# SELLING AND ABANDONING LEGAL RIGHTS

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# Selling and Abandoning Legal Rights

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*Abstract*: Legal rights impose concomitant legal burdens. This paper considers the valuation and disposition of legal rights, and legal burdens, when courts cannot be relied upon to perfectly enforce rights. Because courts do not perfectly enforce rights, victims suffer some loss in the value of their rights depending on the degree of underenforcement. The welfare implications of trading away and abandoning rights are examined. Victims do not necessarily trade away rights when and only when such trade is socially desirable. Relatively pessimistic victims (who believe their rights are weaker than injurers do) trade away rights too cheaply. Extremely pessimistic victims abandon their rights. Implications for the enforceability of waivers, discrimination in courts, and legal ethics are discussed.

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# 1. Introduction

As Bentham noted, legal rights impose concomitant legal burdens.[1] In other words, legal rights are meaningless unless they impose burdens on others to respect or conform their behavior to those rights.

This paper considers the valuation and disposition of legal rights, and legal burdens, when courts cannot be relied upon to perfectly enforce rights. To simplify, I will refer to holders of legal rights who are at risk of injury to those rights as "victims" or "potential victims," and to those who may injure victims as "potential injurers" or "injurers." Obviously, this is overly simplistic, because most actors in the real world are both potential victims and potential injurers at the same time. However, in all societies there have been identifiable classes who are unlikely to be treated solicitously by the courts, and I am particularly interested in these cases here.

Because courts do not perfectly enforce rights, victims suffer some loss in the value of their rights depending on the degree of underenforcement. Uncertain enforcement renders rights less valuable to victims. Injurers, on the other hand, gain to the extent that the burdens imposed by rights are alleviated. As the perceived risk of enforcement (litigation) declines, injurers are less likely to take care or to forbear from causing harm. If rights fall in perceived strength below the threshold necessary to induce conformance, injurers will refuse to take care to avoid harm or to forbear from intentionally causing harm.

The victim's legal right is an asset that he can choose to keep, sell, or abandon. As rights lose value or weaken, victims are more likely to trade them away, or even abandon them. Victims may trade the right whenever the payment offered is greater than the victim's valuation of the right, and will abandon a right whose value is sufficiently low. The maximum payment offered is equal to the overall burden to the injurer of conforming to the right, and the value of the right to the victim is equal to the expected loss in wealth the victim suffers by transferring the right to the injurer.

I examine the welfare implications of trading away and abandoning rights in a regime of uncertain enforcement.[2] There is a condition under which it is socially desirable (efficient) for the victim to sell a right (a waiver) to the potential injurer: specifically, whenever the deterrence benefit from enforcement, which is the difference between avoided harms and avoidance costs, is less than the total enforcement cost.[3] However, the victim will not necessarily trade his right

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[1] Bentham (1780), Chap. XVI, § 38, at 234 ("A man's condition or station in life is constituted by the legal relation he bears to the persons who are about him; that is […] by duties, which, by being imposed on one side, give birth to rights or powers on the other.").

[2] There is a substantial literature on the selling of rights in "perfect enforcement" regimes. See Cooter (1989) (economic analysis of proposed markets for tort rights), Schwartz (1989) (economic critique of Cooter proposal), Hylton (2000) (economic analysis of waiver and arbitration contracts). Radin (2014) presents fairness and rule-of-law based critiques of waivers and similar contractual provisions.

[3] This condition was first derived in Shavell (1982), in an analysis of the efficiency of litigation. Hylton (2000) derives the same condition in an analysis of waiver agreements. I use the term "total" to refer to the sum of victim

when and only when trade is socially desirable. With imperfect enforcement, private and social incentives to waive diverge. More specifically, if the victim and injurer have different perceptions on the strength of rights, their joint incentive to trade will diverge from the efficient rule. Relatively pessimistic victims (who believe their rights are weaker than injurers do) will trade away their rights too cheaply, while relatively optimistic victims will be too reluctant to trade. Extremely pessimistic victims abandon their rights.

Legal rights are obviously important because they establish entitlements that determine bargaining positions. Take, for example, the right to sue for trespass. A weakening of the right to sue for trespass not only reduces the price the potential trespass victim can set for a waiver of the right, but also reduces the value of the victim's land and the victim's asking price for any transfer of a right of access or use of the land.

Although one's first intuition may be to view the selling of a legal right as objectionable,[4] perhaps on the ground that rights and money are incommensurable, such a view is not uniformly warranted. Some potential victims may prefer a monetary payment to holding on to a particular right. And rights can be sold for payment-in-kind, such as specific performance by potential injurers of the demands of potential victims.[5]

I discuss the implications of this model for the enforceability of waivers, discrimination, and legal ethics. The obvious implication of the finding that private and social incentives to waive diverge is that courts should be wary of enforcing waiver agreements. Courts are, in fact, wary of enforcing waivers, even under low transaction cost settings.[6] This is a reasonable stance, since even victims who are fully informed as to the risk of harm, but pessimistic about their rights, will tend to trade away rights too quickly.

Another straightforward application of this model is to discrimination by courts. Discrimination is publicly observed, so that both victim and injurer know of the weakened rights held by the discriminated group. In Shakespeare's *Merchant of Venice*, no one is unaware of the discrimination Shylock will face in the courts.[7] Discrimination induces uncertainty and pessimism about rights, which results in victims trading their rights for inadequate compensation or abandoning them.

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and injurer enforcement costs. I will sometimes simply refer to this as the "cost of enforcement". I will specify "injurer's cost" or "victim's cost" to denote the enforcement (litigation) cost borne by each side.

[4] The intuition is especially strong in the extreme case of selling all of one's legal rights, which results in slavery. Blackstone argued that such a contract would be unenforceable because it is inherently unfair. See William Blackstone, Commentaries, Vol. 1, 411-412 [(1765) 1979].

[5] On "injunctive settlements" (that implement the terms sought by the plaintiff, see Hylton and Cho (2010).

[6] See, for example, Tunkl v. Regents of the University of California, 60 Cal.2d 92 (1963) (establishing *public policy* exception to enforcement of waivers). Aside from the public policy exception, there are many other reasons not to enforce waiver agreements, most falling under the heading of "transaction costs". For example, the waiver agreement may involve risks that are difficult to discern, or may be presented in a setting where the victim cannot competently assess the risks, or may involve risks heavily discounted because distant in time. For analysis of informational obstacles to waiver agreements, see Schwartz (1989).

[7] Indeed, Shylock's outrageous demand for a pound of flesh as the remedy for contract breach may have reflected not his wickedness, but his awareness of the low likelihood of getting a reasonable monetary award from the courts.

This perspective on discrimination is different from the standard Becker model (1957), where discrimination is costly to individual discriminators. Here, discrimination infects the courts, not just private individuals. Discriminatory courts are less likely to enforce the legal rights of victims. Discrimination therefore reduces the costs of injurers in dealing with victims. As discrimination and the resulting pessimism about rights worsen, injurer costs fall further. In the most severe pessimism, victims choose not to enter the courts, and abandon their rights. Such extreme pessimism likely explains instances of spectacular harm, such as racial pogroms and lynchings, where victims fail to seek immediate redress in the courts. The obvious question this generates is whether time bars (statutes of limitation and other legal rules) are appropriate when victims are hesitant to immediately use the courts.

