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# Allaying the Outsourcing Tempest: A Candid Look at Outsourcing vis-A-vis the Future of American Jobs

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# ALLAYING THE OUTSOURCING TEMPEST: A CANDID LOOK AT OUTSOURCING VIS-À-VIS THE FUTURE OF AMERICAN JOBS

GARY S. CLENDENIN\*

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## I. INTRODUCTION

The pursuit of prosperity and contentment lies at the very crux of the immemorially esteemed “American dream,” and Americans have always undertaken this dignified quest by way of work. The liberty to engage in any occupation one desires has been an indispensable dimension of basic American philosophy from the time of our nation’s infancy to the present day—indeed, it even pervades our vision of the future. Not surprisingly, Americans largely relish their jobs; in fact, we, as Americans, use our vocations to paint our identities and shape our lives and ambitions.<sup>1</sup> Accordingly, we are inherently—and ardently—protective of our jobs because they are so inextricably woven into both our individual and national fabrics; anything that operates to undermine our access to and possession of

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<sup>1</sup> KENNETH CASEBEER & GARY MINDA, WORK LAW IN AMERICAN SOCIETY 5 (Carolina Academic Press Advisory Bd. Ed. 2005) (2005).

a job is thus hostilely confronted by concerned and potentially affected American workers. One concept that has been met with such enmity is outsourcing, or, more accurately phrased for the purposes of this article, “offshoring.”<sup>2</sup> The practice of outsourcing American jobs overseas, which has recently gained national media attention and engendered sharp political discord in the legislature as well as in coffee shops and dinner tables across America, has grown endemic among American businesses endeavoring to curtail costs and compete globally.<sup>3</sup>

Outsourcing is generally practiced by businesses as a means to regulate their overhead costs by hiring employees overseas, most commonly in areas such as India, China, or Latin America. These workers are willing to work for wages that are substantially lower than those for which a typical American is willing to work. Consequently, the company’s capacity to compete is greatly increased, which renders them more economically attractive to consumers.<sup>4</sup> A trend that began with manufacturing jobs, outsourcing now deeply infiltrates the information technology (IT) field, and it looms ominously on the horizon for several other industries, including professionals such as analysts, architects, and attorneys.<sup>5</sup> Over the past decade, this controversial yet seemingly inexorable practice allegedly has left thousands of Americans jobless.<sup>6</sup> These displaced workers have been forced to seek other modes of employment – usually with lower pay than their former jobs.<sup>7</sup> Upon a cursory examination, these reductions in labor costs appear to be a blessing for business profits and consumers, however they

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<sup>2</sup> Michael Blanding, *Anti-Globalization Protesters: The Revenge of the Nerds*, BOSTON MAG., May 1, 2004.

<sup>3</sup> Although this article specifically focuses on the outsourcing dilemma as it pertains to job loss in the United States, it should not be seen as an issue that is exclusive to the United States. The practice of outsourcing is, quite the contrary, ubiquitous throughout nations with fruitful business operations (e.g., United Kingdom, Scotland, Germany, Australia, etc.). See e.g., Virginia Marsh, et al., *When Push Comes to Shove Offshore Outsourcing Has Hit the Headlines This Year, but How Much is Really Going On?*, THE FIN. TIMES LONDON, Dec. 1, 2004, at 1 (discussing outsourcing and its effects from a global perspective with reference to multiple Western countries afflicted with resultant job loss).

<sup>4</sup> See Frank J. Spanitz, *Inter-Modal Rail: Will ERISA’s Newly Defined Welfare Benefit Noninterference Clause Curb Outsourcing?*, 23 DEL. J. CORP. L. 589 nn.1-3 (1998) and accompanying text.

<sup>5</sup> Kris Maher, *Job Shift to Cheaper Countries Could Threaten More Careers: Analysts, Architects, Attorneys*, WALL ST. J., Mar. 23, 2004 at B1.

<sup>6</sup> See, e.g., Stephen Baker & Manjeet Kripalani, *Will Outsourcing Hurt America’s Supremacy?*, BUS. WK., Mar. 1, 2004, at 84 (maintaining that over the past three years, the number of American programming jobs that have vanished due to outsourcing has more than doubled, rising from approximately 27,000 to 80,000); see also Louis Uchitelle, *A Statistic That’s Missing: Jobs that Moved Overseas*, N.Y. TIMES, Oct. 5, 2003 (discussing expert estimates that of the 2.8 million jobs that were lost from 2001 to 2003, approximately fifteen percent of this number reappeared overseas).

<sup>7</sup> See generally, Maher, *supra* note 5.

serve only to undermine the livelihoods of affected American workers and instill fear into countless others whose jobs have become vulnerable. Simple statistical analysis reveals that the outsourcing epidemic should give us cause for alarm.<sup>8</sup>

Naturally, the escalation of this practice has occasioned an unequivocal schism in the debate regarding its utility, viability, and ethical implications. On one side is the “protectionist” who believes that the security of American jobs and the deleterious consequences of outsourcing outweigh its attendant benefits. On the other side is the espouser of free trade and employer prerogative, who believes that outsourcing has numerous advantages and is the inescapable result of the natural evolution of the market economy.<sup>9</sup>

Protectionist philosophy has been challenged zealously by champions of free trade and big business, who contend that protectionists (sometimes more harshly referred to as “obstructionists”) have wholly embellished the negative impacts of outsourcing and have exaggerated the potential future loss of American jobs, resulting in heated discourse.<sup>10</sup> However, regardless of the side of the debate upon which one falls, the importance of this issue is evident, as it impacts in one way or another our potential to earn a living. Thus, the issue of a company’s right to send American jobs overseas necessitates both legal and moral consideration.

