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NOTES

Statutory and Common Law Considerations in Defining the Tort Liability of Public Employee Unions to Private Citizens for Damages Inflicted by Illegal Strikes

Despite their nearly universal prohibition, strikes by public em-


The Indiana statute banning strikes was invalidated for unconstitutional lack of judicial
employees are not uncommon. Ordinarily public employers enforce this prohibition through court-ordered injunctions or employment-related sanctions. Recently, however, both public employers and private citizens have attempted to supplement these enforcement mechanisms by suing illegally striking unions for damages. The few courts confronted with such suits have divided on whether to recognize a private cause of action for damages resulting from illegal strikes by public employees.

This Note argues that in the absence of any clear indication that the legislature intended to bar such suits, courts should uphold private actions whenever plaintiffs can establish the elements of a common-law tort. Part I briefly outlines the various theories supporting the view that public sector collective bargaining statutes preempt pri-

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3. “That right of public employees to strike has usually been tested by an application for an injunction forbidding the strike. The right of the governmental body to this relief has been uniformly upheld. It has been put on various grounds: public policy; interference with governmental function; illegal discrimination against the right of any citizen to apply for government employment (where the union sought a closed shop).” Norwalk Teachers’ Assn. v. Board of Educ., 138 Conn. 269, 274, 83 A.2d 482, 484 (1951). Thus, although many statutory schemes specifically include the injunction remedy, e.g., ALASKA STAT. § 23.40.200(b); FLA. STAT. ANN. § 447.507(2) (West 1977) IOWA CODE ANN. § 24-447.507(2) (West 1977); and has not been reenacted. Strikes remain illegal in Indiana, however, by force of Anderson Fedn. of Teachers, 252 Ind. 558, 254 N.E.2d 329 (1970).


vate actions. The analysis is necessarily general, but Part I concludes that in most cases neither the language and structure of the applicable statute nor an analogy to federal labor law will resolve the preemption question. Part II, therefore, looks to the policies that animate no-strike provisions and argues that private actions generally further those policies. Finally, Part III advances nuisance and negligence as valid theories for imposing and defining union liability in tort to private plaintiffs injured by illegal strikes.

I. PREEMPTION OF PRIVATE ACTIONS

The statutory regimes governing employment relations in the public sector fall primarily into three categories. Many states recognize the right of public employees to bargain collectively under a comprehensive statutory and administrative scheme but prohibit strikes by public employees. Other states simply outlaw strikes, without recognizing a right to bargain collectively. And a few

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8. It is not possible within the scope of this Note to identify, much less analyze, the various approaches state courts might take toward the preemption issue. State courts are bound, as a general matter, to follow rules of statutory construction laid down by the legislature. See Hall, Strict or Liberal Construction of Penal Statutes, 48 HARV. L. REV. 745, 754-56 (1935). In the absence of legislative guidance, courts will presumably rely on common-law construction canons, see note 18 infra, a course that this Note argues will often yield no more than post-hoc rationalization for results that should be arrived at only through the sort of policy analysis advanced in Part II.


10. GA. CODE ANN. § 89.1301 (public employees generally); OHIO REV. CODE ANN. §§ 4117.01-4117.05 (Page 1980); TEX. REV. CIV. STAT. ANN. art. 5154(c)(3) (Vernon 1971) (prohibiting public sector collective bargaining and voiding contracts so arrived at, as well as prohibiting strikes); VA. CODE §§ 40.1-55-40.1-57.1 (1950).
states have no statutory provisions whatsoever regulating the right to strike or recognizing the right to bargain.\footnote{11}

The preemption question poses the most difficulty in jurisdictions operating under the first regime.\footnote{12} Where the legislature has both flatly prohibited strikes and established a comprehensive scheme to govern public sector labor relations, courts must first consider whether recognizing private actions would contravene the legislature's intent. Specifically, courts might examine the language and structure of the statute to determine whether private actions comport with the statutory scheme. Courts also might look to federal labor law and reason by analogy from the federal approach to preemption.

A. Statutory Language as Indicative of an Intention to Preempt

Whether public employee statutes preempt private damage actions is not likely to be resolved by standard techniques of statutory construction. Ordinarily, courts look first to statutory language in their attempts to discern legislative intent.\footnote{13} But the typical public employee statute\footnote{14} does not mention private actions, and little extrinsic evidence bears on the legislative intent to preempt, permit, or imply private actions.\footnote{15}

This is not surprising, for these statutes were enacted well before the fairly recent recognition of the possibility of private actions.\footnote{16}

\begin{footnotes}
\item[11] Arkansas, Arizona, Colorado, Louisiana, Mississippi, North Carolina, South Carolina, West Virginia, Wyoming. Now that Indiana's state employee collective bargaining statute has been declared unconstitutional, see note 1 \textit{supra}, it also belongs in this group.
\item[12] Where no statute governs public sector labor relations, no statutory language need be interpreted and only common law policies require consideration. Where the only relevant statute is a simple strike ban, the policies favoring collective bargaining do not partake of legislative significance.
\item[14] \textit{See note 9 \textit{supra}}. The Florida statute, however, provides for actions against illegally striking unions, brought by the public employer. \textit{FLA STAT.} § 447.507(4) (1979). The Iowa code provides that "[e]ach of the remedies and penalties provided by this section is separate and several, and is in addition to any other legal or equitable remedy or penalty." \textit{IOWA CODE ANN.} § 20-12(6) (West 1978). Even such oblique references to the possibility of other, nonstatutory remedies rarely appear in public sector collective bargaining statutes.
\item[16] The earliest reported decision of a case involving a damage action against a public employee union for an illegal strike is apparently Jamur Prod. v. Quill, 51 Misc. 2d 348, 348 (Sup. Ct. 1966). Defendants' counsel in that case later wrote: "Our careful search, as well as that of experienced and resourceful counsel for the plaintiffs in this group of cases, has not revealed any judicial precedent dealing with private damage actions against
\end{footnotes}
Statutory silence, therefore, probably indicates only that the legislature did not consider this issue. In this statutory vacuum, the canons of construction provide a rationalization for any result, but a principled justification for none. In the absence of an express saving or exclusivity provision, courts generally cannot conclude with


17. See McGill v. EPA, 593 F.2d 631, 636 (5th Cir. 1979). (“It would be sophistry for us to divine a congressional intent on a subject it did not consider.”) John Gray's words apply quite clearly here:

Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises to what its intention was. If that were all that a judge had to do with a statute, interpretation, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.


18. The canons amount to no more than a dialectical system, each tenet of which opposes another, equally plausible, venerable, and epigrammatic, but calling for a completely opposite result. See Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395, 401-06 (1950). The points of this dialectic applicable to legislatively intended preemption of private remedies for public remedies for public employee strikes are (1) that statutes should not be interpreted to derogate the common law without a clear expression of legislative intent, and (2) that a comprehensive system of regulation itself indicates legislative intent to completely occupy the field and displace the common law. See, e.g., California v. S.S. Bournemouth, 307 F. Supp. 922, 929 (C.D. Cal. 1969) (“The mere fact that Congress codifies a cause of action and provides a penalty creates no presumption of the nonexistence of similar rights at common law . . .”); Terry v. Lincroft Hotel Corp., 126 Ariz. 548, 552 617 P.2d 56, 60 (Ct. App. 1980) (“Statutes are not to be construed as effecting any change in the common law beyond that which is clearly indicated”); Porter v. Porter, 286 N.W.2d 649, 655 (Iowa 1979) (“statutes will not be construed as taking away common law rights . . . unless that result is imperatively required”). Examples of comprehensive regulatory schemes displacing the common law include Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952) (regulation of shipping); Fulton Cty. Fiscal Court v. Nashville, C. & St. L. Ry., 202 Ky. 846, 261 S.W. 617 (1924) (regulation of railroad crossings); Boston Ice Co. v. Boston & M. R.R., 77 N.H. 6, 86 A. 356 (1913) (liability rules for fires caused by railroad operations).

Insofar as this war between the maxims requires technical resolution, state public employee labor statutes are generally no more comprehensive than the federal legislation from which they evolved. Given that the Supreme Court has found room within the federal labor statutes for state court tort claims based on illegal labor practices, in spite of the added obstacle posed by the Supremacy Clause, these statutes should not preempt private remedies by virtue of their “comprehensiveness.” See note 32 infra.

19. A saving clause “is said to preserve from destruction certain rights, remedies or privileges which would otherwise be destroyed by the general enactment.” IA C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 20.22 (4th ed. 1972). An exclusivity provision is intended to make clear that a statute “creates a new right or imposes a new duty or liability, unknown to the common law, and gives a remedy” that is exclusive. BLACK'S LAW DICTIONARY 674 (4th ed. 1957).
certainty that the legislature would have either rejected or welcomed private actions.

B. Statutory Structure as Indicative of an Intention To Preempt

Because statutory language alone cannot resolve the issue, courts must look elsewhere to infer what the legislature would have intended had it considered private actions. Specifically, a court might attempt to determine whether private actions are consistent with the statutorily established enforcement scheme. This approach suggests two arguments supporting the view that private actions have been preempted, but both yield at best indeterminate, and at worst misguided, results.