Yet another application of the model is to conflicts of interest in lawyer-client relations. In the classic conflict, the lawyer represents both victim and injurer. Such a lawyer could profit by inducing pessimism on the part of the victim, leading him to abandon or trade away his rights, and charging the injurer for the value of the resulting immunity.[8] Alternatively, the injurer could approach the victim's lawyer and fund the pessimism campaign, or purchase confidential information on the victim. Yet another version of the problem is observed where the state weakens rights of individuals or groups through monitoring and surveillance of their lawyers.[9] This points to a novel rationale for regulating lawyer conflicts of interest and information disclosure. Such regulation may play an important role in maintaining legal rights.

The discussion of the model's implications closes with an examination of waiver incentives in a regime where courts apply a damages multiplier that optimizes precaution. It happens that the private incentive to waive is much closer to social incentive in this regime – that is, the

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[8] See Hylton (2021). There are cases of lawyers taking advantage of their clients, sometimes in collusion with an adverse party. For example, in recent news, it has been revealed that a prominent attorney in South Carolina, Alex Murdaugh, paid clients far less than the value of their settlements, taking the remainder for himself, in deals that presumably saved the paying party money as well. Here is one of several of his schemes:

> The charges stem from a settlement that Mr. Murdaugh and his insurers reached with the sons of the housekeeper, Gloria Satterfield, who died in 2018 after falling on the front steps of the Murdaugh family's rural home in Islandton, S.C.
>
> Following Ms. Satterfield's death, Mr. Murdaugh referred her two sons to a lawyer he promised would help them, the sons claimed in a recent lawsuit, but he did not disclose that the lawyer, Cory Fleming, was a close friend and former college roommate.
>
> Mr. Fleming eventually negotiated a $4.3 million settlement with Mr. Murdaugh under which Ms. Satterfield's sons, Tony Satterfield and Brian Harriott, would be paid about $2.8 million after lawyers' fees. But the sons said in their latest lawsuit that they were never told about the settlement and never received any money. Instead, according to their suit, Mr. Murdaugh had directed Mr. Fleming to send the money to him, ostensibly to set up a fund for Ms. Satterfield's adult sons. More than $3 million, the lawsuit said, wound up in Mr. Murdaugh's personal bank account.

See, Alex Murdaugh Charged With Swindling Sons of Dead Housekeeper, Nicholas Bogel-Burroughs, https://www.nytimes.com/2021/10/14/us/alex-murdaugh-housekeeper-insurance-charges.html.

[9] The monitoring of lawyers as means of suppressing legal rights has occurred in the U.S., see NAACP v. Alabama, 357 U.S. 449 (1958) (discussed in Part 4.2 of this paper). More recently civil rights lawyers have been detained in China, see Mary Lawlor, China undermining human rights by locking up rights lawyers, UN independent expert says, at https://news.un.org/en/story/2020/12/1080242; and in Russia, see Civil Rights Defenders, Russian Authorities Must Cease Raids Against Human Rights Lawyers, April 30, 2021, at https://crd.org/2021/04/30/russian-authorities-must-cease-raids-against-human-rights-lawyers/.

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divergence wedge shrinks considerably through application of the multiplier. This leads to the suggestion that a nearly optimal system of rights enforcement could be arranged through the implementation of the care-optimizing multiplier and leaving private waiver agreements to optimize litigation incentives.

Part 2 presents the basic terms of the model and explores the connection between the perceived strength of victim rights and incentives to exercise precaution (or forbear) against causing harm. Part 3 looks at incentives to sell and to abandon legal rights. The key lesson of that part is that incentives to waive rights are inherently distorted from the welfare-maximizing norm by the different perceptions among victims and injurers of the strength of victim rights. I also derive in that part the form of the multiplier that guarantees socially ideal precaution. Part 4 discusses implications of the model.

## 2. Model

I use the term victim to refer to the party who is at risk of injury, and injurer (or infringer) to refer to the party who is likely to injure the victim. Both victim and injurer are risk neutral. The injurer can reduce the risk of injury to the victim by taking care. I interpret taking care to include such activities as exercising precaution to prevent an accident, to perform on a contractual promise, or to avoid infringement of property rights.

The basic terms of the model are as follows. The loss suffered by the victim in the event of an injury is represented by $L$. The cost to infringer of taking care to avoid injuring the victim is represented by $X$. The probability of injury to the victim when the injurer does not take care is $P$. The probability of injury to the victim when the injurer does take care is $Q$, where $Q < P$. The victim's (plaintiff's) cost of litigation is $C_p$, where $C_p < L$. The injurer's (defendant's) cost of litigation is $C_d$.

Intentional injuries are included within this framework. In the case of an intentional injury, $P$ is either equal to one, or close to one, while $Q$ is either zero, or close to zero; and the injurer suffers some cost, or forgoes some gain, when he forbears from intentionally harming the victim.[10]

### 2.1 Legal Remedy

I assume, for simplicity, that liability is strict. In other words, if the victim (plaintiff) sues the injurer (defendant), the court will not inquire into the injurer's level of care.

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[10] Take the case where a business owner burns down the shop of his rival. The "cost" of care is simply the perceived gain that the injurer would forgo if he did not burn his rival's shop down. See Ellis (1983). On the economics of intent rules in the law, see Hylton (2009).

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Despite liability being strict, the victim is not guaranteed compensation. The probability of compensation is observable to the injurer and the victim only *after* the injury occurs *and* the victim initiates litigation in a particular court.

The case for assuming this structure under strict liability is simple and realistic. The specific probability of compensation after an injury generally may not observable until after the victim goes to court, for many reasons. One is that some courts (judges) may be arbitrary or discriminatory, and the plaintiff may not know whether he will face such a judge until after he enters a specific court. A second justification, not requiring the assumption of discrimination, is that there may be specific exclusions or exemptions that apply to either the plaintiff or defendant, making compensation uncertain, until litigation commences, even though liability is strict.[11] A third justification is that the plaintiff may be asserting a relatively novel legal right, or novel application of an established legal right, so that the court's likely reception of the right is unclear ex ante. A fourth justification is that causation evidence may be weaker or stronger depending on the nature of the victim's case. These justifications are neither exhaustive nor mutually exclusive.

