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## **Lost Time: Paying for Delays Associated with Labor Strikes and Traffic Jams**

(chapter in a coming book: *Research Handbook on Law and Time*)

Saul Levmore

January 1, 2024

Waiting is often costly. In many settings, one party delays to impose costs on another. In other settings, delay yields a small gain while imposing significant costs on others who cannot easily bargain. Where the parties can bargain, at least one expects the other to relent and to bring about a settlement that is mutually beneficial. Inasmuch as time offers the opportunity to gather information, compare alternatives, and reach yet better bargains, law does not and should not simply discourage all delays. On the other hand, it is often the case that when parties delay before reaching a bargain, they not only suffer costs, but they also impose costs on third parties who had little opportunity to shorten the delay. It is these costs that are examined in this Chapter, along with an idea for lowering these third-party costs. When this can be done, the costs of delay to the bargaining parties are also likely to be decreased. They might be happy to have a legal rule that appears to tax them but that often encourages quicker agreement and lower delay costs.

### **Third-Party effects and labor strikes**

A starting point is to divide the problem of time management in two, and think first of the more obvious cost of delay, namely that which befalls the bargaining parties, and which they can presumably consider themselves. The focus of this Chapter is on a three-party problem – with the aim of thinking of the third-party losers as suffering a kind of economic loss or unusual tort claim – but it begins with the standard contract theory involving just two.

Start with the case in which one party has information and another has reason to gather much of the same information over time. This information gathering is duplicative and thus costly and wasteful. In principle, the party that can gather information less expensively can profit, while at the same time economizing on social costs, by giving or selling the information to the other. In private life, where law plays a limited role, parties share information on a regular basis. In the commercial world, when the parties can identify one another and assess the potential gains, they can bargain accordingly. Law might encourage such information sharing not only by penalizing false promises and misleading information, but also, or instead, by affirmatively requiring that accurate information be communicated in the first place. For example, law can and does encourage disclosure before litigation. It often requires disclosure about salaries. Employees and even job applicants could share information, but they suffer from a collective action problem. They might in theory pay the employer for information in order to make better decisions about when to look for employment elsewhere or when to make claims of discrimination by an employer. To do this, they need information about their peers, though the employer will want to hold this information back. Law economizes on these costs, or asymmetry, by requiring that some information be revealed. It does so to prevent discrimination and to discourage false claims. But for the most part, parties control information without law's intervention; to intervene would be to favor one party over another. At the same time, to encourage competition, law also affirmatively discourages employers from sharing information with one another, even though some sharing is likely efficient.

In most of these settings, the expected savings involve time as well as the costs, in time and resources, associated with duplicating the information-gathering process.

A familiar example is settlement prior to litigation. Parties resolve cases to avoid the cost of trials and to gain some certainty, which is, in a sense, a conservation of time. In these sorts of cases, law—at least in theory—need only protect against fraud. It can also enforce contracts and, in this way, encourage the bargains that save the costs of litigation.<sup>1</sup> In most cases, parties perceive the cost of delay to themselves, and they reach bargains or move on to contracting with other parties or simply declining some opportunity. But in a subset of cases, they surely underestimate the likely cost of delay or overestimate its future benefits.

The third-party problem is already apparent. The parties contemplating settlement to avoid litigation are unlikely to consider the cost of a judge's time as well as the costs absorbed by witnesses. They are even less likely to consider the costs and benefits to third parties who might learn something from the litigation. The rules of civil procedure do impose modest costs on a party that declines an offer of settlement that later appears to have been unwise. Whether or not this is a good rule is beyond the scope of this Chapter, but it is more likely to be an attempt to save court costs and to encourage good settlement offers rather than to encourage parties to consider third-party effects. Nor do the rules of procedure consider the benefits that litigation or even discovery before litigation offer third parties (Zambrano 2020, as well as the chapter entitled "Litigation Scar Tissue & Construction Costs" in this volume). As for these third-party advantages, the idea that information can be derived from discovery might mean that law ought to encourage litigation where at least one of the parties is likely to be a repeat player. On the defendant's side, this includes cases regarding sexual assault, antitrust, and employment discrimination, but it is probably of less importance for cases involving matters without the expectation of repeat offenders.

Overall, it is hard to know whether further legal intervention is a good idea in these cases. In contrast, long and costly delays associated with labor strikes, also a setting where settlement is stalled because parties misestimate the other side's resolve, have more apparent third-party impact. As for the benefits and costs to the two parties, it is usually difficult for the employer to find a set of new workers and then train them, and it is difficult for many employees to find jobs elsewhere at wages that match those they anticipate from the first employer, given the skills they have already acquired. A labor union has reason to prefer wages that rise with experience, for this takes advantage of its monopoly power and satisfies its median voter. Most employers also prefer such a wage profile because it discourages departures by skilled and proven workers.

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<sup>1</sup> There is an important difference between most lawsuits and labor disputes on the one hand, and job offers (and acceptance) on the other. If, as this Chapter proposes, law imposes a cost on delay in the latter case, it might discourage transactions. If we only tax completed contracts that were delayed, parties will inefficiently move on and contract with a second-best partner with no delay. This Chapter begins with labor strikes because an enormous fraction of these strikes end in a settlement and a return to the workplace. There is little risk that a charge for delay will lead either party to a second-best solution, which might be associated with limited losses. In the case of hiring decisions, it is possible, as will be shown, to encourage applicants and employers to make quicker decisions, even if these are to go their separate ways. There is no danger of suffering from an ex-post bias; it would be unwise to tax slowly-completed contracts as if the completion of these contracts were inevitable.

