
# *BAGATELLKÜNDIGUNG*: DOES PRIVATE OR PUBLIC JUDGING MATTER?

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## I. Introduction

In a primordial essay, William Landes and Richard Posner looked at adjudication from an economic perspective.[1] Their effort prompted the following reaction:

> Since the provision of judicial services has been viewed, during the past several centuries, as an indisputable function of government, it is interesting to think about and speculate upon a system in which such services might be provided by the private sector.[2]

In the United States, we need speculate no longer. More than a quarter of American workers are now governed by employer policies, adhesive contracts, that require them to submit virtually all their legal claims of workplace wrongs exclusively to arbitration systems created by their employers.[3] (This has come to be called "employment arbitration," to contrast it with "labor arbitration" that takes place under collective bargaining agreements.) The reach of these policies dwarfs the number of unionized workers who have access to grievance-arbitration procedures under collective agreements. This development has generated a considerable debate about its social implications and generated as well some empirical research on how these systems function in outcome as compared to the courts.[4] Accordingly, it may be timely to consider afresh what Landes and Posner had to say on whether public or private judging makes a difference.

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[1] William Landes and Richard Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) [*Landes and Posner*].

[2] Otto Davis, *Public and Private Characteristics of a Legal Process: A Comment*, 8 J. LEGAL STUD. 285 (1979).

[3] Alexander J.S. Colvin, *American Workplace Dispute Resolution in the Individual Rights Era*, 23 INT'L J. HUMAN RES. MGMT. 459, 469 (2012).

[4] The latest is by Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Process*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

Landes and Posner compared commercial arbitration to common law judging. Of the former, however, they noted that labor arbitration could have been used just as well,[5] and so we will. The latter, their choice of common law courts, played into a second, segregable and, to them and others, far more important aspect of their investigation, *i.e.* whether, over time, common law courts conduce toward efficient outcomes.[6] That question has taken on quite a life of its own, expanding to compare common law courts to the courts in civil law systems,[7] but it plays no role here. It is the first part of their article, distinguishing private arbitrators from public judges, that is of interest. It needs to be narrowed to be manageable.

The United States has no general law of wrongful dismissal. Unionized employees have access to a grievance arbitration procedure, at the union's discretion, and so to labor arbitration for claims of wrongful dismissal arising under "just" or "adequate" cause provisions of collective bargaining agreements. The Federal Republic of Germany does have a Dismissal Protection Act, the *Kündigungschutzgesetz* (KSchG), to which any employee with a claim of wrongful dismissal may have resort. These arguably provide workable institutional comparisons for privately and publicly dispensed workplace justice. About the time the Landes and Posner paper appeared, Folke Schmidt and Alan Neal suggested that U.S. labor arbitration "can be seen as akin to a system of court resolution."[8] What follows will explore whether that is so.

To give the comparison a sharper focus, a recurring scenario in both systems will be taken up, that of the discharge of an employee for the theft of an item of very small value or of a

[5] *Landes & Posner*, n. 24 at 243 ("We exclude – for no great reason other than limitations of space – the field of labor arbitration.").
[6] Robert Cooter, *The Objectives of Private and Public Judges*, 41 Pub. Choice 107 (1983); and, Paul Rubin, *The Objectives of Public and Private Judges: A Comment*, 41 Pub. Choice 133 (1983).
[7] A comprehensive and insightful guide is supplied by Nuno Garoupa & Carlos Gómez Liguërre, *The Syndrome of the Efficiency of the Common Law*, 29 B.U. INT'L L.J. 287 (2011).
[8] Folke Schmidt & Alan Neal, *Collective Agreements and Collective Bargaining*, preprint from XV INT'L ENCYCLOPEDIA OF COMPARATIVE LAW Ch. 12 at 393 (1984).

very small sum of money – a mere trifle, so to speak.[9] English has no specific word for it, but German does – *Bagatellkündigung*.

In what follows, Landes and Posner's conclusions will be summarized. Following that, an excursion will be made through the two systems under consideration and then the arbitral and judicial treatment of discharge over the theft of a trifle will be compared. The result will then be matched up to what Landes and Posner thought the differences would be, and some thoughts offered at the close on what the growth of employment arbitration in the United States may portend in light the public/private distinction.

