Collapsing the Legal Impediments to Indemnification

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INTRODUCTION

On February 27, 1967, plumber Ellis Funk fell thirty feet through a hole while installing pipe during the construction of a new factory. Ellis Funk received workers' compensation benefits from his employer, Ben Agree Company, and filed a negligence suit against Darin & Armstrong, the general contractor at the construction site. A jury awarded Funk substantial damages from Darin & Armstrong.[1]

Darin & Armstrong, seeking indemnification, sued Ben Agree Company. Darin & Armstrong based its suit on a provision in an agreement, which both parties had signed, that stated: "'[Ben Agree Company] agree[s] to protect, defend, indemnify and hold harmless Darin & Armstrong, Inc., from all liabilities, claims or demands for injury or damages to any person or property arising out of or occurring in connection with the performance of this [agreement].'"[2]

The Michigan Court of Appeals, noting that courts should strictly construe indemnification agreements, held that the quoted provision "cannot be construed to indemnify Darin & Armstrong against its own negligence, because such an intention does not clearly appear from the language used . . . ."[3] The court continued, "Even if the contractual provision could be read . . . as indemnifying Darin & Armstrong against its own negligenee, the provision would be void as against public policy."[4] The court affirmed a lower court's grant of summary judgment to Ben Agree Company.

As this case illustrates, several legal devices prevent parties from creating an enforceable agreement in which one party seeks indemnification for its own negligence.[5] The *Restatement (Second) of Contracts* ("*Restatement*")

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1. Funk v. General Motors Corp., 220 N.W.2d 641 (Mich. 1974).

2. Darin & Armstrong, Inc. v. Ben Agree Co., 276 N.W.2d 869, 872 (Mich. App. 1979) (quoting the parties' agreement).

3. *Id.*

4. *Id.* (citing MICH. STAT. ANN. § 26.1146(1)). For a listing of other statutory proscriptions on such agreements, see *infra* note 15.

5. Hereinafter, I will generally use the term "indemnification" to mean indemnification for the sole negligence of the indemnitee. Typically, an exculpatory clause is to be distinguished from an indemnification agreement. "'An exculpatory clause is one which excuses one party from liability for otherwise valid claims which may be made against him by another. Third parties are not involved. An indemnification or Hold Harmless Agreement . . . is an agreement whereby one party to a lease or other contract agrees to protect the other from claims for loss or damage made against the indemnitee by a third party.'" John R. Collins & Denis Dugan, *Indemnification Contracts—Some Suggested Problems and Possible Solutions*, 50 MARQ. L. REV. 77, 77 (1966) (footuotes omitted). Nonetheless, I will not distinguish between exculpatory clauses and indemnification agreements.

details some of the judicially developed impediments:

> Language inserted by a party in an agreement for the purpose of exempting [it] from liability for negligent conduct is scrutinized with particular care and a court may require specific and conspicuous reference to negligence .... Furthermore, a party's attempt to exempt [itself] from liability for negligent conduct may fail as unconscionable.[6]

The *Restatement* also accounts for legislative proscriptions on indemnification agreements: "A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable ...."[7] This Note examines several of these legal impediments to enforceable indemnification agreements. In particular, this Note scrutinizes instances in which such agreements are rendered unenforceable on grounds of public policy and in which courts require explicit reference to negligence.[8]

The prospect of examining *legal* impediments to *enforceable* indemnification agreements carries with it a readily apparent tension. While the most common critiques of legal interference with private preference have been deemed the objections from "liberty" and from "futility,"[9] this Note does not assail the impediments to indemnification because they may interfere with individual liberty or because they may be ultimately futile. Instead, I hope to challenge the impediments because their rhetoric conceals their true basis and operation and frustrates a range of values potentially arising in contract law.

One such rhetorical ploy of the impediments is the well recognized and problematic public/private distinction: agreements are generally regarded as private-sphere product, but enforcement is doubtlessly a public exercise. By resorting to the public/private distinction, the impediments potentially obscure the State's role in defining promises worthy of enforcement and in enforcing those promises. One commentator has written: "The history of legal thought since the turn of the century is the history of the decline of a particular set of distinctions—those that, taken together, constitute the liberal way of thinking

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The problems of implied indemnity are outside the scope of this Note. For a judicial appraisal of implied indemnity arguments, see Justice Tobriner's majority opinion in Goldman v. Ecco-Phoenix Elec. Corp., 396 P.2d 377 (Cal. 1964) (en banc).

6. RESTATEMENT (SECOND) OF CONTRACTS § 195 cmt. b (1981) [hereinafter RESTATEMENT].

7. *Id.* § 178.

8. I have limited my analysis to construction subcontracts. By so narrowing my focus, I seek to avoid evaluating the doctrine of procedural unconscionability. My discussion may be applied to issues of unconscionability and of indemnification in other types of agreements, but I have declined to undertake such an application at this time.

Context is vital to my discussion. The process of bargaining in the construction industry is relatively free from concerns of unequal bargaining power. Parties to such an agreement are usually represented by counsel and maintain an ongoing business relationship. *See generally* Maurice T. Brunner, Annotation, *Liability of Subcontractor upon Bond or Other Agreement Indemnifying General Contractor Against Liability for Damage to Person or Property*, 68 A.L.R.3d 7, § 2[a] (1976).

9. Cass R. Sunstein, *Legal Interferences with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). The "liberty" (or libertarian) objection "has it that the government ought not, at least as a general rule, to be in the business of evaluating whether a person's choice will serve his or her interests ...." *Id.* at 1131-32. The "futility" objection "emphasizes that in general, interferences with private preferences will be ineffectual, for those preferences will manifest themselves in responses to regulation that will counteract its intended effects." *Id.* at 1132.

about the social world."[10] While controverting and collapsing the bases of the impediments to indemnification, this Note also attempts to highlight several of the dualities or distinctions which the two examined impediments host.

Through these rhetorical distinctions, the impediments to indemnification operate against several prevalent and arguably legitimate values of contract law. The essential difficulty for a "moral" contract law rests in promoting "altruism, community, democratic participation, [and] equality . . . without destroying freedom[, autonomy,] and economic efficiency."[11] The impediments discussed in this Note derogate both the individualist values of classical contract law and the altruist, communitarian values of a modern, "moral" contract law.

In limiting my discussion to the context of indemnification agreements in the construction industry, I have perhaps trivialized my argument. I have chosen this limited context not because I have any particular (ridiculous) passion for the rights of general contractors. Rather, I have chosen this context because it places in stark contrast the language courts employ with the authentic motives behind legal decision. Part I of this Note examines the "unenforceable on grounds of public policy" doctrine and its public/private duality. Part II examines the requirement of an explicit reference to negligence and the objective/subjective and form/substance poles which surface in the requirement's application. Part III discusses more tenable approaches to indemnification and offers some concluding observations.

I. UNENFORCEABILITY ON GROUNDS OF PUBLIC POLICY

A. The Impediment and Its Foundation

Public policy exceptions to the enforcement of agreements appear in a variety of circumstances. Often, as is the case with fraud, undue influence, mistake, and duress, the public policy exceptions supplement and fortify the regime of freedom of contract to the extent that freedom of contract is concerned with genuine individual consent to the terms of a bargain. In addition, the public policy exceptions emerge when the structure of the bargain complies with notions of freedom of contract but when enforcement of the substance of the bargain produces illegal or immoral results. Thus, courts employ public policy exceptions to justify their refusals to enforce

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10. Duncan Kennedy, Comment, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1349 (1982). Professor Kennedy gives several examples of these distinctions: "state/society, public/private, individual/group, right/power, property/sovereignty, contract/tort, law/policy, legislature/judiciary, objective/subjective, reason/fiat, freedom/coercion, and maybe some more I'm not thinking of." *Id.*

11. Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 220 (1987). The various conventional values of contract law find support in the several prominent theories of contractual obligation. *See generally* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 271-91 (1986).

promises concerning a variety of matters, from gambling to restraint of trade.[12]

When the public policy exception is implicated, decision-makers purportedly must balance the interest in freedom of contract with the interests of society. If societal interests "clearly outweigh" the interests in the enforcement of the contract, courts deem the promise unenforceable on public policy grounds.[13] Two reasons lie behind law's reluctance to involve itself in such agreements. The *Restatement* summarizes these reasons: "First, a refusal to enforce the promise may be an appropriate sanction to discourage *undesirable* conduct, either by the parties themselves or by others. Second, enforcement of the promise may be an inappropriate use of the judicial process in carrying out an *unsavory* transaction."[14]

Many jurisdictions have found clauses providing indemnification for one's own negligence in construction subagreements to be "unsavory" or "undesirable." These determinations are primarily legislative.[15] Unfortunately, however, these decision-makers have provided little explanation for their respective determinations that such agreements are "unsavory" or "undesirable."