But it is the externalities, or third-party effects, that constitute the novelty introduced here. Again, we might rely on contracts, turning this into a three-sided bargain, but high transaction costs are a familiar reason for law's involvement. Consider the bargaining process between labor unions and management. It is useful to dig deeper into the bargaining problem these two parties face, before attending to the externalities that the parties impose on others. A union typically overcomes collective action problems among similarly situated workers. The workers could, in principle, contract with one another on a step-by-step basis, but the formation of a collective-bargaining unit economizes on these costs, even if it does so at a price. Unionized workers will often have the same bargaining "power" as the management they face, though there are many reasons why one side or the other is more eager to settle a dispute. Some employees lack outside opportunities, and some employers must invest in training. Often, a monopolist is up against a monopsonist.

There is extensive writing on this sort of bargaining. On the one hand, strikes are unsurprising. Neither party wants to show weakness, and each can see that the other is suffering with the passage of time. When two parties are seeking to divide a surplus, it often seems that the division of the pie is impossible to predict. It is a game of chicken because the cost of a strike is likely to be high on both sides. In the labor context, every lost day is followed by another game of chicken with no clear end in sight. To give an idea of these costs, the relatively minor industry of major league baseball experienced a 7-month strike in 1994-1995, and it is estimated to have cost about \$1 billion, not counting the losses suffered by fans (who lost pleasure), parking facilities, television broadcasters, and a host of other parties, when a large part of the baseball season was lost. A short 10-day United Parcel Service strike threatened—but avoided—in 2023 was estimated to cost about \$2 billion in lost wages and income, and then \$6 billion more when the impact on small businesses and other parties that would suffer because of the unavailability of delivery services was considered.<sup>2</sup> There are of course very much longer and more costly strikes in history. How might such losses be avoided, and why can parties not anticipate these losses and avoid costly strikes in the first place?

There are familiar explanations for this costly game of chicken. It can be understood or recharacterized as a problem of overconfidence that one's opponent will be the first to flinch. Other arguments include things like a sense of fairness (my position is right and yours should be penalized even at a cost to me); competitive sensibilities (one wants to win a game and there might be no end to the drive or pleasure of competition); agency costs (perhaps the union leaders as well as the employer's managers do not suffer enough of the loss that accrues to their principals); and even a sunk cost fallacy (though if one reasons in terms of marginal costs and benefits, this is a fallacious way of thinking). Note that up to this point there is no mention of externalities.

Law might help by offering mediation or other devices. Arbitration itself might be shunned by the parties perhaps because at least one party suspects that an arbitrator will be biased or fail to understand important elements of the dispute. More generally, in standard arbitration proceedings, one or both parties might think that arbitrators tend to split the pie down the middle. This would encourage the employer to think that the labor union will make an outrageously high demand,

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<sup>2</sup> Whether or not these estimates were accurate, the idea is that third-party effects can, even when substitutes are available, sometimes be vastly greater than the projected costs to the parties' negotiating terms of employment. The estimates in the text were taken from <https://www.cnn.com/2023/07/14/economy/ups-strike-economic-impact/index.html>

because the employer is likely to feel bound at the lower end by the previous labor contract. There is substantial literature on these topics, and more to be said, but the focus here is on encouraging a settlement before time imposes costs on third parties.

In many cases, it is reasonable to regard the employer and the union as capable of managing and minimizing their own costs. Just as governments are unlikely to set efficient prices for goods, or even to freeze prices (and wages) for substantial periods of time, it is unlikely that law can set efficient wages or other terms of labor contracts. Indeed, if a party seeks government involvement it is likely to be because it thinks this will tip the bargain to its advantage. This can of course increase the cost of strikes to the other party and to third parties, as is likely true for proposals to allow striking workers access to unemployment insurance. On the other hand, it could encourage employers to give up and settle, and thus reduce third-party costs, unless this happy result is overwhelmed by a greater probability of strikes and third-party costs in the future.

It is difficult for these third parties to bargain with a union or employer to end, or altogether avoid, a strike—a term used here to include both strikes and lockouts, with no implication that we somehow know which party has “caused” the inefficient cessation of production and work.<sup>3</sup> Consider the recent UPS case. Many businesses require parcel service, but most of these businesses can switch to another provider at some cost. The availability of alternatives limits these third-party business losses and thus reduces their willingness to pay the first two parties to avoid a strike. Moreover, if third-party businesses pay the UPS and its workers not to strike, the latter two might threaten strikes more often, and even engage in some strikes to make future threats credible. In any event, during a strike, individual consumers would need to travel to shops if the delivery service used by the shop were unavailable for weeks on end. The consumers themselves would find it difficult, if not impossible, to coordinate and pay the two parties to end their battle. They are even less likely to coordinate than are the shops served by the delivery service. And even if individual consumers who expect deliveries could overcome the coordination problems and pay, they too should fear a moral hazard; unions and employers might relish the next chance to extract payment from many sets of third parties. The question is what law can do to encourage the union and employer to be sensitive to these negative externalities.

### Lowering the cost of strikes

Strikes could simply be outlawed, just as wages and terms of employment have been set by law during wartime, and much as some employees are threatened with imprisonment if they dare strike. Most of these critical workers are somewhat protected by political forces, and some can engage in semi-strikes by engaging in slow downs. But even setting aside any arguments about the inefficiency of bypassing market transactions, forbidding strikes in many industries would be politically unacceptable. The trick is to save social costs and convince voters, if not the combatants themselves, that law is encouraging or even imposing upon them the solution that they likely would have reached on their own over time. The political element depends on people seeing that law is sensitive to the cost of delay to third parties as well as the costs of delay that will otherwise befall the more visible combatants.