The first argument would focus on the fact that many public employee statutes set out in comprehensive detail the enforcement options available to the state for violations of a no-strike clause. A court might conclude that private actions would have been expressly mentioned had the legislature intended to allow them. But it seems equally reasonable to assume that state legislatures act with full awareness that extant or evolving common law actions might complement statutory remedies. Courts should, of course, fashion common law to minimize its interference with legislation, but they should not refuse to consider a common law claim merely because it arises out of conduct that is also statutorily regulated. The growing codification of American law would leave little to the judiciary if deference to the legislature demanded abdication of a court’s common law function in all cases arguably affected by a statute.

The second argument in support of the preemption conclusion also relies on the statutory specification of enforcement procedures. A court might reason that because public employee statutes provide for extraordinary enforcement procedures — procedures not gener-

20. See generally C. Black, Structure and Relationship in Constitutional Law 4-5 (1969) (“[L]egislative activity, administrative rulemaking . . . the making of written constitutions have brought into being in highly developed form [the method of] searching . . . the written text for its reasoning in application to the presented case.”).


22. Several state legislatures currently examine decisions rendered by their courts in an attempt to modify legislation where necessary. See, e.g., ALASKA STAT. § 24.065(a)(1) - (3) (1979 Supp.) (requiring State Legislative Council to “annually examine administrative regulations, published opinions of state and federal courts . . . to determine whether or not . . . the courts and agencies are properly implementing legislative purposes . . . the opinions or regulations indicate unclear or ambiguous statutes.”); MICH. COMP. LAWS §§ 4.311-4.327 (Supp. 1979) (requiring Law Revision Commission to “examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law. . . .”). See G. Calabresi, A Common Law for the Age of Statutes 29-30 (1982).

ally available as remedies in a civil suit — these provisions somehow preempt the less drastic remedy of compensatory damages. But this approach ignores the possibility that the legislature might have merely reserved the most drastic sanctions for its exclusive use — just as the legislature often imposes criminal penalties for conduct that also gives rise to private damage actions. A court could reasonably hold that a statute does not authorize private actions to enforce its own provision without concluding that the legislature intended to bar all private remedies, particularly when the private remedy is compensatory rather than punitive.

C. Analogy to Federal Labor Law

Since the language and structure of the relevant state statutes do not answer the preemption question, a court might seek guidance in federal labor law. The strength of the analogy to federal labor law will, of course, vary from state to state, depending on the statutory and administrative scheme in question and the state interests perceived to be at stake. This approach has much to commend it; after all, many public employee statutes were patterned after the National Labor Relations Act (NLRA). As a result, state courts often accord federal labor law decisions persuasive weight when interpreting their own statutes. Analogy to federal labor law, however, cannot dictate a result one way or the other on the preemption question. Gener-

24. The Lamphere Schools court's language at one point suggests this approach. 400 Mich. 104, 114 n.3. ("There was no precedent for the proposed action under the common law at the time the [public employee statute] was enacted . . . . Nor may such a cause be implied from the [statute]. Furthermore, the statutory remedy . . . is adequate.") (emphasis added).

25. For example, most states treat the creation of a public nuisance as a crime, although civil actions will still lie for private parties seeking redress for special damages. See note 117 supra. See generally Pound, Introduction to F. Sayre, Cases on Criminal Law xxxiii (1927) ("In the beginnings of law, tort and crime are undifferentiated.").

26. The Supreme Court of Washington has implied that the omission from the state's public sector labor relations statute of a provision parallel to § 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) (1976), indicates that the legislature chose to exclude damage remedies from the statutory regime. See Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots, 92 Wash. 2d 762, 773, 600 P.2d 1282, 1288-89 (1979) (en banc). However, § 303 applies only to the recognition of a damage remedy for violation of certain substantive sections of the LMRA itself. Consequently, omission of a parallel section does not indicate an intention to preclude common-law damage remedies predicated on duties independent of the statute.

27. See, e.g., Lamphere Schools v. Lamphere Fedn. of Teachers, 400 Mich. at 119-20. Compare statutes set out in note 9 supra, with 20 U.S.C. §§ 151-69 (1976 & Supp. III 1979). The right to organize, the duty to bargain, and the primary implementation authority of an administrative agency all derive from the NLRA.

28. See, e.g., 400 Mich. at 119-24; Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots, 92 Wash. 2d at 773; 600 P.2d 1288-89; 2A C. Sands, Statutes and Statutory Construction 320 (4th ed. 1972) ("State and federal statutes may be in pari materia, and if so, should be construed together, for it may be presumed that the legislature had in mind existing federal statutes relating to the same subject matter when enacting the statute being construed and that affected parties would have their understanding of the state act influenced by it since the people of the state are subject thereto.").
erality necessarily limits the analysis presented here, while a detailed analysis of the state interests that would underlie a court's decision to dismiss or allow private actions on the basis of analogy to federal labor law is deferred until Part II. But some of the more obvious factors that might concern a court analogizing to federal labor law deserve immediate consideration.

At least one court has expressed the fear that allowing private actions would require the adjudication of ancillary unfair labor practice charges that would, if substantiated, constitute a defense against state enforcement of sanctions established under a no-strike clause. In Lamphere Schools v. Lamphere Federation of Schools, the Michigan Supreme Court reasoned that private actions would contravene earlier decisions vesting exclusive jurisdiction of unfair labor practice charges in the state's Michigan Employment Relations Commission. While understandable, the court's concern fails to justify this severe reaction. The same conduct — in this case, a strike — may give rise to different issues, and the court could have concluded that the strike violated common-law duties without deciding the unfair labor practice issue. Union defenses against sanctions sought by the public employer would not necessarily constitute a defense to the tort claims of private citizens if those claims did not depend on a violation of the statute. The tort theories advocated

29. See note 8 supra.
31. The Lamphere Schools court was particularly concerned with unfair labor practice defenses, 400 Mich. at 118-19, 253 N.W.2d at 824-25, but there are any number of other issues that might be better resolved in an arbitration setting then in court. See generally Van Wezel Stone, The Postwar Paradigm in American Labor Law, 90 YALE L.J. 1509 (1981).
32. Under federal labor law, for example, conduct allegedly in violation of state law is not immune from liability merely because the conduct also can be viewed as involving labor relations concerns. See, e.g., Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters, 436 U.S. 180, 198 (1978). In Sears a retail store owner attempted to oust pickets from his property by filing a state-law trespass action. Depending upon its purpose, the picketing might have, but need not have, constituted an unfair labor practice. ("If Sears had filed a charge, the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim.") Correspondingly, a claim that a public employee strike constitutes negligence or a public nuisance does not depend on violation of the collective bargaining statute, and hence does not implicate the labor board's primary jurisdiction over statutory unfair labor practices.
34. RESTATEMENT (SECOND) OF TORTS § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); RESTATEMENT (SECOND) OF TORTS § 821B, Comment d (1965); see City of Chicago v. Commonwealth Edison Co., 24 Ill. App. 3d 624, 321 N.E.2d 412 (1974) (compliance with environmental regulations does not preclude liability for public nuisance).
by this Note do not depend on statutory violations. Consequently, solicitude for the primary jurisdiction of administrative agencies assigned to resolve alleged violations of collective bargaining statutes should not bar claims advanced under these theories.

The unfair labor practice defense issue is but a specific example of a broader problem that might weigh in favor of preemption. Under federal labor law, courts regularly defer to the National Labor Relations Board's (NLRB) administrative expertise; they rely on the board’s expertise in labor-related matters to justify its exclusive jurisdiction over matters that might otherwise properly be heard in state or federal forums. A state court might reason that private actions would strip state agencies analogous to the NLRB of exclusive jurisdiction over labor disputes. This is a valid concern: The administrative expertise that ultimately justifies exclusive agency jurisdiction is less likely to develop if courts regularly bypass the agency without good reason. Nevertheless, courts should hesitate to assume that the analogy between the NLRB and state administrative agencies warrants the same degree of deference to agency expertise that prevails in the federal context. The most obvious difference between the expertise of federal and state agencies concerns their respective scope. The NLRB is an extensively staffed, hierarchically organized agency that handles a nationwide docket of private sector labor disputes. Most state agencies, by contrast, draw on a far more limited stock of cases.

