STRIKE-OUT

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INTRODUCTION

The Albuquerque firefighters stage a strike for a wage increase. Just then, a fire breaks out and destroys an industrial laundry facility and a surreptitious underground workshop, causing temporary evacuation of adjacent businesses.[1] Should the proprietors have a cause of action against the strikers for property damage and economic loss? More generally, should employees and labor unions involved in a strike against a particular employer be liable for resulting harms to third parties? The answer may have serious economic implications not only for potential claimants but also for parties to employment relations and labor disputes; yet scholars have neglected it for decades.[2] This Article aims to provide a structured, efficiency-oriented response.

Strikes are as old as documented history. In the reign of Ramses III in Pharaonic Egypt circa 1170 B.C., artisans working on the royal tomb in the Valley of Kings struck in protest against inadequate and overdue rations.[3] The first strike in the recorded history of North America occurred in Jamestown, Virginia, in 1619, when Polish craftsmen arguably refused to carry out their work until they were enfranchised.[4] The first strike in the United States probably took place in Philadelphia in 1786, when journeymen printers demanded a minimum wage of six dollars a week.[5] The Industrial Revolution, the emergence of a politically conscious working class, and the rise of labor unions and collective bargaining yielded a proliferation of strikes in the nineteenth and the twentieth centuries.[6] The freedom to strike has been gradually recognized and guaranteed in most Western legal systems, sometimes even under the

1. The hypothetical is based on firefighters' strike cases, such as *Boyle v. City of Anderson*, 534 N.E.2d 1083, 1084–86 (Ind. 1989) (discussing liability for property damage caused by fire during an illegal firefighter strike); White v. Int'l Ass'n of Firefighters, Local 42, 738 S.W.2d 933, 935–38 (Mo. Ct. App. 1987) (same); Fulenwider v. Firefighters Ass'n Local Union 1784, 649 S.W.2d 268, 269 (Tenn. 1982) (same). The particulars are a tribute to the fourth season of *Breaking Bad* (Sony Pictures Television 2011).

2. The most recent scholarship on this topic was published in the early 1980s. *See, e.g.*, Barbara J. Egan, *Damage Liability of Public Employee Unions for Illegal Strikes*, 23 B.C. L. REV. 1087 (1982); Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309 (1978); Note, *Statutory and Common Law Considerations in Defining the Tort Liability of Public Employee Unions to Private Citizens for Damages Inflicted by Illegal Strikes*, 80 MICH. L. REV. 1271 (1982).

3. *See* William F. Edgerton, *The Strikes in Ramses III's Twenty-Ninth Year*, 10 J. NEAR E. STUDIES 137, 137, 140 (1951).

4. James S. Pula, *Fact vs. Fiction: What Do We Really Know About the Polish Presence in Early Jamestown?*, 53 POLISH REV. 477, 490–91 (2008).

5. Henry P. Rosemont, *Benjamin Franklin and the Philadelphia Typographical Strikers of 1786*, 22 LAB. HIST. 398, 398–99 (1981).

6. *See, e.g.*, ENCYCLOPEDIA OF U.S. LABOR AND WORKING-CLASS HISTORY, at xxxii–xxxiv, 67–71, 650–51, 969–971, 1172–74, 1334–37 (Eric Arnesen ed., 2007) (providing lists and in-depth discussion of important unions and strikes, and surveying historical developments).

constitution,[7] and was more recently endorsed by international law.[8] While political, social, and economic changes have led to a marked decline in strike frequency and scope in some countries, most notably the United States, strikes have remained an important component in labor dispute resolution worldwide.[9]

As the ultimate collective action, an actual or a threatened strike mitigates the immense power asymmetry between an employer and its individual employees.[10] By halting production and causing economic loss, the latter exert pressure on the former to accept their demands. Put differently, harming the employer is the crux of the strike. So as long as striking employees comply with the applicable rules, allowing the employer to claim damages for the ensuing harm would counteract the very essence of the strike. Yet this is only part of the story. While employees use strikes as leverage against employers, their actions (or rather inactions) often have external repercussions. Work stoppage may certainly deprive an employer of the benefits of supplying its products or services, but it can also deprive the employer's consumers of the benefits of consumption. External repercussions are very common when the targeted employer is public or when it is a private entity with a monopoly or a dominant market position. In such cases, consumers incur losses if they cannot obtain the product or service from other suppliers or have to use much pricier alternatives. Very often, third-party losses generate the primary (though indirect) incentive for the targeted employer to settle. Consider, for example, strikes by waste management or airport workers. Public harm and consequent uproar would probably exert more pressure on the employers

7. For example, the Preamble to the French Constitution of 4 October 1958 incorporates the Preamble to the Constitution of 27 October 1946, whereby "[t]he right to strike shall be exercised within the framework of the laws governing it." 1946 CONST. pmbl. § 7 (Fr.), http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst3.pdf.

8. *See* International Covenant on Economic, Social and Cultural Rights art. 8(1)(d), Dec. 16, 1966, 993 U.N.T.S. 3 ("The States Parties to the present Covenant undertake to ensure . . . the right to strike, provided that it is exercised in conformity with the laws of the particular country."). Most countries have ratified this convention, whereas the United States signed but has not ratified it. *See id.*; *see also* European Social Charter art. 6, Oct. 18, 1961, 529 U.N.T.S. 89 ("With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties . . . recognise: the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."); Charter of Fundamental Rights of the European Union art. 28, Dec. 18, 2000, 2000 O.J. (C 364) 1, 15 ("Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.").

9. *See, e.g.*, News Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Major Work Stoppages in 2015 (Feb. 10, 2016), http://www.bls.gov/news.release/pdf/wkstp.pdf.

10. *See* M. Forde, *Liability in Damages for Strikes: A French Counter-Revolution*, 33 AM. J. COMP. L. 447, 448–49 (1985) (explaining that without strikes, or more accurately the potential use of strikes, trade unions and collective actions are meaningless).

than any direct economic loss they incur.[11] The question is whether and under what circumstances strikers should be liable for third-party losses.

The Article is divided into two complementary parts—*lex lata* (existing law) and *lex ferenda* (proposed law). Part I analyzes relevant legislation and case law, systematically discussing the primary causes of action used by third-party strike victims—intentional interference with contract or business relations, the prima facie tort, negligence, and breach of statutory and regulatory duties. It demonstrates that American courts have been generally reluctant to impose liability for third-party losses, highlighting the main conceptual and policy hurdles.

Part II puts forward a novel framework for assessing third-party claims, incorporating two fundamental principles. Under the first, which I call "the principle of deference," tort law should not normally undermine a specific legal regime governing the allocation of power in the concrete case, particularly if the applicable regime has been cautiously crafted by the legislative and executive branches of government. Under the second and more traditional tort principle of "reasonableness" or "reasonable care," strikers, like other potential injurers, must take cost-effective precautions to avoid foreseeable harm to others. I will argue that in the particular context at hand, concurrent application of the two principles entails two concessions. On the one hand, the principle of reasonableness should not be enforced to the full extent to secure deference. On the other hand, an exception to the principle of deference must be recognized to prevent considerable deviation from the principle of reasonableness.

The proposed analytical framework involves three steps. First, the court must determine whether the specific harm is a real social cost that can be attributed to the employees' conduct. If the answer is negative, no liability may arise. Second, the court must determine if the strike itself or the specific conduct that caused third-party harms in the course of the strike was unlawful, that is, inconsistent with legislative or regulatory provisions. If the answer is affirmative, these harms may be actionable, assuming that they were taken into account in setting the statutory or regulatory standards. Third, the court must determine whether the specific conduct that caused the specific harm was unreasonable. If it lies outside the protected sphere of the strike, it is subject to the ordinary principle of reasonableness; otherwise, it is subject to a relaxed version of this principle.

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11. In fact, if a public service is provided for free or at a subsidized price, a strike will actually benefit the employer economically (as the obligation to pay wages is suspended), making public pressure the only incentive to settle the labor dispute. *See* Ruth Ben-Israel, *Liability for Harms Caused by Strike*, 14 TEL AVIV U. L. REV. 149, 149–50 (1989) (translated from Hebrew).

Three methodological comments are due at the outset. First, the Article focuses only on third-party losses, not on the employer's.[12] The two categories may be interrelated, and any relevant relation will be duly noted. But they are distinct. As briefly implied above, allowing an employer to seek damages for harm caused by a strike may undermine the very essence of the strike. Thus, even in the case of an illegal strike, courts in many jurisdictions do not allow the employer to recover for its loss.[13] The question of liability for third-party losses seems more complicated, as a matter of both black letter law and legal theory, and therefore more appealing as a research topic.

Second, the Article discusses the potential liability of parties involved in strikes without distinguishing between employees and labor unions. The allocation of liability between these parties may be jurisdiction-dependent. For example, individual employees' liability may be capped,[14] which adds a legal constraint to the non-legal limit set by their financial capacity. Employees may also be exempt from liability for strikes called by their union.[15] Such limitations clearly place a greater burden on the union. Moreover, although unions have traditionally been held liable for tortious activities of their officers or members under common-law agency principles, in some jurisdictions these principles have been modified or replaced by statutory standards that usually make it more difficult to impose liability.[16] In some jurisdictions, union liability in tort is capped.[17] In a few others, unincorporated unions are practically immune from liability because their victims cannot meet the stringent common-law

12. With respect to the employer's losses, see Lamphere Sch. v. Lamphere Fed'n of Teachers, 252 N.W.2d 818, 829 (Mich. 1977) (dismissing a school district's action against a trade union for damages caused by an illegal strike); Fairmont v. Retail, Wholesale, & Dep't Store Union, 283 S.E.2d 589, 594–95 (W. Va. 1980) (dismissing an action brought by a hospital against striking employees); Susan T. Sekler, Note, *Collective Bargaining Under the Meyers-Milias-Brown Act—Should Local Public Employees Have the Right to Strike?*, 35 HASTINGS L.J. 523, 524–25 (1984) (discussing relevant cases in California).

13. Neil Fox, *PATCO and the Courts: Public Sector Labor Law as Ideology*, 1985 U. ILL. L. REV. 245, 298 & nn. 303–04.

14. *See, e.g.*, AXEL ADLERCREUTZ & BIRGITTA NYSTRÖM, LABOUR LAW IN SWEDEN 200, 216 (2010) (explaining that employees' liability for illegal strikes was capped 1928–1992, and that although the cap was abolished, in practice courts still limit employees' liability).

15. *See, e.g.*, 59 § LAG OM MEDBESTÄMMANDE I ARBETSLIVET [Act on the Joint Regulation of Working Life] (Svensk författningssamling [SFS] 1976:580) (Swed.); ADLERCREUTZ & NYSTRÖM, *supra* note 14, at 216.

16. *See* Danny R. Veilleux, Annotation, *Liability, Under Statute, of Labor Union or Its Membership for Torts Committed in Connection With Primary Labor Activities*, 85 A.L.R. 4th 979, § 2[a] (1991) (discussing union liability).

17. Trade Union and Labour Relations (Consolidation) Act, (1992) § 22, 16 Hals. Stat. (4th ed.) 391 (Gr. Brit.).

pleading and proof requirements.[18] The more restrictive the union's liability, the greater its employees' liability. This Article does not discuss the possible limits of each party's liability, so as not to divert attention from the more abstract theoretical issues under examination.

Third, the Article does not consider contractual bases for liability. The idea that certain classes of consumers may be deemed third-party beneficiaries of the collective bargaining agreement between the producer and his employees' union, especially in cases of public sector strikes, is not unheard of.[19] Yet courts have not found it compelling, and for good reason.[20] Much more importantly, this Article aims to demarcate the boundaries of tort liability, particularly in the presence of a competing legal framework, such as labor law, which asserts its dominance with respect to a certain type of conflict. Contractual liability simply lies outside the scope of this project.

I. *LEX LATA*

A. Overview

This Part systematically analyzes various causes of action previously used by third-party victims of strikes. The list is not exhaustive.[21] Rather, it focuses on the most promising bases for liability, highlighting the main

18. *See* Mitchell H. Rubinstein, *Union Immunity from Suit in New York*, 2 N.Y.U. J.L. & BUS. 641, 642 (2006) ("[U]nions are immune from legal liability . . . . because they are not generally incorporated.").

19. *See, e.g.*, Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459, 469 (N.Y. 1983) (discussing the argument that members of the public are third-party beneficiaries of the collective bargaining agreement between public employees' union and the public employer, and may therefore maintain a contractual action against the union); Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots, 600 P.2d 1282, 1285 (Wash. 1979) (en banc) (same).

20. *Burns*, 451 N.E.2d at 469–70 (explaining that the plaintiff needs to establish "that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" and that in the case of third-party harm the plaintiff is "but an incidental beneficiary of the collective bargaining agreement"); *Burke*, 600 P.2d at 1285–86 (explaining that "[t]he intent of the contract is[,] . . . presumptively, to agree to the terms and conditions of employment as between the parties" and that the plaintiffs did not put forward any evidence showing that the parties to the agreement intended to create a third-party beneficiary relationship).

21. Specifically, this Part does not discuss potential liability for public nuisance. *See, e.g.*, *Burns*, 451 N.E.2d at 468–69 (holding that businesses could not recover for harms caused by a transit strike under a theory of public nuisance because to establish such a claim, the plaintiff must show that his or her harm was "of a different kind from that suffered by other persons exercising the same public right," and all members of the public incurred harms of similar kinds (quoting RESTATEMENT (SECOND) OF TORTS § 821C cmt. b (AM. LAW INST. 1979))). Similarly, this Part does not discuss potential liability for conspiracy. *See, e.g.*, *In re* Allied Pilots Class Action Litig., No. 3-99-CV-0480-P, 1999 U.S. Dist. LEXIS 22656, at *23–26 (N.D. Tex. Nov. 15, 1999) (holding that third parties could not recover under a theory of conspiracy), *rev'd on other grounds sub nom.* Kaufman v. Allied Pilots Ass'n, 274 F.3d 197 (5th Cir. 2001).

conceptual and policy issues faced by the courts in deciding third-party claims. It begins with a methodical discussion of relevant intentional torts: intentional interference with contract or business relations and the prima facie tort. These are followed by a discussion of negligence and of the possible reliance on breach of statutory or regulatory duties, either as an external gauge of unreasonableness or as the basis for an independent tort.

Actions that constitute an integral part of the strike, as this concept is understood within each jurisdiction, are fundamentally distinct from actions that cannot be deemed an integral part of the strike, even though they are committed during its course. At its core, a strike is a work stoppage, but many jurisdictions recognize additional actions or omissions that secure or facilitate work stoppage as an integral part of it. Various jurisdictions may differ in delineating the contours of a strike, but conceptual boundaries necessarily exist. Consider, for example, striking employees who assault or threaten violence against a stand-in worker.[22] This action is not normally considered integral to the strike. Liability for non-integral actions is subject to the general principles and rules of tort law. In our example, the substitute employee may sue for battery or assault, and the victims of his inability to work may sue for their consequent loss.[23] These lawsuits are not and should not be affected by the desire to guarantee the freedom to strike, or more generally, to reduce power asymmetry in labor relations. This understanding is central to the analysis but will not be developed further in this Part. Harms caused by actions integral to the strike give rise to context-specific legal problems and a more complex analysis.