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<sup>3</sup> This idea of shared responsibility is discussed below with a comparison to comparative negligence in Tort law.

The problem with most attempts to influence the parties by forcing them to internalize the external costs of their disagreement is that the intervention is likely to favor one party over the other. This will raise objections that are more likely to be offset by the views of parties that are difficult to organize and that may be unable to self-identify in advance. There is also a risk aversion element here. Promising the population that it will benefit from a costly end to strikes requires people to think in terms of expected costs, and this often fails because of risk aversion. People want to know in advance that they will benefit, rather than be told that on average something is good for the economy. Imagine suggesting a doubling of the income tax for a random selection of one half of taxpayers, while forgiving the tax liabilities of the other half. The losing half could change from year to year. Citizens and businesses are likely to object, prospectively and vigorously, to such a plan even if it saves administrative costs for the government, tax liability for half the population, and therefore an overall benefit especially if severely affected parties could purchase private market insurance.

On the one hand, if the intervention shortens a strike, and strikes are very expensive (and far exceed the administrative-cost savings of this hypothetical and bizarre change just imagined in the tax system), the parties themselves will benefit so much that they might agree to internalize the external costs of their disagreement. Still, any intervention will likely favor one party and thus influence the eventual “agreement” in a way that might be inefficient and might be opposed by parties that think they benefit from occasional strikes. Law could, for example, penalize both parties with daily fines for the duration of the strike, but however these fines are structured, one party is likely to be empowered over the other. The fines will encourage one side to give in more quickly than the other, and the overall effect will be for law to create winners and losers, an unpalatable outcome for those who regard even-handedness as an important feature of good lawmaking.

### Strikes as torts

Once external losses are considered, strikes can be usefully compared to what is normally recognized as tortious behavior. In this case the “tort” is something committed by both sides. If it is committed by one anti-social player, we are unlikely to know whether it is management or labor that is more responsible for the damages suffered by third parties. It is tempting to think that after a settlement is finally reached, we can look back and see which side was unreasonable in its demands or holdouts, but this will just prolong a strike. The employer and union can be seen as jointly negligent because they impose costs on others while seeking gains for themselves. They do not take third-party losses into account when contemplating their own precaution-taking. Bargaining strategy is hardly the same as most tortious behavior that brings on third-party damages, but both impose losses that are efficiently preventable. In this way, and with a bit of imagination, many strikes can be thought of as the result of (comparative) negligence by employers and employees. At least one, if not both, of the parties is negligent in cost-benefit and moral terms. In keeping with the insight of the literature on contributory and comparative negligence, it does not matter how the costs are distributed between the parties (Shavell 1980). A legal system that will divide damages between negligent parties will lead at least one of the parties to behave properly and, knowing this, the other party will be inclined to behave non-negligently in order not to be left bearing the entire cost of damages. Indeed, the direct costs suffered by the parties themselves can be included in the calculation, but it does little harm to set that aside here.

The analogy between strikes and comparative negligence is admittedly somewhat twisted and so primarily illustrative. For one thing, it is unclear what a union or employer could do to be deemed non-negligent. There is nothing equivalent to the usual Learned Hand test. The union could make an offer and if some court or third party deemed it a reasonable offer, the employer could be left paying damages until a settlement is reached. This is plausible but would probably not be politically popular. Though it is just one step removed from final-offer arbitration, the fact that the parties have not already chosen this dispute resolution mechanism, or even any method of binding arbitration, coupled with the fact that law has rarely imposed such arbitration on parties other than on some public employees, suggests that this is not a workable solution.

Another problem with the analogy is both doctrinal and conceptual. Tort law does not normally allow recovery for pure economic losses, and the payments encouraged in this Chapter are for the economic losses suffered by third parties. Tort law allows victims to recover for their physical damages as well as lost wages and other economic losses, but if there is no physical injury there is normally no recovery. If A's negligence puts B out of work for a year, B can recover for medical bills and then for lost wages, but B's employer cannot recover the cost of hiring a substitute employee, C, who fills in for B. The employer's loss is said to be a (non-recoverable) pure economic loss. The best explanation for this rule is that in large part C benefits, so that the net social loss is closer to zero than to the employer's loss. Most pure economic losses are indeed offset by economic gains enjoyed by other parties, at least if we can assume that firms have excess capacity as is certainly the case for parcel delivery services and other third parties referred to here (Bishop 1982; Rizzo 1982). Indeed, many of the exceptions to this rule can be conveniently explained as cases where there is no party like B to collect and deter wrongdoers like A. In this way, the law can be described as denying recovery when there is another party that benefits, so that there is little "net social loss." Thus, there is a "fishermen's exception" to the (no recovery for) pure economic loss rule. Similarly, businesses have recovered for what they lost because of oil spills. In both cases, there are no well-situated plaintiffs to recover under conventional tort law and to deter negligence on behalf of polluters or other wrongdoers.

