relations. These widespread and heartfelt beliefs will not quickly be abandoned in favor of the cooperative Japanese approach simply by changing our laws to resemble those in Japan.

#### APPLICABILITY OF JAPANESE PRINCIPLES TO AMERICAN LAW

More important than the similarities between the American and Japanese plant closing laws are the divergent histories and social values influencing them. The Japanese Labour Standards Act, formulated as industrialization began in Japan, embodies a traditionally paternalistic and cooperative attitude towards labor-management relations. Moreover, a completely different institutional structure of enterprise unions, permanent employment, enterprise internalization of difficulties, and active government support of economic development underlies this law. WARN, on the other hand, represents a normative approach to industrial relations. Unlike the Japanese law, the American law drastically departs from the existing norms and historical attitudes. After over a century of complete management autonomy to shutdown operations and layoff workers, WARN authorizes the government to intervene in internal corporate policy. Furthermore, in a system characterized by adversarial relations, the passage of WARN, over the vocal objections of industry, represents a victory for the workers over management. However, this whole attitude contradicts the underlying premise of the Japanese act: humane industrial policies to promote productivity and prosperity for both management and labor.

WARN, in some ways, signifies a movement towards the Japanese approach of cooperative relations and emphasis on employee well-being. Like the Japanese, American officials also appear to recognize that good relations with employees may breed higher productivity for management. For example, then-Senator Dan Quayle (R-Ind.) commented that "[y]ou cannot operate a good business, be productive and competitive in this competitive world if you are going to have that

---

79. Aaron, *Plant Closings: American and Comparative Perspectives*, 59 CHI. KENT L. REV. 941, 962 (1983), quoting R. MCKENZIE, *RESTRICTIONS ON BUSINESS MOBILITY* 57 (1979).

80. *Id.*, quoting *Words and Deeds*, *The Wall St. J.*, Nov. 23, 1979, at 20.

adversarial relationship.”<sup>81</sup> Senate Majority Leader Robert Byrd echoed this sentiment. “America must change the way it has been doing business. One of the fundamental changes must be in the way management and labor confront each other at the negotiation table. Management and labor must forge a new relationship if America is to compete against our foreign competition.”<sup>82</sup> Such an approach demonstrates a rejection of adversarial relations, since both employers and employees benefit from changing their relations.

The legislative history of the bill also indicates a concern with employee protection not previously exhibited in labor issues. For example, the bill’s sponsor, Representative William Ford (D-Mich.), argued for the legislation on the basis of its impact on the individual employee. “People need time to look for new jobs; they need time to put their family finances in order; they need time to find a training program that will qualify them for a good job.”<sup>83</sup> Representative James Oberstar (D-Minn.) supported the Act on the grounds that “fairness dictates that industry owes at least 60 days to workers who have given 10, 20, 30 loyal years to their jobs.”<sup>84</sup> Representative William Clay (D-Miss.) justified imposing notice requirements because of the impact such notice would have on “alleviating . . . unnecessary suffering to individuals and communities.”<sup>85</sup> With a background of laissez-faire capitalism and adversarial industrial relations, justifying labor legislation on grounds of employee well-being and fairness marks a substantial change in attitude. More remarkable, though, is the prevalence of this attitude: 72 Senators, 286 Representatives, and 86% of the population supported the bill.<sup>86</sup>

Changes in attitudes towards work and industry in general may reveal that the discussions on the floor were more than mere rhetoric. For example, complete management termination authority conflicts with the shifting conception of job security as a property, not a contractual right.<sup>87</sup> In his seminal work *Ownership of Jobs: A Comparative Study*, Professor Frederic Meyers explained how this shift may affect plant closing attitudes. “A job, of course, is an abstraction, but like other abstractions such as ‘good will’ and ‘expectancy of profit,’ it may become the object of ‘ownership.’ Acceptance of the idea of job ownership then raises the issue of the consequences of involuntary deprivation of title.”<sup>88</sup> Viewing employment as a property right recog-

---

81. 134 CONG. REC. S8379 (daily ed. June 22, 1988) (statement of Sen. Quayle).

82. *Id.* at S8374 (statement of Sen. Byrd).

83. *Id.* at H3536 (daily ed. May 24, 1988) (statement of Rep. Ford).

84. *Id.* at H3540 (statement of Rep. Oberstar).

85. *Id.* (statement of Rep. Clay).