This article explores the business practice of outsourcing and the steps that potentially affected American workers can take to protect against the loss of their jobs. This article argues that outsourcing is the inexorable result of employers’ and business’ responses to an exponentially—though somewhat predictably—evolving global marketplace. To stop outsourcing altogether will likely prove impossible given its economic efficiency, however, there are a number of steps that communities, workers, and legislatures can and have implemented<sup>11</sup> either to hinder or assuage its deleterious effects. Part II

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<sup>8</sup> See e.g., Steve Lohr, *New Economy; Offshore Jobs in Technology: Opportunity or Threat?*, N.Y. TIMES, Dec. 22, 2003, at C1 (referencing widely cited study conducted by Forrester Research Group which concluded that by 2015, 3.3 million service jobs that were once in America will have moved offshore into other countries).

<sup>9</sup> Compare Rescue American Jobs Campaign, <http://www.rescueamericanjobs.org> (an anti-outsourcing group dedicated to the preservation of American jobs) with Brink Lindsey, *10 Truths about Trade: Hard Facts about Offshoring, Imports, and Jobs* (July 2004), <http://www.reason.com/0407/fe.bl.truths.shtml> (arguing that outsourcing is a benefit rather than a detriment to the economy, notwithstanding the attending loss of numerous American jobs, and that fears concerning its proliferation are ultimately unfounded).

<sup>10</sup> *Id.*

<sup>11</sup> See, e.g., Carolyn D. Marsan, *A Political Hot Potato; Legislatures Juggle Offshore Outsourcing Regulations*, NETWORK WORLD, July 5, 2004 (discussing state legislation directed at curbing governmental outsourcing as well as similar proposed laws in other state and federal legislatures).

briefly examines the history of outsourcing and the evolution of the economy that has rendered this business model so alluring. Part III will explore the labor laws, other legislation, and various legal and business doctrines which have fostered the rise, implementation, and maintenance of outsourcing. Part IV outlines the positive and negative corollaries that have arisen as a result of outsourcing. Finally, Part V lends analysis to the specific vehicles that affected American workers and communities can exploit to reinforce the security of their jobs or to better prepare themselves to adapt and prosper in this rapidly developing economy.

## II. THE FATED EVOLUTION OF OUTSOURCING

Outsourcing is nothing novel to the economy of the United States. Manufacturing companies, such as those producing automobiles, textiles, and furniture, began outsourcing in the early 1970s when they realized that American workers were not only expensive when compared to willing workers overseas, but they were also profitably fungible.<sup>12</sup> The former internal labor market, which spawned the powerful unions pervasive throughout the manufacturing plants of the mid 20th century, affording workers substantial benefits and security in their jobs, dissipated as companies began to recalibrate their goals and adapt to the rapidly evolving, more globally competitive market.<sup>13</sup> Job security, tenure, and loyalty to a particular firm, all qualities which were hallmarks of the internal labor market, became only peripheral concerns as the market developed into a system in which workers transferred through and across firms rapidly and with minimal loyalty.<sup>14</sup> This qualitative shift in the demeanor of the market gave rise to an optimal environment for outsourcing. Because loyalty and job security have been marginalized by the dramatic evolution of our economy from a low-velocity market toward a high-velocity market, the ethical dubiousness of outsourcing is at least partially veiled – the blame can be cast

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<sup>12</sup> See Tracy Halliday, *The World of Offshoring: H-1B Visas Can Be Utilized to Curb the Business Trend of Offshoring*, 25 *HAMLIN J. PUB. L. & POL'Y* 407, 411 (2004). Halliday explains that outsourcing has played a highly dispositive role in shaping the economy's disposition by bringing to an end each economic phase. That is, our first agricultural economy gave way to an industrial economy when agricultural work began to be outsourced two centuries ago. The industrial-based economy then yielded to the technologically-grounded economy in the 1970s when manufacturing jobs started being outsourced and over the past few decades, even these "high-tech" information jobs have been and are being outsourced, ushering in our present offshoring quandary (citing Karen Sinniger, *The Brave New World of Global Outsourcing*, 21 *No. 2 ACCA Docket* 23, at 23 (2003)).

<sup>13</sup> See CASEBEER, *supra* note 1, at 5-12.

<sup>14</sup> *Id.*

upon economic and global compulsions beyond the employer's direct control.<sup>15</sup>

Also contributing to the budding popularity of outsourcing is the exponentially improving ease with which we can communicate ideas, make transactions, and send products across the globe.<sup>16</sup> The technological revolution that has transpired over the past decade concerning computers and the internet is clearly the wellspring of this marvel – it has wholly modified our way of life at home, at school, and certainly at work. It is not surprising, then, that companies seek to exploit these technology and communication breakthroughs while doing business in an effort to facilitate and strengthen their operations.

The evasion of responsibility by companies' decision makers, the competitive exigency of the market, and the ease with which communications and products are conveyed from one party to the next, notwithstanding the immense geographic separation, combine to render offshore outsourcing an attractive business model, which companies seeking higher profits and efficiency are doubtless quick to embrace.

### III. THE CONSEQUENCES OF OUTSOURCING— BOTH SIDES OF THE STORY

#### A. *The "Good" News*

The practice of outsourcing might initially appear to be an all-consuming black hole into which the future prosperity of America is slowly disappearing, evoking visions of millions of jobless Americans, unkempt and hungry, floundering about barren streets, empty factories, and dilapidated shanties. The reality, however, is not nearly so dismal. Despite the immediate job loss occasioned by the practice, there are a number of plausible justifications that urge its endorsement. The principal justification for outsourcing lies in the potential economic benefits that everyone will allegedly enjoy if the practice is uninhibitedly allowed. This line of reasoning typically goes as follows: by hiring employees overseas at lower costs, businesses will be able to increase productivity and lower the prices of their goods and services; this, as a result, will both benefit and motivate the consumer because goods and services will

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<sup>15</sup> See generally Eduardo Porter, *Outsourcing Is Becoming A Harder Sell in the U.S.*, N.Y. TIMES, Mar. 6, 2004, at C2. (examining how company executives do indeed feel that outsourcing is morally suspect, as it callously strips away the livelihoods of many American workers; however, those executives plead that the practice is typically the result of forces beyond the specific firm's control, and it is indispensable to remaining abreast of the severe global competition).