In modern times, there are many tort substitutes so that recovery is in fact given for pure economic losses. For example, recoveries after the Deepwater Horizon oil spill in 2010, funded by a \$20 billion payment by BP Oil, compensated businesses that suffered from lost tourism and other activities. The idea of charging employers and unions for third-party losses is surely not identical to these cases because in the case of work stoppages there is more considerable direct harm to the parties "causing" these losses. This already internalized harm is far greater, in proportional terms, than that suffered by BP or other negligent oil spillers. It is enough of a deterrent to prevent many strikes, but the focus here is on strikes, and social losses, that might be prevented by additional deterrence that reflects social losses. In the UPS example (and not the major league baseball situation), the net social loss is far greater than the loss suffered directly by the parties analogized to tortfeasors. In short, the economic loss piece of the analogy to tort law should not detract from the fundamental idea of considering and reducing the third-party effects of delay.

The better analogy might be to strict liability rather than to (comparative) negligence. In the world of strict liability there is no need to determine which party in the failed negotiation behaved negligently, though it is important to be sure that any negligent party bears a considerable cost of

the damages. A problem with this form of the analogy is that it is unclear how to divide costs, or damages, between two strictly liable parties, when neither of whom is deemed negligent. Normally, if two strictly liable parties are involved in a third party's loss—admittedly a rare thing—a jury will be asked to assess the relative degrees of liability through an examination of each party's relative causal role in the harm. An assessment of the relative negligence seems infeasible since strict liability is on the table. In some settings this is just garbled talk as expressed in jury instructions. It is nevertheless effective because the actual division of responsibility between the defendants does not much matter if the goal is to minimize the cost of accidents that can be efficiently avoided. If a very small wild animal (regarding whom the owner is strictly liable, for having brought the animal out of the wild), together with a previously caged lion, brings about an injury to a person or some private property, we can be sure that a jury will decide that the lion was the much greater "cause" of the loss. In the future, then, those who keep lions will know to take more serious precautions, while the smaller animal's owner will know not to count on a lion's involvement to shield it from substantial liability. If the small animal alone does harm, there will be no lion tamer with whom to share blame because the lion owner can be expected to guard the lion with extreme caution. The small animal will be the only animal to have brought about the loss, and its strictly liable keeper will pay the full damages.

More realistically, or at least frequently, the same is true if two products-liability defendants are somehow connected to a loss. If a toaster oven and a microwave happen to explode at the same time, perhaps because one triggered the other, an injured plaintiff will likely recover after suing both sellers or manufacturers. If the plaintiff sues one, the other might be impleaded. In any event, a jury is likely to be told to apportion the loss based on an assessment of the extent to which each party contributed to the injury. Mere causation, rather than negligence, will be the focus of the inquiry.

The same might be done when parties are unable to resolve a labor dispute. One suspects that a court or arbitrator asked to allocate damages, will act as it would in the case of the wild animals. If there is a large company in combat with a small union, it is easy to predict that the damages will be largely allocated to the larger enterprise. There will be few such cases. If the scheme proposed or simply imagined here is restricted to cases in which it is the externalized costs that motivate legal intervention, then it is likely that low "damages," or charges, would be imposed on a small party, and that overall damages to third parties will also be small. The legal system might only concern itself with costly strikes and these will almost always involve a significant number of workers and a sizeable corporate employer. In any event, the remaining discussion is limited to consideration of cases with substantial externalized costs.

#### Equal responsibility for externalized costs

If the idea under development here, namely that we can hold employers and unions responsible for externalized costs, is limited to conflicts between large parties, a rule of splitting damages equally might work nicely. One method would be to have a third party, whether a court or expert, assess the externalized costs, and then divide these costs equally between the parties. There might also be positive externalities, and the assessor should take these into account as well, and reduce the



negative externality sum accordingly.<sup>4</sup> The assessment would need to establish a total cost per day, so that the parties have an incentive to avoid strikes or at least to settle quickly once a strike is in progress. The assessment process need not be difficult. It can be estimated by the bargaining parties themselves. For example, the parties might have been engaged in a previous work stoppage, and current costs will be like those assessed or observed on some earlier occasion. In other cases, no legal assessment will be needed; the parties might agree, *ex ante*, to hire an expert to assess the costs they will be required to share in the event of a strike, or at least a prolonged strike. They might even agree without the involvement of an expert. If the costs are significant, the parties will have an incentive to settle quickly. If there is a serious problem with estimating third-party costs, it is that some of the costs to these parties are eventually captured by the firm that has been disrupted by the labor strike. In some cases, its producer surplus matches third parties' gains from the firm in the labor dispute at hand. In these cases, the charge to the firm (and perhaps to the striking union) may simply be a way of recapturing the benefit it will enjoy when the strike ends and the third parties catch up for lost time by buying more of its product. This does not mean that the third parties have not suffered losses from delay.

It is impossible (and misguided) to promise that this accounting for, and assignment of, externalized costs does not favor one party over the other. One may simply have cash on hand and regard the division of externalized costs as reason to think that the other party is bluffing and will want to settle quickly. The well-healed party might then be more aggressive, rather than more compromising, in its bargaining position. If this is the case, we might as well skip the step of assessing externalized costs, and simply tax the parties for each day that passes without a settlement. The idea is again to turn the cost of wasted time into something that encourages a faster bargain and less waste.

To be fair, it is always possible that charging parties for external costs lengthens rather than shortens strikes and their attendant costs. If both parties think that the costs imposed on the other will cause this vulnerable party to give in, a strike might be extended, and costs might be increased rather than decreased. This seems unlikely, but it is safest to say that only experience with the idea proposed here would show whether this is true.

