Building Community into Property

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ABSTRACT. American business's fascination with both laborsaving devices and low wage environments is causing not only structural unemployment and dissipation of the nation's industrial base but also the deterioration of abandoned host communities. According to individualist understandings of the right of private property, this deterioration is beyond sanction except insofar as it affects the property rights of others. But corporate stockholders and managers should not be considered the only owners of property the value of which is due in part to the investments of employees and of the host community. The contributions of the latter should therefore be adequately recognized in law. Short-term job protection and long-term planning for leisure are helpful. But still more important is a recognition in public policy of the interests of the community in property owned by corporations. There is ample precedent in our legal traditions for public preemption of private property; but in contrast to much "taking" in the past, this must be exercized in a manner that is truly for the public benefit.

Introduction

In 1979 U.S. Steel (now the generic USX) announced that it would become the third company in as many years to shut down a mill in Youngstown, Ohio. This time people not only protested and sought to negotiate a buyout but in addition went to court over the matter. The judge expressed a great deal of sympathy with the plaintiffs' cause; but he found no law that would satisfy his head. As he put it:

> United States Steel should not be permitted to leave the Youngstown area devastated after drawing from the life blood 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.[1] [emphasis added]

This "new property right" that Judge Thomas Lambros failed to find in his books is in some respects a very old right, namely, the preeminence of the common good over private interests where these conflict. But the legal tradition that prevails in the United States is more attuned to an individualist conception of ownership and control. As a result we tend to avoid the Scylla of fascism by crashing into the Charybdis of corporate autonomy.

Are we then living in a nation of the corporation, by the corporation, and for the corporation? Has the nation praised by Lincoln "of the people, by the people, and for the people" perished from the earth? Rhetoric aside, the answers to these questions seem to be in the affirmative, at least with regard to *property*. In ancient Rome, the owner of property had the right to use or abuse (*jus utendi et abutendi*) that property as he saw fit. These exclusive rights perdured through feudalism and monarchy. But with the rise of democratic states, absolute control over property has given way to a more refined appreciation of the need for social constraints. Imposed at least in principle for the public benefit, these constraints can be detrimental to the interests of an individual property owner. But they seldom interfere with the mightiest property owners of all time, the corporations.

This basic political reality must be taken into account in any assessment of the impact of new technology on our society. In particular, if we do not put some communitarian constraints on management's quest for "flexibility," we will wake up one

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day to discover, for example, that the touted factory of the future is not a dream but a nightmare. This, admittedly, is a pessimistic scenario; but an alternative future is possible. If we can work our way through (1) some unexamined beliefs about business necessity, we might see our way clear to respond appropriately to (2) certain social imperatives that require (3) the recognition of community in law.

I. The reign of "business necessity"

Even the staunchest defenders of American business generally concede that some corporate decisions over the last several decades have harmed our economy and our society. They excuse this harm, however, by appealing to the standard defense of "business necessity." This defense, in turn, is seldom successfully challenged, especially when the decision in question is explained as technological progress required to meet competition. Even unions, however reluctantly, have been cooperative. The UAW agreement with auto manufacturers in 1949 was open to technological progress, as were mine worker contracts negotiated by John L. Lewis, and longshoremen's contracts that acquiesced in new crating technology. Now come robots, expert systems, artificial intelligence, and, before long, automatic factories. Unemployment and social disruption are inevitable side effects. But the assumption of business necessity goes largely unchallenged.

Take plant closings, first of all. Little is being done in this country to avoid shutdowns; but there has been a lot of discussion about why they occur. A marked tendency for companies to substitute capital for labor and for governments to favor capital-intensive production are factors. But why are these policies favored? Some blame rising labor costs (hence the emphasis on wage "concessions" in the 1980s). Others, including experts at the International Labor Organization (ILO), prefer to blame "the importance of technological innovation as a means of (meeting) competition."[2] But the desire for lower labor costs may itself motivate a commitment to technical innovation. So what does the factor of competition add into the mix? For one thing, it encourages companies to weigh environments where cheap labor is available against those where innovation might most easily be introduced. The consideration that tips the balance may be an opportunity to "get out from under" a union.

Bumper stickers say "Buy American" and unions do try to get some sort of "domestic content" legislation passed. But what is there "American" to buy? Most of the components of an IBM-PC are manufactured abroad. Ford Motor Company prides itself on its "world car," the multinational manufacture of which is intended to be invulnerable to any local labor unrest. This practice is duplicated by countless companies whose managers glamorize the process as "globalization." Just in autos, for example, the U.S. Department of Commerce estimates that by 1988 17% of the cars sold by Detroit will be produced abroad, at the cost of an additional 90 000 lost jobs; and by 1995 29% of the parts in domestically produced cars will be imported, with comparable worker displacement as a consequence.

By 1970 General Electric owned the single largest block of shares in the Japanese electronics firm Toshiba (223 million) as well as 40% of its subsidiary, Toshiba Electronics Systems Co., Ltd. It has 24 licensing agreements with both companies and a total of over 60 with Japanese firms to make products that are sold all over the world under the GE label. In 1985 GE spent $1.4 billion to import products sold in the U.S. under the GE label. It buys its microwave ovens from Japan and will be going offshore for room air conditioners in 1987.[3]

In the late 1970s, at the very time that U.S. Steel was accusing the Japanese of "dumping" their products in this country, it was busily investing in overseas operations linked directly to that very competition: partial ownership of 11 foreign companies operating on 5 continents. Between 1972 and 1978, while U.S. banks were redlining American-made steel, Chase Manhattan and Citicorp were responsible for 90% of $538 million invested in the South African Iron and Steel Corporation. Between 1975 and 1977 alone Chase Manhattan increased its investment in Japanese steel from $59 million to over $204 million; Chemical Bank of New York went from $15 million to $82 million; and Citibank increased its loans to Japanese steel from $59 million to over $230 million.[4]