The probability that the victim will receive an award is $\theta$. Once an injury occurs, the victim chooses whether to go to a court. If the victim goes to a court he will immediately incur the cost $C_p$, and at the same time the injurer will incur $C_d$. After the victim incurs $C_p$, the court-specific probability of an award, $\theta$, is revealed. I assume $0 < \theta_l < \theta \leq 1$, where $\theta_l L = C_p$. Thus, every victim can credibly threaten to sue his injurer after an injury occurs, because in every court the *value of the victim's legal remedy* is positive: $\theta L - C_p > 0$. To simplify the analysis I assume cases do not settle out of court after the injury.[12]

Before the injury and court appearance, neither the victim nor the injurer observe the probability of an award, but they both have beliefs regarding its distribution. The true distribution is $f(\theta)$. The victim believes that the probability of an award is governed by the density $f_p(\theta)$ and the injurer believes that it is governed by $f_d(\theta)$. It follows that before the court appearance, the

plaintiff's expectation of the probability of compensation is $E_p(\theta) = \int_{\theta_l}^{1} \theta f_p(\theta) d\theta$, and similarly

the injurer believes that the plaintiff's likelihood of compensation is $E_d(\theta) = \int_{\theta_l}^{1} \theta f_d(\theta) d\theta$. Both

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[11] For example, consider nuisance law, a species of strict liability. Courts exempt the defendant from liability when the plaintiff has "come to the nuisance". But the law on coming-to-the-nuisance is not so clear as to provide an obvious answer to every plaintiff. See Ensign v. Walls, 323 Mich. 49, 34 N.W.2d 549 (1948). For another example, consider an intentional tort such as battery. Courts exempt the defendant from liability when he has a valid self-defense justification. But the law on self-defense is not so clear as to provide an obvious answer to every battery plaintiff. See Courvoisier v. Raymond, 47 P. 284 (Colo.1896).

[12] This is a reasonable assumption, given that this model examines ex ante evaluations of legal rights and legal burdens, well before any injury occurs. If, instead, I were to treat waiver as a stage of the litigation process, this analysis would become more complicated and dependent on my assumptions about the settlement protocol and party asymmetries. I will return to this matter in part 3.1.

parties therefore believe that the expected value of the victim's legal remedy is positive. These expectations are public information.

Both $E_p(\theta)$ and $E_d(\theta)$ can be interpreted as perception indices of the strength of the victim's legal right. Full enforcement of rights entails $E_p(\theta) = E_d(\theta) = 1$. This would be a regime in which there is no discrimination, or arbitrary decision making, against the victim, and both victim and injurer know this is the case. Alternatively, this scenario might describe a regime in which there are no uncertain legal obstacles in the way of the plaintiff receiving compensation, such as legal exemptions or exclusions, or causation requirements.

The basic structure allows for the possibility of imperfections in the processing of information on the strength of rights. Otherwise, the subjective distributions of victim and injurer, $f_p(\theta)$ and $f_d(\theta)$, would be the same and equal to the true distribution. In spite of this allowance, I assume transaction costs are sufficiently low that potential trades that appear to be mutually beneficial, given the parties expectations on rights, are consummated.


2.2 Taking Care to Avoid Injury


Will the injurer take care given the compensation mechanism just set out? The injurer will take care if it is less costly to him to take care than to forgo care. If the injurer takes care, he bears: (i) the cost of taking care, and (ii), provided the victim is likely to sue, the expected liability to the victim for injury done even though the injurer took care plus the injurer's expected cost of litigation. Using the basic terms of the model, the injurer bears $X + Prob(Suit)Q(E_d(\theta)L+C_d)$, which, since the expected value of the legal remedy is positive, and suit is therefore certain, can be expressed

$$X + QE_d(\theta)L+QC_d \quad . \tag{1}$$

This is the *overall burden* of taking care. If the injurer does not take care, his expected cost is

$$PE_d(\theta)L+PC_d \ . \tag{2}$$

The injurer takes care if the overall burden of care is less than the expected cost of forgoing care:

$$X + QE_d(\theta)L+QC_d < PE_d(\theta)L+PC_d \ , \tag{3}$$

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or equivalently

$$X < (P - Q)[E_d(\theta)L + C_d] \qquad (4)$$

I assume the cost of care is less than the incremental harm avoided through care – that is, $X < (P - Q)L$. Thus, taking care is socially desirable, and if compensation were certain, that is, if legal rights were fully enforced, the injurer would always take care.

The injurer's belief regarding the strength of the plaintiff's right affects his decision to take care. The condition for taking care is equivalent to

$$\frac{X}{(P-Q)L} - \frac{C_d}{L} < E_d(\theta) \qquad (5)$$

Thus, we can define a critical threshold expectation (of the strength of the victim's right) on the part of the injurer below which the injurer refuses to take care:

$$\overline{\theta}_d \doteq \frac{X}{(P-Q)L} - \frac{C_d}{L} \qquad (6)$$

If the injurer's expectation of the strength of victim rights is less than the critical threshold expectation, $\overline{\theta}_d$, the injurer will refuse to take care, because he believes the victim's legal right is too weak for precaution to be privately cost efficient.

Note that the injurer's critical threshold expectation depends heavily on the ratio of the cost of care to the incremental harm avoided by care. This ratio is a measure of the *productivity of care*. As care becomes more productive (the ratio falls), the threshold expectation that induces care decreases.[13] In other words, as the productivity of care increases, the deterrent effect of litigation increases. This reason is that as long as some portion of the victim's harm is internalized to the injurer, the liability-reducing impact of care increases as care becomes more productive. On the other hand, as care becomes less productive, the range of potential values of the injurer's

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[13] Consider an example in which the productivity of care is high. Let $X = 20$, $L = 120$, $P = 1$, $Q = 0$, $C_p = C_d = 10$. The critical threshold expectation on the part of the injurer is $\overline{\theta}_d = 20/120 - 10/120 = 1/12$. If the injurer's expectation of the probability of victim compensation is greater than 1/12, the injurer will take care. Also, $\theta_l = 1/12$, so that $E_p(\theta) > 1/12$ and $E_d(\theta) > 1/12$. Thus, over the entire range of observed injurer expectations, injurers choose to take care in response to the threat of litigation.

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expectation that would lead the injurer to cease taking care increases.[14] In other words, the deterrent effect of litigation lessens as care becomes less productive.

In the case where the cost of care is less than the injurer's incremental cost of litigation ($X < (P - Q)C_d$), the injurer's critical threshold expectation will be negative. This means that – so long as the expected value of the legal remedy remains positive, as assumed – the injurer will take care no matter how weak he perceives the victim's right to be. This makes sense, because in this case, given that the victim always sues, the injurer would rather take care than suffer the additional cost of litigation, even if he believes the court will very likely reject the victim's claim.

2.3 Digression on Optimal Care

This is not a model of optimal care. Such a model would be normative in outlook, but this is mostly a positive account of incentives to waive legal rights. Still, the normative question is relevant to some implications of the model.

It is straightforward to see how optimal care can be achieved. Suppose the court multiplies damages in every lawsuit, with a multiplier $m$. Optimal care emerges by setting $m$ to equate the private and social incentive for care:

$$(P - Q)[L + C_d + C_p] = (P - Q)[E_d(\theta)(m^*)L + C_d] \tag{7}$$

This equality means that the incremental social cost of not taking care, which is the sum of the harm and the litigation costs, is the same as the incremental perceived private cost of not taking care. It follows that the *optimal care multiplier* is

$$m^* = \frac{1}{E_d(\theta)}\left[1 + \frac{C_p}{L}\right] \tag{8}$$

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[14] Now consider an example in which the productivity of care is low. Let $X = 100$, $L = 120$, $P = 1$, $Q = 0$, $C_p = C_d = 10$. Under these assumptions, the critical threshold expectation on the part of the injurer is $\bar{\theta}_d = 100/120 - 10/120 = 3/4$. If the injurer's expectation of the probability of victim compensation is less than or equal to 3/4, the injurer will refuse to take care. Also, $\theta_l = 1/12$, so with $E_p(\theta) > 1/12$, victims have a credible threat to sue in response to injuries. So, in this example, care is efficient, though its productivity is low, victims have a credible threat to sue, and for a wide range of injurer beliefs on the strength of victim rights, injurers refuse to take care in spite of the threat of litigation.

