The Theory of the Waiver Scale: An Argument Why Parents Should Be Able to Waive Their Children's Tort Liability Claims

By ROBERT S. NELSON*

YOU HAVE ROUGHLY a 1 in 10,000 chance of dying in a bathtub.[1] You have about a 1 in 4,800 chance of being killed by a falling object.[2] You are more likely to be attacked by a cow than a shark,[3] more likely to be killed by a champagne cork than a bite from a poisonous spider,[4] and if you are a red-headed male, you are more likely than anyone else to go bald.[5] Risk abounds.

But as with any other plentiful resource, systems have developed where risk can be exploited for business gain. One such system is that of the liability waiver,[6] in which parties agree as a condition of entering into service agreements[7] not to hold each other responsible if

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1. *See* National Safety Council, *What Are the Odds of Dying?*, http://www.nsc.org/lrs/statinfo/odds.htm (last visited Sept. 24, 2001) (statistical estimates based on 1996 data from the National Center for Health Statistics and U.S. Census Bureau).

2. *See id.*

3. *See* Uselessfacts.net, *Uselessfacts.net: Statistics, at* http://www.uselessfacts.net/facts/Statistics/ (last visited Sept. 24, 2001).

4. *See id.*

5. *See* Uselessfacts.net, *Uselessfacts.net: Health and Body, at* http://www.uselessfacts.net/facts/Health_and_Body/ (last visited Sept. 24, 2001).

6. This Comment uses the terms liability waiver, liability release, waiver, release, and exculpatory agreement interchangeably. Liability waivers may also be referred to as assumptions of risk, statements of understanding, and/or consents not to sue, and, when contained in broader contractual agreements, indemnity or "hold harmless" clauses. *See* Mario R. Arango & William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure*, 14 U. MIAMI ENT. & SPORTS L. REV. 1 (1997); *see also* BLACK'S LAW DICTIONARY 593 (7th ed. 1999).

7. Waivers may be used in any situation in which a person is asked to contractually release a legal right or advantage. *See* BLACK'S LAW DICTIONARY 1575 (7th ed. 1999). This Comment will focus only on those waivers arising in service agreements.

something goes wrong.[8] By so doing, one party is agreeing to shoulder a risk that might otherwise have been borne by the other.[9] The risk inherent in the activity is changing hands in much the same way that money, goods, or services would in any other business exchange.

By changing the natural allocations of risk in service agreements, waivers change the way tort liability will be assessed. A person becomes liable in tort when he breaches a duty owed to another, thereby causing injury.[10] In service agreements, providers owe their customers a duty to behave as any other reasonable provider would under similar circumstances.[11] Should a provider's conduct dip below this "reasonable provider" standard, he will be deemed negligent and therefore liable for the customer's injury. Waivers preemptively excuse providers from liability incurred by their own negligence.[12]

Even where a service provider was clearly at fault in causing a customer's injury, that provider will not be liable as long as the customer signed a valid exculpatory agreement.[13] "[The agreement] operates to extinguish the . . . cause of action as effectively as would a prior judgment between the parties and is an absolute bar to any [law-

8. *See* Joseph H. King, Jr., *Exculpatory Agreements for Volunteers in Youth Activities—The Alternative to "Nerf®" Tiddlywinks*, 53 OHIO ST. L.J. 683, 683 (1992).

9. *See* Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993).

10. *See* RESTATEMENT (SECOND) OF TORTS § 281 (1965). A party will be liable if it negligently causes injury to another, whose own conduct did not unreasonably contribute to that injury. *See id.*

11. *See* Rowland v. Christian, 443 P.2d 561, 564 (Cal. 1968) (providing,

> [W]henever one person is by circumstances placed in such a position with regard to another . . . that if he did not use ordinary care and skill in his own conduct . . . he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.)

(citing Heaven v. Pender, Q.B.D. 503, 509 (1883)); *see also* RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances.").

12. *See* RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. a (1981) ("[A] party to a contract can ordinarily exempt himself from liability for harm caused by his failure to observe the standard of reasonable care imposed by the law of negligence.").

13. *See id.* There are limits to the degree of fault that can be dismissed by liability waiver. Waiver terms attempting to exempt a party from tort liability for harm caused intentionally or recklessly are often unenforceable on grounds of public policy. *See* RESTATEMENT (SECOND) OF TORTS § 496B (1965). Exculpatory agreements generally do not extend to anything more serious than basic negligence. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 484 (5th ed. 1984).

> [O]n the basis either of common experience as to what is intended, or of public policy to discourage aggravated wrongs, such agreements generally are not construed to cover the more extreme forms of negligence, described as willful, wanton, reckless or gross, or to any conduct which constitutes an intentional tort.

Id. But see Theis v. J & J Racing Promotions, 571 So. 2d 92, 94 (Fla. Dist. Ct. App. 1990) (allowing waiver to encompass gross negligence).

suit] . . . ."[14] Waivers insulate service providers from liability arising from their services.[15] When used effectively, they help lower operating expenses and thereby enable a greater number of providers to compete in the marketplace.

Despite this obvious usefulness, waivers contravene one of the fundamental purposes of American tort law—to encourage safety by holding parties individually accountable for their actions.[16] "[Responsibility for a] loss should lie where it has happened to fall unless some affirmative public good will result from shifting it."[17] In most situations, the compelling safety purposes of maintaining tort liability[18] easily outweigh any countervailing public good that might result from dismissing it (thus no "affirmative" public good would accrue from shifting liability). Waivers, however, constitute one of the rare exceptions where greater aggregate good can result from excusing tort liability rather than enforcing it. This is true because in waiver scenarios the public safety purposes of tort law collide with one of the most respected and deferred-to interests in American jurisprudence—the right to contract.[19] "The [waiver] dilemma places an individual's personal freedom to enter into a voluntary agreement (contract) against strong public policy considerations that protect that individual from unreasonable risks (tort)."[20] So far, courts have almost universally held that in otherwise valid exculpatory agreements, the right to contract slightly trumps the value of upholding tort.[21] "[I]t is a matter of

14. *Dresser Indust., Inc.*, 853 S.W.2d at 508 (citing Hart v. Traders & Gen. Ins. Co., 189 S.W.2d 493, 494 (Tex. 1945)).

15. *See* Kristi L. Schoepfer, Book Review, 10 MARQ. SPORTS L.J. 465, 465 (2000) (reviewing DOYICE J. COTTEN & MARY B. COTTEN, LEGAL ASPECTS OF WAIVERS IN SPORT, RECREATION AND FITNESS ACTIVITIES (1997)). Waivers insulate providers from liability arising from their own conduct or the conduct of their employees. *See id.*

16. *See generally* Stephen D. Sugarman, *Alternative Compensation Schemes and Tort Theory: Doing Away With Tort Law,* 73 CAL. L. REV. 558, 559–60 (1985) (summarizing the opinions of a 1984 report released by the American Bar Association's Special Committee on the Tort Liability System).

17. CLARENCE MORRIS, MORRIS ON TORTS 9 (1st ed. 1953).

18. Whether tort actually encourages public safety is debatable. *See* Sugarman, *supra* note 16, at 558. This Comment presumes that it does.

19. *See* Chumney v. Stott, 381 P.2d 84, 86 (Utah 1963); *In re* Z.J.H., 471 N.W.2d 202, 213 (Wis. 1991) ("[C]ourts have long recognized the importance of freedom of contract and have endeavored to protect the right to contract.").

20. Arango & Trueba, Jr., *supra* note 6, at 3.

21. *See* Haines v. St. Charles Speedway, Inc., 874 F.2d 572, 575 (8th Cir. 1989); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 784 (Colo. 1989); Lee v. Sun Valley Co., 695 P.2d 361, 363 (Idaho 1985); Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 944 (Ill. App. Ct. 1989); Childress v. Madison County, 777 S.W.2d 1, 3 (Tenn. Ct. App. 1989); Colgan v. Agway, Inc., 553 A.2d 143, 145 (Vt. 1988); RESTATEMENT (SECOND) OF TORTS

great public concern that freedom of contract be not lightly interfered with."[22]

Yet despite this widespread acceptance, courts are not particularly fond of liability waivers.[23] "Courts have traditionally disfavored contractual exclusions of negligence liability . . . and have exercised a heightened degree of scrutiny when interpreting contractual language which allegedly exempts a party from liability for his own negligence."[24] As a way of reconciling this lingering mistrust with waivers' undeniable utility, courts have devised a system of strict, ad hoc waiver review in which the benefits of allowing free contract exchange are weighed against the value of upholding tort.[25] This method of review can best be characterized as a sort of "waiver scale."

The mechanics of the scale are deceptively simple: contract will outweigh tort under most circumstances, therefore waivers will usually be upheld. But the contract side of the scale will not be afforded full weight unless bedrock rules of contract have been followed,[26] and the tort side will be afforded greater weight whenever public policy demands.[27] If either or both of these phenomena occur, the waiver scale will tilt away from validity and the exculpatory agreement will not be upheld.

Problems arise not in understanding the theoretical dynamics of the waiver scale, but rather in recognizing precisely which side causes particular exculpatory agreements to be invalidated. "Judicial attitudes toward [waivers] have often . . . been characterized by ambiguity and unpredictability."[28] Consequently, it is often difficult to make out whether courts think certain exculpatory agreements undermine the

§ 496B cmt. b (1965); KEETON ET AL., *supra* note 13, at 482 ("There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility of looking out for himself.").

22. Bituminous Cas. Corp. v. Williams, 17 So. 2d 98, 101 (Fla. 1944).

23. *See, e.g.*, Krazek v. Mountain Rivers Tours, Inc., 884 F.2d 163, 165 (4th Cir. 1989); Wilson v. Am. Honda Motor Co., Inc., 693 F. Supp. 228, 229 (M.D. Pa. 1988); *Heil Valley Ranch, Inc.*, 784 P.2d at 783; Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981) (en banc); *Falkner*, 533 N.E.2d at 945; *Colgan*, 553 A.2d at 145.

24. Doyle v. Bowdoin Coll., 403 A.2d 1206, 1207 (Me. 1979).

25. *See* Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205–08 (Ohio 1998); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11–13 (Wash. 1992).

