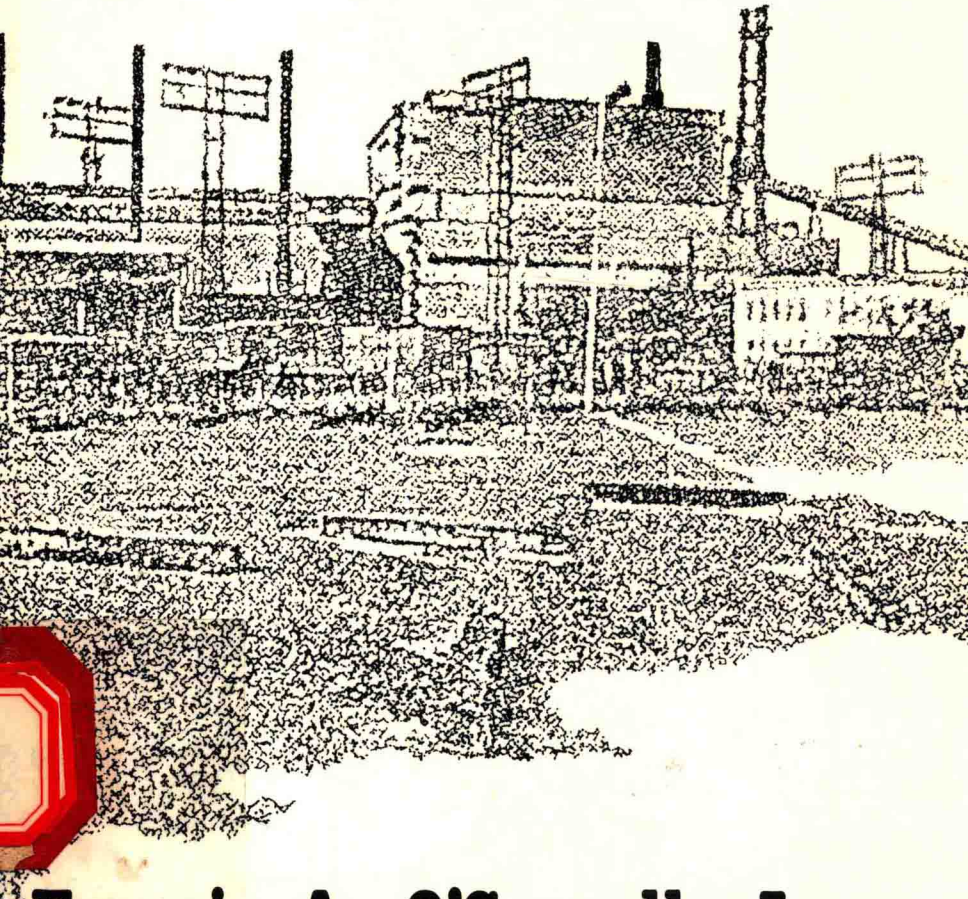
Plant Closings

Worker Rights,

Management Rights

and the Law



Francis A. O'Connell, Jr.

SOCIAL
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To Lonnie, whose patient understanding and
fierce protectionism made it possible

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The use of "we" throughout the text is neither regal nor modest, nor is it merely editorial. This book has been, save for its very last stages, a collaborative effort. The original idea was Professor Richard McKenzie's, and to the extent that the finished product contains any comprehensible economics, they are his. To the extent that it has a properly scholarly tone, that, too, is largely due to his benign influence. To the extent that it falls short in either of those respects, the responsibility is mine.

So, also, in respect of any other imperfections which may have crept in, notwithstanding the devoted and invaluable assistance of three crack labor law scholars—my friend Edward B. Miller, former Chairman of the National Labor Relations Board (NLRB), my stepson William F. Grant of the NLRB, and Professor Leonard Bierman of Texas A & M University. Credit (and no blame) belongs also to numerous other friends and former colleagues—Peter Nash, Jay Siegal, and John Jay stand out —whom I called upon, from time to time, for information or assistance, and who responded without fail and always helpfully.

