Contractual Rules and Terms and the Maintenance of Bargains: The Case of the Fledgling Writer

by

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Table of Contents

I. Introduction ..................................................... 455
II. An Examination of the Bargain Within the Traditional, Contractual Paradigm ........................................... 464
   A. Parties' "Motivation" to Form a Contract .......... 466
      1. Motivation and Freedom of Contract .......... 468
      2. Motivation Within the Bargain—The Indemnity Provision ........................................... 470
   B. The Concept of "Consent" Within the Bargaining Process ..................................................... 472
   C. The Concept of Paternalism Within the Contractual Paradigm ........................................... 478
      1. A "Definition" of Paternalism .................... 478
      2. Paternalism and the Indemnity Provision ...... 480
III. The Bargain Analyzed—A Discovery of Means Which Foster Goals and Expectations .......................... 486
   A. The Problematic Contractual Paradigm .......... 486
      1. Paternalistic Check on the Inclusion of Indemnity Provisions ........................................... 486
      2. Maintenance of Primary Motivational Goals with the Minimization of Paternalism .......... 492

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<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>B. Relational Theory: An Argument Which May Obviate Indemnity Provisions</td>
<td>496</td>
</tr>
<tr>
<td>C. The Case for a &quot;Kinder, Gentler&quot; Indemnity Provision</td>
<td>502</td>
</tr>
<tr>
<td>IV. Conclusion</td>
<td>506</td>
</tr>
</tbody>
</table>
I

Introduction

In a perfect world, contract law would facilitate marketplace exchanges. This could be achieved by: (1) providing rules which guide parties in forming prospective bargains; (2) encouraging marketplace exchanges through minimizing costs; (3) providing rules to fill gaps left open by the parties; (4) optimally allocating resources; and (5) creating rights and duties, the enforcement of which foster a sense of security within the marketplace.

Yet the world is not perfect, and rules of law may fail to operate effectively or efficiently when the rigidity of law does not accommodate contextual nuances of specific situations. If rules fail to adjust to

1. See Alan Schwartz, The Default Rule Paradigm and the Limits of Contract Law, 3 S. Cal. Interdisciplinary L.J. 389, 412 (1993) (suggesting that legal rules have two functions: substantive-affecting transactional outcomes, and transformative—changing parties’ preferences); see also Lon Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 805-06 (1941) (stating that contract rules are justified when they force parties to focus on certain subjects or topics).


Professor Richard McAdams echoes this sentiment regarding this pejorative characteristic of rules. Although he speaks in terms of “law” as opposed to “rules,” the rationale remains analogous. He explains his thesis within the context of racial discrimination as it relates to individualized sacrifices on behalf of groups. Richard H. McAdams, Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination, 108 Harv. L. Rev. 1003, 1007 (1995). McAdams notes that, notwithstanding its crudeness, the law may nonetheless significantly influence individual perceptions and attitudes. See id. at 1081, stating that:

Law is more crude than an intellectual critique, yet it is inherently more public, and can carry more weight. When Jim Crow laws mandated certain forms of
the peculiarities of given situations, the very purpose for their creation is defeated.\textsuperscript{7} Despite justifications based upon efficiency, perhaps the legal community's enthusiasm for rules and their seeming ubiquitous utility is misplaced. Rules are difficult to design for a range of circumstances given the lack of perfect information regarding the situations to which a designated rule is to apply.\textsuperscript{8}

While individual contract rules are based on well-founded objectives,\textsuperscript{9} their collective relevance depends upon their collaborative ability to maintain the substance and integrity of the parties' bargain. The oft-quoted phrase, "integrity of the bargain" encompasses the goal that the parties truly attain their intended bargain. When contract law fails to facilitate the parties' ultimate goals, and there is no regulatory impediment barring enforcement,\textsuperscript{10} decision-makers, and perhaps more importantly the parties themselves, should reexamine the law and perhaps make adjustments to ensure its efficacy. Contract rules and terms have little relevance and use if they fail to preserve the substance of the parties' intended bargain.\textsuperscript{11}

The law, and in particular contract law and the contractual rules and terms that they influence, permeate many phases of society.\textsuperscript{12}

\textsuperscript{7} Sunstein, \textit{Problems with Rules}, supra note 6, at 1021.

\textsuperscript{8} \textit{Id.} at 957 (stating that "[i]n many circumstances . . . enthusiasm for rules seems senseless . . . . Often general rules will be poorly suited to the new circumstances that will be turned up by unanticipated developments; often rule makers cannot foresee the circumstances to which their rules will be applied."). Professor Sunstein notes a number of disadvantages of rules: their inherent rigidity can make them sweep too broadly, or fail to adjust to, or ameliorate, unique situations; they may fail to adjust to fluctuating conditions; they may be manipulated when applied to various situations to accommodate discretionary agenda of decision-makers; and they can allow some wrongdoers to escape penalty. \textit{Id.} at 992-95, 1021-22.

\textsuperscript{9} See supra notes 1-5 and accompanying text.

\textsuperscript{10} This presupposes that the parties' goals are not the product of transactions tainted by illegality, immorality, duress, fraud, or unconscionability. See infra text accompanying notes 86-96.

\textsuperscript{11} For more regarding the relevancy of contractual rules, see, e.g., Henry N. Butler & Barry D. Baysinger, \textit{Vertical Restraints of Trade as Contractual Integration: A Synthesis of Relational Contracting Theory, Transactional-Cost Economics, and Organization Theory}, 32 \textit{Emory L.J.} 1009, 1038-39 (1983) (stating that "the underlying principle of both the classical and neoclassical [contract law] systems is that the function of a system of law is to enhance the utilities created by choice-generated exchange but not necessarily those created by other kinds of exchange," such as restructuring a contract, long after the offer and acceptance to uphold the relationship of the contracting parties).

\textsuperscript{12} For a more detailed discussion of the interrelationship of law and other aspects of society, see Niklas Luhmann, \textit{A Sociological Theory of Law} (Elizabeth King et al. eds. & Martin Albrow trans., 1985) (stating that "law, indirectly or directly, affects all areas
Law remains a fluid concept affecting many different disciplines. Thus, legal principles are universal. The ability of legal rules to bring about change or promote desired outcomes also contributes to the relevancy of those rules.\textsuperscript{13}

If maintaining the integrity of the parties' legitimate bargain is an objective, then contract rules must be evaluated in terms of the effect that they have on that intended bargain. This presupposes, at least initially, that contract rules do have an effect, either intended or unintended. The result, whether pejorative or favorable, must be viewed in terms of the overall impact on the parties' bargain.

No resultant contractual terms more dramatically demonstrate the significance of contract rules' effect on the ultimate integrity of the parties' bargain than those which limit the liability arising from the contract. These provisions, also known as "indemnity," hold "harmless," or "exculpatory" terms or agreements,\textsuperscript{14} seek to limit the liabil-

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\textsuperscript{13} Professor Sunstein also recognizes some of the advantages of legal rules. Given their inherent convenience, rules: potentially reduce informational and political costs of decision-making; check discretion and minimize bias and arbitrariness in decision-making, thereby facilitating equality in judgment; encourage or, if warranted, limit decision-makers to take action in certain cases; assist or notify citizens to modify or conform their conduct; and maximizes accountability. Sunstein, Problems with Rules, supra note 6, at 972-77.

\textsuperscript{14} "Indemnity" has been defined as "the obligation resting on one party to make good a loss or damage another party has incurred." Agricultural Servs. Ass'n v. Ferry-Morse Seed Co., 551 F.2d 1057, 1072 (6th Cir. 1977). See also Balcor Real Estate Holdings, Inc. v. Walentas-Phoenix Corp., 73 F.3d 150, 152 (7th Cir. 1996) (defining "indemnity" as recompense of an outlay to a third party, restitution, insurance, and general compensation); Vesta Ins. Co. v. Amoco Prod. Co., 986 F.2d 981, 985-86 (5th Cir. 1983) (distinguishing between indemnification and insurance; also stating that "indemnity" includes a "contractual or equitable right under which the entire loss is shifted from a tortfeasor who is only technically or passively at fault to another who is primarily or actively responsible.").) (citation omitted); Brown v. Seaboard Coastline R.R., 554 F.2d 1299 (5th Cir. 1977) (defining "indemnity" to mean "reimbursement, restitution, or compensation.") (quoting Parker v. Puckett, 199 S.E.2d 343, 346 (Ga. Ct. App. 1973)). "Hold harmless" agreements have been defined as contractual arrangements "whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility" or as "agreement[s] or contract[s] in which one party agrees to hold the other without responsibility for damage or liability arising out of the transaction involved." Dresser Indus. v. Page Petroleum, Inc., 853 S.W.2d 505, 508 (Tex. 1993) (quoting BLACK'S LAW DICTIONARY 658 (5th ed. 1979)). See also Amoco Canada Petroleum Co. v. Wild Well Control, Inc., 889 F.2d 585, 587 (5th Cir. 1989) (discussing "hold harmless" agreements and stating that "'hold harmless' means to assume all expenses incident to the defense of any claim and to fully compensate an indemnifiee for all loss or expense") (citation omitted); New York
ties of one of the parties (the indemnitee) to the bargain by shifting the risks of the transaction to the other party (the indemnitor). While contract rules note the general enforceability of such provisions, decision-makers who invoke these rules fail to recognize the overall impact of indemnity clauses upon the ultimate integrity of the parties' agreement.

The effect of contract rules, and resultant terms such as indemnity agreements, is most pronounced when these rules are used to fashion bargains within distinct industries or disciplines. The bargains struck between writers, particularly fledgling writers, and publishers illustrate this problem.

A writer's path to success, particularly a newcomer to the industry, involves a combination of elation and confusion. Elation is easily defined. The new writer is consumed with enthusiasm and anticipation about her expression which she seeks to share with the public. Her euphoria continues even though she will likely assent to a lengthy, form publication contract which is replete with comprehensive terms. These terms include, inter alia, advances, assignments, royalties, and rights of recapture. Confusion often results, however, from the writer's naivete, perceived powerlessness in the bargaining

Central R.R. v. General Motors Corp., 182 F. Supp. 273, 291 (N.D. Ohio 1960) (explaining that "hold harmless means to assume all expenses incident to the defense of any claim and to fully compensate an indemnitee for all loss or expense, undiminished by the cost of defending a claim or litigation.").

Indemnity, hold harmless, and exculpatory agreements limit liability. In this article, I will refer to all such agreements as either "contracts limiting liability" or "indemnity agreements." Differences in nomenclature do not alter the analysis.

15. See infra text accompanying notes 102-124.

16. I use the indemnity clause as one example of a contractual term that may affect the integrity of the bargain. This is not meant to suggest that indemnity provisions comprise the only or primary terms which may have such an effect. Other terms, e.g., limitation on assignments, modifications, and termination, may also influence the bargain. For the sake of succinctness, my analysis focuses on the indemnity clause.

17. Like the selection of the indemnity clause, I use the writer and publisher contract as an illustrative bargain that demonstrates my thesis regarding the effect of contract terms on the parties goals and expectations. Of course, the analysis can be applied to contracts of participants in other disciplines. The textual discussion of "writer" extends beyond those who create prose, poetry, or other literary works; it also encompasses musicians, songwriters, computer software drafters, and other creators of original works.

processes and, perhaps, limited understanding of the bargain’s technicalities.19

A troubling issue is the writer’s agreement to indemnify the publisher for any legal liabilities resulting from the publication of her work.20 This indemnity results from the predictable characteristics of the bargaining processes between the writer and publisher. Often the fledgling writer is unfazed by her assent to this term. Ramifications of her assent often remain unknown until well after consummation of the entire contractual arrangement. Despite the potential impact on the writer and, eventually, the written product, this provision may have

19. The problems of fledgling writers can be assumed given their status as relatively unknowledgeable and less powerful bargainers in the publishing industry. Notwithstanding this obvious view, I must admit that the personal experiences of an acquaintance who is a new and promising novelist strongly influenced my desire to write on this topic and also underscored the veracity of the thesis presented. While I choose not to identify this individual by name, I can state that the writer has recently published a novel which has been adopted and distributed by a major publisher. This novel has received positive initial reviews and has led my acquaintance to continue his writing career. I choose not to identify this individual by name to prevent impairment of his bargaining position as he continues in his career.

20. The indemnity provision in the publication contract generally comprises a standard clause which typically includes the following:

Writer hereby indemnifies, saves and holds publisher, its assigns, licensees and their directors, officers, shareholders, agents and employees harmless from any and all liability, claims, demands, loss and damage (including reasonable counsel fees and court costs) arising out of or connected with or resulting from any breach of any of the warranties, representations or agreements made by the writer in this agreement which results in an adverse judgment or settlement entered into the writer’s prior written consent. Notwithstanding the foregoing, such indemnity shall also extend to the deductible under the publisher’s errors and omissions policy without regard to judgment as settlement. In the event that the writer refuses to consent to a proposed settlement which the publisher considers reasonable, participants shall assume the defense of the subject claim, action or proceeding, at the writer’s expense. Such indemnity shall also extend to reasonable counsel fees and court costs incurred in connection with any claim, action or proceeding brought at the writer’s written request. Publisher shall give the writer prompt written notice of any claim, action or proceeding covered by said indemnity, and the notified parties shall have the right to participate by counsel of the writer’s choice at the writer’s sole cost and expense. Pending the disposition of any adverse claim or action, the publisher shall have the right to withhold payment of such portion of monies hereunder as shall be reasonably related to the amount of the claim and the estimated legal expenses; provided, that any amount so withheld shall be released if (and to the extent that) legal action shall not have been commenced with respect thereto in a court of competent jurisdiction within one (1) year following such withholding; and provided, further, that publisher shall not withhold monies otherwise due to the writer if the writer shall deliver to the publisher an indemnity or surety bond, in form satisfactory to the publisher, we shall cover the amount of the claim and estimated legal costs.

See also supra note 11.
profound effects on both the writer and the publisher who presumes he has successfully shifted any potential liabilities.\footnote{21}

The writer and publisher often believe that they have freely entered into a mutually beneficial relationship. Their agreement, however, may be fraught with frustration for both parties because it includes an extensive indemnity responsibility on the part of the writer. The problems for the writer are clear. Her assent to the comprehensive indemnity agreement leads to her assumption of considerable risks associated with publication of her work. Any financial liabilities which result from this publication, i.e., copyright infringement,\footnote{22} and any other issues which may lead to litigation, are her exclusive responsibility. Such an assumption of risk can be financially significant.\footnote{23}

\footnote{21} While I have no precise data with regard to the proliferation of instances wherein fledgling writers have bargained with more experienced publishers, this factor can be reasonably assumed given the reality of the bargaining situation. See supra note 19 and accompanying text. Discussions with practitioners who reviewed contracts between authors and publishers indicate that this bargain situation is not unique. Furthermore, the Author's Guild, Inc., an organization which provides information and guidance to writers, indicates that it reviews indemnity and other provisions of potential contracts between authors and publishers.


Unbeknownst to the publisher and perhaps the writer, there remain residual problems associated with the inclusion of a broad indemnity provision. Certainly the publisher seeks a long-standing relationship with a gifted writer whose additional works will garner popular appeal and, thereby, generate substantial revenue. The writer’s assumption of extensive liability associated with the bargain may effect her creativity, the quality of her future compositions and, perhaps, her financial motivation to write additional works.

