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SHORT STRIKES

MICHAEL M. OSWALT*

The state of strikes—their numbers, their results, their coverage—has been a perennial source of labor movement discussion. And things could get kind of dark. In 1992, the American Prospect asked, “[i]s the Strike Dead?”1 In 2003, so did the New Labor Forum.2 Another decade brought new data and notably less morbidity. “Fast food workers walk out in N.Y. amid rising U.S. labor unrest,” announced the L.A. Times in late 2012,3 linking walkouts at McDonald’s et al., to the first Walmart work stoppage in history the week before. At that point, the tentative answer to the Prospect’s original question seemed to be “no,” with a caveat. Though backed and assisted by big unions, the strikes were small (usually a few workers per store), short (24 hours, at most), and non-union through and through. The Labor Studies Journal still wondered if strikes represented a “contemporary lesson from labor history” or were destined to remain “a historical artifact.”4

In an earlier article, I suggested that short, service industry-based strikes represented an arrow in a quiver of tactics unions were firing at the wall to see what might stick.5 In 2019, the arrow stuck.6 At Wayfair, Ama-

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2. Peter Rachleff, Is the Strike Dead? 12 NEW LAB. FORUM 87, 87 (2003) (“It is not surprising that scholars and activists are asking if the strike has any efficacy left to speak of, or if it should be consigned to the dustbin of history.”).


6. In 2018, a different arrow stuck in the public sector when thousands of teachers lacking even collective bargaining rights struck for days on end. Dana Goldstein, Teacher Walkouts: What to Know
zon, Buzzfeed, Riot Games, major hospitals, and elsewhere, workers have walked out—and quickly returned—on issues as varied as sales to migrant detention camps, line speeds, prayer time, staffing, mandatory arbitration, unionization, and gun sales. To the extent organizations drove the actions, they ranged from the incipient to the non-existent, causing executives at massive start-ups like WeWork to list the prospect of strikes as an inherent risk to the company. Even children started “striking” their schools for a period or two over issues like voting, sexual misconduct, immigration, the environment, discrimination, and guns. By Labor Day, the New York Times Magazine had produced a “[h]ow to organize a Walkout” tip-guide, reminding would-be activists to “[c]arry signs” and designate someone “to voice your demands”—“large megaphone” preferred.

What I had previously described as an institutional weapon has seemingly become a social phenomenon. It seems like a good time to take stock.

Why “short strikes” have not just persevered but expanded has some obvious legal and practical answers. Relative to in-house or longer stoppages, the walkouts maximize protection and minimize job loss. They are custom-built for media coverage. Strikes—done well—are tried and true facilitators of internal capacities that support future organizing.


The goal of this essay is to go deeper. I argue that the past eighteen to twenty-four months signal a short strike inflection point for reasons related to the factors above but that ultimately lead elsewhere. First, while key characteristics of the recent activism can indeed be traced to labor law rules, the administrative tangles and inadequate protections of employment law may explain more. The actions might even represent a new era of “labor law as employment law.” Second, while strikers surely are driven by a desire for “attention,” in practice, much of it derives from tweets, not headlines. An emerging literature on digital protest suggests that although internet activism has limits, when Twitter, Facebook, and Snapchat meet the corporate obsession with online reputation, short strike organizers can overcome the barriers, to powerful effect. Finally, strikes can, and do, engage solidarity spirits, but when it comes to the future of short strikes, the spirits of a downtrodden generation of Millennials may matter more.

The essay proceeds as follows. Part I describes the long decline and very recent rise of U.S. work stoppages. Much of the revival can be attributed to short-term walkouts, and I focus on the three most prominent examples, grouped by organizational support: McDonald’s, where workers were assisted by a union; Google, where workers organized internally; and Uber, where independent advocacy groups played prominent roles. Part II assumes a trio of reasons for short strikes’ spread and adds twists to all three. The result is a tentatively optimistic take on the phenomenon’s effectiveness and future. Part III concludes with a summary of legal reversals that cast that future into doubt but also put a premium on institutional support for budding worker-activists.

I. THE RISE OF SHORT STRIKES

A defining feature of U.S. labor relations is strike decline. Officially, “there has been a significant reduction in the number of annual major work stoppages” over the past forty years. Unofficially, that makes no sense. For the better part of a decade, striking has seemingly become the go-to tactic for people fed up with working conditions in education, technology, hospitality, retail, fast food, transportation, and health care. In April

2019, the practice-focused Law360 published “4 Tips for Avoiding and Surviving Strikes.”15 (Tip 4: “Don’t Poke the Beast.”)16

Much of the discrepancy rests on the government’s insistence on recording only “major” strikes implicating 1,000 workers or more.17 Many recent job actions meet this bar—20 did last year, totaling more participants than any year since 198618—but many more do not. As Jake Rosenfeld has recently argued, this is fast becoming a significant descriptive gap.19

It’s already substantive. The strikes that hit Walmart in October 201220 kicked off a trend that certainly seems “major” in every sense but firm-by-firm participation. By one estimate, the dozens of small strikes organized by Fight for $15 have helped win raises for 22 million workers.21 Others have sparked significant policy reversals at large companies.22 By late 2014, a commentator observed that that “the most remarkable thing” about a few workers walking out over a broken AC was “how unremarkable” that reaction had become.23

But if counting these sorts of minority strikes is important to assessing labor’s state,24 so is accounting for their duration. The walkouts are, by and large, not just small but short, usually lasting no more than a day. Short

16. Id.
20. Josh Eidelson, Wal-Mart Workers on strike, SALON.COM (Oct. 4, 2012), salon.com/2012/10/04/walmart_workers_strike/ [https://perma.cc/P7PY-9L26] (“[T]he first-of-its-kind strike carries risks.”). As Eidelson reported, the first Wal-Mart strike owed much to contracted supply and warehouse workers who had previously struck for multiple days earlier in the summer. Id.
22. See, e.g., Lydia DePillis, Walmart is Rolling Out Big Changes to Worker Schedules This Year, WASH. POST (Feb. 17, 2016) (“The new policies include a few of the things activists have been demanding for several years.”).
23. Max Fraser, Can the One-Day Strike Revive the Labor Movement?, DISSERT MAG. (2014), dissentmagazine.org/article/can-the-one-day-strike-revive-the-labor-movement [https://perma.cc/V27W-UZ4E].
strikes put the conventional justifications for a work stoppage up for debate while also carrying intriguing implications about the tactic’s adaptability and potential. Already, the track record extends to the union, non-union, and contracted segments of the economy.

Unpacking the phenomenon begins with a short tour of the three most recent and publicized examples.

A. Union Backed: #MeToo McDonald’s

The McDonald’s Corporation has become somewhat of an emblem for short-term strikes, dating to a series of twenty-four hour walkouts organized by the Service Employees International Union (“SEIU”)-funded Fight for $15 campaign for raises and union representation that began in 2012. Even as the effort broadened its scope to low wage work in general, the employment and corporate practices that secured the quip “McJob” a spot in Merriam-Webster have continued to receive special organizing and litigation scrutiny. So while sexual violence is not a new problem in restaurants, when an October 2016 survey revealed an epidemic in fast food, specifically, the corporate giant was an easy pivot. The same month, fifteen workers filed EEOC harassment complaints against McDonald’s and its franchisees in eight states. A smattering of

news reports and protests followed, but so did executives’ indifference, assisted by a well-practiced claim that the McDonald’s Corporation has little to do with its “independent” franchisees.

Then, almost a year to the date, Alyssa Milano tweeted “#MeToo.” The phrase had actually been coined in 2006 by feminist activist Tarana Burke, but as early reports of Harvey Weinstein’s depravity surfaced, the hashtag version became social media wildfire. When Ashley Judd’s experience with the director went public, a “dam” broke, and the skepticism that so regularly attached to victims’ allegations of abuse turned untenable.