B. Intentional Torts

1. Interference with Contract or Business Relations

The tort of intentional interference with contractual or prospective business relations seems to be the most natural basis for liability for third-party harm. If a defendant "intentionally and improperly" interfered with the performance of a contract between the plaintiff and another by (1) causing the other not to perform the contract, or (2) preventing the plaintiff from performing the contract or causing performance to be more expensive or burdensome, the defendant is liable for the plaintiff's resulting pecuniary

22. *See, e.g.*, Berger v. City of University City, 676 S.W.2d 39 (Mo. Ct. App. 1984) (the striking firefighters picketed near a fire location, threatening violence against firefighters from neighboring municipalities who came to extinguish the fire, and the plaintiffs' building was completely destroyed).

23. *Id.* at 41–42 (finding that the University City Fire Chief actively and personally interfered with the efforts of the neighboring firefighters to fight the fire, making threats of violence against them, and that "such allegations are sufficient to state a cause of action against [the Fire Chief] as an individual").

loss.[24] In our context, employees may be liable for a third party's loss if their strike prevented the employer or someone else from providing a promised service or product to that third party, or caused that third party not to perform, or to perform at a higher cost, a contract with another. Consider a two-week stevedores' strike during which ships cannot load or unload cargo. An incoming container ship is delayed at the dock until the strike is over, its next voyage is cancelled, and the owner loses expected profit. Alternatively, the ship is forced to sail to and unload at another port to meet a contractual delivery date, and its owner incurs an additional cost. In both cases, the ship owner suffers economic loss, either because another party (the port) or the ship owner himself is unable to perform as expected. Similarly, if a defendant intentionally and improperly interfered with the plaintiff's prospective contractual relation by (1) causing another person not to enter into a relation with the plaintiff, or (2) preventing the plaintiff from acquiring the relation, the defendant is liable for the plaintiff's pecuniary loss.[25] Returning to the stevedores' strike, consider the owner of a cargo of wheat or sugar on board the container ship whose regular customers in the food industry decide to purchase their raw materials elsewhere due to the delay.

American courts have generally been reluctant to impose liability for harms to third parties caused by strikes under a theory of intentional interference with contract or prospective contractual relation. To begin with, in many jurisdictions, intent to harm the plaintiffs is required to establish a cause of action. In these jurisdictions, courts usually conclude that the primary purpose of a work stoppage is to exert pressure on the management to negotiate, not to harm third-party customers. "Consequently, third parties cannot prove that the [labor] union or its members intentionally interfered with their contractual rights."[26]

An excellent example of this line of argument is *Burke & Thomas, Inc. v. International Organization of Masters, Mates, & Pilots*.[27] In that case, the bargaining agent for deck officers of the Washington State Ferry System initiated a strike, causing complete cessation of normal ferry services.[28] Businesses and individuals in the local tourism industry brought

24. RESTATEMENT (SECOND) OF TORTS §§ 766, 766A (AM. LAW INST. 1979).

25. *Id.* § 766B.

26. *In re* Allied Pilots Class Action Litig., 1999 U.S. Dist. LEXIS 22656, at *29; *cf.* JOHN G. FLEMING, THE LAW OF TORTS 607–08 (4th ed. 1971) ("Almost every strike must cause breaches of contracts between the employer . . . and the persons with whom he is doing business . . . . Yet the instigator of the strike cannot be held responsible to such third persons, unless he not only knew of the existence of the particular contracts but, with a view to bringing about their breach, counselled action designed to achieve that end.").

27. 600 P.2d 1282 (Wash. 1979).

28. *Id.* at 1283.

a class action for resulting economic losses.[29] The primary cause of action was tortious interference with business relations.[30] The court explained that to establish this cause of action the plaintiffs had to prove "an intent to interfere with the private business relation."[31] Clearly, strikes cause foreseeable harm to members of the public, and the striking ferry workers here could foresee the disruption of tourist traffic.[32] However, the primary purpose of the strike is "to gain bargaining leverage during contract negotiations with the employer."[33] Its object is "not to injure any third party, but rather to apply pressure to the employer, in order to further the objectives of the union in negotiating a collective bargaining agreement."[34] The crucial point is that a strike's effect on third parties is incidental,[35] so in the absence of specific evidence to the contrary, strikes do not demonstrate an intent to interfere with the business relations of third parties.[36]

Note, however, that in some jurisdictions, such as Texas, the requirement of intent is construed differently. Plaintiffs need not show specific intent to harm them, only that the "defendants desired the consequences of their actions" or "that those consequences were substantially certain" to ensue.[37] Under this interpretation, incidental effects may be actionable.

Secondly, in deciding whether intentional interference with another's contract is "improper," the court considers various factors, including the actor's motives, the interests he or she seeks to advance, and the "social interests in protecting the freedom of action of the actor and the contractual interests of the other."[38] As explained above, a workers' struggle has been recognized as "a fight for a desirable equality, a movement by a large and underprivileged group for a better position in the economic system"; this group "should not be deprived of the only weapons with which it can combat those of the employer."[39] Thus, a strike—at least one which does

29. The question was "whether members of the public who are incidentally injured in their personal or business relationships by an unauthorized strike of public employees have a private claim for relief or cause of action against the employees' union to recover damages." *Id*.

30. *Id*. at 1285.

31. *Id* at 1286.

32. *Id*.

33. *Id*.

34. *Id*.

35. *Id*.

36. *Id*.

37. *In re* Allied Pilots Class Action Litig., No. 3-99-CV-0480-P, 1999 U.S. Dist. LEXIS 22656, at *29 (N.D. Tex. Nov. 15, 1999), *rev'd on other grounds sub nom.* Kaufman v. Allied Pilots Ass'n, 274 F.3d 197 (5th Cir. 2001).

38. RESTATEMENT (SECOND) OF TORTS § 767(b), (d)–(e) (AM. LAW INST. 1979).

39. William H. McDonough, Comment, *Torts: Privilege to Interfere with Contract Relations*, 30 CALIF. L. REV. 181, 188 (1942).

not violate statutes, regulations, or judicial or administrative holdings regarding labor relations[40]—is not "improper," even when it causes harm to third parties.

For example, in *Jamur Productions Corp. v. Quill*,[41] businesses and individuals brought actions against transit workers' unions for harms caused by a New York City transit strike.[42] The court opined that "the objectives of the strike—to obtain higher wages, better working conditions, etc.—may not be deemed improper."[43] A strike cannot be classified as improper in itself, only if it violates a statute or a court-ordered injunction.[44] Similarly, the Supreme Court of California stated in a dictum in *Imperial Ice Co. v. Rossier* that "[t]he interest of labor in improving working conditions is of sufficient social importance to justify peaceful labor tactics otherwise lawful, though they have the effect of inducing breaches of contracts between employer and employee or employer and customer."[45]

Thirdly, at least one appellate court denied liability on the basis of public policy, hinting at what I shall later call "the principle of deference." This view was expressed by the New York Court of Appeals in *Burns Jackson Miller Summit & Spitzer v. Lindner*[46] in the context of a public sector strike. In that case, New York City businesses brought actions against transit workers' unions for harms caused by a transit strike.[47] The court concluded that the plaintiffs failed to establish a cause of action. It held that the interference with the plaintiffs' contracts was only an incidental result of the defendants' conduct, and that "as a matter of policy we should not recognize a common-law cause of action for such incidental interference when the Legislature has, in establishing an otherwise comprehensive labor plan for the governance of public employer–employee relations, failed to do so."[48] Simply put, the court refused to subvert the seemingly comprehensive, thoughtfully crafted statutory regime.

Lastly, in several foreign common law jurisdictions, legislatures have explicitly precluded liability for intentional interference with contract in the context of strikes.[49] The British Parliament first enacted such a provision in

40. RESTATEMENT (SECOND) OF TORTS § 767 cmt. c.

41. 273 N.Y.S.2d 348 (N.Y. Sup. Ct. 1966).

42. *Id.* at 349.

43. *Id.* at 352.

44. *Id.*

45. 112 P.2d 631, 632 (Cal. 1941).

46. 451 N.E.2d 459 (N.Y. 1983).

47. *Id.* at 461.

48. *Id.* at 469.

49. The First Restatement of Torts afforded workers a privilege to intentionally interfere with contracts "if the object and the means of their concerted action [we]re proper" and exempted them from liability for third-party losses when their actions were not directed at the third party. RESTATEMENT

1906.[50] The most recent version was introduced in a 1976 amendment of the Trade Union and Labour Relations Act of 1974. It stipulates that "[a]n act done by a person in contemplation or furtherance of a trade dispute [is] not . . . actionable in tort on the ground only . . . that it induces another person to break a contract or interferes or induces any other person to interfere with its performance."[51] In Israel, § 62(b) of the Civil Wrongs Ordinance provides that "a strike or a lockout shall not be deemed breach of contract" for the purposes of the tort of intentional interference with contract.[52] The language of § 62(b) seems to preclude liability only for interference with the employment contract, not with third party contracts or business relations.[53] However, the supreme court held that this section was intended to afford a defense to strikers not only against claims arising from breach of their employment contracts, but also against those arising from any other breach caused by the strike.[54]

2. Prima Facie Tort

The prima facie tort, which the Supreme Court first recognized in *Aikens v. Wisconsin*,[55] is usually defined as "infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of

(FIRST) OF TORTS §§ 775, 809 (AM. LAW INST. 1939). However, these sections were omitted from the Second Restatement on the grounds that "the law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as a part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations, both state and federal." RESTATEMENT (SECOND) OF TORTS div. 9, intro. note (AM. LAW INST. 1979).

50. Trade Disputes Act, 1906, 6 Edw. 7 c. 47, § 3 (U.K.).

51. Trade Union and Labour Relations (Amendment) Act, 1976, c. 7, § 3(2) (Gr. Brit.), http://www.legislation.gov.uk/ukpga/1976/7/section/3/enacted, *repealed by* Trade Union and Labour Relations (Consolidation) Act, (1992) § 219(1)(a), 16 Hals. Stat. (4th ed.) 632 (Gr. Brit.) (codifying same rule).

52. Civil Wrongs Ordinance (New Version), 1968 N.H. 266, § 62 (Isr.) (translated from Hebrew).

53. Frances Raday, *Torts Liability for Strike Action and Third Party Rights*, 14 ISR. L. REV. 31, 52 (1979).

54. CA 25/71 Feinstein v. Secondary School Teachers' Union 25(1) IsrSC 129, 131 (1971) (Isr.) (translated from Hebrew). In this case, the owner of several secondary schools and students' parents brought legal actions against teachers who went on a strike and their labor union. *Id.* at 130. The parents claimed that the strike prevented the schools' owner from meeting his contractual obligations to provide education to their children—an intentional interference with contract. *Id.* The court denied recovery in accordance with § 62(b), explaining that allowing recovery would eliminate the freedom to strike and curtail the legislative intent. *Id*. at 130–31. Section 37B(a) of the Settlement of Labor Disputes Law, 5717–1957, SH No. 221 (Isr.) (translated from Hebrew), limits this defense to some extent, but only with respect to claims made by one of the parties to the strike. It stipulates that an "unprotected strike" is not considered a strike for the purpose of § 62(b), provided that the claim is brought by the employer or the employee, rather than third parties. *Id*.

55. 195 U.S. 194, 204 (1904) ("*[P]rima facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape.").

acts which would otherwise be lawful."[56] This means that the action is not available if the defendant's acts fall within one of the traditional tort categories.[57] Section 870 of the Second Restatement of Torts uses a somewhat different formulation: "One who intentionally causes injury to another is subject to liability . . . if his conduct is generally culpable and not justifiable under the circumstances."[58] It adds that "liability may be imposed although the actor's conduct does not come within a traditional category of tort liability."[59] Under this formulation, the tort applies even if the conduct falls within an existing category of tort, although this is not a precondition for liability. Either way, the prima facie tort is in effect a residual principle of intention-based liability: the defendant's conduct may be "otherwise lawful." More importantly, because the defendant's intent to cause harm makes the "otherwise lawful" act actionable, the peculiar doctrine appears to punish bad motives, not wrongful conduct.[60] This feature has spawned criticism[61] and has led to the rejection of this doctrine in many jurisdictions.[62]

In the case of *Burns Jackson Miller Summit & Spitzer v. Lindner*,[63] New York businesses sued transit workers' unions for harms caused by these workers' strike.[64] As explained above, the court found that the plaintiffs could not recover under the theory of intentional interference with contract or business relations.[65] Alternatively, the plaintiffs relied on the prima facie tort doctrine, but this argument was also rejected.[66] The New

56. ATI, Inc. v. Ruder & Finn, Inc., 368 N.E.2d 1230, 1232 (N.Y. 1977); Burns Jackson Miller Summit & Spitzer v. Lindner, 451 N.E.2d 459, 467 (N.Y. 1983); *see also* Geri Shapiro, Note, *The Prima Facie Tort Doctrine: Acknowledging the Need for Judicial Scrutiny of Malice*, 63 B.U. L. REV. 1101, 1101 (1983) (discussing *ATI* and other cases).

57. Shapiro, *supra* note 56, at 1104.

58. RESTATEMENT (SECOND) OF TORTS § 870 (AM. LAW INST. 1979).

59. *Id.*

60. Shapiro, *supra* note 56, at 1104.

61. *Id.* at 1104, 1107 ("This implication has evoked much criticism from courts that believe the law should punish only wrongful acts, and not wrongful thoughts. . . . The most frequent criticism of the prima facie tort doctrine is that courts should not make bad motives actionable.").

62. *See, e.g.*, Krause v. Hartford Accident & Indem. Co., 49 N.W.2d 41, 44 (Mich. 1951) ("Bad motive, by itself, . . . is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent." (alteration in original) (quoting 3 COOLEY ON TORTS § 534, at 545 (4th ed.))); Teas v. Republic Nat'l Bank of Dall., 460 S.W.2d 233, 242 (Tex. App. 1970) ("If an act be lawful, . . . an improper motive does not render it unlawful. . . . Malicious motives make a bad case worse, but it cannot make that wrong which, in its own essence, is lawful." (alterations in original) (quoting Griffin v. Palatine Ins. Co., 235 S.W. 202, 204 (Tex. Comm'n App. 1921), *set aside by* 238 S.W. 637 (Tex. Comm'n App. 1922))).

63. 451 N.E.2d 459 (N.Y. 1983).

64. *Id.* at 461.

65. *See supra* notes 46–48 and accompanying text.

66. *Burns*, 451 N.E.2d at 468.

York Court of Appeals held, in line with other courts,[67] that there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, in Justice Holmes's words, unless defendant acts from "disinterested malevolence."[68] The Second Restatement of Torts adopted a slightly less rigid approach: "If the only motive of the actor is a desire to harm the plaintiff, this fact becomes a very important factor"[69]—"very important" rather than decisive. It further explained that a motive of this sort is sometimes called "disinterested malevolence," to indicate that the defendant does not aim to promote any personal interests by his or her conduct, except venting his or her ill will.[70] With respect to the plaintiffs in *Burns*, the court held that the actions for prima facie tort could not stand because, although the plaintiffs alleged intentional and malicious action, they did not allege that the defendants' sole motivation was disinterested malevolence.[71] Because a strike is intended to advance the employees' interests, it cannot generally be said that the only motivation for harming the third parties is malevolence.