## II. The Dispute Resolution/Precedent (or Rule) Generation Dichotomy

Landes and Posner distinguish two functions of adjudication: the resolution of disputes and the generation of "precedent" or "rule production." They argue that, "[A] private market is more likely to engage in dispute resolution than in rule creation."[10] Private judges, with an obvious incentive for future acceptability, will strive to reach a fair result in the cases before them; but, "why should they make any effort to express the results in a way that would provide guidance for future parties?"[11] They might want to manifest their fairness and competence, that is, to advertise; but there might be more cost effective ways to do that. The scenario of advertising by the publication of arbitration awards is "no more than plausible"[12] because the production of precedent would confer benefits on future parties without compensation. And on this they point to commercial arbitration where arbitration awards "are not a source of rules or

[9] This scenario was deployed more than a generation ago as part of a series of questions put through the labor laws of ten countries, including Germany and the United States. Hoyt Wheeler & Jacques Rojot, WORKPLACE JUSTICE: EMPLOYMENT OBLIGATIONS IN INTERNATIONAL PERSPECTIVE (1992). As this follow-on study will show, the legal situation has been notably stabile.
[10] *Landes & Posner* at 240.
[11] *Id.* at 238.
[12] *Id.* at 239.

precedents"; in fact, where "[a]rbitrators generally do not write opinions."[13] The publication of awards might even cost arbitrators business as parties without actionable grounds under the arbitrally-announced rule (or precedent) would shy away from bringing these cases before them.

From this it follows that arbitrators, who are judges in a market-driven system, "will tend to promulgate vague standards which give each party to the dispute a fighting chance."[14] Moreover, if each private judge was a precedent-producer "there is likely to be a bewildering profusion of precedents and so no obvious method of harmonizing them."[15] Standardization requires a single source. In a public forum that role would be performed by a court of last resort. In a market-driven system, that would mean a monopoly.[16]

They consider the possibility of severing rule-making from dispute resolution, committing the former to a public body, a legislature, whilst committing the latter to private judges. But this, they say, would be " 'inefficient.' "[17] Nevertheless, they do note that the rules to be applied in commercial arbitration are not self-generated by arbitrators; rather, they do come from "the courts and other sources of public law."[18]

In all, the nub of the Landes-Posner paper was captured by Robert Cooter this way: "[C]ompetition compels private judges to consider the effects of their decisions upon the actual litigants exclusively, whereas public judges can give weight to third parties."[19] Cooter draws a policy conclusion from this that will be taken up at the close.

Before proceeding, three areas of possible confusion should be mentioned. First, Landes and Posner use "precedent" and "rule" interchangeably. (They sometimes also use "standards"

[13] *Id.* at 248.
[14] *Id.* at 240.
[15] *Id.* at 239.
[16] *Id.*
[17] *Id.* at 240.
[18] *Id.* at 249.
[19] Robert Cooter, n. 5 *supra* at 108.

for the content of a rule or a precedent, the vagueness in which, they argue, private judges would be more likely to adopt than public ones.) They do not draw any distinctions between rules and precedents. From what appears, they assume that an explained decision, an opinion, would be a precedent that will have a rule or rule-like function governing future behavior even if only in the notion that future cases like the one decided will be treated much as the decided one was.

Second, they do not connect up the fact that, as they see it, commercial arbitrators apply standards manufactured for them from outside the arbitral system – by the legislature (rules) or courts (precedents) – with their opinion that that division of labor would be inefficient. However, as the issue of efficiency is outside this discussion, it will not be pursued; it is enough to observe that such is the situation in the system they treat.

Third, although they note, again in passing, that there are more cost effective ways for an arbitrator to display competence to would-be purchasers of her services than the publication of her awards, they pursue that idea no further. We are not told what those alternatives would be.

## III. Wrongful Dismissal

### A. General Overview

#### 1. The United States

There is no federal law generally assuring a right against wrongful dismissal in the United States. Montana,[20] Puerto Rico,[21] and the U.S. Virgin Islands[22] do afford such protection, but these are not major jurisdictions. For employees who do not have contracts of employment

[20] Mont. Code Ann. § 30-2-901 et. seq.
[21] P.R. Laws Ann. tit. 20, §§ 185a-185l
[22] V.I. Code Ann. tit. 24, § 76

of fixed duration, unless a discharge is unlawful on some statutory or common law ground, the wrongfulness of it, as being, say, arbitrary or excessive, is of no legal consequence.[23]

In other words, for rank and file employees in the United States, the right to be dismissed only for just cause is, in economic terms, a public good; and these employees ordinarily lack the bargaining power to secure that protection on an individual basis. Unions, however, negotiate for just such public goods – occupational health, safety, privacy, and the like. Collective agreements almost invariably contain a provision that employees can be dismissed only for "just," "adequate," or "good" cause, which is determined by resort through the collective agreement's grievance-arbitration procedure.