In Hollywood, at least. The swift justice associated with #MeToo’s call-out culture did not necessarily translate to non-celebrities and it had not so far at McDonald’s. #MeToo’s legal defense fund, though, did, and in 2018 lawyers from TIME’S UP partnered with the campaign in a second round of complaints alleging unwanted touchings, propositions, and assaults—many reported, all ignored. This time, Fight for $15 brought the now twenty-five accusers to Chicago to meet, share stories, and—insured to


33. See Wiessner, supra note 31.


35. Id.


37. MacKinnon, supra note 34.


39. Hannah Giorgis, The Simple Request of the McDonald’s Anti-Sexual Harassment Protests, ATLANTIC (Sep. 20, 2018), https://www.theatlantic.com/entertainment/archive/2018/09/the-simple-request-of-the-mcdonalds-antisexual-harassment-protests/570775/ [https://perma.cc/9E68-PW3M] (citing “the overall lack of empathy from the public” and noting that “McDonald’s employees . . . have been speaking up about workplace harassment for years . . . [and] have thus far lacked support, not conviction”).

40. Thomhave, supra note 32.

corporate deflection—plan next steps. That included setting up weekly “women’s meetings” in their stores that would soon attract hundreds of co-workers. The forums helped focus demands, foremost enforcement of the “zero-tolerance” rules already on the books, plus new training systems and a national anti-harassment committee with “representatives of leading national women’s rights groups.” They also built consensus for a tactic: a one-day strike.

For Fight for $15, it was certainly on-brand. But for an organization most obviously linked to living wages, the new focus was also acknowledgment that bad pay is often a toxic two-for-one, with economic dependence fueling vulnerability, silence, and continued abuse. When a strike vote passed committees in mid-September, McDonald’s began to confront the issue more publicly, touting “policies, procedures and training... specifically designed to prevent sexual harassment at our company.”

The franchisees, it suggested, had similarly comprehensive protocols.

But paperwork was never the problem. As Fight for $15 noted dryly in response, “[w]hatever policy they have is not effective,” and on September 18, 2018—National Cheeseburger Day—McDonald’s workers in ten cities struck to start over. The #MeToo links were explicit, plastered on signs (using Golden Arches font) and duct tape-covered mouths. St. Louis strikers went noisier, yelling, “[h]old your burgers, hold your fries, keep your hands off my thighs,” while the Chicago contingent took to the

42. Tanya Harrell’s reporting experience is representative: “[T]hey didn’t take it very seriously... The owners really don’t care, I really feel like they don’t care at all.” Id.
43. Thomhave, supra note 32.
44. Lennard, supra note 38. See also Thomhave, supra note 32.
45. Giorgis, supra note 39.
48. Id.
49. Id.
52. Id.
53. Id.
skies, flying a “MCDONALDS: STOP SEXUAL HARASSMENT” banner around and around Hamburger University.  

As scripted, it was over in a day. Workers like Adriana Alvarez who, like many, doubled as Fight for $15 organizers, described her motivation first as “anger” and second as a desire to represent those not ready to walk: “These women who have been harassed need to feel that. They need to see that they’re not alone and it’s okay to stand up and say, ‘You know what, this happened to me and it shouldn’t happen to me. Do something about it.’”

B. Non-Union: Google

The McDonald’s activism can be couched as another expression of labor’s multi-decade march beyond its blue-collar base and into the private sector service economy. So can the movement’s more recent moves into white collar industries like medicine, law, insurance, and especially online journalism. Silicon Valley is a different story. There, high salaries, free food, a near-mythic ethos of individualism, and old-fashioned anti-unionism made labor organizing “wildly difficult” if not completely “alien.”

Search giant Google seemed well-positioned to continue the trend, incorporating a democratic sheen into work life that included a company-sponsored petition process to address concerns and regularized “T.G.I.F” Q&A sessions with the CEO. Those procedures, however, relied on a baseline of bottom-up empathy, and by 2017, the scope and intensity of employee grievances started to overwhelm the system. When complaints that pro-LGBT content was being quietly marginalized on YouTube spilled into the press, management flailed, launching three increasingly fraught

54. Thomhave, supra note 32.
55. Covert, supra note 41.
60. Tveten, supra note 58.
public apologies in just fourteen hours. By 2019, most had come to view the company’s communication pathways cynically, effectively dead-end “mechanisms for expressing feelings.” “[R]eal power over decision-making,” remarked the longtime head of an internal research group, required something different.

What that something might be emerged from a snowball of events starting with an October 25, 2018 report that executive Andy Rubin was investigated for workplace sex abuse, found responsible, then feted and gifted with $90 million on his way out the door. It was not the only post-harassment “hero’s farewell” either.

Enraged employees confronted Google executives at the Friday staff meeting. One, Claire Stapleton, returned to her computer and, using the company’s intranet, created a discussion forum to organize a strike. By Monday, 200 employees had signed on. By Wednesday, 1,500 were ready to walk. And by then, harassment issues were just a starting point. Celie O’Neil-Hart, from marketing, took charge by sorting people into Google Groups and complaints into Google Docs, allowing comments to resonate and concerns to winnow across thousands of screens in real time. Transforming the maze of narratives into concrete calls for change would have been outlandishly complex but for the technical, management, and market-

62. . Scheiber, supra note 59. They were also increasingly feared as tools for retaliation and division. Daisuke Wakabayashi, Google Is Trying Too Hard (or Not Hard Enough) to Diversify, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/2018/03/09/technology/google-diversity-lawsuits.html [https://perma.cc/7KV3-GWTE].
63. . Scheiber, supra note 59.
67. . Id.
68. . Id.
ing talents that landed everyone at Google in the first place.70 Stephanie Parker, a YouTube policy specialist, called the process “really fun.”71

Ultimately, the crowds whittled discussion into five demands, including ending mandatory arbitration for discrimination claims, adopting pay and harassment transparency measures, establishing a “uniform, globally inclusive process for reporting sexual misconduct,” promoting “the Chief Diversity Office to answer directly to the CEO,” and appointing “an Employee Representative” to the Board of Directors.72 There was also a name—Google Walkout for Real Change73—and, importantly, a plan. On Thursday, November 1, 11:10 a.m. Tokyo time, workers in Japan left their desks and headed for the street.74 As other time zones caught up, so did Googlers in cities stretching from Singapore to Zurich, Haifa, Berlin, London, Dublin, New York, and Hyderabad, India.75 Overnight, the 1,500 names listed on Stapleton’s strike list had ballooned to 20,000 worldwide.76 Messages like “Time’s Up tech” and “Not Ok, Google” dotted sidewalks surrounding forty-seven separate corporate outposts.77

Clues to the expansion could perhaps be spotted in how organizers couched the day’s event in a press release, more of a solidarity action with “teachers, fast-food workers and others who are using their strength in numbers to make real change” than a tech-centric uprising.78 A hyper-local unity played an even bigger part. Strikers left notices explaining, “I’m not at my desk because I’m walking out . . . with other Googlers and contractors,”79 the latter a “shadow work force” doing the same jobs for less money, fewer benefits, and more indignities. Though they outnumbered direct

70. . Id.
71. . Id.
76. . Scheiber, supra note 59.
77. . Weaver & Hern, supra note 74; Carville & Grant, supra note 75.
78. . Scheiber, supra note 59.
79. . Weaver & Hern, supra note 74.
employees, all were “barred” from staff meetings, parties, and promotions.80

The company appeared at once stunned and philosophical. Executives had already apologized repeatedly.81 Asked whether the week’s events suggested Silicon Valley had lost some of its idealism, CEO Sundar Pichai referred to “a deeper thing here, which is: Technology doesn’t solve humanity’s problems . . . humanity has to deal with humanity’s problems.”82

Workers seemed to also have internalized that lesson. A strike fund, started with the $100,000 severance from just-departed activist Liz Fong-Jones, was already taking donations for next time.83

C. Contracted: Uber

If Google forever changed the search for data, Uber, its San Francisco-based neighbor, forever changed the search for stuff. But finger taps for cars, food, fix-its, or really, whatever—“Uber for X” is a standard Silicon Valley elevator pitch—also altered the complexion of modern work.84 Probably not for the better. Stripped of the minimal legal protections and economic nets that come with “employee” status,85 “gig” jobs have become synonymous with “financial fragility,”86 exhaustion,87 and often breathtaking sacrifice.88