B. Unsavory and Undesirable?

Decision-makers have perhaps found indemnification agreements undesirable because they can operate to reallocate liabilities under workers' compensation law. In some construction site accidents, a subcontractor's injured employee might sue the general contractor at the site because workers' compensation laws prohibit the injured worker from collecting tort damages directly from his employer. Thus, an effective indemnification clause forces the subcontractor-employer to protect the general contractor from the subcontractor's injured employee. In this manner, the indemnification contract requires the employer to pay more for its workers' injuries than workers' compensation laws would exact alone. But, disdain for this circumvention of the workers' compensation

12. *See generally* RESTATEMENT, *supra* note 6, ch. 8; E. ALLAN FARNSWORTH, CONTRACTS ch. 5 (2d ed. 1990).

13. RESTATEMENT, *supra* note 6, § 178.

14. *Id.* at ch. 8, introductory note (emphasis added).

15. *See, e.g.*, ALASKA STAT. § 45.45.900 (1986); ARIZ. REV. STAT. ANN. § 34-226 (1990); CAL. CIV. CODE § 2782 (West 1993); CONN. GEN. STAT. ANN. § 52-572k (West 1991); DEL. CODE ANN. tit. 6, § 2704 (1975 & Supp. 1993); GA. CODE ANN. § 13-8-2 (Michie 1986 & Supp. 1993); HAW. REV. STAT. § 431:10-222 (Michie 1993); IDAHO CODE § 29-114 (1980); ILL. REV. STAT. ch. 29, para. 61 (1991); IND. CODE ANN. § 26-2-5-1 (Burns 1992); LA. REV. STAT. ANN. § 9:2773 (West 1991); MD. CTS. & JUD. PROC. CODE ANN. § 5-305 (1989 & Supp. 1993); MICH. COMP. LAWS ANN. § 691.991 (West 1987); MINN. STAT. ANN. § 337.02 (Supp. 1993); MISS. CODE ANN. § 31-5-41 (1990); MONT. CODE ANN. § 28-2-702 (1993); NEB. REV. STAT. § 25-21,187 (1992); N.J. STAT. ANN. § 2a:40a-1 (West 1987); N.M. STAT. ANN. § 56-7-1 (Michie 1986); N.Y. GEN. OBLIG. § 5-322.1 (Consol. 1989); N.C. GEN. STAT. § 22B-1 (1993); OHIO REV. CODE ANN. § 2305.31 (Anderson 1991); OR. REV. STAT. § 30.140 (1991); R.I. GEN. LAWS § 6-34-1 (1992); S.C. CODE ANN. § 32-2-10 (Law. Co-op. 1991); S.D. CODIFIED LAWS ANN. § 56-3-18 (1988); TENN. CODE ANN. § 62-6-123 (1990); UTAH CODE ANN. § 13-8-1 (1992); VA. CODE § 11-4.1 (1993); WASH. REV. CODE ANN. § 4.24.115 (West 1988); W. VA. CODE § 55-8-14 (1981).

laws does not appear to animate the findings of unsavoriness and undesirability.[16]

Instead, decision-makers may be concerned that the indemnitee, enjoying a lesser incentive for safety, will not maintain a safe workplace.[17] Doubtlessly, governmental concerns with construction site safety are legitimate. Construction workers sustained 190,000 disabling injuries in 1989.[18] Two thousand, one hundred construction workers died from work-related accidents in the same year.[19] But there is little reason to believe that indemnification agreements result in a lower safety incentive for those in control of the work site. Although a general contractor-indemnitee may be relieved of the direct expense of the accident, there remain a variety of other concerns which act to keep the general contractor's safety incentives high.

Even with a carefully drafted and effective indemnification clause, the general contractor may incur indirect costs from construction site accidents. Worker injury dampens work site morale and efficiency. Parties lose production time in training new workers, and despite provisions for attorneys' fees, litigating a third-party claim remains expensive. Given the cooperative nature of the construction site, the general contractor also has an interest in maintaining a safe workplace for its own employees.

In addition to these indirect costs, federal law provides incentives for the general contractor to maintain a safe workplace.[20] Further, labor unions

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16. *See* Brunner, *supra* note 8, § 2[a] at 22 (noting that this result "is generally not regarded as rendering the indemnity invalid"); Arthur Larson, *Third-Party Action over Against Workers' Compensation Employer*, 1982 DUKE L.J. 483. While primarily concerned with instances of comparative fault, Professor Larson suggests that, except in Alabama, concern with workers' compensation law is not a primary basis for the public policy impediment. *Id.* at 502.

17. *See, e.g.*, Davis v. Commonwealth Edison Co., 336 N.E.2d 881, 884 (Ill. 1975) ("The legislature . . . may have considered that the widespread use of these agreements in the industry may have removed or reduced the incentives to protect workers and others from injury."); Levine v. Shell Oil Co., 269 N.E.2d 799, 803 (N.Y. 1971) (stating that "perhaps concern[] with the notion that indemnification against . . . negligence leads to negligence by the indemnitee" motivates the judicial approach to such agreements).

18. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 422, tbl. 690 (111th ed. 1991) [hereinafter BUREAU OF THE CENSUS]. A "disabling injury" is one which "results in death, some degree of physical impairment, or renders the person unable to perform regular activities for a full day beyond the day of the injury." *Id.*

19. *Id.*

20. The Occupational Safety and Health Act ("OSHA"), 29 U.S.C. §§ 651-678 (1988), "encourag[es] employers and employees in their efforts to reduce the numbers of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working conditions . . . ." *Id.* § 651(b)(1). Further, the Act provides that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; . . . [and each employer] shall comply with occupational safety and health standards promulgated under [the Act]." *Id.* § 654(a).

While there is some authority holding that OSHA does not require a general contractor to provide a safe workplace for the subcontractor's employees, *see, e.g.*, Horn v. C. L. Osborn Contracting Co., 591 F.2d 318, 320-21 (5th Cir. 1979), many jurisdictions have found that OSHA extends a general contractor's responsibilities to the subcontractor's employees. *See, e.g.*, Arrington v. Arrington Bros. Constr. Inc., 781 P.2d 224 (Idaho 1989); Kelly v. Howard S. Wright Constr. Co., 582 P.2d 500 (Wash. 1978) (en banc). General contractors remain subject to enforcement provisions of federal regulations, even if their obligation to compensate injured persons may be shifted to a subcontractor. Egan v.

enjoy a degree of control over workplace safety.[21] Unions represented approximately twenty-three percent of construction workers in 1989.[22] Few industries maintain as high a degree of unionization. Indeed, unions have played an instrumental role in the struggle for safer working conditions.[23] While in the past, collcctive bargaining agreement language focused on safety equipment, proteetive devices, and hazard pay, today, collective bargaining language often places on employers the duty to maintain a safe workplace.[24] Also, collective bargaining terms have given workers the right to refuse dangerous work. Collective bargaining terms and common law developments frequently afford the employee protection against firing or other retaliation for raising health and safety issues.[25]