<sup>16</sup> See Lindsey, *supra* note 9.

be more affordable.<sup>17</sup> The resulting shift of cost savings to the consumer will produce a greater demand for products and services across the board, thus fostering sound economic growth.<sup>18</sup>

Another benefit of outsourcing is that other countries outsource some of their operations to America, which creates jobs for many Americans, and we, as a nation, incur the economic benefits thereof.<sup>19</sup> In other words, the same economic model that sends our jobs overseas simultaneously brings jobs here. For example, the U.S. ran a trade surplus in I.T. services from 1995 to 2002; that is, the profits gained from exporting our services greatly exceeded the costs of imports.<sup>20</sup> Additionally, a study has shown that for every dollar spent by an American corporation on outsourcing to India, only 33 cents of that dollar remains in India; the remaining 66 cents returns to the U.S. "in the form of cost savings, new exports, and repatriated profits."<sup>21</sup>

Outsourcing is also supported by the proposition that there are not enough skilled American workers to satiate fully American businesses' IT needs. Thus, offshoring does not necessarily eliminate jobs, but rather it compensates for the scarcity of local skill.<sup>22</sup> Moving jobs overseas also comports with the strengthening and growth of the global economy, and it brings jobs and capital to underdeveloped areas of the world.<sup>23</sup>

Finally, the most contested issue regarding outsourcing is that its negative consequences are gross exaggerations promulgated by powerful unions and Democratic lobbies,<sup>24</sup> and that, in reality, not many jobs are sent abroad.<sup>25</sup> These contentions should, however, be taken with a grain of salt,

<sup>17</sup> See, e.g., Bruce Bartlett, *Productivity is Overtaking Outsourcing*, N.Y. SUN, Oct. 13, 2004.

<sup>18</sup> See Lindsey, *supra* note 9.

<sup>19</sup> See Thomas Sowell, *Outsourcing*, <http://www.townhall.com/columnists/thomassowell/ts200404316.shtml> (last visited Jan. 21, 2005). Sowell argues that if we were to restrict our businesses from offshoring to other countries, it is conceivable that these companies (e.g., Toyota and Honda) would pull their operations out of the United States, and many Americans would lose their jobs at these facilities as a result.

<sup>20</sup> See Lindsey, *supra* note 9. According to Lindsey, from 1995 to 2002 American exports rose from \$2.4 billion to \$5.4 billion in the categories of computer processing and database services, while imports rose from \$300 million to \$1.2 billion; accordingly, the trade surplus increased by \$2.1 billion over those years.

<sup>21</sup> Bartlett, *supra* note 17.

<sup>22</sup> See Lindsey, *supra* note 9.

<sup>23</sup> See Jay Shankar, *Indian Groups Split Over Outsourcing Ahead of Anti-Globalization Forum*, AGENCE FRANCE PRESSE, Jan. 13, 2004, (discussing the benefits that India receives due to the outsourcing of jobs to their country; also discusses the opposing view that outsourcing distresses their economy because of the low wages it entails).

<sup>24</sup> See, e.g., Lindsey, *supra* note 9; see also Sowell, *supra* note 19.

<sup>25</sup> See, e.g., Porter, *supra* note 15. Porter comments on a study by the Department of Labor that looked at job loss in the first quarter of 2004. It found that 4,633 workers were laid off because their jobs

as many studies—especially those that project *future* job loss in light of the presently growing outsourcing trend—have contradictory findings.<sup>26</sup>

### B. The “Bad” News

The most palpable consequence of the offshoring of American jobs is, obviously, the attendant American job loss. Notwithstanding studies that tend to show that outsourcing concerns are unwarranted, these job losses are *real*, and *real* Americans are left in a financial quagmire out of which they might not be able to climb due to a deficiency in education or a limited repertoire of skills.<sup>27</sup> Many Americans, who possess a low-velocity market mindset, have worked loyally for a specific firm for many years (sometimes their entire lives), and upon the firm’s decisions to reduce costs by sending jobs overseas, these Americans are stripped of their jobs and left with no recourse.<sup>28</sup> Doubtless, this occasions a sad economic reality for thousands of American families every year, thus creating a significant drain on governmental resources such as unemployment insurance, welfare, Medicaid, and the like.<sup>29</sup> It follows that those who are impoverished and unemployed will not be able to exploit the benefits of the inexpensive goods and services that outsourcing allegedly provides, thus detaching them from the market and hampering the flow of the economy.<sup>30</sup>

The negative consequences of outsourcing are not limited to the financial travesty of those affected workers. The primary non-economic concern is that offshoring of IT services requires the distribution of private information into foreign hands. Information such as bank account numbers, financial

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were transferred overseas, which accounts for a mere 2.5 percent of the total 182,456 long-term job losses in this period. Although the study was significantly undercut by its inclusion of only firms with 50 or more workers where at least 50 filed for unemployment insurance, Porter notes that it does buttress the argument that job loss is only faintly contributable to outsourcing practices. Rather, some experts posit, it is a result of the increase in technology and advancements in methodology that eliminates employers’ needs for so many workers.