81. Conger et al., supra note 66.
Yet, increasingly the apps that structure digital work are also structuring opportunities for self-organization and push-back. So, while opaque, algorithm-driven hiring and pay practices offer companies unprecedented business flexibility, the instability has led workers to operate like guerrilla H.R. teams, troubleshooting unfavorable app “adjustments” that can sometimes be translated into unflattering press.89

But it’s not just press attention. Over the years, such incidents have become fodder for concrete forms of collective action, including partial strikes (rejecting orders under a certain size),90 intermittent strikes (sparking short surges by turning off the app en masse for a “minute or two”),91 boycotts (#DeleteUber became a national story),92 and even “buycotts” (encouraging shoppers to protest and purchase by tipping twenty-two cents plus cash to maintain base pay).93 There have also been full strikes, usually regional94 and linked to an event like the Super Bowl in New York95 or, early last year, a sudden fare cut in Los Angeles and Orange counties.96

The Southern Californian action seemed to mark a tipping point. By 2019, once isolated skirmishes had begun to coalesce with the help of city-specific organizing groups positioned to unite drivers against some of the deeper dysfunctions of the gig economy, like harassment and mental health.97 With nearly 3,000 members,98 L.A.’s Rideshare Drivers United

94. In many cases the “region” has been abroad. See, e.g., Chloe Taylor, Uber drivers strike across the UK in protest over workers’ rights, CNBC.COM (Oct. 9, 2018), https://www.cnbc.com/2018/10/09/uber-drivers-strike-across-the-uk-in-protest-over-workers-rights.html [https://perma.cc/P7OZ-K36T].
(“RDU”) was further along than most, thanks in part to a proprietary app letting drivers communicate with organizers and, crucially, each other.99 While fare cuts were the immediate issue—one driver made less in seventy hours than he used to make in forty-five100—the mere opportunity to talk to other drivers had already generated discussions about a Rideshare Bill of Rights and a state cap on Uber commissions.101 It also helped organizers turn attention to an unmatched opportunity for drivers to make their case to the public: Uber’s IPO.

The goal was $120 billion,102 netting disgraced founder Travis Kalanick well over $8 billion, replacement CEO Dara Khosrowshahi between $80 and $100 million, and most drivers nothing.103 Hitting that figure already required an image makeover,104 and the various driver collectives did not want Uber’s spin on rideshare work to have any role in the company’s attempt at a redemption narrative.

RDU’s challenge was to transform the relatively ad hoc, small, and isolated strikes of previous years into a relatively planned, large, and united strike on May 8, offering day.105 Injecting dissension into a major news story would naturally attract mainstream attention but social media, espe-

100. . Siddiqui, supra note 98.
101. . Holder, supra note 97.
cially Facebook ads, allowed for more direct targeting. Workers who expressed interest or had questions could then be funneled into Signal or WhatsApp groups for person-to-person organizing.

Word, and buy-in from various driver collectives, spread quickly. That a genuinely local infrastructure had by that point spread across the country became apparent in the disparate banners and plans that developed from there. While RDU planned a twenty-four hour shutdown and noon picket at LAX, the New York Taxi Workers Alliance targeted just the morning rush before rallying outside of Uber HQ in Long Island City. Atlanta drivers logged-off for twelve hours. Even demands differed somewhat, with RDU focused on a minimum wage, commission cap, and clearer receipts, the San Francisco-based Gig Workers Rising calling for reforms ranging from health insurance to transparency, and Chicago’s Rideshare Advocates demanding raises, a driver cap, and a fair way to appeal firings (“deactivations” in Uber-speak).

All told, strikers likely numbered in the hundreds, a minuscule relative total the New York Times politely described as “modest.” But their voices reverberated. The Times also reported on drums, smoke flares, and chants in East London, brass bands and clogged streets in San Francisco, widespread political support, and defiant scenes in Melbourne, São Paulo, Queens, and across the Brooklyn Bridge. The largest gig worker strike in history was also, for most participants, their first.

106. See, e.g., Glaser, supra note 99, (noting the central role of “a closed Facebook community group for drivers only”).
111. Wamsley, supra note 109.
112. Paul, supra note 105.
114. Id.
115. Id.
The IPO, for its part, dropped at the bell and never recovered. It was, according to business reports, a “highly unusual” result.\(^{117}\)

II. CAUSES AND CONSEQUENCES: A SECOND LOOK

Eight years after Walmart and McDonald’s workers made headlines by walking out of work, the short strike has seemingly become a stable—and flexible—tactic. SEIU, the major labor union that funds Fight for $15, remains committed to it, but ad hoc groups of workers connected mostly through apps and shoestring groups have also picked up the baton. Most agree that the labor movement’s revival will require strikes, but whether short strikes of the sort described here contribute to or detract from that project is contested.\(^{118}\)

Less covered is why, after so many years of decline, this particular version has metastasized so quickly. Some answers are easy. For starters, labor law. Stopping work to exit the premises and protest working conditions is blackletter legal.\(^{119}\) A quick turnaround reduces the likelihood of being replaced in the interim.\(^{120}\) Further, strikes get attention. The press likes to cover conflict and disruption,\(^{121}\) and short strikes—sandwiching both—get activists a short window to “frame” the issues.\(^{122}\) Finally, strikes build solidarity.\(^{123}\) A short strike eases participation by limiting sacrifice while still strengthening internal ties going forward.

[https://perma.cc/3LXR-ZCVM].


\(^{118}\) For an overview of some nuances to this near-consensus, especially the role—if any—of illegal strikes, see James Gray Pope et al., The Right to Strike, BOSTON REV. (May 22, 2017) and its many responses. In 2017, the Labor Studies Journal devoted a “Special Section” to the question of one-day strikes, specifically. See generally Robert Bruno, Labor Debates: Assessing the Fight for $15 Movement From Chicago, 42 LAB. STUD. J. 365 (2017). See also Max Fraser, Can the One-Day Strike Revive the Labor Movement?, DISSENT (2014).


\(^{120}\) NLRB v. Mackay Radio & Telegraph, Co., 304 U.S. 333, 345-46 (1938).

\(^{121}\) Zeynep Tufekci, Twitter and Tear Gas: The Power and Fragility of Networked Protest 212 (2017).

\(^{122}\) The role of issue and collective action “frames” on movement development has been studied extensively. See, e.g., Robert D. Benford & David A. Snow, Framing Processes and Social Movements: An Overview and Assessment, 26 ANN. REV. SOC. 611 (2000).

\(^{123}\) This has been suggested ethnographically and in reviews of social science literature. See Rick Fantasia, Cultures of Solidarity 232-33 (1988); Nigel Nicholson & John Kelly, The Psychology of Strikes, 1 J. OCCUPATIONAL BEHAV. 275, 281-82 (1980) (“[Strikes] can, after a very short space of time, permanently alter the beliefs, assumptions and values of those involved.”); Doug McAdam, The Biographical Consequences of Activism, 54 AM. SOC. REV. 744, 754 (1989) (finding “a certain self-perpetuating quality to individual activism . . . deepening . . . commitment to activist values and perpetuating the process of personal change that initial forays into activism have set into motion”).
Yet, the same factors existed thirty years ago. There must be more to the story. Three new chapters are sketched out below. The first shifts the lens from labor to employment law, where weaknesses in the regulation of individual workplace rights may shape short strikes as much as the bedrock protections of group rights. Second, while public attention has always been critical to activism, today’s frenetic, freewheeling information economy has made it harder than ever to generate and control it in ways that project credibility and strength. Borrowing from Zeynep Tufekci’s theory of protest capacities, I argue that McDonald’s, Google, and Uber workers have cracked the code by pitting corporate delicacies against sophisticated social media shaming and on-the-ground organizational support. Third, solidarity is both a cause and consequence of collective action, but the ties most relevant to the course of short strikes might already be endemic to the newest generation of workers—who now outnumber everybody else.