To the extent that indirect costs, OSHA, and union power fail to foster safety and thus leave indemnification agreements appearing undesirable, it is instructive to envision the subcontractor as the general contractor's insurer. If the transaction is so characterized, one could question whether liability insurance itself is harmful to the safety level at the workplace. From the general contractor's perspective, both indemnification and conventional insurance provide risk allocation and a method of transferring ultimate financial responsibility for accidents. Following the reasoning of those who fear that indemnification leads to dangerously lowered safety incentives, analysts would predict this era of mandatory automobile liability insurance to be marked by an increasingly large number of automobile accidents. However, legal determinations have recognized the irrelevance of insurance to negligence.[26] These legal determinations reflect a broader understanding of safety and insurance: while economic factors have a substantial impact on the levels of safety, they do not provide a complete explanation for decisions

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Atlantic Richfield Co., 566 A.2d 1249, 1251 (Pa. Super. 1989). Given the broad purposes articulated in the Act, it seems mere formality to limit "employee" to those under direct control of the general contractor. Further, because OSHA clearly applies to the subcontractor at the construction site, *see, e.g.*, Zemon Concrete Corp. v. Occupational Safety and Health Review Comm'n., 683 F.2d 176 (7th Cir. 1982); Dun-Par Engineered Form Co. v. Marshall, 676 F.2d 1333 (10th Cir. 1982), the subcontractor will have additional incentive, beyond the indemnification agreement, to provide a safe workplace. Violations of OSHA standards are often regarded as negligence per se, or at least of strong evidence of negligence. Koll v. Manatt's Transp. Co., 253 N.W.2d 265, 270 (Iowa 1977).

Commentators have attacked OSHA for a variety of reasons. *See generally* DANIEL M. BERMAN, DEATH ON THE JOB: OCCUPATIONAL HEALTH AND SAFETY STRUGGLES IN THE UNITED STATES (1978); JOHN MENDELOFF, REGULATING SAFETY: AN ECONOMIC AND POLITICAL ANALYSIS OF OCCUPATIONAL SAFETY AND HEALTH POLICY (1979); W. KIP VISCUSI, RISK BY CHOICE (1983). Although the OSHA penalties may be inexpensive and infrequently levied, there is little question that this scheme provides *some* additional incentive to all employers at the work site.

21. *See generally* NATIONAL SAFETY COUNCIL, PROTECTING WORKERS LIVES: A SAFETY AND HEALTH GUIDE FOR UNIONS (2d ed. 1992).

22. BUREAU OF THE CENSUS, *supra* note 18, at 425, tbl. 697.

23. BERMAN, *supra* note 20, at 117.

24. *Id.* at 119.

25. *Id.*; ALAN WESTIN, WHISTLE BLOWING! 5 (1981).

26. For example, FED. R. EVID. 411 provides in part: "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully." The Advisory Committee Note to Rule 411 states, "[C]ourts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault. . . . At best the inference of fault from the fact of insurance coverage is a tenuous one."

regarding safety levels. Calabresi states this view: "Economic theory can suggest one approach—the market—for making the decision. But decisions balancing lives against money or convenience cannot be purely monetary ones, so the market method is never the only one used."[27] McCormick argues: "Subject to a few pathological exceptions, financial protection will not diminish the normal incentive to be careful, especially where life and limb are at stake."[28] If indemnification is relevant to concerns about undesirable lowered safety incentives, decision-makers should consider non-economic motives in addition to the more tangible counterweights to diminished workplace safety discussed above.

Whether the "harshness" of indemnification caused decision-makers to find such arrangements "unsavory" is worth brief appraisal.[29] To deny enforcement to such agreements because of "harshness" suggests adherence to the doctrine of substantive unconscionability. Like those regarding concerns with safety, this motive has been imputed only conjecturally. But "harshness," as limited solely to the resultant allocations of the transaction, stands weakly in relation to doctrines of classical contract law.[30] Far more importantly, as understandings of the underpinnings of contract law grow beyond the primitive notions of the classical contract, some commentators have begun to recognize that "contract law's proper function [is] as a transfer mechanism that is conceptually dependent on more fundamental notions of individual entitlements."[31] The moral prerequisite to contractual obligation under this entitlements theory of contract is consent,[32] and thus, the harshness of a bargain would be important only as evidence that the parties would not have consented to the agreement.[33]

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27. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 18 (Student ed. 1970).

28. CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 201 (John W. Strong ed., 4th ed. 1992).

29. Fort Wayne Cablevision v. Indiana & Michigan Electric Company, 443 N.E.2d 863 (Ind. App. 1983), is one of many cases that cite concern with a harsh result as the animating factor of the impediments against indemnification. *Id.* at 867-68.

Some legislative histories indicate that concern for unfairness has motivated the legislative impediments. The statement of Commissioner Weinerman of the Connecticut General Assembly's State and Urban Development Committee is typical: "We feel that it is unfair to ask the [sub]contractor to be responsible for somebody elses [sic] negligence." HEARINGS ON SENATE BILL 411 BEFORE THE STATE AND URBAN DEVELOPMENT COMMITTEE OF THE CONNECTICUT GENERAL ASSEMBLY (1977), at 261 (Mar. 1, 1977) (statement of Comm'r. Weinerman).

30. "[T]here can be no unconscionable enrichment, no advantage upon which the law will frown, when the result is but to give one party to a contract only what the other has promised . . . ." Groves v. John Wunder Co., 286 N.W. 235, 238 (Minn. 1939).

31. Barnett, *supra* note 11, at 321. Barnett writes, "If the 'death of contract' movement is a product of disillusionment with and abandonment of both the will theory of contract as a distinct source of contractual obligation and the bargain theory of consideration as the means of formally distinguishing between enforceable and unenforceable exercises of the will," the new recognition of contract as integral to notions of rights and entitlements is a "resurrection of contract." *Id.*

32. *Id.* at 297. Barnett distingnishes the consent theory from the other prevalent theories of contract, namely, will, reliance, fairness, efficiency, and bargain theories. *Id.* at 291-94.

33. The concept of implied consent is revisited, *infra* note 61.

Concerns for the operation of workers' compensation laws, for the decline of safety incentives, and for legal promotion of "harshness" provide scant weight for the social interests side of the balance against enforcement of contracts in which one party seeks indemnification for its own negligence. An examination of the interests in enforcement follows.

C. The Interests in Enforcement

If the societal concerns with indemnification agreements "clearly outweigh" the interests in enforcement of the agreement, *Restatement* section 178 declares that the agreement is unenforceable on grounds of public policy. The general interest in the making and enforcement of agreements—the value of freedom of contract—has been the subject of substantial debate. "From a utilitarian point of view, freedom to contract maximizes the welfare of the parties and therefore the good of society as a whole. From a libertarian point of view, it accords to individuals a sphere of influence in which they can act freely."[34] However, many commentators have attacked freedom of contract and its dependence on the conventions of the marketplace.[35] To these commentators, the imagery of contract law conceals and denies oppressive aspects of socioeconomic relations. Oppression and alienation appear to be consequences of what people wanted. Contract law helps muddle distinctions between narrow economic definitions of freedom and equality and more authentic and complete meanings.[36]

Without regard to the arguments surrounding the merits of freedom of contract, promises play an important social role.[37] And when a court is called upon to perform the *Restatement* section 178 balance within the existing regime of contract, several particular factors strongly suggest that enforcing the promise would be fair. First, the case for enforcement becomes stronger when one party has begun performance.[38] This is usually the situation in the

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34. FARNSWORTH, *supra* note 12, § 1.7 at 21-22; *see also* Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 702-12 (1990) (comparing three theories of contract which the author labels libertarian consent theory, Posnerian theory, and relational theory); Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769, 784 (1985) (discussing utilitarian and libertarian viewpoints along with the contractarian view).

35. *See* Jay M. Feinman & Peter Gabel, *Contract Law as Ideology*, *in* THE POLITICS OF LAW (David Kairys ed., 2d ed. 1990); *see also* Jay Feinman, Essay, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 852-57 (1983); Gordon, *supra* note 11.

