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I. Introduction

At common law, civil remedies, including suits for damages, were available to parties injured by strikes in the *private* sector.[1] Such damage actions became, for the most part, pre-empted by federal statutes specifically granting private sector employees the right to engage in certain protected concerted activities.[2] Even today, however, damage actions remain available where private sector strikes go beyond statutory protections or violate contractual provisions.[3]

Public sector labor law has had a markedly different development.[4] Statutory protection of public employees' bargaining rights is a relatively recent phenomenon.[5] In contrast to the limited statutory protection afforded strikes in the private sector,

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1. For an excellent discussion of common-law "aspects of the law of torts in relation to labor unions," see C. GREGORY & H. KATZ, LABOR AND THE LAW 88-95 (3d ed. 1979). *See also* F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 6.

2. This protection came primarily in sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1983); 29 U.S.C. § 52 (1983); sections 4 and 7 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 107 (1983); and section 7 of the National Labor Relations Act, 29 U.S.C. § 157 (1983).

3. *See* 29 U.S.C. §§ 185, 187 (1983).

4. *See generally* K. HANSLOWE, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT (1967); B. Schneider, *Public-Sector Labor Legislation — An Evolutionary Analysis*, in PUBLIC-SECTOR BARGAINING (B. Aaron, J. Grodin, J. Stern eds. 1979).

5. *See* Schneider, *supra* note 4, at 192-93 n.2.

state laws have, with virtual unanimity, declared strikes by public employees illegal and against public policy.[6] New York's Taylor Law[7] exemplifies the majority approach.

If logic determined the availability of damage actions to private parties injured by illegal public sector strikes, the analytical approach might be as follows. Damage actions were available when *private* sector strikes did not have affirmative statutory protection. Certainly, then, actions for damages should be available for *public* sector strikes, which, rather than being statutorily protected, have affirmative statutory *condemnation*. In fact, denying such relief would grant *public* sector strikes an insulation from monetary damages *greater* than private sector strikes enjoy. This is because damage actions for *illegal* private sector strikes are available even today. It would therefore seem that a private damage remedy should be available in the context of illegal public sector strikes, which have also been condemned as contrary to established public policy.

Interestingly, the very fact that public sector strikes are expressly made unlawful, by itself, has complicated what should be the very straightforward analysis outlined above. An initial question is whether the strike penalties prescribed by the public sector statutes were intended to be the *exclusive* remedies for illegal strikes. Since the National Labor Relations Act[8] prescribes no penalties — because private sector unions generally *have* the right to strike — exclusivity is not a hurdle for a damage action based on an illegal *private* sector strike.

Further, so-called "policy" issues concerning accountability for illegal strikes become clouded in the public sector. A private sector union that strikes illegally has full legal accountability for any damages it causes. Yet, under ill-conceived notions of "policy," courts have actually shielded *public* sector unions from such accountability.[9]

The causes of action and legal issues potentially applicable in the context of damage actions for illegal public sector strikes are manifold. This Article directly addresses 1) the key *issue* of

6. *Id.* at 203.
7. N.Y. CIV. SERV. LAW §§ 200-215 (McKinney 1983 & Supp. 1988).
8. 29 U.S.C. §§ 141-169 (1983).
9. *See infra* Part IV.

exclusivity in the context of 2) a key *cause of action* as interpreted by 3) the key *jurisdiction* of New York under 4) a key *statute*, the Taylor Law.

It is hoped that this analysis will help clarify the issue in New York and provide some guidance for those jurisdictions that have yet to consider the availability of damage actions for illegal public sector strikes.

II. Statutory Remedies Should Not Be Deemed Exclusive

Part and parcel of the question of whether a cause of action may be implied from violation of a statutory no-strike ban is whether statutory strike penalties are *exclusive*. This "exclusivity" issue was first considered by a New York court more than a decade ago.

In *Caso v. District Council 37*,[10] the second department ruled that third parties to the bargaining relation *could* sue public sector unions for damages inflicted by an illegal strike. *Caso* involved an illegal strike by the employees who operated New York City's sewage treatment plants. As a result of the strike, a billion gallons of raw sewage were discharged into the upper East River. This sewage was, in turn, carried by tidal forces into the Long Island Sound and onto the beaches of two Nassau County towns. Nassau County Executive Ralph Caso joined with the supervisors of the affected towns in bringing suit — in their individual *and* official capacities — against the offending unions and their officers.[11]

The question of whether the Taylor Law's strike remedies are exclusive was squarely presented to the appellate division in *Caso*. Concluding that the statutory remedies were *not* exclusive, the court said that the Taylor Law:

> was intended to monitor employer-employee relationships and *not* public employee relations with the public. . . . Clearly, this law was a response to the unique problems of public employer-employee relations. Just as clearly, it was not intended to govern public employee relations with the general public or others. . . .
>
> The purposes of the Taylor Law and the prohibition against

10. 43 A.D.2d 159, 350 N.Y.S.2d 173 (2d Dep't 1973).

11. *See* Caso v. Gotbaum, 67 Misc. 2d 205, 323 N.Y.S.2d 742 (Sup. Ct. Nassau County 1971), *rev'd on other grounds*, 38 A.D.2d 955, 331 N.Y.S.2d 507 (2d Dep't 1972).

> public employee strikes, as well as the general welfare of the public, are best served by permitting appropriate redress for violation of the law. . . . 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. . . .
>
> As it applies to the instant case, there is no Taylor Law provision limiting the remedies available against a striking public employees' union.[12]

The court rejected the union's efforts to avoid liability for the damages caused by its strike, stating:

> Read the way the 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. There is no support for such protection in the statute itself, in the language of the legislative committee which studied the area and drafted the bill, or in reason. Nor is there any wisdom in a decision which puts the "right" of a public union to engage in illegal activities entirely beyond the court's ability to find suitable redress . . . .[13]

The second department's conclusion that Taylor Law remedies are not exclusive promptly found support in *People v. Vizzini*.[14] There, too, the court found that the statute does not, in words or intent, limit remedies available to third parties to the bargaining relation. Rather, the court concluded that "the legislature left strikes with more serious consequences to whatever penalties might attach."[15]

When *Caso* was decided, the only New York case that arguably supported an exclusivity argument was *Jamur Products Corp. v. Quill*.[16] That case dismissed a suit for damages implied from the Condon-Wadlin Act (the predecessor of the Taylor Law)[17] that arose out of the 1966 transit strike. The *Caso* court

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12. Caso v. District Council 37, 43 A.D.2d 159, 161-62, 350 N.Y.S.2d 173, 176-77 (2d Dep't 1973) (emphasis added).

13. *Id.* at 162, 350 N.Y.S.2d at 177.

14. 78 Misc. 2d 1040, 359 N.Y.S.2d 143 (Sup. Ct. N.Y. County 1974).

15. *Id.* at 1046, 359 N.Y.S.2d at 150.

16. 51 Misc. 2d 501, 273 N.Y.S.2d 348 (Sup. Ct. N.Y. County 1966).

17. The Condon-Wadlin Act was enacted by the New York State Legislature in 1947, codifying New York's common-law ban on public employee strikes. Condon-Wadlin

severely criticized the assumption underlying *Jamur* that the damages flowing from a public employees' strike are tangential or secondary.[18] Indeed, the court in *Caso* specifically rejected the *Jamur* court's statement that "the risk of damage in the subway strike was unforeseeable [since] it is the very inevitability of extensive damage which led to the prohibition of public strikes."[19] The *Caso* court thus understood that *Jamur* adopted what amounted to, at best, a most unrealistic view of the world.

As a later court would observe, the Taylor Law's "comprehensive scheme of injunctions, loss of pay, and the unions' loss of dues check-off privileges simply reflected 'the Legislature's attempt to delicately balance the rights of public employees against those of their employers.' "[20] It was *not* intended to "monitor . . . employee relations with the public."[21]

III. Violation of Taylor Law Strike Ban: An Implied Cause of Action

Once the "exclusivity" hurdle is cleared, attention must turn to the potential bases of actions by third parties to the bargaining relation. Such bases are numerous.[22] This Article will

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Act, ch. 391, § 1, 1947 N.Y. Laws 842, 842-43. The Act also imposed severe strike penalties. It required the termination of any public employee who participated in a strike. *Id.* While a striker could seek reemployment with the public entity, he or she would have to work for the next five years "without tenure and at the pleasure of the appointing body or officer." *Id.* A rehired striker could not receive a raise as a result of the strike, or for three years following reemployment. *Id.*

The Condon-Wadlin Act was replaced by the Taylor Law in 1967. While protecting the bargaining rights of New York's public employees for the first time, the Taylor Act also retained an absolute ban on strikes. Taylor Law, ch. 392, § 2, 1967 N.Y. Laws 1102, 1104, 1109-11.

18. *Caso*, 43 A.D.2d at 163, 350 N.Y.S.2d at 177.

19. *Id.*

20. Burns Jackson Miller Summit & Spitzer v. Lindner, 88 A.D.2d 50, 58, 452 N.Y.S.2d 80, 85 (2d Dep't 1982), (quoting *Caso*, 43 A.D.2d at 161, 350 N.Y.S.2d at 176) *modifying* 108 Misc. 2d 458, 437 N.Y.S.2d 895 (1981), *aff'd*, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983) [hereinafter *TWU*].