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Clearly, the optimal care multiplier is greater than one, so that the victim receives a supercompensatory award. Following the recommendations of Beccaria (1764), Bentham (1780), Becker (1968), and Pollinsky and Shavell (1998), the multiplier scales up the damages award by dividing by an index of the injurer's perceived strength of the victim's right. In addition, it internalizes, in the second factor, the victim's cost of litigation, since that is part of the harm imposed by the injurer on the victim.[15]

## 3. Pricing Legal Rights and Legal Burdens

The strength of the victim's legal right affects the price that he will set on the right, and his bargaining position in any setting where the right might be infringed. Take the case of a sale of the right to the injurer. The victim would seek compensation for the change in his wealth resulting from the loss of the right. The value of the victim's right depends on whether it is a strong or weak right.

Let us start by assuming that the injurer perceives the victim's right as sufficiently strong that the injurer takes care. In terms of the model, this means that the injurer believes that the victim's probability of an award is greater than the critical threshold necessary to induce precaution – that is, $E_d(\theta) > \overline{\theta}_d$. Under this assumption, the *minimum price (asking price) that the victim will set for his right* is:

$$PL - Q[L - (E_p(\theta)L - C_p)] \tag{9}$$

The first term reflects the cost to the victim after transferring the right to the injurer. The injurer, once acquiring the right, no longer takes care, so the victim suffers the expected loss *PL*. The second term reflects the cost borne by the victim when he retains the right, which is the difference between the expected harm, *QL*, and the expected value of the remedy delivered by the right, $Q(E_d(\theta)L - C_p)$.

Note that since the expected value of the legal remedy is positive, the asking price set for the victim's right is positive, which means that the victim will not abandon the right. As one would expect, the value of the victim's right increases with the expected probability of compensation and decreases with the victim's cost of litigation.

The victim will sell his right to the injurer when the victim's valuation of the right is less than the injurer's expected burden,

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[15] On the economics of multipliers in a costly legal system, see Hylton & Miceli (2005).

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$$PL - Q[L - (E_p(\theta)L - C_p)] \; < \; X + QE_d(\theta)L + QC_d \, , \tag{10}$$

or equivalently,

$$(P - Q)L - X < Q(C_p + C_d) - (E_p(\theta) - E_d(\theta))QL \tag{11}$$

This expression compares the deterrence benefit from rights enforcement through litigation (left hand side), against the expected joint gain from barring litigation (right hand side). The expected join gain from barring litigation is the excess of the expected litigation cost savings over the expected *net wealth effect of litigation*. Enforcement through litigation has a positive net wealth effect when the plaintiff is *relatively optimistic*, $E_p(\theta) > E_d(\theta)$, and therefore gains more in expectation from litigation than the injurer loses. Conversely, enforcement has a negative net wealth effect when the victim is *relatively pessimistic* about his rights, $E_p(\theta) < E_d(\theta)$.

The waiver condition above can be compared to the standard waiver condition when rights are fully enforced, that is, when $E_p(\theta) = E_d(\theta) = 1$. In that case, *waivers are exchanged when the deterrence benefit from enforcement is less than the expected cost of litigation*:

$$(P - Q)L - X < Q(C_p + C_d) \tag{12}$$

Put simply, the rights enforcement game is not worth the candle. This is also the condition, established in Shavell (1982), that governs the social desirability of litigation. Thus, *when enforcement is perfect, rights are waived when and only when litigation is socially inefficient.*

It follows that there is a divergence between private and social incentives to waive legal rights. The social incentive compares the deterrence benefit to the savings in litigation costs. The private (or joint) incentive includes the expected net wealth effect of litigation, which is merely a transfer between the parties.

When rights are not perfectly enforced, the waiver condition includes the expectations differential, $E_p(\theta) - E_d(\theta)$, analogous to that in the well-known Landes-Posner-Gould settlement model.[16] In the waiver condition here, the expectations differential serves a similar function as it does in the LPG model. A waiver is an ex ante settlement. The victim waives his right to a legal remedy against the injurer in exchange for a payment, or some sort of concession. As the victim's perception of the strength of the right increases relative to the injurer's, it becomes less likely that the injurer will be willing to offer a payment that induces the victim to waive his right.

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[16] Landes (1971), Posner (1973), Gould (1973).

If rights are not perfectly enforced, and expectations on the strength of the right differ between injurer and victim, waivers may not be exchanged in only the instances where such exchanges are socially desirable. In particular, if victims are relatively pessimistic about the strength of their rights they will discount and too readily sell their rights. Conversely, if victims are relatively optimistic they will be too reluctant, from a social perspective, to sell their rights to injurers; setting their asking prices too high. Indeed, given that the deterrence benefit is positive by assumption, if the net wealth effect of litigation – the expectations differential – exceeds the total cost of litigation, no waivers will be exchanged, regardless of the social inefficiency of litigation.

Take the relative pessimism case. In a discriminatory or arbitrary court system, victims will discount the value of their rights. This means that in contractual settings they will waive their rights for inadequate prices. Waivers could take the form of agreements not to sue, or burdensome conditions on the right to sue, such as arbitration or mediation requirements, or the exhaustion of internal remedies and processes. Contrary to the intuition that a contracting party will raise his price substantially to compensate for the risk of discrimination, in this analysis potential victims of discrimination do not raise their prices, because the underlying rights are perceived by them to be weak. One "price" a victim might pay for exercising his right to sue is the cost of retaliation; and if the underlying right is weak, a mild threat of retaliation may be sufficient to induce the victim to waive.[17]

Lastly, consider the case of imperfect enforcement of rights coupled with equal expectations on the strength of rights: $E_p(\theta) = E_d(\theta) < 1$. Here there is no anticipated net wealth effect from litigation. Victims waive rights under the same conditions – that is, efficiency – as when rights are fully enforced. Thus, if *victims and injurers have the same expectations on the strength of rights, victims will sell rights only when such transfers are socially efficient*.

In interpreting these results, especially the case of equal expectations, it should be noted that this is a positive account of the social incentive to waive. If the injurer took steps to increase the cost of litigation, the waiver condition would reflect those increased costs, suggesting waivers should be more frequent. On a normative view, this is troubling, because it suggests that waivers should be more frequent where the injurer has made litigation more costly to the victim.

This analysis assumes that the costs of litigation are all necessary and reasonable costs associated with the enforcement of rights. If the costs of litigation include additional injurer-made costs, such as retaliation, the normative implications of this model should be modified accordingly.