86. Matlack, *Forewarning*, 1988 NAT’L J. 1534, 1535.

87. Millspaugh, *supra* note 60, at 34.

88. Aaron, *supra* note 79, at 951, quoting from F. MEYERS, OWNERSHIP OF JOBS: A COMPARATIVE STUDY 3 (1964).

nizes the significance of work as the vehicle for individual identity, advancement, and accomplishment, as well as a source of community economic benefit and security. This notion guarantees employees a vested right to the continued benefits employment ensures.<sup>89</sup>

The rise of the doctrines of corporate accountability and social responsibility also illustrates new limitations on business autonomy.<sup>90</sup> These doctrines subject business to a wide range of constituencies such as "employees, consumers, suppliers, local communities, taxpayers, and even future generations."<sup>91</sup> The proposed 1980 Corporate Democracy Act, which would have legislated the final rejection of the employment-at-will doctrine in favor of "just cause" terminations represents one example of the reforms that these doctrines envision; the fact that it received serious consideration evinces the changing attitudes.<sup>92</sup>

Finally, the application of many of these principles in collective bargaining agreements demonstrates their growing acceptance. Recent negotiations between the United Auto Workers (UAW) and the automotive industry signal an increasing role for unions in enterprise decision making and an increasing accountability of management to its workers. Although many agreements include only "effects" bargaining to minimize the impact of plant closings after they are announced, Ford, Chrysler, and General Motors began in 1982 to guarantee the unions against plant closings for a limited number of years and to provide benefits and procedures for layoffs in the contracts.<sup>93</sup> Thus, a major American industry recognized its obligations to its employees and voluntarily limited its authority to terminate at will. This reflects growing acceptance among the nation's corporate leaders of the importance of good industrial relations to productivity and management's obligation to act humanely.

The passage of WARN, the Congressional speeches, scholarly discussion, and UAW talks, however, should not be construed as a complete abandonment of American laissez-faire attitudes or as an endorsement of the Japanese model. WARN itself is an incremental step. It does not limit management authority to close plants or layoff workers; it only requires them to inform workers of that decision. The Act also severely restricts its scope through its vague statutory language and the numerous exceptions which may completely eradicate any protection that may have been otherwise afforded to workers. Its own sponsor, Senator Howard Metzenbaum (D-Ohio), reassured the

---

89. Millspaugh, *supra* note 60, at 34-35.

90. *Id.* at 33.

91. *Id.* at 34.

92. *Id.*

93. See generally Kovach and Millspaugh, *The Plant Closing Issue Arrives at the Bargaining Table*, 4 J. LAB. RES. 367, 370-74 (1983).



bill's opponents that he intended the law to be "absolutely neutral with respect to labor law,"<sup>94</sup> that even he did not expect WARN to depart from traditional management-labor relationships and policies. Despite these limitations, the bill did not pass easily: the President vetoed it and large corporations, those most affected by it, vociferously opposed its passage.<sup>95</sup>

### CONCLUSION

The Japanese have developed a successful system of labor relations law, both formal and informal, which has contributed to their rapid economic growth. Although the Japanese began after World War II with a largely American-styled legal framework, American legislators and businessmen cannot duplicate their solutions in response to similar problems. Japan's plant closing law works well because it conforms to unique Japanese customs and social behavior. Applying essentially the same law in a similar American legal framework will not necessarily yield the same results, because the institutions and social norms underlying the laws differ so dramatically.

Studying the Japanese approach, however, does offer lessons for Americans not in its specific policies, but in its goals: economic growth combined with worker protection. The Japanese success in combining the goal of productivity with a humanitarian approach proves that the two values need not be mutually exclusive, and may, in fact, be related. By inspiring loyalty and fostering productivity in employees, Japanese labor policies benefit both workers and management. Understanding that policies which benefit workers need not harm management may provide a solid starting point from which Americans can fruitfully re-evaluate our own labor relations.

---

94. 134 CONG. REC. S8611 (daily ed. June 27, 1988) (statement of Sen. Metzenbaum).

95. Alexander B. Trowbridge, president of the National Association of Manufacturers, commented that mandatory plant closing legislation "has more to do with election year politics than it does with helping American workers." BUREAU OF NAT'L AFFAIRS, *supra* note 73, at 2. J. Bruce Johnston, Executive Vice President for USX Corp., testified that "the notice and consultation provisions of H.R. 1122 are unnecessary and unworkable in the manufacturing setting. . . ." (quoting from *Hearings before the House Committee on Labor Management Relations and Employment Opportunities*, 100th Cong., 2nd Sess., March 17, 1987).