21. *Id.*

22. For example, in its suit against a striking union, *see infra* notes 85 to 153 and accompanying text, Jackson, Lewis, Schnitzler & Krupman, a law firm, asserted the following causes of action in addition to those discussed herein: (1) tortious interference with business; (2) common law, noncategorized, tort of malice; (3) tortious conspiracy to violate the Taylor Law, the March 31, 1980, injunction, and plaintiff's rights; and (4) as third-party beneficiary of the union's collective bargaining agreement with NYCTA. *See*

consider the question of whether a private cause of action may be implied from violation of the Taylor Law's strike prohibition.

New York courts have long applied a simple rule to determine the availability of a private damage action where a statutory command has been breached. The rule had been that a member of a class for whose benefit a statute was enacted may recover the damages proximately resulting from a violation of that law.[23] However, recent cases, discussed below, seem to suggest that New York may have now adopted the *federal* standards for implied causes of action announced by the United States Supreme Court in *Cort v. Ash*.[24] The standards require that: 1) plaintiff be a member of the class for whose benefit the statute was enacted;[25] 2) there be an indication of legislative intent to create the federal right for the plaintiff (or the absence of an indication of legislative intent not to create the right);[26] 3) the implication of such a right be consistent with the statutory scheme; [27] and 4) the cause of action not be one traditionally relegated to state law in an area of particularly state concern.[28]

The Supreme Court developed the *Cort v. Ash* standards in order to cope with a particular *federal* problem: the explosion of *federal* litigation resulting from a rapid proliferation of *federal* statutes.[29] No persuasive reason has appeared for abandoning the once-settled New York rule in favor of standards that were developed in response to a peculiarly federal problem. In any event, in view of the currently unsettled state of New York law,[30] the implied cause of action theory will be addressed under both the traditional New York *and* the *Cort v. Ash* standards.

Burns Jackson Miller Summit & Spitzer v. Lindner, 88 A.D.2d 50, 53-54, 452 N.Y.S.2d 80, 82 (2d Dep't 1982).

23. Indeed, the court of appeals has described the rules as "so general and well established that it is not subject to debate or question . . . ." Abounader v. Strohmeyer & Arpe Co., 243 N.Y. 458, 466, 154 N.E. 309, 311 (1926).

24. 422 U.S. 66, 78 (1975).

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *See* Kaplan, *Implied Causes of Action*, 8 LITIGATION [Journal of ABA Litigation Section], 33-34 (Summer 1982).

30. *See infra* notes 178-179 and accompanying text.

A. *The Traditional New York Rule*

1. *Genesis of the Rule*

For more than one hundred years, the court of appeals had consistently held that *where a statute is violated to the detriment of one whom the statute was intended to protect, an action for damages will be implied*: "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the *same statute* for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law."[31] The court of appeals reexamined the rule in 1926. In *Abounader v. Strohmeyer & Arpe Co.*,[32] a case arising out of a breach of a statute governing the labeling of food products, the court held that "when the duty imposed by the statute is manifestly intended for the protection and benefit of individuals, *the common law, when an individual is injured by the breach of the duty, will supply a remedy if the statute gives none.*"[33]

The *Abounader* court directly addressed the question of whether a statute enacted for the benefit of the *general* public would give rise to an *individual* action for damages. The court held that it would.

> Holding then that this statute was passed for the benefit and protection of the general public and that it *imposed upon one like the defendant a duty to the public and each member thereof*, it is . . . well settled that such an one who has suffered from a disregard and violation of the duty has a cause of action for his damages against the one who has disregarded his duty. *From the duty and its violation there is implied a cause of action in favor of the one for whose benefit the duty was imposed and who has been injured by its violation.* No element of ordinary negligence is essential. *Violation becomes actionable default.*[34]

Since *Abounader*, the court of appeals has repeatedly sus-

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31. Willy v. Mulledy, 78 N.Y. 310, 314 (1879) (emphasis added). *Accord* Martin v. Herzog, 228 N.Y. 164, 168, 126 N.E. 814, 815 (1920); Karpeles v. Heine, 227 N.Y. 74, 79, 124 N.E. 101, 102 (1919); Amberg v. Kinley, 214 N.Y. 531, 535, 108 N.E. 830, 831 (1915).

32. 243 N.Y. 458, 154 N.E. 309 (1926).

33. *Id.* at 466, 154 N.E. at 311 (quoting 2 COOLEY ON TORTS 1408 (3d ed.)) (emphasis added).

34. *Id.* at 465-66, 154 N.E. at 311 (emphasis added).

tained this as the New York rule.[35] Lower New York courts have been faithful in applying that rule. "In the State of New York, when a statute imposes a duty, any person having a special interest in the performance thereof may sue for a breach which caused him damage."[36] The rule, indeed, was recently reiterated by the appellate division in *Kohler v. Ford Motor Credit Co.*, stating: "A person injured by the violation of a statutory duty is permitted to maintain an action for that violation if he is within the class of persons intended to be protected by the statute."[37]

Consistent with this traditional rule, actions implied from statutory violations had been dismissed by New York courts

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35. *See, e.g.*, Filardo v. Foley Bros., Inc., 297 N.Y. 217, 222, 78 N.E.2d 480, 482 (1948) (violation of statutory duty gives rise to cause of action for damages), *rev'd on other grounds*, 336 U.S. 281 (1949); Maloney v. Hearst Hotels Corp., 274 N.Y. 106, 110, 8 N.E.2d 296, 297 (1937) (liability arises from failure to observe ordinances); Schmidt v. Merchants Despatch Transp. Co., 270 N.Y. 287, 305, 200 N.E. 824, 829 (1936) (statutory duty imposed for benefit of particular group creates liability per se and implies right of recovery); Pine Grove Poultry Farm, Inc. v. Newton By-Products Mfg. Co., 248 N.Y. 293, 297, 162 N.E. 84, 85 (1928) (violation of statutory duty is negligence as a matter of law and gives rise to right of recovery for injuries sustained).

36. Hopkins v. Amtorg Trading Corp., 265 A.D. 278, 283, 38 N.Y.S.2d 788, 793 (1st Dep't 1942) (contrasting the New York rule with the Food, Drug and Cosmetics Law of New Jersey). *Accord* General Teleradio, Inc. v. Manuti, 284 A.D. 400, 405, 131 N.Y.S.2d 365, 369 (1st Dep't 1954) (finding a right of action in the state courts for violations of the Lea Act); Town of Waterford v. Brockett Lumber Co., 227 A.D. 422, 426, 237 N.Y.S. 436, 441 (3d Dep't 1929) (holding that willful injury to highway is punishable under penal law).

37. Kohler v. Ford Motor Credit Co., 112 Misc. 2d 480, 482, 447 N.Y.S.2d 215, 217 (Sup. Ct. Albany County 1982) (citations omitted). *See also* Goldstein v. Mangano, 99 Misc. 2d 523, 528, 417 N.Y.S.2d 368, 372 (N.Y. Civ. Ct., Kings County 1978) ("New York law has long recognized that where a statute imposes a duty, breach of that duty gives the offended party a cause of action."); Johnson v. Clay Partition Co., 93 Misc. 2d 414, 416, 402 N.Y.S.2d 912, 914 (Sup. Ct. N.Y. County 1977) (" 'The rule is well settled that where a criminal or penal statute imposes a duty but furnishes no civil remedy to the protected class, a breach of that duty gives rise to a cause of action in favor of the latter class.' "); Hornbeck v. Towner, 25 Misc. 2d 956, 957, 208 N.Y.S.2d 785, 786 (Sup. Ct. Sullivan County 1960) ("Yet, a violation of section 95 thereof gives rise to a cause of action in favor of a person damaged thereby, even though that section does not expressly confer or create a cause of action."); Emerald Packing Corp. v. Hygrade Food Products Corp., 21 Misc. 2d 919, 920, 194 N.Y.S.2d 1, 3 (N.Y.C. Mun. Ct., N.Y. County 1959) ("It is clear to this court that . . . in the case at bar, . . . [for] violation of these statutes . . . a cause of action exists."); Munzer v. Blaisdell, 183 Misc. 773, 775, 49 N.Y.S.2d 915, 917 (Sup. Ct. N.Y. County 1944) ("[I]t is well settled that, where a positive duty is imposed by statute, a breach of that duty will give rise to a cause of action for damages on the part of the person for whose benefit the duty was imposed . . . .").

only where 1) there was no violation of the statute involved,[38] 2) the party bringing the action was not a member of the class intended to be benefited by the statute,[39] or 3) the damages suffered were not proximately caused by the statutory violation.[40]

2. *Elements of the Cause of Action Under the Traditional Rule*

Accordingly, under the traditional New York rule, a cause of action for damages implied from violation of the Taylor Law should have two elements: 1) membership in the class of intended beneficiaries of the Taylor Law's strike ban, and 2) damages that were proximately caused by the illegal strike.

In *Burns Jackson Miller Summit & Spitzer v. Lindner* ("*TWU*"),[41] discussed in greater detail below,[42] the second department, properly applying one aspect of *Abounader*, recently concluded that every member of the general public is an intended beneficiary of the Taylor Law's strike prohibition.[43] In its analysis, the second department first quoted the language of section 200 of the Civil Service Law and its own earlier construction of that language in *Caso*:

> "The Legislature of the State of New York [hereby] declares that *it is the public policy of the state and the purpose of this act* to promote harmonious and cooperative relationships between gov-

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38. *See, e.g.*, Bourcheix v. Willow Brook Dairy, Inc., 268 N.Y. 1, 5, 196 N.E. 617, 618 (1935) (action based upon common-law negligence of defendant not in privity with plaintiff does not give rise to action for statutory violation relating to breach of warranty).