The common interpretation of the intent element as requiring "disinterested malevolence" is sometimes criticized as making the "lack of excuse or justification" element logically redundant. Whenever a justification exists, malevolence cannot be the sole motivation, so if the defendant also intended to promote a certain interest, the analysis will stop at the intent element, and the justification element will never be examined.[72] An alternative interpretation of the intent element requires that malevolence be the primary or dominant motivation.[73] Usually, this approach would not make any real change in the analysis of strike cases like *Burns*, where malevolence is neither the sole nor the dominant motivation for harming third parties. A third possible interpretation of the intent element requires malevolence, but not as the sole or dominant motivation. Under this approach, after establishing malice, the court must determine whether the malicious conduct may be excused or justified.[74] This approach would probably change the analysis but not the outcome of third-party claims, which might encounter additional difficulties.

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67. *See* Shapiro, *supra* note 56, at 1117–18 ("The most prevalent method of analysis used by courts defines the intent element of the tort very narrowly. The plaintiff must show that the purpose of the defendant's activity was solely malicious, unmixed with any other motives." (footnote omitted)).

68. *Burns*, 451 N.E.2d at 468 (quoting Am. Bank & Trust Co. v. Fed. Reserve Bank of Atlanta, 256 U.S. 350, 358 (1921) (Holmes, J.)).

69. RESTATEMENT (SECOND) OF TORTS § 870 cmt. i (AM. LAW INST. 1979).

70. *Id.*

71. *Burns*, 451 N.E.2d at 468.

72. Shapiro, *supra* note 56, at 1118–19.

73. *Id.* at 1123–25.

74. *Id.* at 1120–22 (discussing the alternative motivation approach).

As *Burns* demonstrates, the disinterested malevolence interpretation of the intent element precludes recovery for third-party losses. Therefore, no additional explanation is necessary for rejecting the prima facie tort theory. But even a less restrictive interpretation would not facilitate third-party claims. Two of the common reasons for rejecting the actions for intentional interference with contract seem applicable *mutatis mutandis*. First, a strike is generally intended to affect the employer; its effects on third parties are usually incidental, and it may be very difficult to demonstrate intent to harm them. Second, the prima facie tort hinges on the lack of excuses and justifications for the defendants' conduct. Exercising the freedom to strike, in an attempt to mitigate power asymmetry in labor relations and protect employees' interests, appears to be a very strong justification, or at least a legally valid excuse, for causing harm.

C. Non-Intentional Torts

1. Negligence

At first glance, the tort of negligence may seem a promising path for strike victims. However, an action in negligence faces at least five fundamental obstacles. First, as demonstrated above, many losses incurred by third parties are purely economic. American courts have consistently denied recovery in negligence for economic losses that stem from an injury to another, also known as relational economic losses.[75] The leading authority is *Robins Dry Dock & Repair Co. v. Flint*,[76] in which the Supreme Court held that "a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."[77] Despite its explicit reference to a contractual relationship between the plaintiff and the immediate victim of the conduct and to the defendant's unawareness of such a relationship, this case was broadly interpreted to exclude liability for any relational economic loss, whether the relationship

75. *See, e.g.*, Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 409, 416–20 (2011); Ronen Perry, *Relational Economic Loss: An Integrated Economic Justification for the Exclusionary Rule*, 56 RUTGERS L. REV. 711 *passim* (2004); Ronen Perry, *The* Deepwater Horizon *Oil Spill and the Limits of Civil Liability*, 86 WASH. L. REV. 1, 10–24 (2011); Ronen Perry, *The Economic Bias in Tort Law*, 2008 U. ILL. L. REV. 1573, 1574–76 [hereinafter Perry, *The Economic Bias*].

76. 275 U.S. 303 (1927).

77. *Id*. at 309. For further discussion of this case, see Henry D. Gabriel, Testbank*: The Fifth Circuit Reaffirms the Bright Line Rule of* Robins Dry Dock *and Fails to Devise a Test to Allow Recovery for Pure Economic Damages*, 31 LOY. L. REV. 265, 267–71 (1985); Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at* Robins Dry Dock v. Flint, 20 J. LEGAL STUD. 249 (1991); David R. Owen, *Recovery for Economic Loss Under U.S. Maritime Law: Sixty Years Under* Robins Dry Dock, 18 J. MAR. L. & COM. 157 (1987).

between the two victims was contractual or noncontractual,[78] known or unknown to the injurer.[79] Further attempts to restrict the Court's ruling to lost profits as opposed to positive outlays,[80] to negligence as opposed to other forms of action (e.g., nuisance),[81] or to the law of admiralty as opposed to the common law,[82] have also failed.

Federal courts have generally accepted the broad interpretation of *Robins Dry Dock* and applied it to the great majority of relational economic loss cases,[83] with a few narrow exceptions.[84] Most state courts have also embraced the bright-line rule,[85] and the Second Restatement of Torts explicitly endorsed it.[86] Only a few courts replaced it with a more generous approach. The New Jersey Supreme Court, for example, held that one owes a duty of care to take reasonable measures to avoid the risk of causing purely economic loss to particular individuals or individuals comprising an identifiable class "with respect to whom [one] knows or has reason to know are likely to suffer such damages" by one's conduct.[87]

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78. *See, e.g.*, Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 625 (1st Cir. 1994); Barber Lines A/S v. M/V Donau Maru, 764 F.2d 50, 51 (1st Cir. 1985); Louisiana *ex rel.* Guste v. M/V Testbank, 752 F.2d 1019, 1021, 1023–24 (5th Cir. 1985); *In re* Oriental Republic Uruguay, 821 F. Supp. 950, 954 (D. Del. 1993); *In re* Cleveland Tankers, Inc., 791 F. Supp. 669, 677 (E.D. Mich. 1992); Gen. Foods Corp. v. United States, 448 F. Supp. 111, 114 (D. Md. 1978).

79. *See, e.g.*, Steele v. J & S Metals, Inc., 335 A.2d 629, 630 (Conn. Super. Ct. 1974); PPG Indus., Inc. v. Bean Dredging, 447 So. 2d 1058, 1060–61 (La. 1984); Ferguson v. Green Island Contracting Corp., 355 N.Y.S.2d 196, 197–99 (N.Y. App. Div. 1974).

80. *See, e.g.*, *Barber Lines*, 764 F.2d at 51–52; *In re Cleveland Tankers*, 791 F. Supp. at 677.

81. *Barber Lines*, 764 F.2d at 56–57; *Testbank*, 752 F.2d at 1030–31; Dick Meyers Towing Serv. v. United States, 577 F.2d 1023, 1025 n.4 (5th Cir. 1978) (per curiam); Rickards v. Sun Oil Co., 41 A.2d 267, 269 (N.J. 1945).

82. *See, e.g.*, *Ballard Shipping*, 32 F.3d at 627–28; *In re* Nautilus Motor Tanker Co., 900 F. Supp. 697, 703 (D.N.J. 1995).

83. *See, e.g.*, *In re* Taira Lynn Marine Ltd. No. 5, 444 F.3d 371, 377–81 (5th Cir. 2006); Getty Ref. & Mktg. Co. v. MT Fadi B, 766 F.2d 829, 832–33 (3d Cir. 1985); *Barber Lines*, 764 F.2d at 51–52; *Testbank*, 752 F.2d at 1021–28; Hercules Carriers, Inc. v. Florida, 720 F.2d 1201, 1202 (11th Cir. 1983) (per curiam); Akron Corp. v. M/T Cantigny, 706 F.2d 151, 152–53 (5th Cir. 1983) (per curiam); Kingston Shipping Co. v. Roberts, 667 F.2d 34, 35 (11th Cir. 1982) (per curiam); Marine Navigation Sulphur Carriers v. Lone Star Indus., Inc., 638 F.2d 700, 702 (4th Cir. 1981); Cargill, Inc. v. Offshore Logistics, Inc., 615 F.2d 212, 213–14 (5th Cir. 1980); Louisville & Nashville R.R. v. M/V Bayou LaCombe, 597 F.2d 469, 472–74 (5th Cir. 1979); *Dick Meyers Towing Serv.*, 577 F.2d at 1024–25; Kaiser Aluminum & Chem. Corp. v. Marshland Dredging Co., 455 F.2d 957, 958 (5th Cir. 1972) (per curiam).

84. *See* Perry, *The Economic Bias*, *supra* note 75, at 1613–17.

85. *See, e.g.*, Conn. Mut. Life Ins. Co. v. N.Y. & New Haven R.R. Co., 25 Conn. 265, 275 (1856); Koskela v. Martin, 414 N.E.2d 1148, 1151 (Ill. App. Ct. 1980); Gosch v. Juelfs, 701 N.W.2d 90, 91 (Iowa 2005); 532 Madison Ave. Gourmet Foods Inc. v. Finlandia Ctr. Inc., 750 N.E.2d 1097, 1103 (N.Y. 2001); Aikens v. Balt. & Ohio R.R. Co., 501 A.2d 277, 278–79 (Pa. Super. Ct. 1985).

86. RESTATEMENT (SECOND) OF TORTS § 766C (AM. LAW INST. 1979) ("One is not liable to another for pecuniary harm not deriving from physical harm to the other, if that harm results from the actor's negligently" interfering with contract or prospective contractual relation).

87. People Express Airlines, Inc. v. Consol. Rail Corp., 495 A.2d 107, 116 (N.J. 1985). This authority was subsequently followed in Alaska. *See* Mattingly v. Sheldon Jackson Coll., 743 P.2d 356, 359–61 (Alaska 1987).

The second problem with an action in negligence is that a strike constitutes an omission *ex definitio*. Striking employees do not act; they refuse to work. The common law has traditionally denied liability for pure omissions or "nonfeasance."[88] The general rule is that a defendant cannot be liable for a pure failure to act for the plaintiff's benefit.[89] The Second Restatement of Torts provides an extreme example: a person who notices that a blind man steps into the street in front of an approaching car and can save that man without any danger to himself but fails to do so is not liable for the blind man's injury.[90] The vast theoretical debate about the desirability of such a rule lies outside the scope of this Article.[91] The rule has several exceptions. For instance, a potential injurer may be under a duty to act for the benefit of another if he or she actively creates a risk to the other, assumes a duty to act, or stands in a special relationship to the potential victim.[92] An even more important exception, which is highly relevant in the case of strikes, applies where affirmative duties are imposed by statutes, regulations, or binding judicial or administrative decisions.

A foreign supreme court case provides an excellent example. In *Ashdod Automobile Industries Ltd. v. Chizik*,[93] a maritime officers' union instigated a strike.[94] During the stoppage, two shipmasters disobeyed a port authority's order to move two container ships moored near a cargo ship pier, even though their cargo had been unloaded.[95] Because this was the only dock suitable for unloading containers, no other container ship could unload its cargo at that time.[96] Due to the significant cost of delay, a large ship carrying the plaintiffs' containers had to sail to another port, thousands of miles away, where the containers were transferred to a smaller ship.[97] The cargo ultimately reached its intended destination after the strike ended, so its owners incurred additional transportation costs and other economic

88. DAN B. DOBBS, THE LAW OF TORTS 853 (2000).

89. RESTATEMENT (SECOND) OF TORTS § 314 (AM. LAW INST. 1965) ("The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.").

90. *Id.* § 314 cmt. c, illus. 1.

91. The rule may be supported, for example, by a commitment to liberty, or by the high administrative costs of a general duty to act. *See, e.g.*, James G. Logie, *Affirmative Action in the Law of Tort: The Case of the Duty to Warn*, 48 CAMBRIDGE L.J. 115, 118–20 (1989). Law and economics scholars may object to the rule because acting for the benefit of another when the benefit exceeds the cost is efficient and should be incentivized. *See, e.g.*, Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 189–90 (1973); Eric. H. Grush, Comment, *The Inefficiency of the No-Duty-to-Rescue Rule and a Proposed "Similar Risk" Alternative*, 146 U. PA. L. REV. 881, 883–84 (1998).

92. DOBBS, *supra* note 88, at 855.

93. CA 593/81 Ashdod Auto. Indus. Ltd. v. Chizik 41(3) IsrSC 169 (1987) (Isr.) (translated from Hebrew).

94. *Id.* at 175.

95. *Id.*

96. *Id.*

97. *Id.* at 176.

losses.[98] They sued the union, its leaders, and the two recalcitrant captains for these losses. The court explained that according to applicable legislation, the person in charge of any vessel must comply with the instructions of the port manager concerning the vessel's mooring or navigation to or from the dock.[99] Moreover, under relevant regulations, a vessel should not be moored at a port facility or at a location that obstructs the way to a port facility without prior permit from the harbormaster.[100] In this case, the harbormaster ordered that the moored container ships be moved away from the dock, but their captains ignored the order.[101] While these facts were mentioned in a dictum concerning an independent cause of action for breach of statutory duty, the existence of specific duties to act made it much easier for the court to subsequently conclude that negligence was also established.[102]

The third problem with recovery in negligence for third-party losses is that of proximate cause or remoteness. Third-party losses are usually not the direct consequences of the defendants' conduct. This problem is linked to the first through the doctrine of *Robins Dry Dock*, which precludes liability for indirect economic loss (rather than economic losses generally).[103] However, *Fulenwider v. Firefighters Ass'n Local Union 1784*[104] demonstrates that the causal obstacle may arise irrespective of the nature of the harm. In that case, the Memphis firefighters went on an illegal strike.[105] The fire department thus sent an insufficient number of men with insufficient equipment to handle a fire that broke out on the plaintiff's property, and the property was consequently destroyed.[106] The Supreme Court of Tennessee denied liability for negligence.[107] It held that, in the absence of statutes to the contrary, unions and their members are liable for torts committed by them "directly causing immediate personal injury or property damage to employers or to third parties."[108] The specific plaintiff did not allege willful or even negligent destruction of his property by direct

98. *Id*.

99. *Id*.; Seaport Ordinance (New Version), 1971 N.H. 443, § 36(a)(1) (Isr.) (translated from Hebrew).

100. Seaport Regulations, 1971 K.T. 306, §§ 63(a), 64 (Isr.) (translated from Hebrew).

101. *Ashdod*, 41(3) IsrSC at 175.

102. *Cf*. Nili Cohen, *Strike Harms, Malicious Negligence, Economic Loss, and Interference with Contract*, 14 TEL AVIV U. L. REV. 173, 186 (1989) (translated from Hebrew) (explaining that the fact that strikers' conduct is usually an omission does not pose a problem if there is a concrete duty to act).

103. *See* Robins Dry Dock & Repair v. Flint, 275 U.S. 303, 307 (1927).

104. 649 S.W.2d 268 (Tenn. 1982).

105. *Id*. at 269.

106. *Id*.

107. *Id*. at 270.