#### Retroactive payments

The solution proposed here—charging the parties for the externalized costs imposed by their disagreement—can be compared to another idea. It is one that parties might have developed on their own without any need for legal intervention and charges to the warring parties. Union and management could agree that work will continue under existing, previously agreed upon, terms, but that once they do reach an agreement, workers will be compensated retroactively under the conditions (including wages) agreed upon in the new contract. If, for example, wages have been \$30 an hour in the final year of the old contract, and the parties cannot agree on a new contract, then, instead of suffering a strike, they can or must continue to work at \$30 knowing that when they eventually settle the case at \$36, for example, wages will be paid retroactively. The workers

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<sup>4</sup> There are cases where the positive externalities might be deemed to overwhelm the negative ones, and law might declare that there be no charges for third party losses. For example, a lawful protest rally might cause traffic delays, but these delays, annoying as they might be to some citizens, might be protected by the right to free speech, or simply a judgment that the cost is worthwhile.

will receive another \$6 per hour, plus interest perhaps, for the hours worked while no contract was in effect. Of course, workers can quit during the period, and management can hire and fire employees, but all this is constrained by current law.

There are many things wrong with this plan. The most obvious is that management has no incentive to reach a bargain. Even if the rule attaches interest payments to the retroactively increased wages, the new contract might never be reached. The employer will see that it has secured employees at the old wage, and that these costs will not increase until a contract is agreed upon. Something is needed to (eventually) force a bargain, and whatever it is might then affect the bargaining power of the parties. In contrast, the idea of charging the parties for externalized costs gives both sides strong reason to settle.

### Summary of the proposed solution

In the end, the idea of assessing the externalized costs and splitting them may well be close to the optimal solution. As a psychological and political matter, it will probably be regarded as fair, as equal sharing rules normally seem to be. It is superior to a pure tax on strikes because it draws attention to the costs imposed on outside parties. It is superior to any plan that encourages the outside losers to pay the union or management to settle the strike. Note that it would be destructive to follow the plan suggested here and then award the payments to these outside, third, parties. Injured third parties might be hard to identify and, in any event, nothing is gained, and some efficient bargains might be lost, if the payments were made to the identifiable injured outsiders. It is also possible that strikes often settle because of pressure from outsiders, and it would be a shame to lose this pressure by rewarding outsiders as the strike continues. Any payments that are required by parties who enable long strikes might simply go to the federal government or perhaps to local jurisdictions that are most affected by the strike and are themselves injured third parties. There is some chance that governments in search of such income will do what they can to *prolong* strikes and raise social costs, but this seems unlikely. There is not much governments can do to encourage or prolong strikes, and government behavior will be noticed and penalized in the political arena.

Nothing stops the parties from agreeing by contract to something other than a 50-50 division of what they must pay for a prolonged strike. They can do this *ex ante*, *ex post*, or in the middle of the bargaining process, all while in the shadow of a rule that will extract payments from them for every day on which their disagreement imposes costs on third parties.

Before moving on to other applications, a few concluding observations are in order. First, the idea is to encourage returns to work, because work stoppages are costly to the employer and to employees, as well as to third parties. War is costly. Second, the problem with forcing a settlement by legal fiat with a yet greater threat, is that one party is likely to suffer from the threat more than the other. This will almost surely bring about a contract, or settlement, rather quickly, but at the risk of a settlement that is far from what the parties would have reached on their own. Dividing the outsiders' costs is thus better than a large fine or a plan that criminalizes strikes. In any event, such extreme solutions are politically unattractive. Only when third-party effects are enormous—as in the case of a (imagined) strike by police or by military units—does law resort to a complete ban on strikes with serious consequences for violators. And in these cases, the employees are numerous and likely to enjoy considerable political support. If this leads to a kind of underpayment

to police, for example, voters and elected officials will soon see that there is an insufficient supply of new recruits, or even (when possible) a substantial number of early retirements or defectors. There are not many labor contracts that law can really force on workers in the private sector.

A novel feature of the discussion to this point is to liken a dispute between workers and employers to behavior that is discouraged by a tort case governed by a rule of comparative negligence. We might imagine that outside parties could bring a tort claim against the union and management, and a jury could decide on the allocation of damages. We have seen why this is a fitting exception to the normal tort law rule of denying recovery for pure economic losses. On the other hand, allowing tort claims by third parties comes with collective action and other problems. Outside parties might like for workers and management to bring about a strike if they expect over-compensation; and if they expect to be under-compensated, they will still like the result of fewer stoppages. The central idea is to draw attention to the impact on third parties, to use it to reduce the social cost of strikes, and to do this without doing much to alter the parties' relative bargaining power. It is possible that many unions and employers will favor this plan. They will occasionally make payments that to them might look like fines, but they will also expect fewer and shorter strikes. Everyone can benefit.

The analogy or incorporation of comparative negligence law raises questions that are beyond the scope of this Chapter. In some sense, every avoidable damage comes from at least two parties rather than one. A negligent driver on a snowy day might have caused less loss if the pedestrian that was hit had (efficiently) stayed indoors; the injury might also have been avoided if the streets were wider or the curbs higher. The discussion here is imagining that every labor strike results from the behavior of two parties, while most readers will point to specific strikes that were caused by the behavior of just one. In these cases, dividing damages down the middle will seem unfair. Again, the argument is in part avoided here with the idea that even a 50-50 split of the third-party losses will deter the "wrongdoer."

### **Other Applications**

It is time to try some extensions to the somewhat fanciful idea suggested here. A starting point is to ask why we do not always think about assessing and compensating third-party effects. There are many prospective bargains that are not only efficient, but also would positively affect third parties, and yet they are not reached because parties play a game of chicken and simply fail to negotiate a desirable bargain. Why not impose penalties on these parties as well, and especially so where there appear to be significant net social losses?