A. Employment Law and its Discontents

Every labor law casebook has a strike chapter, and it usually starts with Washington Aluminum’s story of seven machinists who walked out of a frigid factory when the furnace broke.\(^{124}\) Since the protest implicated a group and was aimed at bettering working conditions, labor law’s foundational provision, Section 7, covered it.\(^{125}\) The Supreme Court’s empathetic rejoinder that “[t]hey had to speak for themselves as best they could”\(^{126}\) testifies both to the principle’s breadth and that discussions about the law’s role in short strikes are likely to begin and end with this giant of the labor law cannon. But here labor law’s function goes beyond the basics of its protective cloak. The key entry point for thinking about short strikes’ ascent is really employment law, as holes in today’s law of individual rights have thrust yesterday’s law of group rights into a surprise star turn.

It is a surprise because, between the two, labor law has been seen as somewhat of an understudy. The NLRA’s weak remedies, prolix unionization regime, and circa-On the Waterfront conception of work have led to a “gradual shift from labor law to employment law as the primary guardian of workers’ rights.”\(^{127}\) Over the years scholars had, at best, considered the

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125. Id. at 12-13. That is, the action was “concerted” and “for the purpose of . . . mutual aid and protection.” Id. at 12-15.
126. Id. at 14.
categories in tension; at worst, employment law’s smorgasbord of state and national minimum standards were thought to actively corrode labor law’s federally-entrenched right to negotiate for more as a group.128

Recent commentary is more nuanced. Last decade, Richard Michael Fischl identified an “accelerating integration” of regimes, like the “strategic deployment” of individualized wage, safety, and discrimination claims to weaken employer resolve during union campaigns.129 Ben Sachs went further, showing how employment litigation was functioning not merely as organizing “leverage,” but as a full-fledged “substitute form of labor law” that can both galvanize and insulate groups fighting for workplace justice.130 In Sachs’ instructive vignettes, unpaid overtime rallies the collective, the EEOC investigates, sues, and wins $750,000 from a racist employer, and the DOL remedies a retaliatory firing in 9 days.131

To varying degrees, both accounts are premised on labor law’s documented deficiencies. “[W]idely publicized” employment law charges in Fischl’s central case study were tailored to help the union skirt the NLRB’s election machinery altogether.132 The worker center Sachs highlights had already “abandoned the NLRA,” and before the EEOC settlement workers had actually given NLRB charges a chance.133 Save for a surveillance allegation—which resulted in a notice posting—the agency rejected every claim.134 As Sachs notes, winning reinstatement at the Board would have probably taken about two years.135

While the labor law criticism persists, recently the spotlight has expanded to other workplace and workplace-adjacent doctrines.136 The glare has not been good to employment law. Eulogistic language, so common in


131. Id. at 2685-748.

132. Fischl, supra note 129, at 213-14. In an example of increased mutuality between the fields, Fischl notes that the union also filed labor law charges. Id.

133. Sachs, supra note 130, at 2708, 2719-20.

134. Id. at 2719.

135. Id. at 2707.

NLRA scholarship,¹³⁷ has migrated to Title VII.¹³⁸ No plaintiffs fare worse, the EEOC’s budget was larger thirty years ago, and a mix of judicial hostilities and case management pressures increasingly signal “a wholesale abandonment of the antidiscrimination project.”¹³⁹ That includes the harassment sub-category, where, despite #MeToo, misconduct remains “so ubiquitous”¹⁴⁰ some wonder if the law has done more harm than good.¹⁴¹ Pay discrimination, too, is endemic,¹⁴² and in many industries wage theft, and backlash for complaining about it, is part of the business plan, the FLSA notwithstanding.¹⁴³ And, of course, today all employment claims, under all laws, risk banishment to the shadow world of forced arbitration¹⁴⁴—if they even get that far.¹⁴⁵

But if the recent laments signal a new era in relations between employment and labor law, it is not because the double-edged sword has finally dulled on both sides (after all, at-will employment’s injustices have been of academic interest for nearly fifty years).¹⁴⁶ It’s because of how they are suddenly interacting. In a reversal of Fischl’s and Sach’s early 2000s findings, labor law can now be found filling-in for employment law rules activists deem inadequate. Borrowing Sachs’ framing, through short strikes, workers are relying on labor law not simply for its substantive protection of

¹³⁷. Wilma B. Liebman, Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board, 28 BERKELEY J. EMP. & LAB. L. 569, 570-71 (2007) (“Various commentators describe the [NLRA] . . . as dead, dying, or at least ‘largely irrelevant . . . .’”).
¹³⁸. Linda Hamilton Krieger’s recent reflection is representative: “I write this message, put it in a bottle, and throw the bottle out to sea in the hope that one day, when the time is right, someone will find the bottle, take out and read the message, and . . . reviv[e] Title VII, this good law, and with it the hopes and dreams . . . that I believed as an earnest twenty-four-year-old it would come to represent.” Linda Hamilton Krieger, Message in a Bottle, 39 BERKELEY J. EMP. & LAB. L. 53, 57 (2018).
group protest, “but also as the legal architecture that facilitates” the aims of employment statutes.147 Here, “employment law as labor law” has become labor law as employment law. The shift accounts, in part, for short strikes’ rise.

1. Labor Law as Employment Law

Unlike the earliest actions at McDonald’s and Walmart, which emerged as seemingly exceptional—even, at the time, sui generis—responses to the universal realities of bad jobs like low pay and disrespect, the short strikes of 2018 had pedigrees: particularized employment law failures. At McDonald’s, Fight for $15 had already filed 15 EEOC charges in eight different states. The “zero tolerance policy” active at every corporate and franchised store had been revealed, in practice, as “zero policy.” At Google, harassment victims had been required to sign arbitration agreements silencing the facts, their voices, and assorted multi-million dollar payouts to abusers until leaks lifted the veil. In a strange attempt at assurance, the company then announced that forty-eight others had also been fired in the last twenty-four months—but for less money.148 Uber drivers had high hopes that litigation would make them legal employees entitled to minimum wages, overtime, and unemployment. But the efforts had proved “fruitless,”149 and Uber soon persuaded a number of states to amend statutes in the opposite direction.150 So drivers struck for higher pay instead.

When the results were in, McDonald’s and Google workers had won things right at home in a Title VII settlement. McDonald’s set up a “third-party-managed anonymous hotline,” agreed to train “front-line employees,” not just supervisors, and breakroom posters were in the mail.151 Google announced its own “overhaul” of the company’s complaint, reporting, and

148. . Conger et al., supra note 66.
training systems.\textsuperscript{152} Both stopped arbitrating harassment and discrimination claims.\textsuperscript{153} Gains at Uber were less concrete. The company’s new public openness to paid time off, retirement security, and “earnings transparency” was perhaps something,\textsuperscript{154} but it also seemed tailored to head off moves by the California legislature to mandate much more.\textsuperscript{155}

Yet, short strikes are likely to persist less because of short-term “results” and more because of how they facilitate employment law power in ways the standard statutory infrastructure does not. A primary reason is that short strikes can import public meanings into doctrine otherwise developed by courts, pressing employers onto less forgiving conceptual terrains.\textsuperscript{156} The reality of Title VII’s judicial gloss, for example, is that acts most people think constitute sex harassment do not, legally, constitute sex harassment.\textsuperscript{157} A “severe or pervasive” requirement renders most touchings, jokes, leers, and comments nonactionable and offers management attorneys copious helpful comparators.\textsuperscript{158} The law lags #MeToo and, as others have suggested, the mismatch is so profound it may eventually evolve judicial


\textsuperscript{156}. Scholarship has explored activists’ roles in shaping judicial perceptions of constitutional meanings. See Douglas NeJaime, \textit{Constitutional Change, Courts, and Social Movements}, 11 \textsc{Mich. L. Rev.} 877, 878-79 (2013) (providing an overview and suggesting a social movement theory-specific approach). Here, the advocacy of legal meaning is similarly social and “bottom-up,” but the target is profit-maximizing corporations, not courts. I suggest that the substitution of courts with reputation-sensitive companies can make for particularly soft targets. \textit{Id.} at 891; see \textit{infra} Part III.B. As socio-legal scholars have emphasized, because “rights-talk,” like freedom from harassment or poverty-level wages, carries “enormous legitimacy, those who lack social and political clout often use [it] to negotiate social benefits—even if their claims would be largely meaningless in court.” Lauren Edelman et al., \textit{On Law, Organizations, and Movements}, 6 \textsc{Ann. Rev. L. & Soc. Sci.} 653, 664 (2010).


