Joshua Williams Memorial Essay 1992

Sir Joshua Strange Williams was resident Judge of the Supreme Court in Dunedin from 1875 to 1913, and he left a portion of his estate upon trust for the advancement of legal education. The trustees of his estate, the Council of the Otago District Law Society, have provided an annual prize for the essay written by a student enrolled in law at the University of Otago which in the opinion of the Council makes the most significant contribution to legal knowledge and meets the requirements of sound legal scholarship.

We publish below the winning entry for 1992.

THE PROTECTION OF JOB SECURITY: THE CASE FOR PROPERTY RIGHTS IN ONE'S JOB

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I INTRODUCTION

For most workers in New Zealand job security is an impossible dream. Losing one's job can be a catastrophe of great proportion. The 1980s and early 1990s have seen the closure of some of our major industrial establishments and of numerous small businesses, resulting in economic and social disruption for individuals, families and communities. Modern society is dominated by our dependence on wages. We have become a "nation of employees" depending on others for our means of livelihood.[1] Such dependence upon others for income places most of the working population in a very vulnerable position.

Should workers be entitled to job security? This paper will offer the opinion that the answer to this question is yes. It will be argued that the protection of job security can be achieved by reconceptualising property rights to include a new form of property in jobs. This will involve a shift in the underlying ideology prevalent in current employment law and practice — namely that of the free market. I will argue that we should reconceptualise property rights so as to invest employees with the moral authority of owners, whose right of access to their livelihood may not be destroyed without justification.

What is meant by job security? To most workers job security means security of tenure. In other words the worker expects not to be dismissed from his or her job without just cause. To the employer job security for his or her employees means something else. Job security is subservient

1 D H J Hermann, Y S Sor, "Property Rights in One's Job: The Case For Limiting Employment-at-Will" (1982) 24 Arizona Law Review 763, quoting from T Tannebaun, *A Philosophy of Labor* (1951) 9.

to the management prerogative to manage the business in the most efficient way possible. If the most efficient way possible means laying off workers then job security is only a secondary consideration. In general, the protection of job security is left to the bargaining skills of the employees in their employment contract negotiations. Redundancy and severance provisions are not, however, mandatory in employment contracts in New Zealand.[2]

It must be acknowledged that threat of redundancy and general lack of job security places too much control with already powerful employers. It should be remembered that there are, or should be, social responsibilities with property ownership. The struggle between employees and employers over job security is an example of the larger struggle over property rights in a society in which owners are often allowed to exercise their rights without regard for the rights of others. At its base the debate over job security is an argument about "morals, security, human dignity and the proper distribution of power in the workplace".[3] This paper is premised upon the idea that human society ought to be organised in such a way so as to eliminate useless suffering.[4] The protection of the vulnerable in society ought to be the guiding principle when confronted with the distribution of power and wealth.

This paper is divided into four parts. First I shall analyse the problem of job security with reference to two well-known plant closures – the Patea Freezing Works and the Mosgiel Woollen Mills. I will examine the impact of factory closures on these communities and the individuals involved. The arguments for and against the protection of job security will then be presented. Secondly I will briefly comment on the need for a change in direction using New Zealand labour law as an example of an ideology at work. I will then set out the argument in favour of a reconceptualisation of property so as to recognise a property right in jobs. There are three examples which I will present as justifying the incorporation of property rights in jobs. In the third part, I will show how an acceptance of this new property right could be applied in the employment field. This will involve an examination of the legislative and common law recognition of property rights in jobs in both New Zealand and overseas jurisdictions. In particular, I will concentrate on the argument for legislative reform with reference to plant closure regulation and compulsory redundancy legislation. I will conclude by asking the question: will this work in New Zealand?

2 See *Conflicts in the Employment Relationship* (New Zealand Law Society Seminar, May 1989) at 75ff for a discussion of the law of redundancy in New Zealand.

3 J M Beerman, J W Singer, "Baseline Questions in Legal Reasoning: The Example of Property in Jobs" (1989) 23 Georgia Law Review 911 at 995.

4 This premise was adopted in J W Singer, "The Reliance Interest in Property" (1988) 40 Stanford Law Review 611 at 750 quoting Barrington Moore, *Reflections on The Causes of Human Misery and Upon Certain Proposals to Eliminate Them (1970) 5.*

II THE PROBLEM OF JOB SECURITY

A Plant closure and mass redundancy — case examples

(i) Mosgiel Woollen Mills

Mosgiel Ltd was a major woollen textile company operating mills throughout New Zealand. The company was placed in receivership in April 1980 and it ceased operations on 1 August 1980. Throughout the country 1000 of the 1300 employees lost their jobs. In Mosgiel over 400 people were employed at the time of receivership, which accounted for 10% of the Borough workforce. By June 1981 172 employees had lost their jobs. Over one sixth of the workforce had worked at the mill more than 15 years and at one stage the mill had employed over 500 workers in the town.[5] The collapse of Mosgiel Ltd and the number of redundancies which followed were the most widespread in New Zealand's industrial history at that time. Since that time the euphemism of "restructuring" has become synonymous with plant closures and mass redundancies causing major dislocation in workers' lives and in the local economy.

(ii) Patea Freezing Works

Patea is a rural service town situated in southern Taranaki which, over a number of years, developed a major dependence on the local freezing works for its economic viability. On 21 May 1982 Patea's economic base was shattered by the announcement that the works were to close by August. By this time the works employed, in some way or another, most of the town. It is estimated that 400 out of the 600 households in Patea were supported by, or directly derived income from, the works. Indeed 700 of Patea's 1000 jobs were at the works. Patea was the classic "works" town with a large pool of mostly unskilled workers at its disposal. The works paid out over 10 million dollars in wages each year, while making an annual profit of 35 million dollars.[6] The reasons given for the closedown included: increasing market share claimed by other works in the area; poor factory performance in recent years; a lack of modern technology making the plant less efficient; difficulty in adhering to new EEC hygiene standards; and the effect of the Government's decision to de-license the meat industry.[7]

(iii) Impact of the closures

On the tenth anniversary of the closure of the Patea freezing works it was claimed by an ex-worker that 1 in 8 of his fellow workers had died since the closure of the plant.[8] Mr Broughton attributed this to the stress and harmful consequences of redundancy. Such an observation is not new. The impact of redundancy and subsequent unemployment on the worker

5 R M Houghton et al. *The Social and Economic Impact of the Collapse of Mosgiel Limited on the Towns of Ashburton and Mosgiel* (Business Development Centre, University of Otago, November 1981) 11.

6 L Peck, *Closedown: A Review of New Zealand Literature Pertaining to Industrial Closedowns and Mass Redundancies: 1980-1984* (Wellington 1984) 27.

7 Idem.

8 Mr Derek Broughton, Radio New Zealand 'Morning Report', 5 June 1992.

upon the loss of work has been well documented in medical and social science literature.[9] However, as the comments by Mr Broughton reveal, there may also be long-term consequences affecting the individual.