39. *See, e.g.*, Brody v. Save Way N. Boulevard, Inc., 14 N.Y.2d 576, 198 N.E.2d 254, 248 N.Y.S.2d 873 (1964) (retailer's complaint of misleading advertisements dismissed on ground that retailer, as competitor, had no cause of action) *rev'g* 19 A.D.2d 714, 242 N.Y.S.2d 422 (2d Dep't 1963); Moch v. Rensselaer Water Co., 247 N.Y. 160, 169, 159 N.E. 896, 899 (1928) (an action for failure to furnish an adequate supply of water is not maintainable for breach of a statutory duty); Di Caprio v. New York Cent. R.R. Co., 231 N.Y. 94, 97, 131 N.E. 746, 747 (1921) (only those in the class to be benefited by Railroad Law can maintain a cause of action).

40. *See, e.g.*, Friedman v. Beck, 250 A.D. 87, 89, 293 N.Y.S. 649, 652 (1st Dep't 1937) (plaintiff's own conduct rather than defendant's violation of statute was proximate cause of plaintiff's injuries).

41. 108 Misc. 2d 458, 437 N.Y.S.2d 895 (Sup. Ct. Queens County 1981), *rev'd*, 88 A.D.2d 50, 452 N.Y.S.2d 80 (2d Dep't 1982), *aff'd*, 59 N.Y.2d 314, 451 N.E.2d 459, 464 N.Y.S.2d 712 (1983).

42. *See infra* text accompanying notes 106-179.

43. *TWU*, 88 A.D.2d at 59, 452 N.Y.S.2d at 86.

> ernment and its employees and *to protect the public* . . . . These policies are best effectuated by . . . continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition." In *Caso v. District Council* 37 . . . we similarly held that the Taylor Law "is intended to govern employer-employee relationships *for the benefit of the public.*" Thus, *the general public was clearly an intended beneficiary of the act.*[44]

The court then posed the question of "whether a statute intended to benefit the *entire* public may be held to imply a *private* right of action for its alleged violation."[45] The second department noted that the statute in *Abounader* " 'was passed for the benefit and protection of the general public and . . . imposed upon one like the defendant a duty to the public and each member thereof . . . .' "[46] It also cited with approval a commentator's observation that "statutes explicitly found to have been intended for the benefit of the general public have been used as the basis for the implication of a private cause of action."[47]

The Taylor Law clearly was enacted for the benefit of the general public. Indeed, the history of the Taylor Law shows that the specific aspect of the law intended to be of *greatest* benefit to the general public was its strike ban. The Taylor Law was proposed by a committee established by the Governor of New York on January 15, 1966 — three days after an illegal strike of New York City's transit system by the Transport Workers Union ("TWU") ended.[48] An important aspect of the committee's mission was "to make legislative proposals *for protecting the public against the disruption of vital public services by illegal strikes" since such proposals were "urgently necessary and . . . widely demanded, as a consequence of the 1966 transit*

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44. *Id.* (emphasis added) (quoting N.Y. CIV. SERV. LAW § 200 and Caso v. District Council 37, 43 A.D.2d 159, 163, 350 N.Y.S.2d 173, 178 (2d Dep't 1973)).

45. *Id.* (emphasis in original).

46. *Id.* (quoting Abounader v. Strohmeyer & Arpe Co., 243 N.Y. 458, 465, 154 N.E. 309, 311 (1926)).

47. *See* Note, *Private Damage Actions Against Public Sector Unions for Illegal Strikes*, 91 HARV. L. REV. 1309, 1317 (1978).

48. *See* Wolk, *Public Employee Strikes — A Survey of the Condon-Wadlin Acts*, 13 N.Y.L.F. 69, 74 (1967). 39. Governor's Committee on Public Employee Relations, *1966 Final Report* 1, 9 (1966) (emphasis added).

strike in New York City . . . ."[49]

The legislature concurred in the urgency of preventing any repetition of the TWU's or any similar strike. "[T]he catastrophic strike of transit workers in New York City . . . has raised new and urgent demands that something be done, here and now, *to prevent any recurrences of such crippling conditions in any facet of the public service* in New York State."[50]

Thus, from the beginning, the Taylor Law and, in particular, its strike prohibition, were intended and "passed for the benefit and protection of the general public."[51] It imposed on public sector unions "a duty to the public and *each member* thereof."[52] The principal duty imposed upon public employee unions for the benefit of the general public is to *refrain from striking.* This should be sufficient to satisfy the first element of a cause of action implied from a statutory breach under traditional New York law — membership in the class of beneficiaries of the Taylor Law's strike ban.[53]

The remaining question under the traditional New York rule is whether a private party's losses were proximately caused by the illegal strike. The kinds of damages that members of the public may suffer as a result of an illegal strike may, of course, vary depending upon the nature of the interrupted public service. Hence, the causation question would necessarily have to be decided on a case-by-case basis.[54]

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49. *Id.* (emphasis added).

50. Joint Legislative Comm. on Industrial and Labor Conditions, *The Key to Labor-Management Peace and Prosperity in New York,* Legis. Doc. No. 40, at 55 (1966) (emphasis added).

51. *Abounader,* 243 N.Y. at 465, 154 N.E. at 311.

52. *Id.*

53. *See supra* note 39 and accompanying text.

54. Damages shared by the community at large do not result in liability to a private party. An individual may, however, "maintain an action when he suffers special damage from a public nuisance." Copart Indus., Inc. v. Consolidated Edison Corp., 41 N.Y.2d 564, 568, 362 N.E.2d 968, 971, 394 N.Y.S.2d 169, 172 (1977). New York courts have recognized that monetary damages are sufficiently particular to enable a private party to recover for a public nuisance. For example, in Wakeman v. Wilbur, 147 N.Y. 657, 42 N.E. 341 (1895), the defendant obstructed a public highway, thus making it more costly for the plaintiff to operate his business. Upholding the private cause of action, the court of appeals ruled that while the obstruction was "no doubt, an offense against the public," it was also "in a special and peculiar sense, an injury to the plaintiff." *Id.* at 664, 42 N.E. at 343.

New York's approach to this question is consistent with the view of a leading

B. *Should Federal Standards Be Applied in New York?*

While the traditional New York rule has never explicitly been abandoned, a 1979 decision by the second department at least suggested that it may have tacitly been displaced by the federal *Cort v. Ash* standards.[55] However, that decision, *Manfredonia v. American Airlines*,[56] did not adopt the *Cort* standards for cases arising under New York law. Certainly, it suggested no basis for abandoning the longstanding New York rule.

In *Manfredonia*, a suit was brought in New York by the victim of an intoxicated fellow airplane passenger to whom the airline continued to serve drinks. Among other things, the plaintiff asserted a right of action implied from a Federal Aviation Administration regulation, issued under authority of a *federal statute*.[57] The question before the court was "whether the plaintiffs can assert [an implied] cause of action not based upon the [New York] Dram Shop Act, *but on a Federally created remedy*."[58] It was *only* in passing upon "a Federally created remedy" that the *Manfredonia* court applied the federally-oriented *Cort* standards.

In fact, with respect to the proper standard to govern implied causes of action arising under New York statutes, the *Manfredonia* court's *only* comment (in dicta) was that "[t]he *Cort* rule is *compatible* with New York law."[59] The two cases cited by *Manfredonia* to support *Cort*'s "compatibility" with

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scholar. Professor Prosser has explained:

> When the plaintiff is prevented from performing a specific contract, or is put to additional expense, or expensive delay in performing it, there is no doubt that he can always maintain his action, since the contract is clearly an individual matter, not common to the public . . . .
>
> . . . [E]ven where the business is not itself founded upon the exercise of the public right, interference with a public right which causes harm to the business, as by blocking access to a shop which deprives it of customers, or interference with transportation, which prevents a business establishment from obtaining materials or labor, or from shipping its goods to market, has been held to cause such particular damage that the action can be maintained.

Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1014-15 (1966).

55. *See infra* text accompanying notes 24-28.

56. 68 A.D.2d 131, 416 N.Y.S.2d 286 (2d Dep't 1979).

57. Manfredonia v. American Airlines, 68 A.D.2d 131, 138-39, 416 N.Y.S.2d 286, 290-91 (2d Dep't 1979). *See* 49 U.S.C. § 1421(a) (1983).

58. *Id.* at 139, 416 N.Y.S. 2d at 290 (emphasis added).

59. *Id.* at 138, 416 N.Y.S. 2d at 291 (emphasis added).

New York law, however, actually *reaffirm the traditional New York rule.*[60]

In *Daggett v. Keshner*,[61] then Justice Breitel wrote:

> Where . . . the statutory duty of care was imposed for the sole benefit of a class of persons, regardless of the size of the class, of which the plaintiff is a member, the breach of the statutory duty generally constitutes conclusive evidence of negligence. It is then, also, frequently referred to as negligence per se, or negligence as a matter of law. Even in such cases where liability to the plaintiff is impliedly created by the statute, before redress may be obtained, it has been held that the act, wrongful only by statute, must be the proximate (in the sense of reasonably foreseeable) cause of the accident.[62]

So, too, did *Pierce v. International Harvester Co.*,[63] also cited by *Manfredonia,* apply the New York rule. That case noted preliminarily that "violation of a statute constitutes negligence per se." The court continued: "Because of defendant's violation of section 417 of the Vehicle and Traffic Law, . . . plaintiff contends that defendant was guilty of negligence per se in causing plaintiff's injuries. If such violation was the proximate cause of the accident, plaintiff is correct."[64] Hence, the traditional New York rule stated above was applied in *Pierce* as well.