This kind of story can be repeated with regard to industry after industry: earth-moving equipment, industrial and office machines, bearings, forgings, compact-disk players, semiconductors, and (still to

come) optical-disk computer memories. Where once we had manufacturing we now have what a recent issue of *Business Week* calls "the hollow corporation": a service-oriented company that may do everything from designing to distribution, but whose products are manufactured abroad. The list of U.S. companies that are dependent on foreign companies for products is growing daily. Domestic growth is occurring mainly in service, especially at the lower end but also on a more advanced level: so-called "network" companies that distribute outsourced products. Included here are such well-known names as Nike, Dictaphone, Emerson, Schwinn, Ocean Pacific Sunwear, Sulzer (marine diesel engines). Manufacturing accounted for 30% of U.S. gross national product in 1953, but for only about 21% in 1985, with durable goods alone declining from 17.8% to 12% — a drop of 30% in both cases.[5]

What will be the long-term results of this transformation of our economy? Some observers see the shift from manufacturing to service as a progressive move beyond drudgery. Others, including leaders of Japanese industry, watch in disbelief as we lose not only money but the very capability of making money. Such concerns, however, are salient only if one is prepared to take into account interests other than those of financial investors when formulating industrial policy. To a stockholder it matters little where his or her profits have been generated. Such geographical details are important only to those whose livelihood is locally constrained, the would-be employees and host community of a profit-making enterprise. As even middle management personnel are coming to realize, the rights of these constituencies are limited at best.[6] But why should stockholders be the only investors who matter?[7] Employees also make investments in a worksite, as does the community. Should not a company be required to take these investments into account when it decides the future of that worksite?

Consider, secondly, the impact of automation. For several decades, the availability of cheap foreign labor has considerably reduced top management's interest in automation as the way to make profits without payrolls. But some analysts of the corporate exodus to foreign shores see problems ahead; so they are looking with renewed interest to automation as an answer to the pitfalls of globalization. As this view was recently expressed in *Business Week*:

> (T)he new technology would bring a crashing halt to the madcap chase after cheap foreign labor. Because labor costs would be virtually zero and other offshore savings – cheaper materials and lower overhead – would be overwhelmed by the benefits of quick turnarounds and low inventories, the computerized factory could produce things in Indiana for less than they cost to import from India.[8]

Totally disregarded in this projected solution is any concern about workers. In fact, this very silence on the subject of workers exemplifies the traditional attitude of management that labor is simply a cost of doing business and so should be reduced as much as possible. When skilled workers challenged the impoverishing terms offered to them by the early factory owners, the owners responded by seeking a technological substitute for their unruly employees: what nineteenth century Scottish engineer Andrew Ure called "the automatic plan." Today, however, the target is no longer only the comparatively insignificant direct, or "touch," labor costs (10–15% in the U.S.) but additional factors that account for three times as much of the cost of production: indirect labor, middle management, and other overhead.[9]

Some critics of capitalism argue that control of the work process is the overarching reason for mechanization and automation. The "deskilling" of production that mechanization has effected is, according to Harry Braverman, deliberate but not inevitable. In keeping with the Marxist class analysis of this process, he speaks of capitalism striving for domination of dead labor (machinery) over living labor (workers).[10] But not even Lenin would have been moved by such humanistic opposition to automation. And the same assuredly goes for capitalist decision-makers.

Obviously, the purpose of a laborsaving device is to save labor, i.e., to save a company some of the costs associated with paying labor. This means that the process of introducing such a device is inherently, even if not intentionally, hostile to anyone whose labor is thereby going to be "saved." So it is but a short step from this teleology to the etiological claim that management tilts cost-cutting decisions whenever possible in the direction of cutting payrolls.[11] If this is meant as a criticism, however, it falls on deaf ears in American corporate headquarters and, perhaps not coincidentally in our courts as well.

Under American labor law corporate cost-cutting is just good business, unless (in some situations) it is demonstrably motivated by anti-union animus.

How did we ever arrive at such total disregard of the human effects of corporate hegemony? Leaving the sources of power aside, the effect of that power is expressed in the corporatist way in which we have institutionalized our "rugged individualist" notion of freedom. The scope of corporate freedom is a vast subject in its own right; here only some suggestive examples will have to suffice.

First, the binding character of a contract is more likely to be impressed upon the naive consumer of usurious credit than it is on the corporate giant whose agents are tired of dealing with a union. Bankruptcy, demand for concessions, complete plant closing, and takeover (often without successorship obligations) have become convenient ways to undermine a collectively bargained agreement.

Secondly, businesses come and go, following the latest offer of a "good business climate." They leave disintegration in their wake when they go; and, in various ways, they do the same when they arrive in a community. Typically, they concede neither to workers nor to surrounding townspeople any effective control over the terms and conditions of their stay. (New Japanese-managed plants may in some respects be exceptions to this rule.)

Thirdly, the notion of a "trade secret" is often appealed to to justify a hands-off approach to Big Brother, Inc. Whatever the issue, whether it is workplace health and safety, wages and benefits, or rumors about imminent layoffs or even a plant closing – mum's the word in corporate America; and so long as other corporations are not thereby shut out of the market, courts consider this to be an entirely appropriate way of doing business. In particular, they seldom see a need to trouble ill-informed workers with such awesome information.[12]

In special cases (e.g., ones that involve subcontracting or only partial closing) the National Labor Relations Board (NLRB) might require meaningful notice to allow for "decision-bargaining" prior to a move. More often it may require notice for purposes of "effects-bargaining."[13] But the Supreme Court's top priority in all these cases is still managerial rights, which it, like others in the judicial system, typically associates not with the reality of a giant corporation but with the nostalgic fiction of a nineteenth-century entrepreneur.[14] And as a result freedom in America is now more the prerogative of corporations than of people.