It is accepted by most commentators that the individual and social costs of plant closures and mass redundancies are very significant.[10] The immediate response to redundancy or lay-off is traditionally shock, followed by anger and anxiety. People must face the immediate loss of projected family income and the difficulty in finding a new job in a depressed economy. It is also observed that minority ethnic groups and women have more difficulty in finding new jobs. Moreover, the redundancy also affects the wider family and can lead to stresses in relationships. Data from American statistics over the period 1940-1973 showed that a 1% increase in the aggregate unemployment rate, sustained over a period of six years, had been associated with approximately 37,000 total deaths (20,000 heart related, 920 suicides, 650 homicides), and 4000 mental health admissions.[11] The feeling of depression and discouragement about future prospects were the causal factors. The subsequent unemployment faced can often stigmatise the worker, isolating him or her from family and friends. For individual employees and their families there is also the stress of having to pay their mortgages and considering relocating to where there is work. To many young families this is not a viable option. The problem of re-employment is often exacerbated by the low skill-levels of many New Zealand factory workers. The age of the employee and the timing of the redundancy can also affect the worker's re-employment prospects. Recent New Zealand studies have shown that the effect on the individual is indeed significant especially where the process of redundancy is flawed.[12]

The effect of a plant closure or mass redundancy also has a significant impact upon the local community. To a large extent this depends on the size of the community. For instance, a city the size of Auckland could

9 See for example: K Moser, A Fox and D Jones, "Unemployment and Mortality in the OPCS Longitudinal Study" (1984), The Lancet at 1324-1329; M MacDonald et al, *Health Consequences of Unemployment,* Mental Health Foundation/NZ Psychological Society Symposium on Unemployment (ed M Abbott, Mental Health Foundation, Wellington 1982); S V Kasl, S Gore and S Cobb, "The Experience of Losing a Job: Reported Changes in Health, Symptoms and Illness Behaviour", Psychosomatic Medicine (1975) v 37(2), at 106-121; S Kasl and S Cobb, "Some Mental Health Consequences of Plant Closing and Job Loss" in L Freeman and J Gordus, eds, *Mental Health and the Economy* (Upjohn Institute for Employment Research, Kalamazoo, W.E., 1979); J Grayson, "The Closure of a Factory and its Impact on Health" in J Harrington, ed, *Recent Advances in Occupational Health,* v 11 (Edinburgh 1984).

10 C C Perrucci, *Plant Closings: International Context and Social Costs* (New York 1988) 2.

11 B Bluestone and B Harrison, *The Deindustrialisation of America: Plant Closings, Community Abandonment and the Dismantling of Basic Industry* (1982) 63-66, quoted in Singer, supra n 4 at 718. Note that care must be taken in accepting such studies as universally valid although they are helpful in the general trends they describe. Another study of two factory closures concluded that the suicide rate of blue collar workers was significantly greater than expected of blue collar workers of the same age: Kasl, Gore and Cobb, op cit, n 9 supra.

12 Supra n 6 at 4. For example, when insufficient notice of closure is given and there is a lack of information accompanying the notice.

more easily integrate 400 new workers than a town the size of Patea. In Patea there was a withdrawal of up to 10 million dollars in wages from the local economy. This was partially replaced with Government benefits. Substantially reduced spending power meant that local businesses suffered, many reporting a significant down-turn in sales, while others had to close.[13] Land and property values in Patea also dropped and the population structure changed. Although most families elected to stay in the area (a fact which reflects the established iwi and whanau links) the younger population drifted away to places where they could find work. By 1984 the High School roll had dropped nearly 20% while the unemployment rate increased substantially.[14] Two years after the closure of the works there was little reported investment and a general feeling of stagnation, with the town surviving essentially on the unemployment benefit and Government work schemes.[15]

In a 1981 study of the town of Mosgiel it was found that those surveyed saw their prospects as very grim. The town was built around the mill and the inhabitants had formed a very close association with the enterprise. The shock of closure was compared to a bereavement. The study emphasised three main social effects of the closure: the stress associated with the shock of losing something so visible in their lives; the humiliation of having to register as unemployed; and the necessity for individuals to reassess their personal finances. Local businesses also feared a loss of income.[16] A follow-up study conducted five years later, to identify the lasting effects of the closure, concluded that the predicted impact on the local community was not as great as was expected. However, this study has significant limitations to its general validity and its conclusions must be treated with due suspicion.[17]

13 P Melser et al, *Patea After the Freezing Works: an assessment of the social and economic impact on Patea of the closure of the Patea Freezing Company* (Town and Country Planning Division, Ministry of Works and Development, Wellington 1982) 23.

14 Supra n 6 at 31. The actual drop in the school roll was 18.9%.

15 Ibid at 28.

16 Supra n 5 at 14-15. The study involved informal interviews with 159 of the 174 workers made redundant as well as a survey of the business community. The study took a community perspective rather than an individual or psychological perspective.

17 R M Houghton et al, *Redundancy in the Woollen Textile Industry: Mosgiel Ltd workers five years later* (Business Development Centre, University of Otago, April 1987). The study traced 95 of the redundant workers previously interviewed in 1981. 77 of the previous interviewees were located and 51 were interviewed. Mill workers now employed at the Alliance Mill (which took over part of the old Mosgiel operation) were also interviewed to compare work experience and attitude between the groups. The results showed that 41% of the workers had retired, 57% were currently employed and 2% unemployed (1 person). The general conclusion from this study, that the impact on the community was not as great as expected, must be treated with caution given the very small sample of the survey. Other factors have to be taken into account such as the purchase of some of the plant by Alliance Textiles and the fact that the study reported that those not working when interviewed in 1981 tended to remain out of the workforce for significant periods of time. Also women were more likely to take early retirement and the older workers tended to be more disadvantaged in re-employment. The study did not identify whether or not the rate of pay in the new job was less than that of the old job or specify how long it took to find a new job and what the costs of retraining and relocation were. The figures, therefore, must be treated with suspicion.

B Arguments against the protection of job security

Most of the arguments against the protection of job security reflect a basic adherence to the principles of the free market. In what could be called the management argument against the protection of job security, it is contended that the benefits of increased worker security would be outweighed by the costs of limiting managerial discretion over the workplace. The management argument can be summarised in three points.

First, management needs absolute power to fire or lay off workers as a necessary incentive for the owner's capital to be put to productive use. The owner needs this absolute power as a landowner needs security from non-owners. If the manager or owner cannot exclude the unproductive and the excess worker, then there is no guarantee of maximum profit. In other words the lesser the control, the greater the risks, and therefore the less the vestment.[18] The security of capital investment and the flow of labour, it is claimed, is essential to the survival of any business. This argument takes as its premise the principle that owners can do as they wish with their property without interference, unless a promise was made or a Government regulation interferes. In this sense the employer is not obliged to protect job security unless it is provided for in a freely bargained contract or the State imposes such terms into the employment contract.[19] Mass redundancies and plant closures are seen as part of the allocation of efficient resources. To interfere with such redundancies and plant closings will interfere with the "market's magic".[20] Any infringement of the freedom of contract and free property use transfers an unacceptable limitation upon economic liberty. Furthermore, if employees are concerned about job security they are free to negotiate with the employer to include a provision in their employment contract.