108. *Id*. at 272.

action of the union or its members. The claim was based only on "secondary" or incidental harm as a by-product of the work stoppage.[109]

The fourth problem is one of public policy. Recall the case of *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots*,[110] in which the Washington State Ferry System employees went on an unauthorized strike, causing economic losses to businesses and individuals in the local tourism industry.[111] The third parties relied, *inter alia*, on the tort of negligence, asking the court "to permit the recovery of damages where the union could reasonably foresee that economic and other harm would befall" them.[112] The court declined, holding that "the delicate balance of labor relations is now primarily the province of the legislature" and that "the schemes created by statute for collective bargaining and dispute resolution must be allowed to function as intended, without the added coercive power of the courts being thrown into the balance on one side or the other."[113] Creation of new remedies in the area of labor relations calls for judicial restraint.[114]

Specifically, the ferry workers in *Burke* were subject to the jurisdiction of the Washington State Public Employment Relations Commission in cases of labor disputes.[115] A tort action by one of the parties to a labor dispute could erode the commission's ability to resolve it, and tort actions by third parties would have an even greater impact. Because "enormous penalties" not subject to the commission's control could be imposed on one of the parties, the commission's adjustment of a dispute would become meaningless.[116] Furthermore, the existence of a third-party cause of action would complicate and prolong the bargaining and dispute resolution

109. *Id*. At the outset, the court explained that the question was "whether a private action for damages may be maintained by a property owner *incidentally affected* by an illegal work stoppage." *Id*. at 269 (emphasis added).

110. 600 P.2d 1282 (Wash. 1979) (en banc).

111. *Id*. at 1283.

112. *Id*. at 1287.

113. *Id*. at 1288. Put differently, allowing incidentally injured parties to recover would "create a weapon . . . which was neither anticipated by the legislature nor included in its comprehensive scheme for collective bargaining and resolution of labor disputes." *Id*.; *see also id*. at 1290 (mentioning "the delicate balance to be sought in public employee labor relations," "the legislature's active role in regulating this process," and "the absence of a legislatively created cause of action for damages sustained by third parties").

114. *Id*. at 1289–90 ("[A] rule of judicial restraint is appropriate in the creation of remedies in the area of public employee labor relations . . . . [A] rule of judicial restraint regarding recognition of a new cause of action for damages in favor of third parties is the appropriate rule to be followed at this time.").

115. *Id*. at 1289.

116. *Id*.

processes.[117] For example, employees might demand indemnification for damages paid to third parties.

The fifth problem is also one of public policy but of a different sort. In certain markets, liability for negligently caused third-party harm (as opposed to specifically intended harm) may impose a considerable economic burden on employees and labor unions. The adverse consequences may include a chilling effect on employees' willingness to go on strike;[118] financial breakdown of unions—with a resulting increase in power asymmetry;[119] deterrence of competent persons from pursuing a socially desirable career path (for example, firefighting); and complication of the bargaining process between the targeted employer and the union (which might insist on indemnification for sums paid to third parties).[120] This set of concerns is related to at least two of the previously mentioned problems. The fear of crushing liability usually serves as a central justification for the traditional rule precluding liability for relational economic loss.[121] Still, in the context of strikes, it was sometimes invoked to fend off claims for property damage.[122] Similarly, the fear of reducing employees' and unions' relative power underlies the judicial reluctance to supplement the legislative scheme with tort liability. However, the adverse consequences of crushing liability would have been relevant even in the absence of a legislative and regulatory framework.

2. Breach of External Norms

Context-specific statutes, regulations, judicial orders, and administrative decisions (hereinafter external norms) may be relevant in two ways. To begin with, the external norm may explicitly impose civil liability. While such provisions are not unheard of in the realm of labor relations, their relevance to our discussion is quite limited. For example, the federal National Labor Relations Act,[123] which is applicable only to private-sector labor relations, provides that whoever is injured in his business or property by an unfair labor practice[124] of a labor union in an

117. *Id*. at 1290 ("Eventual settlements could be prolonged pending the resolution of multiple tort claims and counterclaims. The inevitable result would be to create labor law logjams in our courts and, at the same time, to exacerbate labor-management disputes." (quoting Lamphere Sch. v. Lamphere Fed'n of Teachers, 252 N.W.2d 818, 830 (Mich. 1977))).

118. White v. Int'l Ass'n of Firefighters, Local 42, 738 S.W.2d 933, 937 (Mo. Ct. App. 1987).

119. *Id*.

120. *Id*.

121. *See* Perry, *The Economic Bias*, *supra* note 75, at 1596–1600.

122. *See*, *e.g.*, *White*, 738 S.W.2d at 934 (denying property owners' action against a firefighters' union and some of its officers for property harm sustained during a strike).

123. 29 U.S.C. §§ 151–69 (2012).

124. The term "unfair labor practice" is defined in 29 U.S.C. § 158.

area affecting commerce may sue for the harm caused.[125] This provision creates a statutory action for damages on behalf of employers and third parties harmed by prohibited secondary boycotts, recognitional strikes, and work assignment strikes.[126] Still, as the court in the Washington State Ferry System case explained, the statutory cause of action is limited to "a certain class of unfair labor practices which Congress clearly found particularly objectionable and does not apply to primary strikes in the course of collective bargaining."[127]

A more promising strategy may be importation of duties or prohibitions from external norms into duty-based torts. Thus, breach of a specific duty imposed by an external norm may support an action in negligence. "Negligence per se is a tort concept that allows a civil court to adopt a legislatively imposed standard of conduct as the standard of a reasonabl[e] . . . person."[128] The unexcused violation of a duty or prohibition imposed by a legislative enactment or an administrative regulation may constitute negligence as a matter of law. It does if the purpose of the external norm is to protect a class of persons to which the plaintiff belongs from invasions of interests as the one injured by the kind of harm that actually resulted or by the materialization of the kind of risk that actually materialized.[129] Some common law jurisdictions also recognize an independent tort of breach of statutory duty.[130] But because the latter applies under similar conditions, the conceptual distinction will not be pursued further. At any rate, construction of the external norm is necessary to determine whether it actually imposes a duty, on whom, for whose benefit, and under what circumstances.

On several occasions, third-party victims of strikes tried to invoke such theories. Alas, they encountered several obstacles. First and foremost, legislative and regulatory constraints on the freedom to strike may be interpreted as protecting the parties to labor relations, or the public as such, rather than specific categories of potential victims. For example, in *White v.*

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125. 29 U.S.C. § 187(b).

126. The definition of an unfair labor practice includes prohibited secondary boycotts, recognitional strikes, and work assignment strikes. *Id.* § 158(b)(4); *see also* Burke & Thomas v. Int'l Org. of Masters, Mates & Pilots, 600 P.2d 1282, 1288–89 (Wash. 1979) (en banc) (interpreting § 187).

127. *Burke*, 600 P.2d at 1289; *see supra* notes 27–29 and accompanying text for an overview of the facts.

128. *In re* Allied Pilots Class Action Litig., No. 3-99-CV-0480-P, 1999 U.S. Dist. LEXIS 22656, at *23 (N.D. Tex. Nov. 15, 1999), *rev'd on other grounds sub nom.* Kaufman v. Allied Pilots Ass'n, 274 F.3d 197 (5th Cir. 2001).

129. RESTATEMENT (SECOND) OF TORTS §§ 286, 288A, 288B (AM. LAW INST. 1965); *see also* El Chico Corp. v. Poole, 732 S.W.2d 306, 312 (Tex. 1987).

130. *See, e.g.*, SIMON DEAKIN ET AL., MARKESINIS AND DEAKIN'S TORT LAW 294–310 (7th ed. 2013) (discussing the tort of breach of statutory law in English law and explaining that it is conceptually separate from the general tort of negligence); *see also* Civil Wrongs Ordinance (New Version), 1968 N.H. 266, § 63 (Isr.) (translated from Hebrew) (recognizing the tort).

International Ass'n of Firefighters, Local 42,[131] property owners brought an action against a firefighters' union and some of its officers for property harm caused by fire during their strike.[132] The plaintiffs tried to base liability on the defendants' violation of the statutory prohibition against public employee strikes in Missouri.[133] The Missouri Court of Appeals upheld the view that the statutory provision was enacted primarily for the benefit of the public employer, the direct victim of a public employee strike.[134] Additionally, fire departments are "fashioned for the benefit of the entire community," and "no cause of action accrues to an individual based on a breach of duty for failure to perform services due to the public at large."[135]

Second, a statutory or a regulatory provision cannot underlie an action in tort if imposing civil liability is inconsistent with the purposes of the specific legislation or regulation. This, again, is related to the principle of deference: a civil cause of action cannot arise from statutes or regulations if this undermines the carefully crafted framework for labor dispute resolution and strikes in particular. For example, in *Burns Jackson Miller Summit & Spitzer v. Lindner*[136] (the New York City transit strike case), the plaintiffs tried to base their claim on a New York statute that prohibited strikes by public employees (the so-called Taylor Law[137]). The court rejected this theory, explaining that "the provisions of the present statute and the history of their enactment strongly suggest that a private action based upon the statute was not intended."[138] The legislature was concerned about the consequences of imposing crushing liability on employees and unions, and "provided precisely the remedies it considered appropriate."[139] Moreover, the primary purpose of the statute was "to defuse the tensions in public employer–employee relations by reducing penalties and increasing reliance on negotiation and the . . . Public Employment Relations Board" in

131. 738 S.W.2d 933 (Mo. Ct. App. 1987).

132. *Id*. at 934.

133. *Id.*

134. *Id*. at 937–38 ("[T]he intended beneficiaries of the Public Sector Law are not, [sic] individuals like the plaintiffs, but governmental instrumentalities."). That is why according to Missouri law the targeted employer can sue for violation of this statutory provision. *See* State *ex rel*. Ashcroft v. Kan. City Firefighters Local No. 42, 672 S.W.2d 99, 113 (Mo. Ct. App. 1984) (explaining that third-party claims raise "issues we do not confront: whether—in the light of the strike ban of the particular statute and other distinctive circumstances—the statutory prohibition was intended to benefit someone other than the public employer and, if so, whether the claimant was among the class contemplated").

135. *White*, 738 S.W.2d. at 938.

136. 451 N.E.2d 459 (N.Y. 1983).

137. N.Y. CIV. SERV. LAW §§ 200–214 (McKinney 2011 & Supp. 2016).

138. *Burns*, 451 N.E.2d at 465.

139. *Id*. at 466 (quoting Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 15 (1981)).

resolving labor disputes.[140] Civil liability might "upset the delicate balance established after 20 years of legislative pondering."[141]

II. *LEX FERENDA*

A. Theoretical Foundations

1. Deference

After sketching out existing case law and highlighting the conceptual and policy issues faced by the courts in deciding third-party claims, we turn to the construction of a new analytical model. The proposed framework is based on two fundamental principles: deference and reasonableness. The principle of deference focuses on the interaction between tort law and other branches of law governing the particular setting, especially when the competing regime involves a complex and carefully crafted system of legislation and regulation. Although this Article discusses a concrete legal question (strikers' liability for third-party harm), and a specific interaction between torts and another area of law (labor law), the principle of deference is generally applicable whenever the boundaries of tort liability must be delineated in the presence of a competing legal framework that asserts its dominance with respect to a certain type of conflict. Simply put, the narrow version of the principle of deference holds that tort law, which is usually shaped and implemented by the judiciary, should not undermine legitimate allocations of power by and under a complex legislative and regulatory regime applicable to the conflict at hand. More broadly, tort law should not counteract legal schemes that implement compelling legislative and regulatory policies.

The principle of deference has two main rationales. First, the legislature (and to a lesser extent the regulator) is usually better equipped than the judiciary for making and implementing public policy with far-reaching implications.[142] The legislature has concrete expertise, sometimes

140. *Id*.

141. *Id*. In an earlier case, a lower court discussed a "negligence per se" claim based on previous New York legislation prohibiting public employees' strikes, known as the Condon-Wadlin Act. Jamur Prod. Corp. v. Quill, 273 N.Y.S.2d 348, 350 (N.Y. Sup. Ct. 1966). The court held that the absence of a remedy prior to the Condon-Wadlin Act, and the failure of this Act to introduce a remedy, "lead inexorably to the conclusion that the plaintiffs are without any cognizable action at law." *Id*. at 353.

142. *Cf*. Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 484 (2000) ("The legislature has fact-finding capabilities the judiciary lacks."); David Landau, *Political Institutions and Judicial Role in Comparative Constitutional Law*, 51 HARV. INT'L L.J. 319, 328 (2010) ("[C]laims for judicial deference to legislative institutions . . . rest on ideas about . . . superior information-gathering and policymaking capacity of legislatures. . . . Empirical work finds that the U.S. Congress has considerable capacity to gather and evaluate information, mostly through the committee system, which allows it to formulate complex policy initiatives.").

manifested in the continuous work of specialized committees, in identifying the competing interests, considering the implications of various strategies on the macro level, and generating a delicate and defensible balance. The legislature also has the resources to gather and analyze enormous quantities of data, to solicit scientific literature reviews, and to obtain external counseling. The legislative process involves a thorough debate among advocates of competing ideologies, affected individuals, businesses, and organizations, as well as experts. Most importantly, in identifying problems and tailoring the solutions, the legislature is not restricted to the facts of a specific dispute but sees the whole picture. When it enacts a comprehensive scheme in a certain area following thorough deliberation, this scheme is presumably superior to any alternative the judiciary might devise. Courts are simply unfit to contest and redraw these carefully drawn lines.

Second, the legislature is generally more representative of society and more accountable than the judiciary.[143] Furthermore, legislative processes involve collaborative decision-making, rely heavily on dialogue and debate, and take into account a much wider array of interests of potentially affected parties and views on the questions under consideration. The legislature is, therefore, more likely to shape a balanced framework. Thus, it enjoys greater democratic legitimacy in making and implementing wide-ranging policies.[144] The democratic credentials of the legislature serve as a good reason to constrain judicial power.[145] Once the legislature has erected a balanced structure through a collaborative process, it would be undemocratic for a judge to destabilize it. Courts should exercise restraint when asked to add to or subtract from a comprehensive statutory system.

In applying the principle of deference to the question of third-party harm caused by strikes, one must first understand how labor law—the law of strikes in particular—operates. Collective bargaining and union-organized strikes are not normally justified in terms of efficiency because neither enhances aggregate welfare. Quite the contrary: they reduce the supply of labor below the competitive level and increase its price (that is, wages) above the competitive level.[146] One may argue that these measures

143. *See* Greene, *supra* note 142, at 484, 486 (discussing representativeness and accountability).

144. *See* Landau, *supra* note 142, at 328 (explaining that judicial deference to legislative institutions "rest on ideas about the democratic legitimacy . . . of legislatures").

145. *Id*.

146. Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 1001 (1984); *see also* Donald A. Dripps, *New Directions for the Regulation of Public Employee Strikes*, 60 N.Y.U. L. REV. 590, 593 (1985) ("A convincing case for the general utility of unions probably cannot be made on the basis of welfare economics. Like any other cartel arrangement, labor unions impair economic efficiency, thereby imposing a genuine economic welfare loss. Wages and opportunities for unemployed or unorganized workers diminish as employers consume less labor than they would under more competitive conditions." (footnote omitted)).

do have some social benefits: they increase productivity by facilitating transfer of information about dissatisfaction from employees to employers, thereby preventing high attrition rates, and by encouraging—through seniority schemes—old employees to share knowledge with younger employees.[147] However, these arguments are questionable. If transfers of information were important, employers could encourage them by cash rewards; if tenure increased productivity, employers would support it; if unionization truly increased productivity, employers would not try to prevent unionization.[148]

Labor law—of which collective bargaining and strikes are central components—cannot be explained or justified in terms of classical microeconomics. Ultimately, the justifications for labor law depend on noneconomic grounds of social policy.[149] Traditionally, labor law aimed at mitigating power asymmetries in labor relations and securing "fairer" bargaining and outcomes. In other words, the law facilitates a transfer of wealth from one group of persons to another.[150] Within this framework, the freedom to strike has been essential. The power imbalance cannot be reduced unless employees are able to exert pressure through effective collective measures.[151]

The law of strikes, therefore, is a body of law that allocates power between the employer and the employees (and their unions), often taking into account third parties' interests. More accurately, the law of strikes imposes different costs on parties to labor disputes, thereby affecting their relative bargaining powers. An unregulated strike imposes costs on both parties. The employer loses income because production is reduced or halted, and the employees lose their wages. These costs are affected by several variables, including the duration of the strike, the importance of the striking employees in the production process, and the nature of the product and its components (consider a dairy workers' strike).[152] Without further

147. *See* Posner, *supra* note 146, at 1000 (explaining and refuting these claims).

148. *Id*. at 1001.

149. Dripps, *supra* note 146, at 593.

150. *See* Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 992 (1986) ("[T]he motivations behind the labor laws respond to the one area regarding which classical microeconomics offers the least guidance: a desire to transfer wealth from one group of persons to another.").

151. *See* PAUL DAVIES & MARK FREEDLAND, KAHN-FREUND'S LABOUR AND THE LAW 292 (3d ed. 1983) ("There can be no equilibrium in industrial relations without a freedom to strike. In protecting that freedom, the law protects the legitimate expectation of the workers that they can make use of their collective power . . . ."); Dripps, *supra* note 146, at 595 ("The right to strike . . . is the keystone of successful collective bargaining. Without a strike threat, employers cannot be compelled to attend to union interests." (footnote omitted)).

152. *See* Posner, *supra* note 146, at 1002.

regulation, the balance of those costs determines the ultimate settling point between the union's initial demand and the employer's initial offer.[153]

Labor law, by regulating strikes, affects these costs. On the one hand, the law can reduce the employer's or increase the employees' expected costs. This can be done by prohibiting certain types of strikes; requiring prior notice of an intent to strike; prohibiting the strikers from causing the employer certain types of loss; allowing the employer to hire replacements for the striking workers, as is the case in the United States;[154] or enabling the employer to offer replacements permanent jobs. On the other hand, the law can increase the employer's and reduce the employees' costs. This can be done, for example, by obliging the employer to pay back wages for the duration of the strike (an uncommon feature in Western jurisdictions); preventing the employer from paying replacements higher wages than those paid to the striking workers, as is the case in the United States;[155] or precluding discharge of striking workers who have been replaced.[156]

Labor law—a complex system of statutes and regulations supplemented by common law principles and rules—offers a delicate balance between the parties to labor relations and disputes. This framework—tailored by a competent body with democratic credentials for a specific economic, social, and political environment—should be respected by the courts. Adding or subtracting costs or benefits to either party, in particular by imposing liability on employees who complied with labor law or refusing to impose liability on those who failed to comply, may destabilize the carefully struck balance. This principle has been recognized by the courts themselves on various occasions.[157] Moreover, the drafters of the Second Restatement of Torts followed this logic and totally

153. *See id*. at 997.

154. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) ("[It is not] an unfair labor practice to replace the striking employes [sic] with others in an effort to carry on the business."). Of course, hiring replacements, even when allowed, has its costs. In traditional industries replacement workers need to "cross picket line[s] thrown up by the striking workers' union," with "a latent threat of violence," and they may also fear being stigmatized as "scabs" and being maltreated by co-workers after the strike is over. Posner, *supra* note 146, at 998. Also, the greater the skill and knowledge required to perform the tasks, and the more complicated and time consuming the tasks are (consider the high-tech industry), the more difficult it is to find replacements.

155. Posner, *supra* note 146, at 997–98. This limits the ability to hire replacements.

156. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967) ("[U]nless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." (quoting NLRB v. Great Dane Trailers, 288 U.S. 26, 34 (1967))).

157. For example, in *Burns Jackson Miller Summit & Spitzer v. Lindner*, 451 N.E.2d 459 (N.Y. 1983), the court applied a deference rationale in denying third parties' claims for intentional interference with contract and negligence per se. *See supra* notes 46–48, 136–141 and accompanying text. In *Burke & Thomas, Inc. v. International Organization of Masters, Mates & Pilots*, 600 P.2d 1282 (Wash. 1979) (en banc), the court applied this rationale in rejecting an action in negligence. *See supra* notes 110–117 and accompanying text.

omitted the part concerning interference with economic relations through labor disputes,[158] which existed in the First Restatement.[159] Applied to third-party harms, the principle of deference requires that such costs will be imposed on employees (or labor unions) if and only if liability maintains the predetermined balance.

In recent decades, labor law has undertaken a more ambitious goal, that of promoting "industrial harmony" or "industrial peace." The idea that collective bargaining contributes to social harmony has become central in labor law and literature.[160] This goal may be manifested in the structure and substance of labor law in general and in the law of strikes in particular. In the American railroad industry, for example, "minor disputes"—namely those concerning interpretation and application of existing collective bargaining agreements[161]—are subject to compulsory and binding arbitration before the National Railroad Adjustment Board.[162] This process precludes strike action.[163] In the case of "major disputes," namely those concerning the formation of a new agreement or the modification of an existing one, the parties are obliged to "maintain the status quo while they undertake a series of conciliation, mediation, and arbitration procedures," but either party "may resort to self-help measures once those procedures are exhausted."[164] The significant role of alternative dispute resolution and the desire to maintain industrial peace seems evident. Allowing additional claims that complicate the bargaining process and stimulate more controversy may frustrate the very purpose of these laws. The principle of deference will, therefore, call for liability for third-party harm if and only if such liability does not unreasonably counteract a legislative scheme aimed at industrial peace.

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158. RESTATEMENT (SECOND) OF TORTS div. 9, intro. note (AM. LAW INST. 1979) ("[T]he law of labor disputes and their effect in interfering with contractual relations has ceased to be regarded as a part of Tort Law and has become an integral part of the general subject of Labor Law, with all of its statutory and administrative regulations, both state and federal. Chapter 38 has therefore also been omitted from the Second Restatement of Torts."); *see also Burke*, 600 P.2d at 1288 (relying on the Restatement).

159. *See supra* note 49.

160. Dripps, *supra* note 146, at 594.

161. Major disputes seek to create contractual rights while minor disputes seek to enforce them. Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n, 491 U.S. 299, 302 (1989).

162. 45 U.S.C. § 153(i) (2012).

163. *Consol. Rail*, 491 U.S. at 303–04.

164. *In re* Allied Pilots Class Action Litig., No. 3-99-CV-0480-P, 1999 U.S. Dist. LEXIS 22656, at *12–13 (N.D. Tex. Nov. 15, 1999) (citing *Consol. Rail*, 491 U.S. at 302–03), *rev'd on other grounds sub nom.* Kaufman v. Allied Pilots Ass'n, 274 F.3d 197 (5th Cir. 2001); John C. Claya, Annotation, *What Constitutes "Minor" or "Major" Dispute for Purposes of Determining Whether Dispute Is Subject to Mandatory Arbitration Before National Railroad Adjustment Board Under Railway Labor Act*, 170 A.L.R. Fed. 1 *passim* (2001).

2. Reasonableness

The second pillar of the proposed analytical model is the principle of reasonableness. To be sure, reasonableness is a ubiquitous legal concept,[165] but we shall focus here on its specific role in the law of torts. The so-called "reasonable person test" is the traditional test for compliance with the duty of care in negligence.[166] Negligence arises from doing an act that a reasonable person would not do under the circumstances or from failing to do an act that a reasonable person would do.[167] The concept of reasonableness can be imbued with diverse meanings.[168] To begin with, it may reflect a common practice or a common perception of morality.[169] These are the "positive" or "empirical" accounts of reasonableness. Alternatively, reasonableness can be defined as compliance with standards of conduct deriving from one or another normative ethical theory. These are the "normative" definitions of reasonableness. Admittedly, the choice between positive and normative accounts, and among different versions of each, may be highly controversial.[170] But this Part does not delve into these controversies and consciously endorses the modern economic definition of reasonableness as the cornerstone of the analysis.[171]

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165. *See, e.g.*, Robert Unikel, Comment, *"Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence*, 87 NW. U. L. REV. 326, 327 (1992) ("'[R]easonableness' has gained a prominent position in almost every area of American law.").

166. *See, e.g.*, Blyth v. Birmingham Waterworks Co., (1856) 156 Eng. Rep. 1047, 1049; 11 Exch. 781, 784 ("Negligence is the omission to do something which a reasonable man . . . would do, or doing something which a prudent and reasonable man would not do."); RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965) (explaining that the standard of care is that of a reasonable man); Francis H. Bohlen, *The Probable or the Natural Consequence as the Test of Liability in Negligence*, 49 AM. L. REG. 79, 83 (1901) ("The test is the conduct of the average reasonable man—not the ideal citizen, but the normal one." (footnote omitted)); Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813, 822 (2001) ("For as long [as] there has been a tort of negligence, American courts have defined negligence as conduct in which a reasonable man . . . would not have engaged.").

167. Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2014–17 (2007).

168. *Cf.* Gilles, *supra* note 166, at 817 ("The discussion so far has emphasized the range of behavioral standards that could plausibly be used to explicate the reasonable person standard.").

169. *See, e.g.*, Osborne v. Montgomery, 234 N.W. 372, 375 (Wis. 1931) ("We apply the standards which guide the great mass of mankind in determining what is proper conduct of an individual under all the circumstances.").

170. *See* Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323 *passim* (2012).

171. I do not argue that the economic approach is central or dominant in Anglo-American case law. Such an argument may be highly controversial. *See, e.g.*, Ronald J. Allen & Ross M. Rosenberg, *Legal Phenomena, Knowledge, and Theory: A Cautionary Tale of Hedgehogs and Foxes*, 77 CHI.-KENT L. REV. 683, 699–701, 708–16, 719 (2002) (showing that the Hand formula is rarely used in courts); Richard W. Wright, *Hand, Posner, and the Myth of the "Hand Formula,"* 4 THEORETICAL INQUIRIES L. 145, 151–52 (2003) ("[T]he Hand formula continues to be rarely mentioned in all but two United States jurisdictions: the state of Louisiana and . . . the U.S. Court of Appeals for the Seventh Circuit."). But this formula has a strong theoretical appeal regardless of any actual use by the courts.

The economic definition holds that a person acts unreasonably if he or she takes less than the socially optimal level of care. This definition can be traced back to a series of cases decided by Judge Learned Hand in the 1940s in which he related three variables in an algebraic inequality: if the probability of harm is labeled P, the severity of harm L, and the burden of precautions needed to eliminate the risk of harm B, "liability depends upon whether B is less than L multiplied by P: i. e., whether B < PL."[172] Put differently, failure to take cost-justified precautions is negligent. Imposing liability on negligent injurers forces potential injurers to take into account, or internalize, the externalities of inefficient conduct, thereby preventing such conduct. According to economic wisdom, this deterrence of unreasonable risk is the primary objective of tort liability.[173] The Hand formula does not necessarily aim to maximize wealth. Although this view has been advocated by Judge Posner and his disciples,[174] wealth maximization is a highly problematic normative goal,[175] and even law and economics scholars now tend to favor a more comprehensive economic paradigm, that is, welfare maximization.[176] I will assume that the Hand formula is indeed aimed at economic efficiency in this broad sense.

The raw formula needs to be refined to equate reasonableness with efficiency. First, the original Hand formula balances the expected loss against the costs of eliminating the risk. In reality, eliminating risks is hardly ever feasible, so the relevant comparison should be between the cost of precaution and the ensuing reduction in expected loss. Second, efficiency requires that accident costs and benefits be considered in

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172. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); *see also* Moisan v. Loftus, 178 F.2d 148, 149 (2d Cir. 1949) (using similar terminology); Conway v. O'Brien, 111 F.2d 611, 612 (2d Cir. 1940) (same), *rev'd on other grounds*, 312 U.S. 492 (1941); Gunnarson v. Robert Jacob, Inc., 94 F.2d 170, 172 (2d Cir. 1938) (same).

173. *See, e.g.*, Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co., 916 F.2d 1174, 1181–82 (7th Cir. 1990) ("[T]he emphasis is on picking a liability regime (negligence or strict liability) that will control the particular class of accidents in question most effectively . . . .").

174. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972) (explaining the Hand formula in terms of societal wealth maximization). For a more general discussion of wealth maximization as a positive and normative goal, see WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 16 (1987), and Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99 (David G. Owen ed., 1995).

175. *See, e.g.*, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (discussing the problem with treating wealth maximization as a normative goal).

176. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 968, 977–80 (2001) (describing welfare economics as accommodating all factors relevant to individuals' well-being, rather than just wealth). This view was criticized from several angles. *See* Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003) (criticizing Kaplow and Shavell's account); David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351 (2002) (same); Michael B. Dorff, *Why Welfare Depends on Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847, 862–88 (2002) (same).

marginal rather than total terms.[177] Third, the raw Hand formula does not seem to take into account levels of activity, as opposed to levels of care. Therefore, a person may raise the level of activity above the optimum without being subject to liability as long as he or she takes the appropriate level of care.[178] In theory, this problem will be solved if we consider the reduction in activity level as a possible precaution whose cost equals the marginal benefit of the activity.

B. Preconditions: Strike-Attributable Social Cost

1. Strike-Attributable Loss

The first question to be asked in deciding third-party claims under the proposed model is whether the particular harm should be attributed to the striking employees' conduct. Sometimes the harm should be attributed, wholly or partly, to the targeted employer or to the ultimate victim, and in both cases, imposing full liability on the employees or their union might lead to underdeterrence of the employer or third party and overdeterrence of strikers. Let us start with the employer. In many jurisdictions, the targeted employer can continue production during a strike using non-striking employees, such as executives or temporary replacements.[179] Third-party harm may be attributed, at least in part, to the employer if it did not take steps to continue production. Arguably, the employer has a sufficiently strong incentive to use non-striking employees because work stoppage normally causes a significant harm to the employer itself. If this were always true, attributing third-party harm to the employer would remain a theoretical possibility. However, at least a public employer, which provides services for free or at a subsidized price, may not have an incentive to hire replacements unless it can be found liable for third-party harm.[180] This does not mean that an employer that could continue production would necessarily be liable. After all, liability requires more than mere causation of harm. Even if the employer is found liable, it may end up sharing the burden with the employees, the labor union, and even the ultimate victim. But any harm for which the employer ought to be responsible should not be borne by the employees.

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177. To understand why marginal values should be considered, see LANDES & POSNER, *supra* note 174, at 87, and STEVEN M. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 6–9 (1987).

178. *See* SHAVELL, *supra* note 177, at 23–25 (discussing the level of activity).

