

PAY TO PLAY? THE ENFORCEABILITY OF CONDITIONAL EXCULPATORY CONTRACTS FOR STUDENT ATHLETES

*Stephen Richardson Donat**

I. INTRODUCTION

High school athletic programs offer students a valuable extracurricular education that would otherwise be unavailable as a part of the required curriculum. Of the approximate fifteen million high school students in the United States,¹ over half participate on an athletic team of some kind.² Unfortunately, injuries are an innate characteristic of athletics. Injury statistics from the most popular high school sports teams³ show that each year, approximately two million injuries are sustained.⁴ Out of those two million injured, 500,000 seek medical attention⁵ and 30,000 are hospitalized.⁶ Yet, participation is at an all-time high.⁷ As society continues to evolve and recreational entertainers continue to require exculpatory contracts, voluntary participants seemingly have become increasingly less

* J.D., 2019, Seton Hall University School of Law.

¹ *Fast Facts*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Feb. 27, 2019).

² *Probability of Competing Beyond High School*, NCAA, <http://www.ncaa.org/about/resources/research/probability-competing-beyond-high-school> (last visited Feb. 27, 2019).

³ John W. Powell & Kim D. Barber-Foss, *Injury Patterns in Selected High School Sports: A Review of the 1995–1997 Seasons*, 34 J. ATHLETIC TRAINING 277 (1999) (showcasing injury statistics from the top ten high school sports: football, wrestling, baseball, field hockey, softball, girls' volleyball, boys' and girls' basketball, and boys' and girls' soccer).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* See also *Sports Injury Statistics*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/healthlibrary/conditions/pediatrics/sports_injury_statistics_90,P02787 (last visited Feb. 27, 2019) (illustrating the statistics of adolescent sports injuries that result in emergency room visits, traumatic brain injuries, and death).

⁷ Compare NAT'L FED'N OF STATE HIGH SCH. ASS'N, NFHS HANDBOOK 2016–17 (2017), <http://nfhs.org/media/1017531/2016-17-nfhs-handbook.pdf>, with NAT'L FED'N OF STATE HIGH SCH. ASS'N, NFHS HANDBOOK 1969–2014 (2014), <http://www.nfhs.org/ParticipationStatics/PDF/Participation%20Survey%20History%20Book.pdf>, and NAT'L FED'N OF STATE HIGH SCH. ASS'N, NFHS HANDBOOK 2014–15 (2015), http://www.nfhs.org/ParticipationStatics/PDF/2014-15_Participation_Survey_Results.pdf, and NAT'L FED'N OF STATE HIGH SCH. ASS'N, NFHS HANDBOOK 2015–16 (2016), http://www.nfhs.org/ParticipationStatistics/PDF/2015-16_Sports_Participation_Survey.pdf.

hesitant about waiving liability.⁸ As a result, individuals are beginning to question whether these conditional waivers have any legal significance or if they are just a mere formality implemented to deter the injured from pursuing legal action.⁹

In today's increasingly litigious culture, it is essential that student athletes sign liability waivers or pre-injury releases as a condition of participation.¹⁰ Schools require exculpation in order to shift the risk from themselves to the participants who, by entering into such contracts, expressly agree to assume the risk of injury.¹¹ In so conditioning participation upon this contractual relationship, these agreements reduce the risks, and therefore the costs, of extracurricular activities¹² and are more cost-effective than insuring against the likelihood of such claims.¹³ In the context of extracurricular athletics, exculpatory contracts are also important to the students. Assent from the participant provides evidence of a conscious decision to voluntarily join in the sport, to accept the foreseeable consequences of that particular activity, and to forego future claims or causes of action that may arise in the event of injury.¹⁴

Of course, exculpatory contracts cannot protect against *all* potential claims.¹⁵ Furthermore, unless the contract is conspicuously drafted so that a

⁸ See generally Joshua D. Arters & Ben M. Rose, *Kindly Remove my Child from the Bubble Wrap—Analyzing Childress v. Madison County and Why Tennessee Courts Should Enforce Parental Pre-Injury Liability Waivers*, 11 TENN. J. L. & POL'Y 8, 9 (2016).

⁹ *Id.*

¹⁰ For the purposes of this Comment, liability waivers, hold harmless clauses, and similar exculpatory releases are referred to as exculpatory contracts.

¹¹ BRUCE B. HRONEK & JOHN O. SPENGLER, *LEGAL LIABILITY IN RECREATION AND SPORTS* 77 (Sagamore 2d ed. 2002).

¹² Arters & Rose, *supra* note 8, at 55–56.

¹³ *Kirton v. Fields*, 997 So. 2d 349, 363 (Fla. 2008) (Wells, J., dissenting) (observing that insuring against the probability of injuries sustained while participating in public school events is not a realistic alternative because the high costs of doing so “deplete already very scarce resources”).

¹⁴ See generally *Authorization & Waiver by Parent(s) or Legal Guardian(s) of Minor Child*, 16 COMPLETE L. 35 (1999) (showcasing an example of a boilerplate exculpatory contract). Even though student athletes are the ones who are directly affected, schools within the United States generally require the parent(s) or guardians(s) of minor students to waive such liability over their child's claims. See, e.g., *Doe v. Banos*, 966 F. Supp. 2d 477, 479 (D.N.J. 2013) (reaffirming the constitutionality of the Haddonfield Board of Education's school policy requiring parents to consent to a “24/7 [p]olicy” as a prerequisite to their children's participation in extracurricular activities and school sponsored sports teams). The validity of parental waivers in the context of extracurricular athletics will not be addressed in this Comment.

¹⁵ *St. Paul Fire & Marine Ins. Co. v. Universal Builders Supply*, 409 F. 3d 73, 83–87 (2d Cir. 2005) (holding that protection from reckless, grossly negligent, or intentional conduct that results in injury is against public policy); *Jones v. Dressel*, 623 P.2d 370, 376 (Colo. 1981) (en banc) (holding that exculpatory contracts which attempt to insulate a party from liability, “in no event will . . . shield against a claim for willful and wanton negligence”).

reasonable person is able to appreciate its terms, the agreement is deemed unenforceable.¹⁶ Likewise, courts justify the invalidation of conditional exculpatory contracts as offending public policy only where its enforcement would adversely impact the fundamental concerns to the whole of society.¹⁷

Conditional exculpatory contracts for student athletes are unique, and differing views of public policy have created a rift in their enforceability across the country. One understanding is that a student's choice to participate in an extracurricular activity is a voluntary decision in a non-essential activity, and therefore, any conditional exculpatory agreement that may be required as a prerequisite for participation is otherwise enforceable.¹⁸ The other understanding is that extracurricular activities are indistinguishable from the rest of the curriculum, i.e., since the field is an extension of the classroom, such conditional exculpatory contracts are void and unenforceable.¹⁹ Under this latter view, because there is no difference between curricular classes and extracurricular activities, invalidation is warranted because a student's voluntary participation in an extracurricular activity is thought to be just as important to that student's education as well as the school's overall educational scheme as is the curriculum.²⁰ As a result of this divide, a student athlete in one jurisdiction would have a claim that a similarly situated student athlete in another jurisdiction would not.