It is not unreasonable to suppose that state agencies can

35. See text accompanying notes 113-116 infra.
36. See generally Van Wezel Stone, supra note 31. It has been assumed, for example, that the NLRB is capable of assessing the effect of an employer's speech on employee conduct. See NLRB v. Virginia Elec. & Power Co., 463 U.S. 469, 479 (1941) ("The purport of these utterances may be altered by imponderable subtleties at work, which it is not our function to appraise.").
37. See, e.g., Amalgamated Assn. of Street Employees v. Lockridge, 403 U.S. 274, 288 (1974): The rationale for preemption . . . rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system. (Footnote omitted.)
38. See Diver, Policymaking Paradigms in Administrative Law, 95 Harv. L. Rev. 393 (advancing the view that "incrementalist" policymaking by administrative agencies was dominant from 1930 through the mid-1960s, agency adjudication and rulemaking reviewed "leniently" on factual issues).
40. By contrast to the annual volume of NLRB dispositions, the Michigan Employment Relations Commission, for example, issued only 151 decisions in 1980. This figure was derived from the index to its annual volume of decisions. See XV MERC Labor Opinions at 2r-6r (1980).
never develop a level of expertise equivalent to that of the NLRB. Less persuasive reasons, therefore, might support judicial deference to administrative expertise in the state context — particularly when a court faces novel questions of common law. In any event, if exclusive agency jurisdiction is thought imperative, or if private actions require adjudication of matters properly within the agency's jurisdiction, courts should simply stay proceedings until the agency reaches its decision. This procedure would preserve whatever administrative expertise the agency has to offer without denying plaintiffs their common-law rights.

In general, then, neither conventional statutory analysis nor analogies to federal labor law resolve the preemption issue. Given that the legislature had no opportunity to consider private actions when enacting public sector labor statutes, both the decision that such statutes pre-empt private damage actions and the decision that they do not risk contravening the rule the legislature would have laid down had it considered the issue. The best course through this statutory vacuum evaluates private actions in light of the goals of public employee statutes in an effort to further the broader policy purposes animating this legislation. Federal courts pursue this type of analysis whenever they consider whether the NLRA pre-empts a tort claim arising under state law. State courts should avoid superficial attempts to resolve the private action question by mechanical application of construction canons or misplaced analogies to federal labor law. An open reliance on policy analysis follows the best common-law tradition, and possesses the added advantage of apprising the legislature of the court's concerns. Legislatures certainly have the

42. Since the framers of neither the state, see note 17 supra, nor the federal legislation considered the propriety of private actions, this should not be surprising. The framers of the federal legislation, involved with conferring the right to strike on private sector workers, clearly did not contemplate private actions against public employee unions for illegal strikes.
43. See McGill v. EPA, 593 F.2d 631, 636 (5th Cir. 1979) (It would be sophistry for us to divine a congressional intent on a subject it did not consider. Nor would it be permissible for us simply to withhold judgement on the basis that there is no law to apply. Instead we must attempt, at least in part intuitively, to determine how we think Congress would have voted had the question been raised legislatively.).
44. See, e.g., McGill v. EPA, 593 F.2d at 636-37; Montana Power Co. v. Federal Power Comm'n, 445 F.2d 739, 746 (D.C. Cir. 1970) (en banc), cert. denied, 400 U.S. 1013 (1971); In re Order Authorizing Interception of Oral Communications and Video-tape Surveillance, 513 F. Supp. 421, 423 (D. Mass. 1980); B. Cardozo, The Nature of the Judicial Process 128 (1921) ("Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function." (emphasis added); J. Gray, supra note 17.
45. See note 32 supra.
46. G. Calabresi, supra note 22, at 178-81; B. Cardozo, supra note 44, at 128.
47. G. Calabresi, supra note 22, at 29-30.
authority to revise whatever result a court might reach, and nothing suggests that they will hesitate to do so when they disagree with a court's resolution of the private action question. 48

II. THE IMPACT OF PRIVATE DAMAGE ACTIONS ON THE POLICIES EMBODIED IN PUBLIC EMPLOYEE STATUTES

A. Policy Interests Underlying Public Employee Statutes

The propriety of recognizing private actions for strike-inflicted damages depends on a careful weighing of the likelihood that these actions would further or frustrate important state policies. Because comprehensive public sector collective bargaining statutes incorporating no-strike provisions reflect a variety of interests, 49 a court faced with deciding whether to allow private actions must consider how these actions would affect such interests. Accordingly, this Part seeks to identify these broad interests and to examine how private actions would affect them.

1. Public Policy of Collective Bargaining Rights for Public Employees

Public employee statutes reflect concerns that go beyond merely prohibiting strikes. The policy objectives that forged private sector labor law also relate to labor relations between governments and their employees. It has long been recognized that "[t]he claims upon public policy made by the need for industrial peace, industrial democracy and effective political representation point toward collective bargaining for public employees." 50 Indeed, collective bargaining has been viewed as one means of avoiding illegal strikes, precisely because it serves to improve working conditions and terms of employment and to encourage an ongoing, harmonious relationship between public employers and employees. 51 Appeals to fundamental

48. State legislatures were not reluctant, for example, to reenact their death penalty statutes. See W. LOCKHART, Y. KAMISAR & J. CHOPER, CONSTITUTIONAL LAW 613 (5th ed. 1980).

49. See, e.g., Kheel, Strikes and Public Employment, 67 Mich. L. Rev. 931, 931 (1969) ("One of the major unmet challenges we face is how to prevent strikes by public employees without denying them the right to organize and bargain collectively."); Comment, Collective Bargaining for Public Employees and the Prevention of Strikes in the Public Sector, 68 Mich. L. Rev. 260, at 260 ("Because of the inherent conflict in legislative goals, it is unclear at the present time whether the new statutes can achieve both the promotion of fairer employment contracts than have prevailed in the past and the prevention of all strikes in public employment.") (emphasis in original).


51. See, e.g., Anderson, Strikes and Impasse Resolution in Public Employment, 67 Mich. L. Rev. 943, 953-54; Kheel, supra note 49 at 942:
I suggest that reliance on legal prohibitions, penalties, and elaborate third-party recommendations has not worked, and that before we turn in desperation to compulsory third-party determination, which cannot serve as a steady diet, we should give bargaining in the
fairness can also justify collective bargaining: It would be anomalous to deny public employees, who perform essential and often dangerous services in the public interest, a privilege almost universally granted private sector employees.  

This does not mean, however, that public employees ought to possess the same labor rights and benefits as employees in the private sector. The concerns that support collective bargaining for public employees may argue for an approximate balance in the bargaining power of public employers and public employee unions, but it is by no means clear that the same balance should prevail in the public sector and in the private sector, or that only complete incorporation of private sector labor rights in the public sector can achieve this balance. The sound policy considerations that underlie the no-strike provisions in most public employee statutes — as well as principled respect for the sovereign prerogatives of state and local governments — may justify significant differences between the rights of public and private sector employees. A review of the policies that support public employee strike bans suggests both that significant differences between private and public employers justify no-strike clauses and that correlative differences between private and public unions diminish any fear that an effective strike ban will destroy collective bargaining.

2. Public Policy Behind the Strike Ban

The theories that strikes by public employees should be outlawed because they offend the government's sovereignty, or because pub-
lic employees owe extraordinary loyalty to the government, have given way to a more sophisticated justification for the strike ban. Supporters of the ban now point to political and economic realities that they claim require a flat prohibition of strikes. Specifically, they argue that the short-term perspective of government managers leads them to cave in to demands that unions back up by refusing to provide essential public services. Because employment-related decisions in the public sector invariably have budgetary implications that require political resolution, this view maintains that perversion of the political process will occur if public employers cannot count on an effective strike ban.

Critics assail this view on three fronts. First, they question whether public services are in fact uniquely essential. Second, they contend that without the ability to strike, collective bargaining amounts to no more than collective begging. Finally, they note that these clauses often have proved ineffectual. A law likely to be breached by thousands of decent citizens, critics argue, erodes general respect for the law, whether or not the public employer imposes sanctions after an illegal strike.


59. Chief Judge Fuld states this position unequivocally:

Quite obviously, the ability of the Legislature to establish priorities among government services would be destroyed if public employees could, with impunity, engage in strikes which deprive the public of essential services. The striking employees, by paralyzing a city through the exercise of naked power, could obtain gains wholly disproportionate to the services rendered by them and at the expense of the public and other public employees. The consequence would be the destruction of democratic legislative processes because budgeting and the establishment of priorities would no longer result from the free choice of the electorate's representatives but from the coercive effect of paralyzing strikes of public employees.


Proponents of these views admit to the overgeneralizations involved. See The Unions and the Cities, supra note 78, at 30.


62. See note 2 supra.

63. "There is enough data to suggest that, in the public sector, there may be a de facto right to strike, despite the legal strike ban in force." Edwards, supra note 52, at 892 (citing "at least 70 teacher strikes in the fall of 1972"). See St. Antoine, Public Employee Unions and the Law, Quad. Notes, Fall 1970, at 9, 12.
merits close scrutiny, they do not, even collectively, warrant interring no-strike provisions.

The argument that public employees do not provide uniquely essential services seeks to undercut the central premise of those who argue that the nature of public services enables public unions to wield almost unlimited power when they threaten to strike. Obviously, not all public employees provide crucial services and many private sector workers provide goods and services as important as those provided by the public sector. But this misses the point: It is the vulnerability of public services that truly distinguishes them from most services provided by the private sector. No readily available private sector capability can fill the void created by public employee strikes. Because the most vital public services — education and police and fire protection — are rendered without any user charge, the private sector cannot offer more than a margin of competition. Such market services as do exist — for example, private education and security services — cater to a limited and generally well-to-do clientele.