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To all of them I give my deepest gratitude and add the hopeless wish that I have repaid them by writing a better book.

Frank O'Connell
Aptos, California
January 1986

PREFACE

We live in an age of rights. More accurately, perhaps, ours is an era characterized by an intense *preoccupation* with "rights" of one kind or another. We seem to be asserting rights, defining them, debating them—incessantly.* Some of those rights are traditional, in the sense that they spring from natural or constitutional law, statutory enactment, or the common law of contracts or torts. That is to say, they either inhere in or have been conferred upon the person or they derive from the ownership of property and entail the exercise of dominion over it. They are conferred by the legislature (or, as happens with increasing frequency these days, by the judiciary acting legislatively), or they arise out of contracts or other voluntary transactions. Examples come readily to mind: land-use rights (law), the right to unemployment insurance (legislature) and to an integrated education (judiciary), or the right to occupy a dwelling under a lease (contract). Standing atop them all, of course, are the natural, "unalienable" rights with which men are "endowed by their Creator" and the constitutional rights which they enjoy as members of a free society. All true rights in our society must stem from one or another of these sources.

Lately, however, we have seen the rise of what might be called pseudo-rights. Their roots are not to be found in laws or contracts. Indeed, they often are not rights in any real legal sense at all, but simply *desiderata* of one sort or another—often running counter to traditional legal principles. They are called "rights" for a very good reason: our society is generally and traditionally hospitable to rights and hostile to their suppression or infringement. Hence, to attach the nomenclature of rights to what, at bottom, may be little more than unsupported demands or aspirations has been found useful by partisans. Frequently, it makes possible the achievement of some goal which has proved difficult or impossible to achieve through traditional channels. Labeling the goal a right makes an enormous—often crucial—difference.

If the foregoing strikes some as excessively elementary, the excuse is that these reflections on the nature of rights seemed a necessary background against which to examine the various rights with which this study is concerned. In one way or another and to one degree or another,

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*See *Disabling America: The "Rights Industry" in Our Time* by Professor Richard E. Morgan, Chairman of the Department of Government at Bowdoin College (New York: Basic Books, 1984). An extreme example of the epidemic of "rights" terminology—of the tendency to confuse a claim on compassion with a right—was recently observed in California. A bumper sticker spunkily asserted: "Animals Have Rights Too." It appeared on a pickup truck with California plates, but, lest too much be read into that, it should be added that the bumper sticker proclaimed its source as The Fund for Animals in New York City.

the rights asserted by or on behalf of various actors in a plant-closing drama exhibit just about all of the characteristics we have just described, both for "rights" and for "pseudo-rights." If we are to sort them out and judge their merits, we must do so using the traditional criteria by which asserted rights are tested and conflicts of law are resolved.

What, precisely, is the content of "the worker's right to his job," to take one phrase which has been appearing with greater and greater frequency? In what respects is the right founded on traditional rights theory and in what respects might it be said to be merely a pseudo-right? Is it a sort of prescriptive right, acquired over time simply by working for a given employer? Is it something less—a right to notice, severance pay, and, perhaps, other benefits on termination, as prescribed in so-called plant-closing legislation? Is there a right in the job conferred by the National Labor Relations Act (other than those claims and entitlements which may result from collective bargaining under that law)?

Advocates of each of these views exist. Their rationale needs to be analyzed. A sorting out of substance and terminology is an indispensable prerequisite to any attempt to assess the validity of the claim of either workers' rights or management rights in plant-closing situations and to any attempt to resolve analytically the conflict between the two. Clarifying the terms of the public debate on so important a subject would seem, in itself, to be a worthy objective for this study.

But it has even more ambitious objectives: By defining and delimiting the terms "workers' rights" and "management rights," and proposing accommodations where they conflict, this study hopes to narrow the area of genuine conflict and thereby contribute to its peaceful and appropriate resolution. Among other things, it hopes to demonstrate to the advocates of so-called plant-closing legislation that a good deal of what they seek to accomplish is already in place or achievable under existing law—both contract and tort law, as well as the National Labor Relations Act (NLRA).