179. *See, e.g.*, NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938) ("[It is not] an unfair labor practice to replace the striking employees with others in an effort to carry on the business.").

180. *See supra* note 11 and accompanying text.

Conclusion 1A: If the targeted employer could reasonably continue production, then at least some of the harm cannot be attributed to the employees and their union and should not be borne by them.

Sometimes the third party can avoid the loss by using substitute products or services that satisfy his or her needs. If the targeted employer operates in a competitive market, substitutes may be available at a similar price. True, even a strike against a single producer in a competitive market may reduce supply and result in higher prices. However, depending on the nature and the structure of the specific market, unaffected competitors may expand production to satisfy the excess demand and to take advantage of the higher price. Prices will fall as supplies increase, although they will not return to their levels of competitive equilibrium. Ultimately, some supply reduction and price increase may persist, but the economic repercussions will be significantly reduced by new market entries and increased production by competitors.[181] The price increase to consumers willing to pay it is just a wealth transfer to the unaffected competitors, not a true social cost that has to be taken into account in shaping an efficiency-oriented legal regime.

Furthermore, although consumers who refuse to pay the increased price will lose the satisfaction of consumption, and this loss of "consumer surplus" may be a true social cost,[182] even this loss may be reduced to some extent. Presumably, the amount that deprived consumers no longer spend on the product or service produced by the targeted employer or its competitors may be spent on alternative consumption choices. For example, instead of attending a basketball game when the local team's players are on strike, frustrated basketball fans can go to a concert or a restaurant. Any sum used this way is also a wealth transfer. Indeed, since the alternative consumption choices rank lower in the deprived consumers' demand functions, the consumer surplus will be lower, and the reduction in aggregate consumer surplus will be a real social cost. Accordingly, the lost consumer surplus of those who no longer consume the service or product of the targeted employer is offset neither by its competitors' gains nor by consumer surplus accrued through alternative consumption choices.[183] Still, the net cost is relatively low, leaving most of the costs of strikes on the parties to the labor dispute.[184]

By contrast, if the targeted employer does not operate in a competitive market, as in the case of a public service provider (consider fire

181. Dripps, *supra* note 146, at 603–04, 606–07.

182. The magnitude of this cost is the difference between the most the deprived consumers would pay for the product and the prestrike price.

183. Dripps, *supra* note 146, at 603–04.

184. *Id*. at 606–07, 611.

departments or border controls) or a private entity with a monopoly or a dominant market position, there are no reasonably priced substitutes. In such a case, the strike can eliminate supply, especially if the prestrike price was lower than the production cost (a common feature of public services)—so private entities have no incentive to step in.[185] All consumer surplus (in the case of a monopoly) or most of it (in the case of a dominant player) is lost for the duration of the strike or until new producers emerge.[186] Very often consumers will not be able to make alternative consumption choices, either (consider, again, fire departments). Losses incurred by third parties in such cases may be true and substantial social costs, subject to the analysis in Subpart B.2 below.

How should this affect third-party rights? Any harm that the third party could avoid or reasonably mitigate by using similar products or services offered by the targeted employer's competitors, or by reasonably changing consumption choices, cannot be attributed to the striking employees and their union. From a conceptual perspective, even if all other conditions for liability are met, liability should be denied or limited by an appeal to concepts like proximate causation, remoteness, contributory negligence, or mitigation of damages. From an economic perspective, imposing liability on employees for harms that could be avoided by the victims themselves would have two unwarranted consequences. First, liability may weaken third parties' incentives to turn their resources to alternative, and perhaps equally valuable, use during the strike.[187] Second, a loss that could be mitigated by the victim is not a social cost externalized by the injurer, so imposing liability may lead to overdeterrence of actual and potential strikers.[188] Thus, whenever substitutes or reasonable alternative consumption choices exist, liability must be denied or reduced.

Conclusion 1B: If the third party could reasonably use substitutes or make alternative consumption choices, then at least some of the harm cannot be attributed to the employees and their union and should not be borne by them.

185. *Id*. at 607. The longer the expected strike and the lower the establishment costs, the greater the chances private entities will step in. But generally this will not be worthwhile, especially in the case of subsidized public services.

186. *Id*. at 608–09.

187. *See* Victor P. Goldberg, *Recovery for Economic Loss Following the Exxon* Valdez *Oil Spill*, 23 J. LEGAL STUD. 1, 17 (1994).

188. Israel Gilead, *Tort Law and Internalization: The Gap Between Private Loss and Social Cost*, 17 INT'L REV. L. & ECON. 589, 591–92 (1997).

2. Social Cost

As explained above, many of the losses incurred by third parties are purely economic. A possible economic justification for denying recovery for such losses is that they are not true social costs.[189] From an economic perspective, tort law imposes liability on actual injurers for harms caused by their inefficient conduct in order to make potential injurers internalize the social costs of such conduct *ex ante*, rendering any decision to engage in inefficient conduct not worthwhile.[190] Recall the economic definition of negligence. If a person's conduct exposes another to a specific risk, defined by the probability of harm to the other (*P*) and its degree (*L*), and that person can eliminate the risk by taking precautions at a cost *B*, not taking these precautions is negligent if $B < PL$. Imposing liability for inefficient (negligent) conduct would make the potential injurer consider the risk to the other (*PL*) as his or her own, incentivizing him or her to take the necessary precautions. However—and this is crucial—in the assessment of the social costs of one's conduct, it is important not to add private losses that reflect "wealth transfers," namely diminution of personal wealth that generates corresponding gains for others. Such gains do not mitigate the private loss, but they cancel it out in the calculation of the externalized social cost. Internalization of private losses irrespective of the parallel gains may lead to overdeterrence. Arguably, many economic losses correspond to resulting economic gains. Thus, exclusion of liability prevents overdeterrence.[191]

Assume that the product or service provided by the targeted employer is required in the consumer's own production process, and that a strike would prevent the consumer from utilizing this product or service and result in a loss of profit. Now assume that the striking employees consider

189. W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 1 (1982).

190. *See, e.g.*, Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 15–17 (2000) (discussing the economic rationale for tort liability); John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 545–46 (2003) (describing and differentiating between two branches of economic deterrence theory); Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 421 (1998) (describing various economic theories of deterrence in tort liability); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 873 (1998) (discussing the economic incentives the tort system provides to deter socially injurious acts).

191. Bishop, *supra* note 189, at 4. This view is now firmly established in the academic literature. *See, e.g.*, LANDES & POSNER, *supra* note 174, at 251; RICHARD A. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 467–68 (1982); SHAVELL, *supra* note 177, at 138–39; Bruce Feldthusen & John Palmer, *Economic Loss and the Supreme Court of Canada: An Economic Critique of* Norsk Steamship *and* Bird Construction, 74 CAN. B. REV. 427, 436, 439 (1995); Gilead, *supra* note 188, at 593–94; Goldberg, *supra* note 187, at 19–22, 31–32, 36–37; Andrew W. McThenia & Joseph E. Ulrich, *A Return to Principles of Corrective Justice in Deciding Economic Loss Cases*, 69 VA. L. REV. 1517, 1531 (1983); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 736–37 (2006) [hereinafter Posner, *Economic Torts*].

taking certain measures to reduce the probability of the third-party loss. A concrete illustration would be a brewery that cannot produce beer when a large shipment of hops is delayed at the port due to a strike of container truck drivers against their employer, a port-trucking company. The striking drivers consider moving their trucks to enable smaller vehicles hired by the brewery to access the containers and deliver the hop sacks to their destination. Now, if the brewery's competitors can increase their production during the strike at no extra cost beyond what the normal production costs would have been, their gain will fully offset the unfortunate brewery's loss. So the externalized social cost will be nil. Taking measures to prevent the private loss would be inefficient because the cost of these measures would exceed the social cost they prevent. On the other hand, if the competitors cannot increase their production temporarily at a cost similar to what the normal cost would have been, prices will increase and sales will drop. In such a case, there is an actual social cost.

The critical question is when a competitor can expand its level of production without destabilizing the market equilibrium. If the interference occurs at an off-peak time, the competitors can easily increase their production, utilizing their excess manufacturing potential.[192] The extra production costs incurred by the competitors (which include human resources, raw material, electricity, machinery wear and tear, etc.) cannot be regarded as true social costs caused by the strike. But for the strike, these would have been borne by the affected brewery. However, if the interference occurs at peak, the costs of production may rise and the supply curve will shift upward.[193] The farther demand is from its peak, the smaller the affected brewery's market share, and the shorter the interruption, the easier it is for the competitors to stand in for the unfortunate brewery without destabilizing market equilibrium. Because demand is only seldom at its peak, we may conclude that in most cases a temporary disturbance to production by one of the targeted employer's consumers does not give rise to a social cost, or that the private losses of the interrupted consumer greatly exceed such cost. Exclusion of liability for the economic loss thus prevents internalization of wealth transfers. True, considerable social costs may occur once in a while. But identifying these rare cases and trying to evaluate the respective social costs (which are by no means equivalent to the private losses) is not worthwhile. The cost of gathering and processing

192. *Cf.* Posner, *Economic Torts*, *supra* note 191, at 737 ("Most retail establishments operate most of the time with a bit of excess capacity in order to handle peak demands.").

193. Bishop, *supra* note 189, at 14–15.

the necessary information is significantly higher than the social cost that would consequently be internalized.[194]

Furthermore, even if the interruption occurs at peak, and even if the market share of the affected brewery is relatively high and the interruption is rather long, social cost will not necessarily ensue. The third party's customers may sometimes have an inventory that can be utilized during the interruption and then renewed. At times, especially if the interruption affects the production of durables, customers may prefer to postpone new acquisitions regardless of the unavailability of an inventory. In both cases, the interrupted producer's profits are not lost but rescheduled. Also, the interrupted producer or its competitors may use their own inventories to meet demand.[195] In all of these cases, the market equilibrium will not destabilize.

Conclusion 1C: Without specific legislative intent to prevent third-party losses that are mere wealth transfers, strikers may be liable only for losses that constitute true social costs. Examples of such losses include property damage caused by fire in the case of a firefighter strike, nonpecuniary losses incurred by residents during a waste management workers' strike, and the cost of diverting a ship from its course pending a port workers' strike.

C. First Ground for Liability: Unlawfulness

1. Overview

According to the principle of deference, tort law should not undermine legitimate allocations of power by and under a complex legislative regime applicable to the conflict at hand or counteract legal schemes that implement compelling legislative and regulatory policies. Labor law offers a delicate balance between the parties to labor relations and disputes. This framework, tailored by a competent body with democratic credentials for a specific environment, should be respected by the courts. Adding or subtracting costs or benefits to either party may destabilize the balance. In the current context, tort law should not normally impose sanctions on employees exercising their freedom to strike in accordance with labor law. Yet at the same time, tort law may, and often should, penalize violations of strike laws. A prohibition imposed by labor law and designed to protect

194. *Id.* at 17.

195. Producers and consumers may well hold larger-than-optimal inventories out of fear of negligent interruptions of production. This means that negligent interruptions cause true social costs (the cost of holding the additional inventory). However, since non-negligent interruptions are usually more frequent than negligent ones, and since there are other commercial reasons for holding inventories, the impact of negligent interruptions on inventory strategies should not be considerable.

third-party interests must be respected by allowing third parties to claim damages when violation of that prohibition harms their protected interests.[196] Therefore, two questions arise. First, was the harm caused by unlawful conduct under labor law? Second, did the lawmaker contemplate third-party interests and intend to protect them (possibly along with other interests) through the particular prohibition?[197] These questions must be discussed on two levels: the strike itself and the specific action or inaction taken during the strike.

2. The Strike Itself

Labor law imposes several restrictions on the freedom to strike, making certain types of strikes unlawful. It protects the lawful strike, but not the unlawful one,[198] and tort law—under the principle of deference—should follow suit. To begin with, many jurisdictions limit or prohibit public employee strikes. The International Covenant on Economic, Social and Cultural Rights permits the imposition of "lawful restrictions" on the exercise of the freedom to strike "by members of the armed forces or of the police or of the administration of the State."[199] In the United States, strikes or work stoppages by public officers or employees are almost universally prohibited,[200] either by common law[201] or by statute,[202] and this prohibition

196. To the extent that lawmakers adopt efficient rules and standards to which tort law defers, deference coincides with reasonableness.

197. This Subpart focuses on violations of applicable legislation and regulations. Breach of contract (including a collective bargaining agreement) would not normally confer rights on third parties. Raday, *supra* note 53, at 68.

198. Ben-Israel, *supra* note 11, at 161.

199. International Covenant on Economic, Social and Cultural Rights art. 8(2), Dec. 16, 1966, 993 U.N.T.S. 3.

200. Dripps, *supra* note 146, at 591.

201. *See, e.g.*, Anchorage Educ. Ass'n v. Anchorage Sch. Dist., 648 P.2d 993, 996 (Alaska 1982) (holding that the common law prohibits strikes by public employees); Martin v. Montezuma-Cortez Sch. Dist. RE-1, 809 P.2d 1010, 1013 (Colo. App. 1990) (same), *rev'd in part on other grounds*, 841 P.2d 237 (Colo. 1992) (en banc); City of Pana v. Crowe, 316 N.E.2d 513, 514 (Ill. 1974) (same); Boyle v. City of Anderson, 534 N.E.2d 1083, 1085 (Ind. 1989) (same); Lamphere Sch. v. Lamphere Fed'n of Teachers, 252 N.W.2d 818, 829 (Mich. 1977) (same); State *ex rel*. Ashcroft v. Kan. City Firefighters Local No. 42, 672 S.W.2d 99, 105 (Mo. Ct. App. 1984) (same); Aristizibal v. City of Atlantic City, 882 A.2d 436, 452 (N.J. Super. Ct. Law Div. 2005) (same); City of Alcoa v. IBEW Local Union 760, 308 S.W.2d 476, 479–81 (Tenn. 1957) (same); Burke & Thomas, Inc. v. Int'l Org. of Masters, Mates & Pilots, 600 P.2d 1282, 1287 (Wash. 1979) (en banc) (same); James Duff, Jr., Annotation, *Labor Law: Right of Public Employees to Strike or Engage in Work Stoppage*, 37 A.L.R.3d 1147 (1971). The Supreme Court of California holds a different view. Cty. Sanitation Dist. No. 2 v. L.A. Cty. Emps. Ass'n, 699 P.2d 835, 854 (Cal. 1985) (in bank) ("We conclude that it is not unlawful for public employees to engage in a concerted work stoppage for the purpose of improving their wages or conditions of employment, unless it has been determined that the work stoppage poses an imminent threat to public health or safety."); *see also* Sekler, *supra* note 12, at 524–25, 531–37 (discussing relevant case law in California).

has consistently withstood constitutional scrutiny.[203] Courts frequently state that the modern rules prohibiting such strikes simply incorporate or reassert the traditional common law rule.[204]

To determine whether third parties should be allowed to claim damages for harms caused by violations of this prohibition, we need to outline its main rationales. First, some courts have stated that public-employee strikes deny the government's authority or constitute a rebellion against it.[205] Second, the idea that public employees exert pressure on their employer to obtain a greater share of its profit runs counter to the notion that the government does not carry out its tasks for profit.[206] Third, public employers are more vulnerable to strikes because they are subject to political pressures.[207] Public pressure to immediately resolve a labor dispute may result in overvaluation of the uninterrupted provision of the service and a short-sighted, panic-driven distribution of public funds, instead of a cautious, deliberative, and controlled distribution.[208] Put differently, public sector strikes might interfere with democratic control of the budget process.[209] The first two rationales seem to focus on employer–employee relations, and the third on a general interest of the public at large.