Irrespective of which party is in the best position to assume such liability, central to the parties’ bargain is the creativity factor—that over time, the writer will continue to produce popular works which are innovative, widely disseminated, and income-producing. Broad and oppressive indemnity clauses in a new writer’s contract manifest two distinct, yet related pitfalls. First, the provision may be superfluous because the publisher will likely be involved in any legal action pursued by third parties claiming that the writer’s work has damaged them. Second, and perhaps most significantly, a broad indemnity clause may ultimately stymie the very product, i.e., future productivity, which both parties seek to cultivate.

When the influences of legal rules and contractual terms which they necessitate, such as indemnity provisions, unnecessarily frustrate the parties’ goals, i.e., the integrity of their bargain, decision-makers should adjust these rules or, at the very least, the parties should alter the terms of their prospective agreements. The viability and, perhaps, suitability of rules should correlate with their circumstantial utility. This requires the adoption of a more case-by-case approach to the applicability of certain rules such as those related to indemnity agreements. The task of preserving the parties’ intent becomes more criti-

24. My assumption that the indemnity provision may “chill” the author’s creativity for future works may be subject to challenge. From an objective basis, however, the fledgling writer who reads and understands the breadth of the provision would likely take to heart the responsibilities which flow therefrom. Indeed, the author who inspired this article indicated that the breadth of his publication contract, with particular attention paid to the indemnity provision, remained in his consciousness as he contemplated his second novel. See supra note 19. He successfully completed his next work; yet, uppermost in his mind during its creation were his obligations under his publication agreement. While this phenomenon did not deter him from creating additional works, it impacted the free flow of ideas which normally would occur during the creative process.


26. See Sunstein, Problems with Rules, supra note 6, at 958 (advocating a casuistic approach to decision-making and stating that the disadvantages of rules and rule-bound justice are often insufficiently appreciated. “In the casuistic enterprise, judgments are
cal when contract rules are used to fashion bargains within distinct disciplines such as the publishing industry.

I do not advocate a retreat from the use of contractual rules—this would breed uncertainty and inefficiency within the market. Decision-makers and bargainers should, however, examine the utility of these rules in light of the parties' overall goals and expectations. The "adjustment" of contract rules and the parties' agreement is consistent with focusing upon the parties' motivation to bargain. It also reflects the reality of the parties' consent, a linchpin concept in contract law.

This article posits that all involved parties should recognize the counter-effectiveness of certain contractual terms such as indemnity provisions in their contracts. Courts and parties should maintain this skepticism irrespective of the parties' motives, i.e., risk aversion, which prompt the incorporation of these clauses. If indemnity clauses frustrate a goal of the parties, and that goal was the primary stimulus for the transaction, consideration must be given to eliminating the clause in its entirety at the extreme, or modifying it at the very least. Adjusting an indemnity clause may facilitate the parties' ultimate goals which initiated their bargain. This choice may also eliminate the need for a decision-maker to adjudicate a breach of the indemnity or other term of the contract. Eliminating intrusion by the decision-maker should reduce the costs of policing the bargain.

For example, writers and publishers (and similar bargainers in other disciplines) should seriously reconsider including in a contract oppressive indemnity provisions allocating liability to the writer. Regardless of traditional models which impose liability upon the party in the best position to guard against such liabilities, indemnity provisions should maintain the integrity of the true focus of the parties' bargain: creativity and prolificacy. Ultimately, the bargaining process and its resulting contractual terms must be scrutinized not only to prevent

27. My position here relates to that of Professor Sunstein, who criticizes strict adherence to, or dependence upon, rules. He notes that a compromise between rule-dominance and rulelessness may be the promotion of "privately adaptable" rules which "allow private adjustment, harness private ordering, and reduce the informational costs imposed on government." Such rules may further certain "regulatory goals" through the identification of entitlement in lieu of designation of outcomes. Id. at 1023.

28. While I use a typical indemnity or hold harmless provision contained in writers' contracts as a term affecting the substance of the writing subsequently produced, this does not imply that this is the only provision that could affect the outcome of the writer's work. Indeed, there are other provisions that could similarly affect the product produced by the artist. Such clauses include royalty provisions, assignment provisions, publication in other forms, distribution rights, and copyrights. I single out the contract limiting liability clause as one significant provision that could likely affect the writer's product.
unfairness to the writer, but also to maintain the integrity of the parties' bargain, the goal of which is to produce fresh and original works for future distribution. To preserve this goal, the bargaining process must be less formalistic. It must also exhibit a certain elasticity in scrutinizing contemplated contractual terms such as indemnity clauses. As a matter of policy within contract law, this scrutiny is crucial to maintaining motivational goals, expectations, and creativity.\textsuperscript{29}

Part II of this article begins with a model of a bargain between writer and publisher and a typical controversy initiated by a third party. This illustration provides an appropriate case reference to illustrate the contractual analysis which follows. Part III then examines the traditional, theoretical paradigm governing contract law. This segment focuses upon three concepts which color parties' bargains: motivation, consent, and paternalism. Although contract theory emphasizes consent as a justification for enforcement, decision-makers and parties must also appreciate the initial motivations prompting the parties to bargain. This evaluation explicates why publishers and other bargainers include indemnity provisions in their agreements, and why such inclusion may warrant special vigilance. This section also elucidates the present policies relevant to indemnity provisions and the potential need to protect certain bargainers, such as fledgling writers, who may be exploited under such clauses.

Part III of the article also attempts to prove that including indemnity provisions in contracts between writers and publishers, as well as other bargainers, may be unnecessary and counterproductive. While the traditional contractual paradigm may theoretically justify the in-

\textsuperscript{29} A compelling point regarding credibility cited by Ellen Smith Pryor, who was also heavily influenced by Susan Estrich's article on rape, influenced this work. Professor Estrich emphasized the importance of an author's subjective experiences within the subject matter about which he or she writes. Ellen Smith Pryor, The Tort Law Debate, Efficiency, and the Kingdom of the Ill: A Critique of the Insurance Theory of Compensation, 79 Va. L. Rev. 91, 94 n.11 (1993) (quoting Susan Estrich, Rape, 95 Yale L.J. 1087, 1089 (1986) (stating that she "[c]ould not imagine anyone writing an article on prosecutorial discretion without disclosing that he or she had been a prosecutor"); see also Blake D. Morant, Contracts Limiting Liability: A Paradox with Tact Solutions, 69 Tul. L. Rev. 715, 719 n.15 (1995).

Given this observation by both Professors Pryor and Estrich, I deem it probative to indicate my particular background which led me to write on this subject of the effects of contract law and rules on the bargains within certain disciples such as the arts. Notwithstanding the fact that I teach contracts, I have practiced the discipline for a number of years as a private attorney. While I have not proffered any artistic pieces for publication, I actively participate in the musical arts and have acquaintances who have written works for publication within both the musical and literary fields. My own experiences, together with those of my acquaintances, provide insight into how the bargaining process affects the expression made by these individuals. The combination of these experiences have influenced me significantly.
clusion of terms such as indemnity clauses, this neither ensures the viability of the clause, nor guarantees the maintenance of the parties' goals and expectations. As further substantiation that indemnity clauses are unnecessary, the publishing contract is examined as a possible relational contract. If publishing contracts are relational, then cumbersome indemnity clauses may be superfluous given the inherent nature of the parties' bargain to avoid the very problems which indemnity clauses attempt to rectify. This analysis demonstrates that oppressive indemnity provisions should be supplanted with alternative mechanisms that can minimize the publisher's liability.

While some parties may be wary of the excision of the indemnity provision from their agreement, Part IV suggests a way to preserve the parties' contractual goals. The alternative modifies the typical, onerous indemnity provision by minimizing the risks associated with the publisher's distribution of the writer's material. It also eliminates barriers to creativity which the writer may face in executing such an ominous agreement. Modification of the indemnity provision would produce a more equitable agreement. Rethinking the inclusion of such provisions in publishing contracts may ultimately ensure the preservation of productive creativity and prolificacy.

II

An Examination of the Bargain Within the Traditional, Contractual Paradigm

A model of a typical suit involving a writer and publisher may aid in understanding the complications generated by the inclusion of an indemnity provision. The typical publishing contract contains an indemnity clause which allot sweeping liability to the writer for any third party actions based upon such causes of action as copyright infringement, plagiarism, and libel.30

Assume that W (the writer) authors a book entitled "Great Intentions" and P (the publisher) distributes the book in accordance with its bargain with W. C, a third party, claims that "Great Intentions" contains enough material similar to C's manuscript to constitute copyright infringement. C may then institute a lawsuit against W, who allegedly infringed on C's copyright, and also P, who distributed the work. Assuming P did not contribute to the creation of the book, C nonetheless includes P in the litigation since P is in a better position than W to pay any judgments. Given the comprehensive indemnity provision contained in their publication contract, P will seek to re-

30. See supra note 20; see also In re Stein and Day Inc., 81 B.R. 263 (S.D.N.Y. 1988).
cover from W on any and all judgments which C attains even though P may maintain control of the strategic decisions related to the litigation itself. 31 W's ultimate pecuniary loss could be mitigated if P has procured insurance to cover such contingencies experienced jointly by P and W. 32

Bargaining transactions, such as those illustrated above, tend to conform to a contractual paradigm which governs the validity of resultant agreements. This paradigm contains concepts which work together to define the goals, expectations, and performance of the parties. Three significant, interrelated concepts provide the justification for the parties' agreement. They are: motivation, which encompasses the goals and prompt individuals to seek out certain parties and ultimate bargains; consent, which comprises the parties' assent 33 to the

31. Under the classic scenario, the publisher's contract would include an indemnification agreement referencing both the writer's pecuniary liability for any judgments sustained as a result of actions involving the writer's work, as well as the publisher's right to decide exclusively the conduct of the litigation involving that work. See supra note 20; see also D. Appleton & Co. v. Warbasse, 155 N.Y.S. 987 (1915) (finding that a publisher may recover from a writer those damages resulting from suits involving the writer's work. Such liability of the writer stems from the "hold harmless" covenant contained in the parties' contract.).

32. See McGinnis v. Employers Reins. Corp., 648 F. Supp. 1263 (S.D.N.Y. 1986), in which the writer of a book sought indemnity against the publisher's insurer for legal fees and costs incurred to defend an action based in libel. In McGinnis, Joe McGinniss wrote FATAL VISION, a book depicting the circumstances surrounding the murder of Jeffrey MacDonald's family at Fort Bragg, North Carolina on February 16, 1970. Prior to publication of this work, McGinniss reached a consent and release agreement with Capt. MacDonald granting McGinniss extensive rights to use information concerning MacDonald's story. After publication of the book in 1983, Capt. MacDonald filed suit against McGinniss and the publisher of FATAL VISION, G. P. Putnam's Sons. Id. at 1265. While not explicitly stated, it is clear from the facts of this case that the publisher, Putnam's, provided for the coverage of McGinniss under its insurance policy with Employers Reinsurance Corporation, who agreed to

- pay on behalf of the insured such loss . . . as the insured sustains by reason of liability imposed by law or assumed under contract the damages because of injury . . . arising out of: (a) libel or slander . . . or (b) invasion or infringement of the right of privacy . . . ; or (c) plagiarism, piracy or misappropriation of information or ideas . . .

Id. at 1265-66. The court opined that the insurer maintained an obligation to cover the legal expenses incurred by the writer as a result of defending the libel suit of Capt. MacDonald. Id. at 1270-71.

By subsuming McGinnis in its insurance coverage, Putnam's must have recognized the futility of an onerous indemnity provision which would attempt, yet fail, to saddle McGinniss with sole liability for such suits. Putnam's may have also sought to preserve a relationship with McGinniss for possible future works.

33. The term "assent" is generally synonymous with the word "consent," which connotes a party's cognitive volition to enter into an agreement. See Elizabeth S. Scott, Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy, 1986 DUKE L.J. 806, 865 n.131 (1986) (illustrating that "assent" has been described as "knowledgeable agreement"). Consent is defined as "willingness in fact for conduct to occur." RESTATE-
ultimate bargain, their expectations, and an essential foundational element in contract law;\textsuperscript{34} and paternalism,\textsuperscript{35} which serves as the decision-maker's check on the parties' motivation and confirms the validity of the parties' consent.\textsuperscript{36} As subsequently demonstrated in this section, the writer and publisher's situation illuminates these concepts in the contractual paradigm which appear in most bargains.

Substantiation of the paradigm's concepts should confirm the validity and, therefore, enforceability of the parties' agreement. This examination also aids in understanding the parties' need for the inclusion of certain contractual terms such as indemnity provisions. This segment of the article also will delineate the operative facets of these concepts. An understanding of the workings of motivation, consent, and paternalism within the bargaining context explicates the dynamics of the parties' exchange. It also provides a key to the maintenance of the parties' goals and fulfillment of expectations.

A. Parties' "Motivation" to Form a Contract

Potential parties to an agreement contemplate and seek out transactions to maximize personal gain. These bargainers may also want to undertake the transaction to realize or further benefits to society. Such motivation\textsuperscript{37} fuels the parties' drive toward a prospective bargain and ultimately contributes to the realization of their goals.

As a precursor to a bargain, individuals must be motivated to enter into such a relationship. Strangely, few, if any, decision-makers or scholars acknowledge the true significance of motivation in the formation of bargains.\textsuperscript{38} Motivation has been considered an element in

\textsuperscript{34} Consent" or "assent" is a key concept in the establishment, and ultimate enforcement, of a contractual arrangement. Peter H. Schuck, \textbf{Rethinking Informed Consent}, 103 \textit{Yale L.J.} 899, 900 (1994) (acknowledging that "[c]onsent is the master concept that defines the law of contracts in the United States").

\textsuperscript{35} For a more comprehensive delineation of the concept of "paternalism," see infra text accompanying notes 86-124.

\textsuperscript{36} The identification of motivation, consent, and paternalism is not meant to suggest that they are the only concepts within the contractual paradigm. Other complex notions such as efficiency, breach, and damages also play significant roles. This article, however, will focus on motivation, consent, and paternalism given their particular applicability to, and effect upon, publishing and other similar contracts which contain indemnity provisions.

\textsuperscript{37} "Motivation" generally refers to the incentive or motive to contract. \textbf{Webster's II New Riverside University Dictionary} 772 (1984). I adopt the term "motivation" as a concept which comprises the driving force that compels the parties to seek out and ultimately consummate bargains with other parties.

claims for breach of the duty of good faith and fair dealing in employment contracts. In fact, motivation generally has a pejorative connotation when the decision-maker must regulate the bargain under the veil of unconscionability. Yet motivation should not be viewed myopically. The concept represents a powerful, cognitive starting point for parties contemplating the need for an agreement and seeking others who will devise a bargain fostering their mutual goals. This force within the contractual paradigm defines the parties' goals, which become expectations once assent is reached. As will be demonstrated subsequently, motivation may provide a key to the maintenance of the parties' true bargain.

As for W and P, their "motivation" to enter into a publication agreement may encompass many goals. Both parties may seek the socially utilitarian goal of increasing or disseminating artistic expression. The parties may also desire a long-term relationship marked by the publication of the writer's future works. Inherent in the second goal is the belief that the writer's future works will be creative, well-received by the public, and original. An omnipresent, tacit, and, perhaps, overriding motivation in the bargain between W and P is the

law generally does not deem itself competent to judge motivation, the ultimate extension of state of mind, and thus avoids its definition altogether. Contract law of course purports to avoid subjective state of mind altogether in determining contract formation, and particularly eschews motivation.