This study aims also at the policy makers. As in the case of any other right or privilege, there are strong arguments to be made against doctrinaire and unrestrained assertion or enforcement of rights, however genuine and well founded they may be. (Needless to say, the argument is even more powerful in the case of rights of dubious provenance.) "Your right to swing your arm stops where my nose begins" is not just a colorful aphorism. It is a fundamental principle of a society of free and responsible individuals. It is another way of saying that every right gives rise to a duty—sometimes negative (keep off my grass), sometimes positive. In the latter case, someone (employers, taxpayers) has a duty to respond to the claimant's claim.

Obviously, then, a right in respect of a job (whatever it may consist of) implies some invasion or diminution of the right of the owner of the enterprise which provides the job, i.e., the employer. It may be accomplished by mutual agreement (the preferred mode in our transactional society) or it may be imposed by law. If the latter, what justification can be offered for it? And how far may it extend before it becomes manifestly improper, both as an invasion of property rights and as a matter of legal and socio-economic policy?

More specifically, how widely can the concept and costs of "workers' rights" be applied in plant-closing situations before they can be said to interfere unduly with (a) management's inherent right to run the enterprise, and (b) the efficacy and mobility of capital in a free market economy? Conversely, how absolute are management rights? How much interference with them can be argued to be a proper and essential ingredient of a humane economy? These questions have never been more timely, given the incessant assault on property rights which has come to characterize our polity. Policy makers have never been more in need of enlightenment and guidance. Happily, this study offers both!

We begin with an overview of the origin of the problem and the nature of the issues with which our study deals. This is followed by a brief examination of so-called plant-closing legislation. What rights does such legislation aim at conferring? On whom? At whose expense? What are the arguments for and against it? We then proceed to an area which has been generally overlooked in the workers' rights debate: the National Labor Relations Act. The object is to examine the way in which a law already on the books—the Act recently celebrated its fiftieth anniversary—has been or can be utilized to accomplish (for unionized workers, at least) much of what is sought by plant-closing laws. This involves an extensive analysis of decisions of the National Labor Relations Board (NLRB) and the courts, chiefly in the area of the duty imposed by the Act on employers to bargain with the unions of their employees concerning managerial decisions which will eliminate jobs. Again, as in the case of plant-closing legislation, this study evaluates what is aimed at in the way of workers' rights, what has been achieved, and with what impact on the employers involved, on the rest of the economy, and on the law.

We then turn to an analysis of "job rights" as a legal and economic concept, and we explore sources of workers' rights to be found in traditional contract and tort law.

We conclude with some modest proposals to employers and unions for the accommodative resolution of the tensions between workers' rights and management rights.

PREFACE

A personal postscript: The author spent forty years in the field of labor law and employee relations. Except for a brief stretch of government service, all of those years were spent on the management side of the table. It would be fatuous to assert or assume that the present writing is not influenced by that experience—that it does not reflect, as Justice Cardozo put it, "the likes and dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man."* We are each the product of our own cumulative experience, and we carry it to each new task we address.

I have tried, nevertheless, to be objective, fair, *professional.* Absolute evenhandedness is probably beyond my grasp, after all those years on one side, and it would produce, in any case, a study at once stupifyingly bland and flagrantly disobedient of my editor's stern injunction to "express a point of view."

With these confessions I hope to disarm and engage readers whose experience and sympathies may lie on the other side of the playing field.

Francis A. O'Connell, Jr.
Aptos, California
December 1985

*Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1971), p. 167.

