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Book Review

A Review of Contract Law in the United States: Reading Margaret Radin's - *Boilerplate*

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Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, Princeton University Press, 2012; Pp.360; ISBN: 9780691155333 (Hardcover) ISBN: 9781400844838 (eBook)

Contract law in the United States of America is in a state of flux. The old common law model of contracts, deemed dead by Professor Grant Gilmore as long ago as 1974[1], lives on but struggles to find a comfortable re-invention. The conversion from a paper to a digital universe, the change in the nature of most contracts and the evolution of legal scholarship are disruptive factors. But the trouble runs even deeper. Is it time to rethink contract law entirely? So long as individuals wish to bind themselves to agreements enforceable by the state there will be contracts. The question may be how to think of contracts coherently. To this end, this essay looks at a book that holds some answers.

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[1] ('THE DEATH OF CONTRACT' authored by Prof. Grant Gilmore, published in 1995 by the Ohio State University Press spawned much discussion and criticism. The fact that it still causes controversy is a testament to the power of its insights.)

Boilerplate

In 2013 Professor Margaret Radin published *Boilerplate*,[2] a monograph in which she explores the heart of contract law in the United States in the 21st century. The book has earned prestigious recognition but has also drawn potent criticism. As one who has taught contract law to generations of law students at Berkeley Law School, Boalt Hall, both the praise and the attacks make sense to me. Though I align myself with those who praise the work, objections raised by its critics are not trivial. Radin paints with a broad brush when explicating doctrinal matters. The prescriptive last part of the book does not hold out a solution that is either easily embraced or conceivably implemented. Objections aside, there is much to be said about the book. This essay will focus on the two elements that are most cogent. The first is the model for understanding contracts that is presented. The second is Radin's reflection on the nature on contract theory in the United States. The two points are intimately intertwined but are profitably explored separately.

The Model of Contracts

In her book, Professor Radin calls for a reconsideration of the nature of contract law. She contends that the intellectual architecture of contract theory is no longer relevant to reality. As a senior scholar with an impressive list of achievements, Professor Radin is well-positioned to offer a penetrating critique and a new definition to the contractual relationship. To accomplish this task, Professor Radin sets out two models of framing contract law. The assumptions made about the basic building blocks of contract law are delineated and questioned in her tightly presented analysis. These two models of contract are built on two different sets of assumptions. The models might live in the same theoretical world, but they cannot be explained by the same old theories.

[2] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (Princeton University Press, 2012).

World A

In World A, a contract is conceived as an arm's length transaction between parties of relatively equal strength. The parties are not necessarily equal in intelligence or bargaining skill but as competent adults each party to a transaction possesses individual autonomy that allows him to make choices. The choices are his own. Independent of government or the interference of those who present themselves as knowing better, a person creates his own world of contract. Even bad choices must be supported if the system is to function. From this context the full range of contract theory is cast. The competence of the parties to make a contract is based on said party's possession of the mental ability of a normal human actor. Once a person is of age and mentally fit, that person can enter into contracts. He is autonomous, fully able to make decisions, good or bad, and to be responsible for the consequences of his actions. This autonomous adult is at the center of much common law theory.

In World A, contractual questions of offer and acceptance are judged according to standards set in a context where the parties to the contract looked one another in the eye. The result was something on a very human scake. Skill and preparation were rewarded. Free autonomous individuals made choices based on self perception of advantage. Although some participants prospered and some did not, but the scale of actions, the avenues of reasoning, were intuitive. Bargaining between individuals can be found among even infants.

This conception of the transaction is crucial to theories of consent, liability and the full range of the theories of autonomy and free choice. It is permissible for the legal system to refuse to judge the adequacy of consideration if the parties are competent and thus are able to judge for themselves the desirability of an exchange. In World A it is logical to hold a contracting party to executory and even consequential damages. After all, the party was on notice to look out for himself when entering into the contract. In Model A, assigning responsibility for actions taken to the party who takes them is logical. One may dispute the theory, but it has coherence and power.