When illegal strikes disrupt public services, therefore, alternatives available in the private market will rarely suffice. Furthermore, the certain resumption of public services deters market entry during the strike. Thus, although fuel oil may be as essential to citizens as fire protection, a strike at one refinery does not cripple the entire market. At worst, prices rise to reflect reduced supply and the costs of diverting goods from other markets. But vital public services cannot be diverted readily, if at all, from other markets.

64. See, e.g., Burton & Krider, supra note 60, at 426; Edwards, supra note 56, at 362; Note, supra note 57, at 557 ("Many strikes in the private sector are far more serious than strikes in certain parts of the public sector. Nevertheless, all strikes are permitted in the former and almost none are permitted in the latter.") (footnotes omitted).
65. See note 64 supra. To take a glaring example, most doctors work in the private sector and most librarians in the public sector.
66. See The Unions and the Cities, supra note 58, at 194 ("[T]here [is] . . . virtually no fear of entry by a nonunion rival . . . "); Armor, The Right to Strike: Some Basic, but Neglected, Questions, 2 GOVT. UNION REV., Summer 1981, at 3, 11 ("But the critical difference is that governments are, by definition, monopolies. Neither they nor their unions are affected by the economic flywheel that usually holds private unions and companies within the bounds of reality.").
67. The most important municipal services — police and fire protection — are "public goods," i.e., they would be "purchased" in insufficient quantities if provided by the private sector. See J. HIRSHLEIFER, PRICE THEORY AND APPLICATIONS 454-58 (1976).
68. See Armor, supra note 66, at 11.
69. When private strikes threaten utterly to preclude the availability of important products, the law provides for emergency procedures to terminate the strike. "[T]here is no such thing as an unlimited right to strike in private employment. The Congress, state legislatures, and the courts have for many years prescribed limitations on the right to strike . . . ." Anderson, supra note 51, at 948. See 29 U.S.C. § 178(a) (1976); United Steelworkers of America v. United States, 361 U.S. 39 (1959).
70. See generally P. SAMUELSON, ECONOMICS 403-05 (9th ed. 1973).
and police and fire protection amount to geographically limited natural monopolies satisfying an inelastic demand that the private market simply cannot satisfy over the short-run of a public employee strike.\textsuperscript{71}

Just as the differences between private and public sector services necessitate the strike ban to avoid the unacceptably high price that strikes by public employees exact in the absence of market alternatives, differences between the private and public sector bargaining contexts suggest that the strike ban has not eviscerated collective bargaining. The sensitivity of public sector management to the disruption of essential services allows unions to exercise a powerful non-economic influence unavailable to workers in the private sector.\textsuperscript{72}

Public managers may have every incentive to satisfy union demands first out of available funds,\textsuperscript{73} and the costs of current contract concessions often remain invisible, concealed in the fiscal catacombs of large municipal budgets until well into the future.\textsuperscript{74}

Public sector unions also enjoy political influence that tends to offset their inability to strike legally. Public employee unions have demonstrated that they can muster the manpower, financing, and discipline to utilize fully whatever political advantages they may possess over private sector unions.\textsuperscript{75} Whether this potential political influence yields bargaining leverage equal to that enjoyed by private employees who possess the right to strike defies certain determination. But when combined with the formal elements of statutory collective bargaining — the employer's duty to bargain in good faith and impasse procedures that include fact-finding, mediation, conciliation, and arbitration\textsuperscript{76} — this unique advantage of public sector unions tends to offset the loss of the strike weapon. The policies underlying legislative decisions to retain the strike ban thus fully comport with both common sense and democratic theory.\textsuperscript{77}

The argument that frequent violation justifies elimination of no-

\textsuperscript{71} See \textit{The Unions and the Cities}, supra note 58, at 194.
\textsuperscript{72} See \textit{The Unions and the Cities}, supra note 58, at 160-70; Comment, supra note 49, at 273-74.
\textsuperscript{73} \textit{The Unions and the Cities}, supra note 58, at 195.
\textsuperscript{74} This problem is exacerbated by the fact that many of the larger cities, unlike private industry, must deal with several different bargaining units whose contracts expire at different times.
\textsuperscript{75} See note 72 supra.
\textsuperscript{76} See Anderson, supra note 51, at 953-54 ("These statutes, all of which prohibit public employees from striking, are based on the conviction that the political process can be substituted for the strike weapon as an orderly method of dispute resolution. . . . The theory behind these laws is that fact finders or arbitrators who are empowered to make recommendations, advisory awards, or final and binding determinations will be able to provide an effective political substitute for the strike.") (emphasis in original); Comment, \textit{supra} note 49, at 275-88.
\textsuperscript{77} See, e.g., note 59 \textit{supra}.
strike clauses applies to any statutory prohibition. The legislature
enacts every statutory norm with the knowledge that it will be vi­o­lated, but this does not strip legislation of its force.78 If anything, the
failure of a legal norm to command obedience suggests the need for
more effective, if not necessarily more severe, enforcement proce­du­res.79 Finally, this argument can be challenged forcefully on the
facts: The vast majority of public employee contracts emerge from
collective bargaining negotiations in which strikes play no role.80

B. The Impact of Private Damage Actions

This review of the policies animating public employee statutes
that embody both the right to collective bargaining and a prohibition
against strikes will not convince committed opponents of either the
strike ban or the unionization of public employees that their respec­
tive policy preferences can be reconciled within the framework of
these statutes as they are currently written. But unlike the partisans
on both sides of this debate, courts cannot avoid the difficult task of
balancing the conflicting policies implicated in public employee stat­utes. They must instead consider whether to allow private damage
actions in light of the policies against strikes by, and in favor of col­lective bargaining for, public employees.

1. The Impact of Damage Actions on the Policy Against Strikes

Damage actions impose a cost on public employee unions for il­lega­l strikes. Everything else being equal, this cost will tend to dis­courage unions from striking and thus further the policy against
illegal strikes.81 And this deterrence is likely to operate more effec­tively than sanctions spelled out under a statute because of the large
number of potential plaintiffs.

The deterrent effect of private damage actions will be most ap­parent in cases where public employers forgo their statutory reme­
dies.82 If the public employer holds the bargaining advantage —

78. See J. Andenaes, PUNISHMENT AND DETERRENCE 12-13 (1974) ("[L]egislators proba­bly realize that many will break the rules but reason that many will observe them, so that
something, at least, will be gained.").

79. See Armor, supra note 66, at 9-10.

80. See Anderson, supra note 51, at 947. Cole, supra note 2, at 316, identifies 413 public
employee strikes for the latest year of available statistics; obviously, this represents only a tiny
fraction of the number of collective bargaining agreements reached by governmental employ­ers and employees during this period.

81. Armor, supra note 66, at 9-10; Note, Private Damage Actions Against Public Sector Un­ions for Illegal Strikes, 91 HARV. L. REV. 1509, 1519 (1978) (hereinafter cited as "Harvard
Note").

82. See Armor, supra note 66, at 8-10; Kheel, supra note 49, at 933:
(Describing the 1966 New York transit strike: Not only had the law failed to stop the
strike, but it threatened to produce a second work stoppage because of the penalty provi­sions. The enforcement of these provisions would have denied the transit workers the
because the employees in question perform less than critical services or can be easily replaced — injunctive relief will ordinarily be sought, and the union will be unable to rely on negotiated amnesty. If the union complies with the injunction, the strike will end quickly with little resulting damage. If the union defies the injunction, civil contempt fines will quickly exhaust its resources. Neither scenario offers private litigants much incentive to sue.

By contrast, if a powerful union can force a public employer to forgo statutory and equitable remedies, private damage actions may function as an important equalizer. Private actions are likely to arise only when public unions expect to nullify the employer’s enforcement of the statute and succeed in doing so. Private citizens are unlikely to risk the expense and uncertainty of litigation if a struggle in bankruptcy court for scraps of the union’s financial remains constitutes the sole reward. But where economic or political realities frustrate the intended operation of the strike ban, private damage actions can have the salutary effect of significantly deterring illegal strikes.

Courts and commentators have argued, however, that private actions will tend to prolong those strikes that do occur because unions
will add indemnification agreements to their list of demands. 87 Two factors suggest that these fears may be misplaced. First, the financial constraints on local governments 88 will often mean that indemnification agreements can only be granted at the expense of other union demands. 89 The union’s prestrike perception of the cost of an illegal strike will thus remain the same — an indemnification agreement will cost the union wages and benefits that it would have otherwise received. Second, the common law of duress, 90 judicial reluctance to enforce agreements violative of public policy, 91 and the general rule against indemnification for punitive damages, 92 render the enforcement of such agreements problematic at best. And any possibility that unions might prolong strikes to secure indemnification must be discounted by the probability that private actions will entirely prevent many strikes.

