# CONTRACT'S REVENGE: THE WAIVER SOCIETY AND THE DEATH OF TORT

*Ryan Martins,*[†] *Shannon Price*[†] *& John Fabian Witt*[†]

TABLE OF CONTENTS



† J.D., Yale Law School, expected 2020.

† J.D., Yale Law School, expected 2020.

† Duffy Professor of Law and Head of Davenport College, Yale University, john.witt@yale.edu. Many thanks to Omri Ben-Shahar, Nora Engstrom, Ron Glazer, Ken Simons, Roseanna Sommers, and Tom Witt for helpful readings.

## INTRODUCTION

Zombie contract has risen from the dead to put a stake through the heart of tort.

A half century ago, leading observers of American law reflected on what they believed was the end of an era. For more than a century, from the 1830s, in what Roscoe Pound called "the formative era" of American law,[1] up at least until the New Deal, significant swaths of the American common law's private law doctrines were distinctively organized around contract.[2] By the middle of the twentieth century, however, the basic structure of the common law's contractual reasoning seemed to be under attack. "[I]t is the fate of contract," proclaimed leading scholar Grant Gilmore in 1974, "to be swallowed up by tort."[3] Dean William Prosser described with equal confidence an "assault upon the citadel of privity"—the doctrine that had once supported the predominance of contract in the law of products liability; courts, Prosser said, had at last "throw[n] away the crutch" and based their rulings on tort obligations at the expense of contractual liabilities.[4] Gilmore confidently predicted "the death of contract." He and Prosser believed they were watching the advent of an age in which tort's public obligations would dominate where previously the rights and duties of contract law had ruled. Leading torts scholar Greg Keating puts the point bluntly: "[t]ort has triumphed over contract and property."[5]

---

1 ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW (1938).

2 *See infra* Section I.A. There were a number of noncontractual alternative ordering principles, too, for example, racial status in the law of slavery and the private law of Jim Crow, *see* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1980); GERALD DAVID JAYNES, BRANCHES WITHOUT ROOTS: GENESIS OF THE BLACK WORKING CLASS IN THE AMERICAN SOUTH, 1862–1882 (1986); DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, & THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL (2001), labor and class status in the law of employment, *see* KAREN ORREN, BELATED FEUDALISM: LABOR, THE LAW, AND LIBERAL DEVELOPMENT IN THE UNITED STATES (1991); CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993), and social status. *See* Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

3 GRANT GILMORE, THE DEATH OF CONTRACT 94 (1974).

4 William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1134 (1960).

5 Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1150 (2009).

History has turned out to be more complicated. Contract has found ways to reassert itself. Public dispute resolution has given way to the private contractual settlement of claims.[6] Increasingly, contract excludes trials altogether. Sometimes it does so in advance, as Margaret Jane Radin, Judith Resnik, and others have shown, through contractual arbitration clauses, which have shunted into private fora the resolution of the publicly imposed obligations on which Gilmore and Prosser focused two generations ago.[7] Sometimes it does so after the fact in the form of settlement contracts, which now dominate the resolution of civil disputes like never before in the history of the common law.[8]

In this Article, we draw attention to a further way in which contract is wreaking its revenge. Virtually everywhere one goes in contemporary life, there are waivers to be signed: in apartments and housing developments,[9] in daycare centers[10] and nursing homes,[11] in big box stores[12] and birthday party

6 Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUDS. 459 (2004); John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012).

7 MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015); Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507 (2011).

8 Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L.J. 2663 (1995).

9 Milligan v. Chesterfield Vill. GP, LLC, 239 S.W.3d 613 (Mo. Ct. App. 2007); Crosby v. Sahuque Realty Co., 234 So. 3d 1190 (La. Ct. App. 2017), *writ denied*, 239 So. 3d 294 (La. 2018); Tolliver v. 5 G Homes, LLC, 563 S.W.3d 827 (Mo. Ct. App. 2018).

10 Gavin W. v. YMCA of Metro. L.A., 131 Cal. Rptr. 2d 168 (Ct. App. 2003); Lotz v. Claremont Club, No. B242399, 2013 WL 4408206 (Cal. Ct. App. Aug. 15, 2013).

11 Gates v. Sells Rest Home, Inc., 57 S.W.3d 391 (Mo. Ct. App. 2001); STV One Nineteen Senior Living, LLC v. Boyd, 258 So. 3d 322 (Ala. 2018).

12 BJ's Wholesale Club, Inc. v. Rosen, 80 A.3d 345 (Md. 2013).

factories,[13] in schools[14] and sporting events,[15] at hair salons,[16] in gyms,[17] and on skiing slopes.[18] In these domains and in many others, Americans today sign tort waivers at rates not seen since the middle of the nineteenth century, and perhaps never seen at all.[19] The prevalence of waivers has produced something that neither Gilmore nor Prosser saw coming: a waiver society in which contract has once again, as it last did more than a century ago, succeeded in displacing large swaths of tort. Indeed, lest anyone underestimate the incursions of contract, the latest edition of the leading practice manual in the field now asserts that "a well-written waiver" can "protect a service provider from liability for injuries resulting from provider negligence in 45 or more states."[20] This assertion overstates the enforceability of waivers. But not wildly so. And it suggests the full extent of waivers' penetration of American life.

With this Article, we announce a new website dedicated to collecting, displaying, and marveling at the sheer chutzpah and lush variety of waivers in American life.[21] Go to the Waiver Society Project page and send us your waivers. And check out the law of waiver enforceability in states across the United States.

In the meanwhile, this Article traces the process by which the waiver contract has become a real life version of *The Walking Dead*, haunting tort law anew. Part I rehearses the rise and fall of contract in nineteenth- and twentieth-century American law. Part II describes the undead-like return of contractual waivers of tort liability and assesses the current landscape of

---

13 Baker v. Just for Fun Party Ctr., LLC, 923 N.E.2d 224 (Ohio Ct. App. 2009); Woodman *ex rel.* Woodman v. Kera LLC, 785 N.W.2d 1 (Mich. 2010).

14 Munn v. Hotchkiss Sch., 24 F. Supp. 3d 155 (D. Conn. 2014); Morrison v. Nw. Nazarene Univ., 273 P.3d 1253, 1254 (Idaho 2012).

15 *Morrison*, 273 P.3d 1253; Brotherton v. Victory Sports, Inc., 24 F. Supp. 3d 617 (E.D. Ky. 2014); Lloyd v. Sugarloaf Mountain Corp., 833 A.2d 1 (Me. 2003).

16 Dixon v. Manier, 545 S.W.2d 948 (Tenn. Ct. App. 1976); Baker v. Stewarts' Inc., 433 N.W.2d 706 (Iowa 1988).

17 Cox v. U.S. Fitness, LLC, 2 N.E.3d 1211 (Ill. App. Ct. 2013); Forrester v. Aspen Athletic Clubs, LLC, 766 N.W.2d 648 (Iowa Ct. App. 2009) (unpublished table decision); Seigneur v. Nat'l Fitness Inst., Inc., 752 A.2d 631 (Md. Ct. Spec. App. 2000).

18 Squires *ex rel.* Squires v. Goodwin, 829 F. Supp. 2d 1062 (D. Colo. 2011), *aff'd sub nom.* Squires v. Breckenridge Outdoor Educ. Ctr., 715 F.3d 867 (10th Cir. 2013).

19 *See infra* notes 54–58.

20 DOYICE J. COTTEN & MARY B. COTTEN, WAIVERS & RELEASES OF LIABILITY 10 (9th ed. 2016).

21 *About the Waiver Society Project*, WAIVER SOC'Y PROJECT, https://www.waiversociety.org [https://perma.cc/5CUQ-4WPX].

waiver enforceability in the United States. Finally, Part III assesses the significance of the doctrinal trends and concludes that Americans are on the verge of living in a waiver society. Standard contractual practice today displaces tort liability more aggressively than at any time in American history, including even at the high point of the nineteenth-century age of contract.

## I. CONTRACT'S RISE, CONTRACT'S FALL

The striking place of contractual waivers in modern tort practice comes into view when set in the trajectory of contract and tort over the past century and a half.

### A. *Contract's Reign: The Nineteenth and Early Twentieth Centuries*

Modern tort law emerged from the interstices of the common law writs in the first half of the nineteenth century.[22] From nearly the very beginning, the claims of contract conspired to reduce tort law's domain. In *Priestley v. Fowler*, the Court of Exchequer, in an 1837 opinion written by Chief Lord Baron Abinger, held that an employee had no cause of action against his employer for the torts of a fellow servant.[23] Fifteen-year-old Charles Priestley, an employee, was thrown from an overloaded wagon owned and operated by his employer Fowler.[24] At trial a jury awarded him 100 pounds. But on appeal, Abinger rejected the suit. He contrasted the case from those arising out of contracts between common carrier and passenger. The case turned on the terms of a different kind of contract, what Abinger called "the mere relation of master and servant."[25] As Abinger put it, an employee like

---

22 *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005); BARBARA YOUNG WELKE, RECASTING AMERICAN LIBERTY: GENDER, RACE, LAW, AND THE RAILROAD REVOLUTION, 1865–1920 (2001); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981).

23 Priestley v. Fowler (1837) 150 Eng. Rep. 1030; 3 M. & W. 1.

24 Michael Ashley Stein, Priestley v. Fowler *(1837) and the Emerging Tort of Negligence*, 44 B.C. L. REV. 689 (2003); *see also* Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982); A.W. BRIAN SIMPSON, *A Case of First Impression:* Priestley v. Fowler *(1837)*, *in* LEADING CASES IN THE COMMON LAW 100 (1995).

25 *Priestley*, 150 Eng. Rep. 1030.