The Common Law origins of World A are grounded in the historical experience of centuries past. The English Common Law is the foundation upon which much of the legal architecture of thought in the United States is built. U.S. law students still read British judicial decisions as part of the required first year curriculum in Contracts, Property and Torts.[3] The framing and characterization of legal categories are still rooted in the Common Law.

Contract law is even more complex. In the United States, contract law is subject to the dictates of federalism. At a law school like Berkeley, the general theory of contracts is taught. By contrast, practicing lawyers work in a world largely governed by state law. The lower federal courts play a role via cases that qualify for diversity jurisdiction, but even these decisions are invariably applying state law. Ergo contract Law is actually different in each state. Yet those who teach contracts at most law schools use one of a handful of popular texts on Contract Law. This group of casebooks are broadly gauged, looks at general principles. The books present the law's dilemmas, not the law's solution. Instructing the lawyers of the future in general theories of law rather than in practical skill is counter-intuitive. Yet the practice dominates academia. The accepted wisdom in the United States is that the more prestigious the law school, the more abstract the curriculum will be. Harvard, Yale, Stanford, Berkeley and peer institutions do not train practicing lawyers, they train judges and law professors.

To assist in understanding Contract doctrine, the professor of contracts can point to the Restatement of Contracts, 2nd Edition. The American Law Institute (ALI), a blue-ribbon association of the United States leading judges, academics and practitioners the Restatement. It is an attempt to set out a logical statement of the best principles to be found in the decisions of the courts. It is a purified common law. Though it is a magnificent tool, it is not enacted by any legislature or the precedent of any court. It is

[3] (In the fall semester of 2014 students in the Contracts class that I teach reads, among many others, the decisions in Raffles v. Wickelhaus, 2 H &C 906 (1864), 159 Eng. Rep. 373 and Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Court of Exchequer)).

internally inconsistent in places. It is a marvelous intellectual jumping off point, but it is neither primary authority nor always right. The Uniform Commercial Code, which was also written by the ALI, this time in tandem with the then National Conference of Commissioners on State laws, offers a legislative solution. A group of zealots who believed in systematizing and rationalizing the law of commercial contracts produced the Uniform Commercial Code (UCC).

The UCC is a progressive and functional form of contractual behavior, has been adopted in some form by each of the fifty states in the United States. According to the plan, members of the American Law Institute and the then National Conference of Commissioners of Uniform State Laws,[4] carried the UCC to each state legislature. Powerful lobbying efforts were made. In the end, each state adopted the UCC as positive law for its own jurisdiction. Because the UCC had to be enacted by each state, through the office of its own legislature, amendments were made, format was converted, but in large part the UCC became ubiquitous. The courts of each state interpret the provisions of the UCC as they choose. Some of the most challenging sections of the Code are interpreted quite differently from one state to the other. But the gravitational power of the UCC is what counts the most.

In the resultant World A, incremental changes may be made by the courts, amendments may be made by legislative bodies, but the old system moves forward in a coherent and intuitively justifiable manner. The Restatement of Contracts, 2nd Edition and the UCC work with other state legislation to chart the way for autonomous individuals to create contracts in World A.

World B

In World B, Professor Radin presents a vision of the world of contract as it stands in the early decades of the 21st century. No longer is the iconic contract one between two competent parties that is negotiated from scratch. In this World, only one party is a

[4] David Frisch, *Commercial Law's Complexity* 18 GEO. MASON L. REV. 245 (2011) (The Commissioners on Uniform State Laws changed its name to the more salubrious Uniform Law Commission (ULC) in 2007).

human being. The other side is a corporate entity. There is no real negotiation over terms. The offeree is presented with a pre-drafted form. The form is no longer the final step in a negotiation between the parties, it is a take it or leave it offer. A purchaser may be able to fill in a few blanks but the great superstructure of the contract is predetermined, drawn up by the vendor. The contract will contain a large section of "boilerplate." Boilerplate stands for the litany of provisions that travel with many contracts in World A. These are the terms that fill out the contract. Typically there are many terms, they may stretch over many pages. It is acknowledged by the courts that one does not normally read them. One is signing not after considered bargaining. One is just signing. Boilerplate terms cover a wide range of issues but largely set out protections for the vendor.