This Comment examines whether public policy may invalidate conditional exculpatory contracts between schools and student athletes. Part II of this Comment summarizes the public policy considerations argued by litigants and adopted by certain courts to invalidate mandatory exculpatory contracts. This Part describes the idea of extending the public interest beyond the bounds of the traditional curriculum and argues that a traditional education and the option to participate in extracurricular athletics is not so intertwined as to justify a concern to the whole of society, therefore triggering the public interest. Part III of this Comment reviews various methods courts use to determine the existence of the public interest and its impact in the extracurricular context. Because it is unclear what tests courts should apply, this Part discusses and analyzes the two most popular approaches. Part IV of this Comment discusses these two methods through an examination of the analyses adopted by Washington in *Wagenblast v. Odessa School District*,²¹ by California in *Hohe v. San Diego Unified School*

¹⁶ See *Anderson v. Regis Corp.*, 185 Fed. App'x 768 (10th Cir. 2006).

¹⁷ *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 970 (Wash. 1988).

¹⁸ See *Sharon v. City of Newton*, 769 N.E.2d 738, 745 (Mass. 2002).

¹⁹ See *Wagenblast*, 758 P.2d 968 at 970.

²⁰ *Id.* at 972.

²¹ *Id.*

District,²² and by Massachusetts in *Sharon v. City of Newton*.²³ Part V ultimately rejects Washington's approach and urges for the adoption of the hybrid approach applied in Massachusetts. Finally, Part VI concludes that the public interest does not extend to instances when schools condition exculpation of liability for student participation in extracurricular athletics, and doing so does not conflict with public policy and should be a permissible means for schools to protect themselves against liability.

II. FOR THE GREATER GOOD OF THE COMMUNITY

A. *Public Policy as Gatekeeper to the Public Interest in Athletics*

Although the idea of public policy is open-ended, that term is widely understood as being synonymous with the public good.²⁴ Traditionally, the forces behind the invocation of the "policy of the law" to invalidate a contract were aimed at agreements that tended to promote litigation or restrict competition.²⁵ It was, and still is, important for courts to promote the public welfare by refusing to enforce contracts that conflict with society's moral principles while protecting the freedom to contract. Therefore, courts are often presented with public interest arguments when determining the validity of contracts and generally hold that for a contract to be void as against public policy, its enforcement must be violative of the public good.²⁶

Public policy as a means to invalidate conditional exculpatory contracts protects the public from the harms of overly broad, confounding, and complex waivers. In doing so, courts determine whether the language of the contract is inconspicuous and therefore contrary to public policy. An important consideration is whether the participant has been put on notice as to what is contained in the terms of the exculpatory agreement as well as what is ultimately being waived. Illustrated in *Atkins v. Swimwest Family Fitness Center*,²⁷ the Supreme Court of Wisconsin invalidated Swimwest's conditional exculpatory contract because Swimwest's exculpatory language was vague.²⁸ In *Atkins*, Swimwest served as a private health and fitness

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

²³ 769 N.E.2d 738 (Mass. 2002).

²⁴ See *Nat'l Bank of Com. v. Greenberg*, 258 S.W.2d 765, 767 (Tenn. 1953); see also *Wallihan v. Hughes*, 82 S.E.2d 553, 558 (Va. 1954) (describing the idea of public policy as a "will-o'-the-wisp of the law [that] varies and changes with the interests, habits, need, sentiments and fashions of the day"); *Hanks v. McDannel*, 210 S.W.2d 784, 786 (Ky. 1948) (recognizing the aim of public policy as "the protection and promotion of the public welfare, including public health and looking to the protection and advancement of morality").

²⁵ WILLIAM R. ANSON, *PRINCIPLES OF THE LAW OF CONTRACT* 286 (Arthur Corbin ed., 3d Am. ed. 1919).

²⁶ See, e.g., *Steele v. Drummond*, 275 U.S. 199 (1927).

²⁷ 691 N.W.2d 334 (Wis. 2005).

²⁸ *Id.* at 343.

2019]

COMMENT

1071

facility, equipped with a swimming pool, that was available to the public as both members and non-members.²⁹ When Dr. Charis Wilson visited this facility as part of a physical therapy and rehabilitation regimen, she was required to fill out a guest registration form before being allowed access.³⁰ Swimwest's guest registration form contained exculpatory language that shifted all liability to the guest and required but a single signature for both non-member registration as well as exculpation.³¹ After filling out the required paperwork, Wilson was last seen entering the pool by the on-duty lifeguard.³² In a matter of minutes, Wilson's body was taken from the bottom of the pool, and she died one day later.³³

In looking for guidance from an earlier Wisconsin case with a similar issue,³⁴ *Atkins* adopted a two-pronged approach to determine the validity of Swimwest's contract. Unpredictably, the first prong is not a determination of whether an activity encompasses general categories of risk, but rather whether the participant likely contemplated a specific risk before assuming all liability.³⁵ Therefore, the court first looked to whether Swimwest "clearly, unambiguously, and unmistakably inform[ed] the signer of *what* [was] being waived."³⁶ Here, the court reasoned that an ordinary participant would not have clearly understood that the guest registration form's exculpatory language applied to all others' negligent and intentional acts,³⁷ and held that the breadth of the waiver made it problematic to determine what was within Wilson's contemplation at the time she registered.³⁸

²⁹ *Id.* at 336.

³⁰ *Id.*

³¹ *Id.* at 337 ("Waiver Release Statement[:] I agree to assume all liability for myself without regard to fault, while at Swimwest Family Center. I further agree to hold harmless Swimwest Fitness Center, or any of its employees for any conditions or injury that may result to myself while at the Swimwest Fitness Center. I have read the foregoing and understand its contents.").

³² *See id.*

³³ *See Atkins v. Swimwest Family Fitness Ctr.*, 691 N.W. 2d 334, 337 (Wis. 2005). The attendant coroner listed drowning as the cause of death. *Id.*

³⁴ *Yauger v. Skiing Enters.*, 557 N.W.2d 60 (Wis. 1996) (dealing with the wrongful death of a minor at the Hidden Valley Ski Resort and the enforceability of the corresponding exculpatory agreement required by that resort).

³⁵ *See Atkins*, 691 N.W.2d at 341 (noting that Wilson most likely would not have contemplated "drowning in a four-foot deep pool with a lifeguard on duty").

³⁶ *Id.* at 339 (emphasis added).

³⁷ *See id.* at 340 (justifying this determination because Swimwest's use of the word "fault" is all-encompassing and potentially barred any non-member's claims arising under any scenario); *see also Dobratz v. Thomson*, 468 N.W.2d 654, 661 (Wis. 1991) ("Only if it is apparent that the parties, in light of all the circumstances, knowingly agreed to excuse the defendants from liability will the contract be enforceable."); *Arnold v. Shawano Cty. Agric. Soc'y*, 330 N.W.2d 773, 777-78 (Wis. 1983) (holding that if an exculpatory contract fails to express the intent of the parties "with particularity[.]" such a contract will not be enforced).

³⁸ *See Atkins*, 691 N.W.2d at 341.

The second prong asks whether the contract “alert[ed] the signer to the nature and significance of *what* is being signed.”³⁹ Again, the court held that it would be unclear to an ordinary participant whether Swimwest’s form was a guest registration, an exculpatory contract, or a hybrid of both.⁴⁰ Holding the contract unenforceable, *Atkins* reasoned that Swimwest could have required non-members to sign an exculpatory contract separate and apart from the registration form, which would have clearly identified these two documents and provided Wilson with adequate notice of the exculpation, guarding against her inadvertent assent to its terms.⁴¹ Ultimately, the court reasoned that the exculpatory language appeared to be a part of the larger guest registration and that Wilson could not have reasonably agreed to Swimwest’s exculpation.⁴²

B. *A Patchwork of Public Policy: Individualized Jurisdictional Justifications*

In New York, statutes have been enacted for the protection of the public from unfair exculpation under the belief that contracts that eliminate liability altogether are *per se* invalid.⁴³ Section 5-326 of New York’s General Obligations Law holds that exculpatory contracts that seek to exempt “pool[s], gymnasium[s], place[s] of amusement or recreation, or similar establishment[s]” from liability for negligence are void as against public policy and wholly unenforceable.⁴⁴ As a result, New York courts broadly apply this law to invalidate exculpation in several different categories of extracurricular and recreational activities.⁴⁵

Connecticut also has a unique way of invalidating exculpatory contracts that purport to waive liability from public voluntary participation in various activities. Justifying invalidation on public policy principles, Connecticut protects the public interest in voluntarily participating in various nonessential activities as well.⁴⁶ For example, *Hanks v. Powder Ridge*

³⁹ *Yauger*, 557 N.W.2d at 63 (emphasis added).

