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Bruce D. Fisher

Francois Lenglart

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BRUCE D. FISHER* AND FRANCOIS LENGLART**

I. INTRODUCTION

Marlene DuPre sold women's sweaters in Marks & Spencer's Paris store. She had worked there for five years and considered her position secure, given Marks & Spencer's strong financial structure and the general positive acceptance of Marks & Spencer's products in France. A turn of events, including a sales decline coupled with a generally weakened demand for Marks & Spencer's products, resulted in a sudden decision by Marks & Spencer's to close all of its French stores and dismiss DuPre from her job. Was this legal under French and EU law?

Bill Foster drove to work in Atlanta, Georgia with the confidence of one who works for a "blue chip" corporation that is a Dow Jones Average component and a stock found in many mutual fund portfolios. Bill was about to get the shock of his life: He learned that the Coca-Cola company was about to reduce its world-wide workforce by 20 percent, and a sizable number of the Atlanta employees would be released from their jobs.

* Visiting Professor, HEC School of Management, Paris; Professor, University of Tennessee.

** Associate Professor, HEC School of Management, Paris.

"We must lower the labor costs of our company or I'll lose my job," said Ralph Morgan, CEO of Bigger Industries. "If our company fails to be competitive, our stock price could fail to increase or even drop, and I would not get a year-end bonus and my stock options in our company would be worthless. Therefore, as a manager, I have a duty to the stockholders, the firm, and to myself: I must close our local factory and move those jobs to Mexico or Hong Kong where hourly labor costs are lower. It's a tough decision, but as manager, I must make it, even though it means friends in my community will lose their jobs."

The individuals in the first two scenarios above are fictional. Nonetheless, the recent job losses encountered by loyal employees of blue chip companies, such as Marks & Spencer and Coca-Cola, are real.[1] Paradoxically, as the third scenario suggests, a "lifeboat" mentality exists among top managers regarding the need for cuts in middle and blue-collar corporate workforces.

Many executives see cuts in the workforce as essential to keep the corporate ship afloat.[2] There is a perception that top corporate managers are the beneficiaries of such cuts because they believe corporate survival and executive bonuses hinge on such cuts.[3] Line workers are thrown overboard to the sharks, while those still safely in the lifeboat—top managers—benefit by receiving executive compensation that is often lavish[4] and extravagant.[5]

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1. Mark Born, *M&S European Staff March on Oxford Street*, DAILY TELEGRAPH, May 18, 2001, at 10; Constance L. Hays, *Coca-Cola to Cut 20% of Its Staff After Woes at Home and Abroad*, N.Y. TIMES, Jan. 27, 2000, at A1.

2. *E.g.*, Floyd Norris, *Former Sunbeam Chief Agrees to Ban and a Fine of $500,000*, N.Y. TIMES, Sept. 5, 2002, at C1. "Mr. Dunlap, who embraced the nickname Chainsaw Al, became famous in the 1990's as he laid off thousands of workers at Scott Paper in what he said was a necessary move to cut costs." *Id.*

3. *E.g.*, *id.* "His autobiography, 'Mean Business,' became a best seller after he joined Sunbeam. 'Most C.E.O.'s are ridiculously overpaid,' he wrote in the book, 'but I deserved the $100 million I took away when Scott merged with Kimberly-Clark.'" *Id.*

4. *See, e.g.*, Alan Cowell, *Marks & Spencer Reports Another Loss*, N.Y. TIMES, July 12, 2001, at W1.

> Angry shareholders criticized the chief executive of Marks & Spencer, the British retailer, today after the company reported its 12th successive quarterly slide in sales but asked investors to give its directors larger rewards. About 2,500 shareholders crammed the annual meeting here to vote on a remuneration plan that would double the amount of stock given to top managers if they met performance targets. With the support of institutional investors, the plan was approved, but not before small investors vented their frustration at being asked

> to approve the increases without seeing a turnaround in the company's fortunes. . . . [T]he company's share price is still 17 percent lower than it was when [CEO Vandervelde] took over, and its market value peaked four years ago and, at around $10 billion, is less than half its 1997 high. Despite the poor figures, Marks & Spencer stock rose by as much as 3.5 percent, since the quarterly figures met analysts' expectations.

Id.

5. *See, e.g.*, Constance L. Hays, *A Hefty Farewell Package for Former Coke Executive*, N.Y. TIMES, Mar. 4, 2000, at C2.

> Coca-Cola's former chairman and chief executive left the company last month after two turbulent years in which Coke's growth stagnated, its earnings fell and its image became stained by problems. . . . Nevertheless, the executive, M. Douglas Ivester, is walking away with a generous bon voyage package—a total of $17.8 million in payments and other benefits, like stock options that can be immediately vested, as well as the release of nearly two million shares of formerly restricted stock worth about $97.7 million at the close of trading yesterday. . . . The board also wanted to retain Mr. Ivester, who is no longer a director, as a consultant. Another reason for the multiple payments is 'to preclude Mr. Ivester from competing in the nonalcoholic beverage industry' until 2007, the spokesman said. The package includes $704,400 in annual pension payments, plus an additional $795,600 a year beginning this month and continuing until March 2002, when Mr. Ivester turns 55. At that point, Mr. Ivester will begin receiving $675,000 a year, beyond his pension, through his lifetime and that of his wife, Kay. He will also be paid $1.5 million a year for three years, starting this year, in lieu of what he might have received under long-term incentive plans that Coke offers its senior executives. Elsewhere the proxy notes that 'neither Mr. Ivester nor Mr. Daft earned an award for the performance period ended Dec. 31, 1999.' And Mr. Ivester will receive $675,000 a year for 'consulting services' from 2002 through 2007, the proxy said. . . . One money manager expressed dismay at the size of the package, which also includes a laptop computer, cellular phones, club dues through 2001 and the title to a 1996 Mercury Grand Marquis—Mr. Ivester's company car. 'This compensation package is outrageous, considering the mediocrity of performance,' said Fredric E. Russell, a Tulsa, Okla., money manager who recently sold his stake in Coca-Cola. 'And it raises serious questions about whether Coca-Cola can really be clear about turning the ship around for its shareholders. This stands as a monument to the close, cozy, and perhaps nefarious relationship between the board of directors and top management.'

Id. See also Lucent Discloses Pay for Ex-Chief, N.Y. TIMES, Aug. 14, 2001, at C9.

> Lucent Technologies Inc. said today that it would pay its former chairman, who was dismissed last fall, a severance package that includes a $5.5 million one-time payment and assumption of bank loans. The company, based in Murray Hill, also said it would assume $4.3 million in loans that the former chairman, Richard McGinn, had with two banks. The three year loan by Lucent is at a competitive interest rate and is backed by real estate Mr. McGinn owns. The details were disclosed in a filing with the Securities and Exchange Commission. Mr. McGinn, who was also the chief executive, already receives about $1 million a year under the pension plan he was eligible for, according to a Lucent proxy statement filed in February. A portion of Mr. McGinn's stock options were also vested, although all of them are worth less than Lucent's current stock price of $6.45 a share, the company said in the filing.

This paper first presents a comparison of France and the United States from an economic and social perspective. The paper then discusses the macroeconomic forces that have led to downsizings in mature economies such as France and the United States. Part III compares the legal systems of the two countries, including a brief comparison of the business judgment rule, which empowers corporate managers to restructure corporations and lay off employees. In addition, it describes the legal "safety net" that consists of plant closing notification requirements, unemployment compensation, and health benefits available to downsized workers.[6] Part IV compares the legal "safety net" in these two nations to examine from the employees' standpoint the extent to which it reduces the severity of downsizing. Part V concludes by

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Id. Lucent's common stock was worth $70.66 per share at one point in the year 2000. Gregory Zuckerman & Dennis K. Berman, *Lucent Debt Is Downgraded by Rating Agencies*, N.Y. TIMES, Feb. 13, 2001, at B7. *But see* John Tagliabue, *Alstom's Ex-Chief Rejects Severance Pay Package*, N.Y. TIMES, Aug. 19, 2003, at W1.

> Among this summer's oddities, which have included a record-breaking heat wave and a lack of tourists, the French were startled today by news that a former senior executive at one of the country's largest conglomerates was foregoing a $4.6 million severance payout after being criticized for his management record. The manager, Pierre Bilger, the former chairman and chief executive of Alstom, which makes things like gas turbines, told his successor in a letter that he would repay the money, 4.1 million euros, because he did not want the issue to be a burden on present management. . . . Colette Neuville, the president of a French shareholder group that had criticized Mr. Bilger, said that 'a page of history had been turned' in French corporate affairs. She said it was the first time a French company had been reimbursed for severance pay approved by a company board, though she noted that there had been precedents elsewhere in Europe.

Id.