<sup>26</sup> See Lohr, *supra* note 8 (citing Forrester Research study predicting that by 2015, 3.3 million American service jobs will have moved overseas).

<sup>27</sup> See Maher, *supra* note 5 (discussing the case of a medical transcriptionist whose job was sent overseas, forcing her to seek other employment with drastically lower wages, thus rendering it difficult to make ends meet).

<sup>28</sup> See Rescue American Jobs Campaign, *supra* note 9. This is an organization dedicated to the preservation of American jobs and dissemination of anti-outsourcing literature and information. It shares the often heartrending stories of multiple Americans whose jobs have been outsourced and whose livelihoods have been substantially compromised as a result.

<sup>29</sup> See Halliday, *supra* note 12, at 416-17.

<sup>30</sup> *Id.*



statements, medical records, and business records are exposed in countries, which may have insufficiently protective privacy laws.<sup>31</sup> In an age where identity theft is widespread, the fact that U.S. companies are sending such vital, private information abroad should summon heightened concern. The legal recourse available to Americans who might fall victim to offshore abuse of their information is complicated and uncertain.<sup>32</sup> Legislation has recently been proposed by Senator Hillary Clinton that would require businesses to disclose to consumers that private information was being handled offshore and would provide consumers with a right to sue U.S. employers for the fraudulent activity of their subcontractors. However, a White House spokesman has censured this bill as superfluous because the Federal Trade Commission has sufficient authority to take remunerative action. This legislation has also been attacked on the grounds that it would create a deluge of costly litigation.<sup>33</sup> Either way, there is clearly no agreement or certainty regarding how these privacy issues should be resolved, thus painting a dark hue of suspicion upon the practice of outsourcing.

Finally, pursuant to the abundant research that has been conducted on outsourcing, it does not appear that the practice is going to wane anytime soon; in fact, it will likely continue to increase, infiltrating many different and new vocations and industries.<sup>34</sup> It is similarly likely that foreign subcontractors desirous of assuming the responsibilities of U.S. workers will surface and popularize in other economically-challenged countries. For example, Russia, in an effort to rebuild its economy, is modeling its outsourcing agencies after the successful Indian model in an attempt to attract Western employers seeking to offshore.<sup>35</sup> Although avid proponents of free trade would see this occurrence as propitious, it is indisputable that it will create financial distress for the American worker whose job will be consequently exterminated.

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<sup>31</sup> See Bob Davis, *As Jobs Move Overseas, So Does Privacy*, WALL ST. J., May 10, 2004, at A2 (discussing Americans' concerns over privacy after a medical transcriber in Pakistan threatened to post medical records of U.S. patients on the internet in order to coerce a U.S. subcontractor to pay her).

<sup>32</sup> For a thorough examination of the privacy problem and the potential remedies of this dilemma, see Kenneth N. Rashbaum, *Offshore Outsourcing of Health Data Services*, 16 HEALTH LAW. 24 (2004).

<sup>33</sup> Davis, *supra* note 31, at A2.

<sup>34</sup> See Maher, *supra* note 5.

<sup>35</sup> See Erin E. Arvedlund, *Modest Now, Russian Outsourcing Has Big Hopes*, N.Y. TIMES, Dec. 15, 2004, at W1 (discussing Russian companies' growing attempt to strengthen their outsourcing base and attract American companies). See also Ryan Chittum, *Latin America Shows Outsourcing Promise*, WALL ST. J., Oct. 5, 2004, at A19 (discussing the increasing attractiveness of Latin American offshoring regimes due in part to their high level of negotiation skills and geographic proximity).

#### IV. LEGISLATIVE AND DOCTRINAL BENEFICENCE TOWARD OUTSOURCING

##### A. Labor Law and Employer Prerogative

Companies seeking to outsource have not encountered many daunting legislative obstacles in their pursuit to cut costs. In fact, labor legislation and the doctrines which have evolved out of labor case law are conducive to the practice of outsourcing, notwithstanding the intention to strike a fair balance between the powerful company and the relatively disadvantaged workers. This favoritism for employer prerogative emanates from the specifics of the National Labor Relations Act (NLRA)<sup>36</sup> and its interpretive case law.<sup>37</sup> For example, in *Textile Union Workers of America v. Darlington Manufacturing*,<sup>38</sup> the Supreme Court held that an employer's decision to close a plant was "so peculiarly a matter[] of management prerogative that [it] would never constitute [a] violation[] of section 8(a)(1), whether or not [it] involved sound business judgment, unless [it] also violated section 8(a)(3)."<sup>39</sup> Further reinforcing the doctrine of employer prerogative, the Supreme Court in *First National Maintenance Corp. v. NLRB*<sup>40</sup> held that the employer had no duty under 8(a)(5) to bargain collectively over its decision to close a part of its business and terminate union employees as a result.<sup>41</sup> The Court, per Justice Blackmun, memorably stated that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."<sup>42</sup>

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<sup>36</sup> National Labor Relations Act, Pub. L. No. 74-198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

<sup>37</sup> See Terry Collingsworth, *Resurrecting the National Labor Relations Act – Plant Closings and Runaway Shops in a Global Economy*, 14 BERKELEY J. EMP. & LAB. L. 72, 73-74 (1993).

<sup>38</sup> 380 U.S. 263 (1965).

<sup>39</sup> *Id.* at 269. Section 8(a)(1) of the NLRA states that it is an unfair labor practice for an employer to interfere with any of the provisions laid out in § 7 of the Act, i.e., simply stated, the right to organize or join a union. 29 U.S.C. §§ 157-58. Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158.

<sup>40</sup> 452 U.S. 666 (1981).

<sup>41</sup> *Id.* at 688.