Discharge of a unionized worker due to misconduct commonly proceeds in this sequence: once management has been informed of the act or incident it commences (or must commence) a suitable investigation. The employee is usually interviewed, in which he or she has a statutory right of union representation. Even so, the employee may be suspended while the matter is under consideration. After investigating, management may issue a notice of termination. The union can file a grievance and take the discharge up through the procedure the collective agreement sets out, usually in a series of steps. Failing settlement, the union may notice the case for arbitration. An arbitrator, usually a single arbitrator, but sometimes one of a tripartite panel, will be selected, commonly from a panel provided by a neutral listing agency, and a hearing will be held. If the arbitrator does not sustain the discharge he or she could order the employee to be

[23] The number of reported cases of arbitrary dismissal held inactionable under the at-will rule is substantial. A recent case comes close to the instant scenario. In *Pomeroy v. Wal-Mart Stores, Inc.*, 834 F. Supp.2d 964 (E.D. Cal. 2011), an employee of 31 years' service asked her employer's jewelry department to repair her husband's watchband. It was irreparable and so was replaced. As there was no billing attached to it when the plaintiff picked it up, she asked the department to have the supervisor let her know the billing status. The store claimed she was called, failed to pay for a new watchband within 48 hours, and was fired for theft. She disputed the facts. The court granted Wal-Mart's motion for summary judgment on alternative grounds, one of which is that, as an at-will employee, she had no legal basis to contest the arbitrariness of her discharge.

reinstated; the arbitrator has no power to award money damages. Reinstatement may be with full back pay, with no back pay, or less back pay for a period of time, effecting a suspension as the more reasonable penalty short of discharge. Other remedial conditions may be imposed.

Arbitral awards are subject to a judicial review, but under highly defferential terms. The arbitrator is part of a system of industrial self-government; he or she speaks the parties agreement. Even mistakes of fact are not reviewable.[24] In principle, an arbitrator's judgment on a matter of discharge is not to be second-guessed by the courts.[25]

In principle, an arbitrator can render a decision without any explanation. There are labor arbitration systems that call for just that, usually of an expedited nature – that a discharge will be sustained or denied without more, or that limit the arbitrator to a one-paragraph explanation. But, contrary to Landes' and Posner's assumption, in the vast majority of labor cases the parties do expect an opinion, a resolution of any factual dispute and an explanation of what it is the arbitrator found to be more persuasive in one or the other of the parties' arguments.

Labor arbitration awards are not officially reported. With the permission of both parties, however, they may be submitted to commercial publishers who exercise their own editorial judgment. This may well be a form of arbitral advertising, but, if it is, an externality of it is the production of a library of arbitration awards that are routinely referred to as influential authority even as the sample may be skewed by refusals to authorize publication of potentially significant decisions or by the publisher's editorial judgments. In addition, there are several practitioner – oriented venues for compilation, commentary, and criticism of labor arbitration decisions and doctrine.

[24] *E.g.* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).
[25] On occasion, a court does manage to get it wrong. For an extraordinary example *see* Northern States Power Co., Minn. v. IBEW, Local 160, 711 F.3d 900 (8th Cir. 2013).

Labor arbitration awards are not precedential in the sense of there being a rule of *stare decisis*, save those decided under collective agreements that make them so, but only for those parties and only under the particular agreement. Individually and collectively, however, published awards can be highly influential. The clear weight of arbitral opinion would bear heavily enough that the individual arbitrator, if he or she wishes to be selected in the future, would need a fairly powerful reason to depart from it and would be constrained to explain why that is so.

## 2. Germany

The idea of a labor court, transported to Germany from France in early the nineteenth century, took modern form in the *Arbeitsgerichtgesetz* (ArbGG) of 1953. It provides for a three-tiered structure – a court of first instance, *Arbeitsgericht* (ArbG), a higher court of appeal, *Landesarbeitsgericht* (LAG), which can determine facts as well as law, and a federal labor court, *Bundesarbeitsgericht* (BAG), which hears only questions of law. At all three levels the labor courts are tripartite consisting of professional and lay judges, the latter representative of labor and management. The Federal Labor Court's decisions can be appealed to the Supreme Constitutional Court insofar as they implicate a constitutional issue. Otherwise, the labor courts are the courts of last resort on labor matters.

The discharge of an employee under the KSchG is a bit more complicated than a discharge under a union contract in the United States. In addition to mandatory notice to the works council, if one is in place, and a separate role for it in the process, the law's touchstone is that a dismissal is wrongful within the law if it is "socially unjustified" (*sozial unrechtfertigt*). An ordinary dismissal requires the giving of timely notice to the employee scheduled according

to the employee's length of service. However, under section 626 of the German Civil Code (*Bürgerliches Gesetzbuch*) (BGB), a dismissal may be effected summarily, without notice – an "extraordinary" dismissal – but only for "important reasons," *i.e.* notice cannot be expected when the "facts on the ground are considered and the interests of both parties are balanced." In either case, the employee may proceed to the labor court to contest the social justifiability of the decision. If held to be unjustified, the court can order reinstatement or, far more likely, a payment of compensation for the dismissal.

The decisions of the lower labor courts are available, but are not published in a nationwide reporter. Instead, the more important or interesting cases are noted in one or more of the several German labor law journals, sometimes accompanied by legal commentary. The decisions of the Federal Labor Court are published, but are almost routinely quickly excerpted and commented on in legal periodicals.