C. *An Implied Right of Action Under* Cort v. Ash

A simple reading of *Cort v. Ash* makes it obvious that the federal standards enunciated there simply could not be adopted wholesale for application in state court actions arising under state statutes.[65] The fourth *Cort* standard shows this clearly: "[I]s the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be

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60. *See supra* text accompanying notes 31-54.

61. 284 A.D. 733, 134 N.Y.S.2d 524 (1st Dep't 1954).

62. *Id.* at 735-36, 134 N.Y.S.2d at 527 (citations omitted) (citing *Schmidt*, 270 N.Y. 287, 200 N.E. 824; *Martin*, 228 N.Y. 164, 126 N.E. 814; *Karpeles*, 227 N.Y. 74, 124 N.E. 101; *Amberg*, 214 N.Y. 531, 108 N.E. 830; Stern v. Great Island Corp., 250 A.D. 115, 293 N.Y.S. 608 (1st Dep't 1937).

63. 61 A.D.2d 255, 402 N.Y.S.2d 674 (4th Dep't 1978).

64. *Id.* at 259, 402 N.Y.S.2d at 676 (citation omitted).

65. For the four standards announced by the Supreme Court in Cort v. Ash, 422 U.S. 66, 78 (1975), see *supra* text accompanying notes 25-28.

inappropriate to infer a cause of action based solely on federal law?"[66] This standard assumes the availability of a state cause of action if a federal remedy is denied. It also demonstrates that the entire *Cort* test was conceived of as a way of coping with a peculiarly federal problem. But even if New York did adopt the three potentially applicable *Cort* standards, a damage action implied from the Taylor Law should nonetheless be recognized.

The potentially applicable elements of the *Cort v. Ash* test are:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," . . . — that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?[67]

Since the Taylor Law's strike prohibition was enacted for the "especial benefit" of the general public,[68] the first *Cort* standard is satisfied. The other federal standards also appear to be satisfied in actions implied from violation of the Taylor Law's strike ban.

1. *Legislative Intent*

The second *Cort* test considers whether "there [is] any indication of legislative intent, explicit or implied, either to create such a remedy or to deny one."[69] There is no overt evidence of legislative intent either to recognize or to deny an implied right under the Taylor Law. However, legislative silence may, in certain circumstances, be significant. This is particularly true here because the Taylor Law is far from static. Rather, it is one of the most frequently examined statutes in the state's codebook.

The New York State Legislature has amended the Taylor Law on numerous occasions[70] in the aftermath of *Caso v. Dis-*

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66. *Cort*, 422 U.S. at 78.

67. *Id.* (citations omitted).

68. *See supra* text accompanying notes 41-53.

69. *Cort*, 422 U.S. at 78 (citations omitted).

70. Act effective May 23, 1974, ch. 443, 1974 N.Y. Laws 1314; Act effective May 31, 1974, ch. 724, 1974 N.Y. Laws 1882; Act effective May 31, 1974, ch. 725, 1974 N.Y. Laws

trict Council 37.[71] On *none* of these occasions has the legislature so much as intimated disapproval of *Caso*'s conclusion that the Taylor Law is *not* an "impenetrable shield" to a civil damage suit by a third party to the bargaining relation. Significantly, *Caso* was decided under the Taylor Law, not Condon-Wadlin, and it specifically *upheld* a private suit to recover damages resulting from a Taylor Law breach. By its silence in the aftermath of *Caso,* the legislature has approved the notion that third parties to the bargaining relation may sue for damages resulting from an illegal strike.

In *Caso,* the private damage action for breach of the Taylor Law's strike proscription was not asserted in the form of an implied right. However, to the legislature, the *availability* of a private damage action should be more important than the legal theory invoked. As was said in *Caso:*

> 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.*
>
> . . .
>
> [*The Taylor Law is*] *not an impenetrable shield of immunity* for public employees who may illegally cause serious damage to persons or parties other than their employees.[72]

Moreover, there is nothing remarkable about the proposition that a private damage action may coexist with the Taylor Law's explicit remedies for illegal strikes. As the court of appeals stated in *Abounader*: "The fact that penalties are ordained for violations of course furnishes no argument against [implication of a private damage action]. *Civil responsibility and public punishment by common usage have long since been established as appropriate and complementary associates.*"[73]

1886; Act effective Aug. 9, 1975, ch. 850, 1975 N.Y. Laws 1359 (McKinney); Act effective July 1, 1977, ch. 216, 1977 N.Y. Laws 276 (McKinney); Act approved Aug. 3, 1977, ch. 677, 1977 N.Y. Laws 1081 (McKinney); Act effective July 5, 1978, ch. 465, 1978 N.Y. Laws 790 (McKinney); Act effective June 28, 1979, ch. 316, 1979 N.Y. Laws 780 (McKinney).

71. 43 A.D.2d 159, 350 N.Y.S.2d 173 (2d Dep't 1973). For a discussion of *Caso,* see *supra* text accompanying notes 10-21.

72. *Caso,* 43 A.D.2d at 162, 350 N.Y.S.2d at 176-77 (emphasis added).

73. 243 N.Y. at 465, 154 N.E. at 311 (emphasis added).

In *Jamur Products Corp. v. Quill*,[74] a cause of action implied from a violation of the Condon-Wadlin Act was dismissed.[75] However, the notion that legislative silence after *Jamur* somehow signals an intent to deny an implied right under the Taylor Law is incongruous. Judicial construction of a *prior* statute is, at best, of marginal relevance with respect to the interpretation of a *successor* statute. This is particularly true here, for the very *failures* of the Condon-Wadlin Act were the principal reasons for the Taylor Law's enactment.[76]

Caso, moreover, *rejected the fundamental assumption underlying Jamur*. Thus, not only was *Jamur* a construction of a repealed statute, but the underpinnings of that holding had been shaken by a subsequent decision *rendered under the Taylor Law*.[77] Again, the legislature never expressed dissatisfaction with *Caso*. It could only believe that *Jamur* retained no precedential value. Accordingly, *Caso*, not *Jamur*, reflects the true intent of the law.

In sum, the legislature's refusal to "overrule" *Caso* signals its acknowledgement that the Taylor Law's strike prohibition was intended to coexist with damage actions by third parties to the bargaining relation. The second *Cort* standard therefore favors implication of a private damage remedy.

2. *Consistency with the Objective of the Taylor Law*

Decisions of the New York courts have always recognized that strike deterrence was the *primary* goal of the legislature in enacting the Taylor Law.[78] That penalties imposed in the interests of strike deterrence may be "stern" and "harsh" has in no way undermined the primacy of that goal.[79] It is equally clear

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74. 51 Misc. 2d 501, 273 N.Y.S.2d 348 (Sup. Ct. N.Y. County 1966).

75. *Id.* at 511, 273 N.Y.S.2d at 357.

76. *See* Peterson, *Deterring Strikes by Public Employees: New York's Two-For-One Salary Penalty and the 1979 Prison Guard Strike*, 34 INDUS. & LAB. REL. REV. No. 4 545, 546 (July 1981).

77. *See supra* text accompanying notes 10-21.

78. *See TWU*, 88 A.D.2d at 64, 452 N.Y.S.2d 89; Cheeseman v. Carey, 485 F. Supp. 203 (S.D.N.Y. 1980), *remanded on other grounds*, 623 F.2d 1387 (2d Cir. 1980); Tepper v. Galloway, 481 F. Supp. 1211 (E.D.N.Y. 1979); Sanford v. Rockefeller, 35 N.Y.2d 547, 324 N.E.2d 113, 364 N.Y.S.2d 450 (1974), *appeal dismissed*, 421 U.S. 973 (1975); Wilson v. Board of Educ., 32 N.Y. 2d 636, 295 N.E.2d 387, 342 N.Y.S.2d 659 (1973).

79. *See Tepper*, 481 F. Supp. 1211; *Cheeseman*, 485 F. Supp. 203.

that the legislature intended to use financial costs as a method — perhaps the *principal* method — of deterring illegal strikes.[80] *Caso v. District Council 37*, moreover, specifically acknowledges that a damage remedy is consistent with the legislative goal of strike deterrence:

> The purposes of the Taylor Law and the prohibition against public employee strikes, as well as the general welfare of the public, are best served by permitting appropriate redress for violation of the law . . . . *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.*[81]

Fiscal constraints to promote compliance with statutory commands is not unique to the Taylor Law, or even to labor relations statutes generally. For example, in concluding that a private right of action should be implied in favor of those damaged by a violation of section 602 of New York's General Business Law,[82] the court in *Kohler v. Ford Motor Credit Co.*,[83] recently stated that it: "cannot conceive of a better method of compelling debt collection agencies to comply with the law than by subjecting them to private suits by the persons whom their illegal collection practices have injured."[84] Similarly, an implied cause of action is consistent with, and indeed in furtherance of, the Taylor Law's primary goal of strike deterrence.

The Taylor Law is also intended to promote harmonious relations between public employers and employees.[85] What, then, of the contention that if third parties could recover the damages suffered as a result of an illegal strike, unions would be unable to survive and the Taylor Law's "public employee bargaining apparatus" would be undermined?[86] This "reasoning," which protects the perpetrator at the victim's expense, is seriously flawed.

