German Law Journal (2022), **23**, pp. 862–871
doi:10.1017/glj.2022.50

CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Private Law and the New Social Question

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(Received 22 June 2022; accepted 22 June 2022)

Abstract
This review of Grundmann, Micklitz and Renner's *New Private Law Theory* begins by noting its historical perspective, and the fruitfulness of setting alongside each other seminal writings of European jurists from the early twentieth century with the contributions of American law and economics and critical legal scholars from the late twentieth and early twenty-first. A century ago, legal scholarship was addressing the "social question:" How to accommodate private law to the demands of a rising working class? Today, steepening inequality and polarization have brought the social question, and with it class politics, back into view. Using as a case study the mass sackings engineered by the shipping company P&O in March 2022, we can see that today's private law is deeply implicated in the generation of structural disadvantage. A private law more concerned with extracting and hiding wealth than creating it might be thought to have a limited future.

Keywords: Private law; labor law; law and economics; class politics; P&O case

A striking feature of Stefan Grundmann, Hans-Wolfgang Micklitz, and Moritz Renner's *New Private Law Theory*[1] is its historical perspective. Alongside mostly American law and economics scholarship, which spans the period from the 1960s to the present day, they reference classic works from the early twentieth century by French, German, and Italian jurists. As they note, the early 1900s was a time when legal scholars across Europe were addressing the "social question," which they suggest was understood in the following terms: "how to deal with and how to integrate the new working class—or more generally, 'the masses'—into a legal order that is based on formal equality?"[2] As they elsewhere observe, the modern law and economics movement largely avoids this question, along with other questions of distribution and fairness. The Coase theorem[3] not only appears to pay no regard to distributional issues, but also can be read, as Stefan Grundmann pithily suggests, as calling upon the state "to ensure liberty for business against barriers stemming from private property;"[4] meanwhile the cost of risk avoidance should fall on the party who "can arrange for these measures at the lowest cost (cheapest cost avoider)."[5] By way of

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[1]Stefan Grundmann, Hans-Wolfgang Micklitz, & Moritz Renner, New Private Law Theory: A Pluralist Approach (2021).

[2]Stefan Grundmann, Hans-Wolfgang Micklitz, & Moritz Renner, *New Private Law Theory: The Core Ideas*, *in* New Private Law Theory 4 (2021).

[3]*See* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ, 1 (1960).

[4]Stefan Grundmann, *Economics and Private Law Institutions, in* New Private Law Theory 79 (2021).

[5]*Id.* at 82.

balance, the authors writing collectively note the relevance of contemporary critical theory, referring to Duncan Kennedy's insistence that "all legal practice decision-making is bound to be primarily politicised."[6] This position, as they say, opens up new perspectives on issues of race and gender. Yet, what is seemingly missing from today's private law theory, in contrast to that of a century ago, is any discussion of *class*.

Has the social question been somehow abolished? We can hardly say that it has been satisfactorily answered. Tracking structural inequality has been the focus of a huge research effort over the past decade. Thanks to the work of Thomas Piketty,[7] Gabriel Palma,[8] Tony Atkinson,[9] Branko Milanovic,[10] and others, we now know that the past five decades have been a time of relentlessly widening wealth and income gaps. From the second decade of the twentieth century, around the time jurists in Europe were addressing the social question, inequalities began to fall. From 1970, around the time of the birth of the US-based law and economics movement, they started to rise again, a process which shows few signs, as yet, of going into reverse.[11]

While the rise of inequality economics has given social scientists rafts of new data to work with, a case study approach may be able to clarify the issues at stake somewhat more vividly. Taking a leaf from *New Private Law Theory*, then we might take a look at a recent event which is in many ways highly revealing of the way private law works these days. This is the case of P&O Ferries.

The basic facts are simple (there are some nuances which we will come to shortly). P&O is a shipping company which runs a number of ferries between British ports and ports in mainland Europe and the island of Ireland. On March 17, 2022, the company dismissed 800 members of its crew, over half its workforce.[12] The dismissals, which took immediate effect, and were mostly communicated by means of a recorded video, were said to be by reason of redundancy, and to be necessary to stave off the company's insolvency. The company announced that it would be hiring replacement labor in the form of agency staff, whose pay, it soon emerged, would be a small fraction of that received by the former crew.[13]

To many, these events would seem highly unjust. Workers, in some cases with decades of service, suddenly found themselves cut off from a stable wage, familiar routines, and interaction with colleagues. Households and communities could no longer rely on the continuing presence of a sizable employer. And the immediate response to the events of March 17 was indeed mostly negative. According to a trade union leader, the dismissals marked "a new low."[14] The Archbishop of Canterbury and the Bishop of Dover together issued a statement observing that "ill treating

[6]*See* Grundmann, Micklitz, & Renner, *supr*a note 1, at 5.