Technically, there is no strict rule of *stare decisis* in the labor courts. But, inherent in the structure, for rulings on issues of law by the Federal Labor Court, especially when there is division between the lower courts, is a very strong role for precedent. What the Federal Labor Court holds of a given fact pattern, as the law of the case, sends a compelling signal of how like cases should be analyzed and treated. In other words, practitioners and the courts treat the decisions of the labor courts, and especially of the Federal Labor Court, rather much as common law lawyers and lower courts would treat court decisions in a common law system.

B. Discharge for Petty Theft

A. Arbitral Practice: The United States

As we have seen, absent a collective agreement (or a protective law) an employer has the power to discharge with impunity. The limit on the employer's power here is worked by collective agreement; in a provision requiring "just' or "good" or "adequate" cause. The standard is not crafted by arbitrators; it is crafted jointly by managements and unions and given to arbitrators to apply, but the provision has become an almost uniform aspect of collective agreements, of industrial justice.

From the thousands of arbitration awards applying the standard of "just cause" a substantial body of precedent has developed that is considered normative as a matter of arbitral practice: employees should know that a rule of conduct exists, what it is, and that it is enforced before it may be applied as a basis of discipline; progressive discipline – oral warning, written warning, suspension – should be observed as to those acts which are not of such a nature as to justify immediate discharge; like cases must be treated alike, conduct condoned for one employee cannot be grounds to discharge another; the employee's disciplinary record and longevity of service must be taken into account; all the circumstances surrounding the misconduct have to be considered.

Theft, whether contractually excepted from progressive discipline or where the contract is otherwise silent with regard to it, is understood to be of such a nature as to be a ground of discharge. In such a case, the common arbitral understanding directs the parties and the arbitrator to all the above circumstances including, where relevant, the value of the item or amount taken. As a standard text observes,

> thefts of trivial value may justify immediate discharge in some settings such as banks or retail businesses with a well-known "zero-tolerance" policy, while in others a small theft

may require only progressive discipline.[26]

Employments where theft is endemic (as in retailing) or the possibility of theft poses a significant reputational problem (as in hotels and nursing homes) may be distinguishable, the status of what is taken – food or other perishable items that would otherwise be thrown out or given away, and whether other employees have taken such items in the past without warning or sanction – is a potential factor in mitigation as well as longevity, for an employee of longer service is judged more amenable to remediation as he or she has more to lose. In other words, though theft may well be and often is a ground for discharge without progressive discipline, that is for the arbitrator to decide; there is no per se rule in cases of petty theft.[27]

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[26] Dennis Nolan, *Standards for Discipline and Discharge* in THE COMMON LAW OF THE WORKPLACE §6.7 at 186 (Theodore St. Antoine ed., 2d ed. 2005).

[27] As Arbitrator Timothy Heinsz, a well-respected arbitrator, put it in an oft-cited award:

> In this case the Arbitrator finds that in view of all the circumstances that the discharge of an employee who has given his continuous service to a company for 23 years (See, Shenango, Inc., 67 LA 869 (Cahn, 1976) for eating a handful of nuts is simply too severe. Murray Machinery, Incorp., 57 LA 1189 (Graff, 1971); and Owens-Corning Fiberglass Corporation, 56 LA 608 (Moore, 1971). Although the grievant's actions cannot be condoned, when considering the manner of the Company's investigation, the facts surrounding the theft – the fact that the theft was not deliberate – and the grievant's length of service, this Arbitrator finds that the grievant's actions do not warrant the degree of discipline imposed.

*Kroger Co.*, 71 LA 989, 992 (Heinsz Arb., 1978).

And by Arbitrator John Sass, another well respected arbitrator:

> Theft is a criminal offense. But not all thefts are subject to the same criminal penalties. Petty thefts are generally subject to relatively modest penalties – usually probation and/or a find of some sort. Larger thefts are generally subject to proportionately harsher penalties.
>
> Here, of course, we are concerned with industrial penalties rather than criminal penalties, but the concept that small thefts should be subject to lesser penalties than large thefts still has at least some validity….
>
> A company may impose the ultimate penalty of discharge for thefts involving items of even relatively nominal value, *provided* that employees have been put on notice that such thefts will result in discharge *and* such rule is reasonably necessary in light of the type of business being conducted. Even then, however, all of the circumstances must be taken into consideration and such consideration may result in a finding that discharge is not justified. (italics in original).

*FMC Corp. Coke Plant*, 90-1 Arb. ¶ 8002 at 3013 (1989).