The Taylor Law's objective of promoting harmonious relations between the government and its employees is guaranteed

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80. *See Caso*, 43 A.D.2d at 162-63, 350 N.Y.S.2d at 176-77.
81. *Id.* at 162, 350 N.Y.S.2d at 176-77 (emphasis added).
82. N.Y. GEN. BUS. LAW § 602 (McKinney 1984).
83. 112 Misc. 2d 480, 447 N.Y.S.2d 215 (Sup. Ct. Albany County 1982).
84. *Id.* at 483, 447 N.Y.S.2d at 217.
85. *See* N.Y. CIV. SERV. LAW § 200 (McKinney 1983).
86. *See TWU*, 88 A.D.2d at 62, 452 N.Y.S.2d at 88.

by granting employees the right to form unions and by ensuring the existence of a collective bargaining apparatus.[87] Prior to the Taylor Law, public employees in New York had no such guaranteed statutory right, and no statutory bargaining apparatus.[88] However, *the Taylor Law manifestly does not guarantee the continued existence of any particular union.* This principle applies with even greater force where the union involved is a willful and flagrant violator of the Taylor Law. Thus, even if permitting a private damage action did "jeopardize the very existence" of a scofflaw union,[89] the Taylor Law's "public employee bargaining apparatus"[90] would not even remotely be called in question.

Indeed, a judgment against a scofflaw public employee union in a private damage action would no more undermine the Taylor Law's bargaining apparatus than the actual bankruptcy of the Professional Air Traffic Controllers' Organization ("PATCO") undermined the federal employee bargaining apparatus.[91] Members of PATCO walked off their jobs after rejecting a 42-month, $40 million dollar wage and benefit package agreed on by the union and the Federal Aviation Administration.[92] The controllers were subsequently dismissed by President Reagan for violating laws prohibiting walkouts by federal employees.[93] Collective bargaining with other unionized federal employees has continued, and the *bargaining apparatus* remains intact even for air traffic controllers.[94] While it may be fashionable to criticize the Reagan administration's handling of the PATCO strike,[95] one significant fact is undisputed: after PATCO's, *there*

87. N.Y. CIV. SERV. LAW § 200 (McKinney 1983).

88. *See* Peterson, *supra* note 76, at 547.

89. *TWU*, 88 A.D.2d at 62, 452 N.Y.S.2d at 88.

90. *Id.*

91. *See* "The Union Is Gone," White Collar Rep., BNA, at A-9, A-10 (July 9, 1982).

92. *Developments in Industrial Relations,* 104 MONTHLY LAB. REV. 48 (Oct. 1981).

93. *Id.*

94. Indeed, at least some air traffic controllers have attempted to form new unions in the aftermath of the PATCO debacle. *See New Union Bids to Speak for Air Controllers,* Newsday, June 30, 1984; *A Fledgling Effort to Unionize the Air Controllers Again,* BUSINESS WEEK, June 18, 1984, at 25; *Some Air Traffic Controllers Petition to Unionize,* New York Times, June 13, 1984, at 16, col. 4.

95. *See* MANAGEMENT AND EMPLOYEE RELATIONSHIPS WITHIN THE FEDERAL AVIATION ADMINISTRATION (1982), *reprinted in Air Traffic Control Revitalization Act of 1981: Hearings on H.R. 5038 before the House Comm. on Post Office and Civil Service,* 97th

have been no further illegal strikes by federal employees.

Where a union demonstrates utter disregard for a statute, that same statute should not insulate the union from liability to those injured by the breach. There should be greater concern for the *injured party, not* the willful violator. If, by paying for the damages it causes, a union becomes unable to function and must dissolve, the law guarantees the employees' right to join a union to whom disregard of the law and the public interest is a less acceptable practice.[96]

In sum, particularly when asserted against a repeated willful and flagrant violator of the Taylor Law, a private damage action might well be the best way to promote compliance with the law. In any event, a private damage action for a violation of the Taylor Law clearly *is* "consistent with the underlying purposes of the legislative scheme."[97] Therefore, even if a variation of the *Cort v. Ash* standards were adopted, a right of action implied from violation of the Taylor Law's strike ban should be recognized.

IV. The 1980 Transit Strike: A Golden Opportunity Missed

At one minute past midnight on April 1, 1980, the TWU struck New York City's subway and public bus lines.[98] The strike was illegal under the Taylor Law, contrary to the long-standing public policy of the State of New York, and in contempt of an injunction issued by the Supreme Court, Kings County.[99]

During its eleven days, the strike brought all subway and nearly all bus service in New York City to an abrupt stop. The effect on the general public was immediate and continuing. Discomfort and inconvenience, delay and disruption became not just the order of the day, but the pattern of life. Traffic reached gridlock proportions. Thousands clogged the sidewalks. It became exhausting and often impossible to get to work. Social ac-

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Cong., 1st and 2d Sess. (1981-1982) (report prepared in the PATCO strike's aftermath by a government-appointed task force).

96. *See* N.Y. CIV. SERV. LAW §§ 202, 203, 208 (McKinney 1983).

97. *Cort*, 422 U.S. at 78.

98. *See* New York City Transit Auth. v. Lindner, 108 Misc. 2d 458, 460, 437 N.Y.S.2d 895, 898 (Sup. Ct. Queens County 1981).

99. *See TWU* 83 A.D.2d 573, 573-74, 441 N.Y.S.2d 145, 146-47 (2d Dep't 1981).

tivities had to be abandoned. Despite public outcry and court-imposed fines, the strike did not end until 8:00 p.m., April 11, 1980.

The results of its illegal 1980 strike came as no surprise to the TWU. That union had *twice before* struck all or part of New York City's mass transportation system. In March 1962, it struck both the Fifth Avenue Coach and the Surface Transportation companies for twenty days. That strike, which of course had a dire effect on the public, ended when the City of New York acquired those bus lines by eminent domain and undertook to operate them directly.[100]

Subsequently, on January 1, 1966, the TWU struck the entire New York City subway and bus system. This catastrophic thirteen-day strike paralyzed the city. It was in direct breach of the antistrike provisions of the Condon-Wadlin Act and of an injunction.[101] That strike not only disrupted the everyday life of the general public, but, like the 1980 strike, also specially affected businesses and professions.[102]

Since then, the TWU has not been loathe to use, or threaten to use, the strike weapon regardless of legal proscription.[103] By its own proclamation, Local 100 "has a historic tradition of 'No

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100. Fifth Ave. Coach Lines, Inc. v. Transport Workers Union of Am., 235 F. Supp. 842, 843 (S.D.N.Y. 1964).

101. Weinstein v. New York City Transit Auth., 49 Misc. 2d 170, 172-78, 267 N.Y.S.2d 111, 113-24 (Sup. Ct. N.Y. County 1966).

102. *See* Jamur Products Corp. v. Quill, 51 Misc. 2d 501, 273 N.Y.S.2d 348 (Sup. Ct. N.Y. County 1966).

103. No sooner had the 1966 strike ended than did Local 100 threaten another strike if the severe Condon-Wadlin Act penalties were applied against it. In the face of this threat, the legislature hastily immunized Local 100 and the TWU. 1971-1972 REPORT OF THE JOINT LEGISLATIVE COMMITTEE ON THE TAYLOR LAW, LEG. DOC. NO. 25 at 11 (1972).

Local 100 "overwhelmingly" authorized a strike against the New York City subway system on January 1, 1968, if its contract demands were not met by 5:00 a.m. that day. New York Times, Dec. 28, 1967, at 41, col. 3; *id.*, Jan. 2, 1968, at 1, col. 1. It also threatened to strike the subway and bus lines in June 1969. *Id.*, June 22, 1969, at 24, col. 4. It again threatened to strike the subway and bus lines if NYCTA did not meet its contract demands by 12:01 a.m., Mar. 29, 1978 (despite the prohibitions of the Taylor Law and a preliminary injunction). *Id.*, Mar. 28, 1978, at 41, col. 1. As recently as Aug. 13, 1981, the TWU continued to insist that it had the right to strike. *Id.*, Aug. 13, 1981, at 1, col. 3. That the union knew the consequences of a mass transit strike when it made this claim is clear from its president's 1967 statement: "We know that the last strike cost the City a lot . . . ." *Id.*, Dec. 28, 1967, at 1, col. 6.

contract, No work!' "[104] Other parts of the TWU have repeatedly demonstrated this same disregard of the law and/or the public weal.[105]

While the 1980 strike was in progress, Jackson, Lewis, Schnitzler & Krupman ("Jackson, Lewis"), a Manhattan-based private law firm, sued the TWU for damages. Seeking to recover out-of-pocket expenses, as well as general and punitive damages, its complaint asserted six causes of action, including prima facie tort and a cause of action implied from violation of the Taylor Law's strike prohibition.[106] A similar suit was brought by the New York law firm of Burns Jackson Miller Summit & Spitzer, now known as Summit Rovins & Feldesman. That firm's complaint included prima facie tort and public nuisance causes of action.[107] In August 1980, the two actions, having common questions of fact and some common questions of law, were joined in Queens County. Cumulatively challenging the legal sufficiency of all causes of action in both complaints, the unions moved to dismiss.[108]

A. *Supreme Court, Queens County*

In passing upon the motions to dismiss, supreme court, special term, Justice Edwin Kassoff dealt with the eight causes of action asserted in the two complaints under three general head-

104. Quoted from an advertisement distributed by the TWU during the 1980 strike. *See also TWU*, 88 A.D.2d at 55, 452 N.Y.S.2d at 84.