\textsuperscript{158}. \textsc{Sandra Sperino & Suja Thomas, Unequal: How America’s Courts Undermine Discrimination Law} 34-37 (2017).
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perceptions. But short strikes force a reckoning right now. Precedents can’t be parsed in the streets. New York Times exposés will be held to the public’s bar for what is, or is not, tolerable. While lawyers tidied briefs, striking took that extant, even intuitive, frame and shoved it in executives’ faces. At McDonald’s that forced a quick concession. “[W]e’re changing,” said the CEO. At Google, it precipitated one of more unexpected turns in modern U.S. labor relations: Sudar Pichai expressed formal “support” for his own workers’ walkout.

Likewise, most would probably be surprised to learn that 90% of those sporting the Golden Arches do not, from McDonald’s perspective, work for McDonald’s. The non-obvious position that McDonald’s Inc. has no control over its franchised workforce is core to its litigation strategy across a variety of workplace laws, and it was the company’s argument to the public when Fight for $15 filed its first round of EEOC charges against franchised stores in 2016. But when it came to strikes, the giant franchisor seemingly lost its nerve. Pre-strike, the company offered self-praise and an arm’s-length confidence in its liberated namesakes: “[W]e firmly believe that our franchisees share this commitment.” Post-strike, the company rolled out implicit bias and harassment trainings for franchise owners, managers, and front-line “crew” to “meet the needs of our workforce and the communities where we live and operate.” Whatever corporate’s legal position on joint-employer doctrine, Fight for $15’s take that “anything [McDonald’s] wants to be effective on, it can be” had—after a dose of Section 7—apparently won out.

160. Cf. 29 C.F.R. § 1604.11(a)(3) (2019) (describing the legal inquiry as whether conduct “unreasonably interferes with an individual’s work performance” or creates an “intimidating, hostile, or offensive working environment”).
161. See, e.g., Edelman, supra note 156 (“[Activists] extend general and accepted legal frames (e.g., the law prohibits gender discrimination in employment) to other aspects of everyday life (e.g., the law prohibits sexual harassment) to call into question previously acceptable social behavior.”).
163. Conger et al., supra note 66.
164. Emily Peck, McDonald’s Workers Detail Horrifying Sexual Harassment, HUFFPOST (Oct. 6, 2016), https://www.huffpost.com/entry/mcdonalds-harassment-complaint_n_57f5385ae4b0b7afa6f0b4584 [https://perma.cc/CX4S-D53F]. For an overview of “joint employment” law in the franchised workplace, see Andrew Elmore, Franchise Regulation for the Fissured Economy, 86 GEO. WASH. L. REV. 907 (2018).
165. A.P., supra note 47.
166. Patton & Eidelson, supra note 162.
167. Abrams, supra note 51.
In other situations, workers are just freer to assert rights under labor law than employment law. Thanks to *Epic Systems v. Lewis*, required arbitration contracts mean Uber drivers cannot use courts or arbitration to claim employment law rights as a group. But if any group—of any size—asserts the identical employment law claim in a strike, it’s protected.

Procedurally, short strikes draw a beautiful contrast. The prerequisites amount to get-up-and-go, no lawyer, negotiation, or even articulated demand needed. That helps make the tactic a fundamentally free agent, equipped to switch on and off and from topic to topic with fluidity. McDonald’s workers have since walked-out over workplace violence, Googlers over retaliation from the first strike, and gig workers are, as noted, confirmed serial strikers.

Very little about employment law is simple. A “vast, hydra-headed body” of regulation governs “a maze of potential claims and forums” and a “jumble of procedures and remedies.” Accessing any part of the system requires a sense of where to start, a baseline many, particularly low-wage, workers do not have. Representation could help, but obtaining it is

170. This, of course, assumes, as many scholars do, that Uber drivers are “employees,” not independent contractors. See, e.g., Kati L. Griffith, *The FLSA at 80: Everything Old is New Again*, 104 CORNELL L. REV. 557, 564-69 (2019).
171. See *NLRB v. Wash. Aluminum Co.*, 370 U.S. 9, 14 (1962) (“The language of §7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made. . . .”)
177. The Restaurant Opportunities Center has studied how pervasive harassment and other illegals in service work become normalized and subsequently ignored by victims. Restaurant Opportunities Ctr. United, *Take Us Off the Menu: The Impact of Sexual Harassment in the Restaurant Industry*, ROCUNITED.ORG (May 2018), https://rocunited.org/wp-
not just difficult but a class issue, where only good salaries provide the requisite power to pay or, in the contingency context, damages to collect.

Then there are the less definable dignitary benefits. A vast literature interrogates the impact of courts and lawyers on activism, but at McDonald’s, Google, and Uber, the regular levers of employment litigation had led mostly to demoralization. Fast food workers filed at regional EEOCs proudly in person. Nothing happened and “frustration” followed. Google pushback was mired in hermetic arbitration for years. Lawsuits left Uber drivers searching for a way to “humanize our struggle,” to “[l]et people know what’s really going on with us.” Accounts of short strikes, in contrast, read like primal screams. “We’re fearless,” said McDonald’s worker Kimberly Lawson, who makes $9 an hour. Marcus, an Uber driver, had similar feelings: “We have to do this.” A Google striker took to a makeshift stage and called for more advocacy, more allyship, and more protest. “What will you sacrifice?” she wondered. The crowd erupted.

The question, of course, is whether the energy can endure. A clue is perhaps revealed in Stephen Befort’s depiction of the many tickets and few winners in the “uniquely American employment law lottery.” Because the drawings and disappointments will surely continue and, in the meantime, everybody can try a short strike.

At McDonald’s, workers “didn’t even know that the conduct they were tolerating was unlawful, and they had no idea, after they had unsuccessfully approached managers, that there was anything they could do about it.” Abrams, supra note 51. On workers lacking basic knowledge of workplace regulation, see Pauline T. Kim, Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protections in an At-Will World, 83 CORNELL L. REV. 105, 133-46 (1997).

For a deft summary of this literature, see Sameer Ashar, Public Interest Lawyers and Resistance Movements, 95 CALIF. L. REV. 1879, 1904-07 (2007).

Thomhave, supra note 32; Covert, supra note 41; Lennard, supra note 38 (quoting a Fight for $15 attorney describing the impact of the EEOC as “an exercise in frustration”).

Bhaiyia, supra note 96.


Glaser, supra note 116.


Befort, supra note 175, at 402.
B. “Attention”

On the basic issue of increasing labor’s power, short strikes have been questioned on efficacy, organizing, and institutional grounds. No one doubts they generate attention. Even skeptics slight the actions as “publicity strikes” aimed at attracting local or, ideally, national interest. Actually, that’s their best feature.

Movements need media, classically to mobilize supporters, validate the cause, and expand the base. How those ends are shaped by mass media, specifically, has been the subject of scrutiny with the upshot being that important movement messages are often lost in translation. But today’s media is much more than “mass.” It is “social” and “participatory.” Activists can frame stories, events, and themes any way they want. Now the question is how, amid the information avalanche, any message survives. As Zeynep Tufekci argues, “attention” itself has become a critical movement resource.

But not just any attention. Attention is relevant to the extent that it “signals,” in Tufekci’s words, “capacities” to spread narratives that persuade, impact elections, or disrupt business as usual. And social media attention counts. It took Occupy Wall Street (“OWS”) eight nights of urban camping to appear in the New York Times—in the Metro section, the headline dripping with derision. After fourteen days, most big papers had covered it, but in substance referenced “police” three times more than the

189. Lydia DePillis, A key union appears to be backing away from one of labor’s most prominent campaigns, WASH. POST (Apr. 15, 2015, 11:50 AM), https://www.washingtonpost.com/news/wonk/wp/2015/04/15/one-union-appears-to-be-backing-away-from-labors-most-prominent-campaign/ [https://perma.cc/CG43-45GV] (describing “some tension within . . . unions about how much to spend on an effort that isn’t a traditional organizing campaign and doesn’t focus on unionized employers”).
193. Zeynep Tufekci, “Not This One”: Social Movements, the Attention Economy, and Microcelebrity Networked Activism, 57 AM. BEHAV. SCIENTIST 848, 859 (2013).
194. Id. at 849, 852.
196. Id. at 211-12.
word “inequality.” Yet, what OWS lacked in newsroom appeal it made up for in narrative capacity, all online. Combining impeccable post-crash, mid-austerity timing and solid gold, 1% versus 99%, oppositional framing, #OccupyWallStreet became hashtag wildfire, jumping from a single retweet in Spain, to another from a Long Island teacher named “Cindy,” to eight from dispersed liberal activists, to seven vegans and poets, to eventually 15,000 posts an hour.