36. Feinman & Gabel, *supra* note 35, at 377-79. These arguments are explored in more detail in part I.D., *infra*.

37. DANIEL W. FESSLER & PIERRE R. LOISEAUX, CONTRACTS: MORALITY, ECONOMICS, AND THE MARKETPLACE (1982). "[T]he greatest tool ever invented by the human race is the *promise*." *Id.* at 1 (emphasis in original). "The promise . . . breaks the ultimate physical restraint. It permits us to live a bit of the future today." *Id.*

Feinman & Gabel, *supra* note 35, effectively critique the operation of classical contract doctrine. Their work does not assail the possibility of binding promises generally.

38. *See, e.g.*, FARNSWORTH, *supra* note 12, § 5.1 at 348. Estoppel and reliance provide case-specific interests in enforcement. Many of the prevalent theories of contract suggest answers for the broader, moral questions of enforcement (for example, why should someone have to pay for my negligence?). An entitlements theory makes the answer to this question contingent on consent. Barnett, *supra* note 11,

construction subagreement where issues of enforcement arise from accidents occurring during the course of performance. Also, insurance is readily available to the indemnitor. The subcontractor usually can obtain insurance for the promised indemnification by adding the contractor to its existing policy.[39] As one court has noted, "the attitude toward torts has changed . . . today, in reality, the indemnity agreements do not shift the loss, but shift the burden of paying for and procuring insurance."[40] Further, to the extent that many jurisdictions permit indemnification when both indemnitee and indemnitor are negligent, it is somewhat arbitrary to "void" an agreement following a legal determination that only one of the two parties was negligent. A finding that the subcontractor is as little as one percent negligent may result in the enforcement of an otherwise unenforceable agreement.[41] Finally, another factor particular to construction subagreements suggests that enforcement may be appropriate. This factor relates to the operation of workers' compensation laws mentioned above. An injured worker, unsatisfied by workers' compensation benefits, cannot sue his employer-subcontractor and is therefore more likely to file suit against the general contractor who does not enjoy the immunity that workers' compensation laws afford. Certainly a non-negligent general contractor can defend such a suit, but there is little reason to prohibit an indemnification contract from providing a basis for defense or reimbursement.

The imputed public policy interests against enforcement of indemnification in construction subagreements appear hollow, and there are genuine, particular interests in enforcement of these indemnification provisions. This realization suggests that judicial determinations of unsavoriness and undesirability are misguided and that parallel legislative determinations are solely the product of subcontractors' political power.[42] The balance suggested by *Restatement*

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at 297; *supra* notes 31-33 and accompanying text.

39. An apparent counterargument to this proposition is that insurance is as readily available to the general contractor as it is to the subcontractor. This is not an appropriate response. The subcontractor's access to insurance weighs in favor of enforcement because it illustrates that there is nothing necessarily "harsh" about indemnification. That the general contractor can procure insurance should not be relevant to the consideration of whether the parties should be able to agree to an allocation of responsibilities and entitlements.

40. Spurr v. Acme Steel Co., 238 F. Supp. 606, 610 (N.D. Ill. 1964), *aff'd sub. nom.*, Spurr v. LaSalle Constr. Co., 385 F.2d 322 (7th Cir. 1967).

41. In Secallus v. Muscarelle, 586 A.2d 305, 306 (N.J. Super. 1991), *aff'd*, 597 A.2d 1083 (N.J. 1991), the court held that a contractual provision requiring the subcontractor to indemnify the general contractor for "any negligence" was void and unenforceable pursuant to a statute, but the provision was not rendered unenforceable insofar as the claim encompassed negligence for which the general contractor was answerable even though the subcontractor might be only one percent negligent.

42. The Connecticut legislative history of the effort to create an impediment to indemnification includes the statement of only one lobbying group, the Subcontractors Association of Connecticut. PROCEEDINGS IN THE SENATE STATE AND URBAN DEVELOPMENT COMMITTEE OF THE CONNECTICUT GENERAL ASSEMBLY, at 348 (Mar. 1, 1977).

The legislative materials also contain the following debate within the Connecticut House of Representatives:

> Mr. Hanlon: Mr. Speaker, through you, Mr. Speaker, a question to the Gentleman reporting out the bill.
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> Mr. Speaker: Please proceed sir.

section 178 fails to yield the appropriate result. Perhaps the balance itself is improper.

D. Collapsing the Basis of the Public Policy Exception

Beyond the practical, factual problems with the public policy impediment to indemnification, the theoretical basis of the impediment creates difficulties. Particular to the public policy exception is the problem of the public/private duality. Professor Clare Dalton writes:

> The opposing ideas of public and private have traditionally dominated discourse about contract doctrine. The underlying notion has been that to the extent contract doctrine is 'private,' or controlled by the parties, it guarantees individual autonomy or freedom; to the extent it is 'public,' or controlled by the state, it infringes individual autonomy.
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> . . . [A] major concern of contract doctrine has been to suppress 'publicness' by a series of doctrinal moves.[43]

According to Professor Dalton, the suppression of publicness involves either conflation or separation of public and private. Doctrines which are seen as separate public supplements to an otherwise private law create the illusion that the private, non-supplementary doctrines are solely products of individual autonomy, and thus "divert[] attention from the fact that the entire doctrine of consideration reflects societal attitudes about which bargains are worthy of enforcement."[44] Further, Professor Dalton suggests that these techniques of suppression of publicness "camouflage critical issues of power—the power of

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> Mr. Hanlon: Through you, Mr. Speaker, would you please indicate who proposed this legislation?
> Mr. Speaker: Representative Frankel.
> Mr. Frankel: Through you, Mr. Speaker, I am not aware of the proponent. It's my understanding that it originally went from State Urban to the Judiciary Committee which finally sent the favorable report out.
> Mr. Hanlon: Through you, Mr. Speaker, if I can direct a question to the chairman of the State Urban and Development Committee in the chamber. I would ask the same question.
> Mr. Speaker: Apparently the chairman is not in the chamber.
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> . . . .
>
> Mr. Hanlon: I question the motivations behind this legislation, exactly who it's trying to protect.

PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES OF THE CONNECTICUT GENERAL ASSEMBLY ON HOUSE BILL 191, at 4302-04 (May 20, 1977).

A realization that these impediments are the product of the subcontractors' political power does not suggest that the impediments are constitutionally infirm. See Davis v. Commonwealth Edison Co., 336 N.E.2d 881 (Ill. 1975), for a failed equal protection argument against the impediment. However, the realization does suggest that there is nothing "unsavory" or "undesirable" about indemnification.

43. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010 (1985).

44. *Id.* at 1011. Professor Dalton specifically addresses the doctrines of duress and unconscionability. She points out that "even as the technique of separation marks out duress and unconscionability as public exceptions to private contract doctrine, within duress and unconscionability doctrine public and private are conflated—the public grounds for disapproving bargains recast as evidence that there is no private bargain to be enforced." *Id.*

the state to police private agreements, and the power of one private party over another."[45]

The public policy impediment plainly operates as a public supplement to purportedly private contract law, and, if Professor Dalton is right, the impediment operates to conceal sources of power.[46] In so doing, the impediment serves to reinforce the rhetoric of individual autonomy and freedom of contract, but it does so without actually respecting autonomy in the particular instance.

The public policy impediment defeats the classical freedom and efficiency values of contract, and by promoting the public/private duality, it hinders the advancement of modern, "moral" contract values. This impediment frustrates both the narrow, individualist guarantee and a broader vision of freedom and equality.

II. THE REQUIREMENT OF EXPLICIT REFERENCE TO NEGLIGENCE

A. The Impediment and Its Foundation

A variety of rules guide courts in their determination of the meaning of an agreement.[47] These rules seek both to ascertain the understanding of the parties and to promote public interests. When a contract rests at the center of litigation, the court will often have at least two competing interpretations from which to choose. For the purposes of this Note, the competing meanings will revolve around whether one party must indemnify the other for the other's negligence. Section 203 of the *Restatement* suggests a hierarchy of preferred meanings. For example, section 203(a) states: "[A]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms [of the agreement] is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect . . . ."[48] Thus, the category of *reasonable* manifestations of intent dominates a court's choice of meaning. "Reasonableness," an objective

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45. *Id.*

46. There are, however, ways to recharacterize the impediment so that it sloughs off some of its "public" nature. Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory*, 74 IOWA L. REV. 115 (1988), states that "[t]he efficient deterrence theory suggests that the illegal contracts doctrine is founded upon a private autonomy basis previously unrecognized because of the exclusive emphasis placed on the doctrine's public policy aspects." *Id.* at 122.