105. For example, a TWU local threatened to strike the Metropolitan Suburban Bus Authority on Jan. 1, 1980, if its contract demands were not met. New York Times, Dec. 29, 1979, at 24, col. 5. The Metropolitan Suburban Bus Authority, like the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority, is a subsidiary of the Metropolitan Transportation Authority. Like the other authorities, its employees are subject to the Taylor Law. Other TWU locals have struck Philadelphia's mass transit system six times between 1951 and 1977 (including a 44-day walkout in 1977), each time with disastrous effects on that city. Wall Street Journal, Jan. 16, 1968, at 1, col. 3; *id.*, May 9, 1977, at 1, col. 3. The Columbus, Ohio, public transportation system was struck by a TWU local in November 1976. New York Times, Nov. 16, 1976, at 18, col. 6. On January 24, 1980, the TWU struck Pan American World Airways in defiance of a restraining order issued by the United States District Court for the Eastern District of New York. Other unions "called the strike 'illegal.' " *Id.*, Jan. 25, 1980, at A13, col. 5.

106. *See TWU*, 88 A.D.2d at 53-54, 452 N.Y.S.2d at 83.

107. *Id.* at 52-53, 452 N.Y.S.2d at 82.

108. *Id.* at 55, 452 N.Y.S.2d at 83.

ings: *prima facie* (noncategorical) tort, nuisance, and the third-party beneficiary cause of action asserted by Jackson, Lewis.

Special term held first that Taylor Law remedies for illegal strikes are nonexclusive and that third parties to the bargaining relation, including private citizens, may sue for damages.[109] The court found that the only disputed questions regarding the noncategorical tort causes of action were intent and special damages.[110] As to intent, the court inquired "whether the public's gain from the defendant's avowed motive outweighs the harm to the plaintiff and the members of the class."[111] "[T]he answer," it concluded, "was given by the New York State Legislature when it codified the longstanding common-law rule in enacting the Taylor Law: *Strikes by public employees, whatever their purpose, are unlawful acts because of their inherently adverse effect upon the public.*"[112]

Special term then found that special damages — in the form of out-of-pocket expenses and lost profits — had been properly alleged in the complaints. The court found that these damages were "direct, foreseeable and substantially different in kind from the potential injury to which the general public was exposed . . . ."[113]

B. *Appellate Division, Second Department*

On appeal, the appellate division noted at the outset that "[*t*]*he Taylor Law . . . 'was intended to monitor employer-employee relationships and not employee relations with the public,*' "[114] thus reaffirming its prior *Caso* holding that the statute's remedies for illegal strikes are nonexclusive.[115] The court then proceeded to examine each cause of action separately.

The appellate division applied the standards for suits implied from federal statutes announced by the United States Supreme Court in *Cort v. Ash*[116] to determine whether the TWU's

109. *TWU*, 108 Misc. 2d at 464, 437 N.Y.S.2d at 901.
110. *Id.* at 465-66, 437 N.Y.S.2d at 902.
111. *Id.* at 467, 437 N.Y.S.2d at 903.
112. *Id.* (emphasis added).
113. *Id.* at 475, 437 N.Y.S.2d at 907.
114. *TWU*, 88 A.D.2d at 58, 452 N.Y.S.2d at 85 (emphasis added) (citation omitted).
115. *Id.*
116. *See* 422 U.S. at 78. *See also supra* notes 65-97 and accompanying text.

violation of the Taylor Law gave rise to an implied cause of action under New York law.[117] Interestingly, the court's discussion suggests that these standards had actually been met in the case before it.[118] The appellate division nonetheless ultimately dismissed, relying principally upon what it considered the "very complexity" of the Taylor Law's enforcement scheme.[119]

C. *Court of Appeals*

The court of appeals affirmed the appellate division's dismissal.[120] After discussing the court's treatment of the issues, this Article will explain why dismissal, unfortunately, appeared to be a predetermined result for which New York's highest court vainly attempted to locate a rationale.

1. *Exclusivity of Taylor Law Remedies*

At the outset, the court seemed to take a familiar analytical approach to the question of whether Taylor Law remedies are exclusive and whether a cause of action should be implied from a violation of the Taylor Law's strike ban. Quoting prior decisions, the court stated: "The general rule is and long has been that 'when the common law gives a remedy, and another remedy is provided by statute, the latter is cumulative, unless made exclusive by the statute . . . .' "[121] The court further stated:

> Whether a statute gives a cause of action to a person injured by its violation, or whether it is intended as a general police regulation, and the violation made punishable solely as a public offense 'must to a great extent depend on the purview of the legislature in the particular statute and the language which they have there employed.'"[122]

Further indicating that it viewed the exclusivity and im-

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117. *TWU*, 88 A.D.2d at 59, 452 N.Y.S.2d at 86.

118. *Id.* at 59-65, 452 N.Y.S.2d at 86-90.

119. *Id.* at 65, 452 N.Y.S.2d at 89-90.

120. 59 N.Y.2d 314, 322, 451 N.E.2d 459, 461, 464 N.Y.S.2d 712, 714 (1983).

121. *Id.* at 324, 451 N.E.2d at 462, 464 N.Y.S.2d at 715 (quoting Candee v. Hayward, 37 N.Y. 653, 656 (1868)).

122. *Id.* at 324, 451 N.E.2d at 462-63, 464 N.Y.S.2d at 715-16 (quoting Atkinson v. New Castle & Gateshead W.W. Co., L.R. [2 Exch. Div.] 441; Taylor v. L.S. & M.S. Ry. Co., 45 Mich. 74, 7 N.W. 728 (1881)).

plied right issues as interrelated, the court stated that "[t]he far better course is for the Legislature to specify in the statute itself whether its provisions are exclusive and, if not, whether private litigants are intended to have a cause of action for violation of those provisions."[123] Absent explicit legislative guidance, said the court, "it is for the courts to determine, in light of those [statutory] provisions, particularly those relating to sanctions and enforcement, and their legislative history, and of existing common-law and statutory remedies, with which legislative familiarity is presumed, what the Legislature intended."[124]

The court examined the Taylor Law and found "no explicit statement as to either exclusivity or intent to create a private cause of action."[125] The court then concluded that based on an "[e]xamination of the history and genesis of the Taylor Law," the statute "is cumulative, not exclusive, and was not intended to establish a new cause of action."[126]

2. *Implied Cause of Action*

The next four and one-half pages of the court's opinion discussed the development of the Taylor Law's current statutory structure.[127] Particular emphasis was placed on changes in the statutory strike sanctions.[128] "Against that background," the court stated, "for a number of reasons, legislative intent to provide a private remedy cannot be discerned."[129] Seemingly, this could mean that the court found no legislative intent on the issue generally. However, the opinion makes it clear that legislative intent was deemed to militate *against* implication of a damage remedy.

The court began its analysis by agreeing that "Jackson, Lewis is 'one of the class for whose especial benefit the statute was enacted.' "[130] It also agreed that "such an action would be a

123. *Id.* at 325, 451 N.E.2d at 463, 464 N.Y.S.2d at 716.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. Note in particular *id.* at 328-29, 451 N.E.2d at 465, 464 N.Y.S.2d at 718.
129. *Id.* at 329, 451 N.E.2d at 465, 464 N.Y.S.2d at 718.
130. *Id.*

powerful deterrent to public employee strikes . . . ."[131] The court then stated that an action implied from violation of the Taylor Law's strike ban "would also, as the claim for [$50,000,000 per day] damages in the Burns Jackson complaint suggests, [impose] a crushing burden on the unions and each of the employees participating in the strike, who could be held jointly and severally liable for damages resulting from violation."[132]

The court cited several factors in support of its finding that such a result would be inappropriate. First, it noted that the Condon-Wadlin Act was repealed " 'precisely because that was a statute punitive rather than constructive in nature.' "[133] Second, it noted the Taylor Law's " 'unusually elaborate enforcement provisions, conferring authority to sue for this purpose both on government officials and private citizens' which strongly suggest that the Legislature 'provided precisely the remedies it considered appropriate. . . .' "[134] Third, the court was influenced by "the 1966 decision in *Jamur Products Corp. v. Quill* . . . which had held that a private cause of action could not be implied from the Condon-Wadlin Act."[135]

Perhaps most significant, however, was the court's conclusion that "[i]mplication of a private action is . . . inconsistent with the purposes of the Taylor Law."[136] The court elaborated:

> Its primary purposes, as both Taylor Committee reports emphasize, was to defuse the tensions in public employer-employee relations by reducing the penalties and increasing reliance on negotiation and the newly created Public Employment Relations Board [PERB] as a vehicle toward labor peace . . . . A private action, which would impose per se liability without any of the limitations applicable to the common-law forms of action . . . , would inevitably upset the delicate balance established after 20 years of legislative pondering.[137]

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131. *Id.*

132. *Id.*

133. *Id.* at 330, 451 N.E.2d at 465, 464 N.Y.S.2d at 718 (quoting Governor's Committee on Public Employee Relations, *1968 Interim Report*, 20 (1968)).

134. *Id.* at 330, 451 N.E.2d at 465-66, 464 N.Y.S.2d at 718-19 (quoting Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1, 13, 15 (1981)).

135. *Id.* (citations omitted).