<sup>42</sup> *Id.* at 676. The Court distinguishes an employer's investment/entrepreneurial decisions from other decisions which impinge upon "terms and conditions of employment" that are subject to mandatory bargaining pursuant to Section 8(a)(5). In other words, the Court argues that the decision to close down a plant or to relocate to another location is considered to be a decision which is so fundamentally rooted in the entrepreneurial realm of management control that it cannot be rendered subject to mandatory bargaining—to mandate bargaining over such a decision would be to effectively place the union bargaining

The Supreme Court's categorically pro-management decision in *First National Maintenance Corp.* effectively vitiates a union worker's claim that he is being unlawfully stripped of a job when the employing company unilaterally decides (that is, without collectively bargaining) to move his/her job overseas. *First National Maintenance Corp.* designates this type of decision by an employer to be one that should be wholly unfettered by union/employee interference, as it intimately relates to a company's investment strategy. It is unmistakable, then, that Supreme Court case law germane to entrepreneurial control plays generously into the hands of companies engaging in, or planning to engage in, outsourcing/offshoring practices.

### B. Tax Relief for Offshoring Companies

Perhaps the most notoriously contested legislation with regard to outsourcing is that which provides tax incentives for businesses to move jobs overseas. In the 2004 election, the Democratic candidate, John Kerry, vehemently railed against President Bush's endorsement of tax relief for such firms.<sup>43</sup> This legislation specifically allows companies to defer the taxes on income made overseas, provided these profits do in fact stay outside of the United States.<sup>44</sup> Experts have estimated that American companies have earned more than \$400 billion in profits overseas.<sup>45</sup> Not surprisingly, executives of such companies have been assiduously lobbying for further tax relief on their overseas profits.<sup>46</sup> Although the future passage of similar legislation augmenting overseas tax relief is uncertain, it is probable that the current tax regime will remain intact in light of President Bush's reelection. The Bush administration has been rather vocal about the importance of allowing freedom of trade and encouraging outsourcing practices to help stimulate our economy.<sup>47</sup>

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representative in the seat of the company's control.

<sup>43</sup> See Edmund Andrews & Jodi Wilgoren, *Kerry to Propose Eliminating a Tax Break on U.S. Companies' Overseas Profits*, N.Y. TIMES, Mar. 26, 2004, at A12 (discussing Kerry's plan to revise the tax system by eliminating such tax breaks and utilize these new tax revenues to lower the overall corporate tax rate and to create incentives for investment and new jobs here in the U.S.).

<sup>44</sup> *Id.* Senator Kerry's plan to eliminate this tax relief would have provided the government with extra tax revenues of an estimated \$12 billion per annum, which Kerry promised to use to reduce the overall corporate tax from 35% to 33.25% if he were elected. *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* If such further relief were to be granted, offshoring businesses would save an additional \$37 billion over the next ten years on taxation of overseas profits. *Id.*

<sup>47</sup> See, e.g., Saritha Rai, *An Industry in India Cheers Bush's Victory*, N.Y. TIMES, Nov. 4, 2004, at W1 (discussing the celebratory atmosphere in India, the country where most U.S. jobs are sent upon being outsourced, upon President Bush's reelection). Senator Kerry's patent anti-outsourcing position and

The policy of such legislation is to afford American multinational firms the requisite financial aid to compete with their foreign counterparts.<sup>48</sup> As a result, the pro-outsourcing argument is that these companies are able to lower the prices of their products and/or services, benefiting both the consumer and the overall economy.<sup>49</sup> It is evident that tax relief is a potent incentive for companies to outsource. After all, outsourcing is principally motivated by a desire to increase profits, and deferring taxes is an excellent way to accomplish that goal. The passage of such tax legislation in the face of keen, anti-outsourcing opposition underscores the unmistakable division of the economic philosophy of each side of the outsourcing controversy. The legislature has clearly sided with the free trade camp, at least with regard to tax deferral for the private sector,<sup>50</sup> as the tax system currently operates to promote offshoring.

### C. *Anti-Outsourcing Legislation and Case Law*

Notwithstanding the nurturing treatment our laws and courts afford the outsourcing business model, there exist whispers of legislative and judicial hope for vulnerable American employees. For example, in 1988, Congress passed the Worker Adjustment and Retraining Notification (WARN) Act,<sup>51</sup> which requires employers with one hundred or more employees to give notice to its workers sixty days in advance of any layoff which affects five hundred or more workers, or for any plant closing which affects fifty or more workers.<sup>52</sup> The WARN Act certainly provides the workers to whom it

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proposal to eliminate the tax relief ran diametrically opposed to the interests of all those involved in outsourcing (with the exception of those whose jobs were lost), especially the firms and workers in India who had been hired as a result of the transfer of outsourced jobs from the U.S. to India. The president of Nasscom, a software and services firm located in India, commented on Bush's reelection: "Some corporations have been cautious about signing or announcing deals in the last few months. . . . Now they will no longer hold back." *Id.* Given that the tax breaks will not be opposed by the executive branch over the next four years, it is not unreasonable to assume that Bush's reelection will serve to increase the number of successful outsourcing agreements.

<sup>48</sup> See Hugo Restall, *Giving Kerry the Business*, WALL ST. J., June 28, 2004, at A11.

<sup>49</sup> See Del Jones, 'Offshoring . . . Benefits the Consumer; Former DHL Chairman: Benefits Create More Wealth for all Involved', USA TODAY, Jan. 17, 2005, at B.6 (interview with pro-outsourcing chairman who exalts outsourcing and censures its critics by contending that outsourcing is critical for the advancement of our economy, it benefits everyone in the U.S., and it should be avidly encouraged).