In support of Braverman's etiological thesis, robots and other electronic devices are in fact designed and developed for the explicit purpose of "saving labor," that is, removing people from their jobs. Industrial engineers and robot suppliers hawk their wares with worker displacement as the bait.[15] And lest anyone confuse the target of this marketing strategy, innovative salespeople at technology trade shows are snappily attired in tuxedos. But it is not entirely clear that even the tuxedo set is sold on the value of these wares, at least not in the United States.

Providers, of course, accentuate the cost savings that an innovative management may expect from the installation of robots and the more complex automation into which they might be integrated. But potential buyers have good reason to be sceptical about their figures. Providers used to claim that robot costs will be recouped within a three-year payback period from savings in direct labor alone. As one writer put it, a Japanese robot in automotive production can do at $5.50/hr. what a UAW worker does for $18.10/hr. (wages and fringes). A simplistic estimate like this assumes one can compare the costs incurred from labor and the costs of procuring and maintaining a robot. But such calculations have seldom proven to be very reliable. So providers have been shifting their emphasis to the worst case scenario, that of a business ceasing to be competitive because it did not automate.[16]

Disregarded in all of these proposed responses to "business necessity" is the unadorned fact that plants may be profitable without being moved or without being automated. For, the investor-oriented biases of the corporation require management to seek not just profit but maximum profit. But in its quest for this elusive goal, American business has stretched the right of private property into a right to abuse, abandon, and abolish.

II. Social imperatives

There might well be a place for "business necessity" in one's set of requirements for social justice. But social justice cannot be assured by tending to business necessity alone. Also of concern must be

what was traditionally called the common weal — or, as some of our older states prefer, the common wealth. This means that we must find a socially less harmful way to respond to the legitimate needs of business. In particular, we should be developing a national work policy that would expand the protection (a) of workers faced with plant closings and new technology and (b) of communities indirectly affected by such "restructuring."

A. *Protection of workers*

We have made something of a start in this direction. A notice requirement, for example, may be built into a bargained contract. Electrical workers won a 2-year notice requirement, with limited access to records, from Westinghouse. But most advance notice agreements in the United States are for no more than a week. And if notice is not explicitly provided for in the contract our courts are unlikely to read it in. We accordingly still have something to learn from other countries, especially those in Western Europe, about protecting workers and their community from the trauma of transition.

Unions in Europe and Japan (as well as some in the United States) have sought "data agreements" and "new technology agreements" as ways of mitigating the impact of robots, word processors and such. Some bargained agreements provide substantial benefits to workers displaced by new technology. But most affect primarily white collar workers, e.g., the members of APEX in the United Kingdom; and they are usually at plant or, on occasion, company level. They are seldom arrived at without considerable resistance on the part of management. In addition to these bargained agreements, some progress has been made through legislation and, to a lesser extent, through litigation.

In Norway and Sweden in particular, both statutes and negotiated agreements assure workers a significant voice in determining how computer-based technologies are to be introduced. Especially important to these programs are (1) the establishment of worker representation in the decision-making process and (2) a program to develop computer literacy among the rank and file with the cooperation of academics.

West Germany is similarly committed, as a nation, to a policy of full employment. This policy was severely tested by the economic crisis of the 1970s. But the commitment is there, in statutes and in practice: in West Germany keeping people employed is a top priority. Proposals to move a plant are subjected to serious scrutiny by the government. If work slacks off, employees are put on "short-time working" and the government pays the difference to keep them at full wages. Under the Protection Against Dismissal Act, an employer who has dismissed a significant number of employees (as defined in the law) has the burden of proving that none of these was the victim of a "socially unwarranted dismissal." This means, by definition, a dismissal "not based on reasons connected with the person or conduct of the worker or on urgent operating requirements precluding his continued employment in the undertaking." Courts have held that a fall in profits is not per se an "urgent operating requirement." Advance notice up to three months must be given to the employee and to the works council, with the result that 20% of the layoffs are averted and more than half of another 10% win compensation before a Labor Court.

Specifically, an employer is required by statute to consult with the works council about every proposed "organizational change." This includes any rationalization of production operations, working methods, technology, communication and decision-making, management and leadership, or control methods. Over 50% of the country's workers over the age of 40 are protected under this statute with a good mix of transitional assistance; and under an Employment Promotion Act any costs incurred in moving to take a different job are reimbursed.[17] About half of the West German workforce is now covered by collective agreements that give special protection in the event of rationalization, e.g., in chemicals, leather and footwear, paper, textiles, metalworking, and especially (a recent focus of controversy) printing.

Workers in Great Britain who are layed off also have recourse through statutory arrangements. Under provisions of The Employment Protection (Consolidation) Act 1978, many employees may seek monetary damages for wrongful dismissal in a court or for unfair dismissal before an industrial tribunal.[18] (Similar statutory protections are available in New Zealand, where a claim must be processed through the appropriate union of which one must be a member.)

At issue here in American legal terms is a nineteenth-century laissez-faire device known as "employment at will" (EAW, hereafter), which infers from a mythical mutuality of contract to the right of either party to end the relationship without cause. There are some statutory limitations on EAW in the United States; but they do not directly concern new technology.[19] More immediately to the point, federal courts try to think of the introduction of new technology as a kind of subcontracting; and in that way they do manage to require effects-bargaining under the National Labor Relations Act.

What unions have been achieving collectively in Europe some individuals achieve in the United States through litigation. In a majority of jurisdictions, courts now allow discharged employees, usually managerial personnel, to try to convince a jury that they have endured "unfair dismissal" or "abusive discharge." These jurisdictions have thus broken with EAW, on the basis of a public policy tort, an implied contract, or (the most far-reaching cause of action) a covenant of good faith.[20] This area of law has burgeoned in the past several years, requiring management to dismiss employees (or "downsize," to use the jargon) with more attention to detail. Mishaps in this regard, however, will be challenged mainly by those with more than average means at their disposal.

On balance, then, Western European countries are far ahead of the United States in smoothing transitions due to industrial transformation. Why? In part because they are individually more compact and homogeneous and in part because they are dealing to a great extent with much more mature industries. But these factors alone are hardly sufficient to account for the marked difference in attitude with regard to the relative importance of people and profits.