136. *Id.*

137. *Id.*

The court noted the observation of the Washington Supreme Court that " 'the schemes created by statute for collective bargaining and dispute resolution must be allowed to function as intended, without the added coercive power of the courts being thrown into the balance on one side or the other.' "[138]

The part of the opinion dismissing the implied cause of action was concluded as follows:

> Having explicitly directed that in assessing penalties PERB and the courts consider the union's ability to pay and refused to enact a decertification provision, the Legislature must be deemed to have negated the unlimited liability, not only to third parties but to public employers as well, and the consequent demise of public employee unions, that would result from recognition of a new statutory cause of action.[139]

The court stated that its dismissal of the implied cause of action did not "require us to conclude that the traditional, though more limited, forms of action are no longer available to redress injury resulting from violation of the statute."[140] The court explained:

> The penalties imposable by PERB and the courts for such a violation provide some solace, but no recompense, for those injured by acts which not only violate the statute but also constitute a breach of duty, independent of the statute, which common-law remedies made compensable. Although it is within the competence of the Legislature to abolish common-law causes of action . . . , there is no express provision to that effect in the statute, notwithstanding numerous amendments of the Taylor Law after the decision by the Second Department in *Caso v. District Council 37*, . . . holding that law nonexclusive and a public nuisance action maintainable.[141]

The court reasoned:

> It is one thing to conclude that limitation of penalties payable to the public treasury and denial of a decertification sanction are inconsistent with the imposition of a new strict liability cause of

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138. *Id.* (quoting Burke & Thomas, Inc. v. International Org. of Masters, Mates & Pilots, 92 Wash. 2d 762, 772, 600 P.2d 1282, 1288 (1979)).

139. *Id.* at 330-31, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.

140. *Id.* at 331, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.

141. *Id.* (citations omitted) (footnote omitted).

> action, and quite another to conclude that persons damaged by actions tortious before public strikes were declared illegal should be denied the recompense to which they would be otherwise entitled in the interest of labor peace.[142]

The court recognized that "indemnification against such liability may become a union demand in the bargaining process and prolong an illegal strike. . . ."[143] However, the court considered that

> an insufficient basis, absent clearer indication of legislative intent, to hold the statute pre-emptive of all common-law causes of action and thus, as the Supreme Court has said in another context, "permit the result, extraordinary in our jurisprudence, of a wrongdoer shifting responsibility for the consequences of his [actions] onto his victim."[144]

The court then turned to the other causes of action asserted in the two complaints, and dismissed them all.

V. Where The Court Went Wrong

The New York court's decision has all the earmarks of a predetermined result in search of a convincing rationale. This is evidenced by the legal lengths to which the court went to reach its conclusions. In short, as this Article will demonstrate,[145] the court tortuously construed existing precedent and changed for the worse settled policies underlying the Taylor Law.

Implicit throughout the decision seemed to be a concern that if it applied existing New York law to an action to recover damages arising out of a public sector strike, the court would improperly be engaged in judicial policymaking or "legislation." However, by creating a special *exemption* from existing legal doctrines for illegal public sector strikes, the court undertook the very judicial activism it purported to avoid.

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142. *Id.* at 331, 451 N.E.2d at 466-67, 464 N.Y.S.2d at 719-20.

143. *Id.* at 331, 451 N.E.2d at 467, 464 N.Y.S.2d at 720 (citations omitted).

144. *Id.* at 331-32, 451 N.E.2d at 467, 464 N.Y.S.2d at 720 (quoting Wyandotte Transp. Co. v. United States, 389 U.S. 191, 204 (1967)).

145. *See infra* text accompanying notes 146-179.

A. *Implied Cause of Action: New Law and New Policy*

In dismissing the implied cause of action, the court departed from longstanding New York law. The implied cause of action should have been upheld once the court concluded that 1) Jackson, Lewis was among the class of intended beneficiaries of the Taylor Law's strike ban, and 2) the firm suffered damages proximately caused by the TWU's breach. Although it agreed that Jackson, Lewis was among the class for whose especial benefit the Taylor Law was enacted, the court's new construction of New York law made it unnecessary to consider proximate causation.

1. *The Shifting Focal Point of Legislative Intent*

Interestingly, the court neither explicitly abandoned the New York rule nor explicitly adopted the federal rule. Its first step was to change the focal point of the "legislative intent" inquiry under New York law. On this issue, the court appeared to be under the mistaken belief that Jackson, Lewis' contentions ignored legislative intent.[146] Legislative intent is indeed very significant. Settled New York law had held that legislative intent on the question of *whether a plaintiff was among the class of a statute's intended beneficiaries* was crucial.[147] In *TWU*, the court looked instead to legislative intent on the specific question of *whether an implied cause of action should be recognized.*

The latter approach, which more closely approximates the federal standard,[148] is really a contradiction in terms. Obviously, if legislative intent existed on the specific question of whether a damage action should be available to private parties, there would be little need to *imply* a cause of action. Only because there typically is *no* legislative intent on that specific question (as is the case with the Taylor Law) did it become necessary to recognize *implied* causes of action.[149]

The U.S. Supreme Court's attempts to divine congressional intent on the narrower issue must be considered in light of its

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146. New York City Transit Auth. v. Lindner, 59 N.Y.2d 314, 325, 451 N.E.2d 459, 463, 464 N.Y.S.2d 712, 716 (1983).

147. *See supra* text accompanying notes 34-37.

148. *See supra* text accompanying note 69.

149. *See* Kaplan, *supra* note 29.

broader objectives. The *Cort v. Ash* standards reflect the Supreme Court's efforts to limit recourse to overburdened federal courts.[150] While not suggesting that the New York judiciary has time on its hands, the absolute explosion of federal statutory law over the past half century generally, and the past twenty years in particular, has not been matched at the state level.[151] If private causes of action could be asserted based on all, most, or even a significant proportion of these federal statutes, the proverbial floodgates of litigation might actually be opened.

In any event, the practical explanation for the development of federal rules affords no compelling legal reason for their adoption by states. In fact, as previously noted,[152] the Supreme Court's federal rules simply could not be adopted wholesale for use in state courts. One element of the federal test is whether the subject matter has traditionally been relegated to state law,[153] a consideration that has no sensible application to a cause of action implied from breach of a state statute.

Even the contradictory focus of the legislative intent inquiry under *Cort v. Ash* makes more sense in the context of federal statutes. Typically, legislative intent is much more identifiable in federal statutes than in state laws. The legislative process is more heavily documented at the federal level than at the state level. Therefore, it may be possible to determine whether Congress actually intended a private action to be implied from a violation of a federal statute. Such a narrow inquiry at the state level can yield only extrapolation by judges as to what the legislature meant when it did and said nothing. Inconsistency and judicial legislation of the sort engaged in by the *TWU* court are the inevitable results of such "analyses."[154]

Discerning who the statute was intended to protect — the

150. *Id.*

151. *Id.*

152. *See supra* text accompanying note 66.

153. *Id.*

154. The arguments raised on this issue exemplify this problem. Since the legislature has never made any explicit statements on private causes of action, the parties debated whether silence in the aftermath of *Caso* was more meaningful than silence after *Jamur*. While one argument might be more intellectually appealing than the other, *see supra* text accompanying notes 70-77, it is most unrealistic to believe that the legislature had *any* intent on the specific question. The *Cort* standard, applied at the state level, necessarily requires such fictional digressions.

key inquiry under the traditional New York rule — is a much less speculative process. While some statutes might appear *unnecessary* at times, rarely is the purported reason for a statute's existence a mystery. And if we know *why* a statute was enacted, it is not a difficult progression to determine *who* the statute is intended to protect. Who the statute is intended to protect is a question that cannot be separated from the reason for a statute's enactment. Indeed, as in the Taylor Law, the intended beneficiaries might even be identified in the statute itself.[155] That general inquiry requires far less speculation than the specific question whether the legislature intended a statute to give rise to a private damage action.

2. *The Court's Misguided Perception of "Labor Harmony"*

The court's new approach to the legislative intent inquiry paved the way for speculation concerning the consistency with the Taylor Law's statutory structure of an implied cause of action.[156] In this regard, the court could not deny that a private damage action would promote the Taylor Law's goal of deterring strikes by public employees — a goal which, until the court's decision in *TWU*, had always been construed as the *paramount* concern of the Taylor Law.[157] The *TWU* court, however, for the first time elevated the legislature's interest in "labor harmony" over and above that of deterring strikes.[158]

It is unnecessary to resolve an esoteric debate as to whether strike deterrence is more important than "labor harmony." Once the TWU intentionally violated the Taylor Law by shutting down mass transit to the detriment of millions of New Yorkers, labor peace had already been breached. This breaching of the peace was brought about by the TWU's own illegal conduct. Neither government officials nor the members of the public

155. *See* N.Y. CIV. SERV. LAW § 200 (McKinney 1983). "[T]he purpose of [the] act [is] to protect the public by assuring . . . the orderly and uninterrupted functions of government. These policies are best effectuated by . . . continuing the prohibition against strikes by public employees and providing remedies for violations of such prohibition." *Id.*

156. *TWU*, 59 N.Y.2d at 330, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.

157. *See, e.g.*, cases cited *supra* note 78.

158. *TWU*, 59 N.Y.2d at 329-31, 451 N.E.2d at 465, 464 N.Y.S.2d at 718.

damaged by the TWU's illegal strike were responsible for the Union's misconduct.

Did the *TWU's strike* promote "labor harmony"? And if not, why should the TWU's breaches of "labor harmony" be condoned or excused while that same statutory goal is invoked as rationalization for insulating the TWU from the private consequences of its illegal conduct? In assessing the implied cause of action, the court *totally ignored* the breach of "labor harmony" caused by the TWU when it violated the Taylor Law to the detriment of millions of New Yorkers. Instead, it equated "labor harmony" with placating and protecting the TWU. In so doing, the court engaged in the worst possible form of appeasement.