Secondly the use of such an absolute managerial discretion keeps the worker on his or her guard. The greater the insecurity of tenure, the harder the employee will work to maintain his or her job. Job security is seen as a disincentive to work. An analogy is made with the employee who is nearing retirement and slows his or her pace accordingly.[21] Such a limitation on managerial discretion may make employers more cautious about hiring people because, once hired, it may be hard to correct any mistakes if job security is protected. There may be increased costs if unproductive workers have tenure or the company merely wants to restructure.[22] It is also argued that complete freedom to fire or make redundant actually maximises security for workers generally. If the employer has absolute discretion over employment, he or she is most likely to make decisions in the company's best interests. If the company is highly productive because of a competent workforce then job security is enhanced.[23]

18 Supra n 3 at 925.
19 Idem.
20 Supra n 4 at 644.
21 Supra n 3 at 926.
22 Idem.
23 Idem.

A third response contends that the costs to the employee of being fired or being made redundant are low. It is argued by Posner that an employee can leave his or her job whenever he or she wants and go to work for someone else. This assumes a free employment market where the forces of supply and demand will soak up the excess supply after a redundancy or lay-off.[24] It is further contended that lay-offs and redundancies do not in fact stigmatise the worker as is commonly assumed and that legal compensation only leads to expensive litigation.[25]

In summary, the management argument relies on the basic principles of classical capitalism dating back to the time of Adam Smith. The power of the employer/owner is justified by the construction of property rights which emphasises the employer's property interest and ignores the employee's interest. The conceptualisation of the employer as owner and the employee as non-owner is an automatic justification for the power the owner has in a free market society to fire or make redundant. The loss of managerial control appears to be feared more than the loss of a job, partly because jobs are not conceptualised as a property interest while control of the workplace (like land) is an aspect of ownership. Moreover, managers and owners tend to have more political power and are better able to protect their managerial control.

C Arguments in favour of protecting job security

The arguments in favour of job security concentrate on an attack on the free market model and on the need to protect the vulnerable in employment relationships. From a worker's point of view the management argument is flawed because it overstates the costs of job security and the benefits of managerial discretion for employers and understates the benefits of job security to workers and the economic system in general. There are five general arguments in favour of protecting and promoting job security.

First, the so-called benefits of maintaining employer discretion have a flip-side in that ownership rights are not absolute. In the classical Hohfeldian sense for every benefit there is a cost and for every entitlement a correlative exposure.[26] Thus economic liberty is not absolute as it entails both rights and duties. The managers and owners cannot, therefore, claim an absolute right. Ultimately we must make a choice of whom to protect and whom to leave vulnerable, given that rights are not absolute but relative.[27]

Second, those who argue that the market should not be tampered with because it will distort and deny the right to economic liberty base their argument upon what has been called the "myth of consent".[28] This myth

24 R Posner, "Hegel and Employment at Will: A Comment" (1989) 10 *Cardozo Law Review* 1625 at 1628.
25 Ibid at 1635.
26 W Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning* (New Haven 1964), 23-65.
27 Supra n 4 at 647-8.
28 Ibid at 645.

extols the virtue, simplicity, and liberty embodied in a system of private property and freedom of contract. It is believed that the bulk of market transactions are the result of free consent between parties. The paradigm promotes individualism and the minimal role of government.[29] It is wrong to make such an priori assumption about the way the market works. In fact there are many distortions and inconsistencies in the market – most of which harm the employees themselves.

Third, it is argued that increased job security can increase productivity. Workers, like employers, need security to develop their labour. If the employee believes that he or she will not lose his or her job unjustly, then there is more of an incentive to work well. There is evidence that there is an increase in production where workers feel secure.[30] Further, workers may feel that the investment they make in developing their skills will not be wasted by an arbitrary closure or firing. Thus, the protection and promotion of job security may not harm the employers as is claimed – indeed it may be to their advantage.

Fourth, the management argument seriously underestimates the costs to employees of the insecurity and fear of redundancy and unemployment. The inability to find a new job and the psychic and familial costs of unemployment and redundancy are significant. The Mosgiel and Patea examples support this conclusion. Those who argue (Posner et al) that the employee has the choice to decide whether or not the job is satisfactory, and that he or she can find another suitable job, are not being realistic. The market is not perfect and does not automatically soak up the excess of workers. Even if a new job is found it may be difficult to command the same wages and conditions. This theory is based upon the inaccurate assumption that employees and employers have relatively equal power to inflict damage on one another. In fact the harm to the employee is much greater than that to the manager or even shareholder who may merely shift the risk around his or her other investments.

Fifth, the threat of redundancy and unemployment places too much control in the workplace with the employer. The hierarchical social structure denies more dependent parties important aspects of their personhood. The importance of "personhood" and property arises from the argument that personal property is held not primarily for its exchange value but because it is necessary to workers' sense of themselves as people.[31] In modern society work or employment occupies a central role in a person's life, because the job both provides basic resources and a sense of identity and worth. In the plant closure scenario, the employer's interest is fungible (ie easily transferred) but to the employees part of their personhood is lost. Therefore, the protection of job security may enhance and maintain the personhood of employees.

29 Ibid at 646.

30 Bahrami, *Productivity Improvement Through Cooperation of Employees and Employers* (1988) 39 Labor Law Journal quoted in Beerman and Singer, supra n 3 at 918.

31 M J Radin, "Property and Personhood" (1982) 34 Stanford Law Review 957 at 959-60.

In summary, the argument for the protection of job security emphasises the great costs to the employee of a plant closure or mass redundancy. These costs are significant and can cause irreparable harm. The argument also questions some of the fundamental assumptions of the free market. It is clear that the market is not free from inconsistency and indeterminacy in its operation and that this inevitably hurts the workers first. If society is to be organised to prevent useless suffering and protect the vulnerable, then there is a very strong argument for recognising workers' job security.

III A RECONCEPTUALISATION: JOB SECURITY AND PROPERTY RIGHTS

A The need for change

(i) The dominant ideology

In a society which is dominated by the ideology of capitalism and the principles of liberalism it is difficult to fight for the protection of job security when it appears to contradict the central tenets of that faith. Instead the attack must focus on developing an alternative ideology. At present employment relations rest upon a particular construction of property and contract. The underlying social vision sees employers as the "owners" and employees as "non-owners". By identifying the relationship in this way the employer has the power to determine access to the job and workplace whereas if the employee wants access he or she must contract with the employer. Thus, employers' property rights have become the ideological baseline by which the legal system operates. If such a construction of the employment relationship is accepted then the argument in favour of job security is doomed even before it is made.[32]

(ii) Ideology in action — New Zealand Labour Law

The bias towards the owner or employer is reflected in recent New Zealand labour law and the Employment Contracts Act 1991. In some of the cases a bias towards management and the freedom to manage according to the principles of the free market can be observed. For instance, in one case it was said by the court ". . . the employer always has the right to manage unless the collective agreement clearly specifies otherwise in any particular field or fields."[33] And in another case Travis J held:[34]

32 Supra n 3 at 946.

33 *NZ etc Electrical etc IUW* v *NZ Steel Ltd* [1982] ACJ 179 at 181. This case dealt with an alleged unilateral variation of an employment contract. The court placed considerable emphasis on the employer's "right to manage".