Tufekci’s point is that a movement’s true strength should be measured by its target’s perception of these three capacities, and it’s a mistake to assume that “off”-line or online activity radiates an inherently superior signal. Occupy’s famous political disinterest allowed its online narrative skills to get zeroed-out by little electoral or—sequestered mostly in parks—disruptive capacity. Clearing the lawns basically cleared the movement.

1. Short Strike “Attention” and Capacities

The deeper promise of short strikes, then, goes not to their status as media catnip but to the capacity-building potential of walking out for the day. On that account, activists understand they’re a triple-threat.

First, while Tufekci has achieved notoriety as an evangel for digitally fueled mass protest, her full praise is really limited to the especially potent narrative force of viral messaging. And short strikers have proven to be skilled virologists. The research here relates to “threshold” effects and how taking a low but not zero-risk action, say, adopting a marriage equality Facebook banner where your “friends” hold differing views, requires re-

197. . Id. at 212.
198. . Id. at 213-14.
203. . Id. at 214-15.
204. . See Tufekci, supra note 195, at 204 (“If there is a broad claim to be made about digital technologies and social movements, it is that these tools often greatly enhance narrative capacity . . . .”). See also infra notes 237, 239.
repeated exposures to others doing it first. Spotting the banner once or twice—even on a close friend’s profile—tends not to be enough “social proof” for most to make a move. That means “peripheral” allies to a cause hold the key to making a story become the story, and short strikers can, and do, target them with abandon. Scholarship has shown, for example, how Fight for $15 deftly leverages its uniquely federated structure to disperse both professional and amateur “opinion leaders” far across the “Twitterverse.” SEIU, Fight for $15’s funder, deploys a cautious, even bland, approach to strike messaging that relies on its “historical institutional reputation” as a workplace expert to solidify views of members, activists, progressive politicians, and other organizations. Simultaneously, regional Fight for $15 groups use creative images, emotional themes, and worker stories “narrated in a ‘talking-on-the-streets’ register” to “broker new networks by elbowing their way into spaces where [SEIU] wouldn’t penetrate otherwise.” The result is a gradually-expanding wage justice narrative that cuts across union membership, issue interest, race, gender, and class. Eight years in, doubling the federal floor—and then some—has become the stock approach to talking about living standards.

More broadly, the tactic’s “come-one-come-all” ethic and low investment, “happening-now” vibe effortlessly carve a wide valley for collecting online support. Googlers logically piggybacked on the established narrative breadth of #MeToo, but workers also attracted attention by playing on longstanding anxieties surrounding precarious work and tech culture. Uber being Uber, striking drivers became a natural proxy for the plight of all platform workers. But as Veena Dubal has argued, that they even at-
tempted to gather a group to confront a system exquisitely designed to divide—and actually pulled it off—was itself an unprecedented victory of gig economy counter-narrative.213

Concededly, short strikes face electoral and disruptive capacity challenges. As the actions have grown, workers have struck companies, not governments, and the animating message is better corporate, not legal, treatment. Any GOTV effects are welcome, but secondary. Moreover, nearly every ounce of strike law is crafted to minimize corporate inconvenience.214 Tufekci’s perspective is that the relative ease of assembling groups digitally has generally weakened protests, since it lets activists skip the in-person negotiations that forge the relational stability and leadership necessary to project electoral or disruptive capacity.215 A tweet might get people to show up, but it doesn’t signal if they’ll vote or how they’ll react if the police do too.216

Yet, Tufekci’s take actually points to short strikes’ electoral and disruptive potential. Institutions devoted to ground-level organizing pre-dated the McDonald’s, Google, and Uber actions. Some were established (Fight for $15), some were incipient (Google Walkout for Real Change), and some were something in between (RDU), but each relied on social media to facilitate, but not necessarily generate, turnout.217 Instead of the tactical freezes and leadership voids Tufekci fears,218 the protests are a marriage of order and spirit, weathering internal transitions and displaying a procedural and messaging nimbleness.219 It is the sort of mix needed to eventually

213. Dubal, supra note 107.
215. Tufekci, supra note 193, at 71, 75-77 (“Technology can help movements coordinate and organize, but if corresponding network internalities are neglected, technology can lead to movements that scale up while missing essential pillars of support.”). Tufekci’s calls this phenomenon “adhocracy,” because “tasks can be accomplished in an ad hoc manner by whoever shows up and is interested.” Id. at 53. Logistics for the massive Egyptian protests in 2011 were coordinated through @TahrirSupplies—from London, the UAE, and elsewhere. Id. at 53-55.
216. From Tufekci’s perspective, the weak electoral and disruptive capacities of the historically-large but social media-fueled anti-Iraq War protests freed President Bush to dismiss the crowds as a “focus group,” invade a country, and glide to re-election. Id. at 189-91, 221. She relies on the civil rights movement, particularly the intimate conversations, meetings, and logistics that facilitated the Montgomery bus boycott, as a contrast. Id. at 62-66.
217. Even at Uber, where on-line organizing was, by necessity, prioritized, it was usually in service to face-to-face or phone conversations. Glaser, supra note 99 (describing how groups “use the tech to get in touch with [drivers], and then an organizer will place a phone call and discuss the issues and try to recruit people that way”).
218. Tufekci, supra note 193, at 77-78 (describing networked movements “unable to develop and agree on new paths to take” due in part to how technology creates leadership vacuums).
219. Google Walkout for Real Change, for example, remains strong despite the departure of two of the strike organizers in Summer 2019. Tellingly, Meredith Whittaker’s internal farewell message focused not on harassment or retaliation but the company’s unaccountable AI capabilities, giving thanks
cultivate a credible electoral signal and, tellingly, the oldest of the three has evolved to attempt just that. When a $15-an-hour bill recently passed the House, Fight for $15 was called “a road map for the left,” with Medicare for All, the Green New Deal, and free college tuition all future destinations.

As for disruptive capacity, the reality is that since short strikes are, well, short—and, to this point, small—production stalls are unlikely. Instead, it’s going to be about the brand. Companies have good reasons to care deeply about their public reputations. How outsiders perceive them affects pricing strategies, the applicant pool, investor interest, and ultimately the bottom line. In the best of times, it is “highly fragile” and “notoriously difficult to manage,” and the social media age is not the best of times. In fact, it has upended the business literature on reputation risks, which had long positioned the public as “passive receivers” of the party line and worried mostly about how companies should craft it. Now the public claps back, with an amazing half of social media users launching virtual complaints across friend and follower networks each month.


In the literature, “brand” and “reputation” are distinct terms, with brand referring to a company’s own aspirational projection of what it “will deliver in terms of products, services, and customer experience,” and reputation referring to the public’s overall positive or negative impressions of the company’s past actions and future conduct. Paul A. Argenti & Bob Druckenmiller, Reputation and the Corporate Brand, 6 CORP. REPUTATION REV. 368, 369 (2004).


Pekka Aula, Social media, reputation risk and ambient publicity management, 38 STRATEGY & LEADERSHIP 43, 46 (2010).


Bowen Zheng et al., Exploring the relationship between corporate reputation and the public’s crisis communication on social media, 44 PUB. REL. REV. 56, 56 (2018).

Ott & Theunissen, supra note 225, at 97.
is almost impossible,” one study concluded, “for organizations to control conversations about themselves.”