6. The downsizing phenomenon is not new to either the United States or France. *See* Hays, *supra* note 1; Norris, *supra* note 2. *See also*, *AOL Time Warner Will Cut More Jobs*, N.Y. TIMES, Aug. 22, 2001, at C4; Barnaby J. Feder, *Gateway Plans Foreign Cuts and Layoffs*, N.Y. TIMES, Aug. 29, 2001, at C1; *Citing Slowdown, Nasdaq Cuts 140 Jobs*, N.Y. TIMES, June 28, 2001, at C9; Danny Hakim, *Ford Plans to Cut 35,000 Employees and Shut 5 Plants*, N.Y. TIMES, Jan. 12, 2002, at A1 ("The Ford Motor Company announced its most sweeping cutbacks in two decades today, eliminating 35,000 workers, closing five plants and dropping four models."); Patrick McGeehan, *American Express to Cut Jobs as Junk Bond Losses Mount*, N.Y. TIMES, July 19, 2001, at C1; Simon Romero & Riva D. Atlas, *Lucent Announces Big Further Job Cuts, and a Large Loss*, N.Y. TIMES, July 25, 2001, at C1; Simon Romero, *Qwest to Cut 4,000 Jobs and Reduce Its Expenses*, N.Y. TIMES, Sept. 11, 2001, at C6. Downsizing, however, has not been confined to the United States. *See* Elizabeth Olson, *ABB, Reporting Lower Profit, Will Cut 12,000 Jobs*, N.Y. TIMES, July 25, 2001, at W1 ("Europe's largest electrical engineering group, reported a 21 percent drop today in half-year profit and said it would shed 12,000 jobs, or 8 percent of its work force, to try to counter the global economic slowdown."); John Tagliabue, *Alcatel Reports a Profit But Plans More Job Cuts*, N.Y. TIMES, July 27, 2001, at W1.

suggesting an alternative to massive layoffs of labor forces, which have been used in several U.S. organizations.

We selected France and the United States for two reasons. First, these two nations are the authors' respective residences. Professor Lenglart is French and Professor Fisher is American, though both authors have worked in each other's countries. Professor Lenglart practiced law with a Memphis, Tennessee law firm at an earlier point in his career, and Professor Fisher continues to serve as a visiting professor of company law at HEC School of Management, Paris in France. Second, we compare French and U.S. law because these two great Western nations need to understand one another, especially at a time when bridge-building between them is desirable.[7]

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7. *E.g.*, Frank J. Prial, *French Wines Get Hammered*, INT'L HERALD TRIB., May 13, 2003, at 20.

> French wines have experienced problems in the American market before: complicated labels, unpopular wine styles, unfavorable exchange rates. But since Prohibition they haven't encountered difficulties as tough as the ones they are now facing. Already battered by the economic downturn, the French are suffering from a boycott in protest of the Chirac government's outspoken objections to the U.S. war against Iraq. According to Impact, a trade publication, some polls show that as many as 30 percent of 'core wine drinkers' are boycotting French wine.

Id. See also Elaine Sciolino, *Estranged Allies: France and Germany Consider Possible Roles in Postwar Iraq*, N.Y. TIMES, July 29, 2003, at A10 (saying "[a]t the Group of 8 economic summit in France in June, Mr. Bush assured Mr. Chirac that it was not American policy to be hostile toward France, and he blamed the news media for exaggerating problems"); *See also*, Charles Bremner, *New Rift Between France and US on Menu for G8*, TIMES (LONDON), May 24, 2003, at 18.

> Although many in France saw French backing for America at the United Nations this week as a penance for their stand over Iraq, President Chirac is intent on pressing home his rejection of American world leadership. Colin Powell, the US Secretary of State, dismayed the French by telling them on television that there would still be a price for opposing the Iraq invasion.

Id. See also Irwin Stelzer, *America Uses Trade to Punish Its Opponents*, SUNDAY TIMES (LONDON), May 11, 2003, at 3, 4.

> Right now one of those goals is not only to reward friends such as Australia. . . . It is to punish those who devoted every resource at their disposal to frustrating America's efforts to hold the security council to its promise to act when Iraq refused to abide by the terms of UN resolution 1441. . . . This means that France is in the president's gun sights, and will be on his mind when he issues final instructions to Zoellick before the next round of world trade talks, scheduled for Cancun, Mexico, in September. Bush has offered to eliminate all America's subsidies for agricultural exports if France and its EU colleagues do the same. The French, who have consistently refused to open their inefficient farmers to competition from America's hugely efficient agricultural industry, responded that they will review the EU's $ 60 billion annual subsidity payments in 2013. In

II. BACKGROUND

A. France and the U.S.A: A Comparison of the Nations and Their Economies

The French and U.S. economies are two of the top five in the world today,[8] despite their difference in size. The United States has the third largest population in the world, while France is twenty-first.[9] In terms of physical area, the United States is fourth largest, while France is forty-seventh.[10] Thus, France occupies about one-nineteenth the area of the United States. The size differences could account for the far greater role played by provincial governments in the United States, as contrasted with the almost exclusive role the national government has in setting the laws of France.

By most measures the United States is a wealthier nation than France, and the living standard differential between the two countries is substantial. The United States has a per capita gross domestic product (GDP) over 50 percent higher than that of France.[11]

Other measures of societal well-being, however, paint a more realistic picture of the quality of life in these two nations. The Human Development Index includes not only income levels, but also measures of adult literacy and life expectancy, and thus provides a more refined, albeit still imperfect, measure of human existence.[12] For instance, France has a relatively high rate of unemployment[13] compared to the United States, but its inflation

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> normal times, one would expect a negotiation in which each party gives some ground to reach an agreement. This is now less likely. The White House has said that it will never forgive or forget France's perfidy, and simply does not trust the French to abide by any agreement they might sign.

Id.

8. THE ECONOMIST, POCKET WORLD IN FIGURES 24 (2003). The United States has the largest economy with a GDP of $9,837.4 billion and France is listed as fifth with $1,294.2 billion (the source did not give a year for this data). *Id.*

9. *Id.* at 14.

10. *Id.* at 12.

11. *Id.* at 26. The United States GDP per capita is $34,940. France's is $21,980 (the source did not give a year for this data). *Id.* The United States is listed as fifth in the world by this measure while France is twenty-second. *Id.*

12. THE ECONOMIST, *supra* note 8, at 28. The UN Development Programme developed this index in 1990. *Id.*

13. *See id.* at 55. France is ranked thirty-ninth with a 10 percent rate of unemployment among nations with highest rates of unemployment. *Id.*

rate is lower.[14] According to this index, the United States ranks sixth in the world, while France is tied with three other nations at eleventh.[15]

Other indices measure economic freedom and gender-related development. The Economic Freedom Index lists the United States as tied with four other nations at fourth, while France is not listed among the top thirty-eight countries.[16] This indicates that the United States has considerably fewer legal restrictions on corporations than does France, an assertion that finds support in this Article.[17] In addition, the gender-related index attempts to measure disparities between the treatment of men and women in a country.[18] By this measure both the United States and France show up well, with the United States ranking sixth with a 93.2, and France thirteenth at 92.2.[19] These data suggest that while women face some discrimination, they are treated about the same as men in both countries.

The data confirm general impressions that both nations are developed, mature economies that provide considerable opportunities for their citizens. Differences lie primarily in economic freedom and relative wealth, with the "poorer" nation—France—providing virtually equivalent human development.

14. *Id.* at 37. France is ranked thirty-first among low inflation rate nations with an annual rate of only 1.6 percent for 2000-01.

15. *Id.* at 28. The United States has a Human Development Index of 93.4, while France's is 92.4. *Id.* The highest rated nation using this index is Norway with a 93.9, followed by Australia, Canada, Sweden with 93.6, then Belgium with 93.5. *Id.*

16. THE ECONOMIST, *supra* note 8, at 29. The Heritage Foundation published this index, and according to it, there are ten measures of economic freedom that measure government intervention in restricting economic relations between and among people. *Id.* The measures are: trade policy, taxation, monetary policy, the banking system, foreign-investment rules, property rights, the amount of economic output consumed by the government, regulation policy, the size of the black market, and the extent of wage and price controls. *Id.* A nation can score between 1 and 5 in each category, 5 being the least free and 1 being the most free. *Id.* According to this measure, Hong Kong is ranked the highest with an economic freedom index of 1.35, followed by Singapore with a 1.55, New Zealand with 1.70, Estonia, Ireland, Luxembourg, Netherlands, and the United States at fourth with a 1.80. *Id.* The United Kingdom is tied for ninth with a 1.85, while Germany is tied for twentieth at 2.10. *Id.*

17. *Infra* Part III(B).

18. THE ECONOMIST, *supra* note 8, at 29. The UN Development Programme published this index, which combines literacy, life expectancy, and per capita income to measure the disparity between the treatment of men and women in a nation. *Id.* The higher the index number, the lower the disparity, and vice versa. *Id.*

19. *Id.*

B. The Theoretical Factor Leading to Employee Reductions in Force

A terrain feature of the contemporary corporate environment is the internationalization of business. This phenomenon traces its philosophical and economic rationale to a largely forgotten[20] nineteenth century English philosopher, David Ricardo, and his theory of comparative advantage.[21] Ricardo explained how international trade could maximize total wealth of all participating trading nations. He hypothesized that if two nations each made the same two products, such as wine and wool, both of the trading nations would be better off from the standpoint of maximizing the utility of scarce resources by each nation's specializing in making what each was comparatively more efficient at making.[22] Thus in a two product economy with both nations making both products, where one nation is relatively more efficient at making wool than wine, and the other is relatively more efficient at making wine, it would benefit both nations if each would make its more efficient product, and then trade. Ricardo noted that even if one of the nations were absolutely more efficient at making both products, both would be better off by specializing in what each was relatively more efficient at, and trading.[23] The gist of Ricardo's theory is specialization and trade to capitalize on the economies of that specialization. This creates a greater economic pie in which everyone may share.

The implications of comparative advantage are less obvious. For all of the Ricardian talk about relative efficiencies, one of the principal advantages of trade is reducing absolute cost differentials in the production process, where such differentials exceed transportation costs between and among nations. For example, suppose manufacturing a product in Korea costs $8.19 per hour, and $19.76 in the United States or $15.70 in France, and the cost to transport products between Korea and the United States or France is less than this labor differential. It would then make economic

20. *See* JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS index (2002) The index to his book about economic globalization does not mention Ricardo.