⁴⁰ *See Atkins*, 691 N.W.2d at 336.

⁴¹ *See id.* at 341.

⁴² *See id.* at 343.

⁴³ N.Y. GEN. OBLIG. LAW § 5-326 (2018).

⁴⁴ *Id.*

⁴⁵ *See Williams v. City of Albany*, 706 N.Y.S.2d 240 (N.Y. App. Div. 2000) (flag football); *Petrie v. Bridgehampton Rd. Races Corp.*, 670 N.Y.S.2d 504 (N.Y. App. Div. 1998) (dirt bike racing); *Rogowicki v. Troser Mgmt.*, 623 N.Y.S.2d 47 (N.Y. App. Div. 1995) (skiing); *Brancati v. Bar-U-Farm, Inc.*, 583 N.Y.S.2d 660 (N.Y. App. Div. 1992) (horseback riding); *Miranda v. Hampton Auto Raceway, Inc.*, 515 N.Y.S.2d 291 (N.Y. App. Div. 1987) (automobile racing); *Wurzer v. Seneca Sport Parachute Club*, 411 N.Y.S.2d 763 (N.Y. App. Div. 1978) (parachute jumping).

⁴⁶ *See, e.g., Jagger v. Mohawk Mountain Ski Area, Inc.*, 849 A.2d 813 (Conn. 2004) (recognizing the existence of the public interest in promoting the public’s participating in

2019]

COMMENT

1073

*Restaurant Corporation*⁴⁷ held that, because participation in various “recreational activities, such as snowtubing, skiing, basketball, soccer, football, racquetball, karate, ice skating, swimming, volleyball[,] or yoga” constitutes an “important and healthy part of everyday life” of a vast majority of the population, the conditional requirement of exculpation results in a violation of public policy, and therefore such contracts are void and unenforceable.⁴⁸ Overall, these jurisdictions rely, in a unique manner, on public policy as a means to protect individuals from inappropriate, overly broad, or inconspicuous exculpatory contracts.

C. *Public Policy and the Parameters of the Public Interest in Education*

Individual state constitutions require its respective governing body to provide an education for its youth,⁴⁹ thereby establishing the existence of an “overwhelming public interest in education.”⁵⁰ It is no surprise, therefore, that courts note the importance that schools play in the upbringing of children.⁵¹ While there is an indisputably clear and present public interest in education, the question remains whether that interest extends *beyond* the curriculum. As a result, there are different boundaries as to how far the public interest in education extends.

It is widely recognized that youth participation in extracurricular athletics improves students’ physical skills and abilities, and supplements their curricular development, education, socialization, and contentment.⁵² Further, the lessons that coaches foster contribute to student athletes’ persistence beyond the athletic field and, thus, positively correlate to their chances for success after graduation.⁵³ Participation in extracurricular

skiing); *Jaworski v. Kiernan*, 696 A.2d 332, 337–38 (Conn. 1997) (recognizing the existence of the public interest in promoting the public’s participation in recreational athletics).

⁴⁷ 885 A.2d 734 (Conn. 2005).

⁴⁸ *Id.* at 746.

⁴⁹ *E.g.*, N.J. CONST. art. VIII, § 3, ¶ 1 (“The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.”).

⁵⁰ *Clifton v. Pearson Educ., Inc.*, No. 11-03640, 2012 U.S. Dist. LEXIS 61569, at *29 (N.D. Cal. 2012); *see also* *Dorsett v. Bd. of Trs. for State Colls. and Univs.*, 940 F.2d 121, 125 (5th Cir. 1991) (recognizing a public interest in education); *Allen v. Scribner*, 812 F.2d 426, 432 (9th Cir. 1987) (same).

⁵¹ *See, e.g.*, *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535–36 (1925) (allowing parents to pursue private or public school options for their children and suggesting that there is no institution that is a more intimate part of our traditional life than schools).

⁵² *See, e.g.*, *The Case for High School Activities*, NAT’L FED’N ST. HIGH SCH. ASS’NS, <https://www.nfhs.org/articles/the-case-for-high-school-activities/> (last visited Feb. 27, 2019).

⁵³ *See, e.g.*, Mike Krings, *Study Shows High School Athletes Perform Better in School, Persist to Graduation More than Non-Athletes*, UNIV. KAN. TODAY (Jan. 24, 2014), <https://news.ku.edu/2014/01/15/study-shows-high-school-athletes-performed-better-school->

athletics also encourages the retention of students who would otherwise drop out of school but for their proclivity and enthusiasm for athletics.⁵⁴ Therefore, student involvement in extracurricular activities positively impacts their education, and participation should continue to be encouraged. But are these desirable results enough to justify an extension of the public interest *outside* of the classroom and onto the field?

There are few differences between the many benefits student athletes receive and the benefits conveyed by compelled physical education programs.⁵⁵ While both programs strive for students to develop the fundamental knowledge and skills necessary to continue a lifetime of healthy activity, physical education is first introduced into the curriculum during elementary school while the opportunity to participate in extracurricular athletics tends to be present only in high school.⁵⁶ Unlike physical education, high school students are not required to participate in extracurricular athletics but rather can make the decision to attend and participate in physical

persisted-graduation-more-nonApr.

⁵⁴ See *id.*

⁵⁵ Compare Grace Chen, *10 Reasons Why High School Sports Benefit Students*, PUB. SCH. REV., <https://www.publicschoolreview.com/blog/10-reasons-why-high-school-sports-benefit-students> (last updated Aug. 28, 2018), and Paige Maslen, *The Social and Academic Benefits of Team Sports*, EDUTOPIA (Dec. 29, 2015), <https://www.edutopia.org/discussion/social-and-academic-benefits-team-sports>, with Admin. Rules of Mont. 10.58.520 (2015), <http://www.mtrules.org/gateway/ruleno.asp?RN=10%2E58%2E520> (defining “physical education” as a program requiring the “demonstrate[ion of] competent motor skill performance in a variety of physical activities[,] . . . strategies to help students demonstrate responsible personal and social behaviors including mutual respect, support of others, safety, and cooperation that promote[s] positive relationships and a productive learning environment[,] . . . [and the] demonstrate[ion of] knowledge and use of instructional strategies to enhance communication among students in physical activity settings”); AL DEP’T OF EDUC., ALABAMA COURSE OF STUDY: PHYSICAL EDUCATION 2 (2009) https://web.alsde.edu/general/HPE_2009_AL_Course_of_Study_Physical_Education.pdf (recognizing skill development, cognitive development, social development, and physical activity and health as the “fundamental components necessary for achieving the goal of excellence in physical education.”); GA DEP’T OF EDUC., GEORGIA PERFORMANCE STANDARDS FOR PHYSICAL EDUCATION 5 (2008), https://www.georgiastandards.org/standards/GPS%20Support%20Docs/Physical_Education_Standards_4-30-09.pdf (outlining the components to “quality physical education[,]” including “skill development . . . regular, healthful physical activity . . . [and] improved physical fitness”).