47. Some commentators have called "determination of meaning," interpretation and "determination of effect," construction. Under this distinction, interpretation is concerned with the intent of the parties and construction modifies this intent in light of public interests or social values. I have not pursued this distinction because I think it is unhelpful and misleading. Social values and notions of public interests necessarily exist at any stage of determination of meaning. Courts may ignore this distinction "in order to obscure the extent of their control over private agreement." FARNSWORTH, *supra* note 12, § 7.7 at 496. *See generally* P.S. Atiyah, *Judicial Techniques and the Law of Contract, reprinted in*, ESSAYS ON CONTRACT (1986).

48. RESTATEMENT, *supra* note 6, § 203(a). Lest the search for preferred meaning predominate, the *Restatement* warns: "The search is for the manifested intention of the parties. If a term or a contract is unconscionable or otherwise against public policy, it should be dealt with directly rather than by spurious interpretation." *Id.* § 203 cmt. c.

inquiry, guides courts through the determination of the parties' subjective understanding and the legal meaning of an agreement.

Within this interpretative scheme, courts may, in some instances, impose formal requirements for an agreement to be enforceable. One primarily formal requirement presents the second common legal impediment to indemnification. Decision-makers often demand that reference to negligence appear in clear and explicit terms within the indemnification agreement.[49] The "clear and explicit reference" requirement appears in both judicial and legislative pronouncements. While this formality serves several functions, it rests on questionable logical and theoretical foundations.

I have described this impediment as "primarily formal" because courts view the requirement of explicit reference as a method of interpretation rather than as a formality. But even when courts "strictly construe" indemnification provisions, the search is often for "magic words" rather than for the parties' true understanding.

Judicial opinions offer some explanation of the various bases for the explicit reference requirement. Many courts hold and the *Restatement* implies that the clear and explicit reference requirement is an outgrowth of the rule of interpretation that, when ambiguous, the terms of an agreement should be construed against the drafter.[50] Other courts employ the rule because they view indemnification for the indemnitee's sole negligence to be a "harsh" or "unreasonable" meaning.[51] These bases overlap[52] and promote the adoption

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49. Courts also describe this requirement as mandating "unambiguous reference" to negligence. Other courts "strictly construe" the terms of the contract against the indemnitee. Some courts have employed a more rigorous requirement—an express negligence standard. *See, e.g.*, Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705, 708 (Tex. 1987) (overruling the clear and explicit requirement and adopting an express negligence requirement in an effort to reduce the "plethora of litigation" regarding interpretation of indemnification agreements). For extensive praise of this approach, see Greta E. Haidinyak, Note, *Interpretation of Indemnity Contracts: Texas Supreme Court Rejects the Clear and Unequivocal Language Standard in Favor of the Express Negligence Doctrine*, 29 S. TEX. L. REV. 445 (1987). Haidinyak applauds the new standard beeause "[p]ublic policy requires that parties know and understand what consideration they are giving" and that "parties should not be forced to pay large judgments due to hidden indemnity provisions in ambiguous contracts." *Id.* at 460. Haidinyak apparently believes that unequal bargaining pervades this area.

The "clear and explicit reference" requirement and the "express reference to negligence" requirement differ only in degree. Both standards claim to represent the majority rule. Brunner, *supra* note 8, § 11[b]. I have chosen to treat the standards as one because they both present the problems of formalism.

50. Construing against the drafter often has the practical effect of construing against the indemnitor/general contractor. The theory of construing against the drafter rests in the notion that the drafter enjoys a position to state the agreement in unambiguous terms and should be penalized for ambiguity. Also, courts often view the drafter as the party with superior bargaining power.

The RESTATEMENT, *supra* note 6, § 206 provides: "In choosing among the *reasonable* meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." (emphasis added).

51. *See, e.g.*, Paul Hardeman, Inc. v. J. I. Hass Co., 439 S.W.2d 281, 285 (Ark. 1969); *see also* Brunner, *supra* note 8, at § 11[a].

52. The RESTATEMENT, *supra* note 6, § 206 cmt. a, states that interpretation against the drafting party is "in strictness a rule of legal effect, sometimes called construction, as well as interpretation: its operation depends on the positions of the parties as they appear in litigation, and sometimes the result is hard to distinguish from a denial of effect to an unconscionable clause."

The reporter's note to comment a provides that "[a]s the text of [§ 206] makes clear, the rule does not apply if the non-drafting party's interpretation is unreasonable. . . . Nonetheless, one may doubt that

of a judicially preferred meaning more than they advance the search for the understanding of the parties.

B. Which Meaning Is Preferred?

The question, "Which meaning is preferred?" operates as "Which meaning does the state prefer?" The range of possible preferred meanings includes only the reasonable meanings of the parties. Rather than reiterate the argument that, in the construction context, there is nothing unreasonable about indemnification for negligence, I have instead provided examples of contractual provisions which courts determined did not provide indemnification for the negligence of the indemnitee. My purpose in so doing is to illustrate that the explicit reference requirement is not a genuine means of interpretation, and that by resorting to formality, courts may circumnavigate the true understanding of the parties in order to avoid enforcing these agreements. Thus, the preferred meaning may often be one which neither party subjectively held.

Indemnification agreements commonly provide that one party will indemnify the other for "any and all claims or liability." Many courts hold that "indemnity 'is an area in which to cover *all* does not include one of its parts.' Thus, an indemnification for 'any and all claims' will not include claims arising from the negligence of the indemnitee despite the otherwise all-inclusive language of the provision."[53] Courts reach this conclusion by requiring clear and explicit reference to the indemnitee's negligence. According to the courts, this requirement is a tool for determining the parties' intent.[54]

As mentioned in the Introduction to this Note, Ellis Funk's employer agreed to "protect, defend, indemnify and hold harmless [the general contractor] from all liabilities, claims or demands for injury or damage to any person or property arising out of or occurring in connection with the performance of [the agreement]."[55] The court found that the agreement failed to provide indemnification for the general contractor's negligence because "such an intention does not clearly appear from the language used . . . ."[56]

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the rule is 'the last one to be resorted to, and never to be applied except when other rules of interpretation fail . . . .'" *Id.* § 206 cmt. a, reporter's note (quoting Quad Constr. Inc. v. Wm. A. Smith Constr. Co., 534 F.2d 1391 (10th Cir. 1976)).

53. Amoco Prod. Co. v. Forest Oil Corp., 844 F.2d 251, 255 n.4 (5th Cir. 1988) (emphasis in original) (quoting Seal Offshore, Inc. v. American Standard, Inc., 736 F.2d 1078, 1081 (5th Cir. 1984)). Both of these cases involved leasing equipment for construction of offshore oil facilities.

54. In *Amoco Production*, the court stated that instead of "'magic words,' the most important consideration is the intent of the parties to contract." *Id.* at 256 (citations omitted). In light of the court's holding, the veracity of this assertion is suspect. For an early critique of this judicial underhandedness, see Scott Conley & George Sayre, *Indemnity Revisited: Insurance of the Shifting Risk*, 22 HASTINGS L.J. 1201 (1971).

