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ESSAY

Unenforceable Waivers

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Textbook tort law establishes that waivers of liability—especially those involving physical harm—are often unenforceable. This Essay demonstrates through an extensive survey of the case law that despite being unenforceable, such waivers remain in widespread use. Indeed, defendants frequently use waivers even when a court has previously declared their specific waivers to be void. So why do such waivers persist? Often the simple answer is to hoodwink would-be plaintiffs. Waivers serve as costless deterrents to tort claims: Either they dupe naïve victims into believing that their claims are barred, or if not, the defendant is no worse off than before. Such flouting of unenforceability doctrine undermines the goals of the tort system—denying compensation to victims and eroding the care incentives of prospective injurers. In this Essay, we focus some long-overdue attention on the problem of unenforceable waivers and explore some solutions.

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INTRODUCTION

A fundamental premise of the legal system is that private agreements sometimes must yield to societal interests and tort liability. Preinjury liability waivers, namely agreements in which potential victims surrender ex ante their right to compensation by potential injurers, are a prime example. Exactly what kinds of waivers are unenforceable may vary by jurisdiction, but no matter what state one is in, certain liability waivers are against public policy and unenforceable.

Take, for example, two canonical cases from the first-year Torts curriculum—*Dalury v. S-K-I, Ltd.*[1] and *Hanks v. Powder Ridge Restaurant Corp.*[2] In *Dalury*, the victim, a skier at Vermont's famed Killington resort, struck a "maze pole" used to guide patrons toward a ski lift.[3] The victim had signed a liability waiver stating:

1. 670 A.2d 795 (Vt. 1995). Major casebooks featuring *Dalury* include RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 315–18 (11th ed. 2016); JOHN C.P. GOLDBERG, LESLIE KENDRICK, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 526–34 (5th ed. 2021); and JOHN FABIAN WITT & KAREN M. TANI, TORTS: CASES, PRINCIPLES, AND INSTITUTIONS 281–83 (5th ed. 2020).

2. 885 A.2d 734 (Conn. 2005). Major casebooks featuring *Hanks* include MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN & MARK A. GEISTFELD, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 464–73 (10th ed. 2016); and JAMES A. HENDERSON, DOUGLAS A. KYSAR & RICHARD N. PEARSON, THE TORTS PROCESS 413 (9th ed. 2017).

3. 670 A.2d at 796.

> I freely accept and voluntarily assume the risks of injury or property damage and release Killington Ltd., its employees and agents from any and all liability for personal injury or property damage resulting from negligence, conditions of the premises, . . . [etc.][4]

The Vermont Supreme Court found this liability waiver unenforceable as against public policy because it would remove injurer incentives to take care and protect the safety of skiers.[5] A Vermont statute required skiers to accept the inherent risks of skiing, but the court held that the ski resort's negligence was "neither an inherent risk nor an obvious and necessary one in the sport of skiing."[6]

In *Hanks*, coincidentally also a winter sports case, the victim sustained serious injuries while snowtubing at the Powder Ridge Ski Area in Connecticut when his foot became caught between his snowtube and the snowtube run's sidebank.[7] Again, the victim had signed a liability waiver stating that he "fully assume[d] all risks associated with [s]nowtubing, even if due to the NEGLIGENCE" of the defendants.[8] The Connecticut Supreme Court found that this waiver, too, violated public policy.[9]

Dalury and *Hanks* illustrate well-understood black-letter law: Courts will hold overbroad liability waivers unenforceable on public policy grounds. By refusing to enforce these agreements, courts not only protect the victims at hand but also future potential victims. After all, if such waivers are unenforceable, defendants gain nothing from using them in the first place.

But is that assertion really true? What courts and commentators (and the casebooks) have largely missed is that injurers routinely ignore these holdings and persist in requiring would-be plaintiffs to sign such unenforceable waivers anyway. Some of the most flagrant examples of this behavior are found in the aftermath of *Dalury* and *Hanks* themselves. Today, skiers at the Killington ski resort are still asked to sign a waiver that states:

> I further agree to Defend, Hold Harmless and Indemnify [the successor owner of the Killington ski area] from any and all liability for personal injury including death and property damage, including any alleged negligence in the operation, maintenance or design of the ski area . . . .[10]

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4. *Id*.

5. *See id.* at 797–99.

6. *Id.* at 800.

7. 885 A.2d at 736.

8. *Id.* at 740.

9. *Id.* at 747 ("[W]e conclude that the agreement in the present matter affects the public interest adversely and, therefore, is unenforceable because it violates public policy.").

10. Killington/Pico Ski Resort Partners, LLC, *2018-19 Direct-to-Lift Pass and Card Products: Express Acceptance of Risks, Indemnification & Forum Selection Agreement – Participant*,

And snowtubers at the Powder Ridge Ski Area must sign a liability waiver that states:

> I agree to release Powder Ridge Ski Area . . . from any and all liability for personal injury, death or property damage which results in any way from negligence, conditions on or about the premises and facilities . . . .[11]

As we know from the cases themselves, these waivers of negligence liability are unenforceable. Yet, the defendants proceed as if the cases never happened.

Dalury and *Hanks* are merely the tip of the iceberg. Even within the reported case law alone, we have discovered dozens of cases, from dozens of states, in which defendants or their successors continued to require the same or equivalent liability waivers even after having them declared unenforceable by courts. In addition, we have also found numerous instances in which sophisticated actors, including leading universities, have flouted well-established law that declares their waivers unenforceable.

Given the ubiquity of liability waivers, the problem is incredibly widespread. Liability waivers do not appear only in recreational contexts like skiing and snowtubing. These days almost everything seems to require a waiver.[12] Riding in a medical transport vehicle?[13] Participating in a bicycle rideshare program?[14] Volunteering to clean up neighborhood storm drains?[15] Attending a political rally?[16] All of these activities have at times involved waivers. And the recent rise of COVID-19 liability waivers, some in contexts of questionable enforceability, only makes the issue even more salient.

Why would defendants require that potential plaintiffs sign liability waivers known to be unenforceable? The answer is simple—to deter litigation and effectively hoodwink plaintiffs. For many

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KILLINGTON (2018), https://cms.killington.com/sites/killington/files/2018-04/19EAR-Direct-to-Lift-Pass-and-Card-Products-Participant-Final.pdf [https://perma.cc/2VF6-3VC7].

11. *Powder Ridge Ski Area Day Pass Agreement and Release of Liability*, POWDER RIDGE, https://powderridge.com/wp-content/uploads/2021/07/2021-22-Day-Pass-Agreement-and-Release-of-Liability.pdf (last visited Nov. 24, 2022) [https://perma.cc/3WQQ-JAAK].

12. For a historical and current discussion about our "waiver society," see Ryan Martins, Shannon Price & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265 (2020); and THE WAIVER SOCIETY PROJECT, http://www.waiversociety.org (last visited Sept. 25, 2022) [https://perma.cc/83KR-ZJ5G].

13. Copeland v. HealthSouth/Methodist Rehab. Hosp., LP, 565 S.W.3d 260, 264 (Tenn. 2018).

14. Corwin v. NYC Bikeshare, LLC, 238 F. Supp. 3d 475, 485–86 (S.D.N.Y. 2017).

15. One of us (Cheng) was once asked to sign a liability waiver to participate in Nashville's Adopt-a-Storm-Drain program.

16. Oliver Milman, *Trump Campaign Asks Supporters to Sign Coronavirus Waiver Ahead of Rally*, GUARDIAN (June 12, 2020, 12:35 PM), https://www.theguardian.com/us-news/2020/jun/12/trump-rally-supporters-sign-coronavirus-waiver [https://perma.cc/A3RG-S4VW].

defendants, waivers are costless shields against liability. If the waivers can dupe signees into believing that they waived their legal rights, great. If not, then the defendants are no worse off than before. The practice at first may seem to be merely a clever psychological trick, but it relies on misrepresentation and deceit, making it both illegitimate and reprehensible. It also impairs the deterrence and compensation functions of tort law. The very reason why courts hold waivers unenforceable is because they cause injurers to have insufficient incentives to take care and protect the safety of potential victims.[17] Fooling naïve plaintiffs into forgoing their tort claims results in the same harm.

In this Essay, we focus some long-overdue attention on the problem of unenforceable liability waivers.[18] We also contribute to a burgeoning scholarly discussion surrounding the use of misrepresentations (or misunderstandings) of the law, which includes recent studies about unenforceable terms in residential leases[19] and noncompete agreements.[20] Our work also shares kinship with concerns over so-called intellectual property abuse, in which copyright holders send cease-and-desist letters of dubious legitimacy in the hope of intimidating their targets.[21] While each area has its own complexities, all share a fundamentally common thread, and personal injury waivers are arguably among the most pernicious instances as they implicate health and safety.

So, what should the legal system do about such deceptive behavior? We ultimately argue that at least when it comes to unenforceable waivers involving personal injury, the appropriate

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17. *See, e.g.*, Dalury v. S-K-I, Ltd., 670 A.2d 795, 799 (Vt. 1995):

> The policy rationale is to place responsibility for maintenance of the land on those who own or control it, with the ultimate goal of keeping accidents to the minimum level possible. . . . If defendants were permitted to obtain broad waivers of their liability, an important incentive for ski areas to manage risk would be removed with the public bearing the cost of the resulting injuries.

18. The last serious academic treatment of the issue was written over three decades ago by Bailey Kuklin. Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988).

19. Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1 (2017).

20. Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L. ECON. & ORG. 633 (2020).

21. *See* John Tehranian, *Curbing Copyblight*, 14 VAND. J. ENT. & TECH. L. 993 (2012) (discussing copyright misuse and the consequences of copyright overclaims); Victoria Smith Ekstrand, *Protecting the Public Policy Rationale of Copyright: Reconsidering Copyright Misuse*, 11 COMMC'N L. & POL'Y 565, 566–69 (2006) (explaining the tools "copyright bullies" use to intimidate less legally sophisticated targets and the chilling effect it has); *see also* Deepa Varadarajan, *The Uses of IP Misuse*, 68 EMORY L.J. 739 (2019) (comparing copyright misuse, patent overclaims, and trade secret misuse).

solution is punitive damages. Legal theorists have long debated the justification for extracompensatory damages, leading to sharp disagreements concerning the appropriate circumstances that call for their imposition. Yet unenforceable waivers are an instance in which the competing justifications converge: As a matter of standard economic theory, underdetection or underenforcement creates suboptimal deterrence, and imposing a damages multiplier equal to the reciprocal of the detection rate ensures that defendants will internalize all of their externalities.[22] As a matter of retributive theory,[23] hoodwinking plaintiffs into abandoning legal rights in a context involving both informational asymmetries and health and safety is a case ripe for retribution. These factors—injurer intentionality, deception, victim vulnerability, and implications for health and safety—are all hallmarks of when courts award punitive damages.[24] And at its basic, practical level, the unenforceable waiver problem is about incentives. At present, such waivers are costless and carry no penalty. Punitive damages would alter that cost-benefit calculus considerably.

The Essay proceeds as follows: Part I details the depth of the unenforceable waiver problem. It first reviews the enforceability of liability waivers, which varies by context and jurisdiction. For example, nearly all states bar such waivers for reckless and willful conduct, while some bar them for ordinary negligence. Many states hold them unenforceable for minors, while others distinguish recreational facilities, common carriers, employment, medical treatment, and other contexts for special treatment. Part I then catalogs the remarkable—and heretofore overlooked—persistence of liability waivers regardless of their enforceability. Most striking will be many cases, like *Dalury* and *Hanks*, in which a waiver already declared unenforceable continues to be used by the very organization that previously lost. Part I finally tries to explain this persistence. It discusses how insurance companies,

22. *See generally* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874, 887–97 (1998) (discussing the reasoning behind the multiplier).

23. *See generally* Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 277, 323–25 (2009) (discussing factors used in calculating punitive damages); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1006–20 (2007) (analyzing the development of punitive damages at common law); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005) (arguing that there are civil and criminal aspects of punitive damages); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 626 (2003) (discussing court opinions describing the goal of punitive damages as the "punishment of the wrongdoer").

24. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576–78 (1996) (identifying factors including proportionality, gravity of crime, harshness of the punitive award, and moral blameworthiness of the conduct).

sports associations, and waiver templates promote the use of unenforceable waiver terms as a means of (illegitimately) deterring litigation, sometimes explicitly so.