Parallel to these protective measures, we should also be developing policies conducive to social harmony in an age of greater leisure – an age which, in some respects, is already upon us. For example, those who are employed often work inordinate overtime hours or at a second job while others seeking work are unemployed. So there is already a need to distribute available work more rationally and equitably; and this could be accomplished, at least in part, through a combination of laws setting a minimum level of income and a maximum level of hours of employment (without regard to self-created jobs). Additional steps into the age of leisure should include not just a new national holiday every decade or so, but an orderly plan for distributing reduced manpower needs by means of shorter work weeks, longer vacations (as in Western Europe) and even sabbaticals for all workers.

Measures such as these are intended to democratize the benefits of leisure. But they will remain irrelevant and ineffectual if corporate owners are not required to share responsibility for the conditions that suggest the need for democratization in the first place. Corporations control most sources of wealth; and if they can exercise this control without regard to the needs of society at large, comparatively few will benefit from the wealth that in principle could expand opportunities for leisure. Without adequate means of support, people who are not working are not at leisure, they are unemployed. So talk about a coming age of leisure is vacuous if it is not complemented with political and economic reform. In other words, if our society is to avoid intolerable mass impoverishment and potential disruption, government priorities will have to favor corporations less and people more.

B. *Protection of communities*

It will not be easy to shift government support from corporations to people; but some appropriate goals are the following:

(1) End the ultimately self-defeating competition among states and localities for businesses that disavow any responsibility for their coming or going.

As steps in this direction, federal standards should be established and enforced with regard to: incorporation; plant-closing justification; minimum wage; workplace health and safety; income maintenance, food stamps and welfare, AFDC (now a 4:1 difference between the highest and the lowest paying state) and general assistance (now a 12:1 difference); unemployment compensation (now 2:1) and rates (now a 50% difference).

(2) Eliminate tax incentives for exporting capital (which amounts to a tax on people).

Instead of using tax reform as an excuse for cutting what is left of public-supported quality of

life, require that companies which contribute practically nothing to our country's social programs start paying their fair share. As it is now, these companies are given every advantage imaginable for choosing to turn their back on the people in this country. Our labor law is not interpreted as applying to corporate moves that end outside our borders. And the Internal Revenue Code is a handy compendium of incentives for making such moves, e.g., a dollar-for-dollar credit for foreign taxes against domestic taxes; indifference to "transfer pricing," whereby a company sets an arbitrarily high price for an item or service sold by the parent company to an overseas subsidiary to keep foreign profits artificially low; and "political insurance" against the pitfalls of investing abroad, even as support for U.S. exports is undermined.

(3) Increase public ownership or at least public-private arrangements with regard to utilities, fuels, and especially "sunrise" industries that government subsidizes.

(4) Support demonstrably feasible proposals for worker control, including proposals that call for conversion from military to domestic products.

(5) Limit the ability of conglomerates to take over businesses and run them into the ground (as happened to Youngstown Sheet & Tube); and prohibit parent companies from "milking" subsidiaries (the way Sperry Rand did to a library furniture company).

(6) Severely limit any form of absentee ownership.[21]

(7) In general, stop regarding resources put at the disposal of enterprise as if they are "giveaways" (*res nullius*) and recognize them for what they truly are: common property (*res communis*).

The kinds of changes here proposed will not be easy to effectuate in the United States, given the individualist bias that underlies our (tacit) industrial policy. But they would not be unprecedented, as has been noted. In particular, companies like Scott Bader in the United Kingdom provide us with examples of how corporate interests may be made to harmonize with the interests of the community. E. F. Schumacher defends this approach as a use of economics "as if people mattered."[22] As he himself acknowledges, his "Buddhist economics" were anticipated by R. H. Tawney, who stressed the interests of community in opposition to what he considered the individualist bias of Max Weber's portrayal of capitalism.[23] More recent statements include Kirkpatrick Sale's convincing argument for limiting our endeavors to a "human scale" and Robert Nisbet's somewhat ambiguous studies of the search for community throughout history.[24]

The interests of the community in a local plant or other enterprise can, of course, be understood to include those of stockholders. Also to be taken into account, however, is the investment of the workers, as the NLRB argued twenty years ago in *Ozark Trailers, Inc.*, 161 NLRB 561, 566 (1966). Similarly, the relevant governmental units must find ways to accommodate business while at the same time remaining accountable to the people of the community, who are also investors through whatever "industrial development" arrangements have been made in their name. Meanwhile, the people themselves need to be active participants in the decision-making process.

A kind of environmentalist approach to this end would be to acknowledge that each facility, regardless of who "owns" it, has rights of its own which may be defended in court by any group of people who can show that they are likely to be harmed by a proposed significant change in that facility (as is now possible in the name of historical preservation). Or, alternatively, empower specially designated members of the community to serve as legal guardians of the facility.[25]

A more socialist approach would involve giving the needs of the community priority over autonomous corporate ownership as we know it today. For example, why not treat the "Oakland" (now "Los Angeles") Raiders as subject to community (read Oakland) interests and impose on its legal owners a fiduciary responsibility to the people of Oakland? As we shall see, there are precedents for this kind of move in U.S. constitutional law with regard to eminent domain. But these precedents are ambiguous at best because the cases tend to favor the interests of corporations over those of the community at large.

III. Recognition of community in law

It being now assumed that the community should have an interest in property at least comparable to that of private interests, what follows is a brief for the claim that that interest is at least inchoatively founded in American law. It is as yet not well enough distinguished from corporate interests. But this distinction is beginning to get some attention; so the time may be ripe for reform.

There are a number of indications that this is the case, not all of which are equally significant or equally appreciated. But among these are the approach (except in the West) to water rights and the development in real estate of a number of quasi-communal arrangements. But the focus of debate and of legal innovation is in the area of social limitations on private property, especially by means of eminent domain. It is accordingly on the latter that I will concentrate, after only some brief remarks about water and shopping centers.