Some more recent illustrative cases are *Safeway*, 128 LA 1066 (Staudohar, Arb., 2010) (discharge of employee of 20 years for taking refill of 54 cents' worth of coffee without paying reduced to 15-day suspension); *Rockynol Retirement Community*, 128 LA 1426 (M. Feldman Arb. 2011) (employee of 19 years' service discharged for taking sandwiches home without paying for them where she would have been entitled a meal after her shift ordered reinstated without back pay); *Kroger Co.*, 124 LA 1633 (D. Singer, Arb. 2008) (discharge of employee of 21 years' service for eating a pie worth 99 cents reduced to suspension in view of company's inconsistent approach to the imposition of discipline for dishonesty). *See generally*, Donald Petersen, *Arbitral Issues and Standards in Theft and*

## B. German Labor Court Jurisprudence

Under the KSchG, discharge for an employee's behavior is a category where social justifiability can be placed in issue. In the case of an ordinary dismissal, the court would have to consider a variety of considerations including, especially, whether there was a clear rule, whether the employee had been given adequate notice or a warning about the violation, and more. The rich texture of the law is summarized in numerous German legal commentaries, but the sense of it is captured in one prepared in English by the German government some years ago the substance of which has not changed. First,

> Where the employee's behavior is contrary to the employment contract and concerns the so-called **sphere of confidence** (e.g. theft…)…a dismissal is basically permissible without prior warning. A prior futile warning is, however, required if the employee could assume with good cause that his behavior was not contrary to the terms of contract or at least not regarded by his employer as grave misconduct which jeopardized the existence or the contents of the employment relationship (Federal Labour Court, judgment of December 13, 1984…).[28]

And, second, under Federal Labor Court jurisprudence as early as the 1960s, only after the conduct "by itself" has been determined to be "suitable to form an important reason" for summary discharge does

> a comprehensive **balancing of the interests** take place in a second stage together with a consideration of all of the facts of the individual case. Here it is to be investigated, whether the continuation of the employment relationship to the end of the period of notice is to be expected or not, whilst considering the concrete facts of the individual case (*those significant from the point of view of employment contract*) and balancing the interests of both parties to the contract. The length of the period of service is always to be considered as part of the balancing of interests….[29]

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*Dishonesty Cases*, 28 J. Collective Negotiations 311 (1999) and Ken Jennings, Dilip Kare & Amit Goela, *An Analysis of Aribtration Decisions in Employee Theft Cases*, – Labor L.J. 161 (March 1991).

[28] Günter Halbach, *et. al.*, LABOUR LAW IN GERMANY: AN OVERVIEW 2-519 at 185-186 (Eva-Maria Föster *et. al.* trans. 5th ed. 1994) (bold in original).

[29] *Id.* at 2-483 at 173 (bold in original) (italics added).

All less drastic alternatives, including dismissal with notice, must be considered: "The extraordinary dismissal and/or termination of employment must be the **inevitable final measure** (**ultima ratio**)…."[30]

As the above italicized portion of the text evidences, German law, that is, the labor court judges and those who theorize about the law, give a good deal of attention to the idea of the employee's contractual commitment in a relationship of confidence; of there being something akin to a well of trust that the employee's conduct can diminish to the point where a single act of theft, even involving a mere trifle, may mean that no trust remains; to requiring consideration of whether, in predicting future conduct, an adequate warning had or should have been given. The Federal Labor Court has often reiterated that the theft of a trifle is in itself ("*an sich geeignet*") an "important ground" satisfying § 626 BGB. But, whether summary discharge is reasonable as a proportionate response requires an assessment of all the concrete circumstances.[31] There is no per se rule.

Whether there should be a per se rule became the subject of recent controversy. In 2009, a fifty-eight year old care giver at nursing home who had been employed there for seventeen years was serving lunch. She placed six pieces of *Maultaschen*, a kind of ravioli, in a bowl and took them. The employer had just the month before posted a notice strictly forbidding the taking of leftovers. The intermediate appellate court sanctioned the lower court's finding that the conditions for summary termination in lieu of notice – which, given the employee's length of

[30] *Id.* (bold in original).
[31] *See generally*, Monika Schlachter, *Fristlose Kündigung wegen Entwendung geringwerter Sachen des Arbeitgebers*, 2005 NZA s.433. *See e.g.* BAG Judgment of 17.5.1984 – 2 AZR 3/83 *summarized* 1985 NZA [Neue Zeitschrift fur Arbeitsrecht] s. 91; BAG Judgment of 12/8.1999 – 2 AZR 923/98 *summarized* 2000 NZA s. 421; BAG Judgment of 11/12/ 2003 – 2 AZR 36/03 *summarized* 2004 NZA s.486.

service would have been a substantial amount – were met.[32] The decision provoked not only legal comment, but some considerable public debate that involved both the president of the Federal Labor Court and a former Minister of Justice.[33] But, as it turns out, the *Maultaschen* case was only a run-up for a few months later the *Emmily* case was handed down, this time by the Federal Labor Court.[34]