Part II analyzes solutions to the unenforceable waiver problem. At present, unenforceable waivers are effectively costless to drafters, so Part II explores three ways to disincentivize their use. The first is to have courts pay closer attention to the contractual doctrines that govern unenforceable terms. Specifically, more restrictive application of partial enforcement or severability may discourage the use of overbroad waiver terms. The second is to use administrative enforcement and civil penalties to deter defendants. And the third and most promising option is to impose punitive damages. We defend the use of punitive damages on various theoretical and practical grounds, and we also address doctrinal concerns that might be raised under the Supreme Court's Due Process Clause jurisprudence.

The Conclusion briefly summarizes our main arguments. It also highlights the qualitative approach we take to studying cases and legal doctrine in this Essay as well as looks ahead to future work on liability waivers, especially the questions raised by their use during and after the pandemic.

I. THE WAIVER PROBLEM

Liability waivers are ubiquitous. Joining a health club or fitness center? Chances are that you will be asked to sign a liability waiver. Indeed, nearly all sporting activities seem to be accompanied by waivers nowadays, whether it is skiing, skating, climbing, running, or horse riding.[25] The waiver phenomenon, however, extends far beyond sports to all kinds of everyday activities: volunteering at the American Cancer

25. Killington/Pico Ski Resort Partners, *supra* note 10 (skiing); Minnesota Ice, LLC, *Waiver and Release of Liability*, MALL OF AM. (Nov. 2018), https://mallofamerica.com/sites/default/files/2018-11/Skate%20the%20Star%20at%20MOA%20Release_0.pdf [https://perma.cc/7F9M-A7X2] (skating); *Release of Liability and Assumption of Risk*, CLIMB NASHVILLE, https://waiver.smartwaiver.com/w/5de4861bf3a3 (last visited Sept. 25, 2022) [https://perma.cc/C9Q3-E6X5] (rock climbing); *Registration Waiver*, N.Y.C. RUNS, https://nycruns.com/registrant-waiver (last visited Sept. 25, 2022) [https://perma.cc/3C74-UKU7] (running); *Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement*, U.S. EQUESTRIAN FED'N, https://www.usef.org/forms-pubs/FDs-pIVXI9U/usef-waiver-release-of-liability (last visited Sept. 25, 2022) [https://perma.cc/U43B-2F32] (horse riding).

Society,[26] attending trade conventions,[27] scouting,[28] classical music concerts,[29] even entering a dog show at the local library.[30] And concerns about COVID-19 during the pandemic have only intensified their use. Some hospitals now require visitors to sign broad liability waivers,[31] and perhaps even more troublingly, some employers have begun requiring waivers from their employees.[32]

From the standpoint of potential defendants, the question is why not? Waivers are basically costless. Customers and participants typically sign them with minimal scrutiny,[33] and the waiver might extinguish future lawsuits. Even when the waiver is clearly unenforceable, defendants continue to require them unabated, hoping to deter litigation nevertheless.

This Part reviews the law governing liability waivers, as well as their persistence despite legislative and judicial declarations of their unenforceability. It also explores why defendants persist in using unenforceable waivers.

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26. *COVID-19 Safety Acknowledgement -- Liability Waiver and Release of Claims*, AM. CANCER SOC'Y, https://www.cancer.org/about-us/policies/covid-19-safety-acknowledgement.html (last visited Nov. 25, 2022) [https://perma.cc/G2DC-ZVHU].

27. *See, e.g.*, *COVID-19 Liability Waiver and Release of Claims*, QUALITY SERV. CONTRACTORS, https://www.qsc-phcc.org/events/power-meeting-2022/covid19-waiver-and-release-claims (last visited Sept. 25, 2022) [https://perma.cc/XMJ4-YQX8] (plumber's convention).

28. *Waiver of Liability and Acknowledgement of Risks for Bugs, Insects, Plants, and Wildlife*, GIRL SCOUTS OF MIDDLE TENN., https://gsmidtn.org/wp-content/uploads/2017/10/GSMidTN_WaiverOfLiabilityAndAcknowledgementOfRisks_Oct2017.pdf (last visited Sept. 25, 2022) [https://perma.cc/873E-3DZP].

29. *Chamber Orchestra of Philadelphia – Telemann, Bach, and Corelli*, NAT. LANDS, https://natlands.org/event/orchestra-stoneleigh-2021-0627/ (last visited July 31, 2021) [https://perma.cc/A598-R2YX].

30. *Waiver of Liability – Best in Show Dog*, CANTON PUB. LIBR., https://www.cantonpl.org/sites/default/files/CPL_Dog_Show_Waiver_Entry.pdf (last visited July 31, 2021) [https://perma.cc/7LBF-63W8].

31. *COVID-19 Liability Release and Waiver for Visitors*, HUNTINGTON HOSP., https://www.huntingtonhospital.org/wp-content/uploads/2020/09/Waiver-and-Release-for-Visitation-rev.-9-23-20.pdf (last visited Nov. 25, 2022) [https://perma.cc/NYJ5-6G38].

32. *See, e.g.*, Harris Meyer, *Liability Waivers Becoming More Common as Employees Return to Work*, BENEFITSPRO (July 28, 2020, 10:02 AM), https://www.benefitspro.com/2020/07/28/liability-waivers-becoming-more-common-as-employees-return-to-work/?slreturn=20210605144150 [https://perma.cc/JH3K-HMNR] (discussing the increase in employee waivers and resulting controversy); Ami G. Zweig, *Liability Waivers and Workers' Compensation During Business Reopening*, WEIL (July 30, 2020), https://www.weil.com/articles/liability-waivers-and-workers-compensation-during-business-reopening [https://perma.cc/4JX9-A6HS].

33. *See, e.g.*, Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INST. & THEORETICAL ECON. 94, 108 (2012) (noting that even with prominent disclosure of terms, less than 0.5 percent of consumers read online terms and conditions).

A. The Enforceability of Liability Waivers

Liability waivers pose a challenge to both contract and tort theory. From the standpoint of contract theory, liability waivers for negligent behavior arguably should not even exist. The reason is that, at least following the Hand formula, negligent behavior is by definition inefficient—negligence is when the defendant fails to take cost-efficient precautions.[34] Yet, the goal of a typical contract is to adopt efficient terms. Efficient terms create a joint surplus, which is then split between the parties. As such, fully informed parties to a contract should, at least in theory, rarely (if ever) agree to terms that enable each other to behave negligently.[35]

This observation suggests that liability waivers are the byproduct of consumers' lack of information or lack of bargaining power and do not actually serve the parties' mutual interest. If consumers do not realize the true cost that liability waivers inflict on them—either because they do not understand the concept of negligence, do not read the waivers, or over-rely on reputation as a disciplining mechanism—then they may sign them to society's detriment. In situations such as these, where contractual terms cannot be construed to be in the parties' mutual interest, the law has often limited freedom of contract.[36]

From the standpoint of tort theory, liability waivers impair deterrence and compensation, two of the key goals of tort law. Expansive waiver provisions eliminate injurer incentives to exercise care in protecting the health and safety of victims. Worse yet, after an injury occurs, liability waivers (if enforced) shift injury costs to "either

34. Under the Hand formula, negligence is when the cost of the precaution (*B*) is less than the expected loss that the precaution prevents (*PL*) and the defendant fails to take the precaution. Negligent behavior is thus by definition inefficient. United States v. Carroll Towing Co., 159 F.2d 169, 172–74 (2d Cir. 1947).

35. To illustrate this idea, consider the following simple example. Suppose that *A* offers *B* the chance to participate in a risky activity, which will cause *B* an expected harm of 100 (but an expected benefit greater than 100). *A* can eliminate the risk entirely by investing 80. Clearly, both parties will prefer a contract that induces *A* to take the precaution. If the contract absolved *A* from the duty to take due care, both parties (if fully informed) would agree to amend it. In particular, both would be better-off if *A* undertook the duty to take due care (at an additional cost of 80) in return for extra payment by an amount ranging between 80 and 100.

36. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF L. § 187(2) (AM. L. INST. 1988) (enforcing the parties' choice of law unless "the chosen state has no substantial relationship to the parties or the transaction and there is *no other reasonable basis* for the parties' choice" (emphasis added)); RESTATEMENT OF PROP. § 406 (AM. L. INST. 1944) (stating that to be enforceable, any restraint on the alienation of property must be "reasonable under the circumstances"); RESTATEMENT (SECOND) OF CONTS. § 356 (AM. L. INST. 1981) ("A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.").

the innocent injured party or to society at large, in the form of taxpayer-supported institutions."[37]

Given these fundamental concerns about liability waivers from the perspective of both contract and tort theory, all jurisdictions hold at least some forms of liability waivers unenforceable. A few jurisdictions have bright-line statutory prohibitions. Louisiana, for example, has a blanket statutory provision declaring all waivers of personal injury liability to be null and void.[38] Other states have statutes prohibiting waivers in specific contexts, such as skiing,[39] health clubs,[40] or recreational activities generally.[41] Federal maritime law prohibits passenger vessels from imposing contractual provisions that limit liability for "personal injury or death caused by the negligence or fault of the owner or the owner's employees" and declares such provisions void.[42]

More frequently, unenforceability arises out of the common law. Some types of waivers provoke almost universal hostility from courts. For example, courts generally will not enforce liability waivers "for actions that go beyond the limits of ordinary negligence,"[43] which means that disclaimers of gross negligence, recklessness, and intentional conduct are almost always against public policy.[44] Liability waivers are also "almost universally rejected in the employment context,"[45] for

37. Walters v. YMCA, 96 A.3d 323, 328 (N.J. Super. Ct. App. Div. 2014).

38. LA. CIV. CODE ANN. art. 2004 (2022) ("Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.").

39. ALASKA STAT. ANN. § 05.45.120 (West 2022):

> A ski area operator may not require a skier to sign an agreement releasing the ski area operator from liability in exchange for the right to ride a ski area tramway and ski in the ski area. A release that violates this subsection is void and may not be enforced.

40. MASS. GEN. LAWS ANN. ch. 93, § 80 (West 2022) ("No contract for health club services may contain any provisions whereby the buyer agrees not to assert against the seller . . . any claim or defense arising out of the health club services contract or the buyer's activities at the health club."); *id.* at § 85 (declaring such waivers void and unenforceable).

41. N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 2022) ("Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable"); HAW. REV. STAT. ANN § 663-1.54 (West 2022) (barring liability waivers for "negligence, gross negligence, or wanton act[s]" by owners or operators of recreational activities).

42. 46 U.S.C. § 30509; *see also In re* Royal Caribbean Cruises Ltd., 991 F. Supp. 2d 1171 (S.D. Fla. 2013) (holding that § 30509 voided a cruise ship's liability waiver when passenger was injured on a personal watercraft tour).

43. DOYICE J. COTTEN & MARY B. COTTEN, WAIVERS & RELEASES OF LIABILITY 34 (10th ed. 2019).

44. RESTATEMENT (SECOND) OF CONTS. § 195 (AM. L. INST. 1979) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.").

45. Bunia v. Knight Ridder, 544 N.W.2d 60, 63 (Minn. Ct. App. 1996) (citing W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS § 68, at 482 (5th ed. 1984)), *quoted in* Brown v. Soh, 909 A.2d 43 (Conn. 2006); *see also, e.g.*,

innkeepers and common carriers,[46] as well as in medical malpractice[47] and products liability[48] on the grounds of public policy and disproportionate bargaining power.[49]

In other contexts, enforceability can vary widely by state.[50] The judicial rhetoric, which acknowledges the tension between freedom of contract and public policy concerns, is frequently the same.[51] How those factors are (informally) weighed, however, can differ widely.

Despite the differing state attitudes toward waivers, there are frequently clear judicial declarations establishing that certain types of liability waivers are unenforceable. For example, both *Dalury v. S-K-I Ltd.*[52] and *Hanks v. Powder Ridge Restaurant Corp.*,[53] discussed in the Introduction, held quite clearly that liability waivers are unenforceable for public winter recreation activities in Vermont and Connecticut, respectively. A year after *Hanks,* the Connecticut Supreme Court further extended its holding to horseback riding in *Reardon v.*

RESTATEMENT (SECOND) OF CONTS. § 195 (AM. L. INST. 1979) (declaring liability waivers for negligently caused injury in the employment context unenforceable).