34 *Davis* v *Ports of Auckland Ltd* (unreported 15 November 1991, AEC38/91, Travis J at 11). In this case Travis J declined interim orders and injunctions against redundancy notices arguing that they were not unfair and did not amount to a unilateral variation. See also *Feltex Woven Carpets Ltd* v *NZ Woollen Mills etc IUW* (1987) 1 NZELC at 591 for a discussion of the "managerial prerogative" and the "right to manage" and *G N Hale and Son Ltd* v *Wellington etc Caretakers etc IUW* [1991] 1 NZLR 151, 157-8 (CA) where it was held that a redundancy situation is not restricted to whether or not the business is going to the wall but rather that the employer is free to make its business more efficient by making its own commercial decision. The genuineness of an employer's commercial reasons for redundancy may be examinable by the court but the adequacy of those reasons, the court held, are a matter for the employer's judgment.

> In order to achieve its *legitimate* commercial aims, an employer may be able to persuade an employee to agree to a variation of the existing terms of an employment contract. In the absence of such an agreement the employer might have to look to other means to achieve the same result. (emphasis added)

However, the employer does not have a free rein. He or she is obliged to act fairly and reasonably towards his or her employees.[35] Furthermore, there are legislative provisions against discrimination and unfair dismissal.[36]

Confidence in the free market of labour relations is reflected in the Employment Contracts Act 1991 ("ECA"). The primary focus of the Act is on the freedom of contract which now assumes that the employment relationship is based exclusively on the contract of service or the employment contract. The sanctity of contract is stressed as an essential element of the Act. For instance, all current terms and conditions of employment for employees are protected by the Act and can be varied only by contractual agreements. However, even this protection seems to be under threat by employer use of the lawful lockout.[37] The reintroduction of voluntary union membership marks a sharp departure from the industrial relations structure which has existed in New Zealand throughout the twentieth century. Part I of the ECA shows a significant change in policy away from the recognition of the primary role of unions in the industrial relations system and from the collectivist ethic. It reflects a resurgence of the liberal philosophy of individual freedom which includes the notion that the individual workers are able adequately to safeguard their own interests in relation to their employer.[38]

The vast problems experienced by workers associated with the lack of job security suggest there is a need for change to this ideological structure. A change is needed to reflect a communitarian social vision, a vision which attempts to address the imbalances caused by inconsistencies of the free market and the power relationship between the employer and employee. To do this I will examine three alternatives to the traditional employer/employee relationship. The first alternative examines how jobs

35 *Marlborough Harbour Board* v *Goulden* [1985] 2 NZLR 378, 383 per Cooke J (CA) ". . . we think that the position has probably been reached in New Zealand where there are few, if any, relationships of employment, public or private, to which the requirements of fairness have no application whatsoever. Very clear statutory language would be necessary to exclude this elementary duty."

36 For example, Human Rights Commission Act 1977 and the personal grievance provisions of the Employment Contracts Act 1991.

37 See eg *Paul* v *NZ Society for the Intellectually Handicapped Inc* (unreported 15 January 1992, Castle J) where workers were locked out until they agreed to a reduction in allowances. The court upheld the lockout. Also *NZPSA* v *DesignPower Ltd* (unreported 16 April 1992, WEC17A/92, Colgan J) where it was alleged that the employer locked out certain employees who would not sign the collective contract or even participate in negotiations. The court found in favour of the employer, holding that the right to freedom of association (section 5) of the Employment Contracts Act 1991 did not confer substantive rights.

38 For a discussion of the provisions of the legislation see D Shearer, "Employment Contracts Act 1991" (1991) 6 Auckland University Law Review 604-614; R L Turner, "Employment Law" (1991) NZ Rec LR 103.

per se should be recognised as legally protected property rights. Secondly, the claim that the workers have a property interest in the workplace by virtue of their reliance on the employment relationship will be considered. Finally, the protection of public sector jobs will be analysed with reference to Reich's concept of the "new property".[39] But first I will briefly discuss the meaning of rights and property.

B Rights and property

(i) Rights

There are many definitions of what constitutes a "right" and it is beyond the scope of this paper to attempt such a definition. However, it is useful to formulate the root idea of what a right is so as to decide whether or not we should apply it to the employment situation. At its root a right implies that others have a duty to recognise one's claim, and not to interfere with one's interests, conduct, or control. It implies not only a liberty to be exercised by the right holder but also a freedom from interference by others in exercise of the liberty. The rights of one person, therefore, impose obligations on others. The obligations that rights impose may be both obligations not to interfere and obligations to enable.[40] Thus, although there is no clear consensus on what rights are, I adopt the view that rights are "central and stringent entitlements yielded by justifiable rules or principles".[41]

(ii) What it means to have a property right

The questions to be considered here are whether or not an employee can plausibly claim a property right in his or her job and to what extent the law will recognise this. But what does it mean to have a property right? In short, property rights are the rights of ownership. However, there are many different types or incidents or ownership, as Honoré has shown us (eg right to possess, manage, transfer etc).[42] A right of property in a job cannot satisfy all the requirements of full ownership as set forth by Honoré in his incidents of ownership (although not many property claims can). However, this does not mean that an employee cannot claim a partial right of property in his or her job.

C Establishing the claim for property rights in jobs

(i) Property in jobs per se

There are two approaches to establishing a property interest in a job. The first approach can be described as the natural law justification. The second approach considers property in jobs from a legal positivist point of view.

The natural law justification bases property claims in human nature or in social activity. This traditional natural law perspective is best exempli-

39 C Reich, "The New Property" (1964) 73 *Yale Law Journal* 733.
40 Supra n 1 at 765.
41 Idem.
42 L C Becker, *Property Rights: Philosophic Foundations* (London 1977) 19.

fied by John Locke's discussion of the origin and nature of property in *The Second Treatise on Government*. The theory of property holds that a person has the right to his or her own labour and that a claim to property can be made on the basis that one has invested one's labour in an object or enterprise. Thus, one's labour creates the basis of a property claim as a result of the increase in value caused by the application of labour.[43]

However, Locke's labour theory fails to have such applicability in modern society. A modification of Locke's theory is necessitated by the fact that resources are no longer free in the state of nature to which one can directly apply one's labour. We rarely mix our labour with resources – we in fact mix labour with the capitalist economic system. One finds oneself part of a co-operative process which has social dimensions.[44] To avoid this problem it is argued that the co-operative of labour gives rise to social wealth and thus one can establish a right to a claim in possession of part of the social product.[45] Thus, the natural law justification views worker X as having a property right in his or her labour and concomitantly a right in the product of his or her labour.