First, the importance of defending communitarian rights is illustrated by the legal principles developed to effect a just allocation of the use of water. As a general rule, the avoidance of greater harm is sought in all cases involving surface water. Where water is plentiful, riparian doctrine respects the principle of equal rights, either on the basis of natural flow or on the basis of reasonable use. Where water is scarce and hence not likely to be adequate for all who want to use it, prior appropriation is respected.[26] To the extent that our economy can be viewed in terms of "cash flow," the riparian model of respecting equal rights is more appropriate than the western rule, so called, that has turned great rivers like the Colorado into private enclaves.

Secondly, certain communitarian arrangements in real estate reestablish for specialized purposes something like the generalized proprietary communities that are usual among primitive peoples. As defined by Spencer H. MacCallum, a (real estate) community is "divided into private and common areas according to a system of relations which defines and allocates responsibility for the performance of all activities that might be required for its continuity."[27] Typically based on contract, these "communities" are of various types, e.g., hotels, subsidized districts, industrial parks, mobile home parks, a shopping center, a merchants' association, condominium buildings, and interval ownership arrangements.

Thirdly, emerging law with regard to legal intrusions upon private property provides some basis for a broader view of community interest. To be considered here are (1) social limitations on private property and (2) social preemption of private property. The first involves what is called inverse condemnation; the second, eminent domain. Each involves what is technically known as a taking, because of the relevant language in the Fifth Amendment to the U.S. Constitution: "(N)or shall private property be taken for public use, without just compensation." Satisfactory resolution of the difficult and controversial question of just compensation will here be assumed.[28]

1. *Social limitations on private property*

As noted at the outset, jurisprudential support for untrammeled use and abuse of property ended with the demise of Roman law principles in the nineteenth century. But this shift in thinking has not eclipsed the prerogatives of corporations, whose agents move through the world with the greatest of ease. There are good theoretical grounds for closing this gaping loophole. So even if we lack the political muscle to do so, we may take some comfort in the correctness of our course.

The long history of absolute property rights can be summarized by comparing on this subject John Locke and Herbert Spencer. Concerned mainly with defending private property against encroachments by government in the eighteenth century, Locke argued that property rights are based entirely on labor, without regard to their origins. He modified this view, however, by requiring that the laborer leave "enough and as good . . . in common" for others. This so-called Lockean proviso, which in theory would prevent the greedy from running roughshod over those in need, Spencer two centuries later rejected as an unnecessary complication on the primordial source of progress, *laissez-faire*.[29]

Spencer's absolutist view of property was in accord with the mainstream attitude of apologists for the status quo in the nineteenth century. While legislators and jurists in France and Germany were

busy defending private property, justices like Taney in the United States were able to base a slaveholder's "rights" on the due process clause and his "liberty" on a doctrine of substantive due process (the Dred Scott decision); and what justifications James Kent and Joseph Storey could not find in natural law Thomas M. Cooley found in prescriptive law theory.[30] These rationalizations of exploitation, as well as Spencer's blustering in behalf of untrammeled enterprise were the dying gasp of absolutist theories of property, marking the end rather than the beginning of an era.

Even as Spencer was writing, others were preparing the way for the twentieth century by redefining property not as an absolute but as an historical concept, subject to restriction for the public good. First came polemical writing. In the words of French anarchist Joseph Proudhon,

> At present, the alarm is in the camp of the old doctrine; from all sides pour in *defences of property, studies regarding property, theories of property*, each one of which, giving the lie to the rest, inflicts a fresh wound upon property.[31]

Then came scholarly legal commentaries. German jurists Adolph Wagner, Gustav Schmoller, and Rudolf von Jhering provided the tools for Otto von Gierke to put "a drop of socialist oil" into private property.[32] French theorist Leon Duguit developed a systematic case for "realistic" (social) as opposed to the old "metaphysical" (individualistic) system of law. According to him, an individual owner has rights over property only insofar as he fulfills his duties "to employ his goods for the maintenance and improvement of social coherence."[33] And in the United States, economists such as Richard T. Ely and Simon Patten applied to the American scene what they had learned especially from the Germans, and Justices Holmes and Brandeis introduced into legal rulings the new approach of sociological jurisprudence.[34] In 1919 the Constitution of Weimar became the first to sanction a social concept of property, especially in Article 153, which was adopted 30 years later as Article 14 of the Basic Law of Bonn.

Given this jurisprudential context, one should not be surprised that even corporate property rights have been delimited in various ways in the public interest, not only on the basis of such common law concepts as nuisance, but through legislation regulating terms and conditions of employment, hiring practices, environmental degradation, taxation, product liability, antitrust, securities, pensions, patents, and more. Especially subject to controversy in recent years is the concept of eminent domain as applied to corporate enterprise, as will be seen. But on balance these artificial "persons" seem remarkably immune from any of the social responsibilities that the theories proposed and that philosophers continue to espouse.[35]

One example of this immunity is the increasingly common practice of diversification, which effectively undercuts such fine-tuned distinctions as that between partial and total closings that determine to what extent the NLRB will require an employer to notify and negotiate with its "lame duck" employees.[36] Other examples range from disregard for dumping restrictions to manipulation of markets. Basic, however, to all of these manifestations of corporate autonomy is a metaphysical assumption that a corporation exists in a dimension of the universe that is totally isolated from any community where it happens to have located a facility. This self-serving idealism is challenged by each of four kinds of debate over control of corporate property.

The earliest debate over control involved management and labor, until in our own times some recognition is being given to worker ownership, e.g., by means of ESOP's in the United States. But as is often noted, e.g., in such horror stories as that involving South Bend Lathe in Indiana, mere ownership does not necessarily include control.

The second kind of debate has to do with the respective property rights of stockholders and management. Received doctrine has it, of course, that the stockholders are the true owners of the companies whose stock they own. But it is manifest that management exercises effective control over most companies, at least those that are publicly held, except, for example, when a takeover bid proves successful.