46. *E.g.*, Copeland v. HealthSouth/Methodist Rehab. Hosp., 565 S.W.3d 260, 270 (Tenn. 2018) ("[E]xculpatory provisions in contracts involving common carriers are unenforceable on the grounds of public policy and disparity of bargaining power."); Yang v. Voyagaire Houseboats, 701 N.W.2d 783, 790–91 (Minn. 2005) (holding that liability waivers for hotels and resorts are unenforceable).

47. Nadia N. Sawicki, *Choosing Medical Malpractice*, 93 WASH. L. REV. 891, 918–20 (2018). Whether medical malpractice waivers should be unenforceable has become a matter of considerable academic debate. *See, e.g.*, *id.* (arguing for enforceability); Tom Baker & Timothy D. Lytton, *Allowing Patients to Waive the Right to Sue for Medical Malpractice: A Response to Thaler and Sunstein*, 104 NW. U. L. REV. 233 (2010) (criticizing Richard Thaler and Cass Sunstein's proposal to allow waiver of medical malpractice claims).

48. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 18 cmt. a (AM. L. INST. 1997) ("A commercial seller . . . of a new product is not permitted to avoid liability for harm to persons through limiting terms in a contract governing the sale of a product."); *see also* Boles v. Sun Ergoline, Inc., 223 P.3d 724, 727 (Colo. 2010) (en banc) (remarking that "[t]here appears to be virtually universal agreement" that products liability cannot be disclaimed); RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (AM. L. INST. 1965) (noting that liability "is not affected by any disclaimer or other agreement . . . between the seller and his immediate buyer").

49. *See generally* 2 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 21:5 (2d ed. 2022) (summarizing contexts in which exculpatory clauses are "generally regarded as contrary to public policy").

50. *See generally* COTTEN & COTTEN, *supra* note 43, at 157–64 fig.8.2 (summarizing waiver law in all fifty states).

51. *See* Hawkins *ex rel.* Hawkins v. Peart, 37 P.3d 1062, 1066 (Utah 2001) (discussing uneven bargaining power); Miller *ex rel.* E.M. v. House of Boom Ky., LLC, 575 S.W.3d 656, 662–63 (Ky. 2019) (discussing public policy concerns and the distinction between businesses and nonprofits or schools); Hojnowski v. Vans Skate Park, 901 A.2d 381, 386 (N.J. 2006) (discussing consumer protection functions, especially for minor children). *Contra* Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140, 144 (E.D. Pa. 1987) (arguing freedom of contract weighs toward enforceability of waivers).

52. 670 A.2d 795 (Vt. 1995).

53. 885 A.2d 734 (Conn. 2005).

Windswept Farm, LLC.[54] Another example is *Walters v. YMCA*, in which a New Jersey appellate decision found a gym's expansive waiver of liability unenforceable when the plaintiff slipped on a negligently maintained staircase.[55]

Another problematic category of waivers are parental waivers—when parents sign waivers on behalf of their children.[56] Indeed, "[t]he majority of state courts who have examined the issue . . . have concluded [that] public policy precludes enforcement."[57] Notably, some jurisdictions that are typically tolerant of waivers sharply distinguish parental waivers for negative treatment. Iowa, for example, has enforced broad negligence liability waivers[58] but has declared parental waivers unenforceable.[59] Tennessee similarly enforces negligence liability waivers in recreational contexts,[60] but the Tennessee Court of Appeals in *Blackwell v. Sky High Sports Nashville Operations, LLC*,[61] citing long-standing precedent, refused to enforce a parental waiver on behalf of a minor son who was injured at a trampoline park.[62]

B. The Persistence of Unenforceable Waivers

Regardless of the underlying law and legal precedent, one phenomenon is shockingly common: declarations of unenforceability are ignored. Even where there is a clear statute or precedent declaring a type of liability waiver unenforceable, defendants continue to use them.

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54. 905 A.2d 1156 (Conn. 2006).

55. 96 A.3d 323, 328–29 (N.J. Super. Ct. App. Div. 2014) ("Here, defendant seeks to shield itself from all civil liability, based on a one-sided contractual arrangement that offers no countervailing or redeeming societal value. Such a contract must be declared unenforceable as against public policy.").

56. *E.g.*, *Miller*, 575 S.W.3d at 660 (holding parental waivers of negligence liability on behalf of a minor child unenforceable in accord with the common law, and rejecting constitutional parental rights arguments); J.T. *ex rel.* Thode v. Monster Mountain, LLC, 754 F. Supp. 2d 1323, 1328 (M.D. Ala. 2010) ("[U]nder Alabama law, a parent may not bind a child to a pre-injury liability waiver in favor of a for-profit activity sponsor by signing the liability waiver on the child's behalf.").

57. Galloway v. State, 790 N.W.2d 252, 256 (Iowa 2010).

58. Grabill v. Adams Cnty. Fair & Racing Ass'n, 666 N.W.2d 592 (Iowa 2003) (enforcing broad waiver of liability to preclude claim for negligence associated with fireworks during a car racing event).

59. *Galloway*, 790 N.W.2d at 258.

60. *See, e.g.*, Maxwell v. Motorcycle Safety Found., Inc., 404 S.W.3d 469, 475–76 (Tenn. Ct. App. 2013) (enforcing liability waiver of a student taking a motorcycle safety course); Tompkins v. Helton, No. M2002-01244-COA-R3-CV, 2003 WL 21356420, at *3 (Tenn. Ct. App. June 12, 2003) (finding the case "controlled by the terms of the release agreement" signed by a guest at a car racetrack); *see also* COTTEN & COTTEN, *supra* note 43, at 249 (noting that Tennessee courts are traditionally very supportive of waivers).

61. 523 S.W.3d 624 (Tenn. Ct. App. 2017).

62. *Id.* at 656 ("[T]he law in Tennessee states that parents may not bind their minor children to pre-injury waivers of liability, releases, or indemnity agreements . . . .").

As an example, consider New York's statute declaring liability waivers at gyms and other recreational venues unenforceable.

> Every covenant, agreement or understanding in . . . any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment . . . *shall be deemed to be void as against public policy and wholly unenforceable.*[63]

A wide variety of sophisticated actors in New York require liability waivers that are clearly unenforceable under this statute. Columbia University's fitness center requires the following liability waiver for paying guests and family members:

> In consideration of gaining guest membership [at the fitness center] and to use its facilities and equipment, I hereby agree to release, indemnify, and hold harmless Columbia University . . . *from any and all responsibilities or liabilities* for injuries or damages arising out of my . . . participation in any activities or my . . . use of equipment . . . except for claims due to the gross negligence or willful misconduct . . . .[64]

The YMCA of Greater New York similarly requires the following waiver of its members:

> THE USER HEREBY RELEASES, WAIVES, DISCHARGES, AND AGREES NOT TO SUE the YMCA from all liability to the undersigned: for any loss or damage, and any claim or demands therefor on account of injury to the person or property or resulting in death of the undersigned, whether caused by the negligence of the YMCA or otherwise.[65]

This behavior is of course not confined to New York. As previously discussed, Louisiana declares all preinjury liability waivers unenforceable.[66] Yet Louisiana State University ("LSU") requires this unenforceable liability waiver of its students:

> I hereby RELEASE AND HOLD HARMLESS, the State of Louisiana, [and LSU] . . . from any and all liability, claims, damages, costs, expenses, personal injuries, illnesses, death or loss of personal property resulting, in whole or in part, from my participation in, or use of, any facility, equipment, and/or programs of Louisiana State University.[67]

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63. N.Y. GEN. OBLIG. LAW § 5-326 (McKinney 2022) (emphasis added).

64. *Dodge Physical Fitness Center*, COLUMBIA UNIV., https://perec.columbia.edu/sites/default/files/content/pics/Docs/Release%20of%20Liability%202.pdf (last visited Sept. 26, 2022) [perma.cc/WHF3-C57M] (emphasis added).

65. YMCA of Greater New York, *Release and Waiver of Liability and Indemnity Agreement for Members and Program Participants*, YMCA ONLINE REGISTRATION, https://register.ymcanyc.org/waiver (last visited Nov. 26, 2022) [https://perma.cc/4SYV-GRNT].

66. LA. CIV. CODE ANN. art. 2004 (2022) ("Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.").

67. *Policies & Guidelines – Participation Agreement*, LSU UNIV. RECREATION, https://www.lsuuniversityrec.com/policies-guidelines (last visited Nov. 26, 2022) [https://perma.cc/7TAD-ZCEY].

The irony is that LSU had the exact same liability waiver declared unenforceable in 2015. In *Fecke v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*,[68] a Louisiana appellate court declared the same waiver language to be null and inadmissible in a case involving a student who was injured while rock climbing at the LSU Recreation Center.[69]

Disregard of the rules governing liability waivers is widespread, and the practice is all the more flagrant when an organization does so after a court has already declared its waiver unenforceable. After all, in many of these cases, there is no room for legitimate debate about the applicability of prior precedent, and the defendant cannot claim lack of sophistication or ignorance of the law. Continued use of the unenforceable waiver represents intentional flouting, plain and simple. Yet remarkably, these flagrant cases are far more common than one might think.

For example, there is *Mohler v. Kipu Ranch Adventures, LLC*.[70] In *Mohler,* a federal district court found an ATV tour operator's liability waiver unenforceable because a Hawaii recreational activity statute "preclude[d] waivers of liability for negligence[ ] and allow[ed] waivers only for damages resulting from 'inherent risks' that have been fully disclosed to the customer."[71] Today, Kipu Ranch Adventures' liability waiver remains completely unchanged, still requiring customers to say that "I WILL NOT SUE OR MAKE A CLAIM FOR NEGLIGENCE AGAINST KIPU RANCH ADVENTURES."[72]

In *City of Santa Barbara v. Superior Court*,[73] which involved the tragic drowning of a developmentally disabled child at a city-run summer camp, the California Supreme Court held the city's liability waiver unenforceable insofar as it waived liability for future gross

68. 180 So. 3d 326 (La. Ct. App. 2015).

69. *Id.* at 332, 341–42.

70. Civ. No. 13-00611, 2014 WL 5817538 (D. Haw. Nov. 7, 2014).

71. *Id.* at *6.

72. *Release and Waiver of Liability, Assumption of Risk, and Indemnity Agreement*, KIPU RANCH ADVENTURES, https://waiver.smartwaiver.com/w/579673a52b788/web/?auto_tag=fh_id_80857838 (last visited Sept. 25, 2022) [https://perma.cc/3VW7-5TXV]. For another instance in which a defendant has ignored a prior federal district court decision, see *Ward v. Stewart*, 286 F. Supp. 3d 321, 324–34 (N.D.N.Y. 2017), which involved a fatal crash during a car racing event. In *Ward*, the court held that Empire Super Sprints's liability waiver fell under N.Y. GEN. OBLIG. LAW § 5-326 and was unenforceable. *Id.* at 333–34. Empire Super Sprints was not technically the defendant in the case (the plaintiff chose to use the other race driver instead), but nonetheless, its waiver also remains largely unchanged today. *See 2021 Membership Contract with Release of Liability and Indemnity Provisions*, EMPIRE SUPER SPRINTS, https://www.empiresupersprints.com/wp-content/uploads/2020/12/2021-Membership-Forms.pdf (last visited Sept. 25, 2022) [https://perma.cc/3SDW-4FSZ].

73. 161 P.3d 1095, 1097 (Cal. 2007).

negligence.[74] Today, however, the City of Santa Barbara's Parks & Recreation Activity Registration Form still includes the exact same blanket waiver.[75]

In *Yang v. Voyagaire Houseboats, Inc.*,[76] channeling the heightened duties imposed on innkeepers at common law, the Minnesota Supreme Court declared the liability waivers of innkeepers to be unenforceable.[77] The court also concluded that the defendant's houseboats, which were vacation rentals, functioned as hotels.[78] Voyagaire's rental agreement, however, continues to include a blanket waiver of liability.[79]

Parental waivers provide other clear instances of flouting. For example, in *Applegate v. Cable Water Ski, L.C.*, a Florida appellate court held that a parental waiver was unenforceable against a child for negligently caused injuries.[80] Subsequently, the Supreme Court of Florida in *Kirton v. Fields* broadly held that "a pre-injury release executed by a parent on behalf of a minor child is unenforceable against the minor . . . in a tort action arising from injuries resulting from participation in a commercial activity."[81] Today, the successor to Cable Water Ski continues to require a parental waiver for children using park facilities.[82]

The Supreme Court of Kentucky, in *Miller ex rel. E.M. v. House of Boom Kentucky, LLC*, held (on certification) that "an exculpatory agreement between a for-profit entity and a parent on behalf of her

74. *Id.* ("[A]n agreement made in the context of sports or recreational programs or services, purporting to release liability for future gross negligence, generally is unenforceable as a matter of public policy.").