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[17] Alternatively, the victim might abandon the right in response to the risk of retaliation for its exercise. Take the case of a specialized position in an industry dominated by a single employer. One example is that of a professional football coach who intends to sue the National Football League for discrimination. The threat is present that the team owners will never hire such a coach again. Eric Bachman, 4 Crucial Points About the Employment Discrimination Case Against the NFL, Monday, February 7, 2022 National Law Review, Volume XII, Number 38, https://www.natlawreview.com/article/4-crucial-points-about-employment-discrimination-case-against-nfl; Ellen McGirt, Why Brian Flores will never coach in the NFL again, February 8, 2022, Fortune, https://fortune.com/2022/02/08/brian-flores-will-never-coach-nfl-again-miami-dolphins/. The threat of ostracism in the hiring process would be sufficient retaliation, especially if coupled with weak rights to begin with, to induce waiver or abandonment of rights.

Take the case of third-party retaliation, where a group threatens harm to victims who enter the courts. Such retaliatory harm is not a necessary cost of litigation, and waivers that occur in response to such threats should not be viewed as efficient. This is a point I will return to later.

3.1 Sequential Approach Alternative

Recall that I have assumed that disputes do not settle ex post. This is equivalent to assuming that victim and injurer evaluate rights and burdens on their explicit terms rather than on predictions of bargaining outcomes in a future settlement negotiation.

What are the implications of this model if waiver is viewed, instead, as the first stage in a sequence of litigation actions?

Start with the final stage of the litigation sequence, where the parties decide whether to settle. If the victim is relatively optimistic and the expectations differential exceeds the cost of litigation, there is no joint incentive to settle, so the parties litigate for sure. In this case, the right hand side of (11) is negative, while (given the starting assumption that care is efficient) the left hand side is positive, so the condition for waiver cannot be satisfied, and the victim will not waive ex ante. Suppose, instead, that at the final stage the expectations differential is less than the total cost of litigation. Now settlement is possible. If, as assumed here, transaction costs are sufficiently low that mutually beneficial settlement agreements are consummated, then the dispute settles, eliminating litigation costs. With no expected litigation costs, a waiver will occur only if care is inefficient, which contradicts the starting assumption that care is efficient. So, again, no waiver materializes.

The upshot is that *in a sequential litigation model, no waivers occur unless care is inefficient*.

This alternative approach delivers a stark result and leaves little of the initial model. Its implications are broader too. Consider, again, the condition governing the social desirability of suit, from Shavell (1982). The condition holds that suit is socially desirable if and only if the deterrence benefit exceeds the expected total litigation cost. Suit is privately desirable if the expected award exceeds the victim's litigation cost. However, if the parties have the same expectations of litigation outcomes, or if victims are relatively pessimistic, or if victims are relatively optimistic but not enough to cause the net wealth effect to exceed the total cost of litigation, then disputes settle, and no litigation costs arise. Since, under these conditions, there are no expected litigation costs in the first stage, suit is socially desirable as long as care is socially desirable.[18] The divergence between the private and social desirability of suit evaporates for the most part.

To reconcile this alternative approach with the approach taken in this model, I must assume that some features prevent the outcomes just described. One option, following Shavell (1982), is to

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[18] Shavell (1982) discusses implications of settlement. The result stated here is a direct implication of his analysis if settlement costs are assumed to be zero, instead of positive as assumed by Shavell.

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assume settlement cannot eliminate all costs; some legal expenses ("settlement costs") exist in spite of settlement. But this results in simply replacing litigation costs with settlement costs. Instead, I assume the parties have limited information and cannot reach a common estimate, in the ex ante period, of the settlement amount that would result in the final stage of litigation. Under this assumption, the implications of this model carry through even under an approach that treats waiver as merely a stage of litigation.

To be more specific, suppose that individual settlement predictions follow the Nash bargaining solution, as in Cooter and Rubinfeld (1994). However, while Cooter and Rubinfeld assume equal bargaining power, I assume unequal bargaining power, with each party assuming either a bargaining disadvantage or a bargaining advantage.

Consider first the final stage where the parties decide whether to settle. A necessary condition is a positive contract zone for settlement, which means $E_p(\theta)L - C_p < E_d(\theta)L + C_d$ must hold. If the contract zone is positive, then the victim expects the settlement to be $S_p = (\alpha)[E_p(\theta)L - C_p] + (1-\alpha)[E_d(\theta)L + C_d]$ and the injurer believes it will be $S_d = (\beta)[E_p(\theta)L - C_p] + (1 - \beta)[E_d(\theta)L + C_d]$, where $0 \leq \beta \leq 1$ and $0 \leq \alpha \leq 1$.

With equal bargaining power assumed, the weights on the separate "threat points" would be one half each, resulting in a common settlement amount prediction based on an equal split of the surplus. With unequal bargaining power assumed, the weights imply different estimates of the settlement amount, each estimate reflecting an unequal split of the surplus. Thus, $\beta > \frac{1}{2}$ is consistent with the injurer believing he has the bargaining advantage, and $\alpha > \frac{1}{2}$ is consistent with the victim believing he has the bargaining disadvantage. $\beta > \frac{1}{2}$ and $\alpha < \frac{1}{2}$ means each side believes he has the advantage and anticipates grabbing more than half of the surplus.

Working backward, knowing that settlement will be feasible in the end, a waiver is exchanged in the first stage when and only when

$$PL - Q(L - S_p) \; < \; X + QS_d, \tag{13}$$

or, equivalently,

$$(P - Q)L - X < Q(S_d - S_p). \tag{14}$$

This inequality provides a general condition governing waivers when victim and injurer predict that they will settle litigation. If the settlement amount predictions are the same, or if the plaintiff's prediction exceeds the defendant's, the victim waives his right only when care is inefficient (the default assumption is efficiency).

Substituting the specific settlement predictions, the condition for waiver is equivalent to

$$(P - Q)L - X < Q(\alpha - \beta)[(C_p + C_d) - (E_p(\theta) - E_d(\theta))L] . \qquad (15)$$

The prospects for a waiver depend on the contract zone effect (the bracketed term, positive) and the bargaining power effect, $(\alpha - \beta)$. The bargaining power effect is negative, precluding waiver as long as care is efficient, if both sides believe they have the bargaining advantage. The bargaining effect is definitely positive if both sides believe they have the bargaining disadvantage, and may be positive if at least one side believes he is disadvantaged.

The bargaining power effect dampens the influence of the contract zone on the range of waivers observed. For example, if $\alpha = \frac{3}{4}$ and $\beta = \frac{1}{4}$ (both believe disadvantaged), then the bargaining power effect shrinks the effective contract zone by half. Waivers will involve less efficient areas of enforcement.

The claims of this model, developed in the previous part under the assumption that cases do not settle, carry through under this sequential version. The condition governing the joint incentive to waive derived in the previous part, (11), is just a special case of (15) with no bargaining power $(\alpha = 1, \beta = 0)$.