⁵⁶ See COLO. DEP’T OF EDUC., COLORADO ACADEMIC STANDARDS: COMPREHENSIVE HEALTH & PHYSICAL EDUCATION (2009), https://www.cde.state.co.us/sites/default/files/documents/cohealthpe/documents/health_pe_standards_adopted_12.10.09.pdf; See LYNN J. HOUSE ET AL., MISS. DEP’T OF EDUC., 2013–2014 MISSISSIPPI PHYSICAL EDUCATION FRAMEWORK 4 (2013), https://www.mdek12.org/sites/default/files/Offices/MDE/Home_Page/mississippi-physical-education-framework.pdf; *The Case for High School Activities*, NAT’L FED’N ST. HIGH SCH. ASS’NS, <https://www.nfhs.org/articles/the-case-for-high-school-activities/> (last visited May 15, 2019); 2013–2014 MISSISSIPPI PHYSICAL EDUCATION FRAMEWORK 4 (2013), https://www.mdek12.org/sites/default/files/Offices/MDE/Home_Page/mississippi-physical-education-framework.pdf (last visited Feb. 27, 2019).

education in order to fulfill curricular requirements.⁵⁷ This differentiating characteristic has caused some jurisdictions to limit the extension of public policy considerations when determining the enforceability and validity of conditional exculpatory contracts in extracurricular activities.

III. THE REACH OF THE PUBLIC INTEREST IN EDUCATION

When determining whether the public interest is affected by the enforcement of conditional exculpatory contracts, courts have not yet universally adopted a clear-cut test. As a result, courts either formulate their own methods through a dissection of pre-existing approaches or cherry-pick certain factors for consideration, resulting in a patchwork of individualized enforcement.⁵⁸ The first court to lay out an analytical scheme was the Supreme Court of California in *Tunkl v. Regents of University of California*.⁵⁹ Since *Tunkl*, various jurisdictions have adopted what are known as the *Tunkl* factors when determining the outer limits of public interest.⁶⁰

Other jurisdictions refuse to invalidate conditional exculpatory contracts in the context of recreational activities under public policy considerations.⁶¹ In Maryland, *Wolf v. Ford*⁶² expressly rejected complete reliance on the *Tunkl* factors.⁶³ Instead, that court concluded that the ultimate determination of what constitutes the public interest can be made only after a consideration of the “totality of the circumstances” against the backdrop of society’s expectations.⁶⁴ While jurisdictions rely on the general rule that “[e]xculpatory agreements in the recreational sports context do not implicate

⁵⁷ See Eileen O’Brien & Mary Rollefson, *Extracurricular Participation and Student Engagement*, NAT’L CTR. FOR EDUC. STAT. (1995), <https://nces.ed.gov/pubs95/95741.pdf>.

⁵⁸ See, e.g., *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441 (Cal. 1963) (introducing a six-factor inquiry to justify its determination that a conditional exculpatory contract had adversely affected the public interest); *Wolf v. Ford*, 644 A.2d 522 (Md. 1994) (adopting a unique totality of the circumstances test); *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981) (en banc) (cherry-picking four factors from other courts that had resolved similar issues).

⁵⁹ 383 P.2d 441 (Cal. 1963).

⁶⁰ See generally *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874 (Del. Super. Ct. 2005); *Moore v. Hartley Motors*, 36 P.3d 628 (Alaska 2001).

⁶¹ See, e.g., *Henderson v. Quest Expeditions, Inc.*, 174 S.W.3d 730, 733 (Tenn. Ct. App. 2005), *overruled on other grounds by* *Copeland v. Healthsouth/Methodist Rehab. Hosp., LP*, 565 S.W.3d 260 (Tenn. 2018) (“[M]any jurisdictions have recognized that . . . recreational sporting activities are not activities of an essential nature which would render exculpatory clauses contrary to the public interest.”); *Seigneur v. Nat’l Fitness Inst., Inc.*, 752 A.2d 631, 641 (Md. Ct. Spec. App. 2000) (following the trend that “courts from other jurisdictions almost universally have held that contracts relating to recreational activities do not fall within any of the categories that implicate public interest concerns” (citations omitted)).

⁶² 644 A.2d 522 (1994).

⁶³ See *id.* at 527.

⁶⁴ *Id.*

the public interest and therefore are not void as against public policy,”⁶⁵ the determination of whether the public interest is present and affected is the first and most important step in any judicial analysis.

A. *Tunkl v. Regents of University of California*⁶⁶

Although the conditional exculpatory contract in *Tunkl* did not bar participation in extracurricular athletics, the court nevertheless laid out a suggestive rubric to identify the existence of the public interest, and indicated certain types of transactions in which exculpation would be invalid due to an encroachment of public policy.⁶⁷ Rather, *Tunkl* concerned the validity of a conditional exculpatory contract imposed upon a patient for admission to the University of California Los Angeles Medical Center (“UCLA Medical Center”).⁶⁸ Before *Tunkl* was treated, he voluntarily entered into an agreement that set forth certain conditions for his admission, among which was exculpation which released the hospital “from any and all liability for the negligent or wrongful acts or omissions of its employees. . . .”⁶⁹ *Tunkl*’s estate sought to recover damages for the personal injuries caused by the alleged negligence of the two attending physicians that ultimately resulted in his death.⁷⁰

Admitting that “no definition of the concept of public interest can be contained within the four corners of a formula,”⁷¹ *Tunkl* devised six separate categorical considerations that, if any or all exist, may justify the invalidation of conditional exculpation as against public policy: (1) whether the underlying bargain concerns an endeavor of a type generally thought suitable for public regulation; (2) whether the party seeking exculpation performs a service of great importance to the public, which is often a matter of practical necessity; (3) whether the party seeking exculpation holds itself out as willing to perform that specific service for any member of the public; (4) whether, because of the essential nature of the service(s) offered, the party seeking exculpation possessed a decisive advantage of bargaining strength against any members of the public who sought such service; (5) whether, having exercised superior bargaining power, the party seeking exculpation confronted the public with a standardized adhesion contract and provided no provision whereby an interested party had the option to purchase additional

⁶⁵ *Benedek v. PLC Santa Monica*, 129 Cal. Rptr. 2d 197, 202 (Cal. Ct. App. 2002); *see also Westlye v. Look Sports, Inc.*, 22 Cal. Rptr. 2d 781, 791 (Cal. Ct. App. 1993) (“[R]ecreational sports do not constitute a public interest under *Tunkl*.”).

⁶⁶ 383 P.2d 441 (Cal. 1963).

⁶⁷ *See generally id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 442.

⁷⁰ *Id.*

⁷¹ *Id.* at 444.