[7]*See* Thomas Piketty, Capital in the Twenty-First Century (2013); Thomas Piketty, Capital and Ideology (2020).

[8]Gabriel Palma, *Homogeneous Middles vs. Heterogeneous Tails, and the End of the "Inverted-U": It's All about the Share of the Rich*, 42 Development & Change 87, 87–153 (2011).

[9]Anthony B. Atkinson, Inequality: What Can be Done? (2015).

[10]Branko Milanovic, Global Inequality: A New Approach for the Age of Globalization (2018).

[11]On this timing of inequality trends, see, in particular, Piketty, *supra* note 7. In the past decade, the global Gini index has declined slightly (indicating falling inequality) thanks to the large number of people no longer living in conditions of extreme poverty in China, although within China itself, because of stratospheric inequality at the top of the income distribution, inequality is continuing to rise, suggesting that the recent fall in the global Gini may be reversed in time. On whether inequality trends might be affected by the Covid-19 crisis and policy responses to it, *see* Simon Deakin, *Employment and Wage Policies in a Post-Neoliberal World, in* Economic Policies for a Post Neoliberal World (Philip Arestis & Malcolm Sawyer eds., 2021).

[12]Gwyn Topham, *P&O Ferries Sacks All 800 Crew Members Across Entire Fleet*, The Guardian (Mar. 17, 2022), https://www.theguardian.com/uk-news/2022/mar/17/po-ferries-halts-sailings-before-major-announcement.

[13]Gwyn Topham, *Replacements for P&O Crew Paid £1.80 an Hour, Unions Say*, The Guardian (Mar. 21, 2022), https://www.theguardian.com/business/2022/mar/21/replacements-for-po-ferries-crew-paid-180-an-hour-unions-say.

[14]Gwyn Topham, Heather Stewart & Mark Sweeney, *Government Knew of P&O Sackings the Day Before, No 10 Admits*, The Guardian (Mar. 18, 2022) https://www.theguardian.com/business/2022/mar/18/mass-sacking-by-p-and-o-ferries-a-new-low-for-shipping-says-union. At the time the standard hourly rate for the statutory minimum wage in the UK was £8.91.

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

workers is not just business. In God's eyes it is sin."[15] A government minister expressed his "revulsion" at the company's "sharp practices."[16] A P&O manager accepted that its action had caused "distress."[17] At the same time, a journalist found time to celebrate a "dramatic piece of union busting."[18]

Of course, a law and economics approach is meant to be more scientific than this. It can tell us when transactions, and the rules guiding them, are welfare enhancing in overall terms. It teaches us not to confuse private cost with social cost and to accept the inevitability of externalities, both positive and negative, in a complex and inter-connected economy.[19] Placing wealth creation above equitable distribution as the goal of private law will ultimately be to everyone's benefit because, adapting the words of the thirty-fifth President of the United States of America, John F. Kennedy, "a rising tide lifts all boats."[20] Or to put it more prosaically, in the words of an Advocate General of the European Court of Justice, "inevitably, the realization of economic progress through intra-Community trade involves the risk for workers throughout the Community of having to undergo changes of working circumstances or even suffer the loss of their jobs,"[21] so that "workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity."[22]

Let us take a closer look then at the P&O case through a law and economics lens. A law and economics classic, Richard Epstein's 1984 article, *In Defense of the Contract at Will*,[23] informs us that the efficient default rule for employment contracting is the one, standard in American private law, to the effect that either party can terminate the relationship without notice and without needing to have a reason for doing so. The contract at will is an instance of the merits of "private-contracting autonomy."[24] It is the right rule "not because it allows the employer to exploit the employee, but rather because over a very broad range of circumstances it works to the mutual benefit of both parties."[25] It is a "sensible adaptation to the problem of imperfect information over time"[26] and, moreover, self-enforcing on the basis of the parties' rational calculation of their respective interests. This is because, over time, "the gains to both sides from continuing the employment relationship are apt to increase, so that both sides have more to lose from separation."[27] While bad faith or opportunistic terminations cannot altogether be avoided, "a contractual breakdown should nonetheless be an infrequent occurrence, as both sides have strong incentives to keep the relationship viable."[28]

[15]*See* Heather Stewart, Gwyn Topham & Matthew Weaver, *P&O Told it Could Face Unlimited Fine if Sackings Unlawful*, The Guardian (Mar. 18, 2022), https://www.theguardian.com/business/2022/mar/18/po-ferries-could-face-an-unlimited-fine-if-sackings-unlawful.