Priestley had contractual remedies; the employee was free to "decline any service in which he reasonably apprehend[ed] injury to himself."[26]

Priestley anticipated and helped to shape the Massachusetts Supreme Judicial Court's decision in *Farwell v. Boston & Worcester Rail Road*, decided a few years later in 1842.[27] In *Farwell*, which became the canonical American case in the area of workers' injuries, Chief Judge Lemuel Shaw of the Massachusetts Supreme Judicial Court gave over one of tort law's most important domains to contract.[28] As Shaw put it, "express or implied contract" might regulate "such risks and perils as the employer and the servant respectively intend to assume and bear."[29] In the "contemplation of law," Shaw continued, workers' relationships to their employers "must be presumed to be thus regulated."[30] The master was "not liable in tort . . . because the person suffering" was "one whose rights are regulated by contract."[31] Liability thus turned on what such contracts said. And when they said nothing, as was typical, liability depended on how courts construed employment contracts absent some particular specification. Employers like the Boston & Worcester Rail Road would be liable only if the courts decided that employment contracts contained an implied promise by employers to assume the costs of employee injuries. But Shaw concluded that employment contracts contained no such implied promise. If such a promise were a part of the employment relation, Shaw reasoned, "it would be a rule of frequent and familiar occurrence."[32] Yet the caselaw had established "no such rule."[33] The implied contract terms thus favored the master: "the general rule," Shaw ruled, was that the employee "takes upon himself the natural and ordinary risks and perils incident to the performance of such services, and in legal presumption, the compensation is adjusted accordingly."[34]

---

26 *Id.*

27 Farwell v. Bos. & Worcester R.R Corp., 45 Mass. (4 Met.) 49, 52 (1842).

28 *Id.*

29 *Id.* at 56.

30 *Id.*

31 *Id.* at 60.

32 *Id.* at 57.

33 *Id.*

34 *Id.*; *see also* JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 44–45 (2004).

Four decades ago, Morton Horwitz interpreted *Farwell* as "elevating the paradigm of contract to its supreme place in nineteenth century legal thought."[35] Other pieces of the Horwitz thesis have fallen out of favor.[36] But with respect to contract's significance in nineteenth-century American tort law, Horwitz's view has held up over the decades. Scholars continue to see Shaw's reliance on contract as a canonical example of nineteenth-century law's effort to wash out risk with the logic of contract; as one of us has written, Shaw's *Farwell* opinion imagined that "risk would inevitably be washed away in the price term of the employment contract."[37]

Indeed, for nearly a century, the law of employers' liability deployed contract ideas to wash away employers' tort damages. Perhaps most famous (or infamous) is the opinion of Chief Judge Oliver Wendell Holmes, Jr., of the Massachusetts Supreme Judicial Court in *Lamson v. American Ax & Tool Co.*,[38] where a longtime employee was injured by a falling hatchet in the defendant's hatchet factory. Plaintiff had "complained to the superintendent" that a new rack system for drying painted hatchers made such hatchets "more likely" to fall and strike the plaintiff.[39] The superintendent "answered, in substance" that the plaintiff "would have to use the racks" or leave his employment.[40] Holmes, writing in 1900 for a unanimous court, reasoned that the plaintiff had assumed the risk by his consent to the dangerous condition: "He stayed, and took the risk. He did so none the less that the fear of losing his place was one of his motives."[41] Holmes and the *Lamson* case were hardly alone. In Massachusetts, dozens of assumption of the risk cases construed employment contracts to allocate work risks to employees.[42] Employee plaintiffs in the Commonwealth were deemed to have assumed risks such as invisible wear-and-tear to electrical

---

35 MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 209 (1977).

36 *See, e.g.*, Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

37 WITT, ACCIDENTAL REPUBLIC, *supra* note 34, at 15.

38 Lamson v. Am. Ax & Tool Co., 58 N.E. 585 (Mass. 1900).

39 *Id.*

40 *Id.*

41 *Id.* (internal citations omitted).

42 Rosseau v. Deschenes, 89 N.E. 391 (Mass. 1909); Simoneau v. Rice & Hutchins, 88 N.E. 433 (Mass. 1909); Crimmins v. Booth, 88 N.E. 449 (Mass. 1909); *see also* Mad River & Lake Erie R.R. v. Barber, 5 Ohio St. 541 (1856); Wright v. N.Y. Cent. R.R., 25 N.Y. 562 (1862).

wire insulation[43] and the bursting of glass steam tubes in railroad locomotives.[44]

Other states followed along. In Minnesota, the state supreme court affirmed dismissal of a twenty-five-year-old freight depot employee's action for injuries received when a one-ton millstone fell on him while being moved by untrained employees over a poorly designed warehouse floor; every adult, the court ruled, must be assumed to know "the laws of gravitation."[45] In Pennsylvania, the supreme court affirmed the nonsuit of a seventeen-year-old who lost an arm in a tanning machine because "he was acquainted with the risks" of the job.[46] The same court reversed a plaintiff's judgment on the ground that the decedent railroad employee had "assume[d] the risk" that the railroad would place a cattle chute so close to the track as to crush a brakeman on the side of a passing train.[47] And the court affirmed a nonsuit against a railroad engineer on the theory that he had assumed the risk of being struck in the head by iron plates hanging from his employer's bridge.[48]

Such cases, which go on seemingly without end, were not without critics, to be sure. Torts jurist Thomas Shearman complained that such cases were "unjust, because a servant has the same right to complete his contract in reliance upon its original terms that any one else has."[49] But the domination of contract in the case law was clear.

Employers' liability was not alone in making contract central. In the early law of products liability, Chief Baron Lord Abinger's opinion in the 1842 English case of *Winterbottom v. Wright* emphasized contract law once more.[50] Plaintiff was a mail coachman made "lame[] for life" by a coach accident who alleged that the accident resulted from the negligent manufacture of the firm that supplied the coach to the postmaster general.

---

43 Chisholm v. New Eng. Tel. & Tel. Co., 57 N.E. 383 (Mass. 1900).

44 Fuller v. N.Y., New Haven & Hartford R.R., 56 N.E. 574 (Mass. 1900).

45 Walsh v. St. Paul & Duluth R.R., 8 N.W.145 (Minn. 1880).

46 Betz v. Winter, 45 A. 1068 (Pa. 1900).

47 Boyd v. Harris, 35 A. 222 (Pa. 1896).

48 Fulford v. Lehigh Valley R.R., 39 A. 1115 (Pa. 1898).

49 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE 125 (3d ed. 1880); *see also* Laning v. N.Y. Cent. R.R., 49 N.Y. 521 (1872).

50 Winterbottom v. Wright (1842) 152 Eng. Rep. 402, 404–05; 10 M. & W. 109, 114–15.

In *Winterbottom*, Abinger ruled that the plaintiff could not sue absent privity of contract.[51] Only contract offered the basis for the cause of action.

Nineteenth-century jurists were quick to observe that the "legal obligations" of entities like common carriers—even those that sounded in negligence—were "in the nature of a contract."[52] Francis Wharton's 1878 *Treatise on the Law of Negligence* organized the entire field of torts into obligations arising out of contract, on the one hand, and obligations as between strangers, on the other.[53] Seymour Thompson's treatise in 1880 took Wharton's division another step; assuming that all relational obligations were in the proper domain of contract, Thompson set about to describe the law of negligence only "in relations not resting in contract."[54] James Henry Deering acknowledged that express companies could not altogether disclaim their obligations of care to senders, but observed nonetheless that the reverse was closer to the truth, since contractual limitations on liability capping a company's liability at fifty dollars were permissible.[55]

Commercial firms took the hint and set in motion a wave of efforts to limit and abrogate their liability to employees and consumers.[56] As early as the 1860s, railroads sought to adjust their liability to passengers and stockmen accompanying cattle with printed waivers on their tickets.[57]

---

51 *Id.*

52 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 261, at 303 (2d ed. 1870).

53 FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE (2d ed. 1878).

54 1 SEYMOUR D. THOMPSON, THE LAW OF NEGLIGENCE IN RELATIONS NOT RESTING IN CONTRACT: ILLUSTRATED BY LEADING CASES AND NOTES (1880).

55 JAMES H. DEERING, THE LAW OF NEGLIGENCE 227 (1886).

56 WITT, ACCIDENTAL REPUBLIC, *supra* note 34, at 37–62; John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690, 774 (2001).

57 *See, e.g.*, N.Y. Cent. R.R. v. Lockwood, 84 U.S. 357 (1873) (discussing a contractual waiver of liability for injury to a drover accompanying livestock); Chi., Rock Island & Pac. Ry. Co. v. Hamler, 74 N.E. 705, 705–06 (Ill. 1905) (reviewing a waiver of liability for porters employed by the Pullman Company); Ohio & Miss. Ry. Co. v. Selby, 47 Ind. 471, 474–75 (1874) (reviewing a waiver of liability for carrying a stockman); Doyle v. Fitchburg R.R., 44 N.E. 611, 611 (Mass. 1896) (reviewing a waiver of liability for paying employees); Bates v. Old Colony R.R., 17 N.E. 633, 638 (Mass. 1888) (reviewing a waiver of liability for carrying an express messenger); Ill. Cent. R.R. v. Crudup, 63 Miss. 291 (1885) (reviewing a waiver of liability for carrying a mail agent); Bissell v. N.Y. Cent. R.R., 25 N.Y. 442, 446–47 (1862) (reviewing a waiver of liability for injuries to paying passengers); Cleveland, Painesville &

Employment contracts sometimes expressly disclaimed even the small amount of employers' liability that survived the fellow servant rule and the doctrine of assumption of the risk.[58] Other provisions of employment contracts aimed to adopt restrictive contractual statutes of limitations,[59] or to waive safety regulations,[60] or to insist on medical examinations by company physicians.[61]

The contract regime in American tort law reached its apogee at the beginning of the twentieth century in the case of *Ives v. South Buffalo Railway Co.* when the New York Court of Appeals struck down the nation's first general workmen's compensation statute. The statute, as Judge William Werner saw it, unconstitutionally interfered with the freedom of the employer and employee to contract to terms of mutual agreement. The *Ives* case, reasoned Judge Werner, involved "an adult of sound mind and capable of freely contracting for himself" who had "voluntarily enter[ed] upon employment from which he is at liberty to withdraw whenever he will."[62] The statute, however, purported to "write[] into the contract between the employer and employee, without the consent of the former, a liability on his part which never existed before and to which [the employer] is permitted to interpose practically no defense."[63] As Chief Judge Edgar M. Cullen put in his concurring opinion, the unanimous high court knew "of no principle on which one can be compelled to indemnify another for loss unless it is based upon contractual obligation or fault."[64]

---

Ashtabula R.R. v. Curran, 19 Ohio St. 1, 2–3 (1869) (stockman); Pa. R.R. v. Henderson, 51 Pa. 315, 316 (1865) (paying passengers).