2019]

COMMENT

1077

protection against negligence; and (6) whether the party seeking the service was placed under the control of the exculpated party.⁷²

After the court determined that UCLA Medical Center's contract exhibited all of the six factors, it ruled the contract unenforceable and categorically held that all hospital-patient exculpatory contracts fall within a general category of conditional agreements which may be unenforceable as against public policy.⁷³ The Supreme Court of California justified its holding by recognizing the possibility that potential patients who may enter into exculpatory contracts with hospitals are not necessarily in a position to reject the terms of the conditional contract, and, in some cases, are not in a position to find an alternative treatment facility.⁷⁴ In all, the court stated that these contracts result in patients who have placed themselves under the complete control of the hospital and therefore have become totally subject to the risk of its carelessness.⁷⁵ Requiring patients to exculpate the hospital as a condition for eventual treatment is therefore against public policy.⁷⁶

B. *Wolf v. Ford*⁷⁷

Wolf v. Ford did not turn on the validity of an exculpatory contract involving extracurricular athletics either, but rather on the conditional exculpation of a securities investment firm by its client.⁷⁸ After receiving a settlement stemming from a lawsuit arising from an automobile accident, Wolf retained Ford, a stockbroker, with the intent to invest and preserve her money.⁷⁹ Wolf executed a contract that contained exculpatory language that exonerated Ford and his investment firm from "any and all liability for losses which may occur while [Ford is] acting on [Wolf's] behalf except for such as may result from [Ford's] gross negligence or willful misconduct."⁸⁰ Pursuant to the contract, and in the normal course of business, Ford invested Wolf's capital in various stock options.⁸¹ Upset with the associated returns of her portfolio, Wolf terminated her account and filed suit in an attempt to hold Ford accountable for his alleged negligence.⁸² Despite Wolf's

⁷² See generally *Tunkl*, 383 P.2d at 444–46.

⁷³ See *id.* at 447 (recognizing that "practical and crucial necessit[ies]" affect the public interest to the extent that patients may be in critical need of the offered service or skill of the hospital, whether private or public).

⁷⁴ See *id.*

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ 644 A.2d 522 (Md. 1993).

⁷⁸ See generally *id.*

⁷⁹ *Id.* at 524.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

contention that her prior exculpation of Ford was void as against public policy, the Court of Appeals of Maryland affirmed the trial court's holding and enforced the contract, limiting Ford's potential liability to any evidenced loss sustained by gross negligence or willful misconduct.⁸³

Maryland's highest court highlighted that the concept of the public interest is "amorphous" and difficult to apply in order to invalidate exculpatory contracts.⁸⁴ *Wolf* also expressly declined to limit its analysis to the *Tunkl* factor test because those six factors have a tendency to become "too rigid a measuring stick" when determining the existence of the public interest.⁸⁵ Although *Tunkl* warned that its factors were only a "rough outline" to guide future courts as to whether conditional exculpation affected the public interest,⁸⁶ *Wolf* seemed to take caution and indicated that strict dependence on the presence or absence of any of the *Tunkl* factors may be "arbitrary."⁸⁷ Not limiting itself to its six factors, the Court of Appeals of Maryland declined to engage in a *Tunkl* analysis and held that the ultimate determination of the existence of the public interest, and whether or not it is affected, must be decided after an examination of the "totality of the circumstances."⁸⁸

Because public policy precludes the enforcement of conditional exculpatory contracts that adversely affect the public interest, *Wolf* limited its recognition of the public interest to transactions that involve the "performance of a public service obligation."⁸⁹ Specific to its facts, *Wolf* reasoned that the securities industry is inherently risky and willing investors understand the degree of risk involved in that business.⁹⁰ *Wolf*, therefore, stands for the concept that, unless the allocation of risk between the parties to a private contract is "patently offensive," conditional exculpation is embraced under the freedom to contract in private matters.⁹¹

⁸³ *Wolf*, 644 A.2d at 525.

⁸⁴ *Id.* at 526.

⁸⁵ *Id.* at 525–26.

⁸⁶ *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444 (Cal. 1963).

⁸⁷ *Wolf*, 644 A.2d at 527.

⁸⁸ *Id.*

⁸⁹ *Id.* at 526 (listing such services as "public utilities, common carriers, innkeepers, and public warehousemen").

⁹⁰ *Id.* at 528 (reasoning that "the possibility of poor performance of the securities chosen is precisely the sort of harm that is within the contemplation of the parties at the time they entered the agreement").

⁹¹ *Id.*

IV. THE EXCULPATION OF LIABILITY INHERENT IN EXTRACURRICULAR ACTIVITIES

Although *Tunkl* and *Wolf* did not deal with extracurricular athletics, three cases have dealt with the more specific issue of the existence of the public interest and whether it is affected when a school conditions exculpation on voluntary participation in extracurricular activities.⁹² In *Wagenblast v. Odessa School District*,⁹³ the Supreme Court of Washington adopted the *Tunkl* factors to reach its conclusion.⁹⁴ Looking no further than those six factors, *Wagenblast* concluded that conditional exculpation against future negligence claims in the extracurricular context are invalid based on a violation of public policy.⁹⁵ In contrast, the California Court of Appeals discussed *Tunkl* and its six factors in *Hohe v. San Diego Unified School District*,⁹⁶ but held that its circumstances presented an “entirely different situation” because the school did not require exculpation and therefore did not withhold any service.⁹⁷ Similarly, in *Sharon v. City of Newton*,⁹⁸ the Supreme Judicial Court of Massachusetts held that because participation in extracurricular athletic programs is neither compelled by the school nor an essential element of education, the school’s requirement of an exculpatory contract as a prerequisite to voluntary participation did not offend public policy and is enforceable.⁹⁹

A. *Wagenblast v. Odessa School District*¹⁰⁰

In 1988, Washington became the first state to consider the validity of exculpatory contracts in schools as a prerequisite for participation in extracurricular athletic programs.¹⁰¹ In this consolidated case, students from different schools who desired to participate in extracurricular athletics were required to release their respective schools from any liability resulting from the ordinary negligence that arose from their voluntary participation.¹⁰² Being a case of first impression in that jurisdiction, the court primarily looked to *Tunkl* for guidance and adopted its six-factor analysis to rationalize

⁹² *Sharon v. City of Newton*, 769 N.E.2d 738, 745 (Mass. 2002); *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Cal. Ct. App. 1990); *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 970 (Wash. 1988).

⁹³ 758 P.2d 968 (Wash. 1988).

⁹⁴ *See id.* at 971–75.

⁹⁵ *Id.* at 969–70.

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

⁹⁷ *Id.* at 649.

⁹⁸ 769 N.E.2d 738 (Mass. 2002).

⁹⁹ *See id.* at 745.

¹⁰⁰ 758 P.2d 968 (Wash. 1988).

¹⁰¹ *See id.*

¹⁰² *Id.* at 969.

its exploration into whether the public interest was present and whether the contractual requirement adversely affected that interest.¹⁰³

Wagenblast examined the facts under each of the six *Tunkl* factors individually.¹⁰⁴ First, because both of the defendant schools had the ability to delegate authority over extracurricular athletics to the Washington Interscholastic Activities Association (“WIAA”), and indeed looked to the WIAA for its regulatory standards, the court held that each conditional exculpatory contract concerned a type of activity generally thought suitable for public regulation.¹⁰⁵ As to the first *Tunkl* factor, *Wagenblast* held that it had been satisfied because extracurricular athletic programs were a “fit subject for such regulation.”¹⁰⁶

Second, *Wagenblast* reasoned that extracurricular athletic programs are “part and parcel of the overall educational scheme in Washington” and held that such programs are a matter of great importance to the public.¹⁰⁷ The court justified this conclusion by the total expenditure of time, effort, and money that Washington schools spent to maintain and progress extracurricular athletic programs.¹⁰⁸ Further, the court detailed the “substantive” importance of extracurricular athletics to the community in that they “represent a significant tie of the public at large to [the educational system].”¹⁰⁹ As a result of this enthusiasm, *Wagenblast* recognized that it would be unrealistic to view extracurricular athletics as an activity entirely separate and apart from the required curriculum. In satisfying the second factor, the *Wagenblast* court made it clear that offering students the opportunity to participate in extracurricular activities is a great and important service to the public.¹¹⁰

Third, the court indicated that the schools held themselves out as willing to perform this important public service in satisfaction of the next factor.¹¹¹ *Wagenblast* justified this determination based on its understanding that extracurricular athletics are available to all students who satisfy internal eligibility standards such as maintaining academic and disciplinary good standing and having the requisite athletic skill necessary to participate at a competitive level.¹¹²

¹⁰³ *Id.* at 971–72.