21. DAVID RICARDO, THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 77-93 (3d ed., E.P. Dutton 1972) (1817).

22. *Id.* at 77-93.

23. *Id.* at 82.

sense to manufacture in Korea and import into the United States or France.[24]

Labor is a major cost component of many traded items in the world today. Labor costs in the manufacturing sector vary considerably across the world. In 2000, the hourly compensation cost for French manufacturers was $15.70, compared to $19.76 in the United States.[25] This suggests greater pressure for reductions in the U.S. labor force when compared to France because of the greater differentials between the United States and "low cost" labor nations. In the same year, labor costs were $5.85 in Taiwan, $5.63 in Hong Kong, $7.63 in Singapore, $4.75 in Portugal, and $2.08 in Mexico.[26]

The comparative cost labor figures, however, are for "line" workers, but not for executives. The earning difference between top U.S. executives and line workers is far greater than the difference between foreign executives and their "line" workers. Leading economists support "free trade," or at least are hostile to trade barriers that emanate from comparative advantage[27] as do virtually all major international trade agreements, including the WTO (and its predecessor GATT), as well as NAFTA. It is often absolute advantage, rather than comparative advantage, however, that is the real driver of trade.

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24. *See* U.S. Bur. of Lab. Stat., Dep't of Lab., *Table 2, Hourly Compensation Costs in U.S. Dollars*, *at* http://www.bls.gov/news.release/ichcc/t02.htm.

25. *Id.*

26. *Id.*

27. *E.g.*, Richard W. Stevenson, *Global Trade Strengthens Economies, Greenspan Says*, N.Y. TIMES, Nov. 15, 2000, at C2.

> Alan Greenspan warned today that support for free trade and market-oriented policies could wither if the economy turned down. . . . The Fed chairman used the address to make a case that the benefits of globalization accrue to all nations that participate in it, 'especially to some of the least fortunate within those trading societies.' Alluding to protests last year in Seattle against the World Trade Organization and this year in Washington and Prague against the International Monetary Fund, Mr. Greenspan acknowledged that the dislocation sometimes caused by global economic change is emerging as a powerful political force. . . . He stressed that the global economic system had been quite open once before, in the decades leading up to World War I, and that much of the last half-century has been occupied by recovering from the economic blow that nations inflicted on themselves by erecting trade barriers during the 1920's and 30's.

Id.

III. A COMPARISON OF U.S. AND FRENCH LAW

A. Corporate Law Authorizing Downsizings in the United States and France

There is one general observation to mention before examining specific similarities and differences between French and U.S. corporate law. United States corporate law, regarding formation and rudimentary operation, is provincial.[28] Although a U.S. corporation is organized under a particular state's law, it may qualify to do business as a foreign corporation in other states. States are permissive in qualifying foreign corporations within their borders because they benefit from such business activity.

United States corporate law varies more than France, largely because the United States has a federal system in which there are dual sovereigns—states and the national government. Under U.S. federalism, corporate law falls within the domain of the states. Each of the fifty U.S. states has its own corporate codes, which is supplemented by federal law that limits corporate behavior in discrete areas such as antitrust, employment law, and environmental regulation. The Model Business Corporation Act[29] has provided a harmonizing influence among the various state corporate codes.

Although some federally chartered corporations exist, virtually all U.S. corporations are formed under state law.[30] Further, U.S. corporations may organize under the laws of a state other than the one where they are physically located. Such a corporation would qualify as a foreign corporation in the state in which its operations are physically situated. This practice maximizes "legal friendliness" for corporate managements. States encourage corporate formation within their jurisdictions by enacting corporate law that favors corporate interests. Each state tries to relax its incorporation requirements to attract incorporators to its jurisdiction and, not coincidentally, enhance its corporate franchise tax revenues. Justice Brandeis, a former U.S.

28. *E.g.*, DEL. CODE ANN. tit 8 (2001).

29. MODEL BUS. CORP. ACT (1984).

30. General Motors Corporation is a Delaware corporation, even though virtually all of its operations are located in other states. General Motors Corp. v. Washington, 377 U.S. 436, 442 (1964).

Supreme Court justice, labeled this propensity as the "race of laxity."[31]

The provincial nature of the U.S. law concerning corporate formation, along with the attendant lack of public, community, creditor, and labor protections afforded by U.S. corporate codes, contrast with the French approach. The French legal system is unitary. France's national legal system develops rules and applies them uniformly on a national level. For instance, a corporation organized in Marseilles has the same legal characteristics and is subject to the same rules of operation as a corporation organized in Paris. The provinces, therefore, do not vie for firms' incorporation in order to receive tax revenue.

Unlike the United States, France is less biased towards corporate management interests. Indeed, the French corporate code imposes criminal sanctions on corporate managers for violations of certain corporate provisions. In contrast, U.S. corporate codes do not criminally punish corporate management. France's severe sanctions reflect the distrustful sentiments that the French citizenry have towards corporations.[32]

1. The Business Judgment Rule in the United States

State courts in the United States have developed one rule which corporate management cites when called upon to justify its actions: the business judgment rule. The business judgment rule in the United States generally arises from court decisions and is a longstanding rule.[33] Delaware, given its place as the state of incorporation of many major U.S. corporations, is an important referent in corporate law. Its courts have held that the business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best

31. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 557-60 (Brandeis, J., dissenting). Justice Brandeis spoke of the "race of laxity," according to which states tried to outdo one another in accommodating corporate desires for "management friendly" rules of formation and operation. *Id.*

32. *See* THE ECONOMIST, *supra* note 8, at 29. On the economic freedom index, recall that France did not show up among the top thirty-eight nations, and the United States ranked fourth. *Id.* The absence of France in this index shows French society has a greater propensity to regulate individuals and corporations.

33. *E.g.*, Barnes v. Andrews, 298 F. 614 (2d Cir. 1924).

interests of the company."[34] It creates a presumption that actions taken by officers and directors are made with due care, are free from conflicts of interest, and are, in fact, the directors' decision as a body. This rule has the effect of absolving corporate directors and officers from liability for nonnegligent, nonfraudulent, noncriminal acts within the scope of their corporate duties that result in corporate losses.[35] Thus, a context in which the business judgment rule often arises is in corporate insolvency matters where shareholders sue corporate directors for excessive corporate expenditures or even losses. Conferring discretion on corporate managers, as the business judgment rule does, it follows that any federal or state statute imposing specific duties or limits on corporate managers' authority in specific situations reduces the manager's business judgment.

The business judgment rule has been cited as appropriate for application in the context of corporate restructurings.[36] In effect, corporate reorganizations or downsizings are just the sort of "bold corporate leadership" that the business judgment rule seeks to engender and protect from court interference. There are cases upholding corporate managers' decisions to take account of social responsibility in managing corporate resources.[37] Directors who go too far in justifying corporate dividend policy to benefit society in general, as opposed to benefiting shareholder interests, however, have been successfully challenged.[38] Also, in a more contemporary context, some authority holds that the business judgment rule permits managers to take account of employees in corporate takeover contexts, although there appears to be no requirement under the business judgment rule that managers respect employee

34. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1991).

35. *See, e.g.*, Levine v. Smith, 591 A.2d 194, 205-06 (Del. 1991) (upholding General Motors (GM) directors' decision despite shareholder allegations that a majority of the board acted in such an uninformed manner as to fail to exercise due care when GM paid alleged "hush money" to purchase for a huge premium GM stock from its then largest shareholder and director, H. Ross Perot, who had publicly criticized GM for being badly managed).

36. *E.g.*, Pogostin v. Rice, 480 A.2d 619, 627 (Del. 1984) (explaining that the business judgment rule is applicable in case where directors rejected takeover bid for company).

37. *E.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 590 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953) (upholding gift of corporate funds to a university).

38. *E.g.*, Dodge v. Ford Motor Co., 170 N.W. 668, 681-85 (Mich. 1919) (finding that the directors abused their discretion in retaining very large cash amounts for major shareholder's stated social purposes and limiting dividend amounts to shareholders).

welfare in downsizing.[39] Reducing costs by eliminating workers could cut corporate losses or enhance corporate profits and shareholder value, something that courts applying the business judgment rule use as a touchstone.[40] Thus, the U.S. business judgment rule would likely present no risk to managers who desire to downsize.

2. The Business Judgment Rule in France

The business judgment rule in France—to the extent that it exists—is considerably less developed and far less protective of management than its U.S. counterpart. As discussed above, this follows at least in part from France's tradition of placing corporate law on a national level, making corporations subject to the national government, where other powers, for example, labor unions and consumers, can influence the shape of the law.

The French equivalent to the business judgment rule is found implicitly in several places as not limiting management authority in French law. In other words, any law limiting managers' prerogatives to make decisions affecting the corporation curtail the managers' business judgment. In France, many such laws exist, however. First, French company law imposes explicit requirements on management and criminal sanctions if these requirements are disobeyed. Further, French law is prescriptive in terms of defining what is improper management conduct, rather than permissive.[41]

Further illustration of the French prescriptive approach to management liability occurs in French insolvency law. Under such laws, sanctions are imposed on directors when companies enter insolvency. Over forty articles of French insolvency law relate to sanctions against directors when a company enters insolvency. Such sanctions apply to both de jure and de facto managers.[42] French law permits commercial courts to bring claims against corporate managers upon a showing of their "fault." The specific faults for which a corporate manager can be held liable include:

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39. *See* GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016, 1019-20 (S.D.N.Y. 1985).

40. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

41. U.S. law is permissive, which effectively gives managers a "blank check" via the U.S. business judgment rule.

42. CODE DE COMMERCE [C. COM] art. L 624-3 (Fr.); Cass. com., Dec. 14, 1993, J.C.P. 1994, IV, 480.

failing to keep accounts, violation of the statutes, failure to supervise adequately company management, and failure to announce the company situation in due time.[43] Additionally, the general idea of "mismanagement" was recognized and defined by the Cour de Cassation (French Supreme Court) quite independently of specifically defined legal faults. French courts will analyze a company's management on an ad hoc basis to determine if mismanagement exists.[44] Faults that French courts have identified as mismanagement include: acting for personal gain including a grant of a pay increase when the company was experiencing great difficulty,[45] failure to keep proper accounts including falsifying or destroying accounting records,[46] not announcing the stopping of payments on debts,[47] taking actions or making decisions that only could cause the company's insolvency, and failure to supervise the company's business.[48]

As can be seen, there are vastly different levels of authority French and U.S. managers possess regarding corporate management in general. One can rightly conclude that managers possess far wider authority under U.S. articulations of the business judgment rule than do French managers under equivalent notions of managerial discretion. Thus, U.S. managers have greater relative authority to restructure than do their French counterparts.

One would like to think that legal authority to restructure has a reciprocal in employee protections when restructurings occur. Thus, if a nation's legal system provides managers with considerable authority to downsize—as is the case in the United States—one would hope to find a legal safety net more protective of employees than exists in a nation where managers' authority to downsize is sharply circumscribed. The next section examines the U.S. and French legal safety nets to see if this is true.

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43. C. COM. L 624.3; *see generally* Marie-Christine Sordino, *Le Delit de Banqueroute* [*The Crime of Bankruptcy Fraud*], *in* 34 BIBL. DROIT DE L'ENTREPRISE [LIBRARY OF THE LAW OF THE COMMERCIAL ENTERPIRSE] (1995).

44. C. COM. L 624.3; *see generally* Richard L. Koral & Marie-Christine Sordino, *The New Bankruptcy Reorganization Law in France: Ten Years Later*, 70 AM. BANKR INST. L. REV. 437 (1996).

45. *See* Cass. com., June 20, 1995, D. 1995, 448.

46. *See* C. COM. L 624-3; Cass. com, Jan. 4, 2000, B.R.D.A., 2000, 5, No. 6,

47. *See* Cass. com., Jan. 14, 1997, D. 1997, 315, note Remery.

48. C. COM. L 624-3; Cass. com. Oct. 13, 1998, 55 R.J.D.A 22, No. 81 (1999).

B. Comparing U.S. and French Legal "Safety Nets" for a Corporation's Downsized Workforce

1. Unemployment Benefits Under the U.S. Federal Unemployment Tax Act

Unemployment benefits are among the most significant protections for workers downsized out of their jobs. They were created by the Federal Unemployment Tax Act (FUTA). FUTA was enacted in 1935 as part of the Social Security Act of 1935. Today it is contained in Chapter 23 of the Internal Revenue Code.[49] It is both a federal and state program. FUTA imposes a federal tax on employers, the proceeds of which are to be used to provide financial support for involuntarily unemployed workers. The current tax rate is 6.2 percent through 2007 and is imposed directly on the worker's employer.[50]

The FUTA program encourages states to set up their own unemployment benefits program by allowing state unemployment taxes to be credited up to 90 percent[51] against the federal unemployment tax, provided the state program meets certain conditions.[52] The remaining 10 percent of the federal unemployment tax imposed on employers goes to pay the costs of administering the federal program. State programs must meet a number of federal conditions before employers paying into the state program can qualify for the tax credit against the federal unemployment tax. By 1938, every state had passed an unemployment insurance program meeting federal standards.

Persons who are downsized must satisfy several impediments to qualify for state unemployment benefits. First, they must, in fact, be employees as opposed to independent contractors.[53] Second, the employees must have worked for the employer for a base period which varies from state to state.[54] Third, the employee must be involuntarily unemployed. Fourth, alternative new

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49. Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 (2000).

50. *Id.* § 3301(1).

51. *Id.* § 3302(c)(1).

52. *See id.* § 3304.

53. United States v. Garami, 184 B.R. 834 (Bankr. M.D. Fla. 1995).

54. *See* 26 U.S.C. § 3304(a)(2). This section forbids payment of unemployment compensation until two years after the first day of the first period with respect to which contributions are required—effectively a two year period of covered employment prior to eligibility. *Id.*

employment, substantially as favorable in terms of wages, hours, and working conditions, must not be available in the same locality.[55] Fifth, the unemployed person who has received compensation during his benefit year is required to have had work since the beginning of such year in order to qualify for compensation in his next benefit year.[56]

The average weekly benefits vary from state to state. They range from $167 per week for Mississippi to $360 in Massachusetts.[57] Most states provide coverage for twenty-six weeks,[58] while some go as high as thirty-nine weeks.[59] Additionally, certain federal laws provide supplemental unemployment income when state benefits are exhausted. In some instances, federal supplemental benefits can last as long as sixty-five weeks.[60] A few states give unemployment benefits to strikers.[61]

Unemployment benefits are one of the primary legal protections available to assist downsized workers in the United States. Nonetheless, such benefits are limited in time and amount, as already noted. Also, as is noted above, downsized workers receive widely varying amounts of unemployment benefits depending upon the state in which they live. Yet the downsized worker might well be at mid-career facing years of unemployment. Thus, unemployment benefits in the United States are, at best, a temporary measure to assist downsized workers and are not a long-term solution to layoffs.

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55. *See id.* § 3304(a)(5)(B).

56. *Id.* § 3304(a)(7).

57. U.S. DEPT OF COM., STATISTICAL ABSTRACT OF THE U.S. 350 (121st ed. 2001). Some other states' average benefits for 2002 are: California, $217; New York, $275; Illinois, $280; Michigan, $276; Ohio, $251; Florida, $225; Texas, $259; Nevada, $232; Arizona, $176; Connecticut, $287, Washington, $329; Pennsylvania, $291; Alabama, $167, North Carolina, $259; and Tennessee, $210. *Id.*

58. *Id.* at 409.

59. *See* Temporary Extended Unemployment Compensation Act of 2002 (TEUCA), Pub. L. No. 107-47, § 203, 116 Stat. 21, 28 (2002) (providing an additional thirteen weeks of extended benefits payable under a federal-state program to those who have exhausted their regular state benefits).

60. Supplemental Appropriations, Pub. L. No. 108-11, 117 Stat. 559, 608-09 (2003) (amending TEUCA to provide an additional thirty-nine weeks, instead of thirteen weeks, of federal extended benefits).

61. *E.g.*, N.Y. Tel. Co. v. N.Y. State Dep't of Labor, 440 U.S. 519, 524-25,529-30 (1979).

2. French Unemployment Compensation Law

In France, unemployment benefits have been defined in agreements between the Employees' Unions and Employers' Unions. The latest has been in force since January 1, 2001.[62] This national agreement gives rights to employees who have been deprived of jobs by their employer.

This national agreement also creates a period of indemnification based on the previous duration of work. The length of the fixed indemnification is anywhere between 122 to 1,825 days, depending on the age of the worker and the duration of the job before the labor contract is broken.[63] The daily amount of indemnification is 40.4 percent of the previous daily salary plus 9.79 per day.[64] After the period of fixed indemnification, the amount given to the worker depends on the time of indemnification and the age of the worker.[65] This system applies to all workers, regardless of whether or not they are single or have children.[66]

French unemployment benefits are subject to income taxation as every income; the amount of the tax varies depending on the worker's family income.[67] For example, an otherwise qualified, unemployed worker, whose spouse and children work, is subject to the income tax on a family basis.[68] The worker would, therefore, pay income tax on unemployment benefits based on the income of the family unit.[69]

3. U.S. Plant Closing Legislation: Worker Adjustment and Retraining Notification Act

Businesses in major industrial countries, such as the United States and France, are finding the lure of relocating to lower cost nations irresistible.[70] A major challenge employees encounter in

62. Decree No. 2000-601 of June 30, 2000, J.O. July 1, 2000, p. 19339-55, D.S.L., 2003, III, 2115.

63. *Id.*

64. *Id.*

65. CODE DU TRAVAIL [C. TRAV.] art. L 351-19 (Fr.).

66. *Id.*

67. CODE GÉNÉRAL DES IMPÔTS [C. GÉN. IMP.] art. 4 (Fr.).

68. C. GÉN. IMP. 194.

69. *Id.*

70. David Firestone, *A Chief Exporter, and Not at All Pleased About It; North Carolina Is Rapidly Losing Its Once-Plentiful Factory Jobs to Overseas Plants*, N.Y. TIMES,

such situations is uncertainty. For example, employees may ask: Will I have my job tomorrow, next week, next month, or six months because the local plant is closing? Workers should be given advance notice of impending plant closures and mass layoffs.