The third kind of debate has been set off by disenchantment with the paternalistic model of corporate/community relationships. As one long trusted company after another resorts to "downsizing" and corporate flight, the loyalty of their employees, even those on the management level, is

being irremediably shattered.[37] Equally disillusioned are communities that had come to think of these enterprises as permanent fixtures in their midst. But there is good reason to wonder why communities had become so trusting in the first place. For, it is usually they that had been controlled by the corporations, and not the other way around. The Pullman Company, for example, literally owned the town of Pullman, Illinois, and ruled it like a feudal lord; and, in a somewhat more subtle way, the rubber companies controlled Akron, Ohio, just as the steel mills controlled Gary, Indiana, and transnational corporations, like colonizers of old, control the communities in developing countries where they choose to locate a plant or operation of some kind.[38] Such corporation/community relationships are commonplace; the opposite kind of relationship, or, better, one characterized by truly cooperative attention to mutual interests, is still rare.

The fourth kind of debate involves the relationship between a corporation and a host government, whose domain may be as small as a village or as vast as a nation. Concern about their respective property rights is, of course, closely related to the preceding issue with respect to the community; but the emphasis here is more likely to be not on contract but on eminent domain and expropriation. Here again, as leaders in developing countries have learned, merely owning a controlling interest in a business is of little value if one does not also control the political and economic environment, often global, in which that business is conducted.[39] But this problem is not in principle any more insoluble than was, say, that of emancipation when slavery was widely presumed to be an appropriate application of the received doctrine regarding ownership of property.[40]

2. *Social preemption of private property*

The Fifth Amendment of the U.S. Constitution requires that the federal government and, via the Fourteenth Amendment, state governments (or subsidiaries thereof) take private property only for "public use." As applied particularly to eminent domain, there was concern from earliest times that public use might be interpreted to mean nothing more than public benefit. There was good reason for such concern; but as we can now see by hindsight even that standard would be immeasurably superior to what has been the de facto standard, namely, benefit to corporations.

This abdication of public responsibility commonly takes the form of deference to the decisions of local courts. Such deference would be constructive if local courts were fora in which a community's true interests are deliberated. But these courts are usually under pressure to approve the pet project of one or more corporations cloaked in the mantle of "public use." The practical significance of the following analysis, therefore, depends on the extent to which a truly participatory community is able to have its real interests impartially adjudicated. For, the letter of the law is fairly straightforward; what is crucial is how "public use" is interpreted.

In *Bloodgood v. Mohawk Hudson Railroad Co.*, 18 Wend. 9 (N.Y. 1837) a concurring opinion worried about the implications of identifying public use with public benefit because this would diminish the property rights of the individual against whomever the government represents. This equation, however, prevailed both in the East, e.g., in *Scudder v. Trenton Delaware Falls Co.*, 1 N.J. Eq. 694 (1832), and in the West, e.g., *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896). But in the Midwest, courts tended to favor a much more conservative approach to taking, limiting public use to what is absolutely necessary, e.g., in *Ryerson v. Brown*, 35 Mich. 332 (1877).

In 1936 the New York courts found that urban renewal constitutes a public use even if some structures affected are not substandard and some private firms are involved in the project: *New York City Housing Authority v. Muller*, 270 N.Y. 333, 1 N.E.2d 153 (1936). The *Muller* reasoning became a national standard in 1954 when the U.S. Supreme Court endorsed it in *Berman v. Parker* (348 U.S. 28). Since then public benefit has been given such varied meanings as to be virtually indistinguishable from private, i.e., corporate, benefit. For example, a New York court saw nothing improper in the condemnation of thirteen city blocks and all the businesses, however thriving, on those blocks: *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 NY2d 379, 190 NE2d 402 (1963); and a Michigan court blithely upheld the condemnation of an even more extensive urban neighborhood so that General Motors could

allegedly provide jobs and taxes by constructing a new plant: *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981).

The *Poletown* case is an extreme example of corporate interests dictating the meaning of public use. In legal shorthand, this case stands for the proposition that, in Michigan, potential jobs and taxes are enough to meet the public benefit test. But the realities are quite different. For, in this instance a private corporation defined the terms and conditions of the project, an automobile assembly plant, and gave the City of Detroit a deadline for compliance. The City agreed, with the result that 465 developed acres in Detroit and neighboring Hamtramack were condemned at a cost to taxpayers of $200 million. Some 3400 people lost their homes; and 1176 structures, including housing and business property, 3 schools, 16 churches and a hospital, were destroyed. Jobs? Most of these have gone to robots, since the new plant is heavily automated. Taxes? These will come to $10–20 million/year after 12 years of 50% tax abatement, meaning that in economic terms alone it will take a quarter of a century to recoup the unadjusted dollars spent.

Happily, not all eminent domain cases follow the path of least resistance to corporate fiat. Parking garage projects, for example, have had difficulty passing the public benefit test, e.g., in San Francisco in 1955,[41] and in South Carolina in 1978.[42] Also unsuccessful was a recent proposal to construct a complex that included not only a parking garage but also retail stores, a museum and a monorail terminus in Seattle.[43]

The Seattle case is of particular interest because it involves the application of a model statute that minimizes the likelihood of public use being determined by corporate considerations alone. [Id. 638 P.2d at 556]. The statute in question reads as follows:

> Private property shall not be taken for private use . . . . Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public . . . .[44]

Just as the State of Washington teaches us about community protection against abuse of eminent domain, the State of Hawaii has recently given us a lesson about community-based use of eminent domain. The case in question is *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321 (1984), in which the United States Supreme Court upheld Hawaii's use of eminent domain to redistribute land that had been monopolized by a small minority of owners, resulting in artificially high prices on what little land was available for purchase.