The prospect of any such payments for negative externalities is likely to do more harm than good. Law has no way of knowing which potential bargains are efficient, and requiring payment for slow negotiations would threaten to discourage negotiations and bargains altogether. The same could conceivably be true of a failure to renegotiate a labor contract, but here it is overwhelmingly likely that continued employment is efficient. Parties are unlikely to resist taking jobs or building factories because they might be fined or otherwise required to pay for third-party losses or foregone potential gains. Still, this is a small problem with the proposal here. It is like the problem or genius of strict liability in tort law. If the driver of a car is strictly liable for all accidents, regardless of fault, there is likely an activity-level effect. This might be efficient in that it will discourage

automobile ownership when that ownership brings about accidents, but it might also discourage efficient driving because it shifts costs away from pedestrians (who might also do some inefficient walking) or other injured parties onto automobile owners. In most cases, we have no way of knowing whether activity-level effects are better accounted for or ignored in law. The same is true here for something like employment. The cost of hiring a worker rises slightly if the employer (and employee) knows that it might be charged for third-party effects if they fail to reach a bargain someday. In theory, potential employers and employees might be discouraged from entering the earlier contract.

### Settlement before trial

If the larger idea is to reduce the costs associated with wasted time, then another area of interest is bargaining before trial. In the case of criminal trials, the government has an incentive to “pay” for plea bargains because it can avoid the cost of further factfinding and investigation, as well as the cost of conducting trials. In some cases, a defendant’s lawyer has an incentive to go to trial and in many others an incentive to bargain. The dominant view is that the government does pay for bargains, in the form of reduced (suggested) sentences when defendants accept plea bargains, and thus pays to “save time,” in the jargon offered here (McCoy 2020). At the same time, most academic work suggests that this is a problem. If people have a right to trial, then the government is paying people to give up a constitutional right, and this is viewed as troubling (Johnson 2019; Schulhofer 1992).

I will not enter this debate, as it is somewhat orthogonal to the question of time. It is more instructive here to look at the costs of time, and the idea of encouraging settlements in civil cases where a constitutional right is usually absent. Again, the parties absorb most of the costs of delay. They have reason to settle to gain certainty and to avoid the costs of trial. There are civil cases involving the government, such as many antitrust cases, and there are cases between private parties. Both are of interest. The latter can be solved by charging the parties for the costs of court time, though, again, this can change the balance of power. This, too, can be partially solved by having the losing party pay for the cost of judging, if not for the costs imposed on the other party, in the manner of the British fee-shifting rule. It is not a complete and simple solution because many cases will be decided in a way that is less than a complete victory by the winning side.

In civil cases where private parties are pitted against the government, there is less room for discussion about paying people not to exercise their constitutional rights. The discussion thus sets aside takings (the taking of private property by the government) and other cases where there are constitutional concerns but no criminal penalties. The arguments are now like those involving private parties litigating with one another. Settlement might be desirable as a matter of overall efficiency, but it is at least as likely to be inefficient because a failure to settle imposes significant costs on third parties. Indeed, there is a school of thought that is “Against Settlement,” because a dispositive court decision gives valuable information about the law to third parties (Fiss 1983).<sup>5</sup> Court decisions also develop what is presumed to be better law. Under this view, settlement imposes information costs on third parties who would be better off knowing the state of the law. Overall, it is probably fair to say that we have a draw. Litigating provides information to some

third parties, but it delays the advantages of certainty in the case at hand. It is hard to argue for taxing parties to get them to rush to settlement. Similar arguments can be applied to other civil cases and even to criminal cases. In the end, this discussion is meant to reveal that these cases have little in common with labor strikes, where there is a much stronger argument for imposing costs to get the parties to take negative externalities into account.

### Offers of employment

The mixed effects of delay on external costs amount to a common feature of bargaining and decision-making, and it is this mix of positive and negative effects that should make us skeptical about expanding the idea developed here to other settings beyond the realm of labor contracts. Consider, for example, the frustration a job applicant suffers when applying for a job, and then not hearing from the employer for some time. The employer is unlikely to consider the cost of delay to the applicant, to other applicants for the same position, and to other parties who would benefit from knowing which applicant will be hired. The prospective employer might be motivated by a desire to see more applicants, to see whether some current employees are departing or seeking new responsibilities, or by indecision and internal disagreement. At least one of these reasons imposes more costs than benefits.

It is arguable that we could again impose a charge, in tort-like fashion, on the employer who “negligently” defers its own decision-making. On the other hand, the waiting applicants can announce that they need a quick decision, or they will become unavailable. This Coasian solution works in the other direction as well. The employer could pay an applicant to wait for a decision. Exploding offers can work in both directions and can extend to parties that are further removed from the applicant. They also reveal information that the parties may wish to keep hidden. Thus, a prospective employer may not make an (efficient) exploding offer because it thinks it will show a lack of confidence in its attractiveness to employees. The job seeker may not wish to charge for delay because he or she fears that this will be understood as a sign of a difficult person. As usual, if there are no transaction costs, the rule does not matter. But because transaction costs are not zero, the idea is not as fanciful as it first seems. Still, the possibility of bargaining about the cost of delay reinforces the larger idea about mixed effects. Delay by the employer comes with costs (usually to the employer and some third parties) but also with benefits (to the employer), and there is no reason to be confident that charging the employer to make up for negative effects is wise. If the costs are great, the job applicant can announce a withdrawal or be paid to wait. And if third parties are affected, they too can charge someone for the cost of time or pay for quicker decisions. These parties are rarely playing a game of chicken, and that was the root cause of extended labor strikes. While labor strikes clearly impose substantial costs on third parties, and are often socially inefficient, the same is not true for delays in the offer and acceptance of employment contracts. There are gains to both parties from shopping around, and no reason to think that these gains are less than the costs imposed on others. This is nothing more than an advanced form of the “net social cost” explanation familiar to some readers, and noted earlier with respect to the pure economic loss doctrine in tort law.