To address these problems, in the 1980s, a federal statute was enacted, which dealt with notification of plant closings and mass layoffs.[71] This was one of the few explicit attempts by the labor movement to legally limit the power of corporate management to strip communities of industrial plants that serve as the communities' economic base. The purpose of the Worker Adjustment and Retraining Notification Act (WARN) has been to protect workers, their families, and communities by giving notice prior to mass layoffs or plant closures.[72]

WARN covers employee reductions where there are plant closings and mass layoffs.[73] WARN applies to businesses with 100 or more full-time employees and to businesses with 100 or more full or part-time employees who, in the aggregate, work at least 4,000 hours per week, not including overtime.[74] Covered employers must provide notice of plant closings and mass layoffs to employees, state dislocated worker units, and the chief elected official of the unit of local government where the layoff or closing is to occur.[75] For purposes of the WARN Act, employment loss

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Feb. 11, 2001, at A11; Barnaby J. Feder, *Last U.S. T.V. Maker Will Sell Control to Koreans*, N.Y. TIMES, July 18, 1995, at A1.

71. Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109 (2000).

72. Halkias v. Gen. Dynamics Corp., 955 F. Supp. 695, 698 (N.D. Tex. 1997), *aff'd*, 137 F.3d 333 (5th Cir. 1998).

73. Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (2000). Section 2101(a)(2) provides:

> [P]lant closing means the permanent or temporary shutdown of a single site of employment, or one or more facilities or operating units within a single site of employment, if the shutdown results in an employment loss at the single site of employment during any 30-day period for 50 or more employees excluding part-time employees.

Section 2101(a)(3) provides:

> [M]ass layoff means a reduction in force which— (A) is not the result of plant closing; and (B) results in an employment loss at the single site of employment during any 30-day period for— (i)(I) at least 33 percent of the employees (excluding any part-time employees); and (II) at least 50 employees (excluding any part-time employees); or (ii) at least 500 employees (excluding any part-time employees).

74. *Id.* § 2101(a)(1)(A)-(B).

75. *Id.* § 2102(b).

does not cover discharges for cause, voluntary departure, or retirement.[76]

WARN anticipates that an employer may sell its business and also that a purchaser may restructure a business shortly after its purchase. WARN considers any person that is employed full-time by the seller to be an employee of the purchaser after the effective date of the sale.[77] Sometimes, when employers restructure their businesses, they offer to transfer the employee to a different site, as a way of avoiding employment losses. If the new site is a reasonable distance and results in no more than a six month break in employment, WARN's notice requirement is inapplicable.[78] In addition, no notice is required if (1) the employer restructures and offers to transfer the employee, regardless of the distance, with no more than a six months employment break, and (2) the employee accepts either within thirty days of the offer or before the plant closes, whichever occurs later.[79] The notice is given to either the representative of the affected employees, or, if there is none, to the State dislocated worker unit and chief elected official of local government.[80] Finally, notice is also required if 500 or more full-time employees are to be laid off, no matter what the circumstances.[81]

WARN has a number of loopholes that reduce its protections, however. First, it does not count part-time employees. A "part-time" employee is one who works an average of fewer than twenty hours per week or who has been employed fewer than six of the twelve months preceding the date on which notice is required.[82] Second, WARN does not apply to smaller employers—those having fewer than 100 employees. Third, the already short sixty day advance notice period can be excused or reduced to fewer than sixty days if the closure or layoff is due to "unforeseeable business circumstances."[83]

76. *Id.* § 2102(a)(6).
77. *Id.* § 2102(b), 29 U.S.C. § §§ 2101–2109.
78. *Id.* § 2102(b)(2).
79. *Id.* § 2102(b)(2).
80. *Id.* § 2102(a).
81. *Id.* § 2101(a)(3)(B)(ii).
82. *Id.* § 2101(a)(8).
83. Watson v. Mich. Indus. Holdings, Inc., 311 F.3d 760, 763 (6th Cir. 2002).

4. French Law Regarding Notification of Impending Downsizing

The French parliament reviewed French labor law at the beginning of 2002,[84] after a two year discussion of cuts in the work force. The result of this discussion was Parliament's creation of a very complex law, made up of 224 articles that modify the Code du travail (labor code). The French government published the latest decree in May 2002.[85]

a. Comparison of the Old and New Labor Codes

Before discussing the new code, one must first understand the basics of the French workers' representative system.[86] France has a

84. 2002-73, Jan. 17, 2002, J.O., Jan. 18, 2002, 1008 (suspended 2002).

85. Decrees No. 2002-785, 2002-789, 2002-790, 2002-791, 2002-792, 2002-793, May 3, 2002, J.O., May 5, 2002, pp. 8648-56.

86. French law details specific requirements in the area of workers' representational institutions in a company. The following discussion of French labor institutions suggests some of the pitfalls such institutions create for management when it considers downsizing.

The freedom to be a member of a union is constitutionally preserved in France. Every employee is free to be a member of a union or not. Cons. const., July 20, 1983, no. 83-162, *available at* http://www.conseil-constitutionnel.fr/decision/1983/83162dc.htm; Cons. const., July 25, 1989, no. 89-257, *available at* http://www.conseil-constitutionnel.fr/1989/89257dc.htm. Closed shops, therefore, do not exist in France. CODE DU TRAVAIL [C. TRAV.] art. L. 412-2 (Fr.). Each representative union may create a "section syndicale," that is, a shop section in every establishment of a company. *Id.* art. L. 412-6. Without taking into account the number of members of the union in the establishment, the "section syndicale" will be deemed to be representative if it is affiliated with a national representative union. *Id.* art. L. 412-4, 412-6. French companies have to create a "comite d'enterprise," that is, an enterprise committee when the company has fifty employees or more. *Id.* art. L. 431-1. The "comite d'enterprise" is composed of elected members that are delegates of the representative unions as well as the CEO or manager of the establishment. *Id.* art. L 433-1. The enterprise committee in companies with at least 150 employees, must hold a monthly meeting. *Id.* art. L. 434-3. Each year, during one of these meetings, the CEO or his representative must inform the committee of the organization's situation and the forecast on labor activity. *Id.* art. L. 432-1-1. The enterprise committee may use the assistance of an auditor paid by the corporation, but chosen by the committee, to analyze the annual accounts and when collective downsizing of the workforce is envisaged." *Id.* art. L. 432-6. The "Loi de modernization sociale" emphasizes the role of the Comite d'enterprise when decisions are planned by management. " *Id.* arts. L. 432-1 to 432-19.

The legal representation of workers in France is quite important and must be scrutinized when the management makes any major decision regarding change in the corporation. When Marks and Spencer's English management decided to close its shops in France, it made the announcement without prior consultation with the enterprise committee. The enterprise committee sued the French management of the company, and may now have to face the criminal courts. *See* Eric Pfanner, *Marks & Spencer Sheds Unit*, INT'L HERALD TRIB., Oct. 17, 2001, at 14. It is a criminal offense to neglect the number of statutes that restrict the ability of the company to make structural changes if they could affect company personnel, although the law published on January 18, 2002 greatly modifies those statutes.[87]

Before its passage, however, the close scrutiny by the labor administration or the courts caused significant difficulties in the organization of downsizing in French companies. Since passage of the law dated January 27, 1993, managers had to be aware that a court can nullify a downsizing procedure. The Labor Code[88] imposed on the management a duty to prepare and submit to the enterprise committee, and to the labor inspection service of the labor department,[89] a "plan social," that is, a plan to reemploy the previously fired workers.[90] If the courts found the reemployment plan insufficient, they could declare it null and void.[91] The law considered the fired workers as always having been part of the company, even if their unemployment lasted a long time.

A decision of the Court of Appeal in Paris illustrates the old law. In that case, the management of a large Parisian store decided in September 1993 to reduce the number of workers by one hundred and twenty-one. Seven months later, the Tribunal de Grande Instance in Paris (Paris' first level court) declared this procedure null and void under a provision in the labor code[92] that allowed the court to do so if the management does not present a plan to furnish new jobs to the unions. In July 1995, some workers decided to sue the company in the Conseil des Prud'hommes (labor court) to be reinstated to their jobs. They prevailed in a Paris Court of Appeal judgment on February 23, 1996. The Cour de Cassation affirmed this decision on February 13, 1997.[93]

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representative institutions of workers in a French company. C. TRAV. arts. L. 483-1, 483-1-2, 483-1-1, 263-2-2, 152-1, 482-1.

87. *See* C. TRAV. arts. L. 324-1, 321-4-1. Passed after the Conseil Constitutionnel's (Constitutional Court) review. *Id.* arts. L. 324-1, 321-4-1.

88. *Id.* art. L 321-4-1 (2002).

89. *Id.* art. L. 321-7 al. 13.

90. *Id.* art. L. 321-4; Franck Moderne, *Le contrôle juridictionnel des propositions de reclassement dans le cadre des licenciement collectifs pour notif economique*, 1985 DROIT SOCIALE 485, No. 6. (Dec. 19, 1984).