75. *Compare id.* at 1097 n.3 (reporting waiver language that released City from all liability, including that based on negligence), *with* Parks & Recreation, *Activity Registration Form*, CITY OF SANTA BARBARA, https://www.santabarbaraca.gov/civicax/filebank/blobdload.aspx?blobid=19983 (last visited July 31, 2021) [https://perma.cc/C2WL-7GEQ] (releasing City from all liability, including that based on negligence).

76. 701 N.W.2d 783 (Minn. 2013).

77. *Id.* at 790–91.

78. *Id.*

79. Voyagaire Lodge & Houseboats, Houseboat Rental Agreement (on file with authors) (waiving "any loss or damage, or any claim . . . whether caused by negligence or defect").

80. Applegate v. Cable Water Ski, L.C., 974 So. 2d 1112, 1115 (Fla. Dist. Ct. App. 2008).

81. Kirton v. Fields, 997 So. 2d 349, 358 (Fla. 2008).

82. Cable Waterski is a Florida corporation that does (or did) business as Orlando Watersports Complex. *See Licensee Details for Cable Waterski LC*, FLA. DEP'T OF BUS. & PRO. REGUL., https://www.myfloridalicense.com/LicenseDetail.asp?SID=&id=1BB73569225E7D2B6260DA82C4A50A13 (last visited Oct. 3, 2022, 6:21 PM) [https://perma.cc/S2WS-44VL]. Orlando Watersports Complex, in turn, is operated today by Aktion Parks, which uses a parental waiver. *Agreement of Release, Idemnity[sic], and Assumption of Risk*, AKTION PARKS, https://waiver.smartwaiver.com/w/5935caa6ce906/web (last visited Oct. 3, 2022) [https://perma.cc/EFD4-E2X4].

minor child" was unenforceable.[83] The liability waiver at House of Boom Kentucky today reads:

> By signing this agreement, I am giving up my rights and the rights of my spouse and/or child(ren) to sue House of Boom Kentucky LLC for any injury . . . caused in whole or in part by the negligence or fault of House of Boom Kentucky . . . .[84]

This parental waiver is of course unenforceable—the highest court in Kentucky so held just two years earlier in 2019.[85] But House of Boom continues undaunted.

Suffice it to say, flouting occurs with resounding frequency.[86] For the sake of brevity, we will not belabor the point with further examples, but we should note two additional facets to the unenforceability problem. First, some defendants nominally comply with precedent by acknowledging the possibility of limitations, but they do so in ways that are likely to mislead potential victims. For example, in *Rothstein v. Snowbird Corp.*,[87] the Utah Supreme Court made clear that preinjury releases of liability for ski operator negligence violated public policy and were thus unenforceable in Utah.[88] Today's season pass at Snowbird requires that skiers "[t]o the fullest extent permitted by law" waive all "claims arising out of or resulting from NEGLIGENCE."[89] Technically, the term "[t]o the fullest extent permitted by law" limits the waiver so as not to create unenforceable terms. But the limitation is nothing but a shell. The Utah Supreme Court already declared the waiver of negligence claims unenforceable in *Rothstein*.[90] Snowbird's waiver

83. 575 S.W.3d 656, 663 (Ky. 2019).

84. House of Boom Kentucky LLC, Participant and Arbitration Agreement, Indemnification, General Release and Assumption (on file with authors).

85. *House of Boom Ky.*, 575 S.W.3d at 663.

86. *Compare, e.g.,* J.T. *ex rel.* Thode v. Monster Mountain, LLC, 754 F. Supp. 2d 1323, 1328 (M.D. Ala. 2010) (holding that under Alabama law, the parental waiver involved at Monster Mountain was unenforceable), *with Parental Consent, Release and Waiver of Liability, Assumption of Risk, and Indemnity Agreement*, MONSTER MOUNTAIN MX 1, https://www.monstermx.com/wp/wp-content/uploads/2020/03/Minor-Release-Form.pdf (last visited Oct. 5, 2022) [https://perma.cc/T77A-H5RN] (requiring waiver of "ALL LIABILITY TO ME, [and] THE MINOR"), *and* Perry v. SNH Dev., No. 2015-cv-00678, 2017 N.H. Super. LEXIS 32, at *35–36 (N.H. Super. Ct. Sept. 13, 2017) (holding parental waiver of minor's claims at ski area unenforceable), *with* Epic Pass, Release of Liability, Waiver of Claims, Assumption of Risks, and Indemnity Agreement (on file with authors) (waiving liability on behalf of a minor).

87. 175 P.3d 560 (Utah 2007).

88. *Id.* at 564 (holding, even in light of a statute declaring skiers responsible for the inherent risks of skiing, the preinjury waivers of liability for negligence violate public policy and are unenforceable).

89. *2021-2022 Season Pass Waiver*, SNOWBIRD RESORT LLC, https://my.1risk.net/waiver/?a=aHR0cHM6Ly9teS4xcmlzay5uZXQvc25vd2JpcmRhcGl8OTU4MzFiMmRhNzcxNDdjYzlmZTU3ODdjNmVlNTJmNWF8MTc= (last visited Oct. 3, 2022) [https://perma.cc/XHZ4-389Y]. The Snowbird waiver is partly complicated by an additional clause discussed *infra*.

90. *Rothstein*, 175 P.3d at 564.

requiring the waiver of negligence claims to the fullest extent permitted by law is therefore a nullity.[91]

Second, flouting is not universal. Some responsible defendants do in fact account for existing laws or case decisions in which they have been involved, sometimes in thoughtful and nuanced ways. A particularly interesting example is found in the case of the Mt. Bachelor ski area in Oregon. In *Bagley v. Mt. Bachelor, Inc.*,[92] the Oregon Supreme Court declared the defendant's preinjury waiver of negligence liability to be unconscionable and unenforceable.[93] The court recognized, however, that the Oregon Skier Responsibility Law charged skiers with assuming the inherent risks of the sport (though defendant negligence is not an inherent risk).[94] In response, Mt. Bachelor's current liability waiver omits the offending language from 2005 that waives negligence liability[95] and instead focuses properly on the assumption of risk defense to which it is entitled under state law:

> Participant accepts and assumes those risks inherent to the Activity and agrees to not to make any claim nor bring any suit for any damages, injury or death which he/she may suffer against Mt. Bachelor LLC wherein the inherent risks of the Activity constitutes a substantial factor in causing the damage or harm.[96]

The substantial factor language is perhaps a little generous to the defendant, but it is far better than before, and certainly better than what is commonly seen elsewhere.

Some New York gyms also take to heart the prohibition against waivers of negligence found in the New York General Obligation Law. For example, Crunch Fitness's membership agreement requires that

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91. A borderline but more legitimate case is found in *Tayar v. Camelback Ski Corp.*, 47 A.3d 1190 (Pa. 2012). In *Tayar*, the Pennsylvania Supreme Court found the defendant's waiver unenforceable insofar as it waived liability for reckless conduct. *Id.* at 1203. The language in *Tayar* waived claims for injuries that were "the result of negligence or any other improper conduct." *Id.* at 1193. Today, the Camelback resort waiver reads, "the result of negligence, *including gross negligence*, or any other improper conduct *for which a release is not contrary to public policy*." *General Facilities Contract*, CAMELBACK RESORT (emphasis added), https://www.camelbackresort.com/wp-content/uploads/2020/12/CMA-waiver-new-.pdf (last modified Aug. 13, 2020) [https://perma.cc/56G2-JKPN]. The new waiver does not flout the law in that waivers of negligence and gross negligence are permitted under *Tayar*. The language about "conduct for which a release is not contrary to public policy" is again technically true but a nullity. Obviously, a release is not effective if it is contrary to public policy.

92. 340 P.3d 27 (Or. 2014).

93. *Id.* at 45–46.

94. *Id.* at 41; *see also* OR. REV. STAT. §§ 30.970-.990 (1979).

95. *See Bagley*, 340 P.3d at 31–32 (recounting Mt. Bachelor waiver from 2005):

> In consideration for each lift ride, the ticket user releases and agrees to hold harmless and indemnify Mt. Bachelor, Inc., and its employees and agents from all claims for property damage, injury or death even if caused by negligence. The only claims not released are those based upon intentional misconduct.

96. Mt. Bachelor, LLC, Waiver 21/22 (on file with authors).

members waive all claims "except such Damages which result from the willful misconduct, gross negligence, or *negligence* of Crunch, LLC."[97] Equinox, another popular New York fitness club, adds a disclaimer stating that "the foregoing release and waiver of liability shall not apply to any losses or damages caused by . . . the negligence of any Equinox party to the extent prohibited by law."[98] (Notably, Equinox appears to have used an unenforceable waiver at some point previously.)[99] And there are always waivers that are simply more reasonable, hoping to define the responsibilities of hosts versus those of guests.[100] These waivers are not the target of this Essay.[101]

C. Reasons for the Persistence

If a liability waiver is clearly unenforceable, then why do injurers persist in requiring them? In the case of sophisticated actors or those with ample notice of unenforceability, the most obvious reason is simple: to deceive plaintiffs.[102] After suffering an injury, victims who remember, reread, or are told about their preinjury waiver might easily and erroneously conclude that they have no valid claim against the injurer. After all, the waiver says on its face that the victim cannot sue the defendant for any injury, and as a further deterrent, some waivers

97. *Crunch CA – Membership Terms and Agreement*, CRUNCH, LLC (Sept. 23, 2020) [https://perma.cc/25FU-5VA2] (emphasis added) (on file with author).

98. *Important Terms*, EQUINOX, https://www.equinox.com/join/terms/114/5/ (last visited July 27, 2021) [https://perma.cc/3PTT-QZ93].

99. *Membership Agreement*, EQUINOX https://d3aencwbm6zmht.cloudfront.net/asset/224131/manual_highlighted.pdf (last visited Oct. 2, 2022) [https://perma.cc/YUP9-3HTL] ("Member assumes full responsibility for his or her use of the facility and releases Equinox from any and all claims, including those caused in whole or in part, by the negligence of Equinox . . . .").

100. *E.g.*, *Liability Waiver – Barrels of Fun Nashville*, BARRELS OF FUN NASHVILLE, https://www.barrelsoffunnashville.com/liability-waiver (last visited Oct. 2, 2022) [https://perma.cc/86V9-DNMP] ("While Guest understands and agrees that Barrels of Fun will exercise ordinary and reasonable care in the operation of any motor vehicle used for conveyance on the Tour, Guest understands that Barrels of Fun assumes no responsibility . . . relating to other third parties, including other drivers of motor vehicles.").

101. Indeed, these legally compliant actors should express outrage at the rampant flouting, as it places them at a competitive disadvantage. *See infra* Part I.C.

102. James Irving, *Enforceability of Waivers of Prospective Liability*, BEAN KINNEY & KORMAN (Sept. 2012), https://www.beankinney.com/publications-articles-enforceability-waivers-prospective-liability.html [https://perma.cc/L52W-DHF9] ("In Virginia, many proprietors of physically risky ventures continue to require participants to sign waivers of personal injury claims, perhaps assuming that, enforceable or not, the existence of such an agreement may be a deterrent to a law suit."); *Are Liability Waivers Enforceable in Louisiana?*, ALVENDIA, KELLY & DEMAREST L. FIRM, https://www.akdlawyers.com/are-liability-waivers-enforceable-in-louisiana/ (last visited Oct. 2, 2022) [https://perma.cc/GMJ4-WH9Q] ("It's incredibly common for businesses to require liability waiver signatures in Louisiana. Many businesses are not fully aware of Louisiana law, and others use them as a scare tactic. But none of these waivers hold up in court.").

even hold the victim responsible for the defendant's attorney's fees if such a claim is filed.[103]

One sports insurance company baldly makes this hoodwinking strategy explicit on its website when discussing parental liability waivers:

> [Despite unenforceability concerns], we recommend their use anyway as waiver/releases may have a psychological impact and actually deter some parents from filing lawsuits. Also, they may have a psychological impact on some juries when it comes to deciding the amount of damages.[104]

Lawyers also appear to advocate for (or at least acquiesce in) this hoodwinking. For example, with regard to waiver forms for minors, two Illinois lawyers specializing in local government law suggest the following:

> Release and waiver forms signed by minors are simply of no validity . . . . Each self-insured governmental entity and pool must decide whether it is worth achieving a psychological value by continuing the practice of requiring children to release their own rights or parents to release their children's rights. There is a common assumption that some parents will not sue for fairly minor injuries because they think they may be blocked by the execution of release forms.[105]

Their article then concludes with an example liability waiver with a provision for minors under eighteen.[106]

More recently, lawyers have reiterated the psychological deterrence value of potentially unenforceable waivers with respect to COVID-19 liability. For example, lawyers have recommended the use of "waivers, indemnification forms and acknowledgments of risk . . . even if potentially unenforceable, [because they] may deter parties from suing."[107] Another firm, advising school districts, writes that "a waiver, even if unenforceable, may actually deter some signers

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103. *See, e.g.*, KIPU RANCH ADVENTURES, *supra* note 72 ("I further agree to INDEMNIFY AND HOLD THE RELEASED PARTIES HARMLESS from all claims, judgement, and costs, including attorney's fees . . . .").