### Wars

War between two countries is a closer cousin of labor strikes. Each party imposes enormous costs on itself while imposing such great costs on the other that each must hope the other will be the first to give up or retreat. Long after a war is over, it is often seen as having been unnecessary and tragic. One of the things a country can do is invest in its military to discourage a plausible enemy, but, of course, as it does so, its likely opponent is concerned that the other's military investment will encourage offensive action. It, too, then invests in its military. One solution to this waste is to develop weapons that are defensive but not offensive, though this has proven difficult. Another would be to employ a third party. If the third party can protect many clients, then a great deal of the waste can be avoided. A country that is powerful can serve many client states. There is much more to be said about this means of outsourcing national defense, but because this is a matter of resources and bargaining, rather than the cost of time, it is best set aside here. It is also a case where the parties are threatened with serious losses, probably much greater than third-party losses. For both reasons, this is left for the literature on game theory, foreign affairs, national security, and organizations like the United Nations. In the case of organizations like the U.N., if the agreed upon goal is to organize against any cross-border invasion, then the parties must accept the boundaries found upon formation. Norms like self-determination challenge this starting point but, again, this is a subject far beyond the scope of this Chapter. The feature that war and labor strikes do share is the gamesmanship and means of avoiding costly battles. But the solution offered here for labor problems is hardly applicable to war. Warring countries absorb most of the costs of war and it is unlikely that the world would be better off if third parties exacerbated these losses in order to bring wars to a rapid end. It is hard to imagine that we would all be better off if the U.N. promised not to stand in the middle and try to stop wars, but rather to inflict extra losses on warring parties.

#### Traffic delays

A good extension and a better case to analyze than those considered thus far, involves traffic accidents that cause delays. On a busy day, every driver imposes congestion costs on others, and many localities have experimented with tolls or other taxes in crowded places. This is something of a market solution, but it is not necessarily efficient because wealth effects play an important role. My ability to pay for the right to use a quicker lane does not necessarily mean that my time is more valuable than that of a poorer driver who cannot afford the fee. In any event, a great deal has been written about driving surchargers, so the focus here is on the margin, where accidents impose very significant delays on third parties. Drivers not immediately involved in an accident can sit for many minutes or even hours waiting for a road to clear. Under current law, the delayed drivers have no claim against the parties who caused the delay. This might be explained by the pure economic loss doctrine, but there is very often a huge net social loss; a minor accident can cause serious delays. Even class action law has not gone so far as to bring about recoveries, and this is not just because a coordinated claim would be one for pure economic losses. Nor does the government have grounds for recovery as the best situated claimant. Under the pure public service doctrine, a claim is unlikely to succeed even for the cost of rescuing injured passengers or dealing with the accumulating traffic (Guttel and Porat 2020).

Once again, this is a setting where recovery for lost time might promote more efficient behavior. The costs to third parties could be imposed on those who could often drive more carefully, or at least clear busy roads more quickly and thus reduce the costs that delays impose on others. When driver A hits a guard rail and causes a long traffic delay, we understand that A is already

encouraged to drive safely because A encounters the cost of repairing his car, losing time, and facing increased insurance costs, not to mention the danger of injuring himself. Driver A has reason to be careful, to take public transit, or not to travel in the first place. Still, we do not have a no-fault system; the prospect of paying tort damages for injuring another probably adds to the incentive to drive carefully. In any event, under current law, A has little incentive to get his car out of the way quickly after he is involved in an accident. If A were forced to pay for the lost time inflicted on others, A would be yet more efficiently deterred. A might find the first available tow truck, for example, even if it comes at a high cost and is not the one his insurer prefers. If this seems silly to some readers, it is because there are few cases in which someone like A can really affect the degree of delay, and because most of us work hard not to hit guard rails. And if this is so, then the same readers should believe that our costly tort system should stay away from the roads and highways in the first place. At a minimum, it is a case for no-fault.

A more generous explanation returns us to the pure economic loss doctrine. The idea of no recovery for pure economic loss suffered by third parties might simply be well explained by the fact that no additional deterrence will accomplish much. Law generally draws some lines when it comes to causation, and this might be one such line. In the case of traffic delays caused by an accident involving drivers A and B, another driver, C1's, lost time is very unlikely to benefit others. It is a significant net loss. Indeed, other, yet more distant, parties are likely to suffer because of C1's delay, and these losses encountered not by all the C drivers, C1-C100, but by parties further removed from the scene of the accident are indeed more like conventional, and unrecoverable, pure economic losses.