A boilerplate term can have a life of its own. For example, an integration or a merger clause, is designed to give notice that all elements of the contract are contained within the signed writing and that no extrinsic or parol evidence may be introduced to vary the written terms. This reification of the old 'four corners' rule offers clarification and re-enforcement of the sanctity of the written document. As years passed, the merger clause became part of the boilerplate. No longer an element present in negotiation, it became part of a great corpus of boilerplate terms that are incorporated into most contracts automatically. Thus what had once been a choice has now become mere context. Radin is troubled that there is no true consent to such terms. The theory of consent, (i.e. that the independent parties express autonomous judgment designed to further best interests) fades away. Indeed the terms are not designed to be read or consented to by anyone. Boilerplate takes on a life of its own. These take it or leave it forms are adhesion contracts when signed by consumers. The great professor Friedrich Kessler has taught us that there is nothing inherently troublesome about the use of adhesion contracts.[5] Modern life demands them. But Professor Kessler wrote this eighty years ago from the perspective of World A.

[5] Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract* 43 COLUM. L. REV. 629 (1943).

Professor Radin's book creates a place far from World A. In World B the consumer operates in a territory where the boundaries are set out by the terms that are never read. There is nothing startlingly new about this kind of contract. Karl Llewellyn once explained adhesion contracts by analogizing the signing of a form contract to the act of putting one's head in the mouth of a lion. As Llewellyn observed, one can only hope that it is a friendly lion.[6] In fairness, Llewellyn recognized the functional advantages of adhesion contracts, but he had reservations. Professor Llewellyn also lived before computer screens that urged us to scroll down and check the "I have read and approved these terms" box. Llewellyn may have suspected that most of us would scroll down as fast as possible to check the box though. He had a good feel for human frailty.

Professor Radin takes two judicial opinions to task for the advance of World B. One is the Supreme Court of the United States opinion in *Carnival Cruise Lines*[7]. In this decision the Court held a party who had purchased a ticket for a cruise to have consented to boilerplate terms printed on the reverse side of the ticket despite the fact that the party had only received the ticket as he boarded the ship, that he possessed no actual knowledge of it and hence no meaningful assent. In the boilerplate was a forum selection clause that made life much more challenging for the plaintiff. This decision annually drives my students to distraction. The fact that the purchaser had no real understanding of what was signed, indeed under these facts had little opportunity to read the terms had he wished to do so, rankles. Some point out that even he been given a chance to read the boilerplate he may well not have understood what the clauses meant.

Because most contract law in the United States is a matter for state courts and legislatures, the Supreme Court of the U.S. makes limited pronouncements on contract law. Thus *Carnival Cruise*

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[6] KARL. N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 362-371 (1960) (". [t]he one party lays head into the mouth of the lion either-or mostly-without reading the fine print, or occasionally in hope and expectation, (not infrequently solid) that it will be a kind and gently lion.").

[7] Carnival Cruise v. Shute, 499 U.S. 585 (1991).

stands as a lonesome monument but one that has haunted those concerned with the principle of consent.