2. The Impact of Private Actions on the Policy Favoring Collective Bargaining

To the extent that private actions further the policies of the strike ban, they necessarily change the balance of bargaining strength between labor and management. The Supreme Courts of Michigan 93 and Washington 94 have held that this modification of the balance of bargaining strength contravenes the policy in favor of collective bargaining. 95 The Washington Supreme Court reasoned that:

[T]he delicate balance of labor relations is now primarily the province of the legislature, and . . . the schemes created by statute for collective

87. See Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots, 92 Wash. 2d at 775, 600 P.2d at 1290; Harvard Note, supra note 81, at 1319-20.

88. Rehms, Constraints on Local Governments in Public Employee Bargaining, 67 MICH. L. REV. 919, 924 (1969) (“The financial constraints on local governments constitute the most serious problem they face in coping with public employee collective bargaining”). Even if the ultimate resource constraint is very high, so long as a constraint exists at some level all allocations to indemnification come at the expense of other union priorities.

89. Harvard Note, supra note 81, at 1319 n.50.

90. J. CALAMARI & J. PERRILLO, THE LAW OF CONTRACTS 262 (2d ed. 1973) (“[T]oday the general rule is that any wrongful act or threat which overcomes the free will of a party constitutes duress.”) (footnotes omitted).


92. On the problematic nature of insurance against punitive damages, see W. PROSSER, LAW OF TORTS ¶ 2, at 12-13 (4th ed. 1971).

93. Lamphere Schools v. Lamphere Fedn. of Teachers, 400 Mich. at 131, 252 N.W.2d at 830-31.


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.96

Two assumptions lurk beneath this conclusion. The first is that the legislature intended that strikes play a role in determining the balance of bargaining power between governments and public employees.97 Private actions, therefore, are objectionable because they deter strikes and modify the bargaining balance. The second assumption is that private actions operate uniformly, in all bargaining situations, to create an identical perception of increased costs to unions contemplating illegal strikes. Neither assumption can withstand serious scrutiny.

The very existence of the statutory strike ban suggests that the legislature did not intend that the strike threat influence the balance of bargaining strength. The imperative wording of these provisions, and the criminal sanctions often imposed for their violation, strengthens this impression.98 It seems anomalous to conclude that the legislature tacitly approved of, and desired to insulate from liability, conduct it found fit to outlaw.99 And although it is dangerous to infer legislative intent from inaction,100 the retention of the strike ban in most jurisdictions suggests that the proscription is intended to be more than hortatory in its operation. At a minimum, the logic that would lead to rejecting nonfrivolous private actions for strike-inflicted damages because the defendants have long engaged in the illegal conduct that gives rise to the claim is questionable.

One could object, however, that the legislature knew that unions would occasionally violate the strike ban.101 Thus, the possibility remains that in establishing statutory penalties for violation of the strike ban the legislature merely aimed to define the cost of an illegal

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96. 92 Wash. 2d at 772, 600 P.2d at 1288.
97. Harvard Note, supra note 81, at 1320.
98. See, e.g., MICH. COMP. LAWS § 423.202 (1979) ("No person holding a position [governing by this act] . . . shall strike."); N.Y. CIV. SERV. LAW § 210.1 (McKinney) (1973) ("No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike."); WASH. REV. CODE § 41.56.120 (1981) ("Nothing contained in this chapter shall permit or grant any public employee the right to strike or refuse to perform his official duties.").
99. See Caso v. District Council 37, 43 A.D.2d 159, 162, 350 N.Y.S.2d 173, 176 (1973) ("Read the way defendants suggest, the Taylor Law would become an impenetrable shield of immunity for public employees who may illegally cause serious damage to persons or parties other than their employer.").
101. See Anderson, supra note 51, at 946-47 (The short history of unionism in the public sector demonstrates graphically that merely declaring public employee strikes illegal will prevent neither collective bargaining from developing nor strikes from occurring."); Edwards, supra note 52, at 892 (1973) ("The threat or exercise of this de facto right to strike appears to be no less effective than the legalized right enjoyed by employees in the private sector.").
strike. This view conceives the strike ban as a legislatively imposed handicap that renders the strike option more expensive — but not beyond the pale — so as to achieve a definite balance between management and labor.\textsuperscript{102} If valid, this view would harmonize the fear that an unfettered right to strike concedes public unions excessive political power with the suspicion that collective bargaining without the right to strike is a contradiction in terms.

Unfortunately, the elegance of this argument falls before both the language and remedies of public employee statutes. These statutes do not provide that unions may strike as long as they are willing to pay a fee. Strike bans remain imperative;\textsuperscript{103} it is, therefore, difficult to view the strike ban as a sort of tax that allows public employee strikes, but only under circumstances less favorable than those enjoyed by employees in the private sector.

A more direct response to the strike ban as tax argument would rely on the nature of the penalties associated with violations of no-strike provisions. These provisions universally give public employers the right to equitable relief.\textsuperscript{104} If the courts grant an injunction, and the union defies it, the magnitude of potential fines is unlimited. For this reason, it cannot be persuasively argued that the statutory remedy constitutes a delicate legislative balance in the nature of a tax. Private actions cannot upset the legislature's desired balance of bargaining strength in cases involving injunctions because the legislature does not fix the fine that accrues for defiance of an injunction.\textsuperscript{105}

The second assumption essential to the conclusion that private actions will disrupt a legislatively established balance fares no better than the first. The assumption that private actions will operate in all circumstances to impose potentially catastrophic losses on unions and thereby alter the balance of bargaining power ignores the fact that private litigants will rarely sue when the public employer secures injunctive relief.\textsuperscript{106} Private litigants have a significant incentive to sue only when a powerful union emerges from an illegal strike with its resources shielded because the public employer has agreed to forgo statutory remedies.\textsuperscript{107} Even if one grants the Washington

\textsuperscript{102}. See Edwards, \textit{supra} note 52, at 892. This view also pervades \textit{Lamphere Schools} and \textit{Burke \& Thomas}.

\textsuperscript{103}. See note 98 \textit{supra}.

\textsuperscript{104}. See note 3 \textit{supra}.

\textsuperscript{105}. Caso v. District Council 37, 43 A.D.2d 159, 162, 350 N.Y.S.2d 173, 176-77 (App. Div. 1973) ("[T]here is no limit on the amount the employee may be fined and there is no limit on the period that the union may be deprived of its 'dues check-off.' Since the Legislature apparently found that fiscal constraints were appropriate to punish union transgressions, it does not seem that the form, whether fines or damages, is a controlling distinction.").

\textsuperscript{106}. See notes 83-84 \textit{supra}.

\textsuperscript{107}. See note 82 \textit{supra}.
court’s assumption that the legislature intended to establish a de facto balance of bargaining strength by avoiding draconian no-strike sanctions, it seems unreasonable to assume further that the legislature intended that this balance shift in direct proportion to an illegally striking union’s ability to negotiate amnesty. Rather than distorting the bargaining balance ostensibly sought by the legislature, private actions may actually further the legislature’s collective bargaining policies by ensuring some sanction against illegal strikes when political or economic realities vitiate statutory remedies.\(^{108}\)

3. The Impact of Private Actions on Judicial Administration

The final policy consideration that has concerned courts evaluating the propriety of private actions concerns judicial capacity to resolve the many private actions that might arise out of an illegal strike.\(^{109}\) This apprehension of “a labor law logjam in the courts”\(^{110}\) should not deter the courts from considering such actions solely on their merits. The limited number of illegal strikes likely to lead to private actions,\(^{111}\) and the possibility of consolidation, diminish the likelihood that courts will find these actions administratively burdensome. The history of the “logjam” argument suggests that few apologies for the status quo have been offered so often to avoid necessary reforms for so little reason.\(^{112}\) Since the apprehended tidal wave has yet to descend on jurisdictions that have recognized private actions, courts should not hesitate to dispense justice on the merits until such time as the burden of doing so exceeds the benefits.

108. This points up an important distinction between actions by public employers and actions by private citizens. Employer actions of the sort presented to the court in Lamphere Schools depend on the prior balance of bargaining advantage. If the employer holds that advantage, the existing imbalance is aggravated by the addition of the damage action to the arsenal of management. By contrast, if the union can coerce management into not exercising its statutory or equitable remedies, it can also coerce management into forgoing the damage remedy. See Comment, supra note 49, at 293. In sharp contrast, a private damage remedy will only be invoked against a union with the bargaining advantage, since contempt fines would bankrupt the union if a speedy return to work did not render damages minimal. Consequently, private damage actions tend to serve the interest in balanced bargaining, operating counter to employer damage actions of the sort rejected in Lamphere Schools. This suggests that the reliance on Lamphere Schools in Burke & Thomas, which involved a private litigant’s action, was misplaced.

109. Lamphere, 400 Mich. at 131, 252 N.W.2d at 830. The court also refers to this possibility as a “Pandora’s box,” 400 Mich. at 131, 252 N.W.2d at 831, predicting that “[v]arious public employers and public employees, as well as unions would take turns suing each other for tortious damages ad nauseum.” 400 Mich. at 114 n.4, 252 N.W.2d at 823 n.4.