55. Darin & Armstrong, Inc. v. Ben Agree Co., 276 N.W.2d 869, 872 (Mich. App. 1979).

56. *Id.*

Similarly, in *Paul Hardeman, Inc. v. J. I. Hass Co.*,[57] the parties included an exceptionally lengthy indemnification provision in their agreement. In the provision, the subcontractor agreed, among other things, to "defend any and all suits brought against [the] Contractor . . . on account of any . . . accidents . . . ."[58] The court declined to hold the subcontractor liable for the general contractor's negligence: "[W]e cannot say the subcontractor expressed an intent, in words clear and unequivocal, to bind itself for the negligence of the [general] contractor."[59] The court continued, "That is especially true in face of the fact that it would require no extraordinary skill in draftsmanship to so bind the subcontractor in words and phrases of absolute certainty."[60] Whether this fact acts as an interpretative tool is, on the other hand, rather questionable.[61]

In *Amoco Production Co. v. Forest Oil Corp.*,[62] Amoco Production agreed to perform oil exploratory services for Forest Oil. Part of the agreement stated that the exploration would be "at the sole cost, risk, and expense" of Forest Oil.[63] When Amoco Production damaged some of its equipment through its own negligence, it sought indemnification from Forest Oil. The Fifth Circuit affirmed a district court judgment which held that the alleged indemnification provision was ambiguous.[64] Few would dispute this determination. The court additionally affirmed the lower court's ruling that because the provision was ambiguous they would interpret it against the indemnitee.[65] Finally, the court denied Amoco Production an opportunity to present all of its evidence concerning the actual understanding of the parties.[66]

In another case, *Heat & Power Corp. v. Air Products & Chemicals, Inc.*,[67] Heat & Power agreed to "'save and hold . . . harmless [Air Products] from

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57. *Paul Hardeman, Inc.*, 439 S.W.2d 281 (Ark. 1969).

58. *Id.* at 284.

59. *Id.* at 285.

60. *Id.*

61. Professor Barnett might argue that there is hypothetical or implied consent to the requirement of unambiguous reference to negligence. The parties would not have consented to an agreement in which one party receives indemnification for its own negligence unless the form of the agreement complied with the unambiguous reference requirement. Barnett, *supra* note 11, at 300-09. *See also* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992). This assumes that the parties have perfect knowledge and that they share a common notion of ambiguity with the court. Because I argue that parties in this context do not suffer from an inequality of bargaining power, they do not necessarily satisfy the assumptions which Professor Barnett's argument might require. *See also infra* note 83.

62. *Amoco*, 844 F.2d 251 (5th Cir. 1988).

63. *Id.* at 253.

64. *Id.* at 257.

65. *Id.*

66. *Id.* The Fifth Circuit seemed to chide the district judge for allowing any evidence regarding the intent of the parties: "Finding ambiguity . . . the district court in this case nevertheless looked to extrinsic evidence to determine the intent of the parties." *Id.*

In addition to the implied consent issue discussed, *supra* note 61, the issue of ambiguity often appears. An "any and all liability" clause seems unambiguously to include liability for the sole negligence of the indemnitee. And, even in cases where a court might find the clause ambiguous, it should at least receive extrinsic evidence on the parties' understanding. In no case does an "any and all liability" clause unambiguously not include indemnification for the sole negligence of the indemnitor.

67. *Heat & Power Corp.*, 578 A.2d 1202 (Md. 1990).

any and all loss, liability, fine, penalty or other charge, cost or expense by reason of any claim, fine or penalty, or any action or suit . . . ."[68] The agreement also provided that the indemnitor carry insurance for the indemnitee.[69] The Court of Appeals of Maryland determined that the agreement could not be interpreted to indemnify Air Products for its own negligence because such a construction would be contrary to public policy.[70] Nonetheless, the court stated that even if the contract did not violate public policy, the contract was not "sufficiently clear and unequivocal" to indemnify Air Products for its own negligence.[71] Again, the whole may not include all the parts.

Other courts have offered strong arguments against the requirement of a clear and explicit reference to negligence. The reasoning of these courts show that this requirement is not a tool for determining the subjective intent of the parties. The New York Court of Appeals noted "[a]lthough we have no conceptual difficulty with [the strict construction rationale], we do question the judicial feasibility of a rule which allows a court to conclude that where a contract provides that indemnification will be for any and all liability, the parties must have meant something else."[72]

In a related critique of the "clear and explicit reference" requirement, Chief Justice Calvert of the Supreme Court of Texas, dissenting, determined that an "any and all liability" phrase must include indemnification for negligence. Chief Justice Calvert wrote:

> Except in a narrow, nondelegable duty situation (blasting), . . . a general contractor is *never* liable in this jurisdiction for injuries to third persons caused by the work activity of subcontractors *unless its negligence was a proximate cause of the injuries.* Hence, the only reason for including a provision in such contracts for indemnity for general contractors is to protect them from the consequences of their own negligence. It follows that by inclusion of such a provision in their contracts, the parties intend either to provide for indemnity against the consequences of the negligence of the general contractor, or, alternatively, that the provision shall be meaningless.[73]

Another court reached a similar result in *Davis Constructors & Eng'rs, Inc. v. Hartford Accident & Indem. Co.*[74] In determining that a provision

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68. *Id.* at 1204 (quoting the parties' agreement).

69. *Id.*

70. *Id.* at 1206.

71. *Id.*

72. Levine v. Shell Oil Co., 269 N.E.2d 799, 802 (N.Y. 1971). The court continued, "'courts should be wary of construing [indemnification] provisions in such a manner that they become absolutely meaningless.'" *Id.* (quoting Kurek v. Port Chester Hous. Auth., 223 N.E.2d 25, 28 (N.Y. 1966)). The *Levine* court proceeded to determine that an "any and all liability" provision included indemnification for the negligence of the indemnitee: "A contrary construction would result in the conclusion that the clause was a nullity. Surely, this could not have been the intent of the parties." *Id.* at 803 (citations omitted).

73. Joe Adams & Son v. McCann Constr. Co., 475 S.W.2d 721, 730 (Tex. 1971) (Calvert, C.J., dissenting) (emphasis in original), *overruled by*, Ethyl Corp. v. Daniel Constr. Co., 725 S.W.2d 705 (Tex. 1987).

74. *Davis Constructors*, 308 F. Supp. 792 (M.D. Ala. 1968) (applying Alabama law).

indemnifying the general contractor for "all liability, claims and demands,"[75] necessarily included liability for the general contractor's negligence, the court stated that a contrary holding would leave the provision with "little, if any, meaning."[76]

Thus, it appears that the many courts which "strictly construe" the all-inclusive indemnification provisions so that they do not include indemnification for the indemnitee's negligence are using formality to alleviate the perceived harshness of the results of the transaction at the expense of actually approaching the meaning of the agreement.[77] The "clear and explicit reference" requirement impedes creation of an enforceable indemnification agreement because it operates to overlook or confound the parties' understanding.

C. Collapsing the Basis of the Explicit Reference Impediment

The realization that society's preferred meaning is often one that the parties did not hold suggests that freedom of contract and judicial neutrality are far from being genuine, pure, or complete. Further, the realization illustrates how abridged the search for subjective intent may be. The essential difficulty with the "clear and explicit reference" impediment is that it obscures its operation by resorting to the vocabulary of conflicting modes of analysis. Thus, what courts deem a method for determining the subjective intent of the parties is in fact a formality imposing an objectively preferred meaning.

"Although the premise of formalities is that the law has no preference as between alternative private courses of action, [formalities] operate through the contradiction of private intentions."[78] In addition, formalities impose costs on parties. Lawmakers may impose these costs to have a deterrent effect in addition to their cautionary and evidentiary functions.[79] In this way, the

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75. *Id.* at 794.

76. *Id.* at 795. Courts reached similar conclusions in Moore Heating & Plumbing, Inc. v. Huber, Hunt & Nichols, 583 N.E.2d 142 (Ind. App. 1991), and Freund v. Utah Power & Light Co., 793 P.2d 362 (Utah 1990).

77. Possible motives behind such a decision are explored in Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). While Professor Kennedy rightly suggests that empathy often animates state intervention in the law of agreements, *id.* at 563, the case for empathy in this context is small.

78. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1691 (1976). "In every case, the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored." *Id.* at 1692. Professor Barnett writes, "formal promises have had an uncertain place in the law of contract because they lacked a theoretical underpinning." Barnett, *supra* note 11, at 311 (footnote omitted). Professor Barnett suggests under a consent theory of contract that "[t]he voluntary use of a recognized formality by a promisor manifests to a promisee an intention to be legally bound in as unambignous a manner as possible." *Id.* Be that as it may, the "clear and explicit reference" formality is not necessarily a "recognized formality," and its use may be accidental.