[16]Jessica Murray, *P&O Resumes Liverpool-Dublin Service as Government Reviews Contracts*, The Guardian (Mar. 19, 2022) https://www.theguardian.com/business/2022/mar/19/uk-government-reviewing-its-po-ferries-contracts-after-staff-sackings.

[17]*See* Helen Coffee, Simon Calder, Lucy Thackray & Jane Dalton, *P&O Ferries News: Firm Denies Insensitive Behaviour, 'Aims to Have Services Up and Running in a Day or Two*,' The Independent (Mar. 24, 2022), https://www.independent.co.uk/travel/news-and-advice/p-o-ferries-cruises-dover-calais-latest-suspended-b2038703.html.

[18]Matthew Lynn, *Unions Are as Much to Blame as P&O Bosses for the Ferries Crisis*, The Daily Telegraph (Mar. 17, 2022), https://www.telegraph.co.uk/business/2022/03/17/unions-much-blame-po-bosses-ferries-chaos/.

[19]*See* Grundmann, *supra* note 4, at 79–84.

[20]President John F. Kennedy, *Remarks in Heber Springs, Arkansas, at the Dedication of Greers Ferry Dam*, The American Presidency Project (Oct. 3, 1963), https://www.presidency.ucsb.edu/documents/remarks-heber-springs-arkansas-the-dedication-greers-ferry-dam.

[21]Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Eesti* Opinion of Poiares Maduro AG, ECLI:EU:C:2007:292, at 58.

[22]*Id.* at 59.

[23]Richard A. Epstein, *In Defense of the Contract at Will,* 51 U. Chi. L. Rev. 947–82 (1984).

[24]*Id.* at 952.

[25]*Id.* at 953.

[26]*Id.* at 969.

[27]*Id.* at 975.

[28]*Id.*

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

If this analysis is correct, it would seem to follow that the workers sacked by P&O had been compensated *ex ante* against the risk of losing their jobs. In other words, the overall efficiency of the arrangement meant that their wages and working conditions, while the employment continued, were more generous than they would otherwise have been. A rule preventing summary dismissal would have generated a lower "contract-specific surplus."[29] On this basis, the sacked crew can have no real grounds of complaint.

However, the analysis cannot be quite that simple. English law does not follow the American rule of employment at will, or at least not entirely. While the English common law does not require the employer to provide reasons for a dismissal, it generally implies a reciprocal right to notice, based on the custom or practice of the trade or profession concerned.[30] Statute provides for the employee to be given minimum notice periods on the basis of seniority,[31] and for an additional redundancy payment in cases of economic dismissal.[32] These apparent restrictions of the employer's power to dismiss can nonetheless be rationalized on economic grounds, as Epstein's analysis recognizes: on the one hand, they "provide the worker with some protection against casual or hasty discharges"; on the other hand, because they entail only a lump-sum transfer from employer to employee rather than detailed judicial scrutiny of the fairness of the dismissal, they avoid costly monitoring and administrative costs.[33]

The sacked crew were entitled to notice prior to termination and so were dismissed both in breach of contract and in contravention of the statutory minimum notice requirements. Thus, the dismissals were doubly unlawful. Yet the remedy for this unlawfulness poses few real constraints on the employer. The company gave no advance warning of the kind which might have triggered an attempt to prevent the dismissals taking place; but even if this attempt had been made, no legal remedy would have been forthcoming: A court would not have granted an injunction to prevent the employer's impending breach of contract.[34] The only remedy lies in damages. Can this outcome be explained in economic terms? Yes, and here again we can take instruction from a law and economics classic, the concept of "efficient breach:" when a breach of contract generates a surplus from which the victim of that breach can be compensated for their loss, the law will not stand in the way.[35] Not only will no specific remedy be available to restrain the breach; restitutionary damages to strip the contract breaker of their profit normally will not be awarded,[36] and the loss to the victim will be the market value of the breach, taking due account of the duty to mitigate by finding a substitute contract.[37] Nor will non-pecuniary losses be recoverable in a wrongful dismissal action. While the P&O sackings may have caused "distress," this is not actionable loss in the context of employment contracts, according to well established authority in the English law of contract.[38]

The English common law notice rule, together with the legislation on minimum notice periods and redundancy compensation, at least ensured that the sacked crew received non-trivial sums, in certain cases running into six figures, for the loss of their jobs. The company is reported to have

[29]*Id.*

[30]Zoe Adams, Catherine Barnard, Simon Deakin & Sarah Fraser Butlin, Deakin and Morris' Labour Law 4.13–4.14 (7th ed. 2021).