¹⁰⁴ *See generally id.*

¹⁰⁵ *See id.* at 972.

¹⁰⁶ *Wagenblast*, 758 P.2d at 972.

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *Id.*

¹¹⁰ *See generally id.*

¹¹¹ *See id.* at 973.

¹¹² *See Wagenblast*, 758 P.2d at 973.

Fourth, the court held that both of the schools obtained “near-monopoly power” over extracurricular athletics due to its finding that there are few or no alternative athletic programs that possess the same attractions inherent in extracurricular sports.¹¹³ Similar to its justification for the second factor, the court held that the fourth factor was also satisfied, recognizing that athletics have grown to become of “considerable importance to students and the general public alike,”¹¹⁴ and as a result, both schools possessed distinct bargaining strength in requiring the participating student to enter into the exculpatory agreement.¹¹⁵

Fifth, the court pointed out that the schools had rejected attempts by the student athletes to modify the terms of the conditional exculpatory agreements.¹¹⁶ In so finding, the court held that each school exercised superior bargaining power by offering its students an adhesion contract.¹¹⁷ As a result of the procedures put in place, no student athlete was allowed to voluntarily participate in any extracurricular athletic activity without first releasing the school of liability by signing the contract on a take-it-or-leave-it basis.¹¹⁸ Having admitted to an “unwavering policy” concerning the language and terms of the schools’ conditional exculpation, *Wagenblast* had little difficulty justifying the satisfaction of the fifth *Tunkl* factor.¹¹⁹

Lastly, *Wagenblast* held that the student athletes were placed under the control of their schools, and as a result, were subjected to the school’s carelessness.¹²⁰ Recognizing that schools owe a duty of care to students to anticipate foreseeable dangers and take reasonable precautions to protect them while under their control, the court reasoned that the schools subjected the students to certain foreseeable risks that resulted in a breach of that duty of care.¹²¹

After a short analysis of the six *Tunkl* factors, *Wagenblast* held that both exculpatory contracts exhibited all six factors.¹²² Therefore, because the court found that the public interest was present and adversely affected, the two exculpatory contracts were ruled unenforceable.¹²³

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *See id.*

¹¹⁶ *See id.*

¹¹⁷ *See id.*

¹¹⁸ *See Wagenblast*, 758 P.2d at 973.

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *See id.*

B. *Hohe v. San Diego Unified School District*¹²⁴

Two years after Washington's decision in *Wagenblast*, California was tasked with a similar determination of whether public policy had been violated when a school conditioned student participation in an extracurricular activity on its exculpation.¹²⁵ *Hohe*, a fifteen-year-old high school student, was required to enter into two separate exculpatory contracts in order to attend a hypnotism show sponsored by her school.¹²⁶ After she was selected from a group of student volunteers, *Hohe* was hypnotized and sustained multiple injuries after sliding from her chair onto the ground throughout the demonstration.¹²⁷

The court ultimately rejected *Hohe's* argument that the exculpatory contracts required by her school violated public policy.¹²⁸ Looking to *Tunkl*, the court stated that the facts of the case presented an entirely different situation because, unlike *Tunkl*, the public interest was absent and therefore could not be implicated.¹²⁹ Citing to the six *Tunkl* factors, *Hohe* reinforces that "[n]o public policy opposes private, voluntary transactions in which one party . . . agrees to shoulder a risk which the law would otherwise have placed upon the other party."¹³⁰

After considering the language and scope of the two conditional exculpatory contracts at issue, the court indicated that invalidation would cut against public policy and highlighted the school's apprehension and cautionary steps, which resulted in the various procedures put in place to protect *Hohe* and limit its own exposure to liability.¹³¹ Unlike the view expressed in *Wagenblast*, the *Hohe* court believed that the entire community benefits from the policies that require exculpation because such waivers enable schools to operate without the fear and omnipresent threat of overwhelming litigation costs.¹³² The court concluded that because *Hohe* and her father agreed to shoulder the risks of injury in two separate exculpatory agreements, public policy did not bar the transfer of liability and held each of the school's exculpatory contracts enforceable.¹³³

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

¹²⁵ *See id.* at 648.

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.* at 649.

¹²⁹ *See id.*

¹³⁰ *Hohe*, 274 Cal. Rptr. at 649 (citing *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 446 (Cal. 1963)).

¹³¹ *See id.* ("The public as a whole receives the benefit of such waivers so that groups such as Boy and Girl Scouts, Little League, and parent-teacher associations are able to continue.").

¹³² *Id.* ("Every learning experience involves risk.").

¹³³ *See id.*

C. *Sharon v. City of Newton*¹³⁴

More recently, Massachusetts faced the same issue.¹³⁵ In *Sharon*, Newton North High School conditioned Sharon's participation in the cheerleading team on its exculpation from liability.¹³⁶ After she fell and fractured her arm during practice, Sharon brought suit to recoup the associated medical expenses, arguing that her school was nevertheless liable because the conditional exculpatory contract violated public policy and was unenforceable.¹³⁷

Similar to *Hohe*, *Sharon* considered policies that favored the enforcement of exculpatory contracts as well as the community's encouragement surrounding extracurricular athletic programs.¹³⁸ The court noted that shifting the foreseeable risk of negligently caused injury onto a student athlete as a condition of participation in a potentially dangerous activity "ordinarily contravenes no public policy" and that the enforcement of such exculpation was consistent with Massachusetts law.¹³⁹

In line with *Tunkl*, and having further considered the facts of the case against the backdrop of societal expectations, *Sharon* pointed out that the school's exculpatory contract provided Sharon with the option to purchase supplemental accident insurance.¹⁴⁰ The court also noted that the school's exculpatory contract was "clearly labeled" and filled out by Sharon with the distinct purpose of ensuring her participation as a member of the Newton High School cheerleading team.¹⁴¹ Looking to whether the school possessed a decisive advantage of bargaining strength against interested student athletes,¹⁴² the court nevertheless reasoned that so conditioning a student athlete's voluntary participation in a non-essential, extracurricular activity is enforceable.¹⁴³ Through its analysis, *Sharon* ultimately adopted a totality of the circumstances approach and held that the public interest was not offended by the school's requirement that an exculpatory contract be a prerequisite to

¹³⁴ 769 N.E.2d 738 (Mass. 2002).

¹³⁵ *See id.* at 744.

¹³⁶ *Id.* at 741.

¹³⁷ *Id.* at 741–42.

¹³⁸ *Id.* at 744.

¹³⁹ *Id.* at 745.

¹⁴⁰ *See Sharon*, 769 N.E.2d at 743 (indicating that the plaintiff explicitly declined to purchase the insurance); *see also* *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 445 (Cal. 1963) (referencing *Tunkl* factor five).

¹⁴¹ *Sharon*, 769 N.E.2d at 743.

¹⁴² *See Tunkl*, 383 P.2d at 445 ("As a result of the essential nature of the service, in the economic setting of the transaction, the [school district] possesses a decisive advantage of bargaining strength against [the student] who seeks [its] services.").