Of special interest in the case where the injurer has the bargaining advantage. Some courts have said that they are less likely to enforce a waiver in this case.[19] But this model suggests no special concern for the case where the injurer has the bargaining advantage. As the bargaining power of the injurer increases, waivers involve less efficient areas of enforcement, but this is no justification, standing alone, for refusing to enforce them.

3.2 Injurers Perceive Rights as Weak

In the foregoing discussion I assumed that the injurer believes rights are sufficiently strong that he takes care. Now suppose this is not the case; that is, suppose the injurer's expectation on the strength of the victim's right is below the critical threshold that induces care, $E_d(\theta) < \bar{\theta}_d$ . The injurer refuses to take care because he perceives the victim's right as too weak to make care privately cost efficient.

Given the injurer's refusal to take care, the most that he will pay for a waiver from the victim is

$$PE_d(\theta)L + PC_d \qquad (16)$$

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[19] See, for example, Tunkl v. Regents of the University of California, 60 Cal.2d 92 (1963).

What price will the victim set for a waiver of his right to a legal remedy? Since the injurer will not take care, the minimum asking price for a waiver is

$$PL - P[L - (E_p(\theta)L - C_p)] \tag{17}$$

or equivalently,

$$P[E_p(\theta)L - C_p] \ . \tag{18}$$

The waiver will be exchanged when and only when

$$P[E_p(\theta)L - C_p] \ < PE_d(\theta)L + PC_d \ . \tag{19}$$

Thus, the condition governing waivers is now

$$(E_p(\theta) - E_d(\theta))L < C_p + C_d \ , \tag{20}$$

which is the familiar Landes-Posner-Gould settlement condition. This is not surprising given that waivers are, in essence, ex ante settlements. The waiver itself has no bearing on the injurer's incentive to take care in this case. The only effect of a waiver is to determine whether the parties remain free to enter the "betting forum" of the court if an injury should occur. This suggests the LPG analysis is somewhat broader than its application to trial settlements. In a setting where litigation does not affect incentives for care, ex ante waiver incentives are governed by the same considerations that govern ex post settlement incentives.[20]

Since litigation does not affect the incentive to take care in this scenario, all litigation is inefficient. It generates additional costs (litigation) without influencing the incidence of the underlying harmful conduct.[21] The socially efficient outcome entails waiver of rights. However, not all victims waive their rights. If victims are relatively optimistic, to a sufficient degree, the parties will not enter into waiver agreements, and litigation will occur. If victims are relatively

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[20] The term "waiver" is sometimes applied in settings that do not seem appropriate. There are, for example, "waiver agreements" entered into *after* the injury, as in the case of an employment separation agreement that includes a "waiver" of claims for past harms. Such post-injury waivers are better viewed as ex post settlements. Of course, they are governed by the LPG settlement condition.

[21] On the welfare considerations around litigation and settlement, see Spier (1997).

neutral or pessimistic, they will waive, and the outcome will be one in which injurers take no care and victims do not litigate. However, this is not the same as abandonment of rights. Waiving victims still view rights as valuable in this scenario, but choose to waive because the ex ante value of the right is less than the ex ante burden of the injurer.

3.3 Abandonment of Rights

Throughout I have assumed that victims are sufficiently optimistic about the strength of their rights that they regard the right to a legal remedy as valuable – that is, $E_p(\theta)L - C_p > 0$. Hence, every victim goes to court after an injury.

Here I want to consider two changes in the model that would result in victims perceiving their rights as valueless. The first change to consider involves expectations on the probability of a compensatory award, $\theta$. Instead of assuming $0 < \theta_l < \theta \le 1$ (where $\theta_l L = C_p$), as before, now assume $0 < \theta \le 1$. The perception indexes regarding the strength of victim rights are now $E_p(\theta) = \int_0^1 \theta f_p(\theta) d\theta$ and $E_d(\theta) = \int_0^1 \theta f_d(\theta) d\theta$.

Suppose victims believe that the regime is one of sporadic enforcement of rights, so that the victim's expectation falls below the minimum threshold required for the legal remedy to have positive value – that is, $E_p(\theta) < \theta_l$. This might occur because the regime is actually one in which there is weak enforcement, for example where courts are hostile to victims. Alternatively, this might occur because victims have been led to believe that courts are unlikely to enforce legal rights, whatever the truth of the matter.

Since the expected value of the legal remedy is negative, no victim brings a suit in response to an injury. Given that the expectations are public, the injurer knows that no victim will find it rational to sue, and therefore the cost of not taking care, $Prob(Suit)[PE_d(\theta)L+PC_d]$, is equal to zero (because $Prob(Suit) = 0$), and the injurer will not take care. Moreover, since there is no threat of a lawsuit, the injurer will not offer a positive price for a waiver.

This scenario appears as one in which victims perceive their rights to be worthless, and abandon them. Of course, the central problem is that victims perceive courts to be sufficiently hostile, and rights correspondingly weak, that the litigation threat loses credibility.

If victims could bind themselves to file suit,[22] in spite of the weakness of rights, the outcome might be different. The asking price for the right (9) could be positive, in spite of the negative expected value of the remedy. The reason is that the victim could be better off retaining his threat to sue, even though negative value, than relinquishing the threat and suffering the

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[22] The only binding mechanism available in the law is the class action device. The class action is in play when there are numerous injuries generated by the same injurious event or technology. Although class actions convert negative value one-on-one claims into positive value aggregate claims, when there is heterogeneity among victims it is possible to have negative value claims within the pool. This paper examines injuries in the one-on-one scenario inappropriate for class actions.

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consequent greater risk of harm. Indeed, if the avoided harm due to the threat of suit is greater than the expected cost of litigation to the victim, that is, $(P - Q)L > QC_p$, then the asking price is never negative even though the expected value of the remedy may be negative. However, in the absence of a precommitment to sue, the injurer knows that suit is irrational for the victim ex post, and therefore has no reason to pay for a waiver ex ante.[23]

The second alteration of the model that could generate the outcome where rights are treated by victims as valueless involves the introduction of additional costs associated with litigation, such as retaliation against victims who go to court. It should be clear that if the cost of retaliation is sufficiently high, the expected value of the legal remedy could turn negative, rendering the threat to sue noncredible.

## 4. Implications

This model of the valuation of legal rights offers several messages. First, the perceived strength of rights affects victims' perceived value of those rights, and the incentives of injurers to take care to avoid infringing rights. As victims perceive legal rights as less valuable, they will be more willing, or more vulnerable, to trade those rights away, or even abandon their rights. As injurers perceive the rights of victims as weaker, they take fewer precautions to avoid harming victims, and become less willing to forgo any gain in connection with harming victims.

Second, socially desirable waivers occur when the deterrence benefit from enforcing a right is less than the expected cost of enforcement. However, divergent perceptions of injurers and victims regarding the strength of victim rights can distort joint waiver incentives away from the socially desirable standard – even assuming transaction costs are zero. The key factor driving this distortion is the perceived net wealth effect of litigation when expected court outcomes are divergent. This perceived net wealth effect pushes the parties toward litigation (away from waiver) if the victim is relatively optimistic and away from litigation (toward waiver) if the victim is relatively pessimistic.