58 *See, e.g.*, Hissong v. Richmond & Danville R.R., 8 So. 776, 776 (Ala. 1891); Kan. Pac. Ry. Co. v. Peavey, 29 Kan. 169, 174–75 (1883); Purdy v. Rome, Watertown & Ogdensburgh R.R., 26 N.E. 255, 255 (N.Y. 1891).

59 Mumford v. Chi., Rock Island & Pac. Ry. Co., 104 N.W. 1135, 1137 (Iowa 1905).

60 Chi. & Erie R.R. v. Lawrence, 82 N.E. 768 (Ind. 1907); D.H. Davis Coal Co. v. Polland, 62 N.E. 492 (Ind. 1902); Lassiter v. Raleigh & Gaston R.R., 49 S.E. 93 (N.C. 1904).

61 Galveston, Harrisburg & San Antonio Ry. Co. v. Hughes, 91 S.W. 643 (Tex. Civ. App. 1905).

62 Ives v. S. Buffalo Ry. Co., 94 N.E. 431, 447 (N.Y. 1911). For the story of *Ives* and Judge Werner, see generally WITT, ACCIDENTAL REPUBLIC, *supra* note 34, at 152–86.

63 *Ives*, 94 N.E. at 448.

64 *Id.* at 449 (Cullen, C.J., concurring).

### B. *The Death of Contract*

In the second half of the nineteenth century and the first decades of the twentieth, a slow but steady line of cases and new statutes pushed back against the dominion of contract. State legislatures enacted employers' liability reform statutes, establishing exceptions to the fellow servant rule and the doctrine of assumption of risk, while prohibiting employers from contracting out of the new rules.[65] In 1893, Congress in the Harter Act barred water carriers from immunizing themselves by contract from negligence actions by the owners of property damaged or lost in loading, shipping, or delivery.[66] In 1906 and then again in 1908, Congress enacted the Federal Employers' Liability Act (FELA), setting the employers' liability of railroads in interstate commerce and limiting the defense of assumption of risk and the fellow servant doctrine.[67] FELA by its terms prohibited contracting out of the liability its terms created.[68] In 1936, Congress prohibited vessels in admiralty from disclaiming liability to passengers,[69] though a 1935 statute does permit dramatic contractual shortening of the statute of limitations.[70]

State courts began to constrain the empire of contract, too. Courts had never been receptive to railroads' efforts to relieve themselves of liability to

---

65 By the first decade of the twentieth century, eighteen state legislatures had abolished the fellow servant rule for railroads; seven state legislatures had abolished the rule altogether. Twenty states had altered the assumption of risk doctrine. *See* John Fabian Witt, Note, *The Transformation of Work and the Law of Workplace Accidents, 1842–1910*, 107 YALE L.J. 1467, 1483 n.85 (1998).

66 46 U.S.C. § 30704 (2018). Not all carriers are covered by the Harter Act. *See* Koppers Conn. Coke Co. v. James McWilliams Blue Line, Inc., 89 F.2d 865 (2d Cir. 1937); Elizabeth Edwards, 27 F.2d 747 (2d Cir. 1928).

67 Federal Employers' Liability Act of 1908, ch. 149, 35 Stat. 65 (codified as amended at 45 U.S.C. § 51 (2018)); Emps' Liab. Cases, 207 U.S. 463, 499 (1908). Common carriers' liability for loss or injury to property has followed a different statutory scheme, also beginning in 1906 with revisions to the Interstate Commerce Act (ICA). Congress's 1906 revisions to the ICA obliged common carriers to provide receipts or bills of lading to shippers of goods including a value of the goods agreed upon by the shipper and the carrier. Hepburn Act of 1906, Pub. L. No. 59-337, 34 Stat. 584, 595. That agreed-upon value, in turn, sets the damages for which common carriers might be held liable. *Id.* In 1980, Congress further specified the conditions under which passenger carriers could disclaim liability for property loss or injury. *See* Shippers Nat'l Freight Claim Council, Inc. v. Interstate Commerce Comm'n, 712 F.2d 740, 743 (2d Cir. 1983) (citing statute now codified at 49 U.S.C. § 11706 (2018)).

68 35 Stat. at 66.

69 46 U.S.C. § 30509 (2018).

70 Act of Aug. 29, 1935, ch. 804, 49 Stat. 960 (codified as amended at 46 U.S.C. § 30508).

passengers by extracting waivers along with the ticket sale.[71] Courts had also refused to enforce employer efforts to contract around the law of employer liability by exchanging promises of modest compensation in the event of injury in return for ex ante agreements not to sue.[72] Courts enforced after-the-fact or ex post settlement contracts in which injured employees accepted payments in return for promises not to sue for injuries that had already taken place.[73] But they declined to enforce contractual waivers of employers' liability in advance of injury.[74]

Such suspicion of contract in the work injury context nudged legislatures toward abolishing the common law of employers' liability altogether. By the second decade of the twentieth century, states and the federal government began enacting workmen's compensation systems.[75] Workers' compensation programs (as they are now known) mandated compensation without recourse to contractual modification.[76]

Inspired by workers' compensation programs and by the New Deal's novel constraints on freedom of contract, twentieth-century American tort law expanded publicly created liability and compensation norms into products liability cases, too. In the nineteenth century, products liability had been a paradigmatic domain of contract law. *MacPherson v. Buick* decisively shifted the action back to tort. Judge Benjamin Cardozo's 1916 opinion in the case revisited the privity doctrine of *Winterbottom* and established a tort cause of action in the products liability domain independent of any

---

71 *See, e.g.*, HENRY F. BUSWELL, THE CIVIL LIABILITY FOR PERSONAL INJURIES ARISING OUT OF NEGLIGENCE 168–70 (1893).

72 WITT, ACCIDENTAL REPUBLIC, *supra* note 34, at 103–25; PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1 (2003); Epstein, *supra* note 24.

73 *See* Nathaniel Donahue & John Fabian Witt, *Tort as Private Administration*, 105 CORNELL L. REV. (forthcoming 2020).

74 Charles W. McCurdy, *The "Liberty of Contract" Regime in American Law*, *in* THE STATE AND FREEDOM OF CONTRACT 161, 161–97 (Harry N. Scheiber ed., 1998); Witt, *Speedy Fred Taylor*, *supra* note 72.

75 *See* WITT, ACCIDENTAL REPUBLIC, *supra* note 34.

76 See, for example, N.Y. Workmen's Compensation Law, Chap. 816, Laws 1913 (re-enacted and amended by chap. 41, Laws 1914, and amended by chap. 316, Laws 1914), discussed at length in *New York Central Railroad Co. v. White*, 243 U.S. 188 (1917).

contractual relationship.[77] As Cardozo put it, the law "put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else."[78] What followed *MacPherson* is now familiar to students of the evolution of tort doctrine in the United States.[79]

With the California state courts in the lead, products liability doctrine made a further leap from the negligence liability standard of *MacPherson* to a no-fault liability standard. First articulated in Justice Roger Traynor's 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*, the new liability standard proposed to hold manufacturers and sellers strictly liable for defective products without regard to their negligence.[80] Traynor's *Escola* opinion essentially adopted the logic of worker's compensation liability, bringing the no-fault administrative standard of work accidents into the common law.[81] The no-fault standard became the California rule in 1963, in an opinion by Justice Traynor (now writing for a majority) in *Greenman v. Yuba Power Products*.[82] Two years later, the American Law Institute's Second Restatement of Torts embraced the Traynor theory of no-fault liability from *Greenman*.[83]

Supporting these moves toward no-fault liability was renewed resistance among judges to enforcing consumers' ex ante waivers of liability. In 1960, the New Jersey Supreme Court took the doctrine a step further. *Henningsen v. Bloomfield Motors* arose out of an accident involving a 1955 Plymouth that had veered off the roadway on its own and smashed into a wall, injuring the plaintiffs.[84] The defendant car dealer had tried to waive all warranties, "express or implied," other than the obligation to replace

---

77 John C.P. Goldberg & Benjamin C. Zipursky, *The Myths of* MacPherson, 9 J. TORT L. 91 (2016); *see also* G. EDWARD WHITE, *The Twentieth Century Judge as Tort Theorist: Cardozo*, *in* TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 114, 124–39 (2003); Nora Freeman Engstrom, *Boilerplate and the Boundary Between Contract and Tort*, JOTWELL (Apr. 22, 2016), https://torts.jotwell.com/boilerplate-and-the-boundary-between-contract-and-tort [https://perma.cc/6JW2-TPW7].

78 MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

79 *See generally* KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11 (2008); WHITE, *supra* note 77.

80 Escola v. Coca Cola Bottling Co., 150 P.2d 436, 440–44 (Cal. 1944).

81 John Fabian Witt, *The King and the Dean: Melvin Belli, Roscoe Pound, and the Common-Law Nation*, *in* PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW 211 (2007).

82 Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) (en banc).

83 RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).

84 Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 73, 75 (N.J. 1960).

defective parts for ninety days.[85] But citing the "gross inequality of bargaining position" between consumer and dealer in the automobile industry, the court refused to enforce the waiver of the warranties and indeed ruled such waivers unenforceable.[86]

When Section 402A of the Second Restatement of Torts adopted a version of Traynor's no-fault approach to products, it less famously (but perhaps more importantly) added a *Henningsen*-like ban on waivers.[87] The Restatement's comment m asserted that liability for defective products was "not affected by limitations on the scope and content of warranties."[88] Contract would not be allowed to make incursions on the new empire of products liability. The Uniform Commercial Code, promulgated just a few years earlier, adopted a similar view for waiver clauses from consumer products contracts, deeming them unenforceable in personal injury cases.[89] And in the years that followed, courts across the country agreed; contract terms seeking to waive tort liability for defective products, the courts concluded, were unenforceable.[90] Prosser's *Assault upon the Citadel* article, published in 1960, simultaneously summed up and helped bring into being the new state of affairs: the citadel of contract had been overthrown.[91]

In all, the trajectory of the legal materials in the middle of the twentieth century was toward an increased role for public values over private interests. Public norms overrode tailored contract terms.

---

85 *Id.* at 74.