It is bad law and policy to protect a wrongdoer at the expense of his innocent victim. Despite its lip service to this fact,[159] that is precisely what the court did. The facts of the *TWU* case make the court's treatment of the competing interests particularly unpalatable. That was *not* a case where a party negligently and unknowingly caused unforeseeable damages by violating an arcane or obscure technical legal proscription. The law is crystal clear. It is equally clear that the TWU intentionally broke the law. A union simply cannot shut down mass transit in New York City by accident. And, based on its own prior record, the TWU knew in advance exactly what effect its illegal strike would have.[160]

The TWU's conduct was consistent with labor outlawry, *not* "labor harmony." Yet, the court ruled that a private party damaged by the strike could not recover because *that* would upset labor harmony. In any event, permitting the TWU to escape the private consequences of its wrong does not promote *any* realistic conception of "labor harmony."

3. *The Phantom "Crushing Burden"*

In its dismissal of the implied cause of action, the court also seemed influenced by the "crushing burden" that a limitless *per se* statutory cause of action would impose on public sector un-

159. *Id.* at 331-32, 451 N.E.2d at 466-67, 464 N.Y.S.2d at 719-20.

160. *See supra* note 100 and accompanying text.

ions.[161] In so framing the issue, the court ignored the fact that no union would face *any* burden if it simply adhered to the Taylor Law's clear statutory language and did not strike. The court's stated assumptions as to the nature and consequences of recognizing an implied cause of action are similarly flawed.

What burden would truly befall a scofflaw public sector union were an implied cause of action recognized? True, Burns Jackson asserted as a prayer for relief in its class action suit $50,000,000 per day in damages. The court cited this figure to support its claim that the financial burden would be truly crushing were an implied cause of action recognized.[162] However, Burns Jackson's prayer for relief had *nothing whatever* to do with the possible consequences of recognizing an *implied* cause of action; *Burns Jackson did not assert an implied cause of action.*[163] Jackson, Lewis *did* assert an implied cause of action, and *its* prayer for relief was for out-of-pocket damages estimated, not at $50,000,000 *per day*, but at *$25,000* for the *duration* of the strike.[164] Ironically, the court dismissed Jackson, Lewis' implied cause of action based in part on Burns Jackson's prayer for relief, then made *no mention* of the amount of damages sought when it dismissed the causes of action asserted by Burns Jackson for *other* reasons.[165] This sleight-of-hand is a telling indicator of the court's desperation to dismiss the consolidated suits.

4. *Implied Cause of Action as a Common-Law Cause of Action*

Consider next the court's statement that an implied cause of action would impose limitless *per se* statutory liability.[166] Such liability would result from recognizing an implied cause of action *only* if the court again departed from established New York law. That traditional approach permits recovery *only* where a specific intended beneficiary of a statute can show damages proximately caused by a statutory breach.[167]

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161. *TWU*, 59 N.Y.2d at 329, 451 N.E.2d at 465, 464 N.Y.S.2d at 718.
162. *Id.*
163. *Id.* at 323, 451 N.E.2d at 462, 464 N.Y.S.2d at 715.
164. *Id.*
165. *Id.* at 333, 335, 451 N.E.2d at 468, 469, 464 N.Y.S.2d at 721, 722.
166. *Id.* at 330-31, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.
167. *See supra* text accompanying notes 61-64.

While the court properly recognized that each member of the general public is an intended beneficiary of the Taylor Law's strike ban, it hardly follows that every member of the general public could prove *damages proximately caused* by the strike. It is questionable whether such damages could have been proved by anyone who did not rely on mass transit for his or her livelihood. Even people who were unable to get to work because of the strike might have been unable to prove damages if their employers paid them for that time. Similarly, if alternative means of getting to work were not more costly than that provided by the struck mass transit system, there would have been no damages. These are only a few examples, but the point is clear. Rather than truly examining actual provable damages, the court was swayed by the "horrible ifs" scenario painted by the TWU. Had the plaintiffs ever been put to their proofs, damages proximately caused by the strike would have been surprisingly low.

The court also distinguished between what it called the statutory liability of an implied cause of action and "more limited" traditional common-law causes.[168] In so doing, the court ignored the fact that implied causes of action have always been considered common-law causes of action in New York.[169] In New York, a statute merely defines a duty whose breach is compensable in a *common-law action for damages.*[170] If a statute does not expressly provide a private damage remedy, there simply is no statutory cause of action. The supposed distinction between common-law and implied causes of action appears to have been constructed especially for the *TWU* case.

5. *Exclusivity Versus the Complexity of the Taylor Law's Statutory Structure*

Prior to its *TWU* decision, the court of appeals had never considered the question of whether the Taylor Law's strike penalties should be deemed exclusive. In holding that they were not, the court may have felt constrained by the legislature's inaction in the aftermath of the second department's *Caso* holding.[171]

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168. *TWU*, 59 N.Y.2d at 331, 451 N.E.2d at 466, 464 N.Y.S.2d at 719.

169. *See supra* text accompanying note 3.

170. *See, e.g., supra* text accompanying notes 34, 36, 37, 62.

171. *See supra* notes 70-71 and accompanying text.

Whatever the court's motivation, its reasoning in holding the Taylor Law's remedies *nonexclusive* actually undermines its conclusion that Taylor Law remedies are so *comprehensive* as to preclude a private right of action.

In *Caso v. District Council 37*,[172] the appellate division first listed the variety of enforcement provisions and penalties available to punish violations of the Taylor Law.[173] After acknowledging these various penalties, the court nonetheless *specifically allowed a damage action by third parties*.[174] In *TWU*, the appellate division described the statutory provisions in virtually the same words it used a decade ago.[175] Only this time, inexpli-

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172. 43 A.D.2d 159, 350 N.Y.S.2d 173 (2d Dep't 1973).

173. *Id.* at 161, 350 N.Y.S.2d at 176.

174. The cause of action sustained in *Caso* was for public nuisance. There, the court stated that "[a] common-law cause of action in nuisance would appear to be the appropriate remedy in the instant case . . . . The claim itself . . . does represent a cause of action. . . ." 43 A.D.2d at 163, 350 N.Y.S.2d at 178.

175. *TWU*, 88 A.D.2d at 65, 452 N.Y.S.2d at 89. In *Caso*, the court described the Taylor Law as follows:

> The Taylor Law provides that public employees and their union may be punished for engaging in a strike, the employees by loss of pay at twice the daily rate of pay for each day's involvement, the union by loss of its "dues check-off" right, and that the strike may be enjoined by the Supreme Court. Further, in the event of violation of such an injunction, the striking employees and their union may be punished by fines for contempt of court, and the employees also jailed.

43 A.D.2d at 161, 350 N.Y.S.2d at 176 (citations omitted).

The court later concluded:

> In summary, then, the Taylor Law was not intended to provide the exclusive remedies in the event of a strike by public employees. The statute itself states that it is intended to govern employer-employee relationships for the benefit of the public; it does not indicate that it is intended to immunize public employees from all punishment except that meted out by the chief legal officer of the government involved. It is well settled by the cases that the provisions of the Taylor Law are to be liberally construed to effectuate its purpose. The purpose of the Taylor Law is, inter alia, "to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." That purpose can best be served by interpreting the Taylor Law provisions as nonexclusive as to remedies against public employees for damages caused by an illegal strike.

43 A.D.2d at 163, 350 N.Y.S.2d at 177-78 (citations omitted).

However, in *TWU*, the court described the Taylor Law in much the same way, but came to an opposite conclusion, stating:

> The enforcement scheme prescribed by the Taylor Law is quite comprehensive, and includes, *inter alia*, the power to enjoin an illegal strike, to punish a union and its members for their willful violation of any such injunction, to deprive a striking union of its "dues check-off" privileges for an indefinite period of time, and to deduct from the compensation of every public employee who has been found to have violated its provisions "an amount equal to twice his daily rate of

cably, the same court concluded that "[i]t is this very complexity which militates *against* a determination that an additional remedy, i.e., a private cause of action, should be deemed to exist."[176] The court of appeals took the same approach to both issues.[177]

These conclusions — drawn from a virtually identical set of premises — are irreconcilable. The language of the *Caso* court was sweeping and not confined to any particular cause of action.[178] There is, said the *Caso* court, no "wisdom in a decision which puts the 'right' of a public union to engage in illegal activities entirely beyond the court's ability to find suitable redress . . . ."[179] Yet, that was precisely the practical effect of the court of appeals' decision in *TWU*. The appellate division was right in *Caso*; both the appellate division and the court of appeals erred in *TWU*.

VI. Conclusion

The New York experience is instructive for a number of reasons. The principal flaw in *TWU* was that while the court *stated* that the matter should be treated no differently than any other implied cause of action, the *result* it reached was actually a departure from settled law governing implied causes of action.

It is hoped that even if New York does not reconsider its analysis, other jurisdictions will avoid New York's mistake.

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pay for each day or part thereof" that he has been found to have participated in an illegal strike.

88 A.D.2d at 65, 452 N.Y.S.2d at 89 (citations omitted).

176. *Id.* at 65, 452 N.Y.S.2d at 89 (emphasis added).

177. *TWU*, 59 N.Y.2d at 325-31, 451 N.E.2d at 462-66, 464 N.Y.S.2d at 715-19.

178. Caso v. District Council 37, 43 A.D.2d 159, 162, 350 N.Y.S.2d 173, 176-77. *See supra* text accompanying notes 12, 13, 56, 57.

179. *Id.* at 162, 350 N.Y.S.2d at 177.