¹⁴³ *See Sharon*, 769 N.E.2d at 744; *see also* *Minassian v. Ogden Suffolk Downs, Inc.*, 509 N.E.2d 1190 (Mass. 1987).

voluntary participation its cheerleading team.¹⁴⁴

V. A CALL FOR UNIFORMITY

It is the prerogative of the states to decide whether the public interest is present when students voluntarily participate in extracurricular activities. As a result, there may never be uniformity on that front. Washington's individual analysis of the six *Tunkl* factors set forth in *Wagenblast* provides a short but persuasive stage for other courts.¹⁴⁵ *Wagenblast's* limited analysis, however, too narrowly focused its examination of the facts as they fit into the six *Tunkl* factors instead of considering other circumstances outside of the *Tunkl* universe. Until there is consistency in the way courts determine the existence of the public interest, and whether or not that interest is affected, two competing views will persist. It is my position that a third method—a hybrid of *Tunkl's* six-factor approach and *Sharon's* totality of the circumstances analysis—could resolve this issue and preserve the popularity and availability of extracurricular athletic programs while protecting schools' interests.

A. *Washington's Analysis in Wagenblast*

In all, *Tunkl's* six-factor analysis steers courts in the right direction when deciding whether a public interest is present and affected. Parts of Washington's analysis, however, are flawed. *Wagenblast's* inquiry of factors one,¹⁴⁶ three,¹⁴⁷ and six¹⁴⁸ is sound. Consideration of the legislative enactments which granted each of the schools "the authority to control, supervise, and regulate the conduct of interscholastic athletics,"¹⁴⁹ made it clear that *all* extracurricular athletic programs were a fit subject for public regulation in satisfaction of the first factor. Similarly, there was no argument against fulfillment of the third factor because schools generally hold themselves out as willing to provide and perform the services associated with extracurricular athletic programs.¹⁵⁰ Unlike privatized athletic programs

¹⁴⁴ See *Sharon*, 769 N.E.2d at 745.

¹⁴⁵ See generally *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968 (Wash. 1998).

¹⁴⁶ See *Tunkl*, 383 P.2d at 445 (determining whether the exculpatory contract "concerns a business of a type generally thought suitable for public regulation").

¹⁴⁷ See *id.* (determining whether the school district "holds [itself] out as willing to perform this service for any [student] who seeks it, or at least for any [student] coming within certain established standards").

¹⁴⁸ See *id.* at 446 (determining whether "as a result of the transaction, the person or property of the [student athlete] is placed under the control of the [school district], subject to the risk of carelessness by the [school district] of [its] agents").

¹⁴⁹ *Wagenblast*, 758 P.2d at 972.

¹⁵⁰ See discussion *supra* Part IV.A.

which have an ability to be more selective,¹⁵¹ the extracurricular activities offered by schools are made available to *all* students, regardless of wealth, who are able to satisfy certain skill and eligibility requirements. Lastly, and in line with the inherent nature of extracurricular athletics, *Wagenblast* recognized that because student athletes are placed under the control of their schools, they are therefore subject to the risks of carelessness.¹⁵² The court's determination—that a naturally occurring incident of any sports program is that the student athlete is placed under a substantial amount of his or her coach's control¹⁵³—is undeniable.

Wagenblast's analysis of the second factor,¹⁵⁴ however, paved the way for the unnecessary invalidation of each of the schools' conditional exculpatory contracts. Had Washington extended its analysis beyond the rough outline provided by *Tunkl*, the court would have understood that, while schools undoubtedly perform a popular service by offering students the opportunity to voluntarily participate in extracurricular athletics, the importance of these extracurricular programs cannot be on equal footing with a traditional educational curriculum. It would have followed that the limited public interest in education on which the court justified its holding would not have extended outside of the classroom.¹⁵⁵ Further, because extracurricular athletics, by definition, are non-essential to a student's education, *Wagenblast* could have found that, by conditioning participation upon exculpation, the schools did not withhold any advantages from non-participating students because the same themes and benefits of extracurricular athletics are conveyed through the required curricular physical education programs. It would follow that even if the public interest in education is present within the context of extracurricular athletics, it is not strong enough to invalidate conditional exculpatory contracts rooted in public policy.

1. The Public Interest in Education Does Not Extend Beyond the Curriculum

Under *Wagenblast*, Washington's consideration of the second *Tunkl* factor consisted of an inquiry into whether such schools engaged in the performance of a service of great importance to the public.¹⁵⁶ While there is no fundamental right for a student to participate in extracurricular

¹⁵¹ Sean Gregory, *How Kids' Sports Became a \$15 Billion Industry*, TIME (Aug. 24, 2017), <http://time.com/4913687/how-kids-sports-became-15-billion-industry/>.

¹⁵² See discussion *supra* Part IV.A.

¹⁵³ See *Wagenblast*, 758 P.2d at 973.

¹⁵⁴ See *Tunkl*, 383 P.2d at 445 (determining whether the party seeking exculpation "is engaged in performing a service of great importance to the public").

¹⁵⁵ *Contra Wagenblast*, 758 P.2d at 972.

¹⁵⁶ See *id.*

programs,¹⁵⁷ it is undeniable that such activities nevertheless have educational value.¹⁵⁸ Student athletes learn lessons through practice and competition that contribute and supplement the aims and focus of their curricula. As a result of the total expenditure of time and effort by both schools and student athletes alike, *Wagenblast* held that extracurricular athletics are “part and parcel” of a school’s educational scheme and found no difference between the classes taught inside of classrooms and the lessons learned on the fields in which the students were injured.¹⁵⁹

This conclusion is misguided. While extracurricular athletic programs are undoubtedly attractive to students and positively correlate with retention and graduation statistics, research shows that the intensive and excessive training inherent in extracurricular athletics can serve as an obstacle for academic advancement.¹⁶⁰ Further, differentiating characteristics between required curricular courses and voluntary extracurricular activities also provide insight as to why the public interest in education does not extend to extracurricular activities. For example, both athletic and academic extracurricular activities are nothing more than a supplement of the formal knowledge acquired within the classroom.¹⁶¹ Unlike its curricular counterparts, extracurricular activities are not graded and convey no academic credit toward the pursuit of graduation. In addition, extracurricular activities traditionally take place before or after the school day. It was a stretch for *Wagenblast* to find no differentiating characteristics between the curricular and extracurricular schemes of Washington’s schools and hold that there is a present public interest in extracurricular activities powerful enough to invalidate the conditional exculpatory contracts at issue in that case.

¹⁵⁷ See generally *Commonwealth by Packel v. Pa. Interscholastic Athletic Ass’n*, 334 A.2d 839, 842 (Pa. Commw. Ct. 1975); see also *Darrin v. Gould*, 540 P.2d 882, 890 (Wash. 1975).

¹⁵⁸ See *Sherwood v. Moxee Sch. Dist. No. 90*, 363 P.2d 138, 144 (Wash. 1961) (Hill, J., concurring).

¹⁵⁹ *Wagenblast*, 758 P.2d at 972.

¹⁶⁰ See *Practical Considerations on Sport in Education*, SPORTANDDEV.ORG, <https://www.sportanddev.org/en/learn-more/education-and-child-and-youth-development/practical-considerations-sport-education-0> (last visited Feb. 27, 2019).

¹⁶¹ See, e.g., *NYSPHSAA, Inc. Bylaws and Eligibility Standards*, N.Y. ST. PUB. HIGH SCH. ATHLETIC ASS’N, INC., <http://www.nysphsaa.org/Portals/0/PDF/Handbook/2014-2015%20Handbook/ByLaws%20and%20Eligibility%20Standards%202014-2015%20Handbook%209-13-14-2.pdf> (last visited Feb. 27, 2019); *Eligibility Rules*, PA. INTERSCHOLASTIC ATHLETIC ASS’N, INC., <https://www.piaa.org/schools/eligibility/> (last visited Feb. 27, 2019).