86 *Id.* at 87–88; *see, e.g.*, Sipari v. Villa Olivia Country Club, 380 N.E.2d 819 (Ill. Ct. App. 1978). More recent cases following the basic logic of *Henningsen* include Boles v. Sun Ergoline, Inc., 223 P.3d 724 (Colo. 2010) (en banc); Messer v. Hi Country Stables Corp., No. 11–cv–01500–WJM–MJW, 2013 WL 93183 (D. Colo. Jan. 8, 2013).

87 RESTATEMENT (SECOND) OF TORTS § 402A.

88 *Id.* cmt. m.

89 U.C.C. § 2-719(3) (AM. LAW INST. & UNIF. LAW COMM'N 2012) ("Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.").

90 *See* Peter M. Kinkaid & William J. Stunt, Note, *Enforcing Waivers in Products Liability*, 69 VA. L. REV. 1111, 1112 n.7 (1983).

91 Prosser, *supra* note 4. As George Priest later recounted, Prosser's article was just one of many in the 1950s and 1960s expressing strong favoritism for publicly imposed tort liabilities over privately tailored contract terms. George L. Priest, *Riding the Tide Toward Modern Tort Law: William Prosser's "The Assault upon the Citadel (Strict Liability to the Consumer)*," 100 YALE L.J. 1470, 1470 (1991). At the end of the twentieth century, the Third Restatement of Torts adopted the mid-century consensus against enforcing waivers in products liability cases. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 18 (AM. LAW INST. 1998).

Such an approach to public norms, of course, was characteristic of the extended New Deal generation in American law, one that persisted through the mid-century decades. For the New Dealers, the category of activities properly characterized as affected with a public interest was large and growing. Indeed, the constitutional revolution of the mid-1930s turned on precisely this: the expansion of the domain of business affected with a public interest and thus susceptible to public regulation.[92] "[T]here is no closed class or category of businesses affected with a public interest," wrote Justice Owen Roberts in the 1934 case *Nebbia v. New York*.[93] The state action doctrine during the same period stretched the reach of public norms in the Bill of Rights and the Fourteenth Amendment toward the marketplace, if not yet quite fully into it.[94] The Civil Rights Act of 1964 took that plunge, insisting on the impermissibility of race discrimination in places of public accommodation.[95] It is no wonder, then, that leading legal theorists of the age denied for constitutional law purposes that there was a coherent difference between public and private.[96] Nor is it any surprise that courts in the era of contract's recession were wary of enforcing contractual liability waivers. The mid-twentieth century's expansive reading of the domain of public interest meant that courts seemed to reject with ever-greater vigor efforts to kill tort with contract.[97] Justice Hugo Black summed up the New Deal approach in the iconic 1955 admiralty law decision *Bisso v. Inland Waterways Corp.* when he struck down enforcement of a limitation of

---

92 *See* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION 66–83 (1998); HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 175–93 (1993). *See generally* William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY (Naomi R. Lamoreaux & William J. Novak eds., 2017).

93 Nebbia v. New York, 291 U.S. 502, 536 (1934).

94 Shelly v. Kraemer, 334 U.S. 1 (1948). See also sit-in cases up to *Bell v. Maryland*, 378 U.S. 226, 271–81 (1964) (Douglas, J., concurring). On the sit-in cases, see CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST AND LEGAL CHANGE IN THE CIVIL RIGHTS ERA (2018).

95 Civil Rights Act of 1964, tit. II, Pub. L. No. 88-352, 78 Stat. 241, 243–46.

96 Robert Hale was a particularly influential proponent of this argument. *See* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 36–37 (2001).

97 *See, e.g.*, Bisso v. Inland Waterways Corp., 349 U.S. 85, 91 (1955) (holding that tugboat disclaimers of liability in towage contracts were unenforceable as a matter of public policy and citing the value of discouraging negligence by towers and the importance of protecting shippers from "being overreached by others who have power to drive hard bargains").

liability in the towage contract between a tug and its barge. The rule of *Bisso*, Justice Black explained, was "merely a particular application" of the "general rule" against "enforcement of release-from-negligence contracts."[98]

## II. CONTRACT'S VENGEANCE

Yet contract never really died.

In some domains, the restless ingenuity of the marketplace identified new ways to defeat doctrinal limits on contract. The *Bisso* case's effects, for example, were considerably diminished by continued enforcement of so-called "benefit of insurance" clauses that gave tort defendants the benefit of their plaintiffs' insurance policies.[99] By enforcing "benefit of insurance" clauses along with clauses requiring the purchase of insurance, admiralty courts effectively undid much of the work of barring liability waivers in maritime law. Successful contractual alterations of the collateral source rule more generally can accomplish much the same effect.

Similar developments allowed contract to reassert itself in commercial real estate law, too. A New York decision from 1932 upheld waiver clauses between landlords and tenants.[100] The New York legislature, influenced by the ethos of the New Deal and pressured by residential lease tenants, enacted a law making such clauses unenforceable.[101] Sophisticated commercial leases, however, soon began contracting around the new statute by including indemnification and insurance clauses that effectively transferred costs associated with landlord negligence back to the commercial tenants.[102] The effect was the same as a waiver. But the courts read the statute narrowly to permit the creative contractual waivers.[103]

Courts also preserved the utility of waiver clauses as such. The New Deal may have legitimated the administrative state and its regulatory project. But in its wake, many of the older doctrinal limits on the administrative state

---

98 *Id.* at 90.

99 Phoenix Ins. Co. v. Erie & W. Transp. Co., 117 U.S. 312 (1886); *see also* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 3–47 (2d ed. 1975).

100 Kirshenbaum v. Gen. Outdoor Advert. Co., 180 N.E. 245 (N.Y. 1932).

101 N.Y. GEN. OBLIG. LAW § 5-321 (McKinney 2019).

102 Hogeland v. Sibley, Lindsay & Curr Co., 366 N.E.2d 263 (N.Y. 1977).

103 *Id.* Waiver terms are common in homeowners' associations and condominiums. *See* RONALD B. GLAZER, PENNSYLVANIA CONDOMINIUM LAW AND PRACTICE art. 15 (3d ed. 1995).

remained available, lying around like a loaded weapon,[104] for use by a new generation of jurists less enamored of public regulation. Constitutional lawyers are familiar with this pattern in the Commerce Clause jurisprudence, where older doctrine lay in wait for decades only to spring back into action when a new make-up of Supreme Court provided the occasion.[105] Similar dynamics appeared in the common law, where the tools for reasserting the predominance of contract over tort persisted in the law of waivers. At the height of the era in which waivers were disfavored, the California Supreme Court had fatefully observed that an "exculpatory provision may stand" if it did not affect the public interest.[106] Ever since, the question of whether to enforce a waiver of tort liability has turned into a referendum on the choice between private ordering, on the one hand, and publicly imposed liability rules, on the other. In the 1980s, conservatives revived the critique of the New Deal order and resuscitated contract.[107] Views of the proper domains of the public and the private began to shift once more.[108] And views on the relative place of contract and tort started to shift. Prosser, Gilmore, and the New Deal generation thought tort had triumphed

---

104 *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

105 *See, e.g.*, Nat'l Fed'n Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (five justices denying that Congress has the Commerce Clause power to enact a health insurance mandate); United States v. Morrison, 529 U.S. 598 (2000) (Violence Against Women Act); United States v. Lopez, 514 U.S. 549 (1995) (Gun-Free School Zones Act).

106 Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 443 (Cal. 1963). A trickle of decisions upholding exculpatory clauses persisted through mid-century, too. *See, e.g.*, Moss v. Fortune, 340 S.W.2d 902, 903 (Tenn. 1960) (dismissing negligence claim arising out of recreational horse rental on the basis of waiver stating "rides at my own risk"); Bashford v. Slater, 96 N.W.2d 904, 909 (Iowa 1959) (enforcing waiver signed by racetrack flagman in negligence suit against race car driver on grounds that freedom of contract is favored by public policy).

107 *See* ANGUS BURGIN, THE GREAT PERSUASION: REINVENTING FREE MARKETS SINCE THE DEPRESSION (2012); KIM PHILIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009); THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 (Steve Fraser & Gary Gerstle eds., 1989).

108 Intellectual history of anti-regulatory efforts in the Reagan era. PHILIPS-FEIN, *supra* note 107; JEFFERSON DECKER, THE OTHER RIGHTS REVOLUTION: CONSERVATIVE LAWYERS AND THE REMAKING OF AMERICAN GOVERNMENT (2016); KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 103–200 (2019); David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 LAW & CONT. PROBS. 1 (2014).

in the struggle once and for all. But the late twentieth century saw contracts return with a vengeance.

### A. *Doctrinal History*

Tort's battle for supremacy in waiver enforcement was fought in an arena littered with potential weapons for courts seeking to invalidate undesirable contract terms. For a century and more, waivers like other contracts have been held unenforceable by reason of transactional defects, vague terms, mistake, fraud, and a host of other contract-based claims.[109] What distinguished the development of the law around tort waivers was a mechanism rarely used in other contractual contexts: unenforceability for reasons of public policy. Justice Black's observation in *Bisso* that courts historically expressed their hostility toward towage contracts releasing the tower from liability for negligence by giving "such contracts a very narrow construction or by holding them to be against public policy" holds true for waiver law at large.[110]

Because waiver law is almost entirely state law, the task of identifying trends across time and jurisdictions can be daunting. There have always been some outlier states, just as there have always been some states ahead of and behind their time. On balance, however, a trend line emerges in the twentieth-century history of waiver enforcement: from mid-century unenforceability to late century enforceability. This trend can be identified by tracing the development of waiver law from early strict construction doctrine through the age of *Tunkl v. Regents of the University of California* and public policy nonenforcement to the scattered, present-day landscape.

#### 1. The Myth of Strict Construction

In 1891, the New York Supreme Court affirmed a "general principle," one that had been "announced by the courts with often-repeated reiteration:" "contracts breaking down common-law liability and relieving persons from just penalties for their negligent and improper conduct are not

---

109 *See, e.g.*, Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 614–20 (1988).