91. C. TRAV. art. L. 321-4-1; Cass. soc., Apr. 16, 1996, JCP, 1996, II, 836, note Picca.

92. C. TRAV. art. L. 321-4-1.

93. Cass. soc., Feb. 13, 1997, Bull. Civ. V, No. 64, 171, note Lyon-Caen.

The Paris Court of Appeal[94] held that management's plan to furnish new jobs must include both internal and external measures.[95] Internal measures included publication of jobs to be furnished and appointment of a person who would study every internal possibility of re-employment. Should an enterprise fail to present a complete plan to its fired workers, a court may decide to reinstate the workers and declare null and void every measure accompanying the downsizing of the workforce.[96] All workers may request reinstatement on the first day of the procedure, with full benefits, including reimbursement of unpaid salaries.[97]

The new law tried to provide a more restrictive definition of economic downsizing. The new definition was in Article L 321-1 of the Labor Code,[98] passed in 2002, which declared that economic downsizing had to be based on either (1) serious economic troubles that cannot be avoided by other ways and means, (2) technological changes creating serious questions on the survival of the enterprise, or (3) reorganization necessary to assure the survival of the enterprise. The new law allowed no other basis for downsizing.[99] The Constitutional court, however, declared this article null and void, saying that this definition was too strict and contrary to the free enterprise principle that is in the Constitution.[100] French law, therefore, remains subject to the jurisprudential definition of the legal basis for economic downsizing.[101]

Under the jurisprudential definition, the procedure for economic downsizing may be conducted only if the corporation takes the following measures:

(1) Consultation of the enterprise committee, which not only has the right to veto the procedure if it concerns more than 100

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94. C. TRAV. art. L. 321-4-1; Cass. soc., Mar. 28, 2000, D. 2000 inf. rap., 121.

95. C. TRAV. art. L. 321-4-1; Cass. soc., Mar. 28, 2000, D. 2000 inf. rap., 121.

96. A court may do so if the downsizing is a result of a serious or grave circumstance. C. TRAV. art. L. 122-14-4.

97. *Id.* art. L. 122-14-4 as modified by art. 111 of the Law No. 2002-73 of Jan. 17, 2002.

98. C. TRAV. art. L. 321-1.

99. C. TRAV. art. L 321-1.

100. Cons. Const., Jan. 12, 2002, J.O., Jan. 18, 2002, p. 1053.

101. C. TRAV. art. L. 321.1; cass. soc., Jan. 16, 2001, D. 2001, somm., 2170, obs. Boissel.

employees,[102] but also may require appointment of a mediator.[103]

(2) Negotiation of the reduction of work and supplementary hours, which must be at 35 hours per week or 1,600 hours per year.[104]

(3) Decision to stop totally or partially the part of business, and presentation of a study of social and environmental impact of the decision.[105]

(4) Corporate conformity for the election of representative personnel.[106]

The Comite d'entreprise (committee) may block the operation of the plan if it concerns 100 workers or more and if the alternative solutions proposed by the committee are very different from the solutions proposed by the management.[107].

b. Economic Impact of the New Law

This new law will raise the cost of economic downsizing. The indemnification of workers is currently one-tenth of a month's salary per year of employment in the company for those who have worked there fewer than ten years, while those who worked more than ten years receive an extra one-fifteenth. The new law increases the indemnification amount to one-fifth of a month's salary per year of employment for those who have worked fewer than ten years, and one third of a month's salary for those who worked more than ten years. The cost is thereby doubled.[108] This

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102. C. TRAV. art. L. 432-1-3.

103. *Id.* The mediator must be on a list defined by the minister of labor. If the management refuses this mediator, he shall be appointed by the President of the "Tribunal de Grand Instance" (first level court). *Id.* art. L. 432-1; *id.* art. R. 432-20 to 432-25. The mediator will try to find a solution accepted by both parties, or otherwise make recommendations. *Id.* art. L. 432-1-3 al. 6. If both parties accept the mediator's recommendations, they become an agreement. *Id.* art. L. 432-1-3. The downsizing procedure is suspended during the mediation. *Id.* art. L. 432-1. The Comité d'entreprise may find assistance through an expert, appointed by the committee but paid by the company, to study the plan of the management. *Id.* art. L. 432-1.

104. *See id.* art. L. 321-4-1.

105. C. COM. art. L 239-1.

106. C. TRAV. art. L. 321-2.

107. *Id.* art. L. 432-1-3.

108. Decree No. 2002-785, May 3, 2002, J.O., May 5, 2002, 8648 (modifying C. TRAV. art. R. 122-2).

new law is in line with the Cour de Cassation decisions, which created a specific analysis of economic downsizing through a long history of precedent.[109] A company that wishes to reduce its workforce based on economic needs has to propose to the workers either future jobs in the company itself or jobs in other companies in the group, if such company is part of a group.[110] Economic downsizing is illegal without a management-delivered and complete downsizing proposal.[111]

This creates a difficult situation when the group is multinational.[112] For instance, in response to falling profits the European retailer Marks & Spencer created a plan that called for a total withdrawal from Continental Europe at a cost of 4,400 jobs, 1,700 of them in France.[113] The unions sued the management for failure to consult with the workforce before making the decision.[114] As a result, the Paris court, the Tribunal de Grande Instance, froze the closing of the eighteen Marks & Spencer stores in France.[115] The Paris court stated that even if the decision is part of a worldwide plan, French law must be applied when it involves French workers.[116]

Further, Article L. 431-5-1 of the new law creates even more obligations on management.[117] A French company must include other interested parties in discussion regarding company downsizing. Not only will the unions have a significant role in the process, but national and local authorities also will participate.

When company management decides to make a public announcement, the Comite d'entreprise has a right to require the

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109. *See* Cass. soc., Feb. 13, 1997, D. 1997, 171. note Lyon-Caen; *see also* Cass. soc., Mar. 30, 1999, D. 1999, 1115, note Berthelin.

110. Decree no. 2002-785 of May 3, 2002, J.O. May 5, 2002, 8648 (modifying C. TRAV. art. R 122-2).

111. Cass. com., Dec. 12, 1991, R.J.S., Feb. 1992, 102, No. 134.

112. *See* Cass. soc., Apr. 5, 1995, D. 1995, 503, note Keller. The court states that the decline in jobs are not due to real or serious economic reasons, but rather jobs have been transferred to other premises, particularly foreign sites. *Id.*

113. *French Unions Launch Civil Suit Over Marks and Spencers Closures*, AGENCE FRANCE-PRESSE, Apr. 2, 2001, 2001 WL 2375844.

114. *Civil Court to Rule Monday on Marks and Spencer Closure*, AGENCE FRANCE-PRESSE, Apr. 5, 2001, 2001 WL 2378317.

115. Michael Baws, *M&S Learns French Lesson*, DAILY MAIL, Apr. 10, 2001, 2001 WL 17858789.

116. Ian Sparks, *Judge Halts Fall of M&S French Axe*, SCOTTISH DAILY RECORD, Apr. 10, 2001, 2001 WL 17069968.

117. *See* C. TRAV. art. L. 431-5-1.

company to inform and consult it beforehand, if the decision reflected in the announcement affects employment or working conditions.[118] If the announcement concerns another topic, however, then management does not need to inform the Comite d'entreprise before making the announcement, but the Comite d'entreprise has a right to hold a meeting with management within forty-eight hours.[119] If the committee does not hold a meeting, management must individually inform every member of the Comite d'entreprise. If such information is not given, a fine of 3,750 euros and/or a maximum of one year of prison.[120] could await the head of the company's Directeur general (Chief Executive Officer). If management does not correctly follow the procedure, the courts may declare the downsizing null and void, and therefore, workers may ask to be reintegrated into the company.

Additionally, French companies must provide notice of planned layoffs to workers based on seniority. If a worker has worked between six months and two years, he would have to receive one month notice of an impending layoff. If this worker has been employed more than two years, he is entitled to at least two months notice.[121] If an employer is unable to give this notice, the employee is entitled to equivalent indemnification.[122] French law provides a national insurance scheme applicable to every worker in the event a company is unable to pay the required amounts.

C. Health Care

1. Health Insurance for Downsized U.S. Workers

The Clinton Administration attempted to create a national health insurance plan during its tenure, but its attempts proved unsuccessful. The United States is the only major industrial nation that does not currently provide national health insurance for its workers. In essence, because U.S. employers are not required to

118. If the measures proposed in the announcement have important consequences, the management must also inform the Comite d'entreprise of each concerned company in the group and, if it exists, the Comite of the group, or the European committee, individually or in a meeting. *Id.* art. L. 431-5-1.

119. *Id.*

120. *Id.* art. L. 483-1.

121. *Id.* art. L. 122-6.

122. *Id.* art. L. 122-8.

provide health insurance to their workers, the workers subsidize the commercial sector in the U.S. economy, because it is the workers that are often paying for health insurance rather than their employer.

Currently, health insurance for unemployed U.S. workers is found in a patchwork of federal and state laws. Federal law creates two major sources of insurance. First, if an unemployed worker is sixty-five years or older, he or she qualifies for Medicare. Medicare is a national health insurance program for the elderly.[123] Although its coverage is intended to be comprehensive, it nonetheless has gaps, which various private and state health insurance schemes—paid for by employees—can fill. Second, a temporary source of health insurance for unemployed workers is the Consolidated Omnibus Budget Reconciliation Act of 1980 (COBRA).[124]

COBRA permits workers who have lost their jobs to continue coverage under their former employer's group health plan following termination.[125] COBRA applies regardless of whether the worker quits voluntarily or is involuntarily discharged,[126] such as when the company downsizes. It also applies if the worker's hours are reduced to below the minimum requirements for ordinary coverage.[127] Coverage under COBRA specifically applies only to employers that have twenty or more full-time employees on a typical business day during the preceding calendar year.[128] COBRA coverage does not require proof of insurability.[129]

COBRA does not mandate that employers provide coverage health insurance for their workers. Rather, COBRA says that if an employer provides health insurance to its workers, the employees may elect to continue coverage under the employer's group health plan for up to 18 months (or up to twenty-nine months for the disabled) after termination of employment.[130] The former employee must decide within sixty days after termination to opt

123. 42 U.S.C. § 426 (2000) (outlining the requirements and benefits of Medicare).

124. Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161-1169 (2002) (covering the benefits and requirements for COBRA coverage).

125. *Id.* §§ 1161, 1163.

126. *Id.* § 1163. There is no coverage, however, if the worker is dismissed for gross misconduct. *Id.* § 1163(2).

127. *Id.* § 1163.

128. *Id.* § 1161(b).

129. *Id.* § 1162(4).

130. *Id.* §1162(2)(A)(i), (ii), (v).

out of, or continue under, the former employer's group health plan.[131] Former employees might opt out if they find a new job with comparable or better health insurance benefits. For workers who decide to continue under the former employer's policy, coverage is the same as it was pretermination.[132] Family members, for example, could remain covered.

COBRA health insurance, however, is not free to former employees. Although the former employees generally get the advantage of the employer's group rate, which is usually less expensive than if the employee purchased an individual policy, they nevertheless must pay the full premium plus a 2 percent administrative fee.[133] COBRA also specifically excludes under "group health plan" any plan whose coverage is for long-term care services,[134] such as might be required for a stroke victim.

In summary, COBRA offers health insurance protection to downsized employees and the employee's dependents, if the employer's policy so provides.

2. French Health Care Law

French law establishes a nationwide system providing health care. This system contains two parts, one for nonworkers and the other for workers, whether employed or unemployed. This nationwide care system is defined in the Code de la sécurité sociale. Benefits, which cover the worker and members of his or her immediate family, include physician costs, hospitalization costs, medicines, and any other necessary treatment.[135] Costs of doctors and hospitalization are totally reimbursed and medicine is generally reimbursed between 65 and 100 percent. These benefits apply to workers who are employed or unemployed, irrespective of their age. Workers may subscribe to complementary insurance to cover extra costs which are not totally covered by the general system. Workers who are unable to work because of illness are indemnified by the social security system.[136]

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131. *Id.* §§ 1161(a), 1165(1).
132. *Id.* § 1161(a).
133. *Id.* § 1162(3)(A).
134. *Id.* § 1167(1).
135. *See* CODE DE LA SECURITE SOCIALE [C. SEC. SOC.] art. L. 111-1 (Fr.).
136. *See id.* art. R. 323-6, 433-10.

IV. COMPARING LEGAL PROTECTIONS FOR DOWNSIZED WORKERS UNDER FRENCH AND U.S. LAW

In terms of worker notification prior to actual downsizings, the French workers are far better protected than their U.S. counterparts, for several reasons. First, the worker presence at French board of directors meetings affords French workers with an opportunity to know about and present their perspectives on potential downsizings.[137]

Second, French companies that fail to observe French laws on worker notification of downsizing could face criminal sanctions that are far stiffer sanctions than their U.S. counterparts.[138] Thus, the entire worker notification of impending downsizing in France is less likely to affect a surprise for workers by awakening one day to read in the local newspaper that their jobs are leaving town. Workers in France, while not necessarily able to stop a plant closure, are at least involved in the decision-making process early on and have more time to shape and plan their futures.

Also, unemployment benefits in France, which can last up to five years, are ten times longer than in the United States. Finally, downsized French workers qualify for national health insurance protection while U.S. workers under sixty-five must rely exclusively on coverage under COBRA, provided the employer has health insurance and the worker agrees to pay the premiums plus 2 percent.

Given the greater safety net that French workers receive under French law, as compared to the benefits U.S. workers receive under U.S. law, the anomaly of the much stronger business judgment rule in the United States makes the power of management to restructure and downsize workers all the more glaring.

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137. Even though French workers do not have to be board members and, as such, do not have a vote on whether downsizing will occur, the workers may make suggestions for alternatives to downsizing at the board meetings, such as the ones made at the end of this paper on across-the-board pay reductions instead of layoffs.

138. *See supra* Part III(B)(4)(b).

SUMMARY OF COMPARISON[139]

	Unemployment Benefits	Medical Benefits	Notice of Plant Closing
FRANCE	• Duration: 122 to 1,825 days, depending on worker's age and duration. • Minimum benefits if eligible: 40.4% of previous salary plus 9.79 per day	• No age restriction • Physician costs totally reimbursed • Hospitalization costs totally reimbursed • Medicine reimbursed between 65% and 100%	• Planning of the operations to be presented to the "comité d'entreprise" • Planning may be controlled by courts • Notice of at least one month • National compensation insurance system
UNITED STATES	• Duration: up to 26 weeks in all states • Minimum benefits if eligible: $167 per week	• Workers 65 & older qualify for Medicare • COBRA provides up to 18 months coverage under former employer's group insurance if employee pays premium plus 2% admin-istrative costs if employer has health insurance coverage	• 60 days notice of mass layoffs or plant closings if employer has 100 or more full time employees; shorter notice allowed if unforeseen closure

139. *Supra* Part III(B).

V. PROPOSED ALTERNATIVE TO MASS EMPLOYEE DOWNSIZING: NO LAYOFFS AND ACROSS THE BOARD PAY REDUCTIONS COMMENSURATE WITH BUDGET DEFICIENCY

A common corporate response in developed nations to business reversals is to cut costs by downsizing employees. Indeed, management typically views it as the default approach to solving the problem of corporate budget deficits. Massive staff reductions, however, are the unimaginative destruction of "team" principles enunciated in contemporary employment, and ignore stakeholder principles inherent in ethical analysis.

In presenting a solution to an ethical problem, the stakeholder analysis in ethical theory as applied to the corporate sphere dictates that one should first consider a number of constituencies.[140] Constituencies recognized in such analysis include: (1) the firm itself, where profit is paramount; (2) delivering the best products and services to customers; (3) giving shareholders a good return on their investment; (4) being a good citizen in the community where the firm is located; and (5) providing the workers with jobs.[141] By laying off large portions of its staff, a corporation is, in effect, saying that the workers laid off—and only the workers laid off—are to bear the cost of corporate revenue shortfalls. In so doing, a corporation implicitly rejects other constituencies in the stakeholder analysis.

We suggest the following solution to this problem: instead of laying off workers, reduce salary or wages by the same percentage across the board, in all departments of the firm. For example, if a plant found itself 10 percent short on revenues needed to cover costs, rather than cutting the staff by 10 percent, cut everyone's salaries and wages in the entire plant so that all can "share the pain" of deficits. Our approach avoids playing stakeholders against one another by eliminating the need to choose between cutting the corporate dividend, reducing product features or quality, or conducting massive layoffs.

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140. *E.g.*, BRUCE D. FISHER & MICHAEL J. PHILLIPS, THE LEGAL, ETHICAL, AND REGULATORY ENVIRONMENT OF BUSINESS 32-34 (8th ed. 2004). Various U.S. states have enacted a number of stakeholder statutes in order to protect employees and community interests during corporate mergers and possible plant closures. *E.g.*, N.Y. BUS. CORP. LAW § 717(b) (McKinney Supp. 1991).

141. N.Y. BUS. CORP. LAW § 717(b).

Across the board pay cuts reduce the politics of cost cutting. When corporations consider cost cutting, it often becomes a corporate "witch hunt," searching for cost-offenders to lay off, labeling them as "corporate waste." It is not the inefficient, however, who bear the brunt of such efforts; rather, layoffs can eliminate socially beneficial departments and create a popularity contest among employees. Departments, such as environmental staffs, could well be seen as excess costs in need of trimming. Unpopular colleagues, though performing well, could become the victims of "pets" and sycophants who cower to bosses and "rat" on coworkers. This manner of conduct poisons the atmosphere in corporate organizations.

Under our across-the-board approach everyone in the organization keeps his or her job, everyone takes the same hit on their paycheck, and no one is subjected to the humiliation of being evaluated to determine if they are expendable. After all, if the corporation hired the individual in the first place, is this not a testament by the corporation that it viewed the employee as worth having? Furthermore, and perhaps as significantly, the organization is physically able to deliver the same level of service as before the salary reduction because it has the same number of employees who are all versed in their respective roles. In other words, quality of the services or products should not decline because none of the employees are being asked to assume additional duties. The overworked employee—a product of "job enlargement" by Machiavellian corporate personnel departments—is an all too common terrain feature of today's corporate world. The overworked employee would be a less likely result under our proposal as opposed to the downsizing model.

A. *Give Backs: The U.S. Airline Experience*

Recently, the U.S. airlines have had to restructure in order to survive.[142] In several instances pilots, mechanics, and flight

142. *E.g.*, Micheline Maynard, *United and Pilots' Union Reach Tentative Agreement*, N.Y. TIMES, Mar. 28, 2003, at C5.

> United Airlines reached a tentative agreement with its pilots' union yesterday, its most critical labor union. The six-year deal would allow United to proceed with plans for a separate low-fare airline. . . .United wants to shift 30 percent of its operations to the new airline with a working name of Starfish. Employees of the new airline would be paid lower wages, receive a smaller benefit package and work under less restrictive work rules. *Id.*

attendants have agreed to wage and salary cuts.[143] The process by which such cuts take place is protracted and painful.[144] There must be transparency in organizations undergoing across the board salary cutbacks, lest managers be tempted to exclude themselves from the shared pain.[145] Nonetheless, different labor groups

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143. Edward Wong, *Pilots Ratify Concessions At United*, N.Y. TIMES, Apr. 12, 2003, at C1.