Third, pessimism harms victims. Potential victims may inefficiently waive or even abandon their rights because they are relatively pessimistic about the strength of their rights. Thus, in contractual settings they may too readily accept compensation, explicit or implicit, for waiving their right to a remedy against the injuring party. And whether or not transaction costs are low, pessimistic victims may be persuaded to forgo their rights in response to threatened retaliation for asserting them.

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[23] One possibility not discussed so far is the option the victim has to pay the injurer for an ex ante fee-shifting agreement, similar to the ex post agreement analyzed in Donohue (1991). Under such an agreement, the victim would pay the injurer to assume the victim's litigation expense should he decide to sue in the future. The condition governing such an agreement is precisely the same as (11), and the analysis would be repetitive. However, the likelihood of such an agreement, at the behest of the victim, seems slim.

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Where injurers perceive victim rights as so weak that they no longer take care, relatively pessimistic victims will waive their rights, resulting in an outcome of no litigation and no precaution (or forbearance from intentional harm).  Under the same condition, optimistic victims will litigate, but such litigation cannot induce injurers to take care.

When victims are extremely pessimistic about the strength of their rights, they will not use the courts, effectively abandoning their rights.  Injurers will not take care, or offer anything in exchange for waivers, given that there is no threat of litigation.

These results have implications for the desirability of enforcing waiver agreements, and broader matters such as discrimination.  On the enforceability question, this model raises doubts about the desirability of enforcing waiver agreements even in the best-case, zero-transaction-cost setting – and here I use the term waiver agreements to refer broadly to all seemingly-accepted conventions that effectively prohibit litigation.  The hostility courts show toward enforcing waivers may be warranted.  Uncertainty and pessimism about the strength of legal rights can generate waivers in settings where it would be socially preferable for victims to retain their rights.

4.1 Discrimination

The model has implications for the effects of discrimination on legal rights.  Victims who are subject to discrimination in society, including in the courts, will tend to be pessimistic about the value of their legal rights.  Injurers can weaken rights further by enhancing the perception of discrimination on the part of victims.  Victims who believe their rights are weak, because of unequal treatment in the courts, will tend to trade those rights away for little compensation, or even abandon their rights.  These observations generate additional implications.

Discrimination, rather than being a "taste" or byproduct of statistical inferences (Becker, 1957; Phelps, 1972), serves a concrete function, which may help explain its prevalence in many societies.  In interactions between victim and injurer, discrimination reduces the burdens created by legal rights.  Injurers have incentives to foster discrimination in the courts in order to reduce the costs imposed by legal rights and the asking prices for legal rights that are purchasable or appropriable.  In social interactions and general contract settings, bargaining positions and "threat points" of victims are lessened by discrimination in the courts, and the expectations it generates.  At the same time, the superficial framework of legal rights remains intact, and fully accessible to injurers should they need them.

The model provides a perspective for understanding cases where discrimination victims have not asserted their legal rights.   One case is the 1921 racist massacre of black citizens in Tulsa, Oklahoma.  The massacre resulted in the destruction of more than 1,000 homes and a death toll

as high as 300.[24]  One class action compensation claim, brought in 2004, was dismissed by the court because of the amount of time that had passed since the incident.[25]  The massacre involved the aid of city officials.  The relatively small immediate wave of litigation – roughly 100 lawsuits, none successful[26] – reflected the hostility of local courts to black citizens at the time, rendering their legal rights valueless and resulting in the abandonment of those rights for many.  As time passed, additional legal hurdles, such as identification of injurers, contributed to weaken legal rights further.

Importantly, the perceived weakness of legal rights held by black American citizens, over the period of time after slavery and up to the 1960s, could explain the incentives of racist mobs to attack in the first place.   The same perceptions, rationally based, generated the numerous incidents of lynching, and the apparent impunity of injurers who participated.

This model lays out the process by which legal rights are rationally waived, conceded, or abandoned.  It obviously calls into question applications of time bars (statutes of limitation, doctrine of laches, or estoppel, or prescription of rights) in settings where victims have been rationally pessimistic about rights.


4.2 Lawyers and Clients


Lawyers play an important role in shaping perceptions of the strength of legal rights.  This model provides an insight on the regulation of lawyers' actions.

Take the *conflict of interest* problem.  In the classic conflict, the lawyer serves both victim and injurer.  In the course of advising both, the lawyer could persuade the victim that his legal rights are weak.  The beneficiary of such an effort would be the injurer, who would gain by being relieved of the burden of taking care (or of forbearing from causing harm).  In the worst-case scenario, the lawyer could profit by derogating victim rights and charging injurers for the full value of the resulting legal immunity.

There are numerous variations on this worst-case scenario.  The lawyer could severely diminish the value of the victim's right by passing on confidential information to the injurer.  For example, in a setting of discrimination or of sexual harassment, the lawyer could pass on information that would enable the injurer to impeach the credibility of the victim – say, by arguing that the victim could have done more to avoid harm.  The same holds for any tort claim where the injurer could assert a contributory negligence theory.

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[24] See, e.g., History.com, Tulsa Race Massacre, https://www.history.com/topics/roaring-twenties/tulsa-race-massacre.

[25] Alexander v. State of Oklahoma, Case No. 03-C-133-E (N.D. Okla. Mar. 19, 2004); Alexander v. Oklahoma, 382 F. 3d 1206 (10th Cir. 2004), cert denied Alexander v. State of Oklahoma, 544 U.S. 1044 (2005).

[26] Alexander v. Oklahoma, 382 F. 3d 1206, 1218 (10th Cir. 2004).

In *Andrew Corp. v. Beverly Mfg. Co.*,[27] the same law firm represented the patentee and the patentee's rival, who was seeking to patent a competitive substitute to the patentee's technology. This presented the obvious risk that the patentee's confidential information on the validity of its patent claims was passed on to and used on behalf of the rival in its efforts to design around the patentee's claims.[28]

The lawyer could weaken the perceived value of victim rights, through false persuasion of the victim, to enable the injurer to purchase those rights more cheaply in a waiver agreement, or some other agreement in which the victim sells the right to bring a legal claim (for example, employment severance, arbitration agreement, or settlement agreement). Thus, the situation at the start could be one in which the victim's asking price for his legal right is greater than the injurer's bid (injurer's overall burden), precluding the possibility of a waiver. After the lawyer persuades the victim that his right is weak, the victim's asking price falls below the injurer's bid, rendering the victim's right easily purchasable by the injurer, or leading the victim to abandon the right.

These observations suggest that the ethical rules governing lawyers serve an important function in maintaining the value of legal rights.[29] Lawyers are required to maintain client confidences. Lawyers are prohibited, generally, from representing parties whose interests are in conflict, though there are exceptions to the prohibition.

Returning to the problems of discrimination and unequal treatment, a predatory government, or predatory interest groups influencing a government, could severely diminish legal rights through the monitoring of lawyers. In *NAACP v. Alabama*,[30] the state of Alabama sought the business and membership records of the NAACP. Exposure of the records would reveal lawyers who had worked with the NAACP at a time when such work, in Alabama, would have put them in danger, and consequently deter those lawyers and other lawyers from working with the NAACP to prosecute civil rights claims. Similarly, the government of China, in 2015, imprisoned roughly 300 civil rights lawyers, most likely to question them on the details of their activities and persuade them – through hectoring, threats, and torture – to desist.[31] Such a mass detention signals to potential civil rights complainants that no lawyer in China can be relied upon to keep their confidences and to prosecute their claims.