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I. The Problem, The Issues, and The Scope of The Study

"Creative destruction" was the phrase that Joseph Schumpeter, the late, great Harvard economist, coined to describe the process by which a capitalist economy sustains and continuously renews itself. The process involves innovation, improvement, modification—and, now and then, failure and abandonment. Sometimes the process is activated by obsolescence, sometimes by technology, and sometimes by costs of production or marketing which come to be deemed intolerable. Depending on the nature of the activating circumstances, companies have folded, changed direction, or relocated operations to areas closer to markets or to areas where labor costs were less or where other advantages were present or disadvantages absent.

The process is not without pain and casualties. Companies—whole industries—have disappeared. The people who depended on them for a living were faced, often with little advance notice, or sometimes none at all, with the fact that their jobs had disappeared—in all likelihood permanently. Sometimes other jobs were available, but increasingly the displaced employees found themselves in a locality where high unemployment was endemic and permanent. Some looked for and found employment in other regions.[1] Others did not. Some never did. The transition from employed to unemployed, producer to pauper, traumatized some permanently. Ghost towns in the West, the abandoned textile and shoe towns of the Northeast, and the "pockets of poverty" in Appalachia testify to the fact that some places and some people never recovered.

Throughout industrial history until relatively recent times, such dislocations and tragedies were treated more or less as though they were natural disasters. The right of the owner of a business to shut it down or move it or otherwise obey economic imperatives was unabridged. The consequences for employees of the enterprise were considered unfortunate but inevitable. People were thrown on their own resources just as if the plant had been swept away by a hurricane or a flood. Some made

it. Some did not, but, in any event, that was not in times past considered to be a case for intervention by government. Still less was it deemed a duty of the beleaguered enterprise to deploy its resources in cushioning the impact on employees.

Beginning with the Great Depression of the 1930s, however, the pattern has changed. Government intervention in all kinds of social and economic situations became acceptable, and governments soon began shifting some of the burden of economic dislocation to business. (Unemployment insurance is an example.) Whether a cause or an effect of this massive change in our prevailing notions of political philosophy and economy, public attitudes toward those suffering economic adversity changed. Society had always acknowledged a duty toward its less fortunate members—toward those unable to help themselves—but now compassion was expanded to reach those disadvantaged by economic forces beyond their control. This marked a quantum change from the prevailing ethos during the Great Depression when, as has frequently been remarked, the unemployed felt a great sense of personal guilt from the mere fact of their unemployment, however blameless they were.[2] The "Politics of Compassion" became the accepted order—a signal, perhaps, that a new stage of "advanced capitalism" had been reached. In any case, the economic phenomenon described generically as "plant closing" (as used in this study, the term embraces everything from a going-out-of-business shutdown to a geographic relocation of operations, unless some further specificity is required) began to attract attention. Widely publicized industrial movements from the so-called Snow Belt to the Sun Belt undoubtedly were a contributing factor, as was the recession of the early eighties. Some of the attention paid to the phenomenon was purely economic. Some of it was clearly political, and, in some cases, the therapy of choice was fundamental change in our institutional structure and our political arrangements. But all of it was stimulated by the problems created by plant closings. Management decisions to close or relocate plants, and the implementation of such decisions, began to come under scrutiny and attack as being exclusively oriented toward costs and profits, and exhibiting little or no concern for costs in human terms. The result has been a plea for government intervention to regulate plant closures and to require compensation payments to those affected by them. Not surprisingly, the debate centers on rights—the relatively new concept of "workers' rights in their jobs" versus the traditional right of the owner of a business to manage it and to deploy his assets as the economic circumstances require.

The management side of this rights debate has trouble matching the revolutionary appeal of a slogan like "workers' rights." Its arguments,

though solid, are simply not as exciting.[3] They rest on property rights and the imperatives of a market economy. The right of managers to manage—free of any need to consult with unions over managerial decisions or to buy off "job rights"—is unquestionable in a property-based economy, they argue, and ought not to be clouded or encumbered, at least not any more than it already is. The proper discharge of the responsibility of managers to manage capital assets prudently, the argument runs, is in the interest not just of the owners of those assets, but also of the economy at large and, therefore, of the larger society. That responsibility is not borne by, and cannot be shared with, employees and their unions, for it is irresponsible to demand the involvement of persons in decisions when they have no responsibility for their outcome. Moreover, opponents argue, to delay essential management decision making or its implementation by requiring that employees and their unions be given an opportunity to participate, and to add still other and more explicit costs to essential management reaction to economic conditions, is to place a heavy burden on the enterprise and to cripple that mobility of both capital and labor which is an indispensable element of a free market economy. Marginal plants will be driven under and new plants and new jobs will never come into existence. Thus the sides lined up several years ago.