A problem arises with respect to the payment of wages. Surely the payment of wages captures the full value of labour, therefore eliminating the need for the creation of property rights in the job itself (wages being the acknowledgement of the value of labour)? In response to this it could be argued that wages rarely capture the full value of the labour input.[46] It could also be argued that co-operative activity not only produces wages but also profits and a social product (eg goodwill – the value of having an ongoing enterprise).[47] It is such a vested interest in the ongoing enterprise which provides a plausible claim by employees to the right of job security.

Arguments of the legal positivist school provide only a limited way of establishing a property right in a job. Legal positivism views all property as rights to use, transfer and dispose of interests derived from grants by the State and established by the action of law. The positivist doctrine is derived from the works of Thomas Hobbes who argued that the idea of property as a right did not arise in the state of nature but came with the establishment of the Commonwealth or civil state. Thus property rights are the creation of law, and a claim can only be established in relation to the positive law.[48] Therefore, according to the positivist tradition, to say that one has a property right in a job would mean that the law would have to recognise such a claim or interest in order to retain one's employment position. One can really only lobby for legislative change.[49]

In summary, property in jobs per se can be established from the per-

43 Supra n 1 at 767.
44 Idem.
45 Idem.
46 This is essentially premised on the Marxist surplus profit doctrine.
47 Supra n 1 at 768.
48 Ibid at 767. This view was further developed by Jeremy Bentham.
49 See discussion below on possible legislative reform and the recognition of property rights at common law.

spective of natural law theory which works on the basis that labour input adds value to the overall product and therefore one should have a claim to part of the total product (ie beyond wages). Another approach, based on legal positivism, requires that the positive law recognise the property interest before a right can be claimed. This is of course virtually impossible in a legal and political environment which favours the free market ideology. However, the law already recognises a number of different legal fields where reliance on relationships may create legally enforceable rights. This leads on to the second reconception of property rights.

(ii) The reliance interest in jobs

The reliance interest theory is based upon a different ideological viewpoint.[50] The free market ideology encourages us to see individuals as autonomous and property as either owned or not owned in a system of private property. The alternative ideology put forward by the reliance interest doctrine, called the social relations approach, looks at property as a set of social relations. Thus this communitarian social vision starts from the assumption that property rights are almost always shared and that they are ordinarily created in the context of relationships. The nexus between property and social relationships is evident in areas of law like family and matrimonial property, labour relations, and landlord/tenant relationships. Thus the initial assumption describes social relations as comprising a spectrum from short-lived relationships to continued relations in the market place.

Furthermore, the social relations approach asks us to be sensitive to the power inequalities within property relationships because some members are more vulnerable than others. The social relations approach encourages us to ask questions about the relationship between parties. It understands rights as emerging out of the understandings that develop over the course of relationships (eg promises or guarantees) and as not necessarily specified at the time of employment.[51] Thus the doctrine attempts to redescribe property law in terms of the reliance principle, that is, by asking different questions about reliance in relationships.

The relational approach shifts our attention from 'who is the owner?' to 'what relationships have been established?' Unlike the free market paradigm this approach does not see the owner as absolute but as part of a common enterprise. If the workers are seen as part of the corporation then the analysis of property rights changes. The risks the employees take are great and make them very much a part of the enterprise.[52] Thus, if the argument is accepted that we should see a company as a common enterprise, then it could be argued that the law should recognise and protect the ongoing relationship between management and labour.

In the plant closure scenario this may mean that social responsibilities are attached to property ownership. Indeed property law is filled with limits

50 This theory is directly attributable to William Singer, supra n 4, although the idea of reliance in the common law has always been accepted.

51 Supra n 4 at 655.

52 Ibid at 657.

on free use and disposition. Already legal rules require property owners to take social responsibility, for example, restrictions on land use and the prevention of waste discharge in certain areas impose an obligation on the owner not to destroy the environment, and in the residential tenancy situation the law imposes certain duties on the landlord such as ensuring that the building is habitable.[53] The argument could be applied to plant closures and plant destruction on the basis that the corporation should not be allowed to waste property and jobs which have been relied upon by members of the common enterprise, especially at cost to the more vulnerable parties to the relationship.[54] If we accept that corporations are common enterprises and also accept that capital owners have a social obligation to the community and to those with whom they establish continued relations of mutual dependence, then it is possible to envisage a new social vision of property law as protecting reliance in relationships.[55]

Hence by redescribing the property relationship we can see property in terms of a reliance interest. In a sense property rights are redistributed from owners to non-owners. For instance, in the plant closure situation where property creates relations of mutual dependence involving joint efforts, and the relationship ends, property rights must be redistributed among the parties to protect the legitimate interests of more vulnerable persons.[56] Another example is when owners grant rights of access to their property to others – they then cannot, under the reliance doctrine, unconditionally revoke such access. This is because the non-owners, who have relied on the relationship with the owner that made such access possible in the past, may be granted partial or total immunity from having such access revoked to achieve justice.[57]

How then can the reliance interest be used in the real legal world? Singer would argue for the recognition of the reliance interest in the sense that it is evident in legal rules and social practice and therefore should be raised to the surface as a valid principle. This involves accepting that reliance by the vulnerable on relationships with others is legitimate and good as a proper goal of social life and is thus worthy of legal protection.[58] The problem that Singer's argument faces is that although the reliance interest in property is a well established concept in our legal system it is marginalised by judges and lawyers because it does not fit well with our concept

53 See K Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buffalo Law Review 325, 357-67 where it is noted that the freedom of owners to exclude others from their property is substantially limited by rules that require them to allow access to their property (eg building codes, nuisance law, law of easements and covenants, anti-discrimination laws).

54 Ibid at 660.

55 Ibid at 661.

56 For instance, to redistribute resources earned by the more vulnerable party for contribution to the joint efforts or to fulfil the needs of the vulnerable persons.

57 Supra n 4 at 699. Another example is the concept of the equity of redemption where the courts of equity effectively redefined non-owners as owners. In other words the court allowed the borrower to recover title to property even if he or she had not complied with the terms of the mortgage. This illustrates the central premise of property as a social relationship.

58 Ibid at 699.

of the free market. Singer would reply to this claim that we have to reject the free market ideology by convincing the community that we should make a normative commitment to recognise the social obligations of property ownership and to protect the fundamental needs of the community, especially of the vulnerable.[59] However, this does not solve the dilemma. The only way in which the reliance interest could be protected is through regulation.