110 Bisso v. Inland Waterways Corp., 349 U.S. 85, 89–90 (1955).

to be favored, and should not be given an enforcement beyond that demanded by their strict construction."[111]

Strict construction of exculpatory contracts is a common law principle stretching back deep into the nineteenth century. The principle is repeated and held out as valid in most states to this day.[112] Strict construction in waiver law can, in fact, be viewed as contract's first and most persistent concession to tort, as it reflects a general aversion by courts to contracts that allow parties to escape the consequences of negligent behavior. Twentieth-century courts described waivers as existing "at the crossroads of two competing principles: freedom of contract and responsibility for damages caused by one's own negligent acts."[113] Strict construction, courts asserted, would heighten the burden on the waiver drafter to be clear and unambiguous in the contract's terms, theoretically limiting the instances in which the contract could be invoked to override a negligence claim. Classic examples of waivers invalidated by strict construction included waivers that were vague or overbroad in their terms,[114] waivers that failed to specify the types of injuries for which liability was being waived,[115] or waivers that failed to mention the possibility of negligence on the part of an entity or its employees.[116]

In theory, strict construction against the waiver's drafter represented a compromise between the desire of parties to allocate risk by contract, on the one hand, and the efforts of courts to manage responsibility for injuries, on the other. In practice, however, courts were wildly inconsistent in their application of the strict construction canon. After all, what does it mean to strictly construe a contract that is as purposefully open and far-reaching as most pre-injury liability releases? What characteristics must a waiver possess

---

111 Johnston v. Fargo, 90 N.Y.S. 725, 730 (App. Div. 1904).

112 *See, e.g.*, Baltimore & Ohio R.R. v. Duke, 38 App. D.C. 164 (1912).

113 Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 784 (Colo. 1989) (citing Harris v. Walker, 519 N.E.2d 917, 919 (Ill. 1988)).

114 *See* Baker v. Stewarts' Inc., 433 N.W.2d 706, 707–09 (Iowa 1988) (holding a waiver which claimed to waive "any damage or injury, should any result from this service" to be insufficiently clear to waive claims resulting from negligence).

115 *See, e.g.*, Geczi v. Lifetime Fitness, 973 N.E.2d 801, 809 (Ohio Ct. App. 2012) (highlighting the importance of an "including, but not limited to" injuries clause as a reason to enforce a particular waiver).

116 *See* Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 (Me. 1979) (rejecting a waiver that "contain[ed] no express reference to defendants' liability for their own negligence").

to clearly and unequivocally bar a negligence claim? The Minnesota Supreme Court's 1939 decision in *Northern Pacific Railway Co. v. Thornton Brothers Co.* provided an early and illuminating answer to these questions. While reaffirming the general rule of strict construction, the *Thornton Brothers* court enforced a contract in which the shipper Thornton Brothers promised to indemnify the Northern Pacific Railway Company against "any and all claims, loss, cost, damage or expense for injuries to or death of . . . third persons [and property] arising in any manner."[117] Any ruling that the agreement did not include negligence claims, the court argued, would require not a strict construction but an "arbitrary" construction that would "thwart contractual intention" solely based on court's general distaste for negligence waivers.[118] In short, Minnesota decided despite its stated adherence to the strict construction rule that a negligence waiver need not include: (1) the word "negligence," (2) any description of the types of claims waived and risks associated with the activity, or (3) any clarification on whether gross negligence and intentional tort claims were also waived. So much for strict construction.

Minnesota was far from alone in this view, which many pro-enforcement states continue to embrace today.[119] The result is that, by the late twentieth century, the question of whether or not a state followed the "strict construction" rule told a lawyer almost nothing about the likelihood of waiver enforcement in that state. In Maine, for example, strict construction meant that a waiver must "expressly spell out 'with the greatest particularity' the intention of the parties contractually to extinguish negligence liability."[120] The state declared in 1983 that "words of general import [would] not be read as expressing . . . an intent [to waive negligence

---

117 N. Pac. Ry. Co. v. Thornton Bros. Co., 288 N.W. 226, 227 (Minn. 1939).

118 *Id.* at 228.

119 It should be noted that Minnesota's position on waiver enforceability appears less harsh today than it was in 1939. For discussion, see Paula Duggan Vraa & Steven M. Sitek, *Public Policy Considerations for Exculpatory and Indemnification Clauses:* Yang v. Voyagaire Houseboats, Inc., 32 WM. MITCHELL L. REV. 1315 (2006). Further examples of states that do not require the word "negligence" in a negligence waiver include: North Dakota, *Reed v. University of North Dakota*, 589 N.W.2d 880, 886 (N.D. 1999); California, *Benedek v. PLC Santa Monica, LLC*, 129 Cal. Rptr. 2d 197, 202–03 (Ct. App. 2002); Colorado, *Chadwick v. Colt Ross Outfitters, Inc.*, 100 P.3d 465, 467 (Colo. 2004) (en banc); Georgia, *Flood v. Young Woman's Christian Ass'n of Brunswick, Georgia, Inc.*, 398 F.3d 1261, 1264–65 (11th Cir. 2005); Iowa, *Sweeney v. City of Bettendorf,* 762 N.W.2d 873, 879–80 (Iowa 2009).

120 *Doyle*, 403 A.2d at 1208.

claims]."[121] In New York, by contrast, "words conveying a similar import [to negligence]" were sufficient.[122] Maryland has scoffed at the idea that a waiver need contain such "magic words" as "negligence."[123] Alaska, on the other hand, requires not only that the word "negligence" be included in a waiver, but that drafters clarify the effects of the waiver with "simple words and capital letters."[124] So puzzling has the law of strict construction become that Tennessee willingly admits it has "chosen not to apply the rule of strict construction and has adopted a rule of reasonable construction," instead asserting the goal "of arriving at the real intention of the parties."[125] Whether strict construction effectively becomes "reasonable" construction, "arbitrary" construction, "narrow" construction, or something else entirely depends on decades of doctrinal development clarifying each state's unique interpretation of the term.[126]

The New York courts' 1891 assertion that the rule of strict construction "has been announced by the courts with often-repeated reiteration" remained accurate for a century and more.[127] The principle that exculpatory contracts are generally disfavored became, over the decades, a kind of a waiver-law gospel.[128] Nonetheless, reliance on the strict construction canon became so widespread as to be badly misleading. A different metric emerged to track evolving attitudes toward negligence waivers, one that better reflected fact- and situation-specific waiver enforcement inquiry: public policy.

---

121 Emery Waterhouse Co. v. Lea, 467 A.2d 986, 993 (Me. 1983).

122 Gross v. Sweet, 400 N.E.2d 306, 311 (N.Y. 1979) (internal quotation marks omitted).

123 Seigneur v. Nat'l Fitness Inst., Inc., 752 A.2d 631, 636–37 (Md. Ct. Spec. App. 2000) (internal quotation marks omitted).

124 Donahue v. Ledgends, Inc., 331 P.3d 342, 348 (Alaska 2014) (internal quotation marks omitted).

125 Tenn. Liquefied Gas Corp. v. Ross, 450 S.W.2d 587, 594 (Tenn. Ct. App. 1968).

126 For a striking example of a court equating "strict" construction with "reasonable" construction, see *New Hampshire Insurance Co. v. Fox Midwest Theatres, Inc.*, 457 P.2d 133, 139 (Kan. 1969) ("More specifically, the requirement that an exculpatory contract be strictly construed means simply that the court will not extend its terms to situations not plainly within the language used. But at the same time, such contracts are to be fairly and reasonably construed and will not be given such a narrow and strained construction as to exclude from their operation situations plainly within their scope and meaning.").

127 Johnston v. Fargo, 90 N.Y.S. 725, 730 (App. Div. 1904).

128 *See generally* K.A. Drechsler, *Validity of Contractual Provision by One Other than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 AM. L. REP. 8 (1948).

### 2. *Tunkl* and the Public Interest

By the 1980s, the "contract term 'exculpatory' [was considered] almost a flash word . . . [for] 'public policy.'"[129] Yet this was not always the case, especially in state courts. Many early twentieth century attempts to invalidate exculpatory clauses based on public policy arguments were dismissed, even in California, as "more specious than sound."[130] Although courts had long held exculpatory clauses adversely affecting the public interest to be invalid, definitions of the "public interest" were often so elusive as to be ineffectual. As the New Jersey Superior Court put it in 1955, "[t]he meaning of the phrase 'public policy' is vague and variable; there are no fixed rules by which to determine what it is—it has been left loose and free of definition."[131]

Some courts that invoked public policy language in their waiver decisions viewed upholding freedom of contract as the ultimate preservation of the public interest, refusing to invalidate waivers when doing so would appear to go against the original intent of the parties.[132] Contractual distribution of losses between private parties was considered by many courts to be a matter with which the "public [was] in no way concerned."[133] Outside of landlord-tenant and employment relationships,[134] the scope and significance of the public policy inquiry in waiver enforcement remained unclear.

This scattered landscape of public policy enforcement and non-enforcement was the setting for the California Supreme Court's flagship decision in *Tunkl*, which remains the most influential public policy test in

---

129 Cava & Wiesner, *supra* note 109, at 628.

130 R.K. Stephens v. S. Pac. Co., 41 P. 783, 786 (Cal. 1895).

131 Kuzmiak v. Brookchester, Inc., 111 A.2d 425, 430 (N.J. Super. Ct. App. Div. 1955).

132 *See* Sears, Roebuck & Co. v. Poling, 81 N.W.2d 462, 465 (Iowa 1957); *see also* Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982) ("[W]e have noted that the public interest in freedom of contract is preserved by recognizing such clauses as valid." (citing N. Pac. Ry. Co. v. Thornton Bros. Co., 288 N.W. 226, 227 (Minn. 1939))).

133 Checkley v. Ill. Cent. R.R., 100 N.E. 942, 944 (Ill. 1913).

134 For an early ruling on the unenforceability of landlord/tenant negligence waivers, see *Kuzmiak*, 111 A.2d at 432 ("Under present conditions, the comparative bargaining positions of landlords and tenants in housing accommodations within many areas of the state are so unequal that tenants are in no position to bargain; and an exculpatory clause which purports to immunize the landlord from all liability would be contrary to public policy.").

waiver law to date. The story of *Tunkl*'s adoption and adaptation throughout the country provides a useful narrative scaffold for the role of public policy in American waiver law writ large. Decided in 1963—the same year as *Greenman*—*Tunkl* held that an "exculpatory provision may stand only if it does not involve 'the public interest.'"[135] Where a contract implicated the public interest, by contrast, such exculpatory clauses were unenforceable as "contrary to public policy."[136] *Tunkl* went on to establish six factors for courts to consider when identifying transactions affecting the public interest. In those transactions, exculpatory contract provisions could be held invalid as against public policy:

> [A] transaction [affecting the public interest] . . . exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.[137]

Unlike previous cases invoking public policy, *Tunkl* attempted to provide a clear and decisive framework for courts moving forward, a framework that could be used to evaluate any transaction between any set of contracting parties. Importantly, *Tunkl* recognized both the type of business

---

135 Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 443 (Cal. 1963).