39. See Wallis v. Superior Court, 207 Cal. Rptr. 123, 128-29 (Cal. Ct. App. 1984); see also Freeman & Mills, Inc. v. Belcher Oil Co., 33 Cal. Rptr. 2d 585, 594 (Cal. Ct. App. 1994), aff'd, 900 P.2d 669 (Cal. 1995) (stating that an action in tort will not lie for bad faith denial of an employment contract unless the party bringing the action can prove, inter alia, that the motivation for entering the contract was non-profit motivation, i.e., "to secure peace of mind, security, [and] future protection"); Okun v. Morton, 250 Cal. Rptr. 220, 232-33 (Cal. Ct. App. 1988), review denied, 1988 Cal. LEXIS 985 (Cal. Nov. 9, 1988) (agreeing with the court's holding in Wallis that in order for one of the parties to state a cause of action for tortious breach of the implied covenant of good faith and fair dealing, one characteristic that must be present in a contract is that "the motivation for entering the contract must be a nonprofit motivation, i.e., to secure peace of mind, security, [and] future protection"); Miller v. Fairchild Indus., 797 F.2d 727, 735 (9th Cir. 1986).

40. See Frank J. Cavico, Jr., Punitive Damages for Breach of Contract—A Principled Approach, 22 St. Mary's L.J. 357 (1990); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 130 (1810) (indicating that the private beliefs and motivations of parties to a bargain may be irrelevant to enforcement thereof). For more insight into the doctrine of unconscionability, see infra text accompanying notes 51-52.

41. The originality factor precipitates the inclusion of the indemnity agreement in the parties' ultimate contract.
desire to maximize the income from the writer’s present and future publications.\(^{42}\)

1. Motivation and Freedom of Contract

The parties’ motivation to seek and enter into an agreement is premised upon the parties’ freedom to strike legally enforceable bargains.\(^{43}\) “Freedom of contract” is the right and commensurate power of parties to fashion their own bargains.\(^{44}\) The notion of “freedom of contract” has a long and historic basis.\(^{45}\) Strict adherence to this notion of “freedom” to contract would require decision-makers to honor parties’ bargains and exercise restraint in any contemplated interfer-

\(^{42}\) See Part III of this article dealing with the parties’ contemplation of the continuation of their business relationship for the distribution of future works of the writer. See also in this section the discussion regarding the “relational” nature of the writer’s and publisher’s agreement and how the parties’ agreement, while expressly confined to publication by the writer, may evidence a tacit goal to continue their relationship if the initial bargain is mutually successful.

\(^{43}\) See Samuel Williston, Freedom of Contract, 6 Cornell L.Q. 365, 366 (1921). The concept of “freedom” comprised a significant underpinning of the Declaration of Independence and remains reflective of Jeffersonian democracy, thereby facilitating individual action and minimizing governmental interference. Id. at 366. Professor Williston also argues that philosophers have historically applied the concept of freedom to contract law. Id. at 367. See also Allstate Ins. Co. v. Dorr, 411 F.2d 198, 200 (1969); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Atlantic Coast Line R.R. Co. v. Riverside Mills, 219 U.S. 186, 201 (1911); William Adair v. United States, 208 U.S. 161, 172 (1908); Lochner v. New York, 198 U.S. 45, 53 (1905) (stating that an individual’s right “to make a contract in relation to his business [is] a liberty of the individual protected by the 14th Amendment”).

\(^{44}\) See Brokers Title Co. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 1179 (3d Cir. 1979) (stating that “the essence” of contracts is the concept of “vollition,” which connotes a “free exercise of will by parties who are on a relatively equal economic footing and who are brought together in the dynamic marketplace by their needs and desires”); see also 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, 570 (1982) (indicating that “[f]reedom of contract is freedom of the party from the state as well as freedom from imposition by one another”). Professor Kennedy states that the notion of “freedom of contract” fits within the “domain of pre-existing property rights.” Id. at 568. Professor Kennedy also recognizes that the decision-maker’s power to enforce the freedom of contract embodies not only the power to enforce agreements but also to refuse to enforce agreements. This “balance” of non-intervention and over-intervention, which are freedoms, serves to justify the impositions of paternalistic motives regarding the refusal to enforce certain agreements which are contrary to the interests of one of the bargainers. Id. at 569-70.

enance with those bargains. Indeed, some scholars who adhere tightly to the idea of “contractual freedom” opine that laws which “interfere with private arrangements” should be invalidated. Regardless of philosophical differences related to adherence to freedom of contract, the concept may suffer from definitional ambiguities. Indeed, some have noted that the concept of “freedom of contract” suffers from a lack of clarity.

Present views of “the freedom of contract” recognize it may have limitations. A state or judicial entity may legitimately “co-opt” the parties’ right to contract if the bargain is found to negatively affect society, or to contravene public policy. Consequently, improvident agreements, such as contracts which limit the liability of one of the


48. “Freedom” or “liberty” may connote different meanings to various individuals. See Williston, supra note 43, at 366, where Professor Williston states that “words acquire curious connotations in the course of time.”

49. Theorists note that “freedom of contract” is incoherent since the notion rests upon the concept of voluntariness which, at the very least, is elastic. Such elasticity can relegate freedom of contract to a notion promoting ambiguity without an appropriate remedy. See Note, Efficiency and A Rule of “Free Contract”, supra note 46. The freedom of contract notion may also confuse parties in defining their actions within the bargaining context. Consequently, while the parties may freely “enter into an agreement,” their rights and duties pursuant to that agreement may be dictated by circumstances or policies which are independent of, and not necessarily considered by, the parties. See Williston, supra note 43, at 379.

50. Limitations on the freedom of contract may involve questions of degree, depending upon the time, place, and circumstances relevant to such limitations. See Williston, supra note 43, at 379. Various jurisdictions may also reserve power under the contract clause, to interfere with contracts if such action is deemed necessary to promote a public interest. See also Butler & Ribstein, supra note 47, at 781 n.57-58.

51. Agreements which contravene social policies as articulated by legislators may be found unenforceable even though common law dictates their enforcement. See Cathleen M. Devlin, Comment, Indemnity and Exculpation: Circle of Confusion in the Courts, 33 EMORY L.J. 135, 135 n.1 (1984). Police powers, which includes the power to prohibit contracts, are permissible to promote “safety, health, morals, and the general welfare of the public.” Williston, supra note 43, at 375-76. Decision-makers may limit the freedom of contract if such limitations are not considered arbitrary and capricious. Id. at 378.
bargainers, may face restriction despite the notion of “freedom of contract.”

2. Motivation Within the Bargain—The Indemnity Provision

The parties’ motivation to enter into a bargain is often multi-faceted. Individuals manifest a variety of goals affecting not only the decision to enter into a bargain, but also the definition of the terms therein. For example, a bargainer’s motivation to include an indemnity provision may have its origin in the goal of minimizing risks associated with the prospective bargain.

In the W and P situation, the parties have entered into a presumably voluntary transaction. The associated risks that the writer’s work or future works may involve litigation regarding ownership or piracy, have been shifted to the writer in the indemnity provision. The publisher’s motivation to include this term must encompass her goal of avoiding liability for damages associated with the publication of the writer’s work.

The publisher’s avoidance of risks associated with the dissemination of the writer’s works relates to the concept of risk aversion. To some degree, most individuals have an aversion to risk, which par-

52. See, e.g., Morehead v. New York ex rel Tipaldo, 298 U.S. 587, 627-28 (1936) (Hughes, J., dissenting) (“We have had frequent occasion to consider the limitations of liberty of contract. While it is highly important to preserve that liberty from arbitrary and capricious interference, it is also necessary to prevent its abuse, as otherwise it could be used to override all public interests and thus in the end destroy the very freedom of opportunity which it is designed to safeguard . . . we have repeatedly said that liberty of contract is a qualified and not an absolute right.”).

Such limitations on the bargainer’s “freedom” to contract may relate directly to the decision-maker’s view that, irrespective of this basic motivational freedom to enter into a bargain, there may be overriding public policy concerns which militate against enforcement of the agreement. Such concerns relate directly to the concept of paternalism which comprises one of the three concepts of contractual enforcement. See infra text accompanying notes 86-124. This concept of paternalism becomes even more pronounced with regard to an agreement wherein one party assumes the liability of another party incident to their bargain. See infra text accompanying notes 99-124.

53. Lawsuits against writers, authors, or their distributors are relatively commonplace in today’s market. See, e.g., Cartier v. Jackson, 59 F.3d 1046 (10th Cir. 1995) (songwriter sued for copyright infringement); ABKCO Music, Inc. v. Harrisons Music, Ltd., 944 F.2d 971 (2nd Cir. 1991) (songwriter sued for copyright infringement); Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984) (songwriter sued for copyright infringement); Penelope v. Brown, 792 F. Supp. 132 (D. Mass. 1992) (author of a writer’s manual sued for copyright infringement by another author).

54. Richard A. Posner, Economic Analysis of Law 12, 57 (4th ed. 1992). Judge Posner indicates that risk aversion is not a universal phenomenon. For example, many individuals enjoy the risks associated with gambling. Id. at 57. He acknowledges, however, that most people are risk averse, and for those individuals the loss of a portion of wealth “will impose a loss that in utility terms exceeds the amount of money involved . . . .” Id. at 57.
tially explains the prevalence of insurance within the marketplace.\textsuperscript{55} Regardless of the arguments debating which of the parties would be the more appropriate risk bearer,\textsuperscript{56} shifting risks from P to W is a primary, motivational focal point regarding the indemnity clause in a publication agreement. That provision's validity will then depend upon the decision-maker's consideration of paternalistic concerns imbued in such agreements.\textsuperscript{57}

An economist may view the publisher as risk averse if he requires more compensation to bear a particular risk than that risk actually costs when evaluated on an expectancy basis. Viewed in this manner, the publisher's aversion to risk may be less certain. However, he is likely to pay the fledgling writer less than he would to a more established author; therefore, he receives "more compensation" to bear the risk of disseminating her work. Of course, the concept of risk aversion becomes speculative given the reality that the costs of dissemination are difficult to quantify with any appreciable degree of certainty.

Like other normative evaluations contained in efficiency theories, however, the concept of risk aversion is difficult to particularize in all bargaining situations. This dilemma remains ostensible even if one considers the merit of indemnity provisions in transactions where the parties have disparate bargaining positions. Risk analyses often fail to account for systemic differences among parties of disparate wealth.\textsuperscript{58}

\textsuperscript{55} Because insurance has become widely accepted in modern business transactions, decision-makers have moved away from the traditional view that contracts which cover or indemnify the negligence of the indemnity are per se unenforceable. See supra text accompanying notes 50-51.

\textsuperscript{56} The "appropriate risk bearer" embodies a variety of factors. Arguably, the "appropriate risk bearer" should be the party who is in the best position, i.e., could more afford, to obtain insurance. Hence, one may argue that the publisher is in the best position to absorb the risk given his or her resources. Moreover, the publisher, as a sophisticated bargainer, presumably has the superior resources available to ensure that the writer's work(s) are original and do not impinge on the copyright of others. Ultimately, if litigation ensues over the originality of the writer's work, the publisher undoubtedly would be involved as a co-party in such a lawsuit. On the other hand, the writer, as the author, may be in the best position to defend against this risk given the fact that the writer originated the work. However, because both the writer and publisher have similar overall motivations regarding their agreement to publish the work; the attributes of the publisher tend to be more persuasive with regard to the party who is in the best position to guard against the risk. For additional discussion regarding the writer's risk(s), see infra note 183.

\textsuperscript{57} See infra text accompanying notes 86-124.

\textsuperscript{58} See, e.g., Steven Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55, 68-69 (1982); see also W. Kip Viscusi, Product Liability Litigation with Risk Aversion, 17 J. LEGAL STUD. 101, 104-05 (1988) (demonstrating that the study of the determinative effect of risk aversion in product liability cases fails to take into account the wealth of individual plaintiffs); Richard A. Posner, Economic Analysis of Law 539 (3d ed. 1986) (acknowledging that greater dispersion of outcomes discourages litigation among risk averse plaintiffs but de-
While risk aversion may partially explain the publisher's inclusion of the indemnity provision in his agreement with the writer, it does not serve as justification for its enforcement. Notwithstanding arguments that the inclusion of this provision in the agreement may frustrate the parties' overall goals, the factors inherent in the bargaining process may prevent its enforcement.

The motivational element of the paradigm represents an academically neglected, yet compelling, force which propels the parties toward their ultimate bargain. Moreover, it defines the parties' goals which ultimately forecast their expectations. Motivation, then, represents a preliminary element of the parties' bargain, which is subsequently influenced by the notion of consent.

B. The Concept of "Consent" Within the Bargaining Process

Bargained-for exchanges may be classified as "contracts" since they appear to involve an exchange of promises. Consequently, a...
primary purpose of contract law is to preserve the parties’ bargain and to serve as a tangible embodiment of their voluntary assent to the contract’s terms. A critical component in the success and enforceability of publication transactions is the determination that the parties have indeed assented to the bargain. The parties’ consent or manifestation of assent to a bargain is a compulsory, if not dispositive, element of their agreement. Consent also crystallizes the parties’ expectations as related to their motivational goals.

The concepts of assent and voluntariness in the bargaining process appear related. Consensual arrangements, such as the one entered into by W and P, should be enforced if they result from truly voluntary transactions between those parties. This phenomenon reflects, to a significant extent, the neoclassical theory of contract law, which advocates adherence to traditional notions of contractual requirements, yet acknowledges the need for flexibility to accommodate impediments within the bargain process, e.g., capacity (or lack thereof) or unconscionability. Using rules relevant to contract law


63. See E. Allan Farnsworth, Contracts § 3.1 (2d ed. 1990) (stating that assent “is implicit in the principle that contractual liability is consensual”); see also John Edward Murray, Jr., Murray on Contracts § 29 (3d ed. 1990) (acknowledging that “[a] basic question of contract law is whether two or more parties arrived at an agreement, i.e., whether the parties have expressed their mutual assent concerning their future conduct.”).

64. For the purposes of this article the terms “consent” and “assent” comprise synonymous terms and therefore, share the same connotation.


66. See Jay M. Feinman, The Significance of Contract Theory, 58 U. Cin. L. Rev. 1283, 1285-89 (1990) (providing a detailed explanation of the neoclassical theory of contract law); Oliver E. Williamson, Transaction-Cost Economics: The Governance of Contractual Relations, 22 J.L. & Econ. 233, 235-38 (1979) (noting not only the characteristics of neoclassical theory, but also delineating the distinctions between neoclassical theory of contract law, classical theory of contract law, and relational contracting); see also Daniel A. Farber, Contracts and Economic Theory, 78 NW. U. L. Rev. 303, 319-22 (1983) (providing a cogent explanation of the neoclassical model of contract theory, which, inter alia, supports the enforcement of bargained promises.)

While not explored fully in this article, other theories, e.g., critical analysis and economic analysis, may also be probative regarding the operation of contract law. See, e.g., id.; Feinman, supra; Jay M. Feinman, Critical Approaches to Contract Law, 30 UCLA L. Rev. 829 (1983); Charles J. Goetz & Robert E. Scott, Enforcing Promises: An Examination of the Basis of Contract, 89 Yale L.J. 1261 (1980); Robert A. Hillman, The Crisis in Modern Contract Theory, 67 Tex. L. Rev. 103 (1988); Michael J. Meurer, 52 Law & Contemp. Probs. 1 (1989).
implicitly reflects the belief that the rules used will provide an enforcement mechanism for an allocation of risks and commensurately protect the proposed bargain. The neoclassical theory of contract law thus manifests the goal to support and, to a certain extent, facilitate voluntary and consensual transactions. The concept of consent represents a corollary of the freedom of contract notion.