Like most calls for regulation there are arguments for and against. Those who would oppose the regulation of the reliance interest would do so on the grounds that it is fundamentally opposed to the free market paradigm. The free market arguments (discussed earlier) essentially state that to impose the reliance interest doctrine on companies would increase their costs and restrict their so-called rights of ownership. Because companies can at present externalise their costs there is no incentive to protect workers.[60] Regulation might force companies to account for the external costs (eg compulsory severance pay). But why should a company which has to close because of economic conditions, as was claimed in both Mosgiel and Patea, have a responsibility to pay the extra costs of closure? In other words why should one protect a job interest if the plant is unprofitable? I concede the validity of this argument as long as it is recognised that the closure is due to economic conditions outside the company's control and not due to bad management. However, why is it that some profitable plants close? In some cases plants are used as "cash cows" so as to prop up other parts of the company, which means that profits are not being re-invested and the company effectively runs down its capital base.[61] It is argued by some that this is what happened at the Patea freezing works.[62] In other cases a profitable plant is deemed not to be profitable enough. In these cases the owners or employers should be held to account and the regulation of the reliance interest may achieve this. In the case of the factory workers this may mean compulsory severance pay over and above the annual wages, and compensation to the town and community for the disruption caused.

In summary, the reliance interest in property provides an alternative vision of property as a set of social relations. When a company closes or a firm lays off some of its workers after a considerable time in employment the company owes an obligation beyond the employment contract. The basic moral principle is that of the protection of reliance on relationships. It is immoral to close or fire without providing for the workers. But we have to be careful not to assume that the worker is always the vulnerable party. In any employment relationship there is mutual dependence. Each employment situation has to be considered individually as

59 Ibid at 702.

60 Note that the Coase theorem disputes that external costs can be determined easily as emanating from one source. There is no way, according to Coase, of knowing how to identify who was externalising the costs. See R Coase, "The Problem of Social Cost" (1960) 3 J L Econ 1 quoted in Singer, supra n 4 at 704.

61 Supra n 4 at 711.

62 One of the reasons given was that the EEC had imposed new hygiene standards on the plant and that it would be too costly to renovate. In fact the plant had been run down over a number of years. The plant was still making a yearly profit of $35 million.

some working environments are completely different from others. By ensuring that a balance is struck, and that the reliance interest is recognised, job security would be better protected. In a wider sense it is considered that the creation of this new property right would be a modest contribution towards the goal of curtailing the unfair concentration of power in the marketplace.[63] However, we still need to strike a balance between allowing market activity and protecting the vulnerable from the inevitability of economic change.

In the final analysis I find it difficult to see how we can convince those who have the power in our modern society that the protection of the reliance interest is a good thing. One has to convince those infected with the free market ideology that increased worker security and a happier populace will be of economic benefit to them. The only ways in which this can occur is through exposing the failings of the free market model, producing the argument for reliance interest in court, or legislating for the protection of job security. This is indeed a tall order and one not popular in terms of fiscal restraint.

(iii) Reich and "The New Property"

Reich in his major work "The New Property" attempts to identify ways in which the "government largesse" has become the major source of subsistence for a great number of people. One such area is public sector employment. Reich emphasises the importance of public employment, noting that ". . . a profession, job, or right to receive income, are the basis of . . . [an individual's] various statuses in society, and may therefore be the most meaningful and distinctive wealth he possesses".[64] In essence Reich argues that the right of property in a job derives from the status which it gives. In light of the increasing dependence on new forms of wealth Reich calls attention to the relative impotence of employees who lack the protection of a status right in employment, yet such rights are often afforded to other tangible and intangible property.[65]

Thus Reich is stressing both the importance of the workers' interest in employment which satisfies their needs, and the significance of the recognition of a right in a job which involves the right to a status. Such a right should, according to Reich, be viewed as property and receive legal recognition and be protected like other property rights.[66] Laws should reflect the importance of one's status not only to the sense of personal identity but also to an ability to provide for one's needs. Hence laws that regulate to protect one's sense of integrity and identity should be extended to statuses which provide the basis for the earning of a livelihood.[67]

63 Supra n 4 at 750.
64 Supra n 39 at 738-9.
65 Ibid at 737.
66 Ibid at 738.
67 Ibid at 785. See also J E Cribbet, "Concepts in Transition: the search for a new definition of property" (1986) University of Illinois Law Review 1, where Cribbet discusses the continual change in the nature of property, concluding that as our concepts of property have evolved, the balance has shifted from excessive emphasis on individual rights towards a greater dominance of the social interest.

Once again we have to face the dilemma of implementation. How can the legislation protecting integrity and identity be extended to statuses when to do so will offend the free marketers? The use of analogy, logic, and tales of woe extends only so far when you are looking through tainted glasses.

To what extent then has the legislature and the judiciary recognised property rights in jobs and is it a meaningful recognition?

IV THE APPLICATION: JOB PROPERTY IN ACTION

A Legislative and Common Law Recognition of Property Rights in Jobs

Meyers, in his important work *Ownership of Jobs,* written in 1964, said that most mature industrial societies tend to support and encourage feelings of "job ownership".[68] Furthermore, he states:[69]

> Workers do in fact tend to regard themselves as having some kind of possession in a job and to devise institutions which wrest control over incumbency from the hands of the employer and which express objectively a vesting of property-like rights in the worker.

The worker may recognise a property right in his or her job. But does the court?

(i) Common Law recognition

In the United Kingdom the common law has long recognised the right of property in one's job in relation to severance pay and unfair dismissal. Lord Denning in *Lloyd* v *Brassey* stated:[70]

> [A] worker of long standing is now recognised as having an accrued right in his job; and his right gains in value with the years. So much so, that if the job is shut down, he is entitled to compensation for the loss of a job — just as a director gets compensation for loss of office.

In *Wynes* v *Southrepps Hall Broiler Farm* it was stated:[71]

> Just as a property owner has a right in his property and when he is deprived he is entitled to compensation, so a long term employee is considered to have a right analogous to a right of property in his job, he has a right of security and his rights gain in value with the years . . .

In *Hill* v *CA Parsons and Co* it was noted by the court:[72]

68 F Meyers, *Ownership of Jobs* (UCLA 1964) 112.

69 Idem.

70 [1969] 1 All ER 382. This case involved dismissal by reason of redundancy. It is important to note that the court was primarily concerned with the interpretation of the Redundancy Payments Act 1965. However, the comments of Lord Denning are useful in the sense that they recognise a worker's accrued right in his or her job.

71 [1968] ITR 407, 407-8.

72 [1972] Ch 305, 321 per Sachs LJ. This case dealt with the Industrial Relations Act 1971. See also *Nagle* v *Feilden* [1966] 2 QB 633 at 646.

> Over the last two decades there has been a marked trend towards shielding the employee, where practicable, from the undue hardships he may suffer at the hands of those who may have power over his livelihood . . . Some have suggested that he may now be said to acquire something akin to a property in his employment.

Hence, dicta from these cases indicate a general recognition of the concept of property rights in jobs.