79. Keunedy, *supra* note 78, at 1692. However, formalities can promote efficiency by decreasing the amount of litigation and by eliminating problems of double insurance coverage with consequent duplication of cost. Collins & Dugan, *supra* note 5, at 85.

requirement of clear and explicit reference "partakes simultaneously of the nature of formalities and of rules designed to deter wrongdoing."[80]

This "obscurity of purpose"[81] may have the effect of motivating private parties to "respond to the threat of the sanction of nullity by learning to operate the system[,]"[82] but the probability and ramifications of this effect are questionable.[83] A certain unfortunate effect of formality's "obscurity of purpose" is that it helps to mask the legal operations involved. As a formality, the requirement of clear and explicit reference to negligence dissolves into a milder "unenforceable as contrary to public policy" impediment, all the while employed as a simple tool for interpretation.

In addition to the problems with a formality disguised as a method of substantive interpretation, another fundamental problem with the "clear and explicit reference" requirement exists. This problem relates to the subjective-objective duality, which is especially prominent in contract law.[84] As I have

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The resourceful Professor Schauer argues that blind denunciation of formality is inappropriate because formality may sometimes beneficially restrict decision-makers. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

80. Keunedy, *supra* note 78, at 1692 (footnote omitted). Professor Kennedy gives several examples of rules which present both the values of formalities and the deterrence of wrongdoing. Included in these examples are rules which define "nonconsensual duties of care," and "the circumstances in which violations of legal duties will be excused." Also included are "[r]ules for the interpretation of contracts . . . , insomuch as those rules go beyond attempting to determine the actual intent of the parties . . . ." *Id.* at 1692-93. Plainly, the "clear and explicit reference" requirement fits within these categories.

81. *Id.* at 1692.

82. *Id.* at 1699. Courts have used this justification in Ruzzi v. Butler Petroleum Co., 588 A.2d 1 (Pa. 1991) and in Paul Hardeman, Inc. v. J. I. Hass Co., 439 S.W.2d 281, 285 (Ark. 1969). The *Ruzzi* court wrote:

> [W]e must assume that [the parties] knew that the law would not recognize as effective their agreement concerning the *negligent* acts of the indemnitee . . . unless an express stipulation concerning negligence was included in the document . . . .
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> . . . .
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> We must assume that the parties knew that the law gives to the words used . . . a specific meaning and that the words, therefore, must be interpreted in their legal sense.

Id. at 4-5 (emphasis in original).

83. Kennedy, *supra* note 78, at 1699. Professor Kennedy writes:

> It can be argued that private activity is only rarely and sporadically undertaken with a view to the legal consequences. . . . It is . . . unwise to treat the judicial decision process as though it could or should legislate effectively for all or even most contract or tort disputes, let alone all contracts or torts. The parties have an immediate interest in a resolution that will be neither under-nor overinclusive from the point of view of the lawmaker's purposes. The countervailing interest in telling others clearly what will happen in their hypothetical future lawsuits is weak, because it is so unlikely that "others" will listen.

Id. (footnote omitted).

Also, though it is not a concern in the construction context, "a regime of formally realizable general rules may intensify the disparity in bargaining power in transactions between legally skilled actors who use the legal system constantly, and unskilled actors without lawyers or prior experience." *Id.* at 1700 (footnote omitted).

84. *See, e.g.*, FARNSWORTH, *supra* note 12, § 3.6 (discussing the conflict between objective and subjective theories of assent); Barnett, *supra* note 11, at 301 (discussing the tension that the subjective component creates between a will theory of contract and "the inescapable need of individuals in society and those trying to administer a coherent legal system to rely on appearances—to rely on an individuals [sic] behavior that apparently manifests their assent to a transfer of entitlements"); Dalton, *supra* note 43, at 1042-45 (providing a brief description of the historical context of the subjective-objective tension). Professor Barnett claims:

mentioned, the formal impediment falsely appears to be an instrument used to determine the subjective intent of the parties. In fact, the impediment purportedly allows the judge to select an objectively preferable meaning, even if this meaning is foreign to the parties to the contract.

"Our legal culture appreciates the difference between what someone subjectively intends, and the form in which he makes that intention available to others (the objective representation of his thought or wish)."[85] In light of the awareness of the subjective-objective distinction, "our legal culture has explicitly opted to favor objective over subjective . . . . Yet the suppressed subjective constantly erupts to threaten the priority accorded the objective, is subdued, and erupts again."[86]

The tension between subjectivity and objectivity often disintegrates into a difficult choice between "basing liability on an unreliable assertion of private intention, or admitting and justifying the imposition of public law on the parties."[87] The actual predicament with this choice rests not in the difficulty in making a decision, but rather in arriving at the choice in the first place. Professor Dalton writes:

> The central problem in this area is that of knowledge—of access to intent, or understanding. But if contract doctrine is no longer to rely on intent and understanding as the basis of liability, then contract becomes something other than a system of voluntary obligation. And as a body of public rather than private obligation, it then must articulate the public norms on which it rests.[88]

Whether decision-makers can articulate sufficient public values to justify a system of public obligation is unclear.[89] Nonetheless, no genuine public value can support the continued assertion that the "clear and explicit

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> A consent theory's recognition of the dependence of contractual obligation on a rights analysis is able to account for the normal objective-subjective relationship in contract law. The concept of rights or entitlements is a social one whose principal function is to specify boundaries within which individuals may operate freely to pursue their respective individual ends and thereby provide the basis for cooperative interpersonal activity.

Barnett, *supra* note 11, at 301. While the individual entitlements notion does seem to parallel the dimensions of the objective-subjective relationship, the content within these bounds remains to be colored.

85. Dalton, *supra* note 43, at 1039.

86. *Id.* at 1040. Professor Dalton reiterates, "even while objectivity retains its priority, subjectivity is accorded a vital and subversive supplementary role." *Id.* at 1041.

87. *Id.* at 1041. Professor Dalton points to the "endless struggle" with the unknowability of subjective intent and the legitimation problems with non-consensual or non-intent based (objective) interpretive criteria. *Id.*

Professor Barnett offers an interesting perspective on this problem:

> A consent analysis is genuinely interested in the actual intentions of the parties, but we never have direct access to another individual's subjective mental state. . . . Even in a subjective theory, evidence of subjective assent must be manifested at some point . . . .
>
> Therefore, the only difference in the treatment of evidence of subjective intent between subjective and objective approaches to contract concerns evidence of subjective intent that is *extrinsic* to the transaction.

Barnett, *supra* note 11, at 305 (emphasis in original).

88. Dalton, *supra* note 43, at 1066.

89. Professor Dalton writes that the appeal to public values of stability and certainty of transaction is "weak." *Id.*

referenee" requirement is a means of determining the parties' understanding of their agreement. The requirement is a formality used to avoid the substance of an agreement and to mandate an objectively preferred meaning. As such, decision-makers should either expose the true basis of the formality or eliminate the requirement in this context.

III. TENABLE LEGAL APPROACHES TO INDEMNIFICATION

In Parts I and II of this Note, I have attempted to question the foundations upon which the two most common legal impediments to indemnification rest. I have done so by analyzing the various rationales for the impediments and by illustrating the detrimental distinetions that the impediments foster. But the oddity and difficulty that these impediments present becomes even more acute when one surveys legal treatments of indemnification clauses as components to other types of agreements. There are some instances in which courts handle indemnification agreements in manners similar to those explored in Parts I and II, but agreements in these limited instances are far more likely to raise the issue of procedural unconscionability.[90] More commonly, and in a large variety of transactions, courts have little difficulty enforcing indemnification agreements without resorting to language of admonishment or reluctance. In the following paragraphs, I will explore some types of transactions in which indemnification agreements received a balanced treatment. My purpose in doing so is to show that the societal interests against enforcement of indemnification agreements in the construction industry are by no means greater than those interests which might be implicated in situations where courts nonetheless enforce the indemnification agreement.