104. *FAQs,* SPORTSINSURANCE.COM, https://www.sportsinsurance.com/faqs/ (last visited Oct. 3, 2022) [https://perma.cc/926B-JMN3]. A nonprofit Canadian healthcare association, HIROC, includes similar language on its website: "While case law suggests signed waivers are unenforceable against the minors (or adults without capacity), the use of a waiver may act as *deterrent to legal action*." *Waivers*, HIROC, https://www.hiroc.com/resources/risk-notes/waivers (last visited Nov. 26, 2022) [https://perma.cc/8T63-KFJY] (emphasis partially omitted). We doubt the insurance company's claim about an unenforceable waiver's effect on damages, since an unenforceable term would seem inadmissible on relevance grounds. The insurer's assertion is nevertheless as quoted.

105. Stewart H. Diamond & Henry E. Mueller, *Pre-activity Waivers and Releases of Liability*, ILL. PARKS & RECREATION, Mar./Apr. 1989, at 22, 22–23 (recognizing that parents may behave differently once they consult an attorney).

106. *Id.* at 27.

107. Breanne Campbell & Joelle Plumer, *Liability Protection for Businesses in the COVID-19 Era*, SVR LAWS. (Dec. 15, 2020), https://www.svrlawyers.com/news-highlights-posts/2020/12/15/liability-protection-for-businesses-in-the-covid-19-era [https://perma.cc/F9HP-32ZV].

from deciding to bring a legal action against the district and does not expose a district to greater legal liability."[108]

More artful advocacy for unenforceable waivers focuses less on their ability to deceive and more on their ability to *inform*, thereby implicating (potentially legitimate) assumption of risk arguments. For example, with respect to COVID-19 waivers, the leading law firm Jones Day argues:

> Further, even if a waiver is unenforceable, it may bolster an argument that the plaintiff assumed the risk of COVID-19-related injuries—another possible defense against COVID-19 claims.[109]

Similar arguments can also be found on other law firm and insurance company websites.[110] One wonders, however, whether these arguments about assumption of risk are wholly sincere, especially in contexts where waivers are known to be unenforceable. After all, to strengthen an assumption of risk claim, a defendant does not need a blanket waiver of liability. A defendant merely needs to disclose the risks and have the customer acknowledge them. So, while the *disclosure* section of their agreement may help assumption of risk, the waiver clauses themselves are inapposite.

Another excuse defendants offer for using unenforceable waivers is that they are asking for a moral, as opposed to legal, obligation from their patrons. Evidence from behavioral-decision research suggests that parties often feel a moral duty to perform contractual obligations, even when such obligations are unenforceable.[111] Whatever the merits of such moral obligations in other contexts, they should not hold sway here. Recall that legislatures or courts have determined that the waiver provisions are unenforceable because they are against public policy.[112]

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108. Michael J. Julka, Steven C. Zach & Brian Goodman, Boardman & Clark LLP, *Liability Waivers and the COVID-19 Pandemic*, WIS. SCH. NEWS, Sept. 2020, at 30, 32; *see also id.* at 31 (acknowledging various conditions under which waivers are unenforceable in Wisconsin).

109. Tiffany D. Lipscomb-Jackson, Jeffrey J. Jones, Jonathan M. Linas, Martin L. Schmelkin & James S. Urban, *COVID-19 Waivers: The Benefits and the Pitfalls*, JONES DAY (June 2020), https://www.jonesday.com/en/insights/2020/06/covid19-waivers-the-benefits-and-the-pitfalls [https://perma.cc/Y3LL-JPQB].

110. *See, e.g.*, Andrew Ferras, *Adding COVID-19 Language to Your Gym Liability Waiver*, NEXO (May 22, 2020), https://www.nexofit.com/adding-covid-19-language-to-your-gym-liability-waiver/ [https://perma.cc/RG5H-G95E] ("The most important reason to utilize a Liability Waiver is to communicate the inherent risks a client is about to undertake."); Loren L. Speziale, *Does My Business Need a Liability Waiver?*, GROSS MCGINLEY LLP (Oct. 29, 2020), https://www.grossmcginley.com/resources/blog/does-my-business-need-a-liability-waiver/ [https://perma.cc/TB4T-6VST] (stressing the importance of informing customers of risks).

111. *See, e.g.*, Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 849 (2012) ("[U]nlike a legal contract, the psychological contract is not necessarily enforceable. . . . [U]nwritten and unenforceable terms are often of great import to the parties.").

112. *See supra* Part I.A.

It is not that the legal system simply does not wish to get involved in enforcement; the law actively does not want these agreements to be made. And the practical consequences of "moral obligation" are no different than deception—fewer plaintiffs bring claims, which harms incentives and compensation.

The blame for the use of unenforceable waivers does not rest solely with would-be injurers and the legal or other advice they receive. Insurance companies—perhaps precisely for the aforementioned psychological deterrence reasons—often either require policyholders to use liability waivers in their activities,[113] or make it a factor in determining premiums or coverage.[114] Policyholders who neglect to obtain the required liability waivers run the risk of having their claims denied.[115] Various industry or sporting associations also require waivers of liability for events associated with their organizations, sometimes purportedly for reasons connected with insurer requirements.[116]

In the case of unsophisticated actors, much of the use of unenforceable waivers may in fairness come out of ignorance. Given the pervasiveness of liability waivers in society, individuals or small businesses may simply include them while unaware of their unenforceability. Insurers and other organizations further promote the problem by providing waiver templates without respect to jurisdiction.[117] If the Road Runners Club of America provides a waiver

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113. NEXT Insurance Staff, *Business Liability Waiver 101 – All You Need to Know to Protect Your Business*, NEXT INS. (Nov. 22, 2019), https://www.nextinsurance.com/blog/business-liability-waiver/ [https://perma.cc/Z4PY-97A6].

114. *See* American Specialty Insurance, Amateur Sports Facility Insurance Questionnaire (Nov. 2019) (on file with authors) (requiring copy of waiver and asking whether and how waivers are used at the facility seeking insurance coverage); Alive Risk, *Application for Sports and Leisure*, RYAN SPECIALTY 2, https://ryansg.com/wp-content/uploads/2021/01/Sports-Recreation-Application.pdf (last visited Oct. 3, 2022) [https://perma.cc/9FSC-R73L] (asking whether liability waiver is used by applicant).

115. Atain Specialty Ins. Co. v. Ne. Mountain Guiding, LLC, No. 16-5129(BRM)(LHG), 2020 WL 7028459, at *13–14 (D.N.J. Nov. 30, 2020) (recounting insurer's attempt to deny coverage for a policyholder who neglected to obtain waivers from its patrons); *see also* Brief of Plaintiff Atain Specialty Insurance Co. in Support of Motion for Summary Judgment at 35, *Atain Specialty Ins.*, No. 16-5129(BRM)(LHG) (on file with authors) (noting that the policy application required "[a] [w]aiver and release of liability approved by [the insurer]").

116. *E.g.*, *Event Waiver Templates*, RD. RUNNERS CLUB OF AM., https://www.rrca.org/education/event-directors/event-waiver-templates/ (last visited Oct. 3, 2022) [https://perma.cc/CVT5-X6FD] ("All RRCA members are required to obtain waivers of liability from their participants and volunteers for every event. This is a requirement for utilizing the RRCA insurance program." (emphasis omitted)).

117. *E.g.*, *Adult Waiver/Release*, SADLER SPORTS & RECREATION INS., https://www.sadlersports.com/riskmanagement/sports-insurance-waiveradult.php (last visited Oct. 3, 2022) [https://perma.cc/MJE5-54LB] (insurer providing template that waives all claims including negligence and includes a provision for waiving the rights of minor children); *Activity*

template that must be used for all sponsored events, then organizers will simply follow along.[118] The widespread disregard for unenforceability is understandable—after all, if the unenforceable waiver carries no penalty and has a "useful" deterrent effect anyway, what incentive is there to account for governing law?

One interesting exception to the trend toward universal waivers is the United States Equestrian Federation ("USEF"), which provides state-specific liability waivers.[119] Our impression, however, is that the state specificity is primarily to take advantage of various state statutes governing equine liability that are favorable to the organizers, rather than any concern over enforceability. For example, the USEF Louisiana waiver references a Louisiana statute absolving equine activity sponsors of the inherent risks associated with horses,[120] but the agreement then goes on to waive "any [l]iability . . . caused in whole or in part by . . . negligent acts."[121] As we now well know, all preinjury waivers of liability are void in Louisiana.[122]

II. SOLVING THE HOODWINKING PROBLEM

If courts or legislatures have declared certain liability waivers to be void as against public policy, it is obviously not in the public interest to have consumers hoodwinked into believing that those waivers are valid. Moreover, some unenforceable waivers amount to flouting. A court has specifically told a defendant that its waiver is unenforceable, and yet, the defendant continues to operate as before. So how can we stop the use of such provisions?

The fundamental problem is that, currently, unenforceable liability waivers are costless to defendants. To start, the waivers present little or no market cost to defendants. Empirical studies suggest

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Release Form, CAMP TEAM, https://campteam.com/application/waivers-releases/ (last visited Nov. 26, 2022) [https://perma.cc/MS8A-5HB9] (insurer providing template).

118. RD. RUNNERS CLUB OF AM., *supra* note 116 (providing waiver template); *see also, e.g.*, *Waiver, Acknowledgement, Release, Medical Authorization Uniform Participation and Hold Harmless Agreement (Warm-Up Agreement)*, USA WATER SKI, http://www.cas.miamioh.edu/owsa/usawaterski.kit/NSSA/Waiver.pdf (last visited Oct. 2, 2022) [https://perma.cc/CHL2-Z633] (providing universal template).

119. *See State Specific Waiver and Release of Liability*, U.S. EQUESTRIAN FED'N, https://www.usef.org/compete/resources-forms/competition-management/competition-prize-lists/state-waivers (last visited Oct. 2, 2022) [https://perma.cc/A5Q8-Z8E2] (providing library of state-specific waiver templates).

120. *Waiver and Release of Liability, Assumption of Risk and Indemnity Agreement (Louisiana)*, U.S. EQUESTRIAN FED'N, https://www.usef.org/forms-pubs/QPTykCqEM7A/louisiana-state-waiver (last visited Oct. 3, 2022) [https://perma.cc/2F9R-EXJK] (citing LA. STAT. ANN. § 9:2795.1 (1992)).

121. *Id.*

122. *See supra* note 38 and accompanying text.

that consumers typically either do not read the waivers or, at a minimum, do not change their purchasing behavior in response to them.[123] Worse yet, unenforceable waivers present basically no legal cost. If a victim is deterred from filing suit because of the waiver, the defendant gains a windfall. If the victim is not deterred, the defendant is no worse off than without the waiver. Unenforceable waivers do, however, impose considerable costs on society. Worthy victims go uncompensated, placing strain on their families, government assistance programs, and other social safety nets. And culpable injurers unjustly avoid liability, meaning that they will have insufficient incentives to take care.

Conceptually, the trouble arises from a mismatch between harm and remedy. Liability waivers may involve contracts, but they are actually about personal injuries and the need to redress such injuries. Declaring the offending provision unenforceable merely handles the redress in the particular case at bar but does nothing about the cases the court does not see, the ones deterred via the implicit misrepresentation of the law.