26. *See generally Heil Valley Ranch, Inc.*, 784 P.2d 781; *see also* Leslie Hastings, *Playing with Liability: The Risk Release in High Risk Sports*, 24 CAL. W. L. REV. 127, 129 (1988).

27. *See* Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 443 (Cal. 1963); *Scott*, 834 P.2d at 11 ("There are instances where public policy reasons for preserving an obligation of care owned by one person to another outweigh our traditional regard for freedom of contract.").

28. King, Jr., *supra* note 8, at 710.

contract side of the scale or bolster the tort side. Granted, this sort of vagueness normally is not much of a problem; a waiver need only do one or the other to be invalidated, and many exculpatory agreements arguably do both. It is only when doubts arise whether particular exculpatory agreements affect the waiver scale at all that waiver scale mechanics must be closely scrutinized and understood. Waivers involving children frequently raise such doubts.

Each year, thousands of exculpatory agreements are entered into as conditions of children being allowed to participate in activities such as sports and summer camp.[29] Any child who has ever gone on a school field trip has probably had to fill out his or her share of "permission slips,"[30] boilerplate waiver agreements in which signors (usually students and/or their parents) agree not to hold the school responsible for injury resulting from school outings. But schools and other organizations that make regular use of child waivers might be shocked to learn that such agreements are presumptively invalid. Most jurisdictions categorically prohibit all waivers purporting to release liability claims belonging to children.[31]

Minor waivers can be separated into two basic categories: those signed only by minors themselves ("minor waivers"), and those signed by parents ("parental waivers").[32] While waivers signed only by children are far more suspect than those scrutinized and signed by parents, courts often invalidate all exculpatory agreements involving children, regardless of who signed them. The bias against minor waivers is so strong, in fact, that courts rarely even pause to explain why such waivers are invalid.[33] Decisions dealing with minor waivers are often "conclusory and lacking in analysis,"[34] providing scant insight into how such exculpatory agreements implicate the waiver scale.

While it is admittedly easy to see why waivers signed only by minors tilt the scale decidedly away from validity, it is far more difficult to understand how the scale is implicated by parental waivers. The vast

29. *See* Cooper v. United States Ski Ass'n, 32 P.2d 502, 507 (Colo. Ct. App. 2000).

30. Permission slips are essentially acknowledgement forms in which parents give written permission for their children to participate in school field trips. Many such slips also contain language releasing the respective schools sponsoring the trips from liability.

31. *See Scott*, 834 P.2d at 11–12; *see also* Childress v. Madison County, 777 S.W.2d 1, 6 (Tenn. Ct. App. 1989); Del Santo v. Bristol County Stadium, Inc., 273 F.2d 605, 607 (1st Cir. 1960); Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 468 (Conn. Super. Ct. 1958); Kotary v. Spencer Speedway, Inc., 365 N.Y.S.2d 87, 90 (App. Div. 1975); King, Jr., *supra* note 8, at 713.

32. Waivers may also be signed by *both* parents and children.

33. *See* King, Jr., *supra* note 8, at 715.

34. *Id.*

majority of jurisdictions also prevent parents from waiving their children's tort liability claims.[35] According to the waiver scale, then, these waivers must either undermine the contract side of the waiver scale or bolster the tort side.

Although decisions involving parental waivers are arguably more curt and conclusory than those involving minor waivers,[36] it is evident that some courts believe parental exculpatory agreements violate established rules of contract,[37] while others believe such agreements create heightened tort interests to protect children.[38] Parental exculpatory agreements should admittedly be invalidated if they either undermine the contract side of the waiver scale or augment the tort side. As this Comment argues, however, recent decisions have clearly shown that parental waivers do not affect either side of the waiver scale.[39]

Regarding the contract side, no contract rules are broken when a parent, acting in the child's best interests, decides to waive that child's potential liability claims.[40] According to the recent United States Supreme Court case of *Troxel v. Granville*,[41] a parent's right to make decisions affecting the care, custody, and control of the child is a fundamental right guaranteed by the Due Process Clause of the United States Constitution.[42] This right clearly should encompass the ability to enter into parental exculpatory agreements.

Regarding the tort side, there are no convincing public policy reasons why the need for tort liability should outweigh a parent's right to enter into exculpatory agreements on their child's behalf. Parents executing these waivers are well equipped to avoid unfairly stilted exculpatory agreements. As such, parental waivers also do not augment the tort side of the waiver scale.

Given that parental waivers do not alter the default, pro-validity balance of the waiver scale, there is no reason why they should not be categorically upheld. This Comment argues that longstanding common law rules against parental exculpatory agreements should be uni-

35. *See Scott*, 834 P.2d at 11–12; *Childress*, 777 S.W.2d at 6; King, Jr., *supra* note 8, at 715.

36. *See Childress*, 777 S.W.2d at 6.

37. *See id.*

38. *See Scott*, 834 P.2d at 11–12.

39. *See generally id.*; Troxel v. Granville, 530 U.S. 57 (2000); Cooper v. United States Ski Ass'n, 32 P.2d 502 (Colo. Ct. App. 2000).

40. *See Troxel*, 57 U.S. at 66; *Cooper*, 32 P.2d at 507.

41. 530 U.S. 57 (2000).

42. *See Troxel*, 57 U.S. at 66.

versally revoked, either by state legislation or court action. Part I outlines the background of American waiver law, focusing on the key exceptions to waiver validity and how they affect the waiver scale. Part II describes the social costs of preventing parental waivers, as well as the widely divergent paths courts have taken in deciding the question of parental waiver validity. Finally, Part III argues that *Troxel* and other recent cases clearly show that parental waivers do not undermine the contract side of the waiver scale or enhance the tort side.

I. Background

A. Overview of Waiver Law

1. Nature and History of Exculpatory Agreements

Waiver is a hybrid of contract and tort law, growing from the inevitable convergence of the right to contract and the duty to take responsibility for one's actions.[43] Since the Industrial Revolution, courts have recognized the firm and unavoidable duty to avoid causing harm through negligent acts as the cornerstone principle of tort law.[44] Moreover, duty is a commodity, and according to the gospel of contract law, commodities may change hands whenever the parties so intend.[45]

Given the inherent compatibility of these two concepts, the evolution of a system whereby tort duty could be waived as consideration for contract agreements was as inevitable as the subsequent problems and uncertainties that have since plagued American waiver law. Waivers "are basically written documents in which one party agrees to release, or 'exculpate,' another from potential tort liability for future conduct covered in the agreement."[46] Although waivers may be implied through conduct,[47] such as when an athlete impliedly agrees to

43. *See* Bauer v. Aspen Highlands Skiing Corp., 788 F. Supp. 472, 474 (D. Colo. 1992) (citing Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 784 (Colo. 1989)); *see also* Arango & Trueba, Jr., *supra* note 6, at 3.

44. *See, e.g.,* Charles O. Gregory, *Trespass to Negligence to Absolute Liability,* 37 VA. L. REV. 359, 364–65 (1951).

45. *See* Wendell H. Holmes, *The Freedom Not to Contract,* 60 TUL. L. REV. 751, 751–52 (1986).

46. King, Jr., *supra* note 8, at 683.

47. *See* BLACK'S LAW DICTIONARY 1581 (6th ed. 1990).

> A waiver is implied where one party has pursued such a course of conduct with reference to the other party as to evidence an intention to waive his rights or the advantage to which he may be entitled, or where the conduct pursued is inconsistent with any other honest intention than an intention of such waiver, provided that the other party concerned has been induced by such conduct to act upon the belief that there has been a waiver, and has incurred trouble or expense thereby.

release opponents from negligence liability by playing in a sandlot football game,[48] this Comment will focus only on those waivers expressly established by written documents. Express, written waivers arise when parties are asked to sign contracts agreeing to relinquish legal rights as a condition of being allowed to obtain a service. They are frequently used by providers of recreational services and facilities such as scuba diving, parachuting, summer camps, and youth sports leagues.[49]

Exculpatory releases "may take many forms, but all such clauses have one thing in common in that they exempt a party from liability which he would have borne had it not been for the clause."[50] Two of the "most commonly used releases are the waiver of liability[,] and the express assumption of risk."[51] Under the waiver of liability, a party is asked to sign a "written instrument in which the participant agrees not to hold the provider liable for any injuries or damages resulting from the provider's negligence."[52] Waivers of liability constitute affirmative agreements between parties not to sue one another in the event of injury.

Express assumptions of risk provide the same level of protection as waivers, but in a slightly different manner.[53] Rather than asking a participant to affirmatively agree not to sue a service provider, express assumptions of risk arise "when the [participant], in advance, expressly consents . . . 'to relieve the [provider] of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the [provider] is to do or leave undone . . . .'"[54] In other words, the participant expressly acknowledges that the service provider has no duty to guard against the kinds of harm encompassed by the exculpatory agreement. "The result is that . . . being under no duty, [the provider] cannot be charged with negligence."[55]

Id.

48. *See generally* Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

49. *See, e.g.*, Arango & Trueba, Jr., *supra* note 6, at 10.

50. P.S. ATTIYAH, AN INTRODUCTION TO THE LAW OF CONTRACTS 167 (3d ed. 1981).

51. Arango & Trueba, Jr., *supra* note 6, at 7–8.

52. *Id.*

53. *See id.* at 8. Whereas express waivers of liability can be viewed as erecting defenses atop potential negligence claims, assumptions of risk defend against negligence by ensuring that the necessary elements for negligence never crystallize. *See id.* "[T]he fact that the [waiver] uses the words 'hold harmless' rather than the word 'release' does not significantly impact the issue of whether the effect was to exculpate . . . ." Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10 (Wash. 1992).

54. Saenz v. Whitewater Voyages, 276 Cal. Rptr. 672, 676 (Ct. App. 1990) (citations omitted).

55. *Id.*

2. A Cold Reception: Judicial Wariness Toward Exculpatory Agreements

Since their very inception, exculpatory agreements have been frowned upon by courts that looked askance at contractual arrangements purporting to excuse individual tort liability.[56] Given the paramount importance of tort as a deterrent to dangerous conduct, many courts were loathe to allow parties to contractually release each other from their inherent duties of due care.[57] "To relieve oneself of liability for one's own negligence may encourage carelessness."[58] Judicial disapproval of exculpatory agreements may have been further fueled by an innate respect for tort rights,[59] as well as the immense value such rights convey to accident victims themselves.[60]

Yet despite these and other misgivings, most courts recognized the inherent tension in exculpatory agreements between the right to contract and the need to enforce tort liability.[61] To these courts, the social value of enforcing tort liability should be placed on one side of a scale, with the individual right to contract resting on the other.[62] Whether a particular exculpatory agreement will be voided or enforced depends entirely on how its proverbial scales even out.