New Zealand law on this matter tends to be less progressive. In *Wellington Road Transport etc IUW* v *Fletcher Construction Co Ltd* it was said that the fact ". . . that the New Zealand Parliament has not legislated for compulsory redundancy pay may be an indication that this country has not recognised an employee's property right in a job".[73] This comment suggests that the court might at least recognise such a concept as property in work but it appears to require the lead of the legislature. It could also be construed as meaning that we do not have such a property concept at common law and that only the legislature can create such a right. However, the court also recognised the protections under the then Industrial Relations Act which were based on fairness and not on the introduction of property rights.[74]

In the United States there is a growing jurisprudence on the right to property in jobs based on constitutional and social obligations.[75] However, the positivist tradition is still strong and trade union litigants continue to find it very difficult to succeed.

(ii) Legislative recognition

New Zealand is perhaps one of the few countries which has not legislated for the protection of job security. In Canada, Great Britain, and some European countries legislation covering severance and redundancy pay and plant closure has been enacted. The aim of these laws is to afford more protection to the vulnerable workers. However, in general these pieces of legislation do not save jobs — they just make the loss of a job more bearable and less traumatic.

In the United Kingdom legislation requiring redundancy compensation has been a part of the employment law since the late sixties. The current legislation provides that where an employee has been in continuous employment for at least two years he or she is entitled on redundancy to compensation based on age, wage rate, and length of service.[76] Furthermore, a redundancy fund was established which imposed a surtax on social security premiums (paid by the employer) and which is drawn upon at

73 [1983] ACJ 653, 686.

74 A Szakats and M A Mulgan, *Dismissal and Redundancy Procedures* (2nd ed 1990) 198.

75 For example *United Steel Workers* v *United States Steel Corp* 631 F2d 1264 (6th Cir 1980). Dicta indicated that there may be a property right where the employee relied on the promises of the employer, but the court could not find any precedent to back up this statement. For a constitutional approach see *Coppage* v *Kansas* 236 US 1, 14 (1915) which saw property rights within the right to life, liberty, and property.

76 Employment Protection (Consolidation) Act 1978 (UK) s 81(2).

times of redundancy. If the employer fails to make the payment required by the Act, the employee is entitled to look to the fund for payment.[77] Hence a significant measure of protection is given to the employee who might otherwise have to wait at the end of a long line of creditors to receive a redundancy payment. Great Britain also regulates plant closures by requiring two to three months prior notice of closure and requiring that employers negotiate with workers about the decision to close.[78] The employee also has the right to have time off work to look for a new job or make arrangements for training upon being given notice of dismissal by reason of redundancy.[79] There are also restrictions on where factories can be built or relocated if the possible effect of a closure would significantly increase local unemployment.[80]

In Australia both Commonwealth and State legislation protects job security by anti-discrimination and unfair dismissal rules. Severance and redundancy payments are primarily dealt with through industrial awards. In New South Wales the Employment Protection Act 1982 forces employers to give at least seven days notice of redundancy. An Industrial Commission has the power to make a report on the redundancy and order severance payments to a level it may determine, and it also has the power to make other orders such as imposing a duty on the employer to help employees find another job. This obligation on employers to help the redundant employee find a new job offers an increased protection for public sector workers.[81]

Canadian legislatures also recognise the desirability of statutorily authorised severance pay as an adjustment mechanism for workers. Under the Canadian Labor Code the entitlement to severance pay does not depend on a plant closing or a mass redundancy taking place but only requires five years of consecutive employment. A formula is applied which applies to all employees.[82] The province of Ontario has also enacted similar legislation.[83] Canadian legislatures have also recognised the importance of adequate notice periods for workers before the decision to close is made. However, the periods of notice are short.[84]

In most European countries regulation of plant closures is common. In West Germany (now United Germany) companies must report to the local works council with their reasons for closure and a comprehensive statement as to their economic status, so it can be inspected. A major redundancy situation must be reported to the German labour department. Furthermore, 12 months notice must be given to workers before the plant

77 S 81(4). However, the employer can apply for a rebate on contributions.
78 Employment Protection Act 1975 (UK) s 100. The employer commits an offence if there is a failure to notify.
79 S 61. However, this was repealed by the Employment Protection (Consolidation) Act 1978 (UK) s 159.1
80 Supra n 4 at 733.
81 Public Service Act 1922 (Cth). Reprinted 31 July 1991, no 122.
82 Canada Labor Code, RSC 1970 (2d Supp), c.17.
83 Employment Standards Amendment Act 1981, S.O., c.22.
84 M J MacNeil, "Plant Closings and Workers' Rights" (1982) 14 Ottawa Law Review at 38.

is closed.[85] The German constitution actively protects workers by providing a "right to work" and there are also duties imposed concurrent with the right of ownership of private property. The German constitution is consistent with calls by some commentators to protect job security through the national constitution.[86] In France a company requires approval from the Inspectorate of Labour for permanent dismissal of workers. The current government often withholds permission until workers find new jobs – thus employers have an incentive to help workers find a new position.[87] Sweden has the most developed plant closure regulations. The legislation requires six months advance notice of a closure and the workers must have full access to corporate information. The company has a duty to bargain about all the aspects of the decision to close, including timing, number of redundancies and re-training. The government also provides a wage subsidy to allow plants to continue for a temporary period while workers are re-trained or are looking for new work and to ease the transition for the local community.[88] Evidence suggests that there is little economic dislocation caused by such state regulation.[89]

New Zealand has no legislative provision for severance pay or for company closure. Indeed there is little statutory reference to the term 'redundancy'.[90] The ECA does not even mention redundancy within its provisions except as it relates to the existing awards and agreements. There is no longer a right to have redundancy measures included in an agreement. The duty is upon the employee to negotiate with the employer for a redundancy provision to be included in the employment contract. Thus most redundancy situations are settled in a rather ad hoc manner by bargaining between the employer and employee.

B The Application: Legislative Reform

It is submitted that one way of redressing New Zealand's backwardness is by comprehensive legislation in both the severance and plant closure areas. The many thousands of jobs that have been lost since New Zealand began to "restructure" have left us with many degraded and depressed unemployed people. The protection of job security may be too late for people already unemployed but it might reduce the anxiety and trauma of future job losses. It was suggested by the New Zealand Planning Council in 1980

85 Supra n 4 at 733.

86 A V van Themaat, "Property Rights, Workers' Rights and Economic Regulation – Constitutional Protection for Property Rights in the United States of America and Federal Republic of Germany: Possible Lessons in South Africa", The Comparative and International Law Journal of Southern Africa (1990) XXIII, no 1 at 56.