4.3 Normative Remarks on Ideal Enforcement

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[27] 415 F. Supp. 2d 919 (N.D. Ill. 2006).
[28] Applying ethics rules, the court disqualified the law firm and excluded its opinion letters on the validity of Andrew Corp.'s patent claims.
[29] Hylton (2021).
[30] 357 U.S. 449 (1958).
[31] See Mary Lawlor, China Undermining Human Rights by Locking Up Rights Lawyers, UN Independent Expert Says, at https://news.un.org/en/story/2020/12/1080242 (China has mounted a "shocking" five-year assault on lawyers who stand up for human rights, putting them in prison and even torturing them).

As noted earlier, the notion of efficiency has to be treated with care in this model. The basic efficiency condition for waiving or selling a legal right compares the deterrence benefit of enforcement with the total litigation cost. Efficient waivers occur when the deterrence benefit is less than the total litigation cost. However, the cost of litigation must be understood as incorporating only necessary costs incurred in litigation. Otherwise, the injurer's own efforts to increase the victim's cost of litigation would appear to generate a social interest in additional waivers, which would be a perverse conclusion. Any costs generated by the injurer solely to deter litigation should be treated as part of the harm imposed by the injurer on the victim. Such costs should be internalized to the injurer, perhaps through a multiplier on damages.

Let us reconsider the function of the optimal care multiplier, which internalizes to the injurer all of the costs imposed by his conduct. What is the relationship between waivers and the optimal care multiplier? Should waivers continue to occur even if courts implement optimal care multipliers?

Assuming courts apply the optimal care multiplier, the overall burden of taking care for the injurer is

$$X + QE_d(\theta)m^*L + QC_d . \tag{21}$$

Substituting the optimal care multiplier (8), the injurer's burden can be written

$$X + QL + Q(C_d + C_p) \tag{22}$$

This expression reflects the property that the optimal care multiplier internalizes to the injurer all of the costs generated by his conduct, which include the harm and the litigation costs.

Incorporating the multiplier, the victim's asking price for a waiver is

$$PL - Q[L - (E_p(\theta)m^*L - C_p)] \tag{23}$$

which is equivalent to

$$PL - Q[1 - (E_p(\theta)/E_d(\theta))](L - C_p) \tag{24}$$

It follows that waivers are exchanged, under an optimal care multiplier, when

$$PL - Q[1 - (E_p(\theta)/E_d(\theta))](L - C_p) < X + QL + Q(C_d + C_p) \qquad (25)$$

or, equivalently,

$$(P - Q)L - X < Q(C_p + C_d) - E_d(\theta)(E_p(\theta) - E_d(\theta))Q(L - C_p) \qquad (26)$$

If expectations regarding the strength of rights are the same, this condition reduces to a comparison of the deterrence benefit and the total litigation cost. If the plaintiff is relatively pessimistic, he will trade his right too cheaply, and if he is relatively optimistic he will be too reluctant to trade. These results mirror those for the standard case, examined in Part 3, where damages are not multiplied.

However, there is an important difference between waiver incentives with and without the optimal care multiplier. The waiver condition above indicates that the distortion away from efficiency, caused by the net wealth effect of litigation, is considerably weaker in the multiplier case than in the standard case of Part 3.[32]

The upshot is that the optimal care multiplier modifies but does not eliminate the joint incentive to waive. The reason the multiplier does not eliminate waiver incentives is that it guarantees optimal care, but does not control cases where the deterrence benefit of enforcement is less than the cost of enforcement. Put more simply, the optimal care multiplier does not generate overall optimality – does not maximize social welfare.[33] Overall optimality would require the multiplier to minimize the sum of injury costs, avoidance costs, and litigation costs. The optimal care multiplier, however, minimizes only the sum of injury costs and avoidance costs.

In spite of this shortcoming, the optimal care multiplier, combined with private waiver decisions, appears to generate a regime in which care incentives are optimal and enforcement decisions are

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[32] To see this, suppose $C_d = C_p = C$. Then the right hand side of (11) (nonmultiplier case) can be expressed $2QC\{1 - \lambda/\theta_l\}$, where $\lambda = (E_p(\theta) - E_d(\theta))/2$. The distortion from efficiency is just the bracketed term, where the absence of any distortion means that the bracketed term is equal to one. Using the same terms, the right hand side of (24) (multiplier case) is $2QC\{1 - E_d(\theta)(\lambda/\theta_l - 1)\}$. Clearly, the distortion is much smaller in the multiplier case. To clarify with a numerical example, let $E_p(\theta) = .60$, $E_d(\theta)) = .40$, $\theta_l = 1/12$. The distortion in the nonmultiplier case is then $\{1 - .10(12)\} = -0.2$, and the distortion in the multiplier case is $\{1 - .40(.10(12) - 1)\} = \{1 - 0.08\} = .92$.

[33] Hylton and Miceli (2005). Another perspective on this matter is to view the multiplier as an instrument used by a social planner to enhance social welfare. If transaction costs prevent the parties from entering into waiver agreements, then the planner would find a difference in the multiplier that generates optimal care and the multiplier that maximizes social welfare. The multiplier that maximizes social welfare would be set at a value less than the optimal care multiplier in order to discourage suits where the deterrence benefit of litigation is low relative to the cost of litigation. But this discouragement of litigation is unnecessary in a regime where private waiver agreements eliminate inefficient enforcement.

nearly efficient. This suggests that a nearly optimal regime for enforcement of rights can be achieved with the use of a multiplier that aims solely to correct precaution incentives.[34]


5. Conclusion


One person's right is another's burden. However, rights are assets that can be sold, or abandoned. This paper has examined incentives to transfer or abandon rights when enforcement is imperfect – in the sense that courts cannot be relied upon to deliver the remedy required by the law. Under these conditions, if victims and injurers have different beliefs regarding the strength or reliability of victim rights, the private incentive to waive (sell rights) will diverge from the social incentive. In particular, relatively pessimistic injurers will be too quick to waive or even to abandon their rights. This suggests that the tendency of courts not to enforce waiver agreements, even under ideal bargaining conditions, and often drawing on vague "public policy" rationales, may be defensible on economic grounds. The model of rights transfers developed here has immediate implications for other topics, such as discrimination in the courts, the regulation of conflicts of interest in lawyer-client relations, and the design of a procedural system that simultaneously optimizes precautionary and enforcement incentives.

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[34] This is a partial answer to suggestions to generally refuse enforcement to all or certain types of waiver contract (e.g., boilerplate), such as Radin (2014). Prohibiting waivers throws victims into a position of total reliance on courts that may not be completely accessible or reliable for all victims. The multiplier, by contrast, corrects for the weakness of rights and at the same time reduces the tendency to sell rights too cheaply.

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