<sup>50</sup> Congress has not entirely sided with pro-outsourcing arguments, however, both Congress and various states' legislatures have passed, or are considering the passage of laws which either undermine the ease of or prohibit altogether governmental outsourcing arrangements. See *supra* notes 35-39 and accompanying text.

<sup>51</sup> 29 U.S.C. §§ 2101-2104 (1988).

<sup>52</sup> *Id.* § 2102.

applies with added protection in that it diminishes the likelihood that their jobs will be abruptly stripped away. However, whether it significantly hinders employers from laying off workers or closing plants is far from clear.<sup>53</sup> Thus, although ostensibly WARN stands as a legislative bulwark for worker protection, its true potency is diluted, and it likely has no noteworthy impact on outsourcing practices. Simply requiring notice is not prohibitively burdensome, and it does not equate to prevention of job flight. What it *does* equate to is a flight delay.

In 2004, Congress sharpened its aim to quell American job loss by passing a bill that would proscribe government overseas outsourcing contracts involving the use of federal funding for one year<sup>54</sup> at the federal, state, and local levels.<sup>55</sup> This at least temporarily protects governmental employees, and it suggests to American employees and employers in the private sector that Congress is, in some measure, disapproving of offshoring practices. Although opponents of protectionism vociferously objected to this bill which triggered anxiety among business leaders, the likely impact of this legislation is minimal. First of all, the bill is limited to government jobs involving the use of federal funding, and second, the bill's offshoring ban only remains operative for one year.<sup>56</sup>

In direct contravention of the argument that legislative intervention will prove toothless, similar legislation has surfaced and positioned itself as the focal point of debate in multiple state legislatures.<sup>57</sup> Most notably, in May of 2004, Tennessee passed a bill that gives exclusively American based contractors of IT services preference in the bidding process for government projects.<sup>58</sup> Although the federal legislation is arguably fraught with deficiencies, it is apparent that there is a burgeoning legislative opposition in the state

<sup>53</sup> See Stephen D. Ake, *Evolving Concepts in Management Prerogatives*, 24 STETSON L. REV. 241, 244-45 (1994) (noting that the WARN Act's sixty day requirement does not have a significant impact on the length of advance notice that laid-off or displaced workers receive because of its exemptions and lack of enforcement mechanisms). In response to this observation, Ake goes on to examine legislation proposed during the Clinton administration that sought to cure WARN's potency defects; specifically, this legislation proposed to extend the notice requirement in certain circumstances to 6 months. *Id.* at 245.

<sup>54</sup> See Karen MacPherson, *States Sending Jobs Overseas: Legislatures Consider Ban on 'Outsourcing' Government Business*, PITTSBURG POST-GAZETTE, Apr. 4, 2004, at A-8.

<sup>55</sup> See Marsan, *supra* note 11.

<sup>56</sup> See generally Bruce Stokes, *The Myth about Protectionism*, CONGRESS DAILY A.M., Mar. 9, 2004 (arguing that the protectionism scare occasioned by the Congressional ban on overseas outsourcing of federal jobs is wholly unjustified and that such legislation will do little to curb free trade, which is wholeheartedly endorsed by the current Bush administration).

<sup>57</sup> See Marsan, *supra* note 11.

<sup>58</sup> *Id.* Also noteworthy is a directive issued by the governor of Arizona which prohibits state work from being performed overseas. Similar legislation, including preferential treatment of U.S. contractors and complete prohibitions of sending work overseas, is being proposed in numerous other states. *Id.*

governments with respect to overseas outsourcing of state work. Much to the dismay of the American worker, however, the triumph of these employee-friendly bills may be short lived. A number of similar anti-offshoring bills, including one imposing restrictions on the private sector, were passed in the California legislature in 2004, but they were summarily vetoed by Governor Arnold Schwarzenegger.<sup>59</sup> Even in a state literally inundated with technology workers who have been displaced by overseas workers, the legislative accomplishments of the anti-outsourcing regime were swiftly quashed by proponents of free trade. This is not to say that every piece of anti-offshoring legislation that has been passed by state legislatures will be similarly ill-fated, but it does illustrate that even black letter law against outsourcing is susceptible to prompt veto.

State Senators and Representatives are invariably closer to and more entwined with the communities that they represent than are their counterparts in Washington. As a result, they are more frequently exposed to the cries of the local communities and affected employees. It is not surprising, then, that offshoring issues have so prominently emerged in state legislatures, and it is foreseeable that this sort of deliberation will continue in the near future. Whether this opposition for the offshoring of state work will prove to be a legitimate boon for private employees remains uncertain, although doubtless it will serve to boost their morale.

The search for anti-outsourcing case law, unlike that for legislation, proves a rather arduous task. There has obviously been no blanket court decision which has rendered the practice of outsourcing "illegal," thus forbidding its implementation wholesale. To the contrary, most relevant labor case law would suggest that outsourcing, pursuant to the doctrine of employer prerogative, will remain legally unimpaired provided it does not interfere with some other statutory (NLRA) or contractual (collective bargaining agreement) right. There is, however, one case which made it to the Supreme Court in 1997 which has the *potential* to impact meaningfully (i.e., to curb its execution) the practice of outsourcing: *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka, and Santa Fe Railway*.<sup>60</sup>

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<sup>59</sup> Dale Kasler, *Schwarzenegger Vetoes Bills that Curb Outsourcing Jobs*, THE SACRAMENTO BEE, Sept. 30, 2004. Notwithstanding Governor Schwarzenegger's veto of the anti-offshoring bills, some commentators suggest that if such protectionist legislation is to survive and become valid law, it will be met by vehement legal challenges in the courts. See, e.g., Karl Schoenberger, *Auditor Endorses Offshoring Disclosure; Report Suggests only Small Role in State Services*, SAN JOSE MERCURY NEWS, Jan. 21, 2005, at 1.