Barnett opines that the consent theory of contract not only provides a foundation of the “objective” approach to the determination of contractual intent, but also constitutes a more effective theory to substantiate contractual obligations. He acknowledges the popularity of other theories of contractual obligation, party-based theories, e.g., will and reliance theories; standards-based theories, e.g., efficiency and fairness; and process-based theories, e.g., bargained theory. Each of these theories accurately depicts an aspect of the contractual obligation. However, they contain fundamental weaknesses, i.e., definitional ambiguities and vague parameters such as “reasonableness” or “public policy” standards. Consequently, he promotes the use of the consent theory of contract, which not only takes into account an objective approach to discerning contractual intent, but also manifests a clear sense of enforceability that avoids the need to deal in vague concepts.

Barnett’s consent theory represents a moralistic refinement of the freedom of contract notion, strongly relating to the neoclassical theory of contracts. As a result, his depiction of the consent theory complements the evaluative process which decision-makers should implement in the review of all bargains, including those containing indemnity provisions. This concept relates directly to bargains be-

67. See Goetz & Scott, supra note 66, at 1265 (noting that “bargained-for” promises tend to maintain the “value-enhancing” exchanges between the parties. Professors Goetz and Scott further state that “such promises are thus seen as fully enforceable under the compensation rule in order to protect and encourage value-maximizing resource allocation.” Id. (citing RESTATEMENT (SECOND) OF CONTRACTS § 76 cmt. b: “[B]argains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action and exercise of judgment and as a means by which productive energy and product are apportioned in the economy.”); see also WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 442 (4th ed. 1971).

68. Consequently, the neoclassical theory of contract law provides an institutional framework for economic transactions in the marketplace. Feinman, The Significance of Contract Theory, supra note 66, at 1288 (1990). See infra text accompanying notes 86-87, 90-92, 128-130 (noting that the concept of paternalism functions, at least in theory, to ensure that the transaction entered into by the parties was voluntary).

69. See supra text accompanying notes 43-52.
71. Id.
72. See supra note 61.
tween writers and publishers such as W and P. Objective manifestations tend to make matters of consent presumptive within publication agreements—a formalized contract with accompanying signatures substantiate assent. Yet, given certain externalities, the genuineness of that assent may be questionable.73

Although other theories provide justifications for the enforcement of agreements,74 the consent theory comprises a watershed, commencement point in the resolution of whether a bargained-for exchange should be enforced.75

In the transaction involving the writer and publisher, consent to the bargain appears evident. Indeed, the presence of consent may seem obvious. The publisher authors a detailed publication contract which contains many complex terms including an indemnity provision. The writer presumably reads and comprehends the agreement and both parties sign the document. Their motivational goals, namely, distribution of an original work, pecuniary gain, contribution to society, and extension of the bargain for future works by the writer, transform into expectations.

Voluntary transactions, like the one between the writer and publisher, often attempt to allocate a plethora of duties and liabilities. Various legal principles may govern such allocations. Absent any other superseding principles, the common law of torts comprises a primary mechanism dictating how duties and liabilities may be allocated.76 Traditional tort law mandates compensation by tortfeasors

73. See infra notes 114-115, 118-121 (discussing unconscionability).

74. See supra note 66. For an excellent survey of the various theories, e.g., efficiency, relational, and consent, which are relevant to the enforcement of contractual obligations, see generally Symposium on Default Rules and Contractual Consent, 3 S. CAL. INTERDISCIPLINARY L.J. 43 (1993) (providing a comprehensive and thorough review of the various theories of contract as they relate to default rules).

75. See FARNSWORTH, supra note 63; MURRAY, supra note 63. This, of course, does not signify a rejection of "consideration" as a concept affecting enforceability of bargains. See JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 185-87 (3d ed. 1987) (stating that one of the fundamental precepts of contract law is that consideration is required for the enforcement of an enforceable contract as well as any subsequent modifications or agreement); Susan L. Martin, Platinum Parachutes: Who's Protecting the Shareholder?, 14 HOFSTRA L. REV. 653, 665 (1986) ("Common law requires that there must be consideration in order for a contract to be enforceable.").

Additionally, the black letter rule is that a contract may not be modified without consideration. United States v. Stump Home Specialties Mfg., Inc., 905 F.2d 1117, 1121 (7th Cir. 1990); Wisconsin Knife Works v. National Metal Crafters, 781 F.2d 1280, 1285 (7th Cir. 1986).

76. See Jones III v. United Medical Recyclers, 825 F. Supp. 1288, 1294 (W.D. Mich. 1993) (indicating that an individual consumer's tort remedy is derived either from a duty imposed by law or from policy considerations which allocate risk to the manufacturer and seller rather than the consumer); see generally William Prosser, Handbook of the
who violate the rules of negligence. Parties, such as the writer and publisher, may attempt to alter traditional tort law allocation of duties and liabilities through consummation of a contractual agreement which redistributes these liabilities. Application of contract principles enables the parties to juxtapose the common law tort allocations of risks associated with their proposed transaction.

Compliance with these principles provides parties with the security that their bargain will be enforced since breach will result in compensatory damages. Melvin Eisenberg emphasizes that present contract law focuses on what promises should be enforced, and to what extent such promises should be enforced. The solution, if any, to these questions is grounded in the paradigmatic bargain principle, that "damages for unexcused breach of a bargain promise should invari-

LAW OF TORTS 399-442 (4th ed. 1971); see also Troy McNemar, Publisher Liability for Tort Arising from Advertisements: Eimann v. Soldier of Fortune Magazine, Inc., 39 U. KAN. L. REV. 477 (1991) ("Citizens of the United States depend on the judicial system to compensate them when they are injured by another's unreasonable conduct. The law of torts allocates these losses to the party that is responsible for the injury."); Glenn G. Morris, Business Associations, 50 LA. L. REV. 211, 215 (1989) (illustrating that duties are imposed under tort law generally to avoid or at least properly allocate the economic loss of personal injury).

77. The cause of action for negligence generally includes: a duty owed by the tortfeasor to the victim to exercise a prescribed standard of care, a commensurate breach of that duty, and a causal link between the breach of duty and the resultant injury. Generally, the claimant must prove all of these elements in order to recover under a negligence cause of action. See RESTATEMENT (SECOND) OF TORTS § 281 (1965); see also Merten v. Nathan, 321 N.W.2d 173, 177 (Wis. 1982).

78. The Restatement (Second) of Contracts defines a "contract" as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1979). The fundamental purpose of a contract is to preserve a party's bargain and to serve as a tangible embodiment of the party's voluntary assent to the contract's terms. See Steven R. Salbu & Richard Braham, Strategic Considerations in Designing Joint Venture Contracts, 1992 COLUM. BUS. L. REV. 253, 305 (1992) (noting that contracts "perform the traditional legal role of enunciating the terms . . . and helping to ensure performance or to fashion a remedy in the absence of performance"); Robert A. Hillman, An Analysis of the Cessation of Contractual Relations, 68 CORNELL L. REV. 617, 653 (1983) (stating that "the very purpose of a contract is to ensure performance . . . .")

79. See Melvin Aron Eisenberg, Expression Rules in Contract Law and Problems of Offer and Acceptance, 82 CAL. L. REV. 1127, 1178 (1994) ("Under the principles of contract law, the moment a contract is formed each party is subject to liability for expectation damages for breach, even if the breach consists of repenting or recanting only hours or even minutes after the contract was formed."); Howard Gensler, The Competitive Market Model of Contracts, 99 COM. L.J. 384, 391 (1994) ("In contract law, damages are awarded for breach where performance of the contract is materially substandard, incomplete or absent."); Miguel Deutch, Reliance Damages Stemming from Breach of Contract: Further Reflections and the Israeli Experience, 99 COM. L.J. 446, 451 (1994) ("The law of contract compensates a plaintiff for damages resulting from the defendant's breach. It does not compensate a plaintiff for damages resulting from his making a bad bargain."
bly be measured by the value that the promised performance would have had to the plaintiff, regardless of the value for which the defendant's promise was exchanged."80 Considerations of efficiency and fairness relate directly to this principle idea. However, the bargain principle comprises a difficult theory to implement in the real world and has led to the rise of unconscionability as a policing mechanism in the transactional process.81

Implementation of contract principles can affect both the particular provisions and the bargain as a whole. Parties' attempts to alter traditional tort law allocations of risk through contract law usually result in agreements of indemnity82 or exculpation.83 Indemnity provisions illustrate the neoclassical theory of contract law within modern contractual transactions. In keeping with the realism imbued in neoclassicism, these agreements can be subject to restriction if, for example, they are considered unconscionable.84

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81. Id. at 798-801; see also infra text accompanying notes 114-115, 118-120, 128 (discussing unconscionability as it relates to the enforcement of the parties' bargain).

82. Indemnity agreements, which constitute one type of contract limiting liability, generally provide for the shift of liability for loss from one individual who generally would be held legally responsible for certain actions to another individual. See E. Eugene Davis, Indemnity Between Negligent Tortfeasors: A Proposed Rationale, 37 Iowa L. Rev. 517 (1952). See also Harold A. Meriam & John V. Thornton, Indemnity Between Tort-feasors: An Evolving Doctrine in the New York Court of Appeals, 25 N.Y.U. L. Rev. 845 (1950) (The authors of this article not only recognize indemnification as a mechanism which shifts loss from one responsible party to another, but also distinguish the shifting of risks and the attribution of liability due to contribution among joint tortfeasors.).

83. While indemnity and exculpatory agreements both function to limit the liability of a culpable party, these types of contracts maintain distinctive characteristics. Exculpatory agreements serve to limit or preclude the recovery of damages ordinarily due a victim in a tortuous action. On the other hand, indemnity agreements do not apply to the victim's right to compensation. Indemnification merely comprises a mechanism which dictates which party in a contractual arrangement will be liable for damages resulting from the victim's injuries. See Goldman v. Ecco-Phoenix Elec. Corp., 396 P.2d 377, 382 (Cal. 1964) (noting that the limitation of liability contained in the parties' agreement in this case comprises an indemnification agreement in lieu of exculpatory agreement.). See generally Cathleen M. Devlin, Comment, Indemnity and Exculpation: Circle of Confusion in the Courts, 33 Emory L.J. 135 (1984) (indicating the enforceability of indemnity and exculpation agreements contained in real property leasehold contracts, and providing the distinctions between indemnity agreements and exculpation agreements).

84. A significant amount of scholarship has been dedicated to the neoclassical theory of contract law as it relates to the traditional, contractual paradigm. See Melvin A. Eisenberg, The Responsive Model of Contract Law, 36 Stan. L. Rev. 1107, 1111 (1984) (indicating that neoclassical contract theory should be elaborated in order to ensure that the theory encompasses principles which are "intellectually coherent and sufficiently open-textured to encompass the complex and evolving realities of contracts as a social institution"); see generally Eisenberg, supra note 80; Melvin A. Eisenberg, The Principles of Considera-
One may surmise that parties like W and P in the hypothetical, who comport with formalistic rules of contract formation, have assented to a bargain. Yet, if one questions the reality or authenticity of that assent, the result is less conclusive. Consent does not operate in a vacuum, wherein formalistic motives assume its validity. Indeed, true and valid consent must be considered in conjunction with motivation and paternalism.  

C. The Concept of Paternalism Within the Contractual Paradigm

I. A “Definition” of Paternalism

The third consideration which may dramatically affect the efficacy of the parties’ bargain is paternalism. While a precise definition may be elusive, paternalism can be generally characterized as a legal rule or action which thwarts certain acts that are perceived as deleterious to the welfare of actor(s) or third parties. To some extent, paternalism dictates whether an agreement will be enforced, regardless of the transaction’s comportment with formalistic contract rules governing formation.

Paternalistic intervention demands that enforcement of otherwise valid bargains relate directly to a decision-maker’s concerns, usually focusing on the authenticity of consent and the pejorative impact of the parties’ motivation once the bargain has been struck and performed. An omnipresent consideration in the application of paternalistic principles are possible deleterious effects of the agreement on third parties. This latter concern, which may be generally stated as the

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85. As I argued at the beginning of Part II, the contractual paradigm includes not only consent, but also motivation and paternalism. While some may prioritize these concepts, it must be recognized that none of them work to the exclusion of the others. Each must be considered in the evaluation of the parties’ bargain.

86. See Bailey Kuklin, Self-Paternalism in the Marketplace, 60 U. CIN. L. REV. 649, 712 n.9 (1992) (providing sources which attempt to define paternalism); Donald Van DeVeer, Paternalistic Intervention 12 (1986) (“A paternalistic act is one in which one person A, interferes with another person, S, in order to promote S's own good.”); Hugh Collins, The Law of Contract 116 (1986) (adopting a rather narrow definition of paternalism in contract law and stating that paternalism appears in modern contract law as a means of preventing strong parties from dominating weaker parties); Jonathan Simon, Power Without Parentis: Juvenile Justice in a Postmodern Society, 16 CARDOZO L. REV. 1363, 1372 (1995) (“Paternalism is often defined as an exercise of control over an individual that purports to be implemented in the interests of that individual, either overriding or filling in for unreliable or nonexistent individual choices.”); Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 572 (1982) (defining paternalism to include all government intervention that purports to replace the will of a party with what the decision-maker thinks is better for the party).
implementation of "public policy," not only serves as justification for the use of paternalism, but also contributes to confusion and unevenness associated with its application.87

Paternalism functions as a device external to the parties' transaction and, therefore, may not relate to the actual substance of the bargain.88 The operation of paternalism becomes pronounced when the parties' agreement contains certain terms, i.e., the indemnity agreement contained in the writer's and publisher's contract, which the decision-maker may find impinges upon the rights of either one of the parties to the agreement (in this case the writer) or contravene some matter of public policy.89 While not a conspicuous element of the bargainers' agreement, paternalism functions as a decision-maker's mechanism to authenticate consent and protect bargainers and third parties from improvident bargains.90 The operation of paternalism must consequently be viewed in relation to both the motivations91 and ultimate consent92 of parties to their transaction. Moreover, this concept may function to affect parties' agreement as a whole, or specific terms, i.e. the indemnity provision, in particular.

While the universal design may be to protect a bargainer (or other third parties) from the adverse consequences of her bargain, the methods and rationale for doing so may vary. Nonetheless, Anthony T. Kronman categorizes the reasons for certain paternalistic restrictions placed upon contracts.93 These rationales include: economic efficiency and distributive fairness, which reflect the decision-maker's attempt to redistribute wealth in society;94 personal integrity, which

87. Duncan Kennedy provides a comprehensive examination of "paternalism" as it relates to the regulation of the bargaining process. Paternalism, which manifests "empathy" or "love," "involves compelling a decision [which generally is not in accord with the original bargain] on the ground that it is in the beneficiary's best interest." Kennedy, supra note 86, at 624-25 (1982). Consequently, the decision-maker alters the original bargain entered into when paternalistic concerns dictate that the bargain is somewhat flawed. Id.