> United Airlines said yesterday that its pilots had ratified labor concessions that would save it $1.1 billion a year and that it had reached tentative agreement with its mechanics on cost cuts.
>
> Labor costs account for about 40 percent of United's expenses, and the pilots have the highest pay of all the work groups. The mechanics are United's most militant labor group . . . .
>
> The latest tentative agreement with the mechanics gives United $349 million in annual savings over six years. The 10,000 mechanics would take a 13 percent wage reduction . . . .

Id.; but see Micheline Maynard, *Machinists' Union Sues United Over Layoffs*, N.Y. TIMES, Mar. 27, 2003, at C6.

> The machinists' union filed suit yesterday against United Airlines to block the layoffs of 1,148 mechanics at the Indianapolis maintenance base, contending that United had used the war in Iraq as an excuse for cutting its operations.
>
> United maintains that the layoffs are legal under its union contracts, which allow employees to be furloughed without pay in the case of an emergency, like a war. . . . The action came as United and five of its labor unions are engaged in talks of $2.56 billion in concessions that the airline says are necessary to keep flying.

Id.

144. *See* Micheline Maynard, *UAL Pilots Seek to Stave Off Bankruptcy*, N.Y. TIMES, Nov. 4, 2002, at C2.

145. *E.g.*, Edward Wong, *Under Fire for Perks, Chief Quits American Airlines*, N.Y. TIMES, Apr. 25, 2003, at C1.

> After a week of sharp criticism from unions about executive benefits, Donald J. Carty resigned yesterday as chairman and chief executive of American Airlines, which continued to struggle to avoid a bankruptcy filing . . . .
>
> All but one of the directors refrained from commenting publicly on the situation despite demands from workers and governance experts that they explain what they knew about Mr. Carty's decision to delay disclosure of the executive benefits.
>
> On Wednesday night, the lone exception, Mr. Boren, said he would make a motion at the meeting to oust Mr. Carty and accused him of lying to both the board and to some of his fellow executives about whether he had told union leaders about the benefits. Mr. Boren, a former member of the United States Senate, told The Tulsa World that 'Mr. Carty has lost the credibility and trust necessary to effectively lead the company through challenging times.'

Id. See also Edward Wong, *Furious, American's Unions Talk of New Votes*, N.Y. TIMES, Apr. 22, 2003, at C1.

> Still fuming over the failure of American Airlines to inform them of its compensation plans for senior management, all three of the company's major unions said yesterday that they would vote again or were considering voting

recognize that such cuts are needed for the enterprise to survive[146] meaning that these airlines are able to remain in business, albeit in a slimmer configuration.

A number of ideas are at work in the downsizing of U.S. airlines, including the overarching idea that the business must survive if there are to be any jobs. A second idea is that many different employee groups serve customers, and each group must exist to fulfill that purpose. The pilots, mechanics, flight attendants, ticket salespeople, and, of course, the managers each have a special role to play in serving customers. Thirdly, attempts to eliminate one group at the expense of another defeat efforts to build the team environment that airlines strive to create. The last consideration in the downsizing of U.S. airlines is the idea that, although demand has diminished after the 9/11 terrorist attacks, the airlines perform a service for which there is a public market.

B. *Across the Board Salary Cuts: Detroit Symphony Experience*

Although one may assert that a proportional pay decrease across the board, without staff reductions, is idealistic and infeasible in today's ultracompetitive economy, such cuts were in

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> again on $1.62 billion in annual concessions that their members had approved last week.
>
> But Donald J. Carty, chief executive of the AMR Corporation, the parent of American, said that the airline had already begun to carry out some of those cost cuts and would continue to do so. He also apologized for not discussing the compensation packages more quickly, nevertheless he defended them as justified.

Id. See also Edward Wong, *American Air Pulls Back Bonus Plans*, N.Y. TIMES, Apr. 19, 2003, at C1.

> American Airlines dropped plans yesterday to pay large bonuses to seven top executives if they stayed with the company until January 2005. . . .
>
> American's announcement came after union leaders denounced Donald J. Carty, the chief executive, and other officials of the AMR Corporation, the parent of American, for agreeing to take the compensation packages while they were seeking annual labor concessions worth $1.8 billion and for not disclosing them during negotiations.

Id.

146. *E.g.*, Edward Wong, *United Chief Takes Pay Cut But Retains Other Benefits*, N.Y. TIMES, Apr. 5, 2003, at C3.

> United Airlines said yesterday that Glenn F. Tilton, its chief executive, would take a 14 percent cut in his base salary this year, though Mr. Tilton's much more significant stock and cash bonuses and other compensation, worth millions, will remain intact.

Id.

fact made by the Detroit Symphony Orchestra several years ago.[147] Facing a need to cut $1 million from its budget, the orchestra's staff—ranging from the executive director to the janitors—agreed to take a 4.5 percent salary cut.[148]

This collective action by the Detroit Symphony Orchestra, similar to those of the U.S. airlines, evidences several important principles. First is realizing that not only was the viability of the institution at stake, but also that a significant benefit to the community could be lost. This orchestra could easily have closed its doors, causing a decrescendo of community cultural resources. Second was recognizing that the principle of shared pain is a hard pill to swallow, but the orchestra's CEO added credibility to this request by agreeing to cut his personal salary by an amount proportional to what was sought of all other staff. The important and novel factor in this across-the-board salary reduction was the notion of compromise and sharing pain from top to bottom in the organization. The Detroit Symphony proved that there is more than one way to make music together.

If an organization as vulnerable and, arguably, as dispensable as an orchestra can rethink its pay schedule to ensure its continued viability, should not a corporation which provides jobs for its community members be able to do the same? Why cannot corporate management go to its workers and propose a similar solution when confronted with revenue shortfalls threatening the life of the factory and, perhaps, the community in which the company is located?

VI. CONCLUSION

Economic theories based on Ricardian ideas of comparative advantage have resulted in the internationalization of world economies, including those of France and the United States. These developments resulted in, and will continue to result in, significant restructuring and downsizing of corporations in mature economies. France and the United States are two nations where restructuring has resulted in significant employee layoffs.

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147. Allan Kozinn, *Despite Odds, Many of Them, A Bedeviled Orchestra Persists*, N.Y. TIMES, Nov. 4, 1991, at C15.

148. *Id.* Orchestra members, however, were not included in the cut because they had already seen their salaries reduced by 9.8 percent during a contract renegotiation two years earlier. *DSO Approves Pact*, WINDSOR STAR, Aug. 11, 1989, at C4.

This Article has examined two legal aspects of downsizing in France and the United States: the managerial authority to restructure and the safety net available to workers when downsizing occurs. The U.S. legal system generally confers broad, unrestricted authority on U.S. managers to restructure and downsize. France, in contrast, has generally more restrictive laws governing corporate management's downsizing authority.

Given the broad managerial authority to downsize in the United States, one would expect a strong safety net to protect displaced U.S. workers. Conversely, with the many limits French law places on managers to downsize, one would expect a comparatively modest safety net. Yet the opposite is true—French workers have relatively more generous unemployment benefits, health insurance coverage, and layoff notice protections than do U.S. workers. For those downsized out of jobs, the French legal system, with its national health insurance program, is clearly more generous to those with long-term medical problems.

Although the United States and France are among the most prosperous nations in the world in both the aggregate and per capita senses, the United States has a considerably higher national Gross Domestic Product (GDP) than does France ($10.4 trillion versus $1.44 trillion in 2002)[149] and, more importantly, a significantly higher per capita GDP than France ($36,406 versus $24,018 in 2002).[150] This makes the disparity between the sparse benefits the United States provides and the generous benefits France provides all the more striking. The United States appears to be a "Scrooge" nation compared to France when it comes to downsized workers, leaving them to fend for themselves. In contrast, the French people, through their government, provide greater economic support for those otherwise left behind. One might also infer that the costs of internationalization are borne by rank-and-file workers to a greater extent in the United States than in France. Meanwhile the benefits of internationalization accrue to a far greater extent in the upper economic classes in the United States, who already benefit regularly from tax cuts not given to lower income persons. Following downsizing, U.S. executives often reward themselves with extravagant compensation packages, while

149. *United States Factsheet*, Nov. 12, 2003, *at* www.economist.com/countries/USA; *France Factsheet*, Aug. 27, 2003, *at* www.economist.com/countries/France.

150. *United States Factsheet*, *supra* note 149; *France Factsheet*, *supra* note 149.

simultaneously seeking sacrifices from the rank-and-file who are called upon to share the pain.[151] This is a leadership failure when viewed through the prism of stakeholder analysis that recognizes that, in addition to the corporation's shareholders, the corporate employees and the community where the factory resides also have ethical claims on their firms.

Given the unemployment problems caused by downsizing, this paper proposes a shared pain approach in the form of reducing wages and salaries across the board throughout the organization prior to eliminating jobs. U.S. airlines and the Detroit Symphony Orchestra have recently used this approach in order to survive as institutions. Other corporations should consider and adopt such a strategy.

In an era when U.S. and French political relations are strained, the United States can learn much from the French legal system, if it is willing to listen. An egalité philosophy in France has permeated corporate culture, where humane treatment for dismissed employees is more evident than in the United States. Oddly enough, by providing economic support for their downsized workers, the French can better maintain aggregate demand for goods and services, and thereby create a basis for a consumer driven national economic recovery. Individual firms considering downsizing should consider the shared pain suggestions of this article. If they do, perhaps they may effect a seldom realized convergence of economics and ethics.

151. Hays, *Coca-Cola to Cut 20% of Its Staff After Woes at Home and Abroad*, *supra* note 1; Hays, *A Hefty Farewell Package for Former Coke Executive*, *supra* note 5.