110. Lamphere, 400 Mich. at 131, 252 N.W.2d at 830.

111. See Cole, supra note 2, at 316.

112. See, e.g., Winterbottom v. Wright, 153 Eng. Rep. 402, 404 (1842) (“We ought not to permit a doubt to rest upon this subject for our doing so might be the means of letting in upon us an infinity of actions.”). The citadel has fallen, but the sky has not.
III. THEORIES OF RECOVERY

If, as this Note argues, neither the legislature's language nor the policy judgment underlying public employee statutes precludes private actions, courts should adjudicate such actions on the merits. Because courts have rejected causes of action implied from the statutory strike ban and third-party contract claims, plaintiffs would be well advised to pursue other theories for imposing liability on illegally striking unions for strike-inflicted injury to private parties.

A. Nuisance

A public nuisance is defined as an "unreasonable interference with a right common to the general public." The interests protected under the nuisance rubric include public safety, health, and unobstructed travel over public rights of way. These categories


There are several possible explanations for the failure of the implication theory. First, the universal common-law illegality of public employee strikes suggest that the purpose of the statutory strike bans was not to create the duty not to strike, but rather to define new methods of ensuring compliance with the duty that already existed. This in turn suggests that if the legislature chose not to include a damage remedy, it meant to imply none. Second, the public purpose of the strike ban statutes runs counter to the "special benefit" of the plaintiff's class test set out by the Supreme Court in Cort v. Ash, 422 U.S. 66, 78 (1975). Third, recent Supreme Court decisions have significantly narrowed the implication doctrine. See Transamerica Mortgage Advisors v. Lewis, 444 U.S. 11 (1979); Touche Ross & Co. v. Redington, 442 U.S. 11, 78 (1979).

While some hope may linger for the implication theory, see Harvard Note, supra note 81, at 1312-20, these developments suggest that alternative theories may offer better chances to prospective plaintiffs.


115. Offenses against these interests were originally viewed as common law crimes, and nuisance would not lie unless the criminal law also proscribed the alleged nuisance. Every American state has long since adopted an omnibus penal nuisance statute, however, and


117. Offenses against these interests were originally viewed as common law crimes, and nuisance would not lie unless the criminal law also proscribed the alleged nuisance. Every American state has long since adopted an omnibus penal nuisance statute, however, and
dovetail nicely with the interests jeopardized by the interruption of public services. Additionally, because it does not generally matter how the interferences with such interests arose, nuisance offers a plausible theory for imposing liability on illegally striking public unions.

Perhaps more importantly, public sector strikes imperil public rights to a greater extent than do classic nuisances. The risk posed by a firefighters' strike far outstrips the risk posed by the fire hazards of garbage dumps and old buildings—both well established public nuisances. Similarly, striking transit workers frustrate public travel to an extent that the classic prupesture never could. And strikes by sanitation workers affect public health and comfort far more than does a property owner who fails to dispose properly of garbage or maintain the integrity of a cesspool, failures that constitute public nuisances at common law.

Although an interference with public rights will not constitute a nuisance if it amounts to a reasonable intrusion on the public interest, the argument that illegal strikes properly fall within this exception lacks merit. The well-established policies underlying both statutory and common-law strike bans foreclose public unions

"Such statutes are commonly construed to include anything which would have been a public nuisance at common law." W. Prosser, supra note 92, § 88, at 596. Statutory considerations consequently do not alter the analysis presented here in common-law terms. See, e.g., Duncan v. City of Tuscaloosa, 257 Ala. 574, 577-78, 60 So. 2d 438, 440 (1952); City of Chicago v. Geraci, 30 Ill. App. 3d 699, 702, 332 N.E.2d 487, 490 (1975); Commonwealth v. MacDonald, 464 Pa. 435, 453-56, 347 A.2d 290, 300-01 (1975).


118. Note the act or omission standard adopted by the cases set out in note 117, supra. Prosser elucidates: Nuisance "is a field of tort liability, rather than a type of tortious conduct. It has reference to the interest invaded, to the damage or harm inflicted, and not to any particular kind of act or omission which has led to the invasion." W. Prosser, supra note 92, § 87, at 573.


122. W. Prosser, supra note 92, § 887 at 581.

123. See Restatement (Second) of Torts § 821B(2).
from asserting successfully that their interruption of vital services serves the public interest. Precedent establishing that private labor activity, conducted illegally, can constitute a public nuisance, 124 also undercuts argument along these lines.

Public sector strikes thus manifest the necessary elements of a common-law nuisance. And although the case law is sparse, no court that has reached the merits of the claim has rejected a public nuisance theory of liability as applied to a public employee strike. 125 The interests that have been recognized in the limited case law on point include the interest in safety threatened by a firefighters’ strike, 126 the interest in health threatened by a sanitation workers’ strike, 127 and the interest in public convenience threatened by a transit strike. 128 The breadth of the public nuisance theory and the variety of specific nuisances successfully assailed in cases brought against private defendants 129 suggests that future plaintiffs may well succeed in adding to the list of interests enumerated above.

A potential difficulty facing private plaintiffs who pursue a nuisance theory involves the traditional requirement of “special damages” different in kind, and not merely in degree, from those suffered by the public generally. 130 In the absence of such proof, only a designated public officer is entitled to seek redress for a purely public

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124. Courts have held, both before and after the enactment of the National Labor Relations Act, that picketing, pursuant to a strike, that involves intimidation or violence may be a public nuisance. See United Steelworkers v. United States, 361 U.S. 39, 61 (1959) (per curiam) (Harlan & Frankfurter, JJ., concurring); In re Debs, 158 U.S. 564 (1895); Sherry v. Perkins, 147 Mass. 212, 17 N.E. 307 (1888); F.C. Church Co. v. Turner, 218 Mo. App. 516, 279 S.W. 232 (1926).

125. Plaintiffs did not plead nuisance in Lamphere Schools, or Burke & Thomas. In City of Fairmont v. Retail, Wholesale, & Dept. Store Union, 1979-80 Pub. Bargaining Cas. (CCH) 37,157 (W. Va. 1980), the West Virginia Supreme Court of Appeals rejected any common law liability for a peaceful public employee strike in an action where plaintiffs pleaded nuisance. This result, however, depended not on any appraisal of the merits of the nuisance claim, but instead flowed from the court’s broader conclusion to exercise judicial restraint by “adopt[ing] the view of the Michigan Supreme Court in Lamphere. . . .” The fact that West Virginia has no legislative enactment of any sort relating to public employee labor relations casts doubt on the soundness of the Fairmont court’s reasoning.


129. W. Prosser, supra note 92, § 88, at 583-84, notes the following examples culled from the cases: hogpens, storing explosives, keeping diseased animals, a malarial pond, detonating fireworks, keeping a vicious dog, practicing medicine without a license, brothels, speakeasies, indecent exhibitions, bullfights, unlicensed prize fights, public profanity, noises, odors, smoke, dust, vibrations, obstructions of highways and waterways, and disorderly crowds, among others. Turning the community’s children away from the schoolhouse and into the streets seems an annoyance at least equivalent to some of these, although damages would be highly speculative.

130. See Restatement (Second) of Torts § 821C(1); Prosser, Private Action for a Public Nuisance, 52 Va. L. Rev. 997, 997 (1966).
The fact that “special” damages need not be unique may somewhat alleviate this difficulty. Where a sanitation strike injures the public interest in clean waterways, but raw sewage befools an individual’s waterfront, or where a firefighters’ strike jeopardizes public safety generally, but an individual’s home actually burns, it would not be difficult to make out a claim of “special” damages.

In fact, at least one jurisdiction has taken a fairly expansive view of what will satisfy the “special” damages requirement. In Burns Jackson Miller Summit & Spitzer v. Linder, a lower court held that plaintiffs may recover mere “pecuniary losses” as “special” damages. Burns involved a claim by business and professional employees that a New York transit strike hampered their ability to carry on their business activities. The court articulated a distinction between damages resulting from increased “out-of-pocket expenses incurred merely to carry on their professional practices . . . in the face of an illegal strike” and “lost profits” occasioned by the inconvenience of disrupted daily routines. The latter were considered damages suffered in common with the public at large, but the former were deemed recoverable pecuniary losses.

Although the approach in Burns can be faulted in several particulars, the sufficiency of pecuniary losses to satisfy the special damages requirement reflects the prevailing rule. Courts should probably retain enough of the special damages requirement to deny recovery in cases where plaintiffs cannot demonstrate financial loss convincingly. But losses definite enough to withstand rigorous challenge and large enough to justify the expense of litigation cannot

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131. Prosser, supra note 130, at 1005-07.
132. Prosser, supra note 130, at 1008-09.
134. This is the Fulenwider situation. The general loss will express itself as an increase in insurance premiums.
136. 108 Misc. 2d at 475.
137. 108 Misc. 2d at 475.
138. The court’s comprehensive view of special damages may diserve the policies behind the special damages requirement, see Restatement (Second) of Torts, § 821C, Comment a (“The reasons usually given for the rule are that it is essential to relieve the defendant of the multiplicity of actions that might follow if everyone were free to sue for the common wrong; and that any harm or interference shared by the public at large will normally be, if not entirely theoretical or potential, at least minor, petty and trivial so far as the individual is concerned.”), dissipate on trivial claims the resources available for compensation, and produce the anomaly whereby those able to afford alternative private services during the strike will recover their “pecuniary losses,” while those who cannot afford such substitutes, and thus suffer most from the strike, will find their damages “common to the public at large” and not recoverable.
139. Restatement (Second) of Torts, § 821C, Comment b; Prosser, supra note 130, at 1009 (“It is only when the class becomes so large and general as to include all members of the public who come in contact with the nuisance, that the private action will fail.”).
easily be dismissed as trivial. To the extent that the “special” damages requirement might foreclose recovery in cases where several plaintiffs suffer substantial injury, pecuniary or otherwise, the liberal approach taken by the Burns court seems advisable.