[31]Employment Rights Act 1996, c. 18, §86; Adams et al., *supra* note 30, at 4.15.

[32]Employment Rights Act 1996, c. 18, §138; Adams et al., *supra* note 30, at 4.163–4.172.

[33]Epstein, *supra* note 23, at 967.

[34]Specific remedies of this kind are exceptional in the employment context. For the reasons for this, *see* Adams et al., *supra* note 30, at 4.54–4.62.

[35]Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487, 487–507 (1980).

[36]*Attorney General v. Blake* [2001] 1 AC 268.

[37]*British Westinghouse Electric & Mfg. Co. Ltd.* v. *Underground Electric Rys. Co. of London Ltd (No2)* [1912] AC 673.

[38]*Addis* v. *Gramophone Co. Ltd.* [1909] AC 488.

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made compensation payments totaling over £36 million.[39] It will presumably have calculated that it would still be substantially better off because of the savings in salaries and related costs from taking on replacement crew at lower rates.[40] So this looks like a positive sum outcome: the "losers," the employees, were compensated for their losses and the overall result was, arguably, an increase in aggregate wealth, a "rising tide."

This is not quite the full story, however. The company was also in breach of legislation according to which an employer seeking to make more than a certain number of employees redundant must first engage in consultation with relevant employee representatives,[41] and, additionally, give notice of its intentions to the government department which is responsible for employment and business matters.[42] There had been no consultation and no notification. The remedy for breach of the consultation requirements is a civil one, a "protective award"–the effect of which is to increase the compensation payable to the employees affected. This liability will most likely have been reflected in the pay offs made to the sacked crew. However, the obligation to inform the government of impending redundancies is enforceable by the criminal law, and can result in an unlimited fine being levied both on the corporate defendant and on a director or directors with the relevant managerial responsibility.[43]

Can the existence of the criminal sanction be explained using the logic of law and economics? Maybe not, because it radically alters the incentives of the parties, and seemingly not in a welfare-enhancing way. The employer is now faced with an open-ended liability and possible reputational losses associated with criminal responsibility. These could have been avoided had the requisite notice been given, but this would have required a full forty-five days' warning to have been provided. The company appears to have wanted a clean break essentially for the reasons identified in Epstein's analysis of the contract at will: restricting the remedy to a lump sum payment provides administrative certainty and avoids complex monitoring and enforcement costs both *ex ante* and *ex post* the dismissal. Enabling the employer to pay off the workers allows it to price in its future liabilities and move on; everybody is better off this way.[44] But, that outcome is clouded if an unspecified, and possibly very substantial, criminal fine is in prospect.

Law and economics has much to say about the efficiency or otherwise of criminal penalties and about the boundary between private law and the criminal law.[45] In contrast to the private law remedy of an injunction or declaration, which can be the subject of bargaining between the parties, a criminal sanction is not so readily negotiable. While criminal sanctions can in principle be priced in, the employer cannot buy its way out its criminal liability as straightforwardly as it can with its contractual and related statutory obligations. There may be scope for negotiation with the prosecuting authority depending on how far plea bargaining is accepted by the legal system concerned. Plea bargaining is a regular feature of American practice relating to the liability of corporations and of their senior managers, but it is relatively rare in the UK context. Moreover, the open-endedness of the fine provided for by the notification law which P&O infringed is unavoidably a significant obstacle to the kind of calculative action which the law and economics of crime expects of corporate defendants in cases such as this.

[39]*P&O Offers More than £36 Million in Compensation to Sacked Staff*, PERSPECTIVE (Mar. 22, 2022), https://perspectivemag.co.uk/po-offers-more-than-36-million-in-compensation-to-sacked-staff/.

[40]It was reported that the company would be able to halve its normal wage bill: Amelia Jenne, *P&O Ferries: Political Unity after Company Sacks 800*, CHANNEL 4 NEWS (Mar. 18 2022), https://www.channel4.com/news/po-ferries-political-unity-after-company-sacks-800.