87 Supra n 4 at 734.

88 Ibid at 734.

89 Ibid at 733.

90 For instance, it was not until 1974 that the term 'redundant employee' was defined in regulations (Wage Adjustment Regulations, Part IIIA, reg 45A(1), as substituted by Wage Adjustment Regulations 1974, Amendment no 20, SR 1982/161). The Labour Relations Act 1987 clarified the definition provided in the 1974 Regulations (s 184(5)) and acknowledged the legality of strikes in support of redundancy agreement negotiations (s 233 (1)(d)). For discussion see Szakats and Mulgan, op cit n 74 supra, chs 22 and 23.

that a compulsory compensation scheme be developed for those who lose their jobs due to redundancy.[91] The report suggested that the community fund a compensation system for those who suffer hardship due to redundancy. It was argued that the benefits to the economy of this proposal included a more fluid labour force and an ability to accelerate technological change. It was recognised that such a scheme would run on a similar basis to the Accident Compensation scheme. The scheme would levy employers so as to create a fund. In essence this is similar to the scheme operated in the United Kingdom.

It is submitted that compulsory severance legislation, similar to that of the United Kingdom, be introduced in New Zealand. However, given the current economic problems faced by the country the present Government would probably shelve, if not throw out, such an idea. Indeed present Government policy seems very much against the protection of the worker. The limited measures of the new Accident Rehabilitation and Compensation Insurance Act 1992 are evidence of this lack of concern. Moreover, the passage through Parliament of the Redundancy Payments (Taxation and Benefits) Act 1992 further consolidates the political attack on worker job security. The purpose of the legislation is to amend the Income Tax Act 1976 and the Social Security Act 1964 so as to make the full amount of lump sum redundancy payment taxable. It also removes the redundancy stand down period for the unemployment benefit.

My argument is that if plant closures or mass lay-offs benefit society in terms of the efficient allocation of resources it is only fair that the whole of society bear the costs, instead of the costs being borne by the displaced worker. Moreover, severance pay is part of workers' expectation of compensation associated with a property right in a job. Compulsory severance pay would have a number of positive spin-offs. First, it would enable some measure of job security and would make the immediate financial worries associated with redundancy less severe. Second, severance pay would increase labour mobility because it would allow the laid-off worker to re-train or re-locate. Third, severance pay would encourage companies to internalise some of the social costs they caused and had hitherto externalised on to the employees and community.

However, we come up once again against the familiar free market arguments. The primary contention used against compulsory severance is that it interferes with the freedom of contract. There is no need to impose an obligation on a company by imposing terms that were not bargained for. If compensation was so important to the employees, it is argued, then they would have included it in their negotiations. However, this argument fails to address the power inequalities in a labour market which favours the employer.

Collins argues that redundancy legislation ". . . far from securing an employee's property right in a job, tends only to improve job security marginally as a side-effect of the pursuit of the goal of minimising the social

91 New Zealand Planning Council Report on Employment (Wellington 1980) 45-6.

cost of economic dismissals".[92] Even if Collins is right (although I assume he bases his opinion on free market principles) a marginal increase in job security is a start.

A second possible reform could be the introduction of plant closure legislation. A possible scheme could require detailed reasons for the closure along with supporting evidence. It could also require adequate notice of closure as a minimum requirement. Consultation with the employees is an essential feature because if the plant has to close the workers will be better able to accept it if they have all the facts. Another possibility is to force the company to pay compensation for some of the losses incurred by the community because of the closure. This would help to ensure that the company has a social responsibility to the workers and the community. However, the latter suggestions would be considered too radical by most companies and the present Government. It is nevertheless still possible to argue that compulsory notice requirements, reasons, and worker consultation be legislated for as they do not impose as many costs on the employers. In reply to possible management arguments that such legislation would interfere with the workings of the market and cause economic dislocation the evidence of other capitalist countries with such legislation is that economic dislocation is not a problem.[93] Indeed legislation is designed to protect the income of workers, generate new business and jobs, and enable workers to transfer to new jobs.

Thus legislative reform in the current political and economic climate will be difficult to achieve unless the politicians can be convinced that the economic benefits outweigh the costs.

V Conclusion

The question asked at the outset was: should job security be protected and, if so, how? The arguments for and against the protection of job security show that the employee who is put out of a job suffers substantial losses whilst the company often merely reinvests or transfers the operation overseas. The harmful effects of plant closures and mass redundancies can be seen in the two case studies presented — Mosgiel and Patea. There is clearly a need for change. This will involve shifting the baseline ideology which tends to favour the employer or owner. One way of doing this is by reconceptualising the concept of property so that the employees are invested with the moral authority of ownership such that the right of access to their livelihood is not destroyed without justification.

Three examples of how this reconceptualisation can take place were given. The first example was based on the traditional natural law theory that one's labour once mixed with a resource becomes one's property. This concept had to be modified so that the theory was relevant to modern society. The modified theory holds that one is entitled to a share of the total social product since one's labour no longer mixes with a resource

92 H Collins, "The Meaning of Job Security" (1991) 20, *The Industrial Law Journal* 227, 233.
93 Supra n 4 at 734. This is especially so in Sweden where there is a well co-ordinated programme.

but with a capitalist economic system which divides labour into component parts. The second, and most convincing example, postulates that property is not a system of ownership and non-ownership but a system of social relations. The real issue is not who owns a thing but what relationships are involved. This is developed into the doctrine of reliance interest which holds that in a relationship of mutual dependence a property right can exist from reasonable reliance on a promise made or by virtue of the length of service. Hence workers may be able to argue for a property right in the workplace itself. Finally, the idea of status is considered to be a basis for creating a property right in jobs, as a job is central to workers' personhood and livelihood. The law, it is argued, should recognise status as a property right as it does in other areas of property.

It is in the application of these theories that problems arise. How is it that one can call for legislative change in an economic and political environment that favours free market non-interventionist policies? Shifting the ideological base is no easy task. It would involve deconstructing the myths and images of capitalism and the legitimating institutions like the legal system. We face a dilemma of great proportions. Do we accept that we cannot change the system and try to gradually expose its failings by using the system itself? In other words, do we conspire from within or do we try to expose the system in a more outward fashion? Firstly, the inside attack is made difficult because those in power tend to have the resources to fight landmark cases and the workers have few resources. Given the impotence of the post-ECA union movement in New Zealand funding such attacks on the system through the use of the courts will be nearly impossible. Secondly, the attack from the outside would have to take on what Gramsci called the "counter hegemonic struggle".[94] This means that an attack on the dominant ideology is achieved by presenting a counter-ideology which convinces the public and also breaks down the legitimacy of the current ideology. A suggested way of achieving this counter-struggle is to politicise the workers' concerns and use the mass support of unions and other organisations to back up the cause. By bringing politics into the law one may be able to expose the legal system and the dominant ideology.[95] In effect we have to make our moral arguments explicit as well as re-examining our confidence in the present system by asking why traditional analysis proceeds in the way it does.

In the final analysis if one accepts the premise that we must protect the vulnerable and underprivileged then the protection of job security must logically follow. However, we live in a society where concepts of individualism and freedom to pursue one's own goals are the dominant ideology and it is not until the failings and inadequacies of such a system are exposed that job security can be truly protected. This is essentially a question of power and who has it.

94 P Gabel and P Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law" (1982) 11 New York University Review of Law and Social Change, 369, 374.

95 Ibid.