56. *See* Doyle v. Bowdoin Coll., 403 A.2d 1206, 1207 (Me. 1979); *see also Scott*, 834 P.2d at 9–10; King, Jr., *supra* note 8, at 710.

57. *See* Arango & Trueba, Jr., *supra* note 6, at 23.

58. Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291, 1295 (Ariz. Ct. App. 1990).

59. *See generally* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (arguing that personal rights should be "market inalienable"). "Something that is market-inalienable is not to be sold, which in our economic system means it is not to be traded in the market." *Id.* at 1850. According to Radin, rights that are inherently personal should not be treated as commodities lest those trading in such rights suffer "violence to personhood." *Id.* at 1907. *But see* King, Jr., *supra* note 8, at 735 ("[T]he possibility of bringing a tort claim . . . for unintentional injures [sic] . . . is simply less crucial to personhood than the interest in having available the activities and relationships that depend on volunteers.").

60. *See Scott*, 834 P.2d at 12. One of the fundamental arguments the court made in voiding parental exculpatory agreements was that children should not be deprived of tort recovery rights that may, in some cases, be their only means of financial support. *See id.*

61. *See* Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 204 (Ohio 1998); *see also* Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (Ct. App. 1990) ("[N]o 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 . . . .") (quoting Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 446 (Cal. 1963)); *see also* King, Jr., *supra* note 8, at 710–11; Arango & Trueba, Jr., *supra* note 6, at 3.

62. *See Scott*, 834 P.2d at 11; *see also Zivich*, 696 N.E.2d at 204–06.

B. Mechanics of the Waiver Scale

Using this basic "waiver scale" approach, most courts have begrudgingly held that, under normal circumstances, the right to contract slightly outweighs the social value of upholding tort liability.[63] When circumstances are not "normal," however, this default, prowaiver balance can be easily disrupted.[64] Context and circumstance determine the relative weights that will be assigned to the contract and tort sides of the waiver scale in each particular situation. Courts will therefore engage in detailed, fact-specific reviews of challenged exculpatory agreements to determine whether any unusual factors tilt the scales abnormally in favor of tort.[65]

These "tilt" factors are essentially exceptions to the general rule of waiver validity[66] and can be separated into two broad categories: those rooted in rules of contract and those stemming from basic notions of public policy.[67] Although the rationale behind many of the contract-rooted exceptions is admittedly that public policy requires them,[68] courts often cite public policy as an entirely separate category of waiver exceptions.[69] Therefore, it is easier to understand the waiver scale if contract and public policy are viewed as discrete avenues by which exculpatory agreements can be invalidated.

With contract-rooted exceptions, the contract side of a waiver equation will not be afforded full weight unless the basic rules of contract are fulfilled.[70] If an exculpatory agreement was not properly

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63. *See Tunkl*, 383 P.2d at 443 n.6 ("The view that the exculpatory contract is valid . . . represents the majority holding in the United States."). Exculpatory agreements are upheld "begrudgingly" given that they are disfavored under the law. *See id.*

64. Since exculpatory agreements are disfavored, courts will seize upon the slightest problem or deficiency as a means of invalidating them. *See* Arango & Trueba, Jr., *supra* note 6, at 11 ("Although the tide [against exculpatory agreements] has changed, whenever . . . drafting deficiencies reemerged, courts quickly invalidated the agreement.").

65. *See generally* Doyle v. Bowdoin Coll., 403 A.2d 1206, 1207–08 (Me. 1979); *Scott*, 834 P.2d at 9; *Zivich*, 696 N.E.2d at 204–06; King, Jr., *supra* note 8, at 710.

66. *See* Childress v. Madison County, 777 S.W.2d 1, 3–4 (Tenn. Ct. App. 1989); King, Jr., *supra* note 8, at 711.

67. *See generally* Arango & Trueba, Jr., *supra* note 6, at 10–22; Angeline Purdy, Scott v. Pacific West Mountain Resort: *Erroneously Invalidating Parental Releases of a Minor's Future Claim*, 68 WASH. L. REV. 457, 460–61 (1993).

68. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

69. *See* Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 443 (Cal. 1963); *Scott*, 834 P.2d at 11–12 (Wash. 1992); King, Jr., *supra* note 8, at 721–26.

70. *See* Dobratz v. Thomson, 468 N.W.2d 654, 663 (Wis. 1991); Street v. Darwin Ranch, Inc., 75 F. Supp. 2d 1296, 1301 (D. Wyo. 1999); Hastings, *supra* note 26, at 129; Schoepfer, *supra* note 15, at 465–66. The "basic rules" of contract that must be fulfilled include those typically required to evince that the parties clearly intended to be bound by a contractual agreement. *See* RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) ("[T]he

drafted,[71] for example, then the contract side of the scale will be undermined and the tort side will prevail.

With public policy-rooted exceptions, the social interests in upholding tort liability will, under certain circumstances, be afforded greater weight than they would in normal waiver scenarios.[72] If a waiver is used to release liability for extreme misconduct, for instance, the social interests in dissuading such conduct will be afforded greater weight than if the waiver sought to release claims for mere negligence.[73] The enhanced tort side would counterbalance even the full weight of the contract side, tilting the waiver scale away from validity.

The mechanics are analogous to a playground seesaw with a group of very small children piled onto one side and one very large child plopped on the other. Unless all the smaller children squeeze onto their side of the seesaw, there is no way they will ever be able to tilt the board their way. Such is the case with contract rules, all of which must be satisfied if the contract side has any hope of weighing down public policy.[74]

Conversely, the larger child need only be handed the added weight of an ice cream cone in order to tilt the seesaw away from the full weight of the "contract children." The public policy interests in upholding liability, afforded significant weight to begin with, require only slight nuances to shift the waiver scale decidedly in favor of tort.[75]

1. Contract-Rooted Tilts of the Waiver Scale

The contract side of the waiver equation will not be afforded due weight unless the parties to an exculpatory agreement fully intended to release each other from potential tort liability when the agreement

formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange . . . .").

71. *See* Schoepfer, *supra* note 15, at 465.

72. *See Tunkl*, 383 P.2d at 443; *Scott*, 834 P.2d at 11; *Street*, 75 F. Supp. 2d at 1301; Arango & Trueba, Jr., *supra* note 6, at 12–16.

73. *See generally* Reece v. Finch, 562 So. 2d 195 (Ala. 1990); Boehm v. Cody County Chamber of Commerce, 748 P.2d 704 (Wyo. 1987); L. Luria & Son, Inc. v. Honeywell, Inc., 460 So. 2d 521 (Fla. Dist. Ct. App. 1984); King, Jr., *supra* note 8, at 727–31; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.").

74. *See* Arango & Trueba, Jr., *supra* note 6, at 11. ("[W]henever . . . drafting deficiencies reemerged, courts quickly invalidated [exculpatory] agreement[s].").

75. Waivers are disfavored because the public policy interests in upholding tort are so significant to begin with. *See* King, Jr., *supra* note 8, at 721–25; Arango & Trueba, Jr., *supra* note 6, at 24.

was drafted.[76] Waivers will be deemed to embody the parties' intent only where bedrock rules of drafting, presentation, and bargaining equality have been met.[77]

a. Waiver Drafting

Regarding drafting, waivers will be upheld only when they are written in language that unambiguously conveys to signors exactly what rights they are relinquishing.[78] Whether a waiver will be deemed unambiguous depends on how effectively it conveys to the signor the practical effects of the agreement.[79] If a reasonable signor could not possibly have understood what the waiver language meant, then that person cannot later be said to have voluntarily consented to the waiver's terms. Waivers have traditionally been invalidated on drafting grounds due to "'legal-eze' language rendering the contract not understandable."[80]

Waiver language will be deemed unambiguous only if it is basic enough to be comprehended by the average reader, while at the same time technical enough to adequately explain the legal rights being relinquished.[81] Although this requirement theoretically places waiver drafters between the "Scylla of simplicity and the Charybdis of completeness,"[82] most courts do not require waiver language to specifically

76. *See* Milligan v. Big Valley Corp., 754 P.2d 1063, 1067 (Wyo. 1988); Employers Liab. Assurance Corp. v. Greenville Bus. Men's Ass'n, 224 A.2d 620, 623 (1966) ("[Exculpatory agreements] 'must spell out the intention of the parties with the greatest of particularity' . . . and show the intent to release from liability beyond doubt . . . .") (quoting Morton v. Ambridge Borough, 101 A.2d 661, 663 (Pa. 1954)).

77. *See* Douglass v. Skiing Standards, Inc., 459 A.2d 97, 98 (Vt. 1983); Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) ("[A] party seeking indemnity from the consequences of that party's own negligence must express that intent in specific terms within the four corners of the contract."); Arango & Trueba, Jr., *supra* note 6, at 10; Schoepfer, *supra* note 15, at 465–66; King, Jr., *supra* note 8, at 720–22.

78. *See* Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 (Me. 1979); *Milligan*, 754 P.2d at 1067; *Douglass*, 459 A.2d at 98; Schoepfer, *supra* note 15, at 465.

79. *See Doyle*, 403 A.2d at 1207 ("If an express agreement exempting the defendant from liability for his negligence is to be sustained, it must appear that its terms were brought home to the plaintiff . . . .") (quoting W. PROSSER, LAW OF TORTS § 68 (4th ed. 1971)).

80. Arango & Trueba, Jr., *supra* note 6, at 10.

81. *See* Nat'l & Int'l Bhd. of St. Racers, Inc. v. Super. Ct., 264 Cal. Rptr. 44, 46 (Ct. App. 1989) ("[I]f short and to the point, a release will be challenged as failing to mention the particular risk which caused a plaintiff's injuries . . . . If . . . comprehensive, the release is attacked as unduly lengthy . . . .").