[41]Trade Union and Labour Relations (Consolidation) Act 1992, ch. 52, secs. 188–198B [hereinafter TULRCA]; *see* ADAMS ET AL., *supra* note 30, at 7.19–7.30.

[42]TULRCA, *supra* note 41, at sec. 193; *see* ADAMS ET AL., *supra* note 30, at 7.29.

[43]TULRCA, *supra* note 41, at sec. 194.

[44]*See* Epstein, *supra* note 23, at 967.

[45]The locus classicus here is Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POLIT. ECON. 169, 169-217.

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

Redundancy notification laws are, nonetheless, worth a closer look from a law and economics perspective. Such laws are widespread; even the US has one, the federal WARN law, passed in 1988.[46] Most European countries also have these laws, and they are compatible with EU directives specific to redundancy and business transfer situations, and with internal market law.[47] The justification for requiring notification to the state is not hard to discern: mass redundancies have third party effects, impacting not just the workers who lose their jobs but households and communities reliant on the income flows generated by stable employment. Notification permits governments to plan for some of these impacts, for example, by assigning additional resources to state-run employment exchanges which assist displace workers to find new employment.

So, this is one of those situations in which a regulatory solution may be justified, in law and economics terms, by the presence of externalities. The Coase theorem might be predisposed to favor bargaining in preference to regulation as a way of internalizing social costs, but Coase, himself, recognized that this will not always be possible.[48] Harms are indeed reciprocal and imposing legal liability on enterprises for the externalities they create may not be not costless in net—social costs—terms. However, it is not clear, in all situations, that the net welfare-enhancing move is to leave everything up to contract. An efficient bargaining solution may not be available where multiple poorly resourced parties—workers, households, communities—must coordinate their actions to be able to negotiate with a single, well-resourced one—the employer. It may be better, perhaps, to give the state a role in enforcing rules of enterprise liability on behalf of the community, even after accounting for the additional agency costs—the state being the agent of the community for this purpose—which will then arise.

Zooming in further to the facts of the P&O dispute, we can see some additional nuances. It seems that the British version of the redundancy notification rule was a dead letter for many years, never being enforced. In 2006, the then-relevant ministry justified this lax approach on the grounds that there was no evidence of non-compliance.[49] But by 2015, it was taking a different line. In that year, the criminal penalty for failure to notify was changed from a fixed penalty of £5,000 to the current unlimited fine, and a number of prosecutions were brought, including one against a director of a subsidiary of the controversial retailer Sports Direct.[50] Judicial review was sought to have the decision to prosecute set aside, but the application was rejected.[51]

A further development occurred in 2018. In this year, an amendment was made to the relevant legislation, concerning the obligation to notify in a case where the redundancies were in connection with employment "on a seagoing vessel which is registered at a port outside Great Britain."[52] In this situation, "the employer shall give the notification required to the competent authority of the state where the vessel is registered" rather than to the UK authorities.[53] This provision can be traced back, in its turn, to an EU Directive of 2015.[54] That Directive makes it mandatory for a member state to provide for the redundancy notification to be made to the government of the

[46]Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101–2109 (1988).

[47]*See* Case C-201/15 *AGET Iraklis* ECLI:EU:C:2016:972 (casting doubt on laws requiring the state's permission to engage in collective redundancies, but preserving notification rules).

[48]In THE FIRM, THE MARKET AND THE LAW 154 (1988). Coase was famously skeptical about his own "theorem," noting the extreme unreality of the assumptions inherent in any discussion of the zero transaction cost world, and rejecting the idea that this world should be used as a benchmark of any kind: "A better approach would seem to be to start our analysis with a situation approximating to that which actually exists, to examine the effects of a proposed policy change, and to attempt to decide whether the new situation would be, in total, better or worse than the original one."

[49]*See* ADAMS ET AL., *supra* note 30, *at* 7.29.

[50]On why this company is controversial, *see* Simon Deakin, *Brexit, Labour Rights and Migration: Why Wisbech Matters to Brussels*, 17 GERMAN L. J., 13, 13–20 (2016).

[51]ADAMS ET AL., *supra* note 30, at 7.29.

[52]TULRCA, *supra* note 41, at sec. 193A inserted by the Seafarers (Transnational Information and Consultation, Collective Redundancies and Insolvency Miscellaneous Amendment) Regulations, SI 2018/26.

[53]*Id.*

[54]Directive 2015/1794 of the European Parliament of the Council of 6 October 2015 amending Directive 1998/59 (EC).