Nonetheless, the current best practice is for companies to dip their toes into the fray. Social media manufactures a “collective truth” where “images, symbols, stories, myths, and rumors both fabricate and challenge” reputations, and businesses cannot let the dialogue proceed without them. But few, it turns out, are competent interlocutors. Most resort to old media tactics of denial, justification, and persuasion, which tend to fuel online crises by “offering further fodder for disapproval.” The result is a “snowballing of negative comments” that intimidates the company’s genuine supporters into silence. A recent finding is that the better a company’s baseline reputation, the bigger the snowball.

Short strikes are basically anthropomorphized complaints, livestreamed. Always, the action will be packaged and repackaged across social media as “dialogue” that invites righteous anger from corporate outsiders and demands answers from corporate insiders. Maybe a company’s response goes sideways, prolonging the conversation. Or maybe it tracks the accommodative course advised in the literature—Google, instantly giving ground, took this path—and the public senses that the company is listening and learning.

Of course, not every short strike will generate enough virtual wake to sustain, or even make, online or offline headlines. And while organization theorists have called reputation risk the “primary threat to business operations and market value” (and anger, the most dangerous “emotion on the internet”) much of that literature is founded on complaints that engage in conversations about themselves.  

228. Aula, supra note 224, at 44.  
229. Id. at 46-47.  
230. Ott & Theunissen, supra note 225, at 100.  
232. Id. at 60. The public seems, in other words, to hold well-regarded companies to a higher moral standard that, once broken, provokes particular outrage. Id.  
233. Aula, supra note 224, at 46.  
234. See Ott & Theunissen, supra note 225, at 101 (“Highly accommodative strategies appear to be more successful than denial or diminishing strategies—especially if they are combined with actions that demonstrate the organization is listening to its critics.”).  
235. Aula, supra note 224, at 44.  
236. Ott & Theunissen, supra note 225, at 98. A social movement perspective might suggest that strikes represent “exogenous shocks” to corporate reputation, creating a crisis that “calls the legitimacy, adequacy, or appropriateness of [past] practices into question.” Edelman, supra note 156, at 670-71. Changes that follow are often “overt and consciously designed.” Id. at 671.
consumerist sympathies, like product quality or customer service. Employee mistreatment may not be as consistently resonant. Yet, workplace injustices can and do make for viral moments, and SEC disclosures, at least, suggest that some large employers do fear short strike financial fall-out. Moreover, a little virality goes a long way. Kylie Jenner may make $1 million an Instagram post, but the corporate obsession with mere pockets of online reputation is the better tell. Today, so-called “nanoinfluencers” with “as few as 1,000 followers” are showered

237. . And, to be sure, many high-profile examples of viral corporate catastrophes have involved unsafe products or racist customer treatment. See, e.g., Suzanne Baker, Employees at Naperville Buffalo Wild Wings fired after customers described racist incident at the restaurant, CHITRIBUNE (Nov. 4, 2019, 5:06 PM), https://www.chicagotribune.com/suburbs/naperville-sun/ct-nvs-naperville-buffalo-wild-wings-employees-terminated-st-1104-20191104-doprfxa5c5vbnmu2a4e74vb65-story.html [https://perma.cc/M8W5-CH59] (“[A]s of Sunday night the post [about the incident] had been shared more than 4,400 times and generated nearly 3,000 comments.”); Nathan Bomey & Zlati Meyer, Chipotle to retrain all workers on food safety after hundreds fall ill in Ohio, USA TODAY (Aug. 16, 2018, 3:02 PM), https://www.usatoday.com/story/money/2018/08/16/chipotle-mexican-grill-food-safety-retraining/1008398002/ [https://perma.cc/5L5A-GC4M] (citing “the threat of renewed perception among customers that the food is unsafe” as the company’s “primary concern”); Anna Orso, One year later: A timeline of controversy and progress since the Starbucks arrests seen ‘round the world, PHILA. INQUIRER (Apr. 12, 2019), https://www.inquirer.com/news/starbucks-incident-philadelphia-racial-bias-one-year-anniversary-stutter-dilworth-park-homeless-tables-20190412.html [https://perma.cc/9YXY-7NTX] (“After a video of the arrest of Rashon Nelson and Donte Robinson went viral on Twitter, weeks of protests at the Starbucks . . . followed, as did an apology tour by Starbucks leadership and nationwide racial-bias training for the company’s 175,000 employees.”).

238. . A tension between “producerism,” focusing on the supply-side rights and interests of workers and small businesses, and “consumerism,” focusing on the demand-side interests of purchasers, has been of interest to historians, political theorists, and other scholars focused on the rise of big-box stores that seem to privilege low prices over high wages. James Q. Whitman, Consumerism Versus Producerism: A Study in Comparative Law, 117 YALE L.J. 340, 344-49 (2007). A key political question that arises is whether the public is more likely to see its interests aligned with cheap goods or fair workplaces. Some believe low prices will win out every time. See, e.g., BENJAMIN R. BARBER, CONSUMERED: HOW MARKETS CORRUPT CHILDREN, INFANTILIZE ADULTS, AND SWALLOW CITIZENS WHOLE 177 (2007).

239. . A rich example comes from a waitress fired from Applebees for using Facebook to post the receipt of a customer who had scribbled, in response to a mandatory tip, “I give God 10%, why do you get 18?” Ott & Theunissen, supra note 225, at 99. As word of the incident spread online, the company announced that the waitress had violated Applebee’s privacy policy, though it soon emerged that the company had itself published receipt messages on Facebook, fueling further outrage. Id. The restaurant responded by deleting all online receipts and releasing a Facebook message on the importance of customer privacy, which amassed over 10,000 trate comments. Id. Applebees then began selectively deleting critical responses, sparking calls of censorship. Id. A follow-up explanation “was soon buried under negativity,” leading the company to repost it. Id. In the meantime, Applebees tried responding to specific customer comments by cutting and pasting lines from the various justifications. Id. This merely “enraged online users further and prompted them to also copy and paste their denunciatory posts.” Id. Finally, Applebees quit using Facebook. Id. at 100.

240. . Cheng, supra note 8; Josh Eidelson, McDonald’s to the SEC: Strikes Hurt, and We Might Have to Hike Pay, SALON (Mar. 5, 2014, 3:11 AM), https://www.salon.com/2014/03/04/mcdonalds_to_sec_strikes_hurt_and_we_might_have_hike_pay/ [https://perma.cc/LH9Q-MS5V].

with cash and gifts to perform for the brand.\textsuperscript{242} Apparently, every boost—or hit—matters.

Famous or not, paid influencers tend to be young, as companies see Millennials as a key mediating force for online reputations.\textsuperscript{243} They are also a third, and final, key to the short strike surge.

\textbf{C. Millennials}

Millennial culture—what twenty- and thirty-somethings want, and especially how they act—is a subject of much fascination and speculation.\textsuperscript{244} Demographically, they have taken over the workplace,\textsuperscript{245} leading to hand-wriring and, for executives, white papers analyzing how, or whether, to adapt.\textsuperscript{246} As this research develops various snapshots are coming into focus, and in one frame, the Millennials are out on strike. Their workplace legacy may be a sustained revival of the stoppage one day, morning, or afternoon at a time.

The place to begin is attitudinal surveys, which belie caricatures of a self-centered and entitled extended adolescence.\textsuperscript{247} Alone among generations, Millennials are unabashed leftists. Compared to Boomers, they are twice as likely to support socialism, seemingly more interested in joining “independent or issue-based” political movements than an established party, and over a quarter less likely to label themselves as patriots.\textsuperscript{248} They are markedly more progressive on immigration, race, LGBTQ, and drug issues,\textsuperscript{249} messages reinforced by Millennial pop stars.\textsuperscript{250} None of this ap-


\textsuperscript{243}. \textit{Id.}

\textsuperscript{244}. The titles of just three recent books seemingly suggest a difference in species, not generations: RYAN JENKINS, THE MILLENNIAL MANUAL (2017); HANNAH L. UBI ET AL., MANAGING MILLENNIALS FOR DUMMIES (2017); CHRIS TUFF, THE MILLENNIAL WHISPERER (2019).