The second case is *ProCD v Zeidenberg*.[8] This opinion from the Third Circuit of the United States, authored by Judge Easterbrook. Written in the mid 1990s this decision resolved the then vibrant issue of shrinkwrap contracts. The *ProCD* decision is an example of a brilliant judge, using the traditional tools of contract analysis, to deal with a problem which had not been part of the world in which said traditional tools were developed. Shrinkwrap contracts date from the days when most of the software was sold in boxes. The boxes contained compact disks which could then be loaded into one's computer. The boxes were sold in retail stores in those days, and vendors printed the contract of sale on the transparent wrapping of the box. If one opened the box, one accepted the terms. But as contracts grew more and more complex, they could not feasibly print on the wrapper of the box. Vendors thus began of print 'Terms Inside' on the box. Only after purchasing the box and opening it, one found out the terms. Judge Easterbrook reasoned that so long as the purchaser was afforded a chance to return the box for a full refund after reading the terms, the contract was valid. This jumbling of the time line of contract analysis, moving the point at which the contract becomes valid away from the point of purchase into a process that proceeds in stages, was a major development. 'Deal now terms later', also known as rolling contracts, called for intellectual gymnastics. Judge Easterbrook was up to the challenge.

Though numerous commentators have raised pointed objections to *ProCD*, it remains the law. The Supreme Court has said nothing on the matter, and Judge Easterbrook is such brilliant and careful thinker that no subsequent decision has altered it. Judge Easterbrook elaborated on the idea in *Hill v. Gateway*[9], a decision that clarified that the rolling contract's heart was time to reject. Though shrink wrap boxes are shining artifacts of the past, this opinion holds its ground as authority. Though subsequent cases have assailed it and some academics loathe it, no one has worked

[8] *ProCD*, Inc. v. *Zeidenberg*, 86 F.3d 1447 (7th cir. 1996).

[9] Hill v. Gateway, 105 F.3d 1147 (2000).

out a way to dislodge it. Nor has the Supreme Court of the United States shown interest in examining the issue.

A Quick Course in Contract Theory

Boilerplate provides a bonus to the reader. Professor Radin, a respected senior scholar, lays out the state of contract theory in the United States in 2013. Her summary is enormously helpful. Any such summary runs serious risks. There is no way that something so general and approachable as an overview of a major theoretical error will not be subject to criticism. Any definitive pronouncement on a general theoretical legal topic is doomed to controversy. (I hesitate to imagine what would result if the faculty at Berkeley Law School was compelled to agree on what 'law' is, or perhaps a definition of Freedom of Speech). Law professors are contrarians from the womb. Ergo Professor Radin shows bravery in her attempt. Miraculously, however, she is quite successful.

The point of the enterprise is that none of the reigning theories of contract law in the United States incorporate consideration of boilerplate. Her trenchant criticism is powerful. For purposes of my students, or for anyone who wishes to delve into the internal machinery of contract theory, the framing of the question is what matters. Here is a workable, perceptive summary of how scholars and jurists think about the contract theory.

Professor Radin sets out four theoretic pathways to follow: autonomy theory, welfare theory, reliance theory and Aristotelian theory. This section of the book is one of the most useful for the reader. Professor Radin offers an informed and clear description of the battles that currently rage in the realm of contract theory in the United States. Only a scholar of her eminence and senior status could succeed in such an endeavor. Remaining above the fray and setting out the parameters of the contested areas of theory calls for knowledge, judgment and experience. Modern contract theory is in transition. It has always been characterized by a mixture of ideas but the old compromises show stress.

Autonomy Theory

Autonomy theory provides the foundation for the World A. Grounded in liberal theory and entwined with *laissez faire* economics, autonomy theory privileges voluntary action and individual dignity. Radin does a masterful job of working through the spectrum from promises to contract in World A.

Exploring ideas grounded in the work of Hegel and Kant, working all the way to Professor Charles Fried's work on promises, Radin sketches autonomy theory from a myriad of angles. Introducing the work of Professor Benson on unconscionability in contract law completes the project.

Autonomy Theory is frequently discussed in tandem with moral theory or the jurisprudence of natural law. American law has stepped away from claiming a distinctly moral basis that is separate from the legal edifice. The legal system of the United States abjures morality in favor of a system based on structure and fairness. Drawing out the stress lines in examining these ideas is one of Professor Radin's strengths.