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

country in which the vessel is "flagged" as opposed to that in or from which it operates. This is consistent with the view of EU internal market law on flags of convenience, which is that the owner of the vessel has the right to register it in the state of its choosing, any restriction of this right being, in principle, an interference with the principle of freedom of establishment.[55] The UK implemented this Directive in 2018,[56] after the Brexit referendum but before the point at which it ceased to a member state of the EU; it remains good law notwithstanding the implementation of Brexit at the end of January 2020.

In 2019, P&O re-registered a number of its vessels, including the ferries which were to be the subject of the 2022 dispute, from UK law to the laws of a number of other countries, including Cyprus. Thus, it could have given the required legal notice to the Cypriot authorities, and the UK government would have been none the wiser. As it turned out, it failed to do even this, presumably fearing that the news would leak out, to the ultimate detriment of its commercial interests.[57] It seems likely then that the company and several of its individual directors had broken the notification law and so were liable to prosecution. At the time of writing, two months after the announcement of the dismissals, and notwithstanding condemnation of the company's actions by several senior members of the government up to and including the Prime Minister, no prosecution had been brought.

Having zoomed in to take a closer look at the facts of the P&O case, it will now be instructive to zoom out again to consider the wider context of the dispute. It is both a local dispute, impacting one particular group of workers and a specific community,[58] and one framed by a transnational division of labor and related cross-jurisdictional organization of capital. Private law is present here too, in the rules of company law and private international law which allow the partitioning of assets between corporate forms and the allocation of liabilities across legal regimes.

P&O, while a British-based company with a long history, is not currently British owned. In 2006, it was purchased by DP World, an Emirati logistics and shipping company, which is one of the largest of its type in the world, as it currently accounts for around ten percent of global container traffic. DP World's principal shareholder is Dubai World, a Dubai based investment fund, which is majority-owned by the ruler of Dubai, Sheikh Mohamed Bin Rashid Al Maktoum. In 2006, shortly after its purchase by DP World, P&O Ferries was sold to Dubai World; in 2019, it was repurchased by DP World. The aim of this switch in ownership is not immediately apparent, but it presumably conferred some benefit on those ultimately in control of the two companies.[59]

Law and economics teaches us that through the legal institution of corporate personality, company law achieves the partitioning of assets in such a way as to minimize investment risk and, more generally, create the conditions for the optimal (transaction-cost reducing) governance of the firm.[60] Corporate assets are protected from claims by creditors of the shareholders—"entity shielding"—while the shareholders are equally protected from the company's liabilities. Asset partitioning, along with associated legal institutions including shareholders' limited liability, is a fundamental feature of the modern corporate economy, without which the raising of capital would be a much more hazardous and expensive process. When coupled with the rules of private international law governing the applicable laws of commercial transactions and arrangements,

[55]*See Viking, supra* note 21.

[56]*See* SI 2018/26, *supra* note 52.

[57]*See* Stewart et al., *supra* note 15.

[58]It has been reported that around 500 of the sacked workers live in the port town of Dover.

[59]On P&O's ownership structure, *see* Gwyn Topham, *DP World's Controversial History of P&O Ownership*, The Guardian (Mar. 18, 2022), https://www.theguardian.com/business/2022/mar/18/dp-world-p-and-o-ownership-dubai.

[60]Key references here are Frank Easterbrook & Daniel Fischel, The Economic Structure of Corporate Law (1990); Henry Hansmann, The Ownership of Enterprise (1996); Reiner Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe & Edward Rock, The Anatomy of Corporate Law (4th ed. 2020).

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

it is also the basis on which capital can be moved around the world more or less at will in search of "asset-friendly" (low tax and low regulation) legal regimes.[61] It additionally makes it possible for criminal responsibilities to be deflected. Even if P&O and some of its directors had committed criminal offences in connection with the March 2022 sackings, there was no suggestion that criminal liability would fall on the company's ultimate controllers, who were also those who would ultimately profit from the savings on wage and employment costs which were thereby achieved.