136 *Id.* at 444.

137 *Id.* at 445–46 (internal footnotes omitted).

a party seeking exculpation is and the type of service a party seeking exculpation provides as distinct and relevant factors for courts to consider. When the party seeking exculpation "holds himself out as willing to perform" an "essential" service, the *Tunkl* court took a skeptical view of the possibility of equal bargaining power between parties.[138] *Tunkl* not only recognized the existence of privately offered services that become "practical necessit[ies] for some members of the public," but left the task of defining these services at the discretion of the court.[139] The range of businesses and services that could fall within *Tunkl*'s definition of the "public interest" was consequently wide, and no business or service available to the public at large was definitively off of the table.

The *Tunkl* factors began to spread through other states just a few years after their articulation in California. Initially, the breadth and flexibility of the six *Tunkl* factors exemplified courts' willingness to draw a larger range of transactions under the protective umbrella of the public interest, where a simple negligence claim could run roughshod over an otherwise enforceable exculpatory clause. In 1967, *Tunkl* was cited by the Supreme Court of New Jersey as an example of unequal bargaining power sufficient to justify waiver non-enforcement.[140] In 1969, the Court of Appeals of Kentucky invalidated a waiver solely by labeling it "against public policy" under *Tunkl*—no further discussion had.[141] That same year, a more restrained Court of Appeals of Michigan referenced *Tunkl* to support the proposition that courts were "more likely to refuse enforcement" when a clear public interest could be identified.[142] The Supreme Court of Montana praised *Tunkl* in 1973 as "a more definitive test of 'public interest'" than that available in the Restatement of Contracts, further asserting that "particular exculpatory agreement[s] . . . [are] often invalidated" as against public policy.[143] The Supreme Court of Tennessee adopted *Tunkl* wholesale in 1977, as did the Court of Appeals of Indiana, and wholesale adoptions of the *Tunkl* factors continued in state courts well into the 1980s.[144]

---

138 *Id.* at 445.

139 *Id.*

140 Mayfair Fabrics v. Henley, 226 A.2d 602 (N.J. 1967).

141 Meiman v. Rehab. Ctr., Inc., 444 S.W.2d 78, 80 (Ky. Ct. App. 1969).

142 Allen v. Mich. Bell Tel. Co., 171 N.W.2d 689, 692–93 (Mich. Ct. App. 1969).

143 Haynes v. Cty. of Missoula, 517 P.2d 370, 376–78 (Mont. 1973).

144 *See, e.g.*, Miller v. Fallon Cty., 721 P.2d 342 (Mont. 1986); Morgan v. S. Cent. Bell Tel. Co., 466 So. 2d 107 (Ala. 1985).

At the time of its articulation, *Tunkl* was hailed as the "true rule" of exculpatory clauses: the "actual doing of the courts" no longer masked by lifeless dogma.[145] In other words, *Tunkl* admitted that waiver enforcement would be left largely to the discretion of the court, based on fact- and situation-specific analyses far more familiar in tort cases than contract cases. Courts that embraced public policy as a driving determinant of waiver validity created an environment in which "exculpatory clauses [were] denied sometimes as a matter of principle and at other times as a matter of pragmatism."[146] Adoption of a *Tunkl*-style test also reduced the temptation for courts to manipulate the rule of strict construction to produce positive outcomes for sympathetic plaintiffs: rather than relying on a strained interpretation of a waiver's language to render it lacking, a court could simply declare the waiver invalid as against the very public policy that made the plaintiff sympathetic in the first place. By 1988, *Tunkl*'s widespread influence prompted one scholar to assert that the freedom of contract "ethic is weakening and the scope of public interest is widening."[147] At first glance, that scholar had little reason to believe otherwise.

Even in *Tunkl* itself, however, the specter of contract loomed large. The *Tunkl* court characterized its role as "placing particular contracts within or without the category of those affected with a public interest," and emphasized that "obviously no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party."[148] Many state courts adopted partial or modified versions of *Tunkl*, some of which seemed to narrow the scope of the public interest grounds for nonenforcement. In 1982, for example, the Minnesota Supreme Court noted the emergence of what it perceived as a "two-prong test" for the public interest, asking: (1) whether a disparity of bargaining power existed between the parties, and (2) whether the type of service being offered or provided was a public or essential service.[149] Many thought that when Minnesota thereby eliminated the other three *Tunkl* considerations (the type of business

---

145 Daniel I. Reith, *Contractual Exculpation from Tort Liability in California—The "True Rule" Steps Forward*, 52 CALIF. L. REV. 350, n.7 (1964) (internal quotation marks omitted).

146 Cava & Wiesner, *supra* note 109, at 629.

147 *Id.* at 638.

148 Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 444, 446 (Cal. 1963).

149 Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982).

seeking exculpation, availability of the service to the public at large, and adhesion contracts), it had watered down the *Tunkl* factors to the point that fewer transactions are likely to qualify as in the public interest.[150]

A final, intriguing phenomenon born out of *Tunkl* was the use by some states of public policy tests as a way to force actual adherence to the strict construction rule. *Jones v. Dressel*, the Colorado Supreme Court's public policy test, is exemplary of this kind of strategy. Decided in 1981, *Dressel* articulates a four-part public policy test, asking courts to consider: "(1) the existence of a duty to the public; (2) the nature of the service performed; (3) whether the contract was fairly entered into; and (4) whether the intention of the parties is expressed in clear and unambiguous language."[151] The Colorado Supreme Court has specifically asserted that it "designed the *Jones* factors to ensure that agreements to release a party from liability for its simple negligence, although not void as against public policy in every instance, are closely scrutinized."[152] In many ways, the *Jones* test—now adopted in several other states—may be closer to the "true rule" of waiver law than *Tunkl* is. Courts that conducted a clearly defined public policy inquiry were more likely to engage in actually strict construction; courts that prioritized freedom of contract as a public policy were more likely to engage in what amounted to "reasonable" construction. Either way, public policy evaluations and the strict construction rule were linked, and courts' overarching attitudes about the relative importance of contract and tort drove the types of legal tests that waivers faced in a particular state.

### 3. Freedom of Contract in the 1980s and 1990s

Together, the increasing role of public policy evaluations in waiver law and courts' continued invocation of (if not adherence to) the strict construction rule made a strong case for scholars asserting the death of contract in waiver law. The following passage, from Cava and Weisner's 1988 article *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, provides a striking example:

> The cases reviewed from the past decade confirm that bargains containing exculpatory clauses do not benefit from the "freedom

150 *See, e.g.*, Reed v. Univ. of N.D., 589 N.W.2d 880, 886 (N.D. 1999).

151 Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981).

152 Boles v. Sun Ergoline, Inc., 223 P.3d 724, 726 (Colo. 2010).

> of contract" doctrine. Courts critically examine both the conduct of the parties manifesting assent to the bargain and the words describing the excuse. For example, one court held ineffective a registration form containing a release which did not refer to negligence and was signed while the patient was reclining in the dentist's chair just prior to treatment. The court's language reflected its critical attitude toward the clause.[153]

The case that Cava and Weisner reference is *Abramowitz v. New York University Dental Center*, a 1985 opinion in which the Supreme Court of New York invoked the strict construction rule to invalidate an overly broad waiver. In hindsight, however, their analysis overlooks a key aspect of the *Abramowitz* decision, one that foreshadows a recurring trend in pro-enforcement states. As discussed above, the strict construction rule was a far more malleable doctrine than it claimed to be. New York precedent did not mandate the presence of the word "negligence" in negligence waivers.[154] New York had also not adopted a *Tunkl*- or *Dressel*-esque judicial test of public policy enforceability. Thus, the *Abramowitz* court's critical language surrounding negligence waivers masked the fact that no binding precedent actually required the waiver to be invalidated. And in this kind of judicial flexibility lay the seeds of contract's resurgence.

Beginning in the mid-1980s, what had first appeared to be an impending public policy tidal wave in waiver law slowed to a public policy trickle. Some courts simply rejected *Tunkl* and its offspring, and to this day have never adopted a clear-cut public policy evaluation for waiver enforceability.[155] In these states, continued emphasis on strict construction as the dominant waiver analysis "minimize[s] many of the traditional concerns related to the bargaining process and public policy vigilance" and embraces the idea of inherent market efficiency central to the freedom of

---

153 Cava & Weisner, *supra* note 109, at 614 (citing Abramowitz v. N.Y. Univ. Dental Ctr., 110 A.D.2d 343 (N.Y. App. Div. 1985) (citing Willard Van Dyke Prods. Inc. v. Eastman Kodak Co., 189 N.E.2d 693, 695 (N.Y. 1963))).

154 So long as "words conveying a similar import [to negligence] appear[ed]," a waiver could be enforced as a clear manifestation of the parties' intent. Gross v. Sweet, 400 N.E.2d 306, 310 (N.Y. 1979).

155 Ohio is a good example of this type of state: its primary commentary on public policy issues is that waivers "which clearly and unequivocally relieve one from the results of his own negligence are generally not contrary to public policy in Ohio." Swartzentruber v. Wee–K Corp., 690 N.E.2d 941, 944 (Ohio Ct. App. 1997).

contract justification for waivers.[156] Other states, like California, continue to employ public policy tests, but have narrowed the scope of activities considered to be in the public interest to the point that waivers are rarely invalidated.[157] The result is that a well-drafted waiver will be enforceable for most activities in most states, though what "well-drafted" means will vary depending on the state's interpretation of strict construction.[158]

The consequences of this 1980s and 1990s rollback of the *Tunkl* revolution are dramatic. Where once liability waivers seemed headed for extinction, they are now resurgent. There are, of course, outliers from this trend: Virginia has long held all waivers to be unenforceable as against public policy,[159] and Alaska reaffirmed its adherence to an anticontractual version of *Tunkl* in 2014.[160] The Supreme Court of Oregon recently held back the tide and refused to uphold waivers.[161] And a relatively recent pair of Connecticut cases has cast serious doubt on the enforceability of recreational waivers.[162] Generally speaking, however, the broad anticontract reading of

---

156 John G. Shram, Note, *Contract Law—The Collision of Tort and Contract Law: Validity and Enforceability of Exculpatory Clauses in Arkansas*, Jordan v. Diamond Equipment*, 2005 WL 984513 (2005).*, 28 U. ARK. LITTLE ROCK L. REV. 279, 288–89 (2006).