To discourage unenforceable waivers then, the law must somehow penalize their use. In this Part, we explore three such penalty mechanisms designed to make the use of unenforceable waivers more costly to defendants. The first is to focus on the contract doctrines of partial enforcement and severability, which determine exactly what is unenforceable when a contract violates public policy. Making participant agreements or liability waivers more broadly unenforceable when they contain unenforceable aspects may deter defendants from overreaching and encourage them to be more precise with their language and construction.

The second is to impose some form of administrative remedy. If an unenforceable waiver term is not only void but also illegal (an important distinction that is sometimes forgotten), then such a prohibition could be enforced through public or private enforcement actions.

The third and final mechanism involves punitive damages. We will argue that this tort-based remedy is the optimal and most effective solution to the hoodwinking problem. The chief harm of unenforceable waivers is that they impair detection of and recovery for tortious

123. Marotta-Wurgler, *supra* note 33, at 97 (even with prominent disclosure of terms, less than 0.5 percent of subjects read terms and conditions online); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 3 (2014); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 206 (2010).

conduct, which in turn harms deterrence and compensation. The multiplier theory of punitive damages is especially well-suited for addressing this kind of detection problem.

A. Contractual Remedies

Given that liability waivers are contracts, the natural place to look for remedies is in contract law. When a contractual term is unenforceable, what happens to the offending term or, for that matter, the rest of the contract? The answer can help provide disincentives to using unenforceable waiver terms.

Under ordinary circumstances, courts will try to replace unenforceable terms with the "minimally tolerable term."[124] So for example, in the aforementioned case of *City of Santa Barbara v. Superior Court*, the California Court of Appeal held that the defendant's overbroad liability waiver was unenforceable as to claims of gross negligence but that it remained effective against claims of ordinary negligence.[125]

As Omri Ben-Shahar notes, the goal of partial enforcement is "to give maximum effect to the parties' agreement, subject to the constraint of avoiding unreasonableness."[126] Such partial enforcement, however, only makes sense if the parties inadvertently include an overbroad provision or the unenforceability of the waiver is not yet settled law. Indeed, at the time of *City of Santa Barbara*, "no published California case [had yet] upheld, or voided, an agreement purporting to release liability for future *gross* negligence,"[127] so partial enforcement may have been appropriate.

But when a drafting party deliberately includes an unenforceable provision,[128] it should not be reformed to the minimally tolerable solution. There must be some penalty in order to achieve deterrence. Otherwise, drafters would have "incentives to dictate overly oppressive [terms], expecting to lose at worst only the excessive

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124. Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 877, 887 (2011).

125. 161 P.3d 1095, 1096 (Cal. 2007); *see also* RESTATEMENT (SECOND) OF CONTS. § 184 illus. 4 (AM. L. INST. 1981) (offering an example in which an overbroad liability waiver was unenforceable with respect to willful conduct, but "enforceable with respect to negligence"). The California Supreme Court subsequently affirmed the holding that waivers of gross negligence were unenforceable but expressed no opinion on the ordinary negligence issue. *City of Santa Barbara*, 161 P.3d at 1096 n.1.

126. Ben-Shahar, *supra* note 124, at 887.

127. *City of Santa Barbara*, 161 P.3d at 1102 (noting, however, that some cases had suggested unenforceability in dictum).

128. Ben-Shahar, *supra* note 124, at 889 ("Minimally tolerable gap fillers apply only if the crossing of the boundary was done without bad faith.").

increment and to keep it anytime it is not challenged."[129] So, while partial enforcement may have been appropriate in *City of Santa Barbara* itself, it would no longer be appropriate today. As previously discussed, the city continues to use the same waiver, despite having had it explicitly declared overbroad.[130] Should a plaintiff sue the City of Santa Barbara today even for ordinary negligence, the entire waiver term should be void.

The same principle should arguably apply to the waiver in *Lukken v. Fleischer*.[131] In *Lukken*, the plaintiff signed an overly broad waiver before riding a zip line.[132] The Iowa Supreme Court held that the waiver was "unenforceable to the extent it purport[ed] to eliminate liability for the willful, wanton, or reckless conduct . . . alleged."[133] But, perhaps concerned that the trial court had believed the entire waiver enforceable, it expressly allowed partial enforcement.[134] Today, the facility's waiver still uses the same language,[135] and in future litigation, courts should hold it void in entirety.

A recent study exploring public attitudes toward how courts should reform unenforceable terms accords with this intuition.[136] Although "minimally tolerable" provisions are arguably the most reflective of the parties' hypothetical agreement, Ori Katz and Eyal Zamir found substantially greater support among respondents for "moderate" provisions—ones that are more favorable to the innocent party and that include a punitive element against the overreaching party. Moreover, the study suggests that compared to a "minimally tolerable" rule, a "moderate" rule increases the likelihood that plaintiffs will challenge excessive terms in court.[137]

In practice, some courts have adhered to this penalty principle in handling overbroad liability waivers. For example, when the defendant's waiver covered "negligence and for any other theory of recovery," the Ninth Circuit held that "the entire release

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129. *Id.*

130. *See supra* text accompanying notes 73, 125, and 127.

131. Lukken v. Fleischer, 962 N.W.2d 71 (Iowa 2021).

132. *See id.* at 75 (quoting a waiver that waived "all liability . . . whether caused by . . . negligence . . . or otherwise").

133. *Id.* at 82.

134. *Id.* at 82–83 (holding the waiver unenforceable for willful and reckless conduct but enforceable for negligent conduct).

135. *Release and Waiver of Liability Assumption of Risk and Indemnity Agreement*, MT. CRESCENT SKI AREA, https://skicrescent.com/WP/images/Waiver_Winter_2018_19.pdf (last visited July 30, 2021) [https://perma.cc/BJ7U-SYE6].

136. Ori Katz & Eyal Zamir, *Substituting Invalid Contract Terms: Theory and Preliminary Empirical Findings* (Hebrew Univ. of Jerusalem, Legal Rsch. Paper 19–22, 2019), https://ssrn.com/abstract=3457893 [https://perma.cc/2UVG-LSR3].

137. *Id.* at 24–25.

provision . . . including the limitation of liability for ordinary negligence, [was] unenforceable."[138] This penalty principle also operates elsewhere in contract law.[139] The *Restatement of Contracts*, for example, states that partial enforcement should only occur when the party seeking enforcement is not engaged in "serious misconduct."[140] And courts at times have treated intentional or deliberate inclusion of unenforceable terms as "serious misconduct." For example, while courts will ordinarily replace a usurious provision with the maximum permissible rate, if the drafter knew the provision was usurious, then the "promise to pay interest [becomes] unenforceable in its entirety."[141] Courts will similarly "invalidate [an] entire noncompete clause . . . if there is evidence of deliberate overreaching."[142]

Such penalty doctrines are important for creating proper disincentives against hoodwinking. Courts therefore should pay careful attention to their use and not simply fall into the usual default of using minimally permissible terms.[143] Indeed, it may be appropriate to hold not just the waiver provision void but the entire contract void as a penalty. This remedy is best illustrated by *Holiday Universal v. Haber*, which involved a Massachusetts statute that prohibits health clubs from using liability waivers.[144] In *Holiday Universal*, the defendant's membership contract contained a liability waiver, but rather than simply declaring the waiver unenforceable, the Massachusetts appellate court declared "[t]he entire contract . . . void and

138. Farina v. Mt. Bachelor, Inc., 66 F.3d 233, 234, 236 (9th Cir. 1995) (internal quotation marks omitted); *see also*, *e.g.*, Brooten v. Hickok Rehab. Servs., 831 N.W.2d 445, 448 (Wis. Ct. App. 2013) (holding a waiver that referred to "NEGLIGENCE OR ANY OTHER CAUSE" as overbroad and wholly unenforceable).

139. The idea here is related to the *contra proferentem* rule (that contracts are interpreted against the drafter) and other "penalty default rules." *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). While default rules in contract are usually designed to mimic the party's intentions, penalty defaults try to incentivize drafting parties into more desirable behavior. *See id.* at 95–107 (discussing penalty default rules).

140. RESTATEMENT (SECOND) OF CONTS. § 183 cmts. a & b (AM. L. INST. 1981); Nathan v. Tenna Corp., 560 F.2d 761, 765 (7th Cir. 1977) (holding that the plaintiff was not entitled to legitimate sales commissions when the plaintiff had induced other sales based on bribery).

141. RESTATEMENT (SECOND) OF CONTS. § 184 illus. 5 (AM. L. INST. 1981).

142. Ben-Shahar, *supra* note 124, at 889.

143. *See, e.g.*, Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1368–70 (N.Y. 1992) (interpreting a commercial liability waiver to apply to ordinary negligence but not to gross negligence or reckless conduct, even though that distinction was well established, and the court seemed to assume the waiver attempted to cover both).

144. MASS. GEN. LAWS ANN. ch. 93, §§ 80, 85 (West 2022).

unenforceable."[145] In declining to sever the waiver provision, the court noted that:

> It is not the legislative intent to permit regulated businesses to ignore the statutes which control their operations by virtue of "savings clauses." To [do so] would provide no penalty for violating the terms of the [consumer protection statute] . . . .[146]

To be clear, such nonseverability is not standard contract doctrine, and the result in *Holiday Universal* was a function of the specific consumer protection statute involved.[147] But the underlying principle is broadly applicable. Severability is a common gambit used by sophisticated actors and law firms attempting to insert questionable terms.[148] Courts can impose nonseverability to deter such behavior.

Alas, paying attention to partial enforcement and severability is an incomplete solution to the unenforceable waiver problem because it only works in certain contexts. Partial enforcement, for example, only applies when there is something left to partially enforce. So, it may discourage overly broad waivers when, for example, a jurisdiction permits negligence waivers but not gross negligence waivers. Yet, it offers no incentives when a jurisdiction prohibits waivers entirely (or entirely within a specific context, like health clubs or minors). In that case, defendants have nothing to lose regardless of how they draft the waiver provision.

As seen in *Holiday Universal*, courts can of course increase the stakes and hold the entire contract unenforceable. But the effectiveness of this penalty is still limited to specific contexts. A health club may be deterred from adding an unenforceable waiver provision if that renders the entire membership contract void. But nonseverability only works if there is a long-term relationship with other meaningful contractual terms. With one-time waivers, such as those signed by visitors or those found in "day passes," the drafter again has nothing to lose. Either the

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145. Holiday Universal, Inc. v. Haber, 1990 Mass. App. Div. 69 (Dist. Ct. 1990) ("The statute in this case, however, specifically requires that the entire contract be rendered null and void as a matter of public policy.").

146. *Id.* at *3.

147. MASS. GEN. LAWS ANN. ch. 93, § 85 (West 2022):

> Any contract for health club services which does not comply with the applicable provisions of this chapter shall be void and unenforceable as contrary to public policy. Any waiver by the buyer of the provisions of this chapter shall be deemed void and unenforceable by the seller as contrary to public policy.

148. *E.g.*, Lipscomb-Jackson et al., *supra* note 109 ("In most cases, any negative legal consequences following from the inclusion of an unenforceable waiver may be addressable via a properly drafted severability provision.").

waiver works and deters litigation, or it is declared unenforceable, with no negative consequences.[149]

Finally, the other problem with partial enforcement and severability is that their remedial and incentive effects are not well tailored to the social harm involved. The penalty of having *other* contract terms declared unenforceable does not necessarily match the harm created by the waiver in question. Additionally, this remedy only punishes defendants when victims bring claims. But the whole problem of unenforceable waivers is that they deter such claims, and the penalty does nothing to address the harms caused to the plaintiffs who are duped into not bringing claims.

B. Civil Penalties

Rather than trying to impose penalties through contractual remedies, the law can do so more directly through administrative enforcement and civil penalties. For example, under the aforementioned Massachusetts consumer protection statute governing health clubs and gyms, not only are liability waivers unenforceable[150] but they are also expressly prohibited[151] and subject to a $2,500 fine for each violation.[152] Similarly, while federal admiralty law declares liability waivers in passenger transportation contracts to be void,[153] it also expressly prohibits passenger carriers from including them.[154]

There are conceptual reasons to think that the distinction between unenforceability and illegality may make some difference. Semantically, the term "unenforceable" may erroneously imply that drafters can freely use such provisions; it is just that courts will not enforce them. But as we have already noted, unenforceable waiver terms should not be viewed in this way. The reason why courts and

149. Defendants may respond by attempting to separate membership agreements from liability waivers to circumvent the nonseverability penalty. Courts would, however, presumably see through this artifice and not permit form to triumph over function. *See, e.g.*, CAL. CIV. CODE § 1812.83 (West 2022) ("All contracts for health studio services, which may be in effect between the same seller and the same buyer, the terms of which overlap for any period, shall be considered as one contract for the purposes of this title.").