But how exactly were those savings made? It has been reported that the wages paid to some of the agency staff taken on in the aftermath of the March 17 announcement were a small fractionof the UK's statutory national minimum wage. It appears that the contracts of the agency workers concerned were governed by the laws of several overseas jurisdictions, including the law of the channel island of Jersey, a UK dependency but for this purpose, and others, a separate legal system. P&O is also said to have taken advantage of a "loophole" in the coverage of the National Minimum Wage Act 1998, according to which it has no application to work carried out on a foreign-flagged ship operating outside UK territorial waters. This is not really a loophole, if that term is meant to imply an unintended gap in the coverage of the Act. Parliament may be presumed to have known what it was doing when it adopted the National Minimum Wage (Offshore Employment) (Amendment) Order 2020, which came into force on October 1 of that year.[62] This Order provides that the National Minimum Wage Act applies to individuals in offshore employment who work or ordinarily work in the territorial waters of the UK, even if they are employed on a foreign-flagged ship.[63] The problem with this provision, as far as ferries operating between Britain and the European mainland or between Britain and the island of Ireland are concerned, is that at least part of the voyage in question will be outside UK territorial waters. This is certainly the case for ferries operating between the UK and France, for example, and the same exclusionary rule may also apply to those operating between Scotland and Northern Ireland, although that point is yet to be fully tested.

It follows that it was the reflagging of the P&O ferries from the UK to Cyprus in 2019 which enabled it to realize the savings from dismissing its directly employed workforce and employing replacement labor via a series of agencies. Had P&O's ferries still been flagged under UK law, the national minimum wage would still have been payable to its workforce, regardless of the applicable law of the contracts concerned. As it is, it seems likely that the new arrangements will escape the otherwise mandatory application of the National Minimum Wage Act, at least pending the introduction of new legislation to close the gap left by the 2020 regulation.

How does law and economics regard this kind of regulatory arbitrage? It could be all to the good. Making choice of law a contractual matter is beneficial as long as the arrangements in question, like any other contract, are not the result of force or fraud. Rendering otherwise mandatory legislation subject to regulatory competition in this way constrains states to pass laws which appeal to those who "consume" them.[64] In theory, these "consumers" are not just the corporate employers who regularly make use of choice of law clauses to segment their liabilities across jurisdictions, but the workers who agree these contracts.

And yet, in practice, private international law recognizes that workers will have limited resources to devote to bargaining over choice of law clauses, and generally attributes compulsory effect to the labor laws of the state on whose territory the work is carried out. This could be justified on law and economics grounds if we were to take the view that the transaction costs of bargaining over the applicable law are too high, in the case of employment contracts, for the results to be validated as welfare-enhancing.

[61]Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality (2019).
[62]SI 2020/779.
[63]Those who work on UK-flagged vessels are covered by the Act wherever they work.
[64]Charles Tibout, *A Pure Theory of Local Expenditures*, 64 J. Polit. Econ. 416, 416–24 (1956).

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

Most national conflict of laws rules, along with EU's Rome I Regulation, take exactly this position, but, even so, it is subject to some problematic exceptions. Cases in which work is carried out over several different national territories or, in the case of the high seas, none, have to be specifically legislated for; while a general constraint is the possibility that laws limiting the employer's choice of law may be read as restricting the EU's market freedoms, in particular freedom to supply services and freedom of establishment.[65] The UK is no longer a member state of the EU and has specifically excluded from the scope of retained EU law, still in force as part of UK law, the direct effect of Articles 49 and 56 TFEU, which embody these fundamental market freedoms.[66] Thus the UK is, in principle, free to take a stricter line on the application of minimum wage legislation to crew working in international waters.[67] Whether it will do so, in response to the P&O affair, remains to be seen.

It would seem that UK labor law, with some nudges from EU law, has carved out an area of exemption from the normal rules governing the payment of minimum wages. Maritime employment has become a no-go area for the national minimum wage. This is not in any sense an unavoidable outcome. The UK legislator could have taken steps to ensure that employment on ferries operating from its shores was subject to labor law regulation in the normal way. We know that it would have been straightforward to do this because the principal statute extends to all UK-flagged vessels, wherever they are operating in the world, and the 2020 regulation extended it to all ships operating in UK territorial waters whatever flag they were flying.[68]

Had the UK legislator not chosen to exempt the ferry trade in this way, it is very unlikely that the mass dismissals announced by P&O would have occurred. Zooming back into the facts of the case, it transpires that P&O had for several years been raising concerns with the British government over "undercutting" on its cross-channel routes. By continuing to employ a largely British workforce and to observe collectively negotiated terms and conditions of employment, P&O was placing itself at a significant competitive disadvantage compared to other ferry operators. These other companies had already engaged in "fire and re-hire" practices with a view to accessing low-cost replacement labor. Previous British governments, far from criticizing these earlier instances of mass dismissal, had accepted them as the price to be paid for attracting "inward investment" to the ferry trade.[69] P&O's economic difficulties stemmed not from any inherent flaw in its business model, but rather from the absence of a level playing field in the maritime labor market.