157 California courts have "concluded categorically that private agreements made 'in the recreational sports context' releasing liability for future ordinary negligence 'do not implicate the public interest and therefore are not void as against public policy.'" City of Santa Barbara v. Superior Court, 161 P.3d 1095, 1103 (Cal. 2007) (quoting Benedek v. PLC Santa Monica, 104 Cal. App. 4th 1351, 1356–57 (Ct. App. 2002)). This means that a large percentage of modern waivers, the enforceability of which is still questionable in other states, will be enforceable in California barring transactional defects in the contracts. For further discussion of the role of waivers in recreational sports in the 1990s, see Doyice J. Cotten, *Analysis of State Laws Governing the Validity of Sport-Related Exculpatory Agreements*, 3 J. LEGAL ASPECTS SPORT 50 (1993).

158 For an excellent discussion of the wide array of concerns that modern courts have with exculpatory contracts and concerns that waiver drafters should take into account, see Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still a Place for Their Use by Colleges and Universities?*, 29 J.C.U.L. 579 (2003).

159 Johnson's Adm'x v. Richmond & Danville R.R., 11 S.E. 829 (Va. 1890). While the case originally establishing that waivers are in violation of public policy is from 1890, the court has more recently reaffirmed this principle in *Hiett v. Lake Barcroft Community Ass'n*, 418 S.E.2d 894 (Va. 1992).

160 Donahue v. Ledgends, Inc., 331 P.3d 342 (Alaska 2014).

161 *See, e.g.*, Bagley v. Mt. Bachelor, Inc., 340 P.3d 27, 38 (Or. 2014).

162 *See* Reardon v. Windswept Farm, LLC, 905 A.2d 1156, 1161 (Conn. 2006) (applying same reasoning in declining to enforce a horseback riding waiver); Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734, 742 (Conn. 2005) (declining to enforce waiver arising out of a snowtubing accident despite finding that the waiver used express and understandable language, and was otherwise well drafted).

*Tunkl* and similar public policy tests to limit the scope of acceptable negligence waivers has not been realized. Waivers are back in state after state.

### 4. The Restatement

The trajectory of the American Law Institute's torts restatements follows and reaffirms the trendline. The Second Restatement, promulgated in 1965, cited *Tunkl*[163] to announce a bland standard of enforceability "unless the agreement is invalid as contrary to public policy."[164] The result was the ordinary mix of cases alternately upholding and refusing to enforce waiver clauses.[165]

The Third Restatement on Apportionment of Liability, however, subtly altered the earlier approach. The Third Restatement, which was promulgated in 2000, removed the explicit reference to "public policy" as a basis for nonenforcement. "When permitted by contract law," the Third Restatement provision reads, "a contract . . . absolving the person from liability for future harm bars the plaintiff's recovery from that person for the harm."[166] To be sure, the provision does not wholly abandon the old public policy approach. The comments to the relevant provision include a paragraph on "unenforceable contracts" and lists factors drawn from *Tunkl*.[167] Moreover, the drafters of the Third Restatement gesture to the history of nonenforcement by allowing that in certain cases the "substantive law governing the claim" does not permit contracting for a waiver.[168] But the demotion of "public policy" as a basis for unenforceability is palpable. In the

---

163 RESTATEMENT (SECOND) OF TORTS § 496B cmt. j (AM. LAW INST. 1965).

164 *Id.* § 496B.

165 *See, e.g.*, White v. Vill. of Homewood, 628 N.E.2d 616 (Ill. App. Ct. 1993) (citing RESTATEMENT (SECOND) OF TORTS § 496B) (job applicant agility test waiver unenforceable); Barnes v. N.H. Karting Ass'n, 509 A.2d 151 (N.H. 1986) (citing RESTATEMENT (SECOND) OF TORTS § 496B) (go-kart waiver enforceable).

166 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 (AM. LAW INST. 2000); *see* Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. Rev. 481, 487 (2002).

167 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 (AM. LAW INST. 2000); Simons, *supra* note 166, at 487 n.18.

168 RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 (AM. LAW INST. 2000).

new Restatement formulation, contract law serves as the principal gatekeeper to tort.[169]

### B. *Current Landscape*

Today, waiver doctrine is highly variable; the law is a state-by-state jumble of rules and exceptions. But contract is increasingly winning the ongoing tug-of-war over enforcement. Where tort's victory once seemed assured, the last three decades of waiver law development have, in many states, tipped the balance back in favor of contract.

Consider, for example, *Lovelace v. Figure Salon*, decided by the Court of Appeals of Georgia in 1986. Marilyn Lovelace and her husband sued a commercial fitness center for injuries to her back arising out of her use of the defendant's facilities.[170] Lovelace claimed negligence on the part of the defendant in failing to exercise ordinary care during her exercise routine, failing to properly supervise its employees, and failure to warn her of the consequences of lifting too much weight.[171] But defendants introduced a waiver that Lovelace had hurriedly signed as part of her agreement with the fitness center stating, in part, that Lovelace agreed to release defendant from all claims for negligence.[172] So far so good—a routine waiver case. But the Georgia court added an important and subversive element, one that turned the public policy objection to waivers in on itself. "It is the paramount public policy of this state," it wrote, "that courts will not lightly interfere with the freedom of parties to contract."[173]

The *Lovelace* decision was typical of a new wave of decisions reviving an older idea about freedom of contract. Public policy, reasoned the *Lovelace* court, was not an obstacle to the enforcement of contract waivers so much as it was a reason for waiver enforcement. Courts around the country agreed.

---

169 Importantly, the spring 2019 Tentative Draft of the American Law Institute's RESTATEMENT OF THE LAW, CONSUMER CONTRACTS provides that waivers in consumer contracts are unenforceable if they "unreasonably exclude or limit the business's liability of the consumer's remedies" in death or personal injury cases, or in any case involving "an intentional or negligent act or omission of the business." Everything turns on the meaning of "unreasonably exclude or limit." *See* RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 5 (AM. LAW INST., Tentative Draft 2019).

170 Lovelace v. Figure Salon, Inc., 345 S.E.2d 139, 140 (Ga. Ct. App. 1986).

171 *Id.*

172 *Id.*

173 *Id.* (citing Cash v. Street & Trail, 221 S.E.2d 640, 642 (Ga. Ct. App. 1975)).

In a Minnesota case involving injuries at a spa, the court recognized that "the public interest in freedom of contract is preserved by recognizing [exculpatory] clauses as valid."[174] In Nevada, the court upheld a waiver provision in a lease as a "valid exercise of the freedom of contract."[175] In Oklahoma, a waiver barring liability in the case of a fatal auto racing accident was upheld based "upon the broad policy of the law which accords to contracting parties freedom to bind themselves as they see fit."[176] And similarly, in a South Carolina auto racing accident, a prerace waiver was upheld "recognizing people should be free to contract as they choose."[177]

*Reed v. University of North Dakota* featured a different but related move. In *Reed*, a student hockey player for the University of North Dakota suffered extensive injuries as a result of severe dehydration during a race.[178] Prior to the race, Reed had signed a waiver which, among other things, provided that he would "assume all responsibility for injuries" incurred as direct or indirect result of his participation, and that he agreed not to hold the sponsors, employees, etc. responsible for "any claims."[179] Courts around the country have held such generic and broad language to be ineffective. But the North Dakota court claimed that the broad language of the waiver "unambiguously evidences an intent to exonerate [the defendant] from liability for Reed's injuries."[180] Indeed, the court in *Reed* took the opportunity of the case to narrow the reach of the state's old anti-waiver statute, stretching back a century. The North Dakota legislature had provided that "[a]ll contracts which have for their object . . . the exempting of anyone from responsibility for that person's own fraud or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."[181] The *Reed* court, however, interpreted the statute as barring waivers for willful conduct only and

174 Schlobohm v. Spa Petite, Inc., 326 N.W.2d 920, 923 (Minn. 1982) (citing N. Pac. Ry. Co. v. Thornton Bros. Co., 288 N.W. 226, 227 (Minn. 1939)).

175 Miller v. A & R Joint Venture, 636 P.2d 277, 278 (Nev. 1981).

176 Trumbower v. Sports Car Club of Am., Inc., 428 F. Supp. 1113, 1116 (W.D. Okla. 1976).

177 Huckaby v. Confederate Motor Speedway, Inc., 281 S.E.2d 223, 224 (S.C. 1981).

178 Reed v. Univ. of N.D., 589 N.W.2d 880, 882 (N.D. 1999).

179 *Id.* at 885.

180 *Id.* at 886.

181 N.D. CENT. CODE ANN. § 9-08-02 (West 2018).

severed the provisions of the waiver in question that would have immunized the university from suit for such willful torts.[182]

Waivers moved one state south in the year after *Reed*, when the Supreme Court of South Dakota took up the question of enforceability in the automobile racing context.[183] Holzer, a volunteer member of a pit crew, was severely injured and put into a coma when a wheel detached from a car in the midst of a race, flying over 100 feet and hitting him on the top half of his body.[184] Defendant Dakota Speedway asked Holzer to sign a waiver prior to entering the pit area.[185] The waiver discharged the Speedway from "any and all loss or damage" and "any claim or demands" for injury or death arising from participation in the events "whether caused by the negligence" of the Speedway "or otherwise."[186]

Like the Georgia court before it, the South Dakota court concluded that public policy favored enforcing the waiver, now not so much on free contract grounds as on the grounds of a public policy in favor of racetrack pit volunteering. The activity in question, the court reasoned, could only take place if the organizers were shielded from liability.[187]

The trend toward enforcement embodied in *Lovelace*, *Reed*, and *Holzer* came to Florida a few years later, when the state supreme court weighed in on a controverted question in the law of waivers. A number of courts have held that waivers must specifically mention negligence if they are to be enforced to prohibit negligence claims.[188] But in *Sanislo v. Give Kids the World*, decided in 2015, the Florida court ruled otherwise.