In that case, the fifty year old employee had worked as saleswoman with the company for over thirty years. While at the cash register two unredeemed coupons worth 0.48€ and 0.82€, a total of about $1.69 (U.S.) at today's rate of exchange, were left at the cash register and she took them. In an exacting opinion the Court expanded on the law of extraordinary dismissal: it emphasized the critical role of an adequate warning (*Abmahnung*) as necessary both to guide future conduct and as a factor in the test of proportionality; the employee's thirty years of loyal service – about which, the court stressed, the longer one has loyally served the greater the forecast (*Prognose*) of corrective behavior – and of the possibility of dismissal with notice as a proportionate alternative. It made plain, without blinking at the fact that even petty theft can be subject to criminal sanction, that the law of dismissal from employment plays an independent role; that the law knows no "absolute" ground, no per se rule on these facts that would terminate the need for a balanced weighing of all the circumstances.

The *Emmily* decision provoked not only robust debate in legal circles, centering, as one might expect, on all the doctrinal nuances of German law on summary termination,[35] it prompted

[32] Judgment of the LAG Baden-Württemberg of 30.3.2010, 9 Sa 75/09 *summarized in* 2010 AuR s. 224. The lower court decision as set out extensively in 2010 AuR s. 79.
[33] *See e.g.* Ulrich Preis, *Minima (non) curat praetor? Pflichtverteztungen und Bagatelldelikte als Kündingunsgrund, Teil I*, 2010 AuR s. 186 and *Teil II*, 2010 AuR s. 242.
[34] Judgment of the BAG of 10.6.2010 – 2 AZR 541/09 reprinted in 2011 AuR s. 69.
[35] *E.g.*, Wolf-Dietrich Walker, *Die Kündingung wegen eines Bagatelldelikts – Geklärte und ungeklärte Fragen nach der "Emmely" –Entscheidung des BAG*, 2011 NZA s. 1; and in comprehensive treatment of the subject, *e.g.* Anke

an outpouring of debate in the public media – newspapers, magazines, and on television. Even the Minister of Justice weighed in on what was, when all the dust settled, merely a reaffirmance of doctrine that had been settled for decades. Prior cases had also drawn considerable public interest[36] – the Social Democratic Party even considered proposing a change in the law[37] – but, as the *Frankfurter Allgemeine Zeitung* reported of the *Emmily* decision, "although this was not the first dismissal over a trifle, in no other has the public been quite so occupied." [38]

## IV. Landes and Posner Revisited

Is American labor arbitration "akin" to a court system?[39] Or is it that the German labor courts are akin to American labor arbitration? In both, the standard applied is set by a law-giving power outside the adjudicative body: the parties to a collective agreement in the United States; the legislature in Germany. In both, the standard set for adjudication moves at a high level of generality: "just cause" in the former; "social justification" in the latter. In both, the adjudicative bodies have generated volumes of decisions applying and so refining what that standard means in a myriad of factually-nuanced situations. These decisions, when compiled, form a highly influential body of precedent in the U.S.; they do as well in Germany, save that the voice of the Federal Labor Court is more authoritative. All in all, despite the differences in structure, source

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Bergen, *Vertrauen im Arbeitsverhältnis – Die Rechtsprechung des Bundesarbeitsgerichts zur außerordentlichen Kündigung wegen sog. Bagatelldelikte*, 48 JAHRBUCH DES ARBEITSRECHT 48 (2011).

[36] *Der Spiegel*, 30 November 2009 at p. 49 (on the earlier *Bienenstich* case, *Bienenstich* being a certain kind of cake that the employee had taken); *Frankfurter Rundschau* (6 January 2010) (on the *Maultaschen* case); *Frankfurter Allgemeine Zeitung* (FAZ) 31 March 2010 at p. 9.

[37] FAZ, 22 December 2009, Business: Short Reports at p. 12; *Der Tagesspiegel* (April 6, 2010); *Die Welt*, 23 December 2009.

[38] FAZ, 10 June 2010, Business at p. 13. ("Es ist nicht die erste Kündigung wegen eines Bagatelldelikts aber kein andere Fall hat die Öffentichkeit so schwer bewegt wie dieser."). For more coverage in the FAZ see 19 May 2010 Business at p. 23 (coverage of a legal conference); 11 June 2010, Business at p. 13; 16 June 2010 at p. N3. *See also* coverage in *Die Welt*, 1 Feb. 2010 and 17 May 2010; *Der Tagespiegel*, 12 May 2010, 11 June 2010, 9 July 2010; *Frankfurter Rundschau*, 10 June 2010; *Die Welt*, 1 Feb. 2010 (covering a legal conference), 17 May 2010; and *Zeit Online*, 1 June 2010, 10 June 2010; *Die Tageszeitung*, 1 June 2010.