82. *Id.* at 46. Scylla and Charybdis were figures in Greek mythology who terrorized sailors off the coast of Sicily. Scylla was a female sea monster who lived in a cave just opposite Charybdis, a giant whirlpool. Vessels attempting to avoid one would ultimately fall prey to the other. The idiom "between Scylla and Charybdis" is often used to describe situations

spell out every type of conduct[83] and activity[84] encompassed by the exculpatory agreement. "[O]nly on Draftsman's Olympus is it feasible to combine the elegance of a thrust indenture with the brevity of a stop sign . . . ."[85] Rather, in interpreting the scope of a waiver, "it seems best to respect the intention of the parties which seldom contemplates that the agreement will specifically identify each potential risk . . . ."[86] Courts will often gauge the intentions of the respective parties to an exculpatory agreement by scrutinizing the overall language of the agreement itself.[87]

As a practical matter, many service industries have already learned from trial and error precisely which waiver language will stand up in court. For example, "the [recreational sports industry] learned from its prior mistakes by increasing type size and using easily understandable English instead of technical legal terms, thus removing any objection as to the clarity or ambiguity of the rights being waived."[88]

b. Waiver Presentation

As to presentation, waiver language must be conspicuously displayed in order to be valid.[89] Whether waiver language is conspicuous will depend on how it appears in the document in which it is contained.[90] If a reasonable signor would not have noticed the waiver in the first place, then that person cannot later be deemed to have in-

where avoiding one danger invariably exposes a person to another. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2045 (1993).

83. *See* Krazek v. Mountain Rivers Tours, Inc., 884 F.2d 163, 166 (4th Cir. 1989); Heil Valley Ranch, Inc. v. Simkin, 784 P.2d 781, 785 (Colo. 1989); King, Jr., *supra* note 8, at 711–12. *But see* Sirek v. Fairfield Snowbowl, Inc., 800 P.2d 1291, 1295 (Ariz. Ct. App. 1990) (requiring the word "negligence" be used in exculpatory agreements in order for those agreements to release potential tort claims for negligence).

84. *See* Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 945 (Ill. App. Ct. 1989) ("It is not necessary that the parties anticipate the precise circumstances which resulted in the decedent's accident, where . . . the broad language in the exculpatory clause contemplated a wide range of risks . . . ."). *But see* Dobratz v. Thompson, 468 N.W.2d 654, 663 (Wis. 1991) (exculpatory agreement deemed ambiguous and therefore unenforceable since it failed to specifically identify the type of activity that caused injury).

85. *Nat'l & Int'l Bhd. of St. Racers, Inc.*, 264 Cal. Rptr. at 47.

86. King, Jr., *supra* note 8, at 712.

87. *See id.*

88. Arango & Trueba, Jr., *supra* note 6, at 10.

89. *See* Dresser Indus., Inc. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) ("[S]omething must appear on the face of the [contract] to attract the attention of a reasonable person when he looks at it.") (quoting Ling & Co. v. Trinity Sav. & Loan Ass'n., 482 S.W.2d 841, 843 (Tex. 1972)); *see also* Purdy, *supra* note 67, at 460; Schoepfer, *supra* note 15, at 465–66.

90. *See Dresser*, 853 S.W.2d at 511; Schoepfer, *supra* note 15, at 465–66.

tended to consent to its terms.[91] Conspicuousness challenges will often be sustained where waiver language was hidden in a nondescript paragraph in the middle of a document or stamped in small print on the back of a receipt.[92]

Generally, waivers will be deemed conspicuous where they are somehow "set off" in the documents in which they appear, either by being set in bold and/or capital letters, or by appearing beneath a conspicuous and clearly labeled heading.[93] Waiver language may also be deemed conspicuous where it is the only text appearing on the page of a document.[94]

c. Fraud, Unconscionability, and Incapacity

Other contract-based exceptions to the general rule of waiver validity include fraud, unconscionability, and incapacity of the signor.[95] Exculpatory agreements obtained through fraud will be deemed unenforceable under the same rubric of protecting party intent[96]—if a party was induced to sign a waiver by material misrepresentations,[97] then that waiver cannot be an accurate representation of the party's intent.

Under an unconscionability rationale, courts will often find exculpatory agreements to be impermissible contracts of adhesion resulting from gross disparities in bargaining power.[98] If a signor had no

91. *See Dresser*, 853 S.W.2d at 510 (adopting conspicuousness standards articulated in the Texas Business and Commerce Code: "When a reasonable person against whom a clause is to operate ought to have noticed it, the clause is conspicuous.").

92. *See* Ghionis v. Deer Valley Resort Co., 839 F. Supp. 789, 793 (D. Utah 1993); *see also* Hastings, *supra* note 26, at 136–37.

93. *See Dresser*, 853 S.W.2d at 511 ("[L]anguage in capital headings . . . contrasting type or color . . . and . . . in an extremely short document, such as a telegram, is conspicuous.").

94. *See id.* at 510.

95. *See* King, Jr., *supra* note 8, at 713–28; Arango & Trueba, Jr., *supra* note 6, at 5–8; Schoepfer, *supra* note 15, at 466.

96. *See generally* Merten v. Nathan, 321 N.W.2d 173 (Wis. 1982); Dobratz v. Thomson, 468 N.W.2d 654 (Wis. 1991); RESTATEMENT (SECOND) OF CONTRACTS § 163 (1981) ("If a misrepresentation . . . induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.").

97. Courts disagree whether actual reliance by the signor must be shown in order to claim fraud. *See* King, Jr., *supra* note 8, at 726 n.180. *See generally Merten*, 321 N.W.2d 173 (proof of reliance not needed to claim fraud). *But see* Barnes v. Birmingham Int'l. Raceway, 551 So. 2d 929 (Ala. 1989) (reliance required).

98. *See* Jones v. Dressel, 623 P.2d 370, 374 (Colo. 1981) (en banc); Fedor v. Mauwehu Council, Boy Scouts of Am., 143 A.2d 466, 467 (Conn. Super. Ct. 1958); King, Jr., *supra* note 8, at 720. It is often difficult to predict how disparate bargaining positions must be in

choice but to enter into the agreement, then the waiver could not have been entirely voluntary,[99] thus undermining the contract side of the waiver equation.

Regarding incapacity of the signor, many courts follow a seemingly per se rule of voidability for exculpatory agreements signed by or on behalf of minors and incompetents.[100] Since minors and incompetents traditionally have lacked capacity under the law to bind themselves to all but the most essential agreements,[101] they therefore have not been allowed to contractually release future liability claims. Minors that have attempted to bind themselves to exculpatory agreements have typically been "given the power to disaffirm [such] agreement[s] during minority and within a reasonable or specified period after reaching majority."[102]

Although courts often invoke contract rules when invalidating exculpatory agreements due to fraud, unconscionability, or incapacity, the underlying rationale behind such invalidations is often public policy.[103] Both the contract and tort sides of the waiver scale therefore may be implicated by situations involving fraud, unconscionability, or incapacity. Whether invalidations of waivers on these grounds are seen as undermining the contract side of the waiver scale or bolstering the tort side, the resulting tilt of the scale is the same.

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order for a court to invalidate an exculpatory agreement under an unconscionability rationale. *See* King, Jr., *supra* note 8, at 720. Some courts state that a lack of opportunity for negotiation or the fact that services could not be obtained elsewhere justify invalidation. *See Dressel*, 623 P.2d at 374; *see also* King, Jr., *supra* note 8, at 720. Other courts, however, state that "take it or leave it" exculpatory agreements are not inherently contracts of adhesion. *See Dressel*, 623 P.2d at 375; Arango & Trueba, Jr., *supra* note 6, at 4.

99. *See generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) "[A] bargain [is] said to be unconscionable . . . if it was 'such as no man in his senses and not under delusion would make . . . .'" *Id.* (quoting Hume v. United States, 132 U.S. 406, 411 (1889)).

100. *See* Del Santo v. Bristol County Stadium, Inc., 273 F.2d 605, 607 (1st Cir. 1960); *Dressel*, 623 P.2d at 372 n.1, 373; Childress v. Madison County, 777 S.W.2d 1, 6–7 (Tenn. Ct. App. 1989); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10–11 (Wash. 1992); King, Jr., *supra* note 8, at 713–14. *But see* Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649–50 (Ct. App. 1990); Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205 (Ohio 1998).

101. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 12(1)–(2) (1981). Infants, the mentally ill, persons under guardianship, or persons under the influence of intoxicants do not have the capacity to incur contractual duties by manifesting assent to a transaction. *See id.* Those lacking capacity to contract are, however, granted limited rights to enter into binding contracts for "necessaries." *See id.* at § 12 cmt. f (1981).

102. King, Jr., *supra* note 8, at 713. Minority extends until age eighteen. *See* BLACK'S LAW DICTIONARY 997 (6th ed. 1990) (definition of "minor").

103. *See* RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981).

2. Public Policy Based Tilts

The tort side of the waiver equation will be afforded greater weight whenever public policy dictates that greater social benefit will result from enforcing liability than from respecting the right to contract.[104] Although contract will outweigh tort in most situations, unusual circumstances can sometimes augment the value of enforcing liability.[105] Courts generally will find a heightened social interest in upholding tort liability in four basic scenarios: When a waiver is being used in the context of services that are highly important or essential to the public;[106] when the waiver is asking signors to release liability for extreme conduct such as gross negligence, recklessness, or willful misconduct;[107] when the waiver is seeking to release a duty of care established by statute;[108] and when the waiver is being used by or on behalf of children.[109]

a. Waivers Used in Services Necessary to the Public Good

Waivers used in important or essential services are effectively contracts of adhesion.[110] Since these types of exculpatory agreements will produce the same end tilt of the waiver scale either by undermining the contract side or bolstering the tort side, it is not as important to pinpoint which side of the waiver scale they affect as it is to distinguish what types of services will be deemed "necessary or essential" to the public good. In *Tunkl v. Regents of the University of California*,[111] the California Supreme Court articulated six criteria to help gauge when

104. *See Scott*, 834 P.2d at 11; Tunkl v. Regents of the Univ. of Cal., 383 P.2d 441, 445–47 (Cal. 1963).