88. Any "distributive effects" of paternalistic intervention tend to operate as side effects rather than as reflections of the party's bargain. See id. at 624-25.

89. See infra text accompanying notes 101-103, 105-110, 117.

90. Paternalism also relates to the motivation of the parties, particularly in the case where one of the parties seeks to take advantage of the other due to some superior knowledge or bargaining position. See supra text accompanying notes 35-42.

91. Id.

92. See supra text accompanying notes 68, 86-87, 90.


94. Id. at 766-74. Kronman's example of distributive justice is the decision-maker's refusal to allow disclaimers of the warranty of habitability in landlord/tenant relationships. The concept of unconscionability would also fit within the rubric of this justification; see also Anthony T. Kronman, Contract Law and Distributive Justice, 89 Yale L.J. 472 (1980).
seeks to protect a party’s self respect or confidence, and judgment and moral imagination, which reflect the unwillingness to enforce bargains against those individuals who suffer some impairment of judgment. While these rationales are not mutually exclusive, they provide philosophical justification for paternalistic intervention.

In the case of the writer and publisher, rationales focusing on personal integrity and judgment seem irrelevant. However, the concern for distributive fairness or justice, particularly with regard to specific terms within the agreement, may give rise to concerns based in paternalism. The indemnity provision could, therefore, invoke some degree of paternalistic intrusion by the decision-maker.

2. Paternalism and the Indemnity Provision

The decision-maker may either vitiate an entire bargain, or invalidate certain terms within the bargain. Consequently, the basic agreement, complete with the parties’ primary goals and motivations, may remain intact, notwithstanding the possible invalidation of one or more terms contained in that agreement. This flexibility comports comfortably with the function of contract rules. If rules serve to encourage transactions and provide security to bargainers, decision-makers should attempt to preserve the essence of the parties’ bargain, despite the invalidation of one or more of the terms contained

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95. Kronman, Paternalism, supra note 93, at 774-86. Professor Kronman notes that this rationale seeks to preserve individual liberty and, therefore, prevent self-enslavement. He provides as examples antenuptial agreements, which prohibit divorce, and waivers of discharge in bankruptcy. Id. 776-85.

96. Id. at 786-97. This rationale relates to perceived defects in the bargainer’s reasoning. Professor Kronman specifically notes the contracts of minors as an example of the applicability of this rationale. Id. The contractual restrictions based upon incapacity not only invoke the notion of paternalism, but also relate to the absence or authenticity of consent since the incapacitated bargainer did not possess the requisite faculties for true consent.


98. This presupposes, of course, that the writer and publisher’s contract does not impose “quasi-enslavement” on either party to the transaction, and that there are no capacity issues which impaired the parties’ judgment at the time of contract formation.

99. See supra text accompanying notes 1, 5.
Given this fluidity, it is beneficial within the confines of this article to examine paternalism in light of its applicability to indemnity provisions.101

As a preliminary premise and general rule, indemnity provisions are per se valid and enforceable.102 This axiom may also connote the validity of indemnity clauses contained in publishing contracts.103 Such enforceability may be due to the indemnity provision’s resemblance to insurance.104 Despite this general rule of enforceability, the validity of these clauses functions under a significant cloud because of paternalistic concerns.105 Their viability generally depends upon their intrusion on factors relevant to public policy.106 As will be delineated

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100. This presumes, of course, that the parties’ overall bargain does not conflict with paternalistic notions such as illegality, capacity, etc.

101. This is not to suggest that paternalistic notions applicable to the overall agreement either are inapplicable or have no merit. I merely suggest that an examination of paternalistic intervention as it applies to indemnity provisions provides a cogent overview of the concept’s applicability.

102. The prevailing, modern view upholds indemnity agreements exempting a party from ordinary negligence in which no public interest is involved and no statute expressly prohibits the provision. See Gardner v. Downtown Porsche Audi, 225 Cal. Rptr. 757, 758 (Cal. Ct. App. 1986). As a rule, exculpatory contracts are valid so long as they do not conflict with public policy or implicate a unique relationship between the parties which militates against enforcement. See Lohman v. Morris, 497 N.E. 2d 143, 145 (Ill. Ct. App. 1986); see also Devlin, supra note 51, at 139; Mutual Marine Office, Inc. v. Atwell, Vogel & Sterling, Inc., 485 F. Supp. 351 (S.D.N.Y. 1980).


104. The concept of “insurance” represents a mechanism which permits parties to eliminate or minimize their responsibility for risks resulting from perilous exposure or activity. See Robert Riegel & Jerome Miller, Insurance Principles and Practice 27-28 (1966). Insurance provides for a pool of assets accumulated from premiums and other possible resources recovered from individuals who faced similar exposures of liability. Id. at 27. A simplistic explanation of insurance notes that the combination of risks borne by similar parties tends to reduce the uncertainty experienced by individuals facing such risks. Id. at 28. See also Robert Mehr & Emerson Cammack, Principles of Insurance 243, 11-14 (1952); Scott Conley & George Sayre, Rights of Indemnity as They Affect Liability Insurance, 13 Hastings L.J. 214 (1961) (recognizing that indemnity agreements, as a matter of law, shift liability among parties as a matter of law). The authors further indicate that indemnity agreements essentially and ultimately impact insurance carriers of the parties. Id. at 226-28.

105. See supra text accompanying notes 86-90; see also infra text accompanying notes 114-115, 118-120.

106. It is well-settled that contract provisions may be declared invalid when they are contrary to public policy. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955); see infra text accompanying notes 109-117, 122-124. Public policy includes other aspects such as public duty. See Tunkl v. Regents of Univ. of Cal., 383 P.2d 441 (Cal. 1963). It also includes violation of statutes. See Fleming James, Jr., Statutory Standards and Negligence in Accident Cases, 11 L.A. L. Rev. 95 (1950) (noting a differing construction of statutory stan-
below, public policy represents a complex and amorphous phenomenon which incorporates the paternalistic rationales described by Professor Kronman.107

Restrictions placed upon contracts which limit liability rest on the longstanding belief that agreements that contravene public policy are invalid.108 Considerations rooted in public policy generally focus on two primary concerns: that bargaining power disparity among the parties to the contract may result in an unfair allocation of liability,109 and that allowing parties to contract away their liability may encourage reckless or negligent conduct.110 These considerations prompt decision-makers to view indemnity provisions critically.111

"Public policy," however, constitutes an elusive phrase which defies precise definition.112 Generally, it has been viewed as "the com-

dards related to negligence); see also, e.g., RESTATEMENT (SECOND) OF TORTS §§ 285-86 (1965). However, many statutes limit the use of contracts limiting liability, i.e., indemnity and exculpatory agreements.

107. See supra text accompanying note 93.

108. See infra text accompanying notes 109-121.

109. Contract negotiations often present "a situation in which the parties have not equal bargaining power; and one of them must either accept what is offered or be deprived of the advantages of the relation." WILLISTON ON CONTRACTS § 1751 (3d ed. 1972). See also United States v. Bethlehem Steel Corp., 315 U.S. 289, 326 (1942) (Frankfort, J., dissenting) ("the courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage" of the other); Fitzgerald v. Newark Morning Ledger Co., 267 A.2d 557, 558 (N.J. Super. 1970) ("Much depends upon the positions of the contracting parties. If they do not stand on a footing of equality, so that one is compelled to submit to a stipulation relieving the other from liability for future negligence, the stipulation is invalid. . . ."). See infra text accompanying notes 114-115, 118-121.


111. While seemingly straightforward, the law involving indemnity is fraught with uncertainty. See Morant, supra note 29, at 727-28. Such uncertainty stems from such factors as the lack of knowledge or skill on the part of one of the bargainers, and the difficulty associated with determining risks and the liabilities that flow therefrom. See Frank P. Grad, Contractual Indemnification of Governmental Contractors, 4 ADMIN. L.J. 433, 521-22 (1991) (stating that the ABA has asserted that determinations of risks and insurability are extremely difficult to make, and that decisions relating to indemnities involve great uncertainty); see also James B. Sales, Contribution and Indemnity Between Negligent and Strictly Liable Tortfeasors, 12 ST. MARY'S L.J. 323 (1980).

112. See W.R. Grace & Co. v. Local Int'l Union of United Rubber Workers, 461 U.S. 757, 766 (1983) (noting that public policy must be ascertained by "reference to the laws and legal precedents"); Pope Mfg. Co. v. Gormully, 144 U.S. 224, 233 (1892) (stating that the standard of such policy is not absolutely invariable, since contracts which at one stage of our civilization may seem to conflict with public interest, at more advanced stages are treated as legal and binding); see also Pittsburgh, C. C. & St. L. Ry. Co. v. Kinney, 115 N.E. 505, 507 (Ohio 1916) (observing that a correct definition, both concise and comprehensive, of the words "public policy" has not yet been formulated by the courts).
munity common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men . . . ."113 This amorphous definition can ultimately lead to confusion and disparate results when applied by different decision-makers in different bargaining situations. Notwithstanding its nebulous definition, the rubric of public policy often serves to limit many contracts seeking to limit the liability of certain parties.114

Perhaps the most significant consideration in the decision-makers' evaluation of indemnity provisions is the evaluation of contractual terms and their impact upon the perceived disadvantaged party to the bargain. Commonly referred to as unconscionability, this paternalistic concept is a prototypical representation of distributive justice as depicted by Professor Kronman. Specific patterns of conduct of the advantaged party remain intrinsic to the paternalistic concerns regarding the indemnitor. Enforcement of indemnity provisions may be jeopardized by the assumption that the indemnitee will take advantage of her superior bargaining position not only in the negotiation of the agreement, but also in the performance of same.115 The difficulty with enforcement arises from the fact that the indemnitee, who has superior rights under the contract, may behave in an opportunistic fashion regarding matters related to the agreement.116

If the parties exhibit great disparity in bargaining power, public policy may compel the decision-maker to relieve the weaker party of


114. Public policy encompasses a plethora of concerns including unconscionability, breach of public duty (which includes the protection of third parties), and illegality (violation of statutes). For a comprehensive examination of public policy as it relates to indemnity provisions, see Morant, Contracts Limiting Liability, supra note 29.

115. Eisenberg indicates that the concept of unconscionability justifies limitations placed upon the bargain principle given the need to ensure "the quality of the bargain." Consequently, the bargain principle, which on its face appears to be relatively simplistic in design, becomes exceedingly complex and difficult to implement in reality. Limitations placed upon the bargain principle by way of such mechanisms as unconscionability not only complicate the decisions as to which bargains the decision-maker will enforce, but also heightens the administrative costs of enforcing such agreements. Eisenberg, The Bargain Principle, supra note 80, at 798-801.

116. See generally Timothy J. M uris, Opportunistic Behavior And The Law of Contracts, 65 Minn. L. Rev. 521 (1981) (denoting the problem of one party's conduct which is contrary to the other party's understanding of the agreement, notwithstanding that such conduct is not violative of the explicit terms of that agreement). For a more exhaustive discussion of opportunism within the bargaining context, see Richard E. Speidel, Article 2 and the Relational Sales Contracts, 26 Loy. L.A. L. Rev. 789 (1993); George M. Cohen, The Negligence-Opportunism Tradeoff in Contract Law, 20 Hofstra L. Rev. 941 (1992).
her obligation of indemnity under the contract.117 Such disparity relates directly to the concept of unconscionability.118 While seemingly simplistic in perception, the concept of unconscionability comprises an elastic concept which may include other elements such as "oppression"119 and "unfair surprise."120

Eisenberg provides a cogent description of the historical implementation of unconscionability. He first notes that unconscionability was considered a bifurcated concept which includes "procedural" and "substantive" unconscionability. Procedural unconscionability in-

117. See Restatement (Second) of Contracts § 208 cmt. d (noting that an agreement is not void "merely because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent to the unfair terms."); see also Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 446 (Cal. 1963) (holding that public policy may invalidate a negligence disclaimer when "the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services").

118. "Unconscionability" has been defined as "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Leasefirst v. Hartford Rexall Drugs, Inc., 483 N.W.2d 585, 587 (Wisc. Ct. App. 1992). Similarly, the West Virginia Supreme Court describes unconscionability as an "overall and gross imbalance, one-sidedness or lop-sidedness that justifies a court’s refusal to enforce a contract as written.” McGinnis v. Cayton, 312 S.E.2d 765, 776 (W.Va. 1984); see also Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) (indicating that unconscionability is recognized to include "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party"). Furthermore, the doctrine is broken down into two components: substantive and procedural. The McGinnis court identified substantive unconscionability as "unfairness in the contract itself—overall imbalance, one-sidedness. laesio enormis, and the evils of the resulting contract.” Procedural unconscionability, the court explained, "involves inequities and unfairness in the bargaining process.” McGinnis, 312 S.E.2d at 777.

119. The Restatement (Second) of Contracts emphasizes the concept of oppression as an integral part of the assessment of unconscionability. Restatement (Second) of Contracts § 208 cmt. a (1979).

The Restatement (Second) of Contracts recognizes the concept of unconscionability, notwithstanding the Restatement’s basis in the neoclassical theory of contract law. Restatement (Second) of Contracts (1981). See E. Allan Farnsworth, Contracts §§ 1.8-1.11 n.135 (2d ed. 1990); John E. Murray Jr., Murray on Contracts § 9 (3d ed. 1990); Symposium. The Restatement (Second) of Contracts, 67 Cornell L. Rev. 631 (1982).

120. See U.C.C. § 2-302 cmt. 1 (1977) (stating that "the basic test is whether . . . the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . [T]he principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power"); see also Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 514-16 (2d ed. 1993) (providing a comprehensive bibliography of materials related to the concept of unconscionability and other factors used to regulate the bargaining process).
cludes basic unfairness in the bargaining process itself. Substantive unconscionability consists of unfairness in the bargaining "outcome"—that is the actual terms of the agreement. The distinctions between procedural and substantive unconscionability tend to assist in the reconciliation of that doctrine with the bargain principle. Such reconciliation also leads to consideration of "unfair surprise" which is a linchpin consideration within the doctrine of unconscionability. Subsequent thought on the subject has indicated that unconscionability now encompasses not only consideration of unfair surprise but also, in some cases, examination of the fairness of the terms contained in the parties' agreements.\(^{121}\)

Decision-makers may also nullify unambiguous indemnity provisions contained in printed form contracts.\(^{122}\) Commonly referred to as "adhesion contracts,"\(^{123}\) these form agreements require one party to acquiesce to pre-drafted terms, typically printed in small type, on a form supplied by a sophisticated business entity. Under these circumstances, decision-makers invoke public policy and will shield the weaker party from the consequences of her bargain.\(^{124}\)

Paternalism constitutes a significant, yet troublesome concept within the contractual paradigm. While its significance results from its check upon the concepts of motivation and consent, its pitfall may lie in its implementation by decision-makers. Notwithstanding its amorphous nature, paternalism's principal deficiency may be its possible inconsistency and lack of precision with regard to its application. Indeed different bargaining situations with similar characteristics, for ex-


\(^{122}\) See 6A CORBIN ON CONTRACTS § 1472, at 599 (1962).

\(^{123}\) See Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 Harv. L. Rev. 1173 (1983); see also Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 631-33 (1943). Professor Kessler defines an adhesion contract, quite simply, as a "standardized mass contract." These contracts, Kessler writes, are highly practical from a business perspective. He notes, however, that

standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all.