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202. *See, e.g.*, FLA. CONST. art. I, § 6 ("Public employees shall not have the right to strike."); GA. CODE ANN. § 45-19-2 (2016); IOWA CODE ANN. § 20.1 (West Supp. 2016) (prohibiting strikes by public employees); MO. ANN. STAT. §105.530 (West 2015) (same); N.Y. CIV. SERV. LAW § 210(1) (McKinney 2011) (same); *see also* Dripps, *supra* note 146, at 615 ("Modern statutes generally include an inflexible strike prohibition backed by the courts' contempt power."). Federal government employees are also prohibited from participating in strikes. 5 U.S.C. §§ 3333, 7311 (2012); 18 U.S.C. § 1918 (2012).

203. *See, e.g.*, City of New York v. De Lury, 243 N.E.2d 128, 129, 133 (N.Y. 1968) ("[A] legislative classification 'which differentiates between strikes by public employees and employees in private industry' is reasonable and does not offend against the constitutional guarantee of equal protection of the laws. . . . [It does] not offend any due process rights . . . ." (quoting Rankin v. Shanker, 242 N.E.2d 802, 806 (N.Y. 1968))).

204. *See, e.g.*, Bd. of Educ. v. Shanker, 283 N.Y.S.2d 548, 553 (N.Y. Sup. Ct. 1967) (referring to the Condon-Wadlin Act and to the Taylor Law).

205. *See, e.g.*, Norwalk Teachers' Ass'n v. Bd. of Educ., 83 A.2d 482, 485 (Conn. 1951) (holding that allowing public employees to strike may "deny the authority of government"); City of Cleveland v. Div. 268 of Amalgamated Ass'n of St. & Elec. Ry. & Motor Coach Emps., 90 N.E.2d 711, 715 (Ohio C.P. 1949) ("[T]he government is a servant of all of the people. And a strike against the public, a strike of public employees . . . [is] a rebellion against government."); Sekler, *supra* note 12, at 537.

206. *See, e.g.*, City of Manchester v. Manchester Teachers Guild, 131 A.2d 59, 61 (N.H. 1957) (noting one of the reasons for this policy is the "[a]bsence of the profit motive on the part of the public employer.").

207. Dripps, *supra* note 146, at 599, 612–13.

208. At the same time, unions do not have the fear, which exists in the private sector, that demanding too much may lead their employer to collapse under the competition.

209. *See* Sekler, *supra* note 12, at 539 ("[I]f public employees were permitted to strike they would wield a disproportionate amount of political power that could result in a distortion of the political process."). Critics provide two counterarguments. First, political pressure to yield to employees' demands should not be overstated. There is always a counter pressure from taxpayers who do not wish the government to accept all demands, and even if there were none, there is still a limit to what a public

However, a fourth and dominant rationale concerns third parties: public services are essential to the public welfare; thus, public-employee strikes may contravene public welfare or even paralyze society and government.[210] The purpose of the prohibition is to "ensure the uninterrupted provision of services to the public vital to its health, safety, morals and welfare."[211] Critics argue that public services are not necessarily more essential than products and services provided by the private sector. Essentiality depends on the nature of the specific service: some public services may be less important than others (hence nonessential), and some private services may be more important than others (hence essential).[212] Still, at least some public services, such as firefighting, are necessary to prevent emergencies that pose risks to safety or health, or significant inconvenience to a relatively large population. Moreover, while some private sector services and products may be "essential," a private-sector strike (as opposed to a public-sector strike) is less likely to cause harm to consumers because (1) the employer may be able to provide the service using other means, and (2) the public may be able to obtain the service from competitors.[213] And if no serious harm is expected, a categorical prohibition is unjustified.[214] Critics suggest that the general ban be replaced with a solution that better suits the problem, such as limiting the prohibition on strikes to vital public employees (firefighters, police officers, etc.),[215] or limiting the size of bargaining units to ensure that supply is only reduced and not eliminated.[216] At any rate, the prohibition (even if limited in the future) is intended to

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employer would yield to before subcontracting to the private sector. In addition, employees cannot strike indefinitely because they lose wages during the strike. Sekler, *supra* note 12, at 540. Second, private sector strikes may also result in interference with democratic control of the budget process when they increase the prices of services and products consumed by the government in producing public services. Consider strikes in the weapons industry, which may increase the cost of national security, and strikes in construction companies, which may increase the cost of public infrastructure. Dripps, *supra* note 146, at 599–600. I will not elaborate on these arguments here because the criticized rationale is not necessary to support third-party claims.

210. *See, e.g.*, *Norwalk Teachers' Ass'n*, 83 A.2d at 485 (holding that allowing public employees to strike may "contravene the public welfare"); *Manchester Teachers Guild*, 131 A.2d at 61 (noting that one of the reasons for this policy is "the necessity that there be no interruption in the operation of public functions because of the serious consequences which would ensue"); City of New York v. De Lury, 243 N.E.2d 128, 135 (N.Y. 1968) ("[The law is] designed to prevent the paralysis of Government . . . .").

211. State *ex rel*. Ashcroft v. Kan. City Firefighters Local No. 42, 672 S.W.2d 99, 109 (Mo. Ct. App. 1984).

212. Dripps, *supra* note 146, at 597; Sekler, *supra* note 12, at 541.

213. *See supra* Subpart II.B.1.

214. *See* Sekler, *supra* note 12, at 541.

215. *See, e.g.*, OR. REV. STAT. § 243.736(1) (2015) ("It is unlawful for any of the following public employees to strike or recognize a picket line of a labor organization while in the performance of official duties: (a) Deputy district attorneys; (b) Emergency communications worker; . . . (d) Firefighter; (e) Guard at a correctional institution or mental hospital; . . . (g) Police officer.").

216. *See* Dripps, *supra* note 146, at 620–25 (proposing a limit of 25% of those employed in each area).

protect third-party interests, so its violation should underlie third-party claims.

A second constraint, which is popular in Anglo-American jurisdictions, is the prohibition against secondary strike actions (also known as solidarity or sympathy strikes). In the United States[217] and the United Kingdom,[218] workers can typically strike only because of a dispute with their direct employer and are not allowed to strike in solidarity with the workers of another employer. In other jurisdictions, secondary actions may be lawful, but they are subject to more restrictive conditions than primary actions.[219] Although a prohibition against solidarity strikes undoubtedly protects noninvolved employers, it also protects consumers because solidarity strikes reduce supply in relevant markets and may significantly increase the aggregate loss of consumer surplus. Thus, its violation may give rise to a cause of action for third-party harm.

A third constraint may be a ban on strikes when alternative dispute resolution procedures are in progress.[220] For instance, in the American railroad industry, "minor disputes" are subject to compulsory and binding arbitration before the National Railroad Adjustment Board[221] and strike actions are precluded altogether.[222] In the case of "major disputes," the parties must maintain the status quo while they participate in alternative dispute resolution procedures and may resort to self-help measures only after those procedures are exhausted.[223] In some jurisdictions, employees and unions can take part in voluntary arbitration, and in such a case, they may not engage in a strike during the process.[224] The main purpose of such prohibitions is to facilitate alternative dispute resolution and promote "industrial peace." They are seemingly not intended to protect third parties' interests. In fact, allowing third-party claims for the violation of these

217. National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B) (2012) (making secondary strikes an unfair labor practice).

218. Trade Union and Labour Relations (Consolidation) Act, (1992) § 224(1), 16 Hals. Stat. (4th ed.) 637 (Gr. Brit.) ("An act is not protected if one of the facts relied on for the purpose of establishing liability is that there has been secondary action which is not lawful picketing."); Nat'l Union of Rail, Maritime & Transport Workers v. United Kingdom, 2014-II Eur. Ct. H.R. 1, http://www.echr.coe.int/Documents/Reports_Recueil_2014-II.pdf (upholding the British legislation); Jim Pickard, *Corbyn Calls for Solidarity Strikes to be Made Legal*, FINANCIAL TIMES, Jan. 17, 2016, http://www.ft.com/cms/s/0/06e2e522-bd0b-11e5-9fdb-87b8d15baec2.html (discussing current law).

219. *See* WIEBKE WARNECK, EUROPEAN TRADE UNION INST., STRIKE RULES IN THE EU27 AND BEYOND: A COMPARATIVE OVERVIEW *passim* (2007), https://www.etui.org/Publications2/Reports/Strike-rules-in-the-EU27-and-beyond.

220. *See id.* at 10–11 for additional examples from the European Union.

221. 45 U.S.C. § 153(i) (2012).

222. Consol. Rail Corp. v. Ry. Labor Execs.' Ass'n, 491 U.S. 299, 303–04 (1989).

223. *In re* Allied Pilots Class Action Litig., No. 3-99-CV-0480-P, 1999 U.S. Dist. LEXIS 22656, at *12–13 (N.D. Tex. Nov. 15, 1999) (citing *Consol. Rail*, 491 U.S. at 302–03), *rev'd on other grounds sub nom.* Kaufman v. Allied Pilots Ass'n, 274 F.3d 197 (5th Cir. 2001); Claya, *supra* note 164, *passim*.

224. *See, e.g.*, TEX. LAB. CODE ANN. §§ 102.002, 102.032 (West 2015).

prohibitions may frustrate their very purpose because it will complicate and prolong the dispute.[225] Still, a conclusive decision requires a closer look at the specific provisions and the legislative history.

A fourth constraint may be an obligation to maintain industrial peace as long as a collective bargaining agreement is in force. In some jurisdictions, strikes are prohibited if the collective bargaining agreement explicitly proscribes strikes.[226] In others, industrial peace provisions may be implied or prescribed by law, so strikes during the life of a collective bargaining agreement are considered unlawful even without an explicit prohibition.[227] While such prohibitions are quite common, contractual obligations—explicit or implicit—are generally intended to protect the interests of contract parties, not third parties. Therefore, their violation cannot support third-party claims.[228]

A fifth constraint, or more accurately set of constraints, is the duty to comply with various procedural conditions prior to commencing a strike. These may include notice, proper authorization by the representative union, and an official ballot among union members.[229] In the United States, notice must be given at least sixty days before a strike may begin,[230] and strikes called in defiance of the exclusive bargaining representative (known as unofficial, unauthorized, or "wildcat" strikes) are considered an unfair

225. *Supra* notes 115–120 and accompanying text.

226. Lawrence S. Kalban, *The Wildcat Strike: A Wrong Without a Remedy*, 87 DICK. L. REV. 125 (1982).

227. A general industrial peace obligation exists in most member states of the European Union. Wolfgang Ochel & Markus Selwitschka, *Labour Dispute Rules and Strikes in the European Union*, CESIFO DICE REPORT, Summer 2003, at 63, 64–65, http://www.cesifo-group.de/ifoHome/publications/docbase/details.html?docId=14567952; WARNECK, *supra* note 219, at 10–11. In Israel, nearly all strikes by public employees during the duration of a collective agreement are "unprotected strikes." Settlement of Labor Disputes Law, 5717–1957, SH No. 58, § 37A–D (Isr.).

228. *See supra* note 197.

229. *See, e.g.*, *Fair Work Act 2009* (Cth) ss 435–469 (Austl.) (establishing the process for authorizing protected industrial actions through secret ballots); Settlement of Labor Disputes Law, 5717–1957, SH No. 58, §§ 5A, 37A–D (Isr.) (requiring a fifteen-day notice prior to any public sector strike, and providing that public sector strikes are unprotected even when no collective agreement is in force if they were not authorized by the respective trade union in accordance with the statutory and regulatory requirements); Ochel & Selwitschka, *supra* note 227, at 64–66 (discussing the requirement to conduct a ballot prior to a strike in European Union member states); WARNECK, *supra* note 219, at 10–11 (same).

230. 29 U.S.C. § 158(d)(4) (2012).

labor practice.[231] However, as opposed to the laws of many Western countries, American law does not currently require a ballot.[232]

These procedural constraints are generally intended to prevent uncontrolled escalation of labor disputes and to enable peaceful resolution for the benefit of the disputants. Arguably, any reduction in the probability of harm to third parties is an incidental rather than an intended result. Moreover, third-party claims might frustrate the underlying goal of these provisions because they tend to complicate and aggravate the dispute and thwart its quick and peaceful resolution. Still, a careful analysis of the specific provision in the particular jurisdiction is necessary. If there is evidence that the relevant legislature or regulator intended a procedural requirement to reduce expected harm to uninvolved third parties,[233] these parties should be allowed to claim damages for harms caused by its violation.

Conclusion 2A: Third parties should be allowed to recover for harms resulting from an unlawful strike to the extent that the norm whose violation made the strike unlawful was enacted in contemplation of third-party interests and with intent to protect them, possibly among others.

3. The Specific Conduct

Let us now turn from the lawfulness of the strike itself to that of the specific action or inaction complained of. Even when the strike is legitimate, employees are not permitted to do everything in pursuit of their goals. The laws pertaining to employees' conduct during a generally legitimate strike should be followed by tort law under the principle of deference.

Here, we need to distinguish between potentially and necessarily unlawful conduct. Any action or inaction not subsumed under the conceptual boundaries of the strike within the particular jurisdiction (i.e., not integral to the strike) is potentially unlawful, even if committed in the course of a legitimate strike. The question, therefore, is how the term strike

231. *See, e.g.*, Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50, 70–73 (1975) (holding that an unauthorized strike by minority employees to protest discrimination is not protected by the NLRA); E. Chi. Rehab. Ctr., Inc. v. NLRB, 710 F.2d 397, 402 (7th Cir. 1983) ("Unless, therefore, a wildcat strike is called for the purpose of asserting a right to bargain collectively in the union's place or is likely, regardless of its purpose, to impair the union's performance as exclusive bargaining representative, section 9(a) does not put the strikers beyond the pale of section 7."); Posner, *supra* note 146, at 999.

232. For a proposal to introduce a secret ballot requirement, see *Secret Ballot Strike Vote*, CTR. FOR UNION FACTS, https://www.unionfacts.com/article/employee-rights/secret-ballot-strike-vote/ (last visited Sept. 24, 2016).