2. Extracurricular Activities do not Enjoy the Benefit of the Public Interest

Washington's analysis of the fourth *Tunkl* factor inquired into whether each school possessed a decisive advantage of bargaining strength against the students seeking to participate in the extracurricular activities being offered.¹⁶² In the most genuine way, extracurricular athletics strengthen and unite the public through athletics because players and fans represent their communities in solidarity. Similar to collegiate and professional sports, community enthusiasm is what drives many extracurricular athletic programs and has established some of the longest rivalries in the United States.¹⁶³ Even so, extracurricular athletics do not rise to affect the public interest in education because they are nonessential.¹⁶⁴ *Wagenblast* notes that schools have a "near-monopoly power" on athletic programs and that, in most instances, no alternative program of organized competition exists.¹⁶⁵ That is simply not the case.

Generally, physical education is a requirement for all schools in the United States.¹⁶⁶ Similar to extracurricular athletics, physical education allows students to engage in the daily recommended amount of physical activity, and enables them to interact in a way that regular classrooms cannot.¹⁶⁷ For example, physical literacy—a concept on which the national physical education standards are based—promotes the development of competence and confidence in a wide variety of physical activities.¹⁶⁸ Students would be at a great disadvantage if schools did not provide a requisite physical education that conveyed aptitude with respect to motor skills, movement patterns, and other personal and social behaviors. While many students cannot afford private athletic programs where exculpatory releases may not be required,¹⁶⁹ schools are nevertheless able to convey the

¹⁶² *Wagenblast*, 758 P.2d at 973.

¹⁶³ See Sarajane Cedrone & Geoff Serra, *The Nation's Oldest High-School Football Rivalry*, CONN. EXPLORED (Apr. 21, 2016), <https://www.ctexplored.org/the-nations-oldest-high-school-football-rivalry/>.

¹⁶⁴ *Extracurricular*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (Frederick C. Mish et al. eds., Merriam-Webster, Inc. 11th ed. 2003).

¹⁶⁵ *Wagenblast*, 758 P.2d at 973.

¹⁶⁶ Carrie Soucy, *States that Require Physical Education*, <https://study.com/academy/popular/states-that-require-physical-education.html> (last visited Apr. 2019).

¹⁶⁷ Grant Shoffstall, *Why Do Student Athletes Have to Take Gym Class?*, DAILY AM. (Jan. 27, 2016), https://www.dailyamerican.com/entertainment/highschoolhighlights/why-do-student-athletes-have-to-take-gym-class/article_db445a95-bbe4-588b-9ebc-3dec6ca15134.html.

¹⁶⁸ See *National PE Standards*, SHAPE AMERICA—SOCIETY OF HEALTH AND PHYSICAL EDUCATORS, <https://www.shapeamerica.org/standards/pe/> (last visited Feb. 27, 2019).

¹⁶⁹ *Wagenblast*, 758 P.2d at 973.

same educational benefits to students who opt not to participate in extracurricular athletics as a result of requiring physical education in their curricula.

B. *The Relationship Between Extracurricular Athletics and the Public Interest*

Cautioned by *Wolf v. Ford*,¹⁷⁰ *Wagenblast* adopted the *Tunkl* factors but did not heed Maryland's suggestion that those six considerations should not be dispositive, but rather used as a "rough outline" to guide the court's determination of which exculpatory provisions could be found unenforceable.¹⁷¹ Ultimately, *Wagenblast* failed to conduct any other type of analysis or consider other factors outside of *Tunkl*,¹⁷² and its holding is based on this deficiency.

Thankfully, a more thorough analysis was conducted by the court in *Sharon* where Massachusetts did not limit its examination, but instead looked to other relevant considerations in conjunction with a *Tunkl* analysis.¹⁷³ In doing so, *Sharon* noted that it also considered the important policies of the state when analyzing public policy arguments.¹⁷⁴ Through a unique approach, *Sharon* considered the Commonwealth's longstanding tradition of favoring enforcement of exculpatory contracts.¹⁷⁵ Here, the court recognized that "[a] party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence."¹⁷⁶ *Sharon* also looked to *Cormier v. Central Massachusetts Chapter of the National Safety Council*,¹⁷⁷ which stands for the proposition that placing the risk of a negligently caused injury on the injured participant "as a condition of that person's *voluntary choice to engage in a potentially dangerous activity*" usually does not infringe upon the public policy of Massachusetts.¹⁷⁸

Another distinctive consideration was *Sharon's* reflection upon the Commonwealth's encouragement of the availability of youth-based extracurricular athletic programs. The court noted that such encouragement is embodied in legislation which exempts providers from liability for

¹⁷⁰ 644 A.2d 522 (Md. 1993).

¹⁷¹ *Wagenblast*, 758 P.2d at 972–73; *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444–45 (Cal. 1963).

¹⁷² *Wagenblast*, 758 P.2d at 972–73.

¹⁷³ *See generally Sharon v. City of Newton*, 769 N.E.2d 738, 743 (Mass. 2002).

¹⁷⁴ *See id.* at 744.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.*

¹⁷⁷ 620 N.E.2d 784 (Mass. 1993).

¹⁷⁸ *Id.* at 786 (emphasis added).

2019]

COMMENT

1089

negligence.¹⁷⁹ Finally, while considering Sharon's argument that if the exculpatory contract were enforced, there would be no mechanism in place to prevent Massachusetts from requiring exculpation for simply allowing a child to attend school, the court indicated that extracurricular athletics are "neither compelled nor essential," and that "such a comparison does not necessarily follow."¹⁸⁰

My position is that *Sharon* stands for the correct view that the public interest, in no way, is affected by the regulation of extracurricular athletics on the condition that liability be shifted from the school to the student athlete. *Wagenblast* would have come to a different conclusion had the court ventured beyond the boundaries of the suggestive factors laid out in *Tunkl* because the public interest, if any, associated with extracurricular athletics is not comparable to the public interest in education. Instead, *Wagenblast* disposed of this discussion in one short paragraph,¹⁸¹ reflecting the lack of legal justification for its most important finding.

VI. CONCLUSION

Unless the party seeking exculpation is performing a public service obligation¹⁸² or an essential service,¹⁸³ it is difficult to determine whether the public interest is present and would be adversely affected through the introduction of a conditional exculpatory contract.¹⁸⁴ Just as electricity, heat, and hot water qualify as a service of practical necessity to the public, and therefore are worthy of protection by the public interest, so too does education.¹⁸⁵ It does not automatically follow, however, that the public interest in education extends to extracurricular athletics. "[M]erely possessing inherent allure" does not elevate extracurricular activities into the necessary categories of a public school education itself.¹⁸⁶

¹⁷⁹ *Sharon*, 769 N.E.2d at 747 (noting that organizations that offer and run extracurricular athletics programs for minors without imposing a fee are exempt from liability for negligence).

¹⁸⁰ *Id.* at 745 (emphasis added).

¹⁸¹ See *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 972 (Wash. 1988).

¹⁸² See *supra* Part III.

¹⁸³ See *Sharon*, 769 N.E.2d at 745 (listing examples such as medical attention, housing, and public utilities).

¹⁸⁴ See *Wolf v. Ford*, 644 A.2d 522, 526 (Md. 1994).

¹⁸⁵ See *Recent Cases: Negligence—Exculpatory Clauses—School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics—Wagenblast v. Odessa School District*, 102 HARV. L. REV. 729, 734 (1989).

¹⁸⁶ *Id.* at 34–35.