B. Negligence

An articulable duty to the plaintiff, breached by a failure to observe due care, proximate cause, and actual damages, is the classic litany of actionable negligence. The hornbook definition of negligent conduct is “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.” One could argue that a public union is negligent when it engages in an illegal strike when a reasonable man would foresee unreasonable risks to the public, and the strike in fact inflicts damages such as those foreseen.

1. Duty

The steadfast refusal of courts to recognize any duty — on the part of either public employers or employees — to provide individual citizens with vital public services presents the chief difficulty confronting plaintiffs under a negligence theory. As a general

140. See, e.g., W. Prosser, supra note 92, § 30, at 143. Contemporary tort theory and its discontents play little role in the discussion to follow. Insofar as modern tort theory favors locating liability with the least cost damage avoider (within parameters set by a visceral sense of justice), it favors the causes of action advocated here. For while the municipal employer can avoid the strike by acceding to union demands, the cost of damage avoidance then includes the cost of those demands. Beyond this, the intricate comparison of negligence and strict liability as alternate regimes for defining tort liability seems premature in the public sector strike context, as no court has yet held a union that illegally strikes against a public employer liable in simple negligence. See G. Calabresi, The Cost of Accidents (1970); W. Blum & H. Kalven, Public Law Perspectives on a Private Law Problem (1965); R. Epstein, Modern Products Liability Law (1980); R. Posner, Economic Analysis of Law (2d ed. 1977); Calabresi, Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr., 43 U. Chi. L. Rev. 69 (1975); Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972); Posner, A Theory of Negligence, 1 J. Legal Stud. 29 (1972). A recent critical review of this work is Englar, The System Builders: A Critical Appraisal of Modern Tort Theory, 9 J. Legal Stud. 27 (1980).

141. W. Prosser, supra note 92, § 87 at 581.

142. The prevailing approach views the risks of a defendant’s conduct that a reasonable man would foresee as defining the scope of duty and the limits of proximate cause. See, e.g., Whitt v. Jarnagin, 91 Idaho 181, 188, 418 P.2d 278, 285 (1966) (“Every person has a general duty to use due or ordinary care not to injure others . . .” and “[t]he degree of care to be exercised must be commensurate with the danger or hazard connected with the activity.”) (citations omitted); Harper v. Epstein, 16 Ill. App. 3d 771, 772-73, 306 N.E.2d 690, 691 (1974) (“[A] person owes to all others the duty of exercising care to guard against injury which may naturally flow as a reasonably probable and foreseeable consequence of this action.”) (citations omitted); Mang v. Eliasson, 153 Mont. 431, 437, 458 P.2d 777, 781 (1969) (“defendant owes a duty with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous, and hence negligent in the first instance.”); Palsgraf v. Long Island R.R. 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928) (“The risk reasonably to be perceived defines the duty to be obeyed.”).
proposition, substantial policy considerations support this refusal. As applied to illegal strikes, however, it has the anomalous effect of shielding unions from liability for concededly illegal conduct that makes severe harm to some individuals a virtual certainty. Palsgraf\textsuperscript{143} long ago established that the elements of negligence do not exist in isolation and that courts cannot properly assess one element without considering the others.\textsuperscript{144} A frank appraisal of the motivation behind illegal strikes, their likely effect, and the injustice of denying recovery when the risks posed by public strikes devolve with crushing force on individual plaintiffs argues for resolving the duty question against unions that engage in illegal strikes.

The traditional approach is typified by a recent decision of the Tennessee Court of Appeals, which rejected a negligence claim against an illegally striking firefighter's union because it found no duty running from the firefighters to the plaintiff.\textsuperscript{145} The court relied on two earlier decisions\textsuperscript{146} holding that a city does not incur negligence liability for failing to provide fire protection or for injuries resulting from the operation of its firetrucks. From these decisions, the court apparently reasoned that because the state owes no duty to provide services, unions cannot be liable for interruption of whatever services the state chooses to provide. This line of reasoning — equating illegal strikes with a passive failure to provide services that citizens do not enjoy as a matter of right — mires the negligence analysis in the tortuous distinctions that separate an undertaking from a duty, misfeasance from nonfeasance, and the good samaritan rule from the "limited duty" to act affirmatively.\textsuperscript{147}

\begin{footnotes}
\item[144] 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 18.2 (1956). Under the prevailing view inquiry is made into why the particular act or omission complained of was negligent. This will be because the offending conduct foreseeably involved unreasonably great risk of harm to the interests of someone other than the actor. This view would limit the scope of the duty accordingly: the obligation to refrain from that particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous. Duty, in other words, is measured by the scope of the risk which negligent conduct foreseeably entails. (Emphasis in original) (footnotes omitted). \textit{Id.} at 1018.
\item[145] Fulenwilder v. Firefighters (IAFF) Local 1784, 1979-81 Pub. Bargaining Cas. (CCH) § 36,956, at 37,757 (Tenn. App. June 2, 1980) ("We know of no duty imposed upon a firemen's union to furnish adequate fire protection to an \textit{individual property owner} and we have no inclination to now create such a duty.") (emphasis in original).
\item[146] Burnett v. Rudd, 165 Tenn. 238, 54 S.W.2d 718 (1932); Irvine v. Chattanooga, 101 Tenn. 291, 47 S.W. 419 (1898).
\item[147] \textit{See}, e.g., \textit{RESTATEMENT (SECOND) OF TORTS} §§ 314, 323; Harvard Note, \textit{supra} note 81, at 1323-26, and cases cited therein; \textit{see also} Kunz v. Utah Power & Light Co., 526 F.2d 500 (9th Cir. 1975); Jennings v. Davis, 476 F.2d 1271 (8th Cir. 1973). Such distinctions are not simplified by the semantic fact that any action can be described in negative terms, such that doing nothing amounts to the failure to do something, and doing something amounts to the failure to do nothing.
\end{footnotes}
If one focuses on the strike-related conduct of public unions sued in a private action, however, an illegal strike involves more than a mere passive decision not to undertake the provision of public services. A strike demands substantial, concerted organizational effort to succeed; a strike vote must be called, and the result must be communicated to the membership. When public unions strike, they do not intend to terminate their employment — they seek only to interrupt services long enough to secure their demands. To this end, unions must continuously coordinate the conduct of the strike with their negotiating position. This sort of behavior does not signal a passive refusal to provide gratuitous services.

The duty question takes on a different appearance when viewed from this perspective. The issue is not whether government owes private citizens a duty to provide services, but whether public employee unions owe a duty not to interfere with the services that government chooses to provide. Courts have consistently upheld such a duty in related contexts. A railroad company whose train severs a firehose, or delays firemen at a crossing incurs negligence liability to a plaintiff whose building burns. When the railroad's employees had reason to know that they must exercise due care to avoid interfering with fire protection, "interference with the rights of the public to fire protection violates a fundamental social duty and is a common law tort." Similarly, although it is generally held that citizens enjoy no right to use public roads, contractors or property owners adjacent to the roadway owe a duty not to endanger passersby through negligent behavior. Analogizing illegally striking

148. These distinctions suffice to differentiate antistrike regulations from constitutionally impermissible involuntary servitude. Anderson, supra note 51, at 948-49 (1969) ("Moreover, restrictions on concerted work stoppages do not raise an issue of involuntary servitude. The courts have always interpreted the constitutional provisions on involuntary servitude as running to the individual; they have never found that these provisions extend so far as to create a collective right to terminate employment." (citing Dorchy v. Kansas, 272 U.S. 306 (1926))).


150. See Louisville N.R.R. v. Duncan, 16 Ala. App. 520, 79 So. 513 (1918); Cottonwood Fibre Co. v. Thompson, 359 Mo. 1062, 225 S.W.2d at 706 (1949); Luedeke v. Chicago & N.W. Ry., 120 Neb. 124, 231 N.W. 695 (1930).

151. Cottonwood Fibre Co. v. Thompson, 359 Mo. at 1067, 225 S.W.2d at 706 (1949).

152. See, e.g., Sueppel v. Eads, 261 Iowa 923, 928, 156 N.W.2d 115, 118 (1968) ("Permis­sion to operate a motor vehicle upon the public highways is not embraced within the term 'civil rights' and is in the nature of a license or privilege.") (citation omitted); Agree v. Kansas Highway Commn. Motor Vehicle Dept., 198 Kan. 173, 180, 422 P.2d 949, 955 (1967) ("It is established law that the right to operate a motor vehicle upon public streets and highways is not a natural right, but a privilege, subject to reasonable regulation in the public interest.").