<sup>60</sup> 520 U.S. 510 (1997). For an extensive discussion regarding the impact of this case upon the practice of outsourcing, see Spanitz, *supra* note 4. Spanitz concludes that, although this decision appears to stand as a hindrance to companies desirous of outsourcing its operations, its actual effect will be minimal due to: (1) the extremely high burden that employees are faced with in proving their ERISA welfare benefit claims; (2) the relatively miniscule costs employers face by entering into this sort of

At issue in *Inter-Modal Rail* was an employer railway's decision to outsource a division of its cargo handling operations at one of its facilities to a subcontractor,<sup>61</sup> who was to perform the same duties as the former employees, but with significantly cheaper welfare and pension benefit demands.<sup>62</sup> Reversing a decision by the 9th Circuit Court of Appeals, the Court, per Justice O'Connor, unanimously held that the purview of section 510 of the Employee Retirement Income Security Act (ERISA)<sup>63</sup> was not restricted to vested benefits but also included unvested welfare benefits.<sup>64</sup> Many commentators argue that in so holding, the Supreme Court has considerably abrogated an employer's formerly "unfettered" liberty to outsource its operations. This is because it leaves employers in a cloud of uncertainty regarding both the legality of outsourcing and what actions they can and cannot take without contravening section 510 of ERISA.<sup>65</sup>

*Inter-Modal Rail* was decided in 1997, and in 2005, nearly a decade later, we can appreciate the impotency of this decision with respect to curbing outsourcing. Although it might have chilled outsourcing temporarily, this potentially encumbering decision appears to have had no material impact upon companies endeavoring to outsource, as this practice is flourishing more now than ever. Additionally, this decision has not been revisited by the Supreme Court, nor has it been seated at the center of discussion in *any* post-1997 case law or post-1998 legal commentaries, which further suggests that the anti-outsourcing implications of this decision have faded away unnoticed.<sup>66</sup>

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litigation in comparison with the compellingly enormous cost savings that outsourcing can afford them; and (3) the ignorance that this decision even exists. *Id.* at 619-21.

<sup>61</sup> *Id.* at 590. It should be noted that the subcontractor who displaced the employees in this case was an American firm that was subject to a collective bargaining agreement with the Teamsters union, albeit one that was less favorable to employees than the agreement between the Teamsters and the displaced workers. *Inter-Modal Rail Employees Ass'n*, 520 U.S. at 511. Accordingly, this case does not expressly involve the right to offshore, per se, but rather it involves the overall right to outsource in general.

<sup>62</sup> Spanitz, *supra* note 4, at 590.

<sup>63</sup> Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. § 1001 (1994)). Section 510 is designed primarily to "prevent[] unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." Spanitz, *supra* note 4, at 595 (quoting *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980)). Some courts have recognized that section 510 is also applicable to nonvested welfare benefits. Spanitz, *supra* note 4, at 595.

<sup>64</sup> Spanitz, *supra* note 4, at 590.

<sup>65</sup> *See id.* at 618.

<sup>66</sup> The legality of outsourcing has also been challenged in the courts of Australia. In November of 2000, an Australian Federal Court ruling that employers must pay the new employees the same wages as the displaced workers was quashed by the Australian High Court, but no explanatory opinion was

## V. REMEDIES FOR AMERICAN WORKERS

Community action and an open dialogue among workers, employers, and legislatures are the most practical vehicles to assuage the negative effects of outsourcing. By voicing their opinions, disseminating information and engaging in productive debate, workers can negotiate with employers to require suitable notice, retraining programs, or alternate employment positions when outsourcing is imminent. Through the utilization of peaceable, informative, and strategic demonstrations, along with cogent lobbying, workers can persuade legislatures to pass laws that will afford them reasonable protection from having their jobs outsourced. For example, a law that gives preference to non-offshoring firms when awarding governmental contracts is a reasonable compromise between the two camps in the outsourcing debate.<sup>67</sup> It neither prohibits the government from contracting with offshoring companies, nor puts at a disadvantage non-offshoring firms with presumably higher costs. State legislation with respect to outsourcing is a growing trend,<sup>68</sup> and it is not unreasonable to assume that trend is attributable to community action and employees who are vocal about their concerns.<sup>69</sup> A number of alliances have formed specifically over the past few years to campaign against outsourcing and to promulgate information regarding its impact upon American workers and the economy. Representatives of these organizations travel across the nation to share dramatic stories of displaced workers, spread information, and motivate communities not to acquiesce to harmful employer decisions to outsource.<sup>70</sup>

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handed down. See Stephen Long, *Ruling Leaves Crucial Issue No Clearer*, AUSTRALASIAN BUSINESS INTELLIGENCE: THE AUSTRALIAN FINANCIAL REVIEW, Nov. 17, 2000.

<sup>67</sup> See Marsan, *supra* note 11 (discussing legislation passed in Tennessee that gives preference in given state contracts to non-offshoring companies, although not altogether proscribing the giving of state contracts to offshoring companies).

<sup>68</sup> See discussion *supra* Part IV.3.

<sup>69</sup> Indiana's governor recently cancelled a \$15 million dollar contract with an offshoring consulting firm that would have handled some calls in India in response to overwhelming communal and public outcries. See, e.g., Robert Tanner, *Outsourcing Generates Worry – But No Laws*, DESERET MORNING NEWS, Apr. 23, 2004, at A01.