How should a law and economics analysis approach this issue? From the earliest days of the Chicago School, the minimum wage, and labor regulation more generally, were targeted for criticism.[70] Minimum wages were a textbook case of market-distorting regulation, while labor unions were "cartels" which harmed employers, consumers, and non-union workers alike.[71] Driving these arguments was the belief that once private contractual autonomy was restored to the labor market, a new welfare-enhancing equilibrium would establish itself.

With the benefit of several decades of empirical research into one of the most highly contested issues in economics, we now know that these predictions were excessively optimistic, if not simply wrong. Labor markets do not clear in their "natural" or unregulated state. Employers possess market power, whether or not they are monopsonists in the narrow sense of having few or no

[65]Simon Deakin, *Regulatory Competition After Laval*, 10 Camb. Yearb. Eur. Leg. Stud. 581, 581–609 (2008).

[66]Adams et al., *supra* note 30, at 1.46.

[67]*See id.* (The UK's commitments under the EU-UK Trade and Cooperation Agreement prevent it from adopting labor laws which are less protective than those in place at the point it left to the EU, but do not appear to stop it enacting more favorable laws).

[68]SI 2020/779, *supra* note 62.

[69]Gwyn Topham, *P&O Ferries is not the First in UK Waters to Hire Low Cost Workers*, The Guardian (Mar. 30, 2022), https://www.theguardian.com/business/2022/mar/30/p-and-o-ferries-not-first-uk-waters-hire-low-cost-workers.

[70]George J. Stigler, *The Economics of Minimum Wage Legislation*, 36 Am. Econ. Rev., 358, 358–65 (1946).

[71]Richard A. Posner, *Some Economics of Labour Law*, 51 U. Chi. L. Rev., 988, 988–1011 (1984).

https://doi.org/10.1017/glj.2022.50 Published online by Cambridge University Press

competitors.[72] Minimum wage laws tend to redistribute from capital to labor, without causing unemployment.[73] They may induce productivity gains by disciplining firms to devote greater efforts to training.[74] Similar considerations apply, *mutatis mutandis*, to the role of collective bargaining in setting a floor to wages and conditions in sectoral labor markets, and to that of trade unions in proving workers with voice in the context of workplace industrial relations.[75] None of this is in any way incompatible with the Coase theorem, which, as Coase himself explained,[76] specifically leaves open the question of when regulation is welfare-enhancing, and treats the resolution of this question in complex markets, such as the labor market, as resolvable only in the light of empirical testing.

If the UK government were now to restore a degree of regulatory parity to the ferry trade, it would not just be avoiding an otherwise calamitous race to the bottom in wages and conditions of employment; it would be taking a step towards the restoration of a sustainable business environment for the maritime sector. Trade-offs between distribution and fairness are not always inevitable. There are worlds in which they can be combined. Fairness is not a luxury which the law can only aim at once economic growth has been satisfied, but one of the preconditions of an economy which serves the general interest. A private law which is devoted not to creating wealth, but to extracting, shifting, and hiding it, may be thought to have little future.

These have been observations prompted by the publication of *New Private Law Theory*. Its appearance in an English-language version makes available to a wide audience of teachers and students of law and economics a text which will instruct and inform. Its readers may learn as much from Josserand, Duguit, and Weber as they do from Coase, Becker, and Epstein. In doing so, they may be able to envision new pathways both for private law and for law and economics.

[72]Alan Manning, Monopsony in Motion: Imperfect Competition in Labour Markets (2005).

[73]The evidence is reviewed in Simon Deakin & Frank Wilkinson, *Minimum Wage Legislation," in* Labour and Employment Law and Economics (Kenneth G. Dau-Schmidt, Seth D. Harris & Orly Lobel eds., 2009).

[74]Christine Craig, Jill Rubery, Roger Tarling & Frank Wilkinson, Labour Market Structure, Industrial Organisation and Low Pay (1982).

[75]Simon Deakin & Frank Wilkinson, *Labour Law and Economic Theory: A Reappraisal, in* Legal Regulation of the Employment Relation (Hugh Collins, Paul Davies & Roger Rideout eds., 2000).

[76]*See* Coase, *supra* note 48.

Cite this article: Deakin S (2022). Private Law and the New Social Question. *German Law Journal* **23**, 862–871. https://doi.org/10.1017/glj.2022.50