153. Cullman-Jefferson Counties Gas Dist. v. Reeves, 281 Ala. 67, 69, 199 So. 2d 78, 80
public employees to private citizens who negligently interfere with the delivery of vital services is more precise than equating them with a sovereign who has no duty to provide services.

2. Failure To Observe Due Care

In direct contrast to the duty question, the inquiry into whether due care was observed presents an ordinary factual question. The formula generally applied to test a defendant's conduct against the due care standard requires that the utility of that conduct exceed its risk. The legislature's judgment, as expressed in public employee statutes containing no-strike provisions, that the policy of collective bargaining does not justify granting the strike weapon creates at least a rebuttable presumption on the utility-risk issue. And if courts accord the contemporary justification for the strike ban any weight, benefits to the union from an illegal strike are likely to be found dwarfed by the risks that such strikes pose. Once courts recognize a duty of due care to those endangered by the disruption of government services, the negligence of a public employee strike is a conclusion not easily avoided.

156. See notes 74-130 supra and accompanying text.
157. Two lines of precedent in the New York State courts reinforce this conclusion. In Caso v. District Council 37, 43 A.D.2d 159, 350 N.Y.S.2d 173 (1973) and Burns Jackson Miller Summit & Spitzer v. Linder, 108 Misc. 2d 458 (1981), prima facie tort actions for damages resulting from illegal strikes were upheld. This doctrine makes "actionable an intentional wrong that [does] not classify into any of the formal categories" of tort law. 108 Misc. 2d at 465. The doctrine is justified on the ground that "[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," 108 Misc. 2d at 465, quoting Holmes, J., in Aikens v. Wisconsin, 195 U.S. 194 (1904). The sweeping terminology employed by the Burns court begs the question of what constitutes an "intentional wrong," especially when the analysis is, by hypothesis, divorced from the formal categories which define tort law. See W. PROSSER, supra note 92 at 4. ("[E]ven with allowance made for the difficulty of wording it, the rules does not tell us what the law will recognize as 'harm' to another, or as 'justification' for it."). But these cases do suggest that even when the negligence analysis concerning utility of conduct and liability proceeds less formally, that analysis results in finding illegal strikes tortious.

Of closer relevance to negligence, the court in People v. Vizzini, 78 Misc. 2d 1042, 359 N.Y.S.2d 143 (Sup. Ct. 1974), upheld the validity of indictments that charged leaders of a firefighters' local that illegally struck with criminal reckless endangerment, pursuant to N.Y. PENAL LAW §§ 120.20, 145.25 (McKinney 1975). If a union's leaders incur criminal recklessness by conducting an illegal strike, courts should, a fortiori, find it possible to impose civil liability for simple negligence. While Vizzini involved allegations that the defendants fraudulently reported the results of the union strike vote, the magnitude of the risk posed by a strike
Because illegal strikes exert pressure on public management through the medium of damage to the public proximate cause would not appear to present a difficult issue for plaintiffs able to establish cause-in-fact. Government employers, of course, do not operate for a profit and may even save money during a strike. The union enjoys bargaining leverage during a work stoppage precisely because the immediate, primary, and foreseeable result of illegal strikes is damage to the public.

Causation-in-fact may present a closer issue in many cases. While a police strike may lead to a demonstrable and perhaps dramatic crime wave, any particular citizen victimized during the strike may not be able to link the injury conclusively to the strike. Fire destroys many buildings even when the fire department actively

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158. The court in Jamur Prods. Corp. v. Quill, 51 Misc. 2d 501, 509, 273 N.Y.S.2d 348, 355 (Sup. Ct. 1966) dismissed causes of action for nuisance and prima facie tort later upheld in New York courts because the damages complained of were "too remote" to allow recovery. The court cited United Mine Workers v. Osborne, 279 F.2d 716, 729 (6th Cir. 1960), cert. denied, 364 U.S. 881 (1960), as authority for this proposition. 51 Misc. 2d at 507, 273 N.Y.S.2d at 354. Osborne involved a suit against a union for an illegal strike by a sales agent of the employer. The court found that the economic losses to third parties imposed by a strike were too remote to permit recovery.

This authority ignores the distinction, now recognized by the New York courts, between public and private sector strikes. Private sector unions exert pressure on management during a strike by shutting down production, thus reducing sales and, ultimately, profits. But a government employer does not operate for profit. The only way the public union's strike exerts pressure on the employer is by inflicting damage on the public. As the court observed in Caso v. District Council 37, 43 A.D.2d 159, 163, 350 N.Y.S.2d 173, 177 (1973): "The assumption in Jamur that the risk of damage in the subway strike was unforeseeable should be rejected, since it is the very inevitability of extensive damages which led to the prohibition of public strikes." Because the union calculates its bargaining leverage in terms of its capacity to inflict damage on the public — the strike having no other impact on the employer, typically — damage caused in fact by public employee strikes will nearly always deserve classification as "proximate."

159. Education furnishes an excellent example of an expensive service provided without a user charge to the public. The educational system does not expend its funds during the duration of the strike, and hence amasses a subsidy it would normally expend on education. The pressure on the school board to settle therefore partakes of no financial concerns at all, but exclusively of the political pressures brought to bear through the infliction of damage on the public.

160. See Maidlow v. City of Toledo, 921 Govt. Empl. Rel. Rep. 18, 1981-83 Pub. Bargaining Cas. (CCH) ¶ 37,521 (Ohio Court of Common Pleas 1981). Plaintiffs' decedent was a bus driver killed during a robbery that occurred while the police were on strike. The City of Toledo escaped liability as a result of sovereign immunity. The defendant unions also prevailed on motions to dismiss, but neither service report makes clear on what grounds. The fact situation, however, admirably points up the "cause in fact" problem that may arise in such circumstances.
seeks to prevent this result, and this diminishes the likelihood that
fire losses during a strike would not have occurred but for the strike.

Several considerations minimize these difficulties. First, in many
cases the causation question will not prove difficult. In one case, for
example, the court had no difficulty concluding that "but for" the
sanitation strike, plaintiff's beaches would not have been drenched
with sewage.\footnote{161} Second, in cases where the causation issue proves
more difficult, there is no reason to suppose that the trier of fact will
falter. American law typically requires both judge and jury to make
difficult causation judgments.\footnote{162} The final consideration that under­
cuts any objection to private actions premised on the difficulty of
cause-in-fact is the satisfactory resolution of far more difficult causa­
tion questions in other contexts.\footnote{163} An example is the innovative ap­
plication of probability analysis to class-action damage awards.\footnote{164}
Regardless of how troublesome cause-in-fact questions might be in
specific cases, litigants deserve at least an opportunity to present
their evidence to the trier of fact.

4. \textit{Damages}

If private actions are allowed against public unions, the primary
issue will then be whether a union will have the resources necessary
to compensate all potential plaintiffs. A union, possibly impover­
ished by contempt fines, will rarely have assets that even approxi­
mate the size of potential damage awards. This imbalance may lead
to great difficulty in fairly compensating the entire plaintiff class be­
because no individual is likely to receive more than a small fraction of
his actual damages.

This problem does not justify refusing to recognize private ac­
tions. Each plaintiff should be free to decide whether the potential
recovery makes litigation worthwhile, either individually or as a
member of a class. Furthermore, private litigation will rarely be ini­
tiated except against a union possessing significant resources.\footnote{165}
And, as between tortfeasors and their victims, even partial compen­


162. Jurors often weigh the credibility of two witnesses with completely contradictory ac­
counts, or assign fault in unwitnessed double fatality automobile accidents. Such judgments
are at least as ineluctable as the causation problems presented by damage actions premised
upon illegal strikes.


164. Such an approach in a public union strike case would measure the difference in casu­
alties attributable to the strike, and assign each casualty victim for the strike period damages
equal to her actual loss multiplied by the probability that but for the strike she would have
escaped injury. \textit{See} note 163, \textit{supra}.

165. \textit{See} the policy analysis developed in note 107 and accompanying text.
sation serves the fundamental policy of tort law. Plaintiffs deserve at least the option of pursuing partial compensation.

CONCLUSION

The absence of legislative intent to prohibit private remedies through the enactment of public sector labor legislation suggests that common-law tort principles should define the scope of union liability for illegal strikes. Nuisance and negligence offer two possibilities for defining such liability. In the judicious application of these familiar principles, rather than in speculation concerning ineluctable legislative purposes, lies the proper role of courts adjudicating private damage actions against public sector unions for illegal strikes.

166. W. PROSSER, supra note 92, § 2, at 7 (the tort action's "purpose is to compensate him [the victim] for the damage he has suffered at the expense of the wrongdoer."). Most victims probably would prefer partial compensation to none at all. And the deterrent effect of private actions, even if motivated by a lust for attorneys' fees, serves the public policies underlying the strike ban. See notes 81-92 supra.