<sup>70</sup> See, e.g., *Jobs Tour Focuses on Outsourcing*, WORKDAY MINN., Sep. 27, 2004, at <http://www.workdayminnesota.org> (discussing the "Rescue American Jobs Tour" campaigning throughout Minnesota, stopping in multiple towns which are home to displaced employees, and ultimately ending up on the steps of the Minnesota legislature). Although this particular campaign might be labeled as too "protectionist," it is undeniable that their efforts are taken in good faith, that is, they are only trying to protect American workers. The remedies they seek might indeed prove too extreme (e.g., an outright ban on outsourcing), but certainly their voices will be (and have been) heard by state legislatures, further apprising the public and lawmakers of the presence and exigency of the outsourcing dilemma.



As briefly mentioned above, one very real and valuable benefit that workers could obtain by compelling negotiations with legislatures and employers is the implementation of worker retraining and education programs.<sup>71</sup> One commonly cited reason for the shipping of American jobs overseas is the paucity of technologically skilled American workers. It follows that if successful training programs can be implemented for American workers, the necessity to offshore will lessen. The problem with carrying out such a program is deciding who should bear the cost of implementation. One possible solution to this is for the federal government to pass legislation which would require that some portion of the tax breaks to which offshoring companies are currently entitled to be appropriated for the retraining or education of American workers that have been displaced. In fact, IBM has already implemented such a retraining program for its displaced workers.<sup>72</sup> Such retraining/educational programs, then, are not out of the reach of lobbying workers. Additionally, it is essential for workers to be vocal not only about retraining programs, but also about the improvement in our educational system as a whole. Our educational regime is currently molding future American workers, and it is vital that they are being instilled with the knowledge and skills that are indispensable to our nation's evolving economic structure.

With the extraordinary controversy and ethical impropriety that intrinsically attends outsourcing practices, American workers are given powerful bargaining weapons in dealing with legislatures and employers. Thus, the widespread and continuous dissemination of literature and information that pertains to outsourcing is imperative. Public knowledge of which firms outsource, to what extent, for what reasons, and to what countries could indeed play a probative role in the willingness of particular firms to put into practice worker-assistance programs discussed in the previous paragraph. If the public learns that a particular firm is too callous and frivolous in its displacement of workers, then naturally it will rebel by refusing to purchase the firms goods or services. One weapon that might prove rather lethal to the pro-outsourcing regime is the sending of private, valuable information into inadequately governed foreign hands. This problem is already being exploited by outsourcing opponents in Congress,

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<sup>71</sup> See, e.g., John Adams, *The Politics of Spending Overseas*, BANK TECH. NEWS, Feb. 2, 2004, at 14. This article mentions efforts by a pro-outsourcing lobbyist group to increase federal education funding, especially with regard to more rigorous testing standards in the sciences and math (the two fields most closely related to IT services). This, some experts argue, will afford American workers better security in their jobs as well as greater productivity for American firms. *Id.*

<sup>72</sup> See Anne Krishnan, *IBM Executive Sees Upside to Offshoring for U.S. Workers*, THE HERALD-SUN (Durham, NC), Nov. 16, 2004 (discussing IBM's \$25 million "Capital Alliance Program" which is intended to retrain IBM workers whose jobs have been sent overseas).

and if workers desire an upper hand, they too should ensure that the American public is acquainted with this shortcoming of offshoring.

Unfortunately for the American worker, he/she cannot nonchalantly walk into Congress, propose a bill putting an absolute ban on the practice of outsourcing, and have it summarily enacted without resistance. Of course, if this scenario were feasible, the current “outsourced” plight of the American worker would be resolved. The remedy is not so simple, nor is it probable that such an unconditional ban would be advantageous.

The American worker is in a true catch-22: if he submits to the outsourcing regime, he will be labeled a traitor by fellow workers and will potentially be undermining his own livelihood, but if he clamorously rebels against this regime, he will be labeled an “obstructionist” to freedom of trade and an enemy to the economy and the consumer. His most effective remedy is somewhere in the middle—being vocally concerned with the displacement of American workers, but, with agreed assistance from the government and employers, willing to adapt to the new economy and to evolve. This is a precarious line to walk, to be sure, but given the global structure of our economy, prudent adaptation by both employers—be it through outsourcing, automation, or other technology—and employees is compulsory.

## VI. CONCLUSION

The practice of outsourcing is inescapable given the high-velocity, global disposition that our economy has assumed. From the perspective of employers, the financial benefits that it grants to businesses far outweigh the financial woe it casts upon affected American workers and communities. Although affected workers can fight back by petitioning legislatures to enact laws which forbid outsourcing, an outright ban on outsourcing is neither practical nor wise; workers must adapt, just as businesses have, to the changing marketplace. Our values, our economy, our government, and our world have all evolved rapidly, rendering the prototypical blue-collared worker superfluous. However, the combination of community pressure, required worker re-training, dissemination of literature, and restructuring of the current tax regime will certainly assuage the plight of the affected American worker and help mold him into something once again necessary for the proper flow of an American economy which is prosperous at all levels.<sup>73</sup>

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<sup>73</sup> For a comprehensive, optimistic discussion concerning the recalibration, re-education, and adaptation of the American worker in response to our increasingly global economy, see John A. Challenger, *Making the Most of Opportunities in Today's Global Economy*, EXECUTIVE SPEECHES, Volume 9, Issue 3, Dec. 1, 2004, at 1.

As a concerned nation, we are faced with perhaps an unavoidable quandary when confronted with the outsourcing steamroller, but despite its juggernaut status, it must be met head on, and the solution to the problem lies primarily in the hands of the public and those workers who are most intimately affected by its costs. Silence and acquiescence have never conquered tyranny. Nor shall the silent American worker assuage his own plight with assent; the prescription that will allay the wounds occasioned by outsourcing is vocal, cogent community action, and attendant upon this will be the patience, preparation, assistance, education, and training requisite for workers to survive in this inevitably evolving global economy.