[39] Folke Schmidt & Alan Neal, *supra* n. 8.

of law, procedure, doctrinal sophistication and nuance, and, critically, the respective character of the adjudicator – a public judge in Germany and a private judge in the United States – the actual results the two systems produce are virtually identical. [40]

This fact would appear to negate Landes' and Posner's argument that it makes, or should make, a difference whether the judge is a public or a private adjudicator. But this conclusion is misleading for a reason that Landes and Posner do not address. The giveaway lies in the very fact of intense public scrutiny and debate in Germany, involving the media, high government officials and political parties, over whether an employee of long service fired for stealing a dollar or two's worth of goods should have her discharge sustained by the labor court, and the total absence of any public discussion of it when an arbitrator decides the same issue in the United States. The issue barks in Germany. It has no bite in the United States.

The difference might be explained by "culture," the omnium gatherum of comparative law. Germans take law seriously. Visitors from the United States often report their astonishment at the Germans' respectful observance of street crossing lights when vehicular traffic is absent, and their public manifestation of disapproval of anyone who jaywalks even when no car is in sight.[41] American indifference to the law bears a corresponding notability.[42] But a willingness to ignore the law does not imply indifference to it. The American press devotes considerable attention to significant legal cases concerning workplace rights, in both

[40] This echoes the conclusion Hoyt Wheeler and Jacques Rojot drew a generation ago. Hoyt Wheeler and Jacques Rojot, WORKPLACE JUSTICE: EMPLOYMENT OBLIGATIONS IN INTERNATIONAL PERSPECTIVE 375 (1992). *See also* the commentary on their study, Bernard Adell & Roy Adams, *Discipline and Discharge for Theft in Ten Countries*, IRRA 45th Annual Proceedings 501 (—).
[41] James Scott, TWO CHEERS FOR ANARCHISM 4-6 (2012).
[42] Seymour Martin Lipset, AMERICAN EXCEPTIONISM: A DOUBLE-EDGED SWORD (1996). The issue of obedience to the law arises in several places of Lipset's discussion, but is captured in his observation that, "Basically, the American tradition does not encourage obedience to the state and the law." *Id.* at 93.

news coverage and editorial opinion.[43] Americans do care at least about some aspects of employment law. These are brought into the public forum for debate just as they are in Germany. This opens a window on the difference.

The fact that the labor court in Germany is a public body, applying public law, is what draws public attention. Not just the business community, not just labor lawyers and legal academics, but the press, public, and political parties manifest interest in what the law is – and should be. In other words, public law is a matter of public concern,[44] as it is in the United States. Were the United States to enact a fair dismissal law and were the U.S. Supreme Court to decide an *Emmily* case, one way or the other one, could reasonably anticipate public debate, very much echoing the debate in Germany.

But in the United States, the obligation to dismiss only for just cause is one the employer voluntarily assumes, it is not imposed upon it by the state; it is not a matter of public law. Further, the obligation is applied by a judge the employer and union have hired to tell them

[43] For some random recent examples *see A Blow to Workers' Rights*, The New York Times (April 4, 2009) (on Supreme Court decision giving employers and unions the power submit age discrimination claims and other protective law claims exclusively to labor arbitration); *Firefighter Justice*, Wall Street Journal (June 30, 2009) (on Supreme Court decision on class action claim of racial discrimination by the New Haven, Connecticut, fire department); *Ninth Circuit Nuttiness*, Wall Street Journal (April 28, 2010) (on court's approval of mass class action against Wal-Mart); *Robed politicians*, Washington Post (June 27, 2012) (on Supreme Court's decision restricting union agency payment); *The Anti-Union Roberts Court*, New York Times (June 23, 2012) (same); *Tough Tuesday for the NLRB*, Wall Street Journal (May 8, 2013) (applauding the District of Columbia Circuit's decision disallowing a rule requiring employees to post a notice informing employees of their rights under the Labor Act); *The N.L.R.B.'s Contested Poster*, New York Times (May 10, 2013) (criticizing the same decision).

[44] In Italy, too, the small value of what is taken and the employee's length of service are considerations in mitigation. Francesco Liso & Elena Pisani, *Italy* in WORKPLACE JUSTICE *supra* n. 3 at 230, 254. Here, too, the law has remained stable. In one recent case (Cass. Sez. Lavoro, 29 August 2011, N. 17719), a discharge of a clerk for keeping 5€ was held to be disproportionate, but in the other (Cass Sez., 17 August 2012, N. 14551), theft of a hotel guest's 30€s was held to be cause to discharge because of the damage to the image of its employer. (I am indebted to Professor Guido Balandi for bringing these to my attention.) But here, the image of the judiciary as being biased in favor of employees, including cases of petty theft, has been publicly pointed-to as a labor market rigidity stifling economic growth. *See e.g.* Liz Aldermann, *Italy Wrestles With Rewriting its Stifling Labor Laws*, N.Y. Times, August 11, 2012 at A:1. ("Ms. Pallini cited a two-year trial in which a judge reinstated a grocery store employee who stole 80 euros ($98) after concluding that the employee should not lose his job over such a small amount." *Id.* at B-7.). In other words, there is public interest in the consequences of how public law is being dispensed by the public's judiciary.

whether the employer has lived up to its contractual obligation. It is a private matter placed in private hands in the disposition of which the public has scant concern.

