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Boilerplate Symposium I: Peter Alces on Consent

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May 13, 2013

Boilerplate Symposium I: Peter Alces on Consent



This is the first in a series of posts reviewing Margaret Jane

[Radin's Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law.](#)

[Peter A. Alces, Rollins Professor of Law and Cabell Research Professor of Law, The College of William & Mary School of Law](#)

In this fine book, Margaret Jane Radin concludes that “consent” lacks a reality referent in contract. That is, somewhere between what she describes as “World A (Agreement),” the universe of enforceable promises negotiated “at arms’ length” by parties of similar relative sophistication, and “World B (Boilerplate),” where standard and oppressive terms effect normative and democratic degradation, consent is lost. This conclusion is not shocking; it is difficult to think of anyone (probably including even Randy Barnett) who honestly believes that real consent has very much to do with most (even virtually all) contracting these days. So we can all agree: where there is boilerplate, there is no “meaningful” consent, which is to say there is none of the consent that should matter to contract. From that premise, Professor Radin concludes that World B is not a contracts universe at all, but is instead a realm better understood by reference to tort principles (and it is even worse than Grant

Gilmore ever imagined).

But once we acknowledge the death of consent, how much more new is there to say about boilerplate? You could despair with Professor Radin that political forces make it unlikely that the American justice system will respond as would the European Union; that consequentialist apologists rely on arm chair empirical assumptions without actually doing the necessary math; that by a 5-4 decision of the United States Supreme Court the Federal Arbitration Act has been contorted to undermine our justice system; that a curiously reasoned decision of the United States Court of Appeals for the Seventh Circuit has somehow become the prevailing (if not final) word on contract formation: but at the end of the day, it is difficult to identify *certainly* the extent of the harm or glimpse a viable cure. (Those troubled by boilerplate need to do the same math they complain form contracts proponents fail to do.)



While Professor Radin is right that there are distinguishable Worlds of contract, she does not make clear enough that the two Worlds are on a continuum; they are not so clearly dichotomous. Further, the contours of the continuum are obscure: many very sophisticated people know quite well what they are giving up when they sign a form contract or click "I agree," and yet do so willingly. That is generally the rational thing to do. Now **Boilerplate** does put boilerplate on a three dimensional matrix that would be sensitive to degrees of consent, alienability of the right in issue, and the size of the cohort prejudiced. But in describing Worlds A and B in dichotomous terms, the book may obscure the reasons why it remains rational to agree to form contracts, without reading their terms. So I think the book would have been stronger had it described Worlds A and B along a fourth dimension.

What Professor Radin has to say about consent is surely true, but what she says is really a truism: we know that consent is a conclusion rather than an analytical device,

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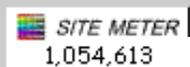
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and that consent is also a term of art, largely divorced from the important normative work it can do in World A. What we do not know, though, is when World A becomes World B: it is not just the case that all form contracts are World B contracts. Whether a contract is World A or World B is a function of the very factors that contract doctrine could take seriously, if the composition of the Supreme Court were different, and if *all* Federal Courts of Appeal judges knew a bit more about the common law of contract and the UCC.

[Posted, on Peter Alces's behalf, by JT]

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