Plaintiffs Sanislo were the parents of a seriously ill child to whom the non-profit resort organization Give Kids the World had provided a free vacation. During their stay at the resort, Ms. Sanislo fell and was injured. The Sanislos sued, alleging negligence by Give Kids the World.[189] As part of their application for the vacation, the Sanislos had signed forms releasing Give Kids the World from liability for any potential cause of action[190] and from

---

182 *Reed*, 589 N.W.2d at 886.

183 *See generally* Holzer v. Dakota Speedway, Inc., 610 N.W.2d 787 (S.D. 2000).

184 *Id.* at 789–90.

185 *Id.* at 790–91.

186 *Id.*

187 *Id.* at 792–95.

188 Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

189 Sanislo v. Give Kids the World, Inc., 157 So. 3d 256, 259 (Fla. 2015).

190 *Id.* at 258.

"any liability whatsoever," including for "physical injury of any kind"[191] and "any and all physical or emotional injuries."[192]

The *Sanislo* court followed the pro-contract trend in the caselaw, citing the public policy considerations in favor of "the enforcement of contracts."[193] The court went further and rejected previous cases striking down waivers that do not explicitly contain language referring to negligence.[194] Previous decisions of Florida's First, Second, Third, and Fourth District Courts of Appeal had found waivers unenforceable when they did not explicitly mention the term negligence.[195] But *Sanislo* decisively moved Florida to a position more favorable to waiver enforcement.

Putting together a generation of pro-waiver decisions, from *Lovelace* to *Sanislo* and beyond, the observer cannot help but see a revived law of contract in what had been an expanding field of publicly imposed tort principles. So strong is the trend in the courts that even many states purporting to explicitly disfavor waivers as a matter of policy nonetheless now regularly enforce them.[196]

Legislatures have followed the same pattern. Recent legislatures have enacted statues authorizing waivers either for particular categories of people (waivers signed by parents for their minor children)[197] or for particular

---

191 *Id.* at 259.

192 *Id.*

193 *Id.* at 260.

194 *Id.* at 270.

195 *See* Levine v. A. Madley Corp., 516 So. 2d 1101 (Fla. Dist. Ct. App. 1987); Van Tuyn v. Zurich Am. Ins., 447 So. 2d 318 (Fla. Dist. Ct. App. 1984); Goyings v. Jack & Ruth Eckerd Found., 403 So. 2d 1144 (Fla. Dist. Ct. App. 1981); Tout v. Hartford Accident & Indem. Co., 390 So. 2d 155 (Fla. Dist. Ct. App. 1980).

196 *See* Wang v. Whitetail Mountain Resort, 933 A.2d 110, 113 (Pa. Super. Ct. 2007); Jordan v. Diamond Equip. & Supply Co., 207 S.W.3d 525, 530 (Ark. 2005); Lloyd v. Sugarloaf Mountain Corp., 833 A.2d 1, 6 (Me. 2003); Turnbough v. Ladner, 754 So. 2d 467, 469 (Miss. 1999); Reed v. Univ. of N.D., 589 N.W.2d 880, 886 (N.D. 1999); Alack v. Vic Tanny Int'l of Mo., Inc., 923 S.W.2d 330, 334 (Mo. 1996); Dobratz v. Thomson, 468 N.W.2d 654, 658 (Wis. 1991); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 783 (Colo. 1989). In New Hampshire, waivers are "generally prohibited," and the burden is on the person seeking to avoid liability to prove that the waiver in question does not violate public policy. If this showing is made, however, the courts will enforce it. Barnes v. N.H. Karting Ass'n, 509 A.2d 151, 154 (N.H. 1986).

197 Minnesota authorized by statute parental waivers in 2013. MINN. STAT. ANN. § 604.055 (2019) (effective May 24, 2013).

categories of activities (equine activities[198] and motorsports,[199] for example). Three such instances, all relatively recent, are especially striking. In Colorado, the legislature recently overruled a state supreme court decision voiding parental waivers.[200] And in Virginia, where courts have held that personal injury waivers are void against public policy for over a century,[201] the legislature in 2008 passed legislation making waivers enforceable for both adults and minor children engaged in equine activities.[202] Until very recently, the Montana civil code barred waivers; the original prohibition against waivers had been in place since the code of 1895.[203] In 2015, however, the blanket state prohibition was amended by the legislature to allow waivers in cases of sports or other recreational activity.[204] This exception is particularly notable both because the category of "sport and recreation" is so broad,[205] and because it is one of the categories of activities in which waivers are most likely to arise.

To be sure, tort has not given way entirely. The onslaught of zombie contract has not been complete. Cases refusing to enforce waivers exist.[206] But they are exceptions to a general trend toward enforcement.

---

198 Georgia explicitly allows general equine waivers by statute since 1991, GA. CODE ANN. § 4-12-4 (West 2018) (effective 1991), and Arizona in 1994, ARIZ. REV. STAT. ANN. § 12-553 (2019) (effective 1994), and Illinois in 1995, 745 ILL. COMP. STAT. ANN. 47/15 (West 2019) (effective July 7, 1995), explicitly allow parental waivers for equine activities.

199 Parental waivers for motorsports were explicitly recognized by statute in Florida in 1991, FLA. STAT. ANN. § 549.09 (West 2019) (effective 1991), Hawaii in 1997, HAW. REV. STAT. ANN. § 663-10.95 (West 2019) (effective 1997), and Indiana in 1998, IND. CODE ANN. § 34-28-3-3 (West 2019) (effective 1998).

200 *See* COLO. REV. STAT. ANN. § 13-22-107 (West 2018) (superseding Cooper v. Aspen Skiing Co., 48 P.3d 1229 (Colo. 2002)).

201 Hiett v. Lake Barcroft Cmty. Ass'n, 418 S.E.2d 894, 896 (Va. 1992).

202 VA. CODE ANN. § 3.2-6202 (West 2018).

203 MONT. CODE § 2241 (1895). Montana borrowed from an identical part of the California Civil Code. *See* CAL. CIVIL CODE § 1688 (West 2018).

204 MONT. CODE ANN. § 28-2-702 (West 2017).

205 Compare this with statues authorizing waivers in only a specific sport, like skiing, ARIZ. REV. STAT. ANN. § 5-706 (2019), or even a related group of sports, like motorsports, ARIZ. REV. STAT. ANN. § 12-556 (2019); HAW. REV. STAT. ANN. § 663-10.95 (2019).

206 *See supra* notes 159–162 and accompanying text.

## III. THE DEATH OF TORT?

History repeats itself. A century and a half ago, contract swallowed tort. The law of the New Deal generation at mid-century reasserted the prerogatives of tort. Now today, fifty years after Gilmore pronounced the death of contract, contract is covertly colonizing tort once more.[207]

This time, to be sure, the mechanism is different and considerably harder to detect. Contract's resurgence is taking place not, as in the nineteenth and early twentieth centuries, through substantive tort doctrines like assumption of the risk or the fellow servant rule, but through subtle changes to waiver enforceability doctrine. State courts are tweaking the emphasis of the *Tunkl* public policy analysis or altering the formal requirements of waiver enforceability. State legislatures enact narrow statutes authorizing waiver enforcement on an industry-by-industry basis. In the aggregate, the trendline is clear. Contract terms are once again vanquishing tort standards.

The story in tort waivers runs parallel to the ever-increasing footprint of arbitration under the Federal Arbitration Act (FAA). In recent years, high-profile FAA decisions have interpreted arbitration agreements under the Act as barring the pursuit of claims in court arising out of publicly imposed obligations under the Securities Exchange Act of 1934,[208] the formality requirements of state contract law,[209] consumer protection laws,[210] and much of the law of employment,[211] including most employment

---

207 Apologies here to the smattering of scholars who have already invoked Gilmore's "death of contract" to assert an impending "death of tort." Notably, such assessments typically identify the welfare state as the source of tort's likely demise. *See, e.g.*, Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 533 (1978); John G. Fleming, *Is There a Future for Tort?*, 44 LA. L. REV. 1193, 1195 (1984). An analogy to the deadly danger we identify here can be found in John C.P. Goldberg, *Ten Half-Truths About Tort Law*, 42 VAL. U. L. REV. 1221, 1271 (2008) (assessing claims that settlements in litigation are producing the "death of tort"); *see also* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 952 n.175 (2010) (rejecting arguments that the existence of strict liability claims represents "the death of torts"). The closest analogy to the spirit of our assessment is Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1177–78 (1990). For skepticism about a different kind of rumor about tort's impending demise, see Arthur Ripstein, *Some Recent Obituaries of Tort Law*, 48 U. TORONTO L.J. 561 (1998).

208 Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987).

209 *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996).

210 *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

211 Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).

discrimination claims.[212] Congress and the courts have together allowed the arbitration contract to alter the enforcement structure of publicly created rights. And as some observers have begun to note,[213] arbitration clauses are increasingly significant in tort and personal injury litigation.[214]

But there is more than an analogy at issue, more than an extension of arbitration from the employment contract and the consumer contract to the personal injury context. For lurking behind zombie contract waivers is a next wave of smart waivers. Let's call them vampire waivers, for they are far more deadly to tort than their clumsy zombie cousins. The arrangements have just begun to play a role, but their widespread destruction of tort rights may be just over the horizon. The crucial move here will be contracts creating FAA-required arbitral enforcement of disputes over waiver clauses. Waiver clauses aim to displace claims enforcing publicly imposed tort entitlements; arbitration clauses superimposed on waiver clauses will further displace the courts from engaging in the waiver enforcement analysis at all. The coming FAA-backed arbitration of waiver clauses will displace the courts and their tort standards twice over. And when that happens, waivers in contract will have sunk their teeth deep into the body of tort.

---

212 Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

213 Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67-SPG LAW & CONTEMP. PROBS. 253 (2004); Sarah Sachs, *The Jury Is Out: Mandating Pre-Treatment Arbitration Clauses in Patient Intake Contracts*, 2018 J. DISP. RESOL. 117.

214 *See, e.g.*, STV One Nineteen Senior Living, LLC v. Boyd, 258 So. 3d 322 (Ala. 2018) (holding that an arbitration clause in a nursing home contract is enforceable as against personal injury claims).