105. *See generally Tunkl*, 383 P.2d 441; Wagenblast v. Odessa Sch. Dist., 758 P.2d 968 (Wash. 1988); Arango & Trueba, Jr., *supra* note 6, at 12–16.

106. *See Tunkl*, 383 P.2d at 445; *Wagenblast*, 758 P.2d at 972; Jones v. Dressel, 623 P.2d 370, 376 (Colo. 1981) (en banc); King, Jr., *supra* note 8, at 721–26.

107. *See generally* Reece v. Finch, 562 So. 2d 195 (Ala. 1990); *see also* L. Luria & Son, Inc. v. Honeywell, Inc., 460 So. 2d 521 (Fla. Dist. Ct. App. 1984); Barnes v. Birmingham Int'l Raceway, Inc., 551 So. 2d 929, 933 (Ala. 1989); Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941, 946 (Ill. Ct. App. 1989); King, Jr., *supra* note 8, at 727–31; Arango & Trueba, Jr., *supra* note 6, at 13.

108. *See* LA. CIV. CODE ANN. art. 2004 (West 1987) (exculpatory agreements for physical injury invalid); Meier v. Ma-Do Bars, Inc., 484 N.Y.S.2d 719, 720 (App. Div. 1985); King, Jr., *supra* note 8, at 725–27.

109. *See* Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979); *see also* Childress v. Madison County, 777 S.W.2d 1, 6–7 (Tenn. Ct. App. 1989); *Scott*, 834 P.2d at 11–12; King, Jr., *supra* note 8, at 713–21.

110. *See Tunkl*, 383 P.2d at 445–46; King, Jr., *supra* note 8, at 721.

111. 383 P.2d 441 (1963).

a service is necessary or essential to the public good.[112] According to the court in *Tunkl*, a party should not be allowed to use exculpatory agreements when:

> [The agreement] 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 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.[113]

None of these criteria are by themselves dispositive, and a waiver need not exhibit all to be invalidated.[114] Those services that do not satisfy the *Tunkl* criteria will be deemed primarily recreational and, barring some other countervailing considerations, will be allowed to use exculpatory agreements.[115] A number of other states besides California have adopted *Tunkl*-like tests for gauging necessary or essential services, including Tennessee,[116] Washington,[117] and Colorado.[118] In addition to hospitalization and health care, services that have been deemed necessary and essential to the public good include banking and escrow services, activities involving common carriers, and public school sports programs.[119]

112. *See Tunkl*, 383 P.2d at 445–47.

113. *Id.* at 445–46.

114. *See id.* at 447.

115. *See id.* at 446.

116. *See* Childress v. Madison County, 777 S.W.2d 1, 4 (Tenn. Ct. App. 1989).

117. *See* Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 973 (Wash. 1988).

118. *See* Jones v. Dressel, 623 P.2d 370, 376–77 (Colo. 1981) (en banc).

119. *See* Buchan v. United States Cycling Fed'n, Inc., 277 Cal. Rptr. 887, 897 (Ct. App. 1991); *see also* Okura v. United States Cycling Fed'n, Inc., 231 Cal. Rptr. 429, 431 (Ct. App. 1986); Arango & Trueba, Jr., *supra* note 6, at 13. A designation of "necessary or essential" does not necessarily mean that all of an entity's services will be precluded from using exculpatory agreements. Schools or community centers that are essential can provide extracurricular, non-essential services that will be allowed to use exculpatory agreements. *See Childress*, 777 S.W.2d at 4 ("[B]usinesses which normally operate under a public duty . . .

b. Waivers Seeking to Release Liability for Extreme Conduct

Where waivers purport to release liability for extreme conduct such as gross negligence, recklessness, and willful misconduct, courts generally agree that the heightened public policy interests in dissuading such conduct outweigh the individual right to contract.[120] Waivers seeking to release liability for willful misdeeds and recklessness are almost universally rejected as overreaching.[121] Most states also prohibit waivers from releasing claims for gross negligence or anything else rising above "garden variety" negligence.[122]

c. Waivers of Statutorily Mandated Standards of Care

Waivers can also be voided if they attempt to release liability for conduct falling below some statutorily mandated minimum standard.[123] Some states have statutes requiring service providers to conform to the standards of care expected of members of their profession.[124] Having been established specifically by legislative mandate, such standards will place greater weight onto the tort side of the waiver scale.

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can execute valid exculpation contracts when the transaction . . . is not under that public duty.").

120. *See generally* Reece v. Finch, 562 So. 2d 195 (Ala. 1990); L. Luria & Son, Inc. v. Honeywell, Inc., 460 So. 2d 521 (Fla. Dist. Ct. App. 1984); Barnes v. Birmingham Int'l Raceway, Inc., 551 So. 2d 929 (Ala. 1989); Falkner v. Hinckley Parachute Ctr., Inc., 533 N.E.2d 941 (Ill. Ct. App. 1989); King, Jr., *supra* note 8, at 727–31; RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981); KEETON ET AL., *supra* note 13, at 480–84.

121. *See Reece*, 562 So. 2d at 198–201; *Barnes*, 551 So. 2d at 933; King, Jr., *supra* note 8, at 727–28; RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981); KEETON ET AL., *supra* note 13, at 480–84. *But see* RESTATEMENT (SECOND) OF TORTS § 496B (1965) (recognizing a right to enter into valid exculpatory agreements that preclude liability for both negligent and reckless conduct).

122. *See* Boucher v. Riner, 514 A.2d 485, 488 (Md. Ct. App. 1986); *see also* King, Jr., *supra* note 8, at 727–31. Plaintiffs that have signed binding waivers can still attempt to bring negligence actions by framing their claims as gross negligence. *See* King, Jr., *supra* note 8, at 730. Some commentators have therefore criticized the practice of allowing waivers to release claims for negligence but not claims for recklessness or gross negligence. *See* King, Jr., *supra* note 8, at 731. "The problem with invalidating exculpatory agreements for more serious kinds of unintentional conduct is that it assumes we can know what recklessness and gross negligence are and how they differ from ordinary negligence." King, Jr., *supra* note 8, at 730.

123. *See* LA. CIV. CODE ANN. art. 2004 (West 1987) (exculpatory agreements for physical injury invalid); *see also* Meier v. Ma-Do Bars, Inc., 484 N.Y.S.2d 719, 720 (App. Div. 1985); King, Jr., *supra* note 8, at 725–27.

124. *See* Lee v. Sun Valley Co., 695 P.2d 361, 364 (Idaho 1984) (citing Chapter 12, Title 6 of the Idaho Code, which requires that saddle service providers conform to the standard of care expected of members of their profession); King, Jr., *supra* note 8, at 725–26.

3. Minor Waivers: Contract or Public Policy Based Tilt?

Similar to those situations where exculpatory agreements constitute fraud or contracts of adhesion, waivers used on minors implicate both contract[125] and public policy rationales.[126] Many courts cite per se contract rules against minor exculpatory agreements, indicating that such agreements undermine the contract side of the waiver scale.[127] "A general public policy analysis has seldom been reached in connection with exculpatory agreements relating to youth . . . activities because these cases have usually been decided on the threshold basis of the minor status of the participants."[128] Some courts, however, have gone so far as to rationalize that public policy interests are heightened when waivers are used on minors, indicating that the tort side of the waiver scale should be afforded greater weight in minor waiver scenarios.[129]

Although courts generally apply the same rules to waivers signed only by children that they do to waivers signed by parents, minor waivers involve vastly different considerations than parental waivers. It is therefore necessary to distinguish the two in order to fully understand how each one implicates the waiver scale.

a. Minor Waivers

As of this writing, most jurisdictions in the United States had recognized that waivers executed by those who lack the capacity to contract are per se invalid.[130] Despite the fact that minors are afforded limited rights to enter into agreements for "necessaries,"[131] waivers are considered to be well beyond their contract capabilities. As the

125. *See* Del Santo v. Bristol County Stadium, Inc., 273 F.2d 605, 607 (1st Cir. 1960); Jones v. Dressel, 623 P.2d 370, 372 n.1 (Colo. 1981) (en banc); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 n.3 (Me. 1979); Childress v. Madison County, 777 S.W.2d 1, 6–7 (Tenn. Ct. App. 1989); King, Jr., *supra* note 8, at 713–21.

126. *See* Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140, 142 (E.D. Pa. 1987); *Dressel*, 623 P.2d at 373 n.1; Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 468 (Conn. Super. Ct. 1958); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11–12 (Wash. 1992).

127. *See Del Santo*, 273 F.2d at 607; *see also Dressel*, 623 P.2d at 372 n.1; *Doyle*, 403 A.2d at 1208 n.3; *Childress*, 777 S.W.2d at 6–7; King, Jr., *supra* note 8, at 713–21.

128. King, Jr., *supra* note 8, at 724.

129. *See Simmons*, 670 F. Supp. at 142; *Dressel*, 623 P.2d at 373 n.1; *Fedor*, 143 A.2d at 468; *Scott*, 834 P.2d at 11–12.

130. *See Scott*, 834 P.2d at 11–12; *Childress*, 777 S.W.2d at 6; *Del Santo*, 273 F.2d at 607 (applying Massachusetts law); *Fedor*, 143 A.2d at 468; Kotary v. Spencer Speedway, Inc., 365 N.Y.S.2d 87, 90 (App. Div. 1975); King, Jr., *supra* note 8, at 713.

131. *See* E. ALLAN FARNSWORTH, CONTRACTS § 4.5 (2d ed. 1990); RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. f (1981).

Mississippi Supreme Court stated, "[m]inors can waive nothing. In the law they are helpless, so much so that their representatives can waive nothing for them . . . ."[132]

Preventing minors from waiving tort liability themselves makes good sense according to the waiver scale. Fundamental contract rules prohibiting minors from entering into binding agreements are violated if children are allowed to waive liability claims,[133] and the unique vulnerability of minors to both exploitation and bad business decisions creates a heightened public policy interest in protecting them from exculpatory agreements.[134] Minor waivers therefore produce a decisive double-tilt of the waiver scale.

b. Parental Waivers

In contrast, parental exculpatory agreements do not clearly implicate either side of the scale. Although courts often reflexively invalidate parental waivers according to "settled law,"[135] no compelling rationale has ever been articulated why parents should not be allowed to release their children's tort liability claims. There are no obvious defects in the contract side of parental waiver equations, thus the normally compelling weight afforded to contract need not be undermined. Minors also are not nearly as vulnerable to bad decisions or exploitation by adults when their parents are scrutinizing waivers for them. Thus, the public policy side of the parental waiver scale is not as clearly augmented as it is with minor waivers.