Courts frequently hold that parties may make an enforceable indemnification agreement to apportion liability for violations of environmental regulations. For example, in *Jones-Hamilton Co. v. Kop-Coat, Inc.*,[91] the court disregarded arguments that indemnification for strict environmental liability contravened public policy[92] and held that parties may agree in advance to relative responsibilities for CERCLA[93] penalties. The court wrote that policy mandates "that parties should be able to distribute the risk of CERCLA liability as they see fit because liability under CERCLA is far reaching. . . . [T]here is no publie policy against private parties bargaining over indemni-

90. For example, courts and legislatures often decline to enforce indemnification clauses in residential property leases. *See* Annotation, *Tenant's Agreement to Indemnify Landlord Against All Claims as Including Losses Resulting from Landlord's Negligence*, 4 A.L.R.4th 798 (1981).

91. *Jones-Hamilton*, 750 F. Supp. 1022 (N.D. Cal. 1990), *aff'd in part and rev'd in part on other grounds sub nom.*, Jones-Hamilton Co. v. Beazer Mat'ls & Servs., Inc., 973 F.2d 688 (9th Cir. 1992). *Jones-Hamilton* contains a discussion of the legislative history of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), and of prior case law enforcing indemnification agreements under CERCLA liability. *Id.* at 1025-27.

92. The indemnitor argued that, by analogy to strict products liability, public policy disallowed indemnification for strict environmental liability. *Id.* at 1025.

93. Compreheusive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675 (1988 & Supp. III 1991).

ty."[94] Further, responding to the indemnitor's arguments that explicit reference to CERCLA liability should be required in order to enforce the indemnification agreement, the court stated that it "will not require the parties . . . to enumerate each and every statutory and regulatory provision which might be violated and all damages which might result . . . . To do so would be contrary to law."[95] The *Jones-Hamilton Co.* court properly dispensed with the "contrary to public policy" and "explicit reference" arguments, and it did so in the context of environmental hazards, where safety concerns are at least as pertinent as those in the construction industry.

Similarly, in *Ranger Nationwide, Inc. v. National Indemnity Co.*,[96] the court, seemingly without hesitation, enforced an agreement in which a truck lessor-operator indemnified a trucking company-lessee for its own negligence. The agreement operated to reallocate liabilities under Interstate Commerce Commission regulations which required that the lessee of a tractor-trailer "'assume complete responsibility for the operation of the equipment . . . .'"[97] The court found that "[t]he primary purpose of the ICC regulations . . . is the fixing of financial responsibility for damages to shippers and *members of the public*. . . . [But] the indemnification agreement . . . 'did not affect the basic responsibility of the lessee to the public; it affected only the relationship between the lessee and lessor.'"[98] The situation in the construction industry is no different.

Courts have also been willing to enforce indemnification agreements as part of complex business dealings. For example, in *Grobow v. Perot*,[99] Ross Perot sought and received enforcement of an indemnification clause included in part of a securities repurchase agreement. In a shareholders' derivative suit against Perot and other General Motors directors related to the securities repurchase agreement, Perot enjoyed indemnification from the other directors. Despite the problems that indemnification might create in this situation, the court stated: "Indemnification as an adjunct to a business transaction is not illegal or necessarily imprudent."[100] Similarly, in *Barnebey v. E.F. Hutton & Co.*,[101] denying public policy arguments against enforcement, the court upheld a clause which operated to exculpate a party from alleged blue sky violations.[102] Courts have even been willing to enforce an indemnification clause included in a complex tax evasion scheme.[103] Surely, societal interests

94. *Jones-Hamilton*, 750 F. Supp. at 1026-27.

95. *Id.* at 1028.

96. *Ranger Nationwide*, 658 F. Supp. 103 (D. Del. 1987), *aff'd without opinion*, 833 F.2d 307 (3d Cir. 1987).

97. *Id.* at 106 (quoting 49 C.F.R. § 1057.12(a) (1992)).

98. *Id.* at 106-07 (quoting TransAmerican Freight v. Brada Miller, 423 U.S. 28, 39 (1975)) (emphasis in original).

99. *Grobow*, 526 A.2d 914 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988).

100. *Id.* at 925 n.14 (citing Good v. Getty Oil Co., 514 A.2d 1104, 1108 (1986)).

101. *Barnebey*, 715 F. Supp. 1512 (M.D. Fla. 1989).

102. *Id.* at 1521-22.

103. *See, e.g.*, Murray Walter, Inc. v. Sarkisian Bros., Inc., 589 N.Y.S.2d 613 (N.Y. App. Div. 1992).

against enforcement are greater when the possibility of intentional illegalities and crimes arise than when unintentional torts occur.

Courts have enforced indemnification clauses in many other instances, including clauses that: 1) act to exculpate an attorney from breach of fiduciary duty;[104] 2) relieve the manufacturer of a component for an artificial heart of any liability, including negligence;[105] 3) protect the negligent lessor of construction equipment;[106] 4) function to indemnify the negligent developer of a golf course for injuries caused by stray golf balls;[107] 5) act to place the risk of liability on the owner of a shopping mall rather than upon the property management company;[108] and 6) redistribute FELA-based liability.[109]

In light of the balanced treatment the courts give indemnification agreements in these contexts, judicial reluctance to enforce indemnification agreements in the construction industry becomes especially difficult to justify. In particular, the apparent concern for safety levels and worker injury at construction sites becomes even more tenuous given the fact that in a number of situations mentioned above, a personal injury animated the proceeding for indemnification. Because the facts and theories on which the impediments to indemnification in the construction industry seem to rest fail to provide a satisfactory justification for their existence, one is left wondering whether the statutory impediments are products solely of subcontractors' political power.

The more tenable approaches to indemnification do not involve a particularly strict construction of the language of the agreement against the indemnitee, nor do they place unsound public policy exceptions in the path of the informed, consenting parties. In fact, the more tenable approaches simply involve the methods of an evolving contract law. While these methods are not thoroughly positive and consistent, there is no reason further to complicate and compound contract law by carving this baseless and underhanded exception for indemnification in the construction industry.

IV. CONCLUSION

I have appraised the two most common legal impediments to indemnification for one's own negligence. The legislative and judicial hostility to this sort of agreement in the construction industry is pervasive, but I have attempted to show that it is nonetheless factually unwarranted and theoretically unsound. For the "unenforceable on grounds of public policy" impediment, this Note argues that there is nothing genuinely "unsavory" or "undesirable" about

104. St. Paul Fire & Marine Ins. Co. v. Perl, 415 N.W.2d 663 (Minn. 1987).
105. Osgood v. Medical, Inc., 415 N.W.2d 896 (Minn. Ct. App. 1987).
106. Blair v. County of Albany, 512 N.Y.S.2d 552 (N.Y. App. Div. 1987).
107. Kole v. Amfac, Inc., 665 F. Supp. 1460 (D. Haw. 1987).
108. Terrace Shopping Ctr. Jt. Venture v. Oxford Group, Inc., 384 S.E.2d 679 (Ga. Ct. App. 1989).
109. FELA is the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988). Representative cases allowing indemnification agreements to redistribute liabilities imposed under FELA include: Brown v. Baltimore & Ohio R.R. Co., 805 F.2d 1133 (4th Cir. 1986); Mead v. National R.R. Passenger Corp., 676 F. Supp. 92 (D. Md. 1987).

indemnification. It also points out that the public/private distinction promoted by the impediment defeats both the classical, individualist values as well as more modern, altruist possibilities of contract law. For the "requirement of explicit reference" impediment, I have tried to show that the search for a "preferred meaning" is not a genuine method of interpretation and that masked legal formalities and the subjectivity/objectivity duality can nurse genuine problems regarding the sources and operation of law. Finally, I have shown that these treatments of indemnification agreements in the construction industry are especially curious in light of the treatments that indemnification agreements receive in other contexts.

An awareness of the impediments and their flaws benefits any interested party. In the drafting stage, requirements such as the explicit reference to negligence are easily satisfied, and in litigation, several arguments could help parties bypass these impediments. But an awareness of the impediments' respective operations can illuminate more than methods of circumnavigation; it can also reveal the problematic distinctions which pervade contract doctrine.