233. *See, e.g.*, Ben-Israel, *supra* note 11, at 156 (discussing Israeli law).

is understood in labor law. At its core, a strike is a work stoppage.[234] Thus, any conduct that is neither a refusal to perform one's tasks nor any act or omission enabling organization of or participation in the work stoppage is potentially unlawful.[235] If such conduct harms third parties, liability may be imposed. For example, if striking factory employees obstruct a highway, preventing a businessman from reaching his destination with a resultant loss of a lucrative transaction, that loss may be recoverable.[236] Note, however, that while any conduct that is not part of or essential to a work stoppage is not covered by the freedom to strike, it is not necessarily unlawful. Such conduct does not enjoy the protection afforded to strikes under labor law and endorsed by tort law according to the principle of deference. But the victim still needs to establish a cause of action in torts without the obstacle of deference. For example, the third party can show that the employees' conduct was unreasonable and caused him or her foreseeable harm.[237]

Apart from potentially unlawful conduct, there are two types of necessarily unlawful conduct. First, any action or inaction that violates a concrete duty imposed on the employees under the laws regulating labor relations or the specific profession is unlawful even if it constitutes mere refusal to perform ordinary tasks during a lawful strike. However, as with regards to unlawfulness of strikes, the unlawfulness of the conduct is not in itself sufficient to justify liability. A plaintiff should be required to demonstrate that the relevant duty or prohibition was intended, at least in part, to protect third-party interests. Otherwise, imposing an additional cost on employees would undermine rather than maintain the delicate balance of power forged by labor law.

A good example is the *Chizik* case.[238] During a maritime officers' strike, two captains of container ships refused to move the vessels from the dock after their cargo had been unloaded.[239] This conduct prevented other container ships from accessing the dock. Clearly, refusing to move the ships was within the conceptual boundaries of the strike.[240] However, in

234. *See* Forde, *supra* note 10, at 463 (explaining that at the minimum strikers can refuse to work).

235. *See* Raday, *supra* note 53, at 32; *see also id.* at 34 (explaining that "[n]o effective protection could be afforded strikers exercising a [freedom] to strike if all acts which caused injury to third parties were considered non-integral to the strike itself").

236. *See* Daniel More, *The Civil Wrongs Ordinance in Light of Forty Years of Case Law*, 39 ISR. BAR REV. 344, 402 (1990) (translated from Hebrew) (using this example).

237. *See infra* Subpart II.D.

238. CA 593/81 Ashdod Auto. Indus. Ltd. v. Chizik 41(3) IsrSC 169 (1987) (Isr.).

239. *Id*. at 175.

240. *See* More, *supra* note 236, at 401–02 (explaining that it was an integral activity, because the workers merely refused to perform their ordinary tasks). *But cf.* Cohen, *supra* note 102, at 187; Raday, *supra* note 53, at 33. Both Raday and Cohen argued that the conduct was not an integral part of the strike, but I believe this view confuses two types of unlawfulness.

their refusal the captains disobeyed the port authority's specific order. This disobedience violated a statutory provision, whereby shipmasters must comply with the instructions of the harbormaster concerning the vessel's mooring or navigation to or from the dock, as well as several regulations concerning mooring.[241] The violation of specific norms regulating the activity made the conduct unlawful. The foreseeable harm caused to owners of cargo aboard approaching ships that could not access the dock should, therefore, be actionable.

Second, any action or inaction that puts at risk interests that strikes, as defined and understood, should not jeopardize—such as life, bodily integrity, health, and possibly property—is unlawful, even if the risk arises from ordinary strike-related activities. Strikes usually exert pressure on the employer by inflicting economic loss and inconvenience. In some jurisdictions, such pressure may also involve property damage.[242] But labor law does not permit employees to expose third parties to risks to which they cannot subject even the targeted employer. Thus, causing physical injuries to third parties should lead to liability. For example, factory workers who assault or threaten violence against stand-in workers during a strike should be liable for the resulting injury. Arguably, this case also fits the first category because in addition to the interest at risk, the act itself might not be considered integral to or essential for carrying out a work stoppage.[243] But physical injuries may justify liability even if the conduct is integral or essential to work stoppage. If a waste-management workers' strike extends over a long period of time, and the resulting contamination leads to illness, the affected residents should be allowed to recover damages. Similarly, if a surgeon leaves a patient in the middle of surgery when a doctors' strike starts, the patient should be allowed to sue for any ensuing physical injury.

Conclusion 2B: Third parties should be allowed to recover for harms resulting from unlawful conduct even during a lawful strike to the extent that the norm whose violation made the conduct unlawful was designed in contemplation of third-party interests and with intent to protect them, possibly among others.

D. Second Ground for Liability: Unreasonableness

Harms caused by an unlawful strike or by clearly unlawful conduct during a lawful strike should be recoverable subject to the qualifications set

241. *See supra* notes 99–100 and accompanying text.

242. *But see* NLRB v. Fensteel Metallurgical Corp., 306 U.S. 240, 255 (1939) (precluding harm to employer's property from the ambit of a legitimate strike).

243. *See* Forde, *supra* note 10, at 463 (explaining that an assault against stand-in workers is not integral to the strike); More, *supra* note 236, at 401 (same); Raday, *supra* note 53, at 32 (same).

forth in the previous sections, along with the principles of causation, the general defenses (such as *de minimis*), and the law of remedies. The remaining cases, namely those in which neither the strike itself nor the particular conduct violated a specific labor law prohibition, should be classified into two categories: cases of potentially (but not necessarily) unlawful conduct and cases of lawful conduct.

The first category consists of acts and omissions that neither represent the strike itself, as this term is defined and understood, nor facilitate the organization of or participation in the strike. Because such acts and omissions do not receive the protection afforded to strikes under labor law, imposing liability for consequent harms will not undermine the delicate balance struck by labor law. Yet for liability to be imposed, victims must establish a specific cause of action, and in an action for negligence, they must demonstrate that the conduct was unreasonable and that the resulting harm was foreseeable. According to the economic definition of reasonableness, a person acts unreasonably if he or she takes less than the socially optimal level of care. The question, as in any other negligence case, is whether the externalized social cost of the particular conduct was greater than the cost of its prevention. Presumably, it will be very difficult for the striking employees to escape liability in negligence. The social cost of the most drastic precaution—avoiding the harmful conduct altogether—cannot include the employees' loss of a bargaining advantage because this advantage is cancelled out by the employer's correlative disadvantage. Thus, only if that conduct generates some additional benefit, and no other precaution exists at a cost lower than the expected harm, may the conduct be reasonable.

Conclusion 3A: Any conduct which neither represents nor facilitates a lawful strike and causes harm to third parties may be actionable under ordinary tort principles. Such conduct will normally be considered unreasonable because it causes harm and generates no net social benefit.

The second category consists of acts and omissions that constitute or facilitate the strike and are not specifically prohibited. Here, the clash between deference and reasonableness is conspicuous. On the one hand, tort law must not undermine the allocation of power between employers and employees (and their unions) under labor law, e.g., by inducing employees to give up legitimate bargaining advantages. Acts and omissions that are integral to lawful strikes and not specifically prohibited are protected by labor law and should not normally be penalized by tort law. On the other hand, tort law must help deter unwarranted conduct. Many acts and omissions integral to lawful strikes are unreasonable, at least in the economic sense, because the social cost they produce could be avoided at a lesser cost. Arguably, when such acts and omissions cause harm, liability should ensue. In a legal system that recognizes the importance of both

deference and reasonableness, and does not consider either to be categorically superior to the other, a compromise must be made.

The main goal of this Subpart is to emphasize the need for a compromise between two fundamental and conflicting principles and to demonstrate how such a compromise can be devised. In the end, however, striking the proper balance between the two principles depends on their respective weights in each jurisdiction. Subject to this caveat, I wish to propose a possible scheme. The starting point is that tort law must generally defer to the preset allocation of power under labor law. This means that the principle of reasonableness should not normally impose new restrictions on the freedom to strike in addition to those already imposed by the laws governing labor relations and professional conduct. The commitment to reasonableness may be manifested in two exceptions as follows.

If the striking employees can choose among several courses of action which exert similar pressure on the employer, their choice should be subject to the principle of reasonableness. In economic terms, they must choose the course of action that minimizes the sum of the expected third-party harm and the cost of precaution. Note that this is a compromise between deference and reasonableness merely on a formal doctrinal level. Imposing liability for choosing the "wrong" course of action seems to subject the freedom to strike to external limits in addition to those set by labor law. But on the substantive level, employees' bargaining position is not weakened. The additional limits do not undermine the balance of power struck by labor law, and substantive deference is maintained.

For example, assume that French maritime officers go on a lawful strike. French ships are now inoperative, and their owners incur severe economic loss. Now assume an American ship approaches the port of Marseille but cannot access the docks where French ships are moored. The ship is forced to travel to Genoa, and its cargo is unloaded there and sent by rail to France. The additional cost of transportation is borne by the ship owners, the cargo owners, or both. The French maritime officers could reduce that cost dramatically by moving a single ship from the dock, making it accessible for the American ship. While not doing so would not be unlawful under labor law, it would be unreasonable: the cost of moving the ship would probably be much lower than the additional cost of transportation, and moving the ship would not reduce the pressure on French shipping companies in the particular labor dispute. Theoretically, the American ship owner might attempt to persuade French ship owners to resolve the dispute quickly, but the marginal effect of such a request would

not be significant.[244] Imposing liability for third-party loss in such cases would force the striking employees to take into account third-party interests without relaxing any of the pressure on their employer.

Conclusion 3B: Even if the strike and the particular conduct were not prohibited by labor law, the strikers may be liable if they could have chosen an alternative course of action that would have exerted similar pressure on the employer but reduced the sum of the expected third-party harm and the cost of precaution.

In addition, if the expected third-party harm *considerably* outweighs the cost of preventing it in terms of losing a marginal bargaining advantage in a labor dispute, the striking employees should be liable for it. This second exception is based on two theoretical innovations. First, in applying the principle of reasonableness, the proposal compares expected harm to the cost of preventing it in terms of lost bargaining power. Indeed, any bargaining advantage that employees have under labor law is cancelled out by the corresponding disadvantage of the employer in a traditional cost-benefit analysis. When one of the negotiating parties loses some of its bargaining power, the pie may be divided differently, but its size does not change. However, the employees' bargaining advantage is a "benefit" that labor law intends to protect. It has a legitimate political distributive, rather than a purely economic, value, and tort law must take it into account. In applying the principle of reasonableness, the potential loss of a bargaining advantage is the "cost of precaution" that ought to be compared to the externalized social cost of the employees' specific conduct. Second, the proposal imposes liability for third-party harm only if the expected harm *considerably* outweighs the cost of precaution. The fact that a third party's expected harm is marginally greater than the cost of precaution, which normally suffices for a finding of unreasonableness, cannot in itself justify liability in the current context. After all, we are discussing conduct that labor law considered lawful, and liability would make it punishable.

The second exception is a real substantive compromise between deference and reasonableness. In line with the principle of reasonableness, strikers will be subject to restrictions that are formally external to the laws governing labor relations and professional conduct, and substantively modify the balance of power struck by labor law. Yet in line with the principle of deference, the freedom to strike in accordance with labor law will not normally be limited by tort law. The inevitable price of this compromise is that neither principle will be fully realized. The principle of

244. Reasonableness must be examined on a case-by-case basis. Thus, the conclusion might change if, for example, an international conglomerate incurs a significant loss because many ships carrying its cargo need to reroute during the strike and threatens to discontinue its business relations with French shipping companies unless they solve the access problem. In such a case, the French officers' refusal to move the ships might be reasonable.

deference will be relaxed in exceptional cases, whereas many acts and omissions deemed unreasonable according to the ordinary economic formula will not be actionable.

Conclusion 3C: Even if the strike and the particular conduct were not prohibited by labor law, the strikers may be liable if the third-party harm *considerably* outweighs the cost of preventing it in terms of losing a bargaining advantage in a labor dispute.

CONCLUSION

This Article addressed a highly important but neglected question about the boundaries of tort liability and the relation between tort law and other areas of law: should employees and their labor union involved in a strike against a particular employer be liable for ensuing third-party harms? Part I analyzed the primary causes of action used by third-party victims of strikes, highlighting the main conceptual and policy obstacles. Specifically, it discussed intentional interference with contract or business relations, the prima facie tort, negligence, and breach of statutory and regulatory duties, and showed that American courts have been predominantly reluctant to impose liability.

Part II provided a new analytical framework for assessing third-party claims. The proposed model has two pillars: deference and reasonableness. According to the principle of deference, tort law should not undermine a specific legal regime governing the allocation of power in the concrete case, particularly if the applicable regime has been crafted with diligence by the legislative and executive branches of government. According to the principle of reasonableness, potential injurers must take cost-effective precautions to avoid foreseeable harm to others and should be liable for such harm if they fail to do so. The model involves three steps.

First, a specific harm should not be recoverable unless it can be attributed to the employees' conduct (the attribution of harm requirement) and constitutes a real social cost (the nature of harm requirement). Specifically, if the targeted employer can reasonably continue production, or if the third party can reasonably use substitutes or make alternative consumption choices, then at least some of the harm cannot be attributed to the employees and their union and should not be borne by them. Moreover, strikers should generally be liable only for losses that constitute true social costs, as opposed to mere transfers of wealth.

Second, if the attribution and nature of harm requirements are met, third parties should be allowed to recover for harms resulting from an unlawful strike, or from unlawful conduct perpetrated during a strike, to the extent that the norm whose violation made the strike or the conduct

unlawful was designed in contemplation of third-party interests and with intent to protect them (though not exclusively).

Third, if the attribution and nature of harm requirements are met, third parties should be allowed to recover if the conduct is unreasonable in the following sense. If the conduct, though not prohibited, lies outside the protected sphere of the strike, because it neither represents nor facilitates a lawful strike, it is subject to the ordinary principle of reasonableness. Such conduct will normally be considered unreasonable if it causes harm to a third party, assuming it generates no net social benefit. Conduct that is not prohibited by labor law and appears to facilitate a lawful strike is subject to a relaxed version of the principle of reasonableness. Strikers may be liable (1) if they could choose an alternative course of action which would exert similar pressure on the employer but reduce the sum of the expected third-party harm and the cost of precaution, or (2) if the third-party harm *considerably* outweighs the cost of preventing it.

The proposed model, a structured combination of two fundamental commitments of tort law, also relieves some of the courts' secondary concerns regarding liability for third-party harm. For example, uncertainty may result in excessive restraint of employees and unions.[245] Mistaking an unlawful course of action for a lawful one exposes employees to the risk of litigation and liability, whereas mistaking a lawful course of action for an unlawful one does not. Thus, in cases of uncertainty, employees will rather err on the side of avoiding collective actions or inactions. Although the proposed model seems to increase the risk to employees, the limits of liability are clearly defined, and its potential impact on the freedom to strike is relatively straightforward.[246] Moreover, the fear of crushing liability, which may jeopardize collective action,[247] is addressed by the strict limitation of the potentially indeterminate liability.

Finally, while this Article focused on a concrete legal question, it laid the foundations for a more ambitious project. The clash between the principles of deference and reasonableness is not unique to labor disputes. The principle of deference is generally applicable whenever the boundaries of tort liability ought to be delineated in the presence of a competing legal framework, crafted by the legislature and the relevant regulators, which asserts its dominance with respect to a certain type of relations. Directions for future research may therefore include the interrelation between tort law and family law or between tort law and tax law.

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245. White v. Int'l Ass'n of Firefighters, Local 42, 738 S.W.2d 933, 937 (Mo. Ct. App. 1987).

246. Still, it hinges on the internal certainty of labor law. *See* Raday, *supra* note 53, at 70 (explaining that the distinction between legitimate and illegitimate strikes must be clearly established to prevent excessive restraint).

247. *White*, 738 S.W.2d at 937.