Moreover, and closely related to Landes and Posner, the outcome of the process is visible in Germany. The decisions of the courts are available, and availed of – by legal commentators and the media. In the United States, unless submitted for publication, which either party may deny, the outcome of the process is invisible. It is a private matter. The one abets the other.

## V. Implications for Employment Arbitration

Robert Cooter came away from the Landes-Posner piece with the conclusion that the main difference between private and public judges is that "competition compels private judges to consider the effects of their decisions upon the actual litigation exclusively, whereas public judges can give weight to third parties."[45] From this he drew a larger, policy conclusion:

> private judges should be allowed, or encouraged, to decide disputes which are truly private in the sense that the effects of the decision do not reach beyond the disputants, but public judges should have exclusive responsibility for cases such as class actions whose effects are diffuse.[46]

More needs be said. It is in the very nature of public law that its effects are always diffuse, not only in the sense of a diffusion of new applications or extensions which could not necessarily have been foretold, that is, of the growth of law; but in the sense that because it is public law that is being applied and not a private contract – an obligation imposed for the public good and not assumed for private advantage – the public has an interest in seeing that it is being rightly observed.

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[45] Cooter, *supra* n. 6 at 108. Some weight is lent to this in Alexander Colvin's finding of a repeat player effect in favor of employers when the same arbitrators have been repeatedly selected by the same employers. Colvin, *supra* n. 4.

[46] Cooter, *id*. The United States Supreme Court has resolved the latter conundrum by allowing arbitration agreements to preclude class or group claims even as they preclude judicial resort as well. *AT&T Mobility* v. *Concepcion*, 131 S. Ct. 1740 (2011).

The lesson arguably to be learned from this admittedly small excursion into the comparative law of petty theft is that when a private forum is used instead of a public one for the disposition of a labor protection, the public may come to view the law itself as a matter of purely private interest; which shift in focus is abetted, in the case of employment arbitration, by the total want of transparency in the process and, contrary to labor arbitration, the absence of any publication of the results.

It has been argued on theoretical grounds that the privatization of labor protective law is inconsistent with democracy,[47] but let us attempt to concretize the issue by specific reference to the Fair Labor Standards Act (FLSA). For the most part, wage and hour claims under the FLSA affect low wage and often precarious workers, those with the least power in society. In the ordinary course, such a claim would be that a low wage worker had not been paid a statutorily mandated but, usually, rather small sum; had, for example, been told from week to week to work a quarter of an hour "off the clock." The wage claim, however small, is not a private matter, or, perhaps more accurately, not only a private matter. As a federal district court recently put it, "the public has an independent interest in assuring that employees wages are fair and thus do not endanger the national health and well-being.' "[48] Consequently, a settlement of the employee's claim brought under the Act requires approval by a court and, when approved, the settlement must be disclosed. The court rejected an employer's motion to seal the settlement, to shelter it from public view on the ground that confidentiality will encourage the process of settlement, thusly:

> The public cannot assess adequately the fairness of a wage settlement agreement without knowing the content of the agreement itself. Moreover, if the public cannot

[47] Richard Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & Contemp. Probs. 277 (2004).
[48] Boozzi v. F&J Pine Restaurant, LLC, 841 F.Supp.2d 635, 641 (E.D.N.Y. 2012) (reviewing authority).

> inspect the agreement for fairness, then the public certainly has no way to determine whether a court has fulfilled its duty when it approves such an agreement.[49]

Yet, under the current state of the law, employers can contract adhesively around the public function of public law by reposing disposition of the claim in the hands of a private adjudicator whose decision need not be judicially approved, need not be publicly available, need not even be reasoned or explained.

The point here is not whether the law has been properly applied in any one case. It is not even the potential blunting effect private disposition may have on the growth of law, in the fact that the parties are not paying the arbitrator to take account of the potential consequences of her decision for third parties and the unlikelihood that the arbitrator will assume to do so. It is, rather, that the shift to private adjudication – one of the express justifications for which is to keep workplace controversies out of the public eye – will contribute to a public perception of labor protective law as a matter of private interest in which the public has no concern. After all, why would there be any greater interest in whether a low wage worker has really been cheated of her wage for a few minutes' work than whether an employee has been discharged arbitrarily for theft of a few minutes' time?

[49] *Id.*