150. MASS. GEN. LAWS ANN. ch. 93, § 85 (West 2022).

151. *Id.* § 80 ("No contract for health club services may contain any provisions whereby the buyer agrees not to assert against the seller . . . of the health club services contract any claim or defense arising out of the health club services contract or the buyer's activities at the health club.").

152. *Id.* § 87.

153. 46 U.S.C. § 30509(a)(2).

154. *Id.* § 30509(a)(1) ("[A] vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting . . . the liability of the owner . . . ."). The statute does not include specific penalties, although the Federal Maritime Commission has delegated authority to enforce the provisions under 46 U.S.C. § 30100.

legislatures declare certain liability waivers unenforceable is because they harm the public interest. To allow drafters to use unenforceable language to deceive victims and psychologically deter lawsuits would run squarely against this rationale. Thus, making clear that such waivers are not just unenforceable but *illegal* may serve an important expressive function.

Illegality, as opposed to "unenforceability," may also cause lawyers to stop viewing these terms as costless or merely tactical. The threat of administrative enforcement (since the behavior is illegal) of course discourages overreaching, but declaring something illegal may also cause lawyers to conclude that they can no longer ethically advocate for using such waivers. It is one thing to advocate using an unenforceable term; it is another to advocate using an illegal one. Relatedly, the change in rhetoric may also affect consumer knowledge and attitudes toward these practices. Illegality provokes outrage, whereas unenforceability sounds like a technicality. Illegality also removes any sense of moral obligation to abide by the agreement. Finally, declaring such terms to be illegal may make it easier for courts to bar partial enforcement and severability. Using an "illegal" provision seems more like "serious misconduct" than using an "unenforceable" one.[155]

Declarations of illegality, civil penalties, and administrative enforcement are, however, also unlikely to solve the unenforceable waiver problem. First, their effects on defendant behavior are unclear. On the one hand, the federal statutory prohibition against waivers on passenger ships seems efficacious. Many major cruise operators appear not to include liability waivers in their ticket contracts, at least not with respect to transportation.[156] On the other hand, a number of fitness centers in Massachusetts continue to impose liability waivers despite

155. *See supra* notes 141–143 and accompanying text.

156. *See, e.g.*, *Ticket Contract*, CARNIVAL, https://www.carnival.com/popups/bookingengine/reservation-terms-and-conditions.aspx (last visited Oct. 6, 2022) [https://perma.cc/2LFZ-28XR] (expressly excluding U.S. journeys from its liability waiver and invoking the federal admiralty statute); *Guest Ticket Contract*, NORWEGIAN CRUISE LINES, https://www.ncl.com/oci/contracts/en-US (last visited Oct. 6, 2022) [https://perma.cc/EU3B-KY5E]; *Cruise/Cruisetour Ticket Contract*, ROYAL CARIBBEAN https://www.royalcaribbean.com/content/dam/royal/resources/pdf/cruise-ticket-contract.pdf (last visited Oct. 6, 2022) [https://perma.cc/4BFR-UJT7] (limiting liability only for damage to property). What cruise ship operators do frequently disclaim is liability associated with shipboard activities, an issue which has been the subject of considerable recent litigation. *See* Johnson v. Royal Caribbean Cruises, Ltd., 449 F. App'x 846, 848–49 (11th Cir. 2011) (construing admiralty law broadly to find cruise line waiver unenforceable for negligence claims arising out of shipboard activities); DeLuca v. Royal Caribbean Cruises, Ltd., 244 F. Supp. 3d 1342, 1348–49 (S.D. Fla. 2017).

the clear prohibition and fines in the consumer protection statute.[157] The failure of the administrative enforcement regime in Massachusetts should perhaps come as little surprise. State officials often have limited resources, and they arguably have bigger problems than unenforceable waiver terms in fitness center contracts.[158]

To deal with enforcement, states could strengthen private enforcement provisions, but their effectiveness would also be questionable. An independent misrepresentation claim for using an unenforceable waiver is unlikely to yield much in the way of damages, and thus, plaintiff attorneys may find such cases (excepting class actions) unattractive. After all, how much harm has occurred to the plaintiff vis-à-vis the waiver itself? The harm caused by unenforceable waivers stems from the cases that the courts do not see, not the ones they do.

Second, as seen in both the admiralty and Massachusetts examples, a civil penalty regime typically requires legislative action.[159] If the legislature wishes to construct such a regime, that is all well and good. But to the extent that much of the doctrine surrounding unenforceable liability waivers has been judicially created through common-law tort and contract, one might like to have a judicially based enforcement mechanism to match. If the judiciary has declared a defendant's liability waiver as being against public policy, and the defendant flouts the decision by continuing to use it, it seems only fitting that the judiciary have the ability to craft the subsequent remedy.

Third, one might worry that small businesses, unaware of the legal prohibitions and influenced by insurers, templates, and the pervasive use of waivers, may inadvertently run afoul of these civil penalties, causing undue hardship. Arguably, the focus should not be on naïve businesses who are ignorant of the law but rather sophisticated actors or actors with prior notice, who are deliberately ignoring the law and deceiving consumers to gain an advantage in ensuing litigation.

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157. *Membership Handbook*, BOS. UNIV. FITNESS & RECREATION CTR. 13–14 (Nov. 2019), https://www.bu.edu/fitrec/files/2019/11/FitRec-Membership-Handbook-November-2019b.pdf [https://perma.cc/8PPK-4CAB] (waiving all claims including negligence); *see, e.g.*, *Waiver*, TRAIN BOS. SPORTS CTR., http://www.trainboston.com/wp-content/uploads/2016/10/Waiver-Updated-TB-2016-3.pdf (last visited July 31, 2021) [https://perma.cc/7X7R-7CMM] (same); *Release and Waiver of Liability and Indemnity Agreement*, W. SUBURBAN YMCA (2021), https://www.wsymca.org/sites/default/files/Liability%20Waiver.pdf (last visited Oct. 6, 2022) [https://perma.cc/RX5G-LZE3] (same).

158. *Cf.* Furth-Matzkin, *supra* note 19, at 24 (detailing the use of unenforceable leasing terms in Massachusetts despite prohibitions and penalties).

159. *See supra* notes 151–155 and accompanying text.

Finally, like the contractual remedies, civil penalties too are somewhat unmoored from the social harm created by a defendant's use of unenforceable liability waivers. From the standpoint of substantive tort law, the goal is for defendants to internalize all of their externalities, thereby creating optimal incentives to take care. But a set penalty is unrelated to these accident costs. Put a different way, civil penalties are an ex ante solution, used in the hope of deterring the use of unenforceable waivers altogether. They are not an ex post remedy that can be used to redress a defendant's use of unenforceable waivers in the past.

C. Punitive Damages

Having explored both contractual and administrative solutions to the unenforceable waiver problem, this Section explores what we argue is the optimal solution—punitive damages. Punitive damages will deter defendants from using unenforceable waivers ex ante and provide a well-tailored remedy when defendants attempt to dupe would-be plaintiffs ex post. Punitive damages in this context also fit comfortably within multiple theoretical perspectives of tort law.

1. Theoretical Justifications

From the standpoint of economic theory, punitive damages are a natural solution to unenforceable waivers. As we have repeatedly emphasized, the primary problem with unenforceable waivers is that they discourage victims from bringing claims, which in turn lowers defendant incentives to take care and harms the tort policy goal of compensation.

This discouragement of claims presents a classic detection problem: because of the unenforceable waivers, fewer victims will bring suit. And it is well-established in the law-and-economics literature that punitive damages can readily handle such detection rate problems. Specifically, if the damages multiplier is set to be the reciprocal of the detection rate, that will ensure that defendants internalize all of their externalities, achieving optimal deterrence.[160]

So, for example, suppose that victims on average suffer $10,000 in injuries, but because the defendant forces all customers to sign an

160. *See generally* Polinsky & Shavell, *supra* note 22, at 889–90 ("To remedy these problems of underdeterrence, damages that are imposed in those instances in which injurers are found liable should be raised sufficiently so that injurers' average damages will equal the harm they cause." (emphasis omitted)). For a case illustrating the idea of the multiplier, see *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677–78 (7th Cir. 2003).

unenforceable waiver, only one in three victims recover from the defendant. Without punitive damages, the injurer will internalize only one-third of the damages it causes, giving the injurer insufficient incentives to take care. However, suppose courts award litigating victims not only $10,000 in compensatory damages but also an additional $20,000 in punitive damages. Or put in terms of the multiplier, suppose that litigating victims receive three times their (compensatory) damages of $10,000, totaling $30,000. Then, injurers will be optimally deterred.

Punitive damages also work from a retributive perspective, because they operate to disgorge the ill-gotten gains that a defendant obtained through its unenforceable waivers.[161] Injurers pay the same amount in aggregate whether they use an unenforceable waiver or not. If they use a waiver, then they will pay only a fraction of claims, but the damages for those claims will be multiplied by the reciprocal, resulting in the same aggregate payout.[162] Indeed, while the expected payout may be the same with or without the unenforceable waiver, the variance is not.[163] If they use an unenforceable waiver, defendants face potentially large judgments in individual cases due to the multiplier, and so, risk-averse defendants will have incentives to desist from using the unenforceable clauses entirely.

2. Doctrinal Fit

Aside from the theoretical justifications, the unenforceable waiver problem also coheres with many of the other traditional factors that justify punitive damages. Consider instances in which a waiver provision is clearly unenforceable based on well-settled law. In these cases, the defendant's behavior is either deliberate or reflects willful blindness, classic aggravating factors for punitive damages.[164] The behavior also involves misrepresentation—the whole point of the

161. Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 423, 433–39 (1998).

162. Suppose v is the number of victims, d is the average damages caused per victim, and f is the fraction of victims who will sue if forced to sign an unenforceable waiver. If the defendant does not use the waiver, the defendant will pay (in total) $v*d$ in damages. If the defendant uses the waiver, then the defendant will pay $((v*f)*d) * (1/f) = v*d$ in damages.

163. To understand this point, let us revisit the earlier example. Without the unenforceable waiver, all plaintiffs will bring their claims with an expected payout of $10,000 each. With the unenforceable waiver, each plaintiff will have a 33% probability of bringing a claim with an expected payout of $10,000 times the multiplier of 3, meaning $30,000. In the first scenario, the variance is $0, since the outcome is constant and deterministic. In the second case, the variance is much higher.

164. *E.g.*, N.C. GEN. STAT. ANN. § 1D-15(a) (West 2022) (listing "willful or wanton conduct" as one of three aggravating factors justifying punitive damages).

unenforceable waiver is to trick victims into believing they have extinguished their legal rights.[165] The practice targets consumers, who are relatively more vulnerable and unsophisticated.[166] And finally, although unenforceable waivers do not directly cause physical injury, they operate in the physical injury context and adversely affect health and safety.[167]

In *Strawbridge v. Sugar Mountain Resort, Inc.*, one of the few reported cases to address the question of punitive damages in the liability waiver context, the court implicitly acknowledged that punitive damages might be appropriate if a defendant "deliberately misstated the law in order to prevent patrons from bringing law suits."[168] In *Strawbridge* itself, the court found no evidence to support that allegation but explicitly declared:

> [F]or ski area operators to contract out of liability for negligence would run counter to the public interest as defined by North Carolina courts, and the exculpatory language on Plaintiff's ticket is, for that reason as well, unenforceable.[169]

Given this language and the fact that Sugar Mountain continues to use a broad waiver provision today,[170] one can certainly imagine a new case finding that Sugar Mountain had ample notice and that its use of the current waiver was sufficiently deliberate to warrant punitive damages.[171]

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165. *E.g.*, BMW of N. Am. v. Gore, 517 U.S. 559, 575–76 (1996) ("[T]rickery and deceit . . . are more reprehensible than negligence." (internal quotation marks and citations omitted)).