\textsuperscript{248}. Ruth Milkman, \textit{A New Political Generation: Millennials and the Post-2008 Wave of Protest}, 82 AM. SOC. REV. 1, 6-7 (2017).

\textsuperscript{249}. \textit{Id.} at 6.
pears to be a function of youth, and the numbers generally hold within ra-
cial and education sub-groups.251

Results like these can be (and often are) explained away as a cyclical “parents-just-don’t-understand” culture clash,252 but the stronger analysis is political. If Millennials are slow to adopt the conventional trappings of adulthood—more live at home than on their own253—it’s because they can’t. They’re trapped in “waithood,” with debt, terrible jobs, and a historic recession—not laziness—to thank.254 This has led, predictably, to cynicism and the full battery of mental health concerns, but also, increasingly, to radicalism.255 Parsing further survey and narrative data, Nick Serpe concludes that much Millennial disdain may be trained on “older people,” but that is because they are in charge, “not because they are old.”256

Sociologist Ruth Milkman takes this point and runs with it, bringing Karl Mannheim’s lens to four prominent Millennial-led movements to argue that young adults define a “new political generation.”257 OWS, Black Lives Matter (“BLM”), the Dreamers, and campus anti-sexual assault movements differ in memberships and approaches to change,258 but three favor direct action and the fourth, focused on Title IX enforcement, has since seemingly merged with #MeToo.259 All are adept digital media organizers.260 As their “new collective impulses” develop,261 Milkman notes


252. . See Keith A. Spencer, Why millennials will miss Boomers when they’re gone, SALON (May 12, 2019 11:30 PM, https://www.salon.com/2019/05/12/why-millennials-will-miss-boomers-when-theyre-gone/ [https://perma.cc/F39X-EZ8D] (“The millennial stereotype of Boomers, as computer-illiterate gullible reactionaries . . . denies the radical political lessons that Boomers left for our generation . . . .”).


256. . Id. at 8-14 (“[T]he political realignment suggested by Pew’s polling and the flourishing of radical movements . . . do not point to an inevitable battle with the grays. The forces that have forged millennials have contributed to growing opposition to the political and economic establishment—which, like all establishments, contains more older people than young.”).


258. . Id. at 2-3, 12.

259. . Id. at 15, 19.

260. . Id. at 7-9.
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that their “strategic repertoires . . . have begun to converge.”262 The workplace increasingly seems like a vanishing point.

Indeed, as stereotypes evolve to encompass a more precise architype of “Millennial rage,”263 at least some of it is getting channeled by the institution designed to direct it to the shop-floor: unions. Over three-quarters of new members are Millennial members.264 Sixty-five percent of the rest say they like unions.265 All approach their fortieths “in worse financial shape than every living generation ahead of them.”266 That reality, and the bad jobs beneath it, bring unprecedented instability—but also less to lose. From there, short strikes offer something of a resistance sweet spot: more rebellion than a letter to the editor, petition, or rally, less risk than sabotage or anything longer. Gallup, analyzing data behind Millennials’ reputation as inveterate quitters, insists “the reality is that they just want a job that feels worthwhile—and they will keep looking until they find it.”267 The bet is that many will stick around—and strike to fix the one they have.

Part of Milkman’s case, in fact, is that the emerging pattern of Millennial unrest has the makings of a protest “wave” where the constituent parts “learn from and emulate one another.”268 If so, walkouts, expanding across an incredible diversity of topics, are unmistakably part of the crest. In just the past twenty-four months, high schoolers have organized walkouts—and, on one occasion, a walk in, with air mattresses—related to voting rights,269 discrimination,270 climate change (twice),271 gun violence,272 online education,273 sexual misconduct,274 and immigration.275

261. . . Id. at 5.
262. . . Id. at 12, 25-26.
265. . Id.
268. . Milkman, supra note 248, at 3.
All these actions were fleeting, and all also build skills that translate to the workplace. Millennials have grown up in a time where labor is small but “laborism,” as Rich Yeselson puts it, is big. Millennials may not personally know a union member (other than a teacher), but their peers would vote to increase the minimum wage, support a paid leave campaign, and “like” a strike. Among intellectuals, academics, and journalists, “labor’s cultural resonance is arguably as strong today as it has been since the late-1940s.” In other words, if Milkman is right about the wave, it’s high tide work and we should expect to see more and more Millennials marching out the door. Unlike high school, they’ll even have a right to do it.

CONCLUSION

This essay tries to move beyond some of the more obvious reasons for the apparent rise of limited duration work stoppages. There are surely labor...
law reasons for their existence, but I argue there are employment law reasons for their expansion. That short strikes get attention is a main—for detractors, the sole—virtue of the tactic, but my focus is on how “attention” has become a technical term. How activists use it to build a strike’s perceived narrative, electoral, or disruptive capacity says much more about the tactic’s ascendance than the presence, or absence, of a headline. Finally, organizers have long liked strikes because they build solidarity cultures. Millennial culture is an equally important engine.

At least, those are some optimistic takes. Here’s the bad news. The right to even a time-limited, Washington Aluminum-style stoppage is under attack. Traditionally, the fact that short strikes exert little economic or administrative pressures has functioned as somewhat of a legal safe haven, as unprotected “intermittent” strikes have tended to require acts that “harass the company into a state of confusion”279 or are so furiously repetitive that an employer cannot easily dock pay or hire replacements.280 But the Board has newly emphasized that what really matters is the bare existence of a plan “to use a series of strikes in support of the same goal.”281 Operating more like a series of jabs than a knock-out blow has transformed from a legal benefit to a legal liability. Similarly, raising a workplace complaint in front of co-workers—or, taken to the extreme, walking out over it—is usually enough to constitute “concerted activity,” certainly where words like “we” or “us” are involved.282 The Board has newly said it actually requires evidence that the complaint was “with or on the authority of other employees,” and words like “we” don’t mean much.283 The same Board now lets employers fire workers for using company email to organize.284 Google, having experienced the old rule in action, is all for it.285

Cumulatively, these and other decisions286 make short strikes riskier. For job-hopping Millennials, that may not change the resistance calculus all

283. Alstate Maintenance LLC, 367 N.L.R.B. No. 68 at *2, *9 (Jan. 11, 2019) (“[Activity is not concerted] solely because it is carried out in the presence of other employees . . . and includes the use of the first-person plural pronoun.”).
284. Rio All-Suites Hotel and Casino, 368 N.L.R.B. No. 143 at *1 (Dec. 16, 2019).
286. For example, while it is not hard to imagine strikers using intemperate language on their way out the door—short strikes are, after all, protests—the Second Circuit has suggested that section 7 might
that much. And perhaps the 2020 election will flip the Presidency, the 
Board, and the law, protecting short strikes more than ever. Maybe not. 
Yet, the very existence of such uncertainty surfaces three of the most vital 
features of the examples at McDonald’s, Google, and Uber: Fight for $15, 
Google Walkout for Real Change, and RDU. That is, workers will need 
help navigating short strikes no matter what. With established unions like 
SEIU, innovative non-profits like Coworker.org,287 and employee champi-

ons like Liz Fong-Jones supporting, seeding, and funding the efforts,288 the 
strikes may be short, but their future could be anything but.

“never protect[] an employee who uses obscenities in the presence of customers, even when discussing 
employment issues.” NLRB v. Starbucks Co., 679 F.3d 70, 80 (2d Cir. 2012).

287. Coworker.org uses online petitions to aid employees in “launching and joining campaigns 
around issues large and small.” COWORKER.ORG, https://home.coworker.org [https://perma.cc/5GGT-
XH82] (last visited Apr. 2, 2020). Whole Foods workers, for example, recently sought support for a 
March 31, 2020 “sick out” demanding “paid leave for all workers who isolate or self-quarantine instead 
of coming to work” amid the COVID-19 pandemic. To: Employees around the world, COWORKER.ORG, 

288. . Sean Captain, Meet the Google engineer getting its workers ready to strike, FAST COMPANY 
(Dec. 3, 2018), https://www.fastcompany.com/90275462/meet-the-google-engineer-getting-its-workers-
ready-to-strike [https://perma.cc/YVv2-WHEW].