But the debate is not just between the advocates of workers' rights (whatever our analysis may show them to consist of) on the one hand and the defenders of property rights or management rights on the other, although surely that is the most visible aspect of the debate. The case for workers' rights is more complex, and the arguments against the concept as it has been advanced are more subtle than labels or slogans make it seem.

Can there be an inherent right in or to a job which is derived simply from working at that job over a period of time? Can the legislature constitutionally create workers' rights by inhibiting the traditional right of the owner to shut down his plant or to move it? Is the National Labor Relations Board authorized to create such a right out of the collective bargaining provisions of the National Labor Relations Act?

If the answer to any or all of these questions is "yes," does the law thereby create an impediment to the mobility of capital which is inconsistent with a free market economy and, on that account, ultimately injurious to the interest of the workers in whose behalf the inhibitions upon plant closure are invoked in the first place? Probably. But the dislocated workers and their unions understandably take the shorter-range view of their interests. When Jerry J. Jasinowski of the National

Association of Manufacturers asks[4] "Does it make sense to jeopardize competitiveness and the employees of a California plant because an Illinois plant is no longer viable?" the answer he gets back from Illinois is loudly affirmative. To those employees it makes all kinds of sense!

The contest between the conflicting views is currently being played out in all three arenas of our government: legislative, executive, and judicial. The legislative approach involves attempts, at both federal and state levels, to enact laws to regulate and to impose costs upon plant closings; the executive aspect chiefly involves administrative interpretations and decisions of the National Labor Relations Board under the National Labor Relations Act;[5] and the judicial role involves (a) the review by the federal appellate courts (especially the Supreme Court of the United States) of the decisions of the NLRB under the Act, and (b) more recently, lawsuits for damages brought by employees displaced by plant closings. This study examines all three areas, commencing with the legislative (the drive for so-called plant-closing laws).

II. The Legislative Approach

Since 1979 there have been upwards of two dozen plant-closing bills introduced in the legislatures of various states, as well as in the United States Congress.

The state legislative proposals have a common thrust: the imposition of costs on plant closings—short, however, of attempting otherwise to prevent or prohibit such closings.[1] As described by Professor Finis Welch, a prominent labor economist at the University of California, Los Angeles, who studied them all in 1984, "provisions of proposed legislation encompass requirements for specific periods of notification to employees (up to two years in some cases), severance pay—which would be determined by length of service and past earnings—and continuation of health insurance benefits. Restitution to affected communities has been proposed, as have government subsidies to worker or community groups for purchase of defunct plants or companies."[2] Professor Welch finds all such legislation counterproductive, not only for the business involved and other businesses which might otherwise arise following a plant closure, but also for the employees involved and other workers who will not be employed in new enterprises.

Although legislation is very much a part of the workers' rights debate these days, it is interesting that none of the state bills undertakes to create or confer a right *in* or *to* a job, such as would require employers to "buy out" such rights, and would permit employees (by refusing to "sell") to delay, block, or compel the revocation of a decision to close a plant. The extent of the right created by state plant-closing proposals, therefore, is not much more than simply an entitlement to notice and compensation when jobs are extinguished. There is no employee right to *prevent* the extinguishment.

The same thing cannot be said, as we shall see, of the rights which employees enjoy under the National Labor Relations Act. Although recent interpretations of the Act fall short of explicitly creating a right *in* the job, they go a long way in that direction by entitling unions and their members in certain circumstances to participate (via the mandatory