Given the seemingly porous foundation upon which parental waiver rules rest, it is not surprising that courts and commentators have begun sporadic attacks on the traditional rule against parental waiver validity.[136] Those attacks were first launched in 1990 with the California appellate court case of *Hohe v. San Diego Unified School District*,[137] the harbinger of what has since become a decade-long reexamination of judicial attitudes toward parental exculpatory agreements.

132. Khoury v. Saik, 33 So. 2d 616, 618 (Miss. 1948).

133. *See* FARNSWORTH, *supra* note 131, at § 4.5; RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. f (1981).

134. *See Simmons*, 670 F. Supp. at 142; *Dressel*, 623 P.2d at 373 n.1; *Fedor*, 143 A.2d at 468; *Scott*, 834 P.2d at 11–12.

135. *Scott*, 834 P.2d at 11.

136. *See* Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 649 (Ct. App. 1990); *see also* Aaris v. Las Virgenes Unified Sch. Dist., 275 Cal. Rptr. 2d 801, 805 (Ct. App. 1990); Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 205 (Ohio 1998); Cooper v. United States Ski Ass'n, 32 P.2d 502, 507 (Colo. Ct. App. 2000); King, Jr., *supra* note 8, at 715; Purdy, *supra* note 67, at 466–70.

137. 274 Cal. Rptr. 647 (Ct. App. 1990).

Since *Hohe*, in which the court abruptly and with little explanation announced that parents can indeed waive their children's liability claims,[138] courts from Ohio to Colorado to Washington have revisited the question of parental waiver validity.[139] The resulting rulings, finding parental waivers to be either valid,[140] invalid,[141] or somewhere in between,[142] have seriously clouded the question of parental waiver validity. In so doing, these decisions have confused and hamstrung those entities that must rely on parental exculpatory agreements for liability protection, including businesses, schools, and volunteer organizations.

II. Problem

Preventing parents from waiving their children's tort claims increases insurance premiums for service providers.[143] These higher costs can then either put the service provider out of business, force the provider to eliminate the parts of his or her business catering to minors, or be passed on to consumers.[144] While arguments might be made that higher liability costs force inept or unwilling service providers out of the marketplace, such arguments become strained when applied to recreational services that benefit minors, particularly charitable services such as sports leagues, summer day camps, and afterschool youth programs.[145] Recreational services provide important public benefits that would be significantly reduced if even a small number of providers were put out of business.[146]

Although doomsday predictions of runaway liability for recreational sports leagues have not yet come to pass,[147] service providers catering to children live under constant threat of legal attack. In the modern era of marathon court battles and multi-million dollar jury awards, even a single lawsuit can prove fatal to many small and me-

138. *See id.* at 649.

139. *See Zivich*, 696 N.E.2d at 205; *Cooper*, 32 P.2d at 507; *Scott*, 834 P.2d at 11.

140. *See Hohe*, 274 Cal. Rptr. at 649; *Aaris*, 75 Cal. Rptr. 2d at 805; *Cooper*, 32 P.2d at 507.

141. *See Scott*, 834 P.2d at 11–12.

142. *See Zivich*, 696 N.E.2d at 205 (carving out a limited exception whereby parental waivers could be valid when used in the context of volunteer, recreational activities).

143. *See Scott*, 834 P.2d at 12 ("[I]nvalidation of releases signed by parents to bar children's claims would make sports engaged in by minors prohibitively expensive due to insurance costs.").

144. *See* Arango & Trueba, Jr., *supra* note 6, at 47–48.

145. *See Zivich*, 696 N.E.2d at 205; King, Jr., *supra* note 8, at 685–92.

146. *See Zivich*, 696 N.E.2d at 205; *see also* King, Jr., *supra* note 8, at 685–92.

147. *See generally* Andrew F. Popper, *A One-Term Tort Reform Tale: Victimizing the Vulnerable*, 35 HARV. J. ON LEGIS. 123 (1998).

dium sized service providers. As of 1997, legal defense costs alone for tort lawsuits ranged anywhere from $20,000 to $600,000.[148] These costs often pale in comparison to jury damage awards. "Notwithstanding legal fees, judgments against . . . providers may also be excessive."[149] Without valid exculpatory agreements to protect themselves against such judgments, service providers may only be a single accident away from complete financial ruin.

But even if parents are not able to waive their children's liability claims, a firm, well-reasoned rule articulating this would be preferable to the confusion and inconsistency that currently plagues waiver law. One of the primary purposes of exculpatory agreements is to allow service providers to avoid the staggering costs of having to decide responsibility for injuries in court. That purpose is obviously frustrated when the very validity of parental exculpatory agreements can be constantly questioned.

Service providers also need clear rules governing parental waivers in order to make intelligent business decisions. If providers know for sure that they will not be able to protect themselves with parental exculpatory agreements, those providers will at least be able to make rational, individualized choices whether they want to run the risk of liability or get out of the minor market altogether. But when service providers have no way of knowing whether parental exculpatory agreements are inherently invalid, those providers can only guess at the risks involved in catering to minors. Fundamental fairness demands that these providers be able to know in advance of litigation whether they can rely on otherwise sound parental waivers to protect themselves.

A. A Decade of Parental Waiver Review: 1990-2000

1. A Chink in the Armor: *Hohe v. San Diego Unified School District*[150]

Nowhere is the ambiguity and inconsistency that currently fog waiver law more apparent than in recent cases questioning the validity of parental exculpatory agreements. *Hohe v. San Diego Unified School District* was arguably the first case to even suggest that parents could

148. *See* Arango & Trueba, Jr., *supra* note 6, at 30 (quoting Mark A. Hruska, *Defensive Retailing and Teaching*, Diving Equipment & Marketing Association Trade Show (Jan. 19, 1996)).

149. Arango & Trueba, Jr., *supra* note 6, at 30.

150. 274 Cal. Rptr. 647 (Ct. App. 1990).

waive their children's tort claims.[151] In *Hohe*, the Court of Appeal for the Fourth District of California enforced a parental waiver prohibiting a high school student from bringing liability claims for injuries she suffered during a school hypnotism show.[152] Hohe, a fifteen year old high school junior at Mission Bay High School in San Diego, was one of about two dozen students chosen to be in the hypnotism show.[153] As a condition of being allowed to participate, however, students had to sign (or have signed on their behalf) release forms stating that they agreed to release the school district from any liability that might arise.[154] Hohe's father signed the release on his daughter's behalf, and she was subsequently injured when she slid from her chair half a dozen times while under hypnosis.[155]

In upholding Hohe's waiver, the court ignored well-established rules against parental waivers and instead focused on the notion that parents are allowed, under certain circumstances, to enter into contracts on their child's behalf.[156] But while parents had traditionally been afforded significant contract powers over their children, those powers had never been thought to encompass the ability to bind children to exculpatory agreements.[157] Perhaps recognizing this, the *Hohe* court explained its holding with but a single line: "A parent may contract on behalf of his or her children."[158] The case was never appealed.[159]

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151. *See* King, Jr., *supra* note 8, at 714–15.

152. *See* Hohe v. San Diego Unified Sch. Dist., 274 Cal. Rptr. 647, 652 (Ct. App. 1990).

153. *See id.* at 648.

154. *See id.* The release form read as follows:

> I agree to indemnify and hold you and any third parties harmless from any and all liability, loss or damage (including reasonable attorney fees) caused by or arising in any manner from my participation in the Magic of the Mind Show including any utterances made by me during the above named show or material furnished by me in connection with my participation in the show. I am solely responsible for my appearance in the show and for any loss to any party arising therefrom.

Id.

155. *See id.*

156. *See id.* at 649.

157. Parents have traditionally been afforded authority to bind their children to agreements, to arbitrate malpractice claims, and to give a medical insurer a subrogation interest for medical conditions tortiously caused by third parties. *See* King, Jr., *supra* note 8, at 717.

158. *Hohe*, 274 Cal. Rptr. at 649.

159. *See id.*

2. Reaffirming the Majority View: *Scott v. Pacific West Mountain Resort*[160]

Hohe impliedly recognized that there are no inherent defects in the contract side of a parental waiver equation when a parent enters into an exculpatory agreement on the child's behalf.[161] Assuming this is true, it follows that parental waivers should only be invalidated if they somehow augment the tort side of the waiver scale. Two years after *Hohe*, the Washington Supreme Court concluded that parental waivers do in fact augment the tort side of the waiver scale.[162]

In *Scott v. Pacific West Mountain Resort*, the Washington high court voided a parental waiver signed on behalf of a twelve year old ski racer who crashed while trying to negotiate a slalom course.[163] In rejecting the waiver signed by the boy's parents, the court began by following the same path as many of its predecessors in deciding the question of validity—it simply assumed that parental waivers were invalid because previous courts had so held.[164] But the Washington court laudably went further than most others by explaining that it was voiding the parental waiver not simply because of precedent, but also because of public policy.[165] Prior to *Scott*, courts often justified prohibitions against parental waivers the same way they justified prohibitions against minor waivers (i.e., that the rules were necessary to protect minors against predatory adults, as well as their own imprudence).[166] Perhaps recognizing that parental waivers involve much different considerations than minor waivers, the *Scott* court offered two new policy arguments as to why tort interests should be augmented in parental waiver scenarios: First, the court reasoned that since the law firmly prohibits parents from waiving children's post-injury liability claims, it

160. 834 P.2d 6 (Wash. 1992).

161. One of the few cases to cite *Hohe* as precedent, *Aaris v. Las Virgenes Unified School District*, stated that *Hohe* showed "[i]t is well established that a parent may execute a release on behalf of his or her child." Aaris v. Las Vegas Unified Sch. Dist., 75 Cal. Rptr. 2d 801, 805 (Ct. App. 1998).

162. *See* Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 11–12 (Wash. 1992).

163. *See id.* at 8–10, 12.