\(^{124}\) Kronman recognizes that bargains which result from the execution of an adhesion contract can fuel the decision-maker's intervention to accomplish distributive justice. See Kronman, Paternalism, supra note 93.
ample, different bargainers who include indemnity provisions in their agreements, may experience differing fates given the vagueness of paternalistic rationales such as distributive justice. As demonstrated in Part III below, emphasis on paternalism and the reality of consent as they relate to indemnity provisions may be misguided and indicates that maintenance of the parties’ basic bargain may require a shift in focus to the primary motivational goals of parties.

III
The Bargain Analyzed—A Discovery of Means
Which Foster Goals and Expectations

The concepts of the contractual paradigm\(^{125}\) confirm the legitimacy of bargained-for exchanges among parties. Yet, segments of the paradigm, particularly paternalism, may alter the original bargain or undermine the parties’ motivational goals and expectations embodied in their proposed agreement.\(^{126}\) Details of the contract, fueled sometimes by overt opportunism or “negative motivation,” may serve to obscure the overall goal or “positive motivation.” The different forms of motivation which may underlie various goals, and the clauses generated therefrom, transform the bargain into a complex paradox.

Ultimately, the more minor motivations of the parties, mostly those which prompt the inclusion of an indemnity agreement into the contract, may frustrate a tacit, yet primary goal to continue the relationship if the initial bargain proves successful. The key to the maintenance of these fundamental goals is the reexamination of particular clauses, such as indemnity provisions, to ensure their need and utility.

A. The Problematic Contractual Paradigm


Motivational considerations, i.e., risk aversion, which give rise to the inclusion of the indemnity provision do not, in and of themselves, justify enforcement of the provision. Although the document on its face may indicate voluntariness on the part of the indemnitee, decision-makers may scrutinize such agreements in order to verify such volition. Certainly, the potential lack of choice on the part of the indemnitee\(^{127}\) may vitiating the voluntary nature of the parties’ agree-

\(^{125}\) See supra text accompanying note 36.

\(^{126}\) The altering nature of paternalism becomes particularly acute in its applicability to indemnity provisions. See infra text accompanying notes 127-128.

\(^{127}\) In the situation involving the writer and publisher, the writer, as indemnitee, may be considered to have fewer choices with regard to publishers since she is a novice author.
ment. Decision-makers utilize paternalistic devices to ensure that consent to, specifically, the indemnity provision to authenticate and verify the consent of the indemnitee. Consequently, the decision-maker will likely evaluate the parties' transaction to ensure that the indemnitee's assent to the agreement was genuine. The veracity of the indemnitee's consent remains inexorably linked to the individual's lack of choice with regard to the agreement. This lack of choice, also associated with diminished bargaining power, is generally embodied in the concept of unconscionability. This factor indicates that the indemnitee may have been compelled to accept the terms imposed by indemnitee. Such an imposition militates against the presumption that the indemnitee voluntarily assented to the indemnitee agreement; therefore, the decision-maker, if convinced that all factors manifest a lack of assent, may refuse to enforce the indemnity provision.

In the situation involving the writer and publisher, initial inspection may reveal that the parties' bargaining positions are indeed disparate. The publisher is a sophisticated business entity with, presumably, pronounced experience in the business of publication. These characteristics contrast sharply to those of the writer who, presumably, is a neophyte in the publication business. Consequently, the publisher would tend to have better access to information required to be fully cognizant of the facts and circumstances critical to the bar-

128. Decision-makers typically will scrutinize an indemnity contract to determine whether the indemnitee voluntarily assented to the contract's terms—i.e., whether the indemnitee exercised free choice. See Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 (Cal. 1981); see also A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120 (Cal. Ct. App. 1982) (The court noted that a contractual indemnity provision may be unconscionable and, therefore, void if the agreement involved elements of "oppression" or "unfair surprise." The court defined "oppression" as circumstances demonstrating "the absence of meaningful choice" by the indemnitee.). But see Boat & Motor Mart v. Sea Ray Boats, 825 F.2d 1283, 1291 (9th Cir. 1987) (stressing that "the allocation of risks by superior bargaining power is not unconscionable"). In his treatise on contract law, Professor Murray explained the rationale behind the judicial skepticism of one-sided contract provisions: "One of the fundamental concepts of contract law is the concept of assent.... The two basic questions raised are: (1) Did the parties agree to any future action or inaction? (2) If they did agree, what are the terms of their agreement (or, what is their circle of assent)?" John E. Murray, Jr., MURRAY ON CONTRACTS § 352 (2d ed. 1974); see also supra text accompanying notes 114-115, 118-120, 128.

129. See supra text accompanying notes 114-115, 118-120, 128.

130. See supra text accompanying notes 114-115, 118-120, 128. When the decision-maker acts out of paternalistic motives she initiates rule changes which seek to improve the welfare of a party to the transaction and thereby encourage them to behave in "their own real interest." Duncan Kennedy, Distributive and Paternalistic Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 570 (1982). The decision-maker's application of unconscionability may function more from a concern of a bargainer's naivete, than from a true lack of bargaining "power." Id. at 634.
gain. Likewise, the writer, as a newcomer, would have little information or access thereto. As a result, the writer would not be able to appreciate fully the impact of her assent to the agreement likely containing an indemnity provision.

The concerns involving the potential unequal bargaining positions may precipitate negative motivation and overt opportunistic behavior on the publisher’s part. Yet, the publisher, as a sophisticated bargainer, would recognize his obligation to deal with the writer in good faith. Consequently, any perceived opportunistic behavior on the publisher’s part may be checked by the requirement that all such agreements be scrutinized in accordance with the implied duty of good faith and fair dealing.

Irrespective of the concept of good faith, the disparate bargaining positions of the publisher and writer raise concerns regarding the writer’s true assent to the indemnity provision. Her weakened position may encourage the decision-maker to employ a paternalistic mechanism.

Notwithstanding arguments regarding the lack of choice on the part of the indemnitor, the decision-maker may scrutinize the in-

131. See supra text accompanying note 116.
132. Restatement (Second) of Contracts § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”).
134. Note that there may be a cogent argument regarding the “transactional incapacity” suffered by the writer. But that concept in and of itself may not lead to the invalidation of the indemnity provision. See supra text accompanying notes 117-120.
135. Lack of choice relates directly to the concept of consent and whether in fact the indemnitor assented to the indemnity provision.
demnity provision with regard to its actual substance. In a publishing contract, if the decision-maker finds the indemnity provision to be unduly burdensome or onerous on the writer, the academic assumption would be that the decision-maker would not enforce the provision against the writer. Yet use of this potential paternalistic remedy remains speculative given the fact that it would be difficult for the decision-maker to find the provision onerous. First, indemnity provisions contained in publishers' and writers' agreements tend to be relatively standard with regard to publication contracts. Moreover, since any actionability under these agreements emanate directly from the writer's work, and the probability of action relates directly to the degree of originality of that work, the fact that the parties' agreement places the majority of responsibility for liability on the writer appears reasonable. Consequently, substantive unconscionability, i.e., that the terms of the writer's and the publisher's indemnity clause are patently unfair or oppressive, remains debatable and fails to provide a true gauge as to whether the decision-maker would invalidate the provision based on those terms.

Likewise, the indemnity provision contained in the publisher's and writer's agreement does not seemingly offend any public policy considerations such as the encouragement of recklessness or the breach of public duty. The decision-maker generally may feel compelled not to enforce indemnity agreements wherein such action may

136. See supra notes 118, 120.
137. See supra note 20.
138. Perhaps the decision-maker recognizes the difficulties and inconsistencies which are inherent in the application of paternalism. See Kennedy, supra note 130, at 633-34 (stating that paternalistic concerns remain somewhat incoherent, with interventions based upon the protection of "incapacitated" minors to reasonably intelligent adults).
139. The situation between the writer and publisher contrasts sharply with those bargainers whose agreement affects the health, safety, or welfare of the general public, i.e., an indemnity or exculpatory agreement between a common carrier and some other equal bargaining partner. See Northwest Airlines v. Alaska Airlines, 351 F.2d 253, 256 (9th Cir. 1965) (noting that an indemnity agreement whereby the indemnitee will assume the liability of damages caused by the negligence of the indemnitee, must not promote a breach of public duty); see also United States v. Contract Management, 912 F.2d 1045, 1049 (9th Cir. 1990) (indicating "concern over the public policy ramifications of allowing the government to shift the burden of its negligent acts to its economically weaker contractors" through indemnification agreements); National R.R. Passenger Corp. v. Consol. Rail Corp., 698 F. Supp. 951, 971 (D.D.C. 1988) ("Broad indemnification is particularly disfavored where the indemnitee's activities directly affect public safety."); Howey v. United States, 481 F.2d 1187, 1192 (9th Cir. 1973) (recognizing that "in certain contexts an arrangement requiring indemnification for the negligent acts of another might be invalid and unenforceable as against public policy"); Titan Steel Corp. v. Walton, 365 F.2d 542, 548 (10th Cir. 1966) (illustrating that with regard to the "enforceability of so-called release-from-negligence contracts whereby one possessed of superior bargaining power is enabled to contract against liability for his own negligence, . . . [t]he federal view is that they are contrary to
induce reckless conduct on the part of the indemnitee.\textsuperscript{140} The encouragement of recklessness does not appear to be a problem in transactions such as those entered into by the publisher and writer. Indeed, given that the provision may discourage authors or composers from adopting the work of others, one may argue that the inclusion of the indemnitee provision would prevent encroachment.\textsuperscript{141}

As a result, the fate of the indemnity provision contained in the publisher’s and writer’s contract remains doubtful at best when viewed solely in terms of the contractual paradigm. The decision-maker may question the writer’s assent to the agreement given the disparate nature of her bargaining position as compared to that of the publisher’s. However, that alone appears to be the most significant factor within the paternalism model to vitiate the agreement. In fact, one may argue that the mere presence of an unequal bargaining position alone would not be enough to invalidate the indemnity provision.\textsuperscript{142} In order for the decision-maker to invalidate the indemnity provision, it appears that the actual substance of the agreement must be unusually oppressive.\textsuperscript{143}

The inescapable conclusion is that the imposition of the paternalistic mechanism, which may be unavoidable with regard to indemnity provisions, may leave parties such as the writer and publisher with a large degree of uncertainty relevant to the enforceability of that provision.\textsuperscript{144} Even if the writer’s consent to the indemnity provision is suspect, the use of paternalistic mechanisms to defeat the clause remains specious. Moreover, the publisher may experience a great degree of

\textsuperscript{140} See Steven Shavell, Economic Analysis of Accident Law 127-28 (1987). For qualifications of this thesis, see id. at 129-31, 134, 146-51. Some argue that the deterrence of conduct through the assignment of remedies under tort law, i.e., compensatory damages, may not be effective and should be replaced. See generally Stephen D. Sugarman, Doing Away With Personal Injury Law 38-41 (1989).

\textsuperscript{141} Such discouragement results in the fear of pecuniary liability resulting from the possible infringement of a copyright.

\textsuperscript{142} The marketplace remains replete with examples of agreements among individual entities with disparate bargaining positions. The mere fact that their positions are different does not necessarily mean that the agreements struck by those parties are per se invalid. Consequently, one must evaluate the language of those agreements in order to determine whether they should be enforced. In the case of the writer and publisher, one may argue that the writer remains in an inferior bargaining position with regard to the publication agreement. However, this omits the reality that authors or composers, even fledgling artists such as the writer, often have agents who are experienced individuals within the publication business. If the writer has such an agent, such counsel may seriously jeopardize the argument that her bargaining position is compromised.

\textsuperscript{143} See supra text accompanying notes 118-120.

\textsuperscript{144} See supra notes 106, 109-117, 122-124, 128-130.
confusion and discomfort with the uncertain results imbued in the application of paternalism.\textsuperscript{145} The confusion inherent in the application of paternalism becomes even more disruptive given that the need for the indemnity provision may be overstated. Consequently, parties must rethink the need for this provision in an effort to maintain their overall motivational goals of the publication contract.

The mechanisms of paternalism surface only after a malfunction within one or more of the elements of the contractual paradigm, i.e., when the motivational goals of one or more of the parties have been frustrated, where the consent of the parties at the time of formation was either skewed or nonexistent, or the pejorative opportunism\textsuperscript{146} of one of the parties frustrated the goals and motivations of the other party. The breakdown within the bargain may prompt one or more of the parties to cease performance and perhaps seek some remedy from the decision-maker. The decision-maker will then likely determine whether or not the elements of paternalism apply to the breakdown of this transaction.

Paternalism is no cure-all, however. The parties should not rely on paternalism to rectify a breakdown within the bargain and to protect their goals and expectations. Paternalism, which is generally implemented only by the decision-maker, can be costly, time consuming, and therefore, inefficient.\textsuperscript{147} The invocation of paternalism requires the parties to expend considerable resources. Moreover, while the rubrics of paternalism are definable academically, they can be difficult for the decision-maker to administer consistently on a case-by-case basis. The resulting unpredictability produces unclear signals, and is likely to foster insecurity in potential bargainers who contemplate future agreements of a similar nature.

If parties to an agreement maintain a focus on the motivational element of the contractual paradigm, they could discover that their need for cumbersome and self-serving terms such as indemnity provisions is minimal and could ultimately frustrate the overall goals which drove them to seek the bargain initially. Moreover, the decision-maker's recognition of the importance of the parties' motivation to contract should prevent the premature invocation of paternalism to

\textsuperscript{145} While publishers want the indemnity provision, that provision's possible vulnerability under paternalism could discourage publishers from entering into the agreement altogether.

\textsuperscript{146} Opportunism generally refers to strategic conduct within the bargain which manifests adverse consequences. \textit{See supra} text accompanying note 94. However, the notion should not be construed so narrowly. Strategic behavior which adheres to the tenets of good faith and fair dealing may be acceptable and enforceable.

\textsuperscript{147} \textit{See infra} note 183.
resolve the parties’ dispute in the event of a transactional breakdown. If the motivation of both parties has been facilitated and sustained, and their respective goals and ultimate expectations preserved in a truly consensual agreement, they will perform their respective obligations without the need for intervention by a decision-maker. This facilitation of the parties’ goals, expectations, and motivations will also obviate the need for obtrusive clauses such as indemnity provisions.

Parties to bargains should particularly recognize the disutility of including indemnity provisions in their agreements. These provisions may ultimately frustrate the mutual goals and expectations of the parties and stymie potential gains that could be realized from their transaction.

2. Maintenance of Primary Motivational Goals with the Minimization of Paternalism

Parties, such as writers and publishers, bargain with each other because of primary motivations which encompass the optimization of gain.148 This goal is related to the concept of profit maximization, which connotes the parties’ objective to maximize the financial gain of their business enterprise.149 Of course, profit maximization may have its limits, particularly if the parties garner such substantial review as to diminish the utility of earning additional profits.150

Irrespective of their desire for pecuniary gain, an equally paramount object of the parties is to maintain their overall motivational goal without impinging adversely upon third parties, thereby violating public policy, and ensuring the voluntary nature of their bargain. In the case of the writer and publisher (and, for that matter, all bargainers in the marketplace) the preservation of positive, motivational

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148. See supra text accompanying notes 37-42.
149. See Lawrence E. Mitchell, New Directions in Corporate Law—Groundwork of the Metaphysics of Corporate Law, 50 Wash. & Lee L. Rev. 1477, 1484-85 (1993) (describing profit maximization within the corporate sphere as “corporate actors [going] about their duties solely in pursuit of stockholder profits” and representing the purpose of the corporation); see also Michael S. Jacobs, The New Sophistication in Antitrust, 79 Minn. L. Rev. 1, 16 (1994) (noting that courts “could define sophisticated firms as those with consistently large profits” and that the pursuit of profits or “profit maximization” defines corporate rationality); Bevis Longstreth, Reflections on the State of Corporate Governance, 57 Brook. L. Rev. 113, 119 (1991) (defining the corporate objective to be that of profit maximization). See also infra note 162 and accompanying text.
goals which precipitate their contract can best be accomplished by minimizing interference from decision-makers. Such minimization can only occur if the needs of paternalism are not apparent in the parties' agreement.