The problem faced by Hawaii was that a very small number of families controlled most of the land in Hawaii, owning as much as 50% of it and leasing even more from state and federal governments, leaving only some 20% in the hands of small private owners. Other homeowners in Hawaii had to content themselves with long-term leases of the land under their houses. To remedy this maldistribution of land, the state legislature passed the Hawaii Land Reform Act of 1967,[45] which authorized the state to condemn land being leased, hold a public hearing, and upon a favorable determination sell the heretofore leased land to the lessee. The Ninth Circuit branded this statute as "a naked attempt . . . to take the private property of A and transfer it to B solely for B's private use and benefit."[46] But the U.S. Supreme Court saw the matter differently and found for the state.

Deferring as usual to the state government's prerogatives in these matters, the Supreme Court applied only a low-level rational basis test to the Hawaii legislation and found it to be a "comprehensive and rational approach to correcting market failure."[47] This was enough, because

> where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.[48]

Decisions such as these are encouraging to one who favors recognition of the interests of the community in law. But they go only so far, partly because of a traditional unwillingness to consider property other than real estate in the same way. This was shown, for example, in the Court's recent denial of certiorari to the "plant closing" case of the (now) Los Angeles Raiders, who moved their franchise but not their stadium from Oakland.[49] The building of sports stadiums has long benefited from favorable eminent domain rulings.[50] Some legal scholars, such as

Charles Reich, Frank Michelman, and Joseph Sax, have argued that even entitlements, e.g., under Social Security, should be protected as property.[51] This step, which would add a valuable tool to the communitarian's chest, the Supreme Court has been manifestly unwilling to take.[52] But in the law of public use there is a little used basis for a more communitarian approach to plant closings and new technology.

This approach would surely be for the public benefit, so would be consistent with traditional jurisprudence. For, private property has long been viewed both in theory and in practice as subordinate to the public benefit. Admittedly, our courts have had some difficulty locating the public benefit beyond the walls of the corporate boardroom. There is, however, some precedent for doing so – not only in scholarly argument but in emerging aspects of property law. With such considerations as guides, we might yet learn to view the Commerce Clause of the United States Constitution not as a synonym for 'business necessity' but as a federal prerogative that is limited by the basic American value of community.[53]

Notes

[1] Judge Thomas Lambros, quoted in Staughton Lynd, 'What Happened to Youngstown', *Radical America* 15, no. 4 (July–August 1981), 43–4. See *Local 1330, et al. v. U.S. Steel*, 492 F. Supp. 1 (N.D. Ohio 1980), *aff'd in part and rev'd in part*, 631 F.2d 1264 (6th Cir. 1980); and discussion of theories of case in Lynd, *The Fight Against Shutdowns: Youngstown's Steel Mill Closings*, San Pedro, CA: Singlejack Books, 1982, pp. 139–46, 160, 162–5, 175–6, 178–9.

[2] Gus Edgren, 'Employment Adjustment to Trade under Conditions of Stagnating Growth', in D. H. Freedman, ed., *Employment Outlook and Insights*, Geneva: International Labour Office, 1979.

[3] 'The Hollow Corporation', *Business Week*, March 3, 1986, pp. 60, 61–2.

[4] Barry Bluestone and Bennett Harrison, *The Deindustrialization of America: Plant Closings, Community Abandonment, and the Dismantling of Basic Industry*, New York: Basic Books, 1982, pp. 145–7.

[5] Business Week, March 3, 1986, p. 58. Regarding semiconductors in particular, see 'Is It Too Late to Save the U.S. Semiconductor Industry?', *Business Week*, Aug. 18, 1986, pp. 62–7.

[6] 'The End of Corporate Loyalty?', *Business Week*, Aug. 4, 1986, pp. 42–9.

[7] See Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property*, rev. ed., New York: Harcourt, Brace & World, 1968 (first published New York: Macmillan, 1932).

[8] *Business Week*, March 3, 1986, p. 72.

[9] *Business Week*, June 16, 1986, p. 101. Ure's expression will be found in his *The Philosophy of Manufactures*, London: C. Knight, 1835, p. 20.

[10] Harry Braverman, *Labor and Monopoly Capital: The Degradation of Work in the Twentieth Century*, New York and London: Monthly Review Press, 1974.

[11] See Edmund F. Byrne, 'The Laborsaving Device: Evidence of Responsibility?', forthcoming in *Philosophy and Technology* IV, ed. Paul T. Durbin, Dordrecht/Boston: Reidel.

[12] A pertinent illustration of this attitude is the paternalistic rationale for secrecy in *General Motors Corp. (GMC Truck & Coach Division)*, 191 N.L.R.B 951, 952 (1971): (D)ecisions (that involve) a significant investment or withdrawal of capital . . . are essentially financial and managerial in nature. . . . (They) oft times require secrecy as well as the freedom to act quickly and decisively. They also involve subject areas as to which the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives.

[13] For a detailed review of NLRB policies in regard to laborsaving managerial decisions, see Philip A. Misciamarra, *The NLRB and Managerial Discretion: Plant Closings, Relocations, Subcontracting, and Automation*, Labor Relations and Public Policy Series No. 24, The Wharton School, University of Pennsylvania, Philadelphia, PA, 1983.

[14] See James B. Atleson, *Values and Assumptions in American Labor Law*, Amherst: Univ. of Massachusetts, 1983.

[15] See, for example, Laurence B. Evans, 'Industrial Uses of the Microprocessor', in *The Microelectronic Revolution*, ed. Tom Forester, Oxford: Basil Blackwell, 1980, p. 144.

[16] 'High Tech to the Rescue', *Business Week*, June 16, 1986, p. 101.

[17] See Werner Sengenberger, 'Federal Republic of Germany', in *Workforce Reductions in Undertakings*, ed. Edward Yemin, Geneva: International Labour Office, 1982, pp. 85–101.

[18] See John Gennard, 'Great Britain', in Yemin, *op. cit.*, pp. 107–39; John Evans, *Negotiating Technological Change: A Review of Trade Union Approaches to the Introduction of New Technology in Western Europe*, Brussels: European Trade Union Institute, 1982, pp. 52–61.