164. *See id.* at 11 ("[I]t is settled law in many jurisdictions that, absent judicial or statutory authority, parents have no authority to release a cause of action belonging to their child.").

165. *See id.* at 11–12.

166. *See* Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140, 142 (E.D. Pa. 1987); Jones v. Dressel, 623 P.2d 370, 373, 373 n.1 (Colo. 1981) (en banc); Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 468 (Conn. Super. Ct. 1958); King, Jr., *supra* note 8, at 715.

should also prohibit parental waivers of pre-injury claims.[167] Second, the court believed that allowing a parent who might be unwilling or unable to care for an injured child to waive that child's liability claims would effectively render the child helpless.[168] Subsequent courts and commentators have cited these reasons as the main modern policy arguments against parental waiver validity.[169]

3. Limited Exceptions to the Majority Rule: *Zivich v. Mentor Soccer Club*[170]

In 1998, the Ohio Supreme Court eschewed the normal workings of the waiver scale to carve out a narrow exception for parental waivers used in the context of volunteer activities.[171] In *Zivich v. Mentor Soccer Club*, the Ohio high court upheld a waiver signed by Pamela Zivich on behalf of her seven year old son.[172] Zivich had been required to sign the waiver as a condition of her son being allowed to participate in the 1993–94 season of the Mentor Soccer Club.[173] The club administered a nonprofit youth recreational soccer league.[174]

After his team won a practice scrimmage, Zivich's son began swinging on the uppermost beam of a soccer goal.[175] The unanchored goal tipped over on top of the child, breaking his collarbone and three ribs, and severely bruising his lungs.[176] The boy's parents filed suit against the Mentor Soccer Club, alleging negligence and reckless misconduct.[177] On appeal, the Supreme Court ruled that the claims of both Zivich and her son were barred by the parental waiver Zivich had signed.[178]

In ruling that parental waivers were valid when used to protect youth recreation volunteers, the court changed the fundamental way in which the waiver scale functions.[179] Rather than presuming that

167. *See Scott*, 834 P.2d at 11–12. Many states maintain statutes and common law rules preventing parents from releasing a child's potential causes of action after the child has been injured without court approval. *See id.* at 11.

168. *See id.* at 12.

169. *See* Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 206 (Ohio 1998); Purdy, *supra* note 67, at 469–75.

170. 696 N.E.2d 201 (Ohio 1998).

171. *See Zivich*, 696 N.E.2d at 207.

172. *See id.* at 202.

173. *See id.* at 202–03.

174. *See id.* at 202.

175. *See id.* at 203.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

public policy interests weighed *against* the contract side of parental waiver equations, the court said there were considerable public policy interests weighing *in favor* of such waivers.[180] It further stated:

> It cannot be disputed that volunteers in community recreational activities serve an important function. Organized recreational activities offer children the opportunity to learn valuable life skills . . . . Due in great part to the assistance of volunteers, nonprofit organizations are able to offer these activities at minimal cost . . . . Yet the threat of liability strongly deters many individuals from volunteering for nonprofit organizations . . . . Therefore, faced with the very real threat of a lawsuit, and the potential for substantial damage awards, nonprofit organizations and their volunteers could very well decide that the risks are not worth the effort. Hence, invalidation of exculpatory agreements would reduce the number of activities made possible through the uncompensated services of volunteers and their sponsoring organizations.[181]

Balancing the detriment of parental exculpatory agreements against the overall social value of youth recreational sports, the court concluded that the waiver scale tipped decidedly in favor of validity when parental waivers are used to protect sports league volunteers.[182] "Public policy does not forbid such an agreement. In fact, public policy supports it."[183]

Despite the unique approach of the *Zivich* court, the case sheds significant light on the overall workings of the waiver scale. In dicta, the court expounded on the argument curtly expressed in *Hohe* that the authority traditionally afforded parents to raise their children should also include the right to enter into parental exculpatory agreements.[184] Citing the Ohio appellate court's concurrence, the Ohio Supreme Court noted that "the right of a parent to raise his or her child is a natural right subject to the protections of due process."[185] This language echoed the implicit argument of *Hohe* that parental waivers do not inherently undermine the contract side of the waiver scale.

B. A New Era of Parental Waiver: *Troxel v. Granville*[186]

Two years after *Zivich*, the United States Supreme Court further bolstered *Hohe's* pro-waiver argument by recognizing that parents should be afforded broad authority over the care and upbringing of

180. *See id.*
181. *Id.* at 205.
182. *See id.*
183. *Id.*
184. *See id.* at 206.
185. *Id.*
186. 530 U.S. 57 (2000).

their children.[187] *Troxel v. Granville* involved an action for visitation rights brought by the paternal grandparents of two young girls whose father had committed suicide.[188] The grandparents sought visitation allowances of two weekends a month and two weeks each summer, whereas the mother wanted to limit the grandparents' visits to a single day each month.[189] The grandparents filed suit under a Washington state statute which provided that "[t]he court may order visitation rights for any person when visitation may serve the best interest of the child . . . ."[190] A Washington superior court granted the grandparents visits of one weekend a month, one week during the summer, and four hours on both grandparents' birthdays.[191] On appeal, the Washington Supreme Court ruled that the statute under which the grandparents sought visitation unconstitutionally infringed the fundamental rights of parents to raise their children.[192]

In affirming the Washington Supreme Court's ruling, the United States Supreme Court officially recognized for the first time the broad right of parents to control the upbringing of their children.[193] Writing for the plurality, Justice O'Connor stated, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[194] Although Justice O'Connor did not define the precise scope of these parental rights, it can be argued that the right of "care, custody and control" should firmly encompass the right to enter into valid parental exculpatory agreements.

III. Solution

Those courts that traditionally voided parental waivers on contract grounds apparently believed that parents simply overstepped the bounds of contract by entering into release agreements on their children's behalf.[195] But *Troxel* seems to recognize that a parent does not

187. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000).
188. *See id.* at 60–61.
189. *See id.* at 61.
190. *Id.*
191. *See id.*
192. *See id.* at 63.
193. *See generally id.* at 66.
194. *Id.*
195. *See* Del Santo v. Bristol County Stadium, Inc., 273 F.2d 605, 607 (1st Cir. 1960); Jones v. Dressel, 623 P.2d 370, 372 n.1 (Colo. 1981) (en banc); Doyle v. Bowdoin Coll., 403 A.2d 1206, 1208 (Me. 1979); Childress v. Madison County, 777 S.W.2d 1, 6–7 (Tenn. Ct.

in fact violate any rules of contract by entering into exculpatory agreements on a child's behalf.[196] Therefore, provided all other requirements are met (i.e., conspicuousness, unambiguousness, no overreaching), parental waivers should be afforded the same contract weight as any other release agreement entered into between consenting adults.

Those courts that traditionally voided parental waivers on tort grounds apparently believed that such waivers allowed children to fall victim either to opportunistic adults or their own naiveté.[197] But again, children are far less vulnerable to exploitation and bad judgment when their parents are scrutinizing prospective waiver agreements. The public policy rationale often used to void minor exculpatory agreements therefore does not apply to parental waivers.

Regarding the more modern policy arguments against parental waivers first advanced in *Scott v. Pacific West Mountain Resort*,[198] subsequent cases and commentaries have exposed serious gaps in the *Scott* court's reasoning.[199] As such, the tort side of the waiver scale should not be afforded greater weight when parental exculpatory agreements are involved.

Given that both the contract and tort sides of the parental waiver scale are afforded the same weight as any traditional waiver equation, parental waivers should be categorically enforced.[200] This break from traditional rules prohibiting parental waivers can ideally be accomplished through state legislation or, more realistically, widespread judicial validation of parental exculpatory agreements.

App. 1989); Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 10–11 (Wash. 1992); King, Jr., *supra* note 8, at 713–14.

196. *See Troxel*, 530 U.S. at 66.

197. *See* Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140, 142 (E.D. Pa. 1987); *Dressel*, 623 P.2d at 373 n.1; Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 468 (Conn. Super. Ct. 1958); *Scott*, 834 P.2d at 11–12; King, Jr., *supra* note 8, at 715.

198. *See Scott*, 834 P.2d at 11–12.

199. *See* Zivich v. Mentor Soccer Club, Inc., 696 N.E.2d 201, 206–07 (Ohio 1998); Purdy, *supra* note 67, at 472–75.

200. Since many states currently follow common law waiver laws stating that exculpatory agreements are presumed valid unless violative of public policy, statutes therefore could be enacted stating that parental waivers are not inherently violative.

A. Parental Waiver Scale Mechanics: The Contract Side

1. Care, Custody, and Control

That a parent's right of "care, custody, and control"[201] should encompass the right to waive children's liability claims is evident from the plain meaning of the words themselves, as well as the very nature of services that make use of exculpatory agreements.

a. Plain Meaning

According to plain meaning, "care" is responsibility for the safety and well-being of others;[202] "custody" is the duty to guard and preserve one's well-being;[203] and most importantly, "control" is the authority to guide or manage one's affairs.[204] When used in the context of parental authority, these terms clearly refer to a broad right of parental dominion over the guidance and well-being of the child. Indeed, Webster's Dictionary even lists parental authority as one of the paradigmatic uses of the word "control."[205]

A broad reading of parental Due Process rights is further justified by Justice O'Connor's remarks in *Troxel*:

> [S]o long as a parent adequately cares for his or her children ([i.e.], is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children . . . .[206]
>
> . . . .
>
> [I]f a fit parent's decision . . . becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination . . . .[207]
>
> . . . .
>
> [T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a "better" decision could be made.[208]

The Supreme Court apparently advocates a hands off approach to regulating the day-to-day choices and value judgments parents make in raising their children.