Welfare Theory

Welfare theory grows from Bentham's ideas on Utilitarianism. Radin tracks how this wealth maximization approach leads to economic analysis. The law and economics movement, powerfully at the center of American legal thought for the last four decades, brings logic to this calculation. Great thinkers like Judge Richard Posner have seized on economic theory as the road to wealth maximization in society. Economic analysis also introduces mathematical precision into legal theory. Since the days of Justice Benjamin Cardozo's monumental book, *The Nature of the Judicial Process*, American judges have puzzled over how to concretize common law norms and judicial interpretation of statutory language. The porousness at the edge of judicial analysis led to the growth of legal realism and its descendants. Economic theory provided balm to the troubled theorists. Equations are strong building blocks. Numbers work.

Some members of the law and economics community have reacted negatively to Radin. Rather than subscribing to the importance of consent as the root of contract, such thinkers place emphasis on the operation of the market. If allowed to function without interference, things will work out. To explain Radin's central problem of uninformed consent in form contracts, the welfare camp has a response. They contend that consumers happily trade an autonomous role in contracting for the cheaper price of goods that should result when a vendor uses boilerplate contracts. There is no empirical work to resolve the question of whether the typical consumer would give up his legal rights under contract law in order to pay a reduced price for a good. Indeed the design of such a study escapes me. But the point is powerful and the forces of law and economics are strong. Rather than rehearsing here the extended line of arguments on this topic here, a better suggestion is to provide a citation to Professor Kim's excellent summary in the Green Bag. It is a readable survey of the contested area.[10]

Radin has long looked beyond the bottom line numbers in transactions. Her breakthrough article on non commodification of goods for sale was an early shot across the bow in a battle that she has fought for decades. One could posit that she stands as the major theoretical exponent for human dignity over profit.

Reliance Theory

The growth of Reliance theory in U.S. Contract Law has been dramatic. Consideration theory had emerged as the center of U. S. contract law. Indeed it came to symbolize the formalist school of jurisprudence. But the doctrine was too difficult to employ in all cases. In a manner that Cardozo would characterize as glacial, the courts found ways around it. The relied upon promise emerged. Since the introduction of Section 90 into the first Restatement of Contracts, contractual liability may be premised upon the detrimental reliance of one party on the promise of another. The saga of Reliance is a long one but, to use one of my favorite metaphors, it is a cake that has been baked. The twists and turns of

[10] Nancy S. Kim, *Boilerplate and Consent*, 17 GREEN BAG 2D 293 (2013) *available at* http://www.greenbag.org/v17n3/v17n3_articles_kim.pdf.

theoretical evolution and justification are complete. Reliance theory has been incorporated into modern U.S. law. The span of time it took to resolve the issue was a long one and the steps in the process never simple, but the job was done. Perhaps it can serve as a model for the growth of Boilerplate theory.

Aristotelean Theory

Building on the work of Professor James Gordley and others, Radin sketches a morality based theory. Rehearsing the work of Professor Fried on promises and the power that they inherently carry, she lays out this appealing theory. Fairness and honesty are noble in constructing a theory. The theory is limited by the extent of the human conscience. If men were angels it could govern transactions successfully. But Oliver Wendell Holmes, Jr.'s famous observation that Contract Law is designed for the 'bad man' cannot be dismissed. Relying on the best intentions of human beings is an enterprise that is doomed from the start. Nor would the anti-authoritarian legal principles that underpin the U.S. Constitution and its legal progeny accept allowing a court to govern transactions by judging the justice of each deal. Better to trust the individuals involved in the deal than to put it into the hands of a governmental entity.

Conclusion

Radin's Boilerplate is a great read for anyone interested in contract law in the United States in 2014.She lays out the topography of contract law with great skill and insight. The second half of the book concerns her prescriptions for solving the dilemmas posed by boilerplate and modern contracting. Her reliance on governmental schemes to insure equity are problematic though intriguing. I will not critique them here. Whether one agrees with them or not, the first half of the book is a terrific primer on contracts. After reading it, anyone will be up to speed on the problems and uncertainties of today.