Concomitant with the parties' goals and ultimate expectations to maximize profits garnered from the writer's present work, a reasonable outgrowth of the original bargain is the publisher's objective to distribute future works of the writer in the event the present work is a success. This goal, whether tacit or explicit, constitutes a logical outgrowth of the parties' desire to maximize profit and ensure continued gain. Given the success of their original venture, it would be rational to deduce that the parties, most particularly the publisher, would seek to bargain for future works of the writer.

Indeed, publishers may explicitly provide for the dissemination of the writer's future works, thereby expressing the desire to maintain a business relationship with a potentially successful writer. The case of In re Stein and Day Inc.\textsuperscript{151} explicitly illustrates this manifestation. In Stein, the writer sought to require a publisher in bankruptcy either to assume or reject their publication contract as executory.\textsuperscript{152} This maneuver by the writer was an attempt to obtain royalties for a book which the debtor-publisher had already distributed.\textsuperscript{153} The court indicated that a publishing contract between a writer and a debtor-publisher was executory only as to the debtor, and that the parties had a valid publication agreement which included, inter alia, a warranty and hold harmless provision, and also an option clause which granted to the publisher the first opportunity to publish the writer's next work.\textsuperscript{154} Under such a clause, the publisher was obligated to notify the writer within six weeks of its intent to exercise its option, and the parties were to agree upon terms governing the publication.\textsuperscript{155}

While the bankruptcy court in Stein did not explicitly address the efficacy and legality of the warranties, hold harmless and option clauses, it must be assumed that these clauses are valid under New York law. This conclusion results from the court's finding that the entire agreement, including the option clause and warranty and indemnity provisions, is binding to the extent that the debtor-publisher maintains its obligation to pay royalties on books provided by the

\textsuperscript{151} 81 B.R. 263 (S.D.N.Y. 1988).
\textsuperscript{152} Id. at 264.
\textsuperscript{153} Id. at 265.
\textsuperscript{154} Id. at 265-67.
\textsuperscript{155} Id. at 266.
The inclusion of such option clauses supports the premise that the writer and publisher have, as an integral part of their bargain, the goal of extending their relationship to market future works of the author.

The presence of an indemnity provision in the parties' agreement raises the possible need for scrutiny based upon paternalistic concerns. Consequently, paternalistic intervention may be minimized if the indemnity provision were eliminated from the parties' agreement. The question then remains: If the indemnity provision were eliminated, how would the publisher's concerns be accommodated?

The publisher must recognize that his motivation for the indemnity provision may be overstated given the realities of the situation. If the provision were indeed enforced, the publisher would be involved in any type of litigation involving the originality or authenticity of the writer's work. The publisher also has far greater financial means to guard against and defend such suits. Those resources ultimately would be involved notwithstanding the presence of this agreement. This is particularly true if the writer remains a novice or fledgling artist with limited resources.

In the absence of an indemnity provision in the publication contract, the publisher would likely become a party to any suit challenging the work of the writer. This is particularly true given the his role as the disseminator of the work, together with his status as a "deep pocket." As a joint tortfeasor, the publisher, unless he can per-

156. Id. at 267.
158. See Bourne Co. v. MPL Communications, Inc., 751 F. Supp. 55, 57 (S.D.N.Y. 1990) (holding that the indemnification provision of songwriter's agreement would be construed to refer only to attorney fees incurred by publisher in actions involving third parties and not to those incurred in litigation between publisher and composer); McGinnis v. Employers Reinsurance Corp., 648 F. Supp. 1263, 1265-66, 1270-71 (S.D.N.Y 1986) (illustrating, albeit tautly, that the publisher's resources in the form of its insurance will be involved in suits relevant to the writer's work).
159. One cannot address the publisher's concern without an examination of the writer's interest in the elimination of the indemnity provision. To appease the publisher, the writer may allow the indemnity provision to remain in the contract in order to accomplish her overall goal of getting her work published. Although she may be uncomfortable with the indemnity provision, she may find relief in the idea that the provision may be unenforceable due to paternalistic concerns. However, given the unpredictability of paternalistic intervention, the writer cannot comfortably rely on a court to alleviate any burden caused by that provision. See supra text accompanying notes 145-147.
160. In many cases involving copyright infringement or some interference with ownership rights, publishers, as well as authors are named as defendants. See Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366 (2d Cir. 1993); Horgan v. MacMillan, Inc. 789 F.2d 157 (2d Cir. 1986); Meeropol v. Nizer, 560 F.2d 1061 (2d Cir. 1977); Arica Institute, Inc. v. Palmer, 770 F. Supp. 188 (S.D.N.Y. 1991).
suade the decision-maker that primary liability should fall upon the writer, would be liable, to some extent, for any damages resulting from a verdict against the defendants. Irrespective of the publisher's lack of culpability, he will ultimately encounter litigation costs associated with defending such a lawsuit. Even if the author is proven to be the primary tortfeasor, her resources to cover the resultant damages are, in most instances, limited. Consequently, the publisher may be liable for any balances that result. This realistic scenario underscores the possible disutility of the indemnity provision.

As a result, the indemnity agreement, included because of the publisher's more minor motivation regarding possible liability for distribution of the writer's work, may tend to frustrate the primary motivation for the agreement—the dissemination of present and future works of the writer and the expectant pecuniary rewards. The inclusion of this provision may have a direct effect on the consciousness and, ultimately, creativity of the writer. The knowledge of potential liability would undoubtedly enter into her consciousness, particularly in the composition of new works. The publisher and writer's agreement tacitly includes the expectation that their bargain will spawn additional creative works developed by the writer, yielding future pecuniary gain for them both. Such creativity and proliﬁcacy impacts the parties' overall motivational goal to maximize gain. Notwith-

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161. One may question the premise that an indemnity provision can intimidate the writer. Given her lack of experience within the bargaining process, she may well disregard or otherwise fail to appreciate the signiﬁcance of her duty to indemnify the publisher in the event of any type of lawsuit involving her work. See Weaver v. American Oil Company, 257 Ind. 458, 276 N.E.2d 144, 145-47 (1971) (noting that lessee's contract was unconscionable given a number of factors including his lack of education and comprehension).

While new to the bargaining arena however, many writers, by nature of their trade and training, may possess the ability to comprehend the signiﬁcance of the indemnity provision. The very language of a typical indemnification clause is not convoluted or incomprehensible to someone of the writer's skill and acumen. See supra note 20 which provides the text of a typical indemnity provision. A lack of appreciation of the clause may closely relate to a failure to read the clause (and other provisions of the contract), rather than a lack of comprehension. The law generally recognizes the bargainer's duty to read their respective contract. See, e.g., Saavedra v. Donovan, 700 F.2d 496, 500 (9th Cir. 1983) (citing Restatement (Second) of Contracts § 23 & cmt. b, § 157 & cmt. b); Trinh v. Metropolitan Life Ins. Co., 894 F. Supp. 1368, 1373 (N.D. Cal. 1995); Hart v. Vermont Inv. Ltd. Partnership, 667 A.2d 378, 58 (D.C. 1995). Once the writer reads the provision, however, her realization of potential liability can be startling. See supra note 19 which depicts the travails of a typical fledgling writer. Her demonstrated unsophistication or lack of knowledge may portend the invocation of unconscionability as a mechanism to protect her. See supra notes 115, 118-121.

162. Others acknowledge the desire of ﬁrms or companies to maximize proﬁts. See William T. Allen, Our Schizophrenic Conception of the Business Corporation, 14 Cardozo L. Rev. 261, 268 (1992) (stating that directors have a duty to "maximize proﬁts of the ﬁrm for the beneﬁt of shareholders"); Andrew J. Nussbaum, Like Money In The Bank? An
standing any plausible argument that the publisher may be in the best position to guard against copyright infringements and defend against law suits, it remains in the best interest of all to omit the indemnity clause, or at least modify it to lessen its impact upon the writer.

B. Relational Theory: An Argument Which May Obviate Indemnity Provisions

Given the uncertainty surrounding the application of paternalism within the bargain, the justification for eliminating indemnity provisions may lie in the recognition that the parties' respective motivations obviate the need for such onerous clauses. Relational theory, which is very much attuned to parties' motivations to contract, pro-

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163. The publisher may be in the best position to defend such suits given his superior resources.

164. One may question whether the indemnity provision truly frustrates the goal of the writer and publisher to produce and distribute future, successful works. Such skepticism flows from the premise that the publisher is more concerned with protecting his present assets rather than developing a long term relationship with the writer. The publisher would, therefore, require the writer to indemnify him from any potential liability resulting from the publication of the writer's work. This point gains significance given the publisher's aversion to the risks associated with publishing the author's work. See supra notes 54-56 and accompanying text.

Yet the publisher's desire to protect what he has, i.e., the company's present assets sans any profits gleaned from the fledgling writer's work, may be overshadowed by his ultimate desire to maximize profits. Companies tend to perish or flourish depending upon their success in accomplishing this latter goal. To ensure financial viability as well as shareholder satisfaction, the publisher, as a corporate entity, would likely seek to generate as much profit as feasible. Distribution of future, successful works of a promising writer should further this goal of maximizing gain.
vides substantiation for the elimination of various enforcement and policing mechanisms within the bargaining process.

Generally, relational theorists concentrate on the motivation of the parties themselves and the subject matter of their agreement as indicators of the expected standard of performance. While difficult to define, relational contracts are best understood by the characteristics they exhibit: incompleteness and duration. They tend to be somewhat incomplete; that is, the parties intentionally omit certain terms to provide for exigencies which would affect the risk or risks associated with the completed contract. Additionally, relational contracts for either goods or services may extend over a period of time. The incompleteness of the parties' agreement is not so much a result of a failure to perfect the contract as it is related to the parties' inability to delineate those terms in a cost-efficient manner. In effect, incompleteness and duration are recognized as features which the bargainers appreciate and freely assume.

Typical examples of relational contracts include requirement contracts, wherein X promises to supply all of the goods required by Y; and output contracts, wherein Y promises to purchase all of the goods produced by X. Additionally, service contracts may also fall within the relational umbrella. For example, X agrees to teach Y's math

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165. See generally sources cited infra note 167.
168. For detailed explanations of requirements and output contracts, see Stacy A. Silkworth, Quantity Variation in Open Quantity Contracts, 51 U. PRTT. L. REV. 235, 237 n.23 (1990); Cheryl R. Guttenberg, Comment, And Then There Were None: Requirements Contracts and the Buyer Who Does Not Buy, 64 WASH. L. REV. 871, 872 (1989).
class for the three-week period that Y travels to Europe. Agreements which provide for one party to exclusively market the goods of, or represent, another party (also called exclusive dealings), are also associated with relational theory. As such, agreements whereby a publisher promises to distribute the work of a writer fit within this rubric.\(^{169}\) These publishing contracts tend to be relational given their lack of specificity with regard to the quantity of services provided by the publisher, as well as quality of performance by the parties in general.

Traditional contractual rules are particularly ill-equipped to evaluate the quality of performance under such agreements. With regard to exclusive dealing arrangements, the decision-maker may dictate that the parties' performances must conform to a "best efforts" standard, that is, the parties must utilize their best efforts in the performance of their contract.\(^{170}\) "Best efforts" appears to equate to the notion of good faith.\(^{171}\) Although abstractly comprehensible, the "best efforts" performance standard raises significant difficulties: How does one define "best efforts"? How does one determine whether the parties have performed in accordance with "best efforts" requirements?

Relational scholars, as a general rule, encourage decision-makers to concentrate on the norms of the parties' relationships in order to establish whether they have performed properly.\(^{172}\) As a consequence, relational theorists would posit that "best efforts" signify that the parties to the agreement would both perform at an optimal level, since such mutual performance would maximize the gain of each individual party.\(^{173}\) Simply stated, since the ultimate goals of the parties would be accomplished only by the performance of their duties at the highest level pursuant to the contract, relational theory would dictate

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169. See Schwartz, supra note 166, at 301-04.
171. See Robert E. Scott & Douglas L. Leslie, Contract Law and Theory 302 (2d ed. 1993), for contracts dealing in the sale of goods, the decision-maker may invoke the performance standards indicated in U.C.C. § 2-103(1)(b) which imposes on merchants the obligation to perform in accordance with "reasonable commercial standards of fair dealings in the trade."
172. Professor Schwartz categorizes relational scholars into two groups: one group believes that decision-makers should identify norms which "transcend the relationship of the parties" and thereby utilize rules which promote fairness. This is classified as an external relational approach. By contrast, internal relational theorists look to the norms inherent in the parties' relationship to derive the rules relative to performance. Schwartz, supra note 166, at 275. Under either approach, the decision-maker looks to the nature of the parties' relationship to derive performance standards.
173. Professors Goetz and Scott refer to this argument as "optimal output" and "joint maximization." Goetz & Scott, supra note 2, at 1111-26.
that the parties will perform at an optimal level to preserve their own interests. This phenomenon has often been referred to as "joint maximization" or "optimal output." As a result, the parties will be assured that each would put forward its "best efforts" in the performance of their bargain.

To a certain extent, relational theory supports the thesis that indemnity provisions are necessary in bargains such as publishing contracts. The viability of this argument requires two assumptions: first, that the publishing contract, while not explicitly noting a continuing relationship, could be considered "quasi-continuing" if one assumes that the parties will continue to deal with one another as long as their initial bargain is successful and mutually beneficial; and second, that both parties, in recognition of the factors requiring their bargain to be successful, will ensure that their subsequent performance will be "optimal," thereby maintaining the integrity of the bargain.

The first assumption can be plausibly demonstrated in the writer's and publisher's bargain. Although the contract between the writer and publisher covers only the transaction involving the writer's present manuscript and therefore appears finite, there is a realistic expectation that success will prompt them to negotiate future agreements for other works written by the writer. In this scenario, it is helpful to think of the writer and publisher's contract as relational. One may go so far as to say that parties tacitly envision a continuation of their business relationship pending the success of their initial venture. The fact that the initial contract is not explicitly continuing in nature only goes to demonstrate the parties' unfamiliarity with one another and the unproven nature of the writer's product. Yet it is reasonable to assume that if the writer's manuscript is well-received and original, resulting in significant gain for both parties, the writer and publisher would likely bargain with each other again if the writer authors a new manuscript.

Other factors also contribute to the continuation of their successful relationship in that scenario. Notwithstanding the parties' satisfac-

174. See George M. Cohen, The Fault Lines in Contract Damages, 80 Va. L. Rev. 1225, 1240 n.45 (1994) ("Joint maximization means that the contracting surplus is maximized, which in turn means that 'allocative efficiency' is achieved . . . .")