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201. *Troxel*, 530 U.S. at 66.
202. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 338 (1993).
203. *See id.* at 559.
204. *See id.* at 496.
205. *See id.*
206. *Troxel*, 530 U.S. at 68–69.
207. *Id.* at 70.
208. *Id.* at 72–73.

b. Nature of Services Using Exculpatory Agreements

That this penumbra of parental authority should encompass the right to draft valid parental exculpatory agreements is clear from the very nature of services that require liability waivers. Although waivers can only be used in the context of nonessential services such as sports and recreation, these services contribute immensely to the mental, physical, and social development of children. As one leading authority on child waivers put it:

> Youth recreational activities can begin to fill the growing void in the lives of many young people. Positive habits can be developed and reinforced, self-esteem enhanced, and emulation of suitable role models encouraged . . . . [Y]outh athletics and other activities offer a respite from television and various sources of media violence that have been tied to youth violence as well as to . . . other adverse behavioral and psychological effects . . . .[209]

Recognizing their inability to procure valid waivers, several service industries have already limited or excluded minor participation altogether.[210] Consequently, parents are deprived of the full range of childrearing choices that might otherwise be available to them if parental waivers were allowed. While many children admittedly are not physically or mentally suited to jump from airplanes, scuba dive across coral reefs, or even play in recreational soccer leagues, parents should at least have these choices available to them. As Helen Keller once said, "Security is . . . a superstition. It does not exist in nature, nor do . . . children . . . as a whole experience it. Avoiding danger is no safer in the long run than outright exposure. Life is either a daring adventure or nothing."[211] Risk, in other words, is everywhere. But when the law prevents service providers from reasonably insulating themselves from legal attack by children, providers in turn decide which risks children will be exposed to. These risk-benefit choices are precisely the kind of "childrearing" decisions that the United States Constitution reserves exclusively for parents, not service providers.

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209. King, Jr., *supra* note 8, at 688–89.

210. *See* Arango & Trueba, Jr., *supra* note 6, at 47. Airborne sports such as hang-gliding and skydiving have excluded minors entirely, whereas the scuba industry has limited minors to dives of certain depths, and the ski industry has limited certain minors to specified slopes. *See id.* at 47–48.

211. Childress v. Madison County, 777 S.W.2d 1, 7 (Tenn. Ct. App. 1989) (quoting ELAINE T. PARTNOW, QUOTABLE WOMAN 173 (1978)).

2. *Troxel's* Impact on the Waiver Scale: *Cooper v. United States Ski Ass'n*[212]

Colorado courts have already recognized that *Troxel's* rights of care, custody, and control include the right to waive children's liability claims.[213] In *Cooper v. United States Ski Ass'n*, the mother of a seventeen year old downhill ski racer signed a liability waiver as a condition of her son being allowed to compete with the Aspen Valley Ski Club.[214] The waiver stated in capital letters that the signor agreed to release the Aspen Valley Ski Club from liability that might arise from participation with the club's competitive ski racing team.[215] While training for the "Super G," a high-speed ski race, David Cooper lost control and crashed into a tree bordering the ski run.[216] He sustained severe injuries to both his eyes, causing total and permanent blindness.[217]

Upon turning eighteen years old, Cooper and his parents filed suit against the Aspen Valley Ski Club, charging negligence and breach of contract.[218] The trial court granted summary judgment to the ski club on all counts, ruling that the waiver signed by David's mother validly insulated the defendant from liability.[219] Cooper appealed.[220]

Stressing that the question of whether a parent may release a child's liability claims was "an issue of first impression" in Colorado, the appellate court began by finding the mere fact that Cooper had filed suit for breach of contract did not ratify the original release agreement.[221] Turning then to the harder question of whether parents are precluded as a matter of law from waiving children's liability claims, the court concluded that parental exculpatory agreements were paradigm examples of the kinds of parental childrearing choices reserved exclusively for parents by *Troxel*.[222] As the trial court stated:

> Thousands of such releases are signed each year by parents enrolling their children in almost every kind of school and recreational activity. Parents in executing or not executing such releases make

212. 32 P.2d 502.
213. *See generally* Cooper v. United States Ski Ass'n, 32 P.2d 502, 507 (Colo. Ct. App. 2000).
214. *See id.* at 504.
215. *See id.*
216. *See id.*
217. *See id.*
218. *See id.*
219. *See id.* at 505.
220. *See id.*
221. *See id.*
222. *See id.* at 507

conscious choices on behalf of their children concerning risks and benefits of participation in a program that may involve risk. Those decisions are individual and based upon circumstances of each family and activity. Those are proper parental choices on behalf of their children which should not be ignored. So long as the decision is voluntary and informed, it should be given the same dignity as decisions regarding schooling, medical treatment and religious education.[223]

Both reason and precedent illustrate that parents do not undermine the contract side of the waiver scale by entering into parental exculpatory agreements. Therefore, courts will only be able to continue invalidating such agreements upon a showing that parental waivers augment the tort side of the waiver scale. It is difficult, however, to make such a showing.

B. Parental Waiver Scale Mechanics Continued: The Tort Side

The anti-parental waiver policy arguments advanced by *Scott*, that parental waivers are analogous to post-injury waivers and that parental waivers effectively allow parents to deprive children of immediate damage recovery, both have serious flaws.[224]

1. Comparing Pre- and Post-Injury Releases

First, it is impossible to compare parental release of a child's post-injury claims to pre-injury parental exculpatory agreements. Post-injury situations involve unique pressures and incentives that are not present in pre-injury waiver scenarios.[225] Such factors can spur parents to act against their children's interests in ways that would not normally occur in pre-injury waiver situations. As one prominent criticism of *Scott* noted:

> When a parent releases or settles a child's claim, a conflict of interest with the child's rights may arise. For example, when a parent accepts a settlement for a child's claim and signs an indemnity agreement, the parent becomes liable to the defendant for any damages the child recovers. This creates a strong motive for the parent not to sue . . . . At times parents may also act ignorantly, or may be coerced or defrauded into signing a release or settlement. For example, they might release a claim hastily in the immediate aftermath of an accident. Parents coping with an injured child may be susceptible to offers of a quick settlement. The emotional trauma and financial pressure of the child's injury may compel the

223. *Id.*

224. *See* Zivich v. Mentor Soccer Club, 696 N.E.2d 201, 206–07 (Ohio 1998); *see also* Purdy, *supra* note 67, at 472–75.

225. *See* Purdy, *supra* note 67, at 474.

parents to agree to an immediately attractive but ultimately inadequate settlement, or prevent them from inquiring into terms that they normally would question.[226]

None of these pressures are present in pre-injury waiver situations. In these instances, parents have no incentive, either financial or otherwise, to act against their child's best interests. In fact, parents faced with a pre-injury waiver situation have every incentive not to agree to waiver terms unless they are in the child's best interests. As the *Scott* critique further noted:

> The concerns underlying . . . [judicial] . . . reluctance to allow parents to dispose of a child's existing claim do not arise in the situation where a parent waives a child's future claim. A parent dealing with an existing claim is simultaneously coping with an injured child; such a situation creates a potential for parental action contrary to that child's ultimate best interests. A parent who signs a release before her child participates in recreational activity, however, faces an entirely different situation. First, such a parent has no financial motivation to sign the release. To the contrary, because a parent must pay for medical care, she risks her financial interests by signing away the right to recover damages. Thus, the parent would better serve her financial interests by refusing to sign the release. A parent who dishonestly or maliciously signs a preinjury release in deliberate derogation of his child's best interest . . . seems unlikely . . . . Moreover, parents are less vulnerable to coercion and fraud in a preinjury setting . . . . A parent signing a future release is thus more able to reasonably assess the possible consequences of waiving a right to sue.[227]

2. Depriving Children of Immediate Recovery

Scott's second rationale, that parental waivers may deprive children of immediate recovery of tort damages, is equally flawed. Even under the current system of law, a parent would often be able to deny a child the right of immediate recovery should the child be injured.[228] During the age of minority, a parent usually has ultimate say over whether a child can bring action for personal injury, thereby effectively retaining control over whether the child can recover any monetary damages. As the *Scott* criticism stated:

> [The] law effectively gives parents the power to initiate their children's litigation. Children under the age of eighteen cannot litigate except through a guardian. While children over fourteen

226. *Id.* at 473.

227. *Id.* at 473–74.

228. *See id.* at 472 ("Most jurisdictions . . . accept the proposition that parents cannot settle or release their children's existing tort claims without judicial or statutory approval.").

> years old may apply independently for a court-appointed guardian, a relative or friend must apply for children under fourteen years old. If their parents do not bring suit, children have only one option: the statute of limitations on most actions for negligence is tolled during minority, and thus children can bring suit after they turn eighteen . . . . [Because] children cannot litigate on their own, parents already possess the power to hamper their children's ability to recover damages.[229]

Rules preventing parents from waiving their child's liability claims are thus moot if their purpose is to protect the child's right to recover immediate damages.

3. Fundamental Fairness

It would also be inherently inconsistent to say that a parent has a fundamental right to waive a child's future liability claims but that public policy might negate such waivers. A right is not a right unless it has some legal consequence. Service providers who enter into parental exculpatory agreements under such circumstances would be put in the grossly unfair position of having to play "musical contract parties" if different public policy rules could be applied to parental waivers. Although the service provider under such circumstances would be contracting with the parent, the rules governing the agreement would effectively be determined by the child. In effect, the service provider would have a binding exculpatory agreement only until the child decided otherwise. Such a result would be fundamentally unfair to service providers.

Conclusion

Children are indeed one of society's most precious resources. Easily prone to both bad business decisions and exploitation by opportunistic adults,[230] children need to be insulated from many business scenarios in which their lack of sophistication and naiveté can lead to unconscionable results. But upon careful scrutiny, it is clear that parental waivers do not present one of those scenarios. The mere fact that a parent signs a liability waiver on a child's behalf should not undermine the contract weight normally afforded to the waiver. Clearly, then, the contract side of the waiver scale is not lightened in

229. *Id.* at 469–70.

230. *See* Simmons v. Parkette Nat'l Gymnastic Training Ctr., 670 F. Supp. 140, 142 (E.D. Pa. 1987); *see also* Jones v. Dressel, 623 P.2d 370, 372 n.1 (Colo. 1981) (en banc); Fedor v. Mauwehu Council, Boy Scouts of Am., Inc., 143 A.2d 466, 467 (Conn. Super. Ct. 1958); King, Jr., *supra* note 8, at 715.

typical parental waiver scenarios. Conversely, there are no compelling public policy reasons why children should be afforded heightened protection from parental waivers; as such, the tort side of the waiver scale should not be augmented. The waiver scale proves that parental waivers, barring some basic contract flaw, should be valid. Any other result would violate parents' constitutionally guaranteed rights of dominion over the upbringing of their children.