[19] Under federal law there are prohibitions against discharge of an employee for union organizing activity (NLRA); for claiming rights under Title VII of the Civil Rights Act of 1964 or the Fair Labor Standards Act of 1976 or the Occupational Safety and Health Act of 1970 or the Age Discrimination in Employment Act of 1967; or for having one's wages garnished (the Consumer Credit Protection Act

of 1976). Various state legislatures have protected employees against discharge for political activity, because of physical handicaps, for serving on a jury, for refusing to take a lie detector test, or, quite commonly, for filing a workers' compensation claim.

[20] National Law Journal, January 20, 1986.

[21] These recommendations parallel those in Bluestone and Harrison, *op. cit.*, pp. 231–62. See also Table 6.7, *ibid.*, p. 163.

[22] E. F. Schumacher, *Small Is Beautiful: Economics as if People Mattered*, New York *et al.*: Harper & Row, 1975.

[23] R. H. Tawney, *The Acquisitive Society*, New York: Harcourt, Brace, 1920.

[24] Kirkpatrick Sale, *Human Scale*, New York: Coward, McCann & Geoghegan, 1980; Robert Nisbet, *The Social Philosophers: Community and Conflict in Western Thought*, New York: Crowell, 1973.

[25] These environmentalist ideas are based to some extent on the work of Christopher Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, Los Altos, CA: William Kaufman, Inc., 1974.

[26] John E. Cribbett, William F. Fitz, and Corwin W. Johnson, *Cases and Materials on Property*, 3rd ed., Mineola, NY: Foundation, 1972, pp. 1065–80.

[27] Spencer H. MacCallum, *The Art of Community*, Menlo Park, CA: Institute for Humane Studies, 1970.

[28] See William Michael Treanor, 'The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment', 94 *Yale L.J.* 694–716 (Jan. 1985).

[29] Gottfried Dietz, *In Defense of Property*, Baltimore and London: Johns Hopkins, 1971, 1963, p. 69.

[30] *Ibid.*, pp. 78–84.

[31] Pierre Joseph Proudhon, *What Is Property?* transl. Benjamin R. Tucker, New York: Fertig, 1966 (first published in English c. 1890), p. 368.

[32] Dietz, *op. cit.*, pp. 98–9, 100–2.

[33] *Ibid.*, pp. 102–3.

[34] *Ibid.*, pp. 103–8.

[35] Illustrative of current philosophical discussion of corporate responsibility are the following three works all published in Englewood Cliffs, NJ, by Prentice-Hall: Thomas Donaldson, *Corporation and Morality* (1982); Clarence Walton, ed., *The Ethics of Corporate Conduct* (1977); Patricia H. Werhane, *Persons, Rights, and Corporations* (1985). See also Brent Fisse and Peter A. French, eds., *Corrigible Corporations and Unruly Law*, San Antonio: Trinity University, 1985.

[36] This is because the courts respect the managerial prerogative of determining whether and how to invest corporate wealth. See Misciamarra, *op. cit., passim.*

[37] See above, Note 6.

[38] See John Gibbons, *Tenure and Toil*, Philadelphia: Lippincott, 1888, pp. 148–9, 183–91; Stanley Buder, *Pullman: An Experiment in Industrial Order and Community Planning, 1830–1930*, New York *et al.*: Oxford, 1967; Alfred Winslow Jones, *Life, Liberty, and Property*, New York/London: Lippincott, 1941; Barbara Dinham and Colin Hines, *Agribusiness in Africa*, Trenton, NJ: Africa World Press, 1984.

[39] See Dinham and Hines, *op. cit.*; Richard J. Barnet and Ronald E. Muller, *Global Reach: The Power of the Multinational Corporations*, New York: Simon & Schuster, 1974, pp. 254–302.

[40] Among the innumerable studies of slavery, see in particular the Marxist analysis in Elizabeth Fox Genovese and Eugene D. Genovese, *Fruits of Merchant Capital: Slavery and Bourgeois Property in the Rise and Expansion of Capitalism*, New York and Oxford: Oxford Univ., 1983; and the religious analysis in David Brion Davis, *The Problem of Slavery in Western Culture*, Ithaca, Cornell Univ., 1966.

[41] *City and County of San Francisco v. Ross*, 44 Cal.2d 52, 279 P.2d 529 (1955).

[42] *Karech v. City Council*, 271 S.C. 339, S.E.2d 342 (1978).

[43] *In re The Westlake Project*, City of Seattle, 96 Wash.2d 616, 638 P.2d 549 (1981).

[44] WASH. CONST. art. 1, par. 16 (amend. 9). See *In re The Westlake Project*, 638 P.2d at 556.

[45] Hawaii Rev. Stat. par. 516–1 to 83 (1976 and Supp. 1982).

[46] 702 F.2d at 798.

[47] 104 S.Ct. at 2330.

[48] *Ibid.* at 2329–30.

[49] *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 646 P.2d 835, 183 Cal. Rptr. 673 (1982), *cert. den.*, 30 June 1986.

[50] See Susan Crabtree, 'Public Use in Eminent Domain: Are There Limits after *Oakland Raiders* and *Poletown*', 20 *Calif. Western L. Rev.* 82, 88–90 (Spring 1984).

[51] See Gregory S. Alexander, 'The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis', 82 *Columbia L. Rev.* 1545–99 (Dec. 1982). See also Margaret Jane Radin, 'Property and Personhood', 34 *Stanford L. Rev.* 957–1015.

[52] See *Flemming v. Nestor*, 363 U.S. 603 (1960); *Board of Regents v. Roth*, 408 U.S. 564 (1972). Compare *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

[53] Although not the basis for much constitutional doctrine, reference to rights reserved to the people in the Ninth and Tenth Amendments to the U.S. Constitution is surely relevant to this claim.

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