175. See Barbara White, Coase and the Courts: Economics for the Common Man, 72 Iowa L. Rev. 577, 585 (1987) (stating that "[b]y definition, society achieves economic efficiency [optimal output] when it reaches a state in which no further re-distribution of resources and goods can be made that will make one individual better off without making another individual worse off.")

176. See Goetz & Scott, supra note 2, at 1111-26 (defining a relational contract as an "on-going contract for the supply of goods or services").
tion with the gains produced from the original transaction, the transaction and information costs associated with consummating new bargains for future works by the writer should be minimized if the parties continue to bargain with one another. While the publisher may look for other writers to represent, she would certainly seek to maintain a relationship with a successful writer who would likely garner more profit than a novice writer. Furthermore, the transaction costs associated with bargaining with a different writer of equal caliber would be higher than those associated with a continued bargain with the initial writer. As a result, the parties would likely maintain a prospective approach to their initial relationship. While the writer's and publisher's agreement may not fit within the precise definition of a relational contract, the realistic implication that the parties will likely continue to bargain for future works by the writer would tend to make the seemingly finite bargain relational in nature.

The second assumption, which focuses upon the parties' adherence to optimal performance standards, tends to be more difficult, yet ostensible. If the parties maintain the tacit expectation that they will continue to deal with one another if their initial arrangement proves profitable, then both parties should have the motivation at the formation of their bargain to operate at an optimal level during the performance of their agreement. Under the relational theory of contracts, mechanisms within the bargain should ensure that both parties will work at a level which will maximize the gain of both parties. Such an "optimal output" would signify that the publisher would perform at her best to maximize her own interests, while simultaneously maximizing the interests of the writer. This self-motivating and policing mechanism of the parties' bargain may obviate, or at the least minimize, the need for paternalistic intervention by decision-makers. This characteristic should please economists, who would likely agree that enforcement mechanisms, whether judicial or legislative, which are external to the bargaining process, may magnify the parties' transaction costs and potentially inhibit the overall efficiency of the bargain.177 It would also eliminate the need for defining ambiguous terms such as "good faith" and "best efforts" which the decision-

maker often uses to determine whether paternalistic intervention is necessary.\textsuperscript{178}

If the writer and publisher's contract can be considered relational, then the parties have a built-in mechanism to ensure that both operate at optimal levels to preserve their potential future bargains. The writer, if she has any aspirations for a continued writing career, would not likely jeopardize the relationship with the publisher by providing unoriginal or plagiarized material. More importantly, the publisher should reconsider the inclusion of an indemnity provision, which may hamper future bargains with a writer, especially since the latter may become renowned and produce future works which may garner significant gain. Clearly, the parties must articulate these motivational goals at the negotiation stage of their bargain so as to enhance the probability that the parties will perform at their optimal levels. It is conceded that the relational nature of such contracts functions most effectively in the policing of the performance of the contract subsequent to its formation. However, if relational theory involves the parties' continuing relationship and the preservation of that relationship, the concept of optimal output can also apply to the contract between writers and publishers.

Joint maximization or optimal output does not signify that the need for paternalism is obliterated. Instead, resorting to paternalistic remedies should be made only on a default basis where: (a) the parties fail to recognize and acknowledge their motivations as the genesis of their transaction and, as a result, joint maximization or optimal output does not operate to ensure the protection of each party's bargain; or (b) where the parties, in reliance on joint maximization, eliminate risk-shifting clauses such as indemnity agreements, and opportunism frustrates the goals and expectations of one or more of the parties. When either of these two conditions occurs, the parties remain free to resort to the decision-maker, who may utilize the checks of paternalism to maintain the integrity of their bargain.

Admittedly, the use of relational theory to justify the exclusion of the indemnity provision has weaknesses. First, the parties may intend that their arrangement remain limited to the one manuscript that is the subject matter of the contract. This intent may reflect the parties' (particularly the writer's) motivational goal and expectation to maintain the freedom to bargain with others regardless of the success of their initial venture. Additionally, the applicability of relational theory to this contract presupposes that writers would not risk the prof-

\textsuperscript{178} See supra text accompanying notes 170-175.
fering of unoriginal or plagiarized material. While there could be unscrupulous writers who are willing to risk the consequences of offering plagiarized material, the probability of such opportunistic conduct should be low given the consequences the writer would incur for such conduct. Yet, it cannot be denied that some authors may be willing to assume such risks. Regardless of the debate regarding these assumptions, it seems clear that relational theory as an evaluative tool is, at the very least, probative of the possible obviation of indemnity provisions within the publishing contract.

C. The Case for a "Kinder, Gentler" Indemnity Provision

Notwithstanding the arguments that the parties should voluntarily eliminate indemnity provisions from their contracts, factors remain which militate against such action. Given the fact that indemnity provisions are per se enforceable,\textsuperscript{179} parties, particularly publishers, may be inclined to include such provisions. In that regard, the publisher may prefer to risk the decision-maker's paternalistic intervention rather than accept the risks associated with a fledgling writer whose work may not be original. The publisher may also feel inclined to include the indemnity provision given the unpredictability of paternalistic intervention by the decision-maker. Buttressing this desire is the reality that indemnity provisions within these contracts tend to be rather commonplace in the trade.\textsuperscript{180} Most importantly, the publisher's degree of risk aversion may overshadow his concerns relative to the maintenance or preservation of the integrity of their basic bargain, i.e., originality, prolificacy, and continuity.

In recognition of such reticence, a plausible compromise might be to restructure the standard indemnity provision to allow the writer some degree of control or involvement in the proceedings if a liability action arises which triggers the invocation of that clause.\textsuperscript{181} The

\textsuperscript{179} See supra text accompanying note 102.
\textsuperscript{180} See supra note 20.
\textsuperscript{181} A modified indemnity clause which is less for parties such as fledgling writers may include the following language:

(a) Author represents and warrants that: (i) She is the sole Author of the Work; now owns all rights in it granted hereunder, free of liens or encumbrances; and has the complete authority to execute this Agreement; (ii) The Work is original and has not been published [unless it has been previously published; prior publication should be duly noted and explicitly excepted]; (iii) The Work does not infringe statutory copyrights or common law literary rights of others, and, to Author's knowledge, neither violates the rights of privacy of other persons, nor is libelous in any manner.

(b) (i) Author agrees to indemnify and hold harmless Publisher, with regard to any reprint or subsequent editions of the Work licensed by Publisher pursuant to the Agreement, against any final judgment for damages (after all appeals) against
writer's interest in this potential litigation clearly substantiates her right to inclusion in, and a degree of control of, this matter. Control need not be exclusive for the writer.\textsuperscript{182} Yet such involvement and shared control should minimize the writer's ultimate costs by ensuring that decisions in the litigation would reflect her interests as well as those of the publisher. This compromise provision still places primary liability upon the writer, thereby satisfying the publisher's aversion to risk. While the compromise does not alleviate the ultimate pecuniary burden placed upon the writer, it should, at a minimum, provide her the opportunity to protect her own interests through participation in the strategic decisions of this litigation.

Another option which may minimize risks associated with the traditional, "writer assumes all liability" agreement might be a provision which commands the parties to indemnify each other for damages resulting from their respective conduct.\textsuperscript{183} Commonly referred to as

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them in any action arising out of facts which constitute a breach of the foregoing warranties and costs and attorneys' fees incurred by them in defending an action in which such judgment is recovered, provided that Author's liability hereunder is limited to \[ \text{figure to be mutually agreed upon}] \% of the sums payable to Author under this agreement or \[ \text{figure to be mutually agreed upon}] , whichever is less. (ii) This indemnity shall not apply to any material inserted in Author's Work pursuant to Publisher's instructions, or to actionable material which Publisher should have known was actionable as noted in (a)(ii).

(c) (i) Publisher shall give Author immediate notice of any suit brought against Publisher or its licensees alleging facts which, if proven, would constitute a breach of the warranties in Subparagraph (a). Author may, if she chooses, defend such suit with counsel of her own choosing, at her own expense; provided that if she does so, Publisher may nonetheless participate in the defense with counsel of its choosing and at its own expense. Publisher shall not settle any claim, demand, action or proceeding without Author's consent. (ii) If Author shall defend such suit, she shall not be responsible for Publisher's attorneys' fees or costs, except as required in Subparagraph (b) above. (iii) If suit is brought, Publisher may hold in escrow, in an interest-bearing account, up to \[ \text{figure to be mutually agreed upon}] \% of each of the next three payments due under [payment provision in publishing contract] until after the suit is terminated, or until [five years—subject to negotiation] after its commencement, whichever occurs first; but in no event shall the amount withheld exceed the amount of damages claimed in the complaint.

182. Indeed, the publisher would want to maintain a degree of control over the litigation given her own interest in that matter.

183. Several factors, however, may militate against the writer assuming sole responsibility for the risks associated with the dissemination of her work. From a cost standpoint, she may be able to avoid this risk at a lower cost than the publisher if her total compensation package is higher in consideration of her assumption of this risk. However, in realistic terms, the fledgling writer is most likely to receive lower compensation for her first work given her status as a neophyte in this bargaining arena. It is likely that the publisher would not be motivated to provide substantial compensation to a new writer whose popularity is unproven. Additionally, irrespective of her ability to avoid the risk of a lawsuit involving her work, instigation of such a suit would more likely include the publisher given the lat-
mutual indemnification agreements, they allocate liability to each party individually.\(^\text{184}\) Given the conceptual reality that each party bears responsibility for their own breaches of conduct, these provisions discourage recklessness and, therefore, would not contravene public policy notions. Consequently, decision-makers may view these clauses more favorably.\(^\text{185}\)

In the case of the writer and publisher, a mutual indemnification clause would signify that each party would ultimately be liable for its own conduct in the bargaining relationship. Theoretically, the writer would be liable for damages resulting from her negligence, while the publisher would maintain liability for his negligent acts. Although this arrangement fails to alleviate the residual concerns emanating from the one-sided indemnity agreement which dictates the author’s liabil-

\(^{184}\) See, e.g., Clark Equip. Co. v. Dial Corp., 25 F.3d 1384, 1385 (7th Cir. 1994) (identifying the mutual indemnification provision in a contract for purchase of assets of a company’s subsidiary which manufactured construction cranes); Central Buffalo Project Corp. v. Edison Bros. Stores, Inc., 619 N.Y.S.2d 890, 891 (App. Div. 1994) (noting the assignment of a commercial lease included mutual indemnification provisions wherein the assignor and assignee each agreed to indemnify the other for a breach of the assignment or other terms of the lease); Silverman v. Riker-Maxson Corp., 456 N.Y.S.2d 775, 777 (App. Div. 1982) (construing the real estate “brokers” agreement which contained a mutual indemnification provision leaving each party responsible for her own liabilities); see also Batchkowsky v. Penn Cent. Co., 525 F.2d 1121, 1123 (2d Cir. 1975).

\(^{185}\) Research fails to reveal cases which find mutual indemnification clauses to be invalid per se. Yet, this does not indicate that these provisions face less scrutiny or are more favored than conventional, one-sided arrangements. It is likely that mutual indemnifications encounter scrutiny similar to that given to conventional indemnity agreements. See cases cited supra note 184.
ity, it does note a degree of reciprocity which facially connotes both parties' responsibility for their reasonable conduct.\footnote{A mutual indemnity clause might include the following language:}

The inclusion of mutual indemnification language does not comprise a panacea for the writer. In fact, it functions more as a placebo rather than a cure for the problems created by the publisher's indemnity agreement. The writer would continue to face potentially significant liability in the event of activation of the indemnity provision wherein she agrees to protect the publisher from her (the writer's) activity. Moreover, the likelihood of publisher liability under his (the publisher's) provision appears slim, given his limited function in the bargain, i.e., distribution of the writer's work. Indeed, the problems of disparity of bargaining position\footnote{See supra text accompanying notes 131-134.} and the possible chilling effect upon the writer's creativity remain.

However, such mutuality impresses upon the parties (particularly the writer) the magnitude of their respective responsibilities, and dispels, at least objectively, the lopsidedness of obligation. These provisions may also appease decision-makers whose concerns relating to "one-sided" indemnification agreements focus upon the encouragement of reckless conduct on the part of the indemnitee (the publisher). With mutual indemnification, there is a symbiotic allocation of responsibility, thereby keeping reckless behavior in check. Yet, the effectiveness of mutual indemnification may be dubious, since the publisher (the more powerful party in the relationship) may nonetheless shift significant liability to the writer (the weaker party).

Of course, this "kinder, gentler" indemnity provision will not serve the writer unless she specifically asks for it. One may posit that a naive or unsophisticated writer may fail to bargain for this modified
clause with the publisher. Yet such naiveté exists in a number of bargaining situations not unique to that of the writer and publisher. Many consumers fail to understand their right to negotiate the modification of certain clauses in preformed contracts which were drafted by the other party.\textsuperscript{188} Given the magnitude of the transaction and the writer’s particular abilities and talents, she should, however, be aware of the significance of these clauses if not her ability to bargain against them. Moreover, her lack of sophistication may underscore the publisher’s duty to notify her of the seriousness of the transaction as well as clauses such as the indemnity provision which will potentially subject her to extensive liability.\textsuperscript{189}

One may question the degree of control that the publisher would cede away to the writer in the event of litigation regarding the writer’s work. Since the writer may be jointly (or individually) liable for any type of litigation therein,\textsuperscript{190} she maintains a right to minimal involvement, i.e., notice, within the framework of the litigation. The bargaining position should be relatively straightforward—if the publisher and writer share responsibility for damages resulting from the publication of the writer’s work, then the writer has a right to notice and some voice in the defense of a resultant lawsuit.

\textbf{IV}

\textbf{Conclusion}

Contract rules, and the resultant terms they influence, should facilitate parties’ bargains, thereby ensuring that the object of those bargains remains intact. In the abstract, while given contract rules may appear functional, when implemented, they may prove unpredictable and counterproductive to the interests of the parties. Illustrative of this factor are indemnity provisions contained in publishing contracts. These provisions may satisfy a certain goal of one party to the agreement, e.g., the publisher’s desire for protection against any resultant lawsuit, yet operate to frustrate prospective, more fundamental goals and expectations, such as creativity, prolificacy, and continuity of the bargaining relationship.

\textsuperscript{188} See supra note 123 and accompanying text.

\textsuperscript{189} See supra note 161. The writer should also seek advice from organizations such as the Author’s Guild, Inc. which serves to counsel writers in their transactions with publishers. Ultimately, fledgling writers must take a certain degree of responsibility to educate themselves regarding the obligations that flow from their potential bargains with publishers.

\textsuperscript{190} See supra note 160.
Decision-makers, while they should recognize the limitation of contract rules and the effects these have on the parties' bargain, often fail to respond to these idiosyncratic manifestations. This may be due in part to the scope of their jurisdiction; they must devise rules that are applicable to a variety of transactions and which, therefore, must have a certain fungibility to maximize their utility in many trades. Thus, parties must be vigilant to ensure that their blanket employment of, and dependence upon, these rules do not lead to the implementation of dysfunctional contractual terms. Bargainers, regardless of the subject matter of their bargain, must remain cognizant of the effect that these rules and the terms which they generate have on their bargain. They must, therefore, adjust or even eliminate those terms to suit their overall motivational goals and expectations. Recognition of the effects that contract rules and resultant terms such as indemnity provisions have on their respective goals will lead to the ultimate achievement of their expectations and, perhaps most importantly, to the minimization of decision-maker intervention.