166. *Cf. id.* at 576 (suggesting that "infliction of economic injury, especially . . . when the target is financially vulnerable, can warrant a substantial penalty"); Catherine M. Sharkey, *Punitive Damages Transformed into Societal Damages*, *in* PUNISHMENT AND PRIVATE LAW 155, 169 (Elise Bant, Wayne Courtney, James Goudkamp & Jeannie Marie Paterson eds., 2021) (noting that "[s]tatutory multipliers exist[ ] in roughly half (25/50) of the [s]tate acts" governing deceptive consumer practices).

167. *See Gore*, 517 U.S. at 576 (suggesting that "indifference to or reckless disregard for the health and safety of others" is a factor determining reprehensibility).

168. Strawbridge v. Sugar Mountain Resort, Inc., 320 F. Supp. 2d 425, 436 (W.D.N.C. 2004).

169. *Id.* at 434.

170. *E.g.*, *Snow Tubing Assumption of Risk and Release of Liability*, SUGAR MOUNTAIN RESORT, INC., http://www.skisugar.com/downloads/Tubing-Waiver.pdf (last visited Oct. 7, 2022) [https://perma.cc/SBE7-TBJS] ("I specifically release the Released Parties for any claims related to their negligence, that is, their failure to use reasonable care in any way in the design or operation of this snow tube facility, or in the installation, maintenance, selection, adjustment and use of the snow tubing equipment.").

171. To be sure, *Strawbridge* involved a federal district court interpreting state law, which harms its formal precedential value. 320 F. Supp. 2d. at 438. Nonetheless, for purposes of the punitive damages analysis, it is clear that the defendant had been specifically previously warned about the problematic nature of its waiver and chose to persist with a broad, unqualified waiver provision, effectively ignoring the federal court's admonition. This context, while not dispositive, arguably provides ample grounds for a future court to conclude that punitive damages are appropriate.

3. Implementation

Whether punitive damages are appropriate in a given case is ultimately a question for the factfinder, but given the doctrinal factors, we can expect punitive damages to be in play more often in some types of cases than others. Aggravating circumstances include cases involving a sophisticated or repeat player, like an insurer or large organization, which faces frequent lawsuits and should know the governing law. They also include contexts in which the law is clear, such as when statutes or appellate decisions exist that categorically define contexts in which liability waivers are unenforceable. And perhaps the most obvious punitive damages cases are the ones that we have featured throughout this Essay—when defendants have already been told in previous litigation that their waivers are unenforceable and yet persist in using the same waivers.

On the flip side, punitive damages are arguably less appropriate when an unsophisticated actor inadvertently violates public policy by following prevailing norms.[172] Another mitigating factor is when the waiver includes information that alerts the consumer to possible limitations to the waiver. For example, consider this language found in the waiver for the popular fitness club, SoulCycle:

> I . . . release and agree to indemnify and hold harmless SoulCycle . . . from any and all responsibility, claims . . . to the fullest extent allowed by law arising out of or in any way related to my participation in the Classes or use of the Facilities, except that this release does not purport to release claims arising out of California's Health Studio Service Contract Law . . . and equivalent state law analogs . . . .[173]

One might argue that allowing such boilerplate language to evade punitive damages would destroy the solution's effectiveness. There is, however, a very important check on such boilerplate—the detection rate multiplier. The clearer the language—for example, "not including negligence"—the less likely the waiver will improperly deter lawsuits, and the lesser the need for a large multiplier. The more opaque the language—for example, "to the fullest extent allowed by law"—the greater the need for a large multiplier. On this spectrum, the SoulCycle waiver, with its citation of specific laws, probably occupies the middle ground.

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172. One interesting complication is when an unsophisticated actor includes an unenforceable waiver because its insurance provider requires it. On the one hand, the unsophisticated actor lacks the reprehensibility conventionally required for punitive damages. On the other hand, to the extent that the insurer is a sophisticated actor and is ultimately the source of recovery, punitive damages are quite appropriate. To deter insurers from this behavior (i.e., requiring unenforceable waivers), punitive damages are needed.

173. *New Rider Waiver Form*, SOULCYCLE, https://www.gns.org/wp-content/uploads/2019/12/NEW-RIDER-WAIVER-FORM.pdf (last visited Oct. 7, 2022) [https://perma.cc/EX6K-BVC2].

We further note that compared to many tort contexts, the damages multiplier is more easily calculated with unenforceable waivers. For one thing, at least from their application forms, some insurance companies seem to imply that premium rates change based on whether an insured uses a liability waiver.[174] Courts could presumably discover and use the differences between those premia to calculate the respective detection rates and the appropriate multiplier. For another thing, survey studies can provide at least some data on consumer attitudes in the presence or absence of the unenforceable waiver. Such surveys would be analogous to those done by experts in trademark confusion cases.[175]

4. Constitutional Due Process Concerns

One potential obstacle to the punitive damages solution is language from recent Supreme Court opinions expressing skepticism about the constitutionality of using multiplier theory to justify punitive damages. Specifically, in both *Cooper Industries, Inc. v. Leatherman Tool Group*[176] and *State Farm Insurance v. Campbell*,[177] the Supreme Court rejected arguments that a high ratio between punitive and compensatory damages could be justified by concerns about underdetection and deterrence.[178]

As Catherine Sharkey has thoughtfully argued, however, "[a] more nuanced view would be that the Court recognizes optimal deterrence as one, but not the sole, underlying justification for punitive damages."[179] For example, in *Cooper Industries*, the Court's objection was that "deterrence [was] not the *only* purpose served by punitive damages" and that there might be trade-offs between efficiency and punishing "morally offensive conduct."[180] And in the later case of *Exxon*

174. *See* NEXT Insurance Staff, *supra* note 113.

175. *See* Shari Seidman Diamond, Fed. Jud. Ctr., *Reference Guide on Survey Research, in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 359 (2d ed. 2000).

176. 532 U.S. 424 (2001).

177. State Farm Mut. Auto. Ins. v. Campbell, 538 U.S. 408 (2003).

178. *See Cooper Indus.,* 532 U.S. at 439–40; *State Farm Ins.,* 538 U.S. at 416.

179. Catherine M. Sharkey, *Economic Analysis of Punitive Damages: Theory, Empirics and Doctrine*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 486, 496 (Jennifer Arlen ed., 2013); *see also* Sharkey, *supra* note 166, at 160 ("Some courts and commentators have nonetheless over-read [*Phillip Morris USA v.*] *Williams* to claim that the Court dealt 'a crippling blow' to the entire category of societal punitive damages . . . .").

180. *See Cooper Indus.,* 532 U.S. at 439–40 (emphasis added); *see also* BMW of N. Am. v. Gore, 517 U.S. 559, 582 (1996) (discussing detection problem), *cited in* Sharkey, *Economic Analysis of Punitive Damages*, *supra* note 179, at 496.

Shipping Co. v. Baker, the Court explicitly recognized the possibility that low detection rates can "open[ ] the door to higher awards."[181]

Further, to the extent that the Court's recent skepticism over multiplier theory represents a shift away from an economic or deterrence view and toward a more retributive one, unenforceable waivers still fit easily. As we have emphasized, the cases we have highlighted involve unsophisticated consumers, deliberate misrepresentation (or willful blindness), and personal injury. Taking all of these factors together, the hoodwinking associated with unenforceable waivers presents a classic case for retributive penalties. A retributive view of punitive damages may moderate the outsized multipliers sometimes required by deterrence theory, but it still demands some multiplier nevertheless. And while deterrence may not be optimal under retributive theory, given the current situation, any deterrence of unenforceable waivers is a step in the right direction.

5. Matching Harm to Remedy

Compared to the other solutions explored in this Essay and elsewhere, punitive damages also offer the ability to tailor sanctions to match the defendant's harm. One of the major drawbacks of contractual remedies and civil penalties is that they seek to deter unenforceable waivers through largely ad hoc sanctions. By contrast, punitive damages are calculated specifically to optimize deterrence and to disgorge any ill-gotten advantage.

CONCLUSION

In this Essay, we have exposed the problem of unenforceable liability waivers. Defendants perceive waiver language as effectively costless, and rather remarkably, we have found documents explicitly advocating for this deceptive practice. Given this state of affairs, we have argued that broader use of punitive damages is a natural solution to this problem. Punitive damages are justified based on deterrence (using multiplier theory) and retributive grounds.

Beyond addressing the important practical problem of unenforceable waivers, this Essay has also contributed to two

181. Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008), *cited in* Sharkey, *Economic Analysis of Punitive Damages*, *supra* note 179, at 497. In *Philip Morris v. Williams* the U.S. Supreme Court vacated a punitive-to-compensatory ratio of 97. 549 U.S. 346, 347–49 (2007). But when the Oregon Supreme Court (ironically, given this Essay's focus on flouting) essentially ignored the decision and reinstated the original $79.5 million judgment, the Supreme Court let the judgment stand. *See* Williams v. Philip Morris Inc., 176 P.3d 1255 (Or. 2008), *cert. denied*, 556 U.S. 178 (2009).

theoretical streams in the academic literature. The first is to suggest a qualitative approach for investigating the effects of legal decisionmaking. In recent years, empirical scholars have attempted to ascertain the effect of legal decisions principally through quantitative studies. One need not, however, be restricted to quantitative methods, as famously seen in Robert Ellickson's book *Order Without Law*. Lawyers often study cases but seldom track their aftermath. And at least in the context of unenforceable waivers, it is astonishing to see so many cases having so little impact going forward. Time and time again, defendants have had their waivers declared unenforceable, only to ignore the decision and go back to using the identical waiver language. As academics, we may teach *Dalury* or *Hanks* in our classes and casebooks, but those determinations of unenforceability are only half the story. The other half is that despite those decisions, defendants like Killington and Powder Ridge continue to ask would-be plaintiffs to sign similar waivers today.

The second is that our Essay contributes to a growing interest in unenforceable contract terms and misrepresentations of the law. While punitive damages are not a universal solution to all misrepresentation problems, they are worth further consideration in some contexts. For example, certain unenforceable lease provisions disclaiming tenant rights may be structurally similar to unenforceable liability waivers in that they cause damage to plaintiffs (by imposing unnecessary costs) and create detection problems. Some leasing terms do not implicate health and safety, but some do and, if coupled with financially vulnerable plaintiffs and a sophisticated defendant, may provide a context suitable for punitive damages.

Even apart from the Essay's broader practical and theoretical implications, we note that liability waivers in and of themselves are a fertile ground for future scholarship. Liability waivers are everywhere. They are not just in the recreational contexts where courts tend to focus. (Indeed, recreational contexts are arguably only more frequently litigated because the unenforceability is more unclear.) Given that waivers are at present costless, given that people literally sign them without reading them, and given that they have become part of prevailing culture, waivers have the potential to expand perniciously into all areas of life. We have already started seeing them in transportation, childcare, employment, and even products liability.

The COVID-19 pandemic merely spurred even greater use of liability waivers. Members of the public operating under pandemic conditions surely assumed certain risks, and one would have expected tort law to recognize as much even without waivers. Yet, hoping to minimize their litigation risks, and perceiving few penalties for

overreaching, businesses of all types sought broad waivers. Hospitals represented the most extreme example. Huntington Hospital in California, for instance, asked all visitors to sign the following blanket waiver:

> I waive and release . . . Huntington Hospital . . . for any loss, costs, claims, demands, causes of action, damages or suits at law and equity *of any kind, including but not limited to* claims for personal injury whether caused by negligence or otherwise, medical expenses, loss of services or wrongful death on account of, or in any way related to or arising out of my contracting COVID-19.[182]

What started perhaps as a reasonable acknowledgment of the risks associated with hospital visitation during the pandemic quickly turned into an opportunity to impose a breathtakingly broad waiver. The document's waiver of non-COVID-19-related negligence liability, for example, is almost surely unenforceable given the hospital's position as a provider of critical services. But what does the hospital have to lose? Most guests will willingly sign the waiver no matter what it states—after all, it is a hospital!

Will these waivers disappear in the wake of the pandemic? Without some mechanism to penalize the use of unenforceable waivers, we doubt it. Drafters have nothing to lose and everything to gain, and in the meantime, tort law will find its ability to achieve compensation and deterrence increasingly inhibited. But this outcome is far from a fait accompli. By identifying and drawing attention to the problem of unenforceable waivers and promoting the use of punitive damages to combat it, perhaps this Essay can start to reverse the tide.

182. HUNTINGTON HOSP., *supra* note 31 (emphasis added).