If we do think that the prospect of tort liability encourages safer driving, and payments go directly to injured parties, then it is noteworthy that the tort system—even if applied to traffic delays—does not bring about an activity-level effect, so long as drivers are risk-neutral. Any activity-level effect imposed on driver B, because she takes into account damages she would need to pay in the event that she causes delay for drivers C1-C100, is offset by the money she would receive when accidents brought about by some of those drivers caused her, driver B, to miss appointments and otherwise suffer from delays she experiences because of the actions of others. The activity-level effect runs in both directions. But, again, I am not proposing that the new damages, taking account of lost time, be paid to affected third parties. To the extent that A and B can be encouraged to drive safely by tort-like claims against them when they are involved in accidents (payable perhaps to the government unless it comes to like long delays), there is something to be gained by taking account of the lost time suffered by third parties. Driver A will hit fewer guard rails and thus the C drivers will be delayed less frequently. And when A and B are in a two-party accident, it is likely that one or both were negligent. The comparative negligence or other scheme that encourages non-negligent driving should include not only the direct cost of injuries to A, B, any passengers, and their vehicles, but also the substantial cost of the lost time suffered by other drivers, like C1 through C100. For present purposes, it does not much matter whether these payments are used in a way that benefits the C's who suffer from delay, or instead go to other recipients.

Nevertheless, one reason why law does not include these claims against A and B in the manner of comparative negligence, is that the C's are difficult to identify. There would also be false claims against A and B, or at least the cost of recording their presence. Some of this is avoided by the emergence of video cameras and advanced surveillance technology interior to each modern car. It

is possible that many C's could easily prove that they were injured by the time lost at the hands of A and B. As a start, delays on highways with tolls are easily computed and especially so for drivers who choose to have transponders in their vehicles. The availability of these records makes it possible for us to assess the third-party costs attributable to A and B's accident. In turn, law can collect and then use these funds for other projects, including perhaps better roads or public transit. The task is to deter A and B.

One effect of the failure of (current) law to compensate for traffic delays is that citizens who are accustomed to delays are likely to call for more lanes on the highway rather than for charging people like themselves who cause delays. They are certainly less likely to call for more enforcement of speed limits because they see themselves as suffering rather than as very occasionally causing delays. Most citizens are not accustomed to thinking about efficient deterrence if only because they are insufficiently trained in law and economics.

It may be fun to think about charging people who cause traffic delays in order to bring about better driving, but the cost—and especially the political cost—of the sort of system imagined here makes the idea far-fetched. If there is something to the idea, it is probably better inaugurated with as little complexity as possible. Perhaps when police arrive at the scene of an accident and observe substantial traffic delays, they should simply ticket all the drivers involved in the accident, other than any that are plainly victims rather than causal agents, and, in this way, charge each some significant fee. If the average significant delay affects 1,000 drivers who would each pay \$10 to be free of the delay, then the \$10,000 could be divided among the drivers who brought about the delay. In most cases, this will amount to a fine of \$5,000. It would remind citizens that their speeding, cell-phone use, and dangerous lane-shifting brings about third-party losses. It might encourage better driving. It might also be popular if every driver who experienced a significant delay were paid with a \$10 credit added to his or her transponder account.

#### Delays with less significant third-party effects

Note that the proposed recovery for traffic delays because of third-party effects does not mean that all delays should be compensated to promote efficient behavior. If an airline flight is delayed, passengers will be furious and, if anything, they will (for psychological reasons) penalize the airline more than is necessary to encourage efficient behavior by the airline. A customer who is annoyed because of a delay at a checkout counter is, again and not just in theory, likely to remember and patronize well-run stores rather than those that often impose the cost of delay. Still, in both cases there are at least as many third-party losers as winners, so there is a significant (net) social loss. Law must count on the market to encourage parties to take account of the time lost by others, in this case customers.

It is possible to imagine a store promising to pay customers who must wait more than five minutes to be served. A supermarket might raise prices and then lower the overall cost at checkout by the lesser of \$5 or 10% of the total charge, to signal that it takes customers' time seriously. Perhaps we do not see this because of some fear of moral hazard; I might pay the customer in front of me to slow things down. This is a kind of moral hazard to be avoided. Similarly, a promise to make pizza free if delivery takes more than 30 minutes, could occasionally lead to a speeding driver who causes an accident. Still, where customers have no control over wait-time, it is not uncommon to



find that they are in fact paid. A hotel that does not have a room ready at the promised time will often offer a free upgrade. And a restaurant that is very slow in delivering food might apologize and offer a free dessert. In these cases, there is no need for law to be involved because the parties have their own means of taking lost time into account.

Finally, when couples date and one party is slow to agree whether to continue the relationship, the loss of time is a familiar cost. But here the cost is borne, for the most part, by one of the “bargaining” parties. Divorce, when children are in the mix, presents a closer case of third-party effects brought about by failed contracts—though this has little to do with lost time. There are certainly third-party effects on children, but parents are probably in a better position to evaluate the costs and benefits, for their children are not exactly third parties. Each child is different, as is each troubled marriage, and it would be difficult to evaluate and monetize the costs to children and therefore the “tax” on the divorcing couple. Still, there could be a fixed tax, unrelated to the particular family. On the other hand, any charge on the divorcing couple—assuming the tax does not bring an end to all divorces—makes the children of the couples who continue to divorce poorer and worse off. Nor can we be sure of an efficiency gain. Almost every labor strike ends with a return to engagement by the labor-management pair, but most divorces end in a continued separation. The couple may have learned that they get more utility living alone, partnering with others, or simply dating.

## Conclusion

There is nothing novel in the claim that time is money. But this Chapter has focused on the idea that parties often impose the cost of lost time on third parties. In some settings, a charge or penalty for this imposition, or negative externality, can reduce waste. The most important example analyzed here is that of labor strikes. Employers and unions could be charged for the costs their disagreements impose on third parties, and all parties—including the combatants—are likely to be better off. A similar idea is suggested for some traffic delays. The larger theme is that law should consider, and then reduce, the costs imposed by delay.

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