The Challenge of Boilerplate

Author : Robin Kar

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Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (Princeton University Press, 2013).

Although Margaret Jane Radin is perhaps best known for her work in property theory, she has recently been focusing her formidable intellect on questions of contract. *Boilerplate* reflects her first book length treatment of these topics, and there is much to like about this book. Here I will focus on one contribution that the book makes to normative jurisprudence, which is to clarify the centrality, pervasiveness (and perhaps even inescapability) of a specific problem for modern contract theory. The problem involves what I like to call a generalized lack of theory-to-world fit: if Radin's arguments are valid, then a very broad range of modern contract theories are addressing the wrong subject matter, given the way that contracts increasingly work in the modern world.

That some market practices pose special problems for some theories of contract is, of course, no big secret. Rarely, however, is it acknowledged just what a general threat some prevalent practices pose to modern contract theory as a whole. For *that* defect, *Boilerplate* provides a timely and incisive cure.

Radin begins her central line of argument by asking the reader to distinguish between two hypothetical worlds, which she calls "World A", or the "World of Agreement", and "World B", or the "World of Boilerplate". In World A, all of the agreements are by stipulation between persons of roughly equal knowledge, capacity and bargaining power. All of the terms are ones that could have been modified in negotiation—both in the sense that every party is willing to change any particular term for sufficient consideration and in the sense that all of the contracts are reached in a context with meaningful alternative arrangements. When parties enter into contracts, they do so only after conscious deliberation over the entire set of included terms and with full understanding of their content. All of the contractual terms in World A are therefore the joint products of private parties' subjective wills. They are also all "freely chosen", in a particularly robust sense of the word.

It follows that all of the contractual terms in World A have an important property, which is highly relevant to political theory. Because they have been freely chosen, their enforcement should—all other things being equal—*promote individual liberty*. (The standard proviso naturally applies here: the parties must also exercise this liberty in a manner that is consistent with the equal liberty of all others, and so not, for example, in ways that would violate ordinary criminal laws.) For committed libertarians, or anyone else who takes the value of liberty to be particularly foundational, strong prima facie reasons thus exist for the deferential enforcement of all terms that result from unregulated private negotiations in World A.

One need not be a libertarian to value liberty, however, and so one need not be a libertarian to accept this last conclusion. Liberty actually plays a central if less foundational role in a broad range of liberal political theories. For utilitarians like Mill in *On Liberty*, liberty is, for example, endorsed because well socialized individuals with lived experience tend to acquire some privileged epistemic access to the routes to their own happiness, and also to encourage the kinds of "experiments in living" that help produce this valuable kind of knowledge. John Rawls is most famous as a critic of utilitarianism and for his work on distributive justice. Still, his first principle of justice—which is lexically ordered above his

principle of distributive justice in a well-ordered liberal state—is that "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty of others". In the degree to which they value liberty, Rawls and Mill are thus not all that far apart. Some theorists, like Charles Fried, have also interpreted the Kantian commitment to autonomy to require robust deference to freedom of contract, viewed primarily as a negative freedom from governmental constraint in the private marketplace. Fried thereby misreads Kant on autonomy in my view, but there is no doubt that Kantian political theory grants liberty under the right construal (as true autonomy, or positive freedom) a central place in restricting legitimate state action. Liberty interests can thus be grounded in a broad range of otherwise differing approaches to liberal political theory, and it will be highly relevant on any that World A terms are the products of free choice.

As Radin rightly emphasizes, some such link to political theory is critical for normative contract theory because the legal enforcement of contracts involves the coercive power of the state. A specifically political form of justification for it is therefore needed. World A is one in which an intuitive and broadly endorsed set of liberty interests converge to make a compelling prima facie case for the legitimacy of enforcing most (if not all) contractual terms that arise from private negotiations in unregulated markets. Hence, one might plausibly think that the right link to political theory exists.

When thinking about the "typical" contract and "ordinary" market activity, World A has played an enormous role in the philosophical imagination. Its free and voluntary exchanges are often thought to provide the paradigm case of private market activity, against which most real world transactions are deemed rough approximations. Legal rules that protect initial property entitlements, and enable private parties to engage in unregulated market exchange, are thus often thought to promote individual liberty by default—and, indeed, to generate one of the most important domains of private freedom. Radin is thus surely right to suggest that "[l]iberal ideal thought holds . . . that the state is justified by the necessity of establishing and maintaining a background infrastructure by means of which private actors can realize and exercise their freedom through private ordering." (P. 44.)

So what about World B, or the hypothetical "World of Boilerplate"? At least in the context of consumer transactions, World B is very different from World A. World B is dominated by phenomena like form contracts, contracts of adhesion, shrinkwrap, clickwrap, rolling contracts, and, of course, boilerplate. In this world, private negotiations tend to produce not only the central terms of agreements, which are explicitly negotiated and freely chosen by the relevant parties, but also lengthy fine print that is rarely if ever read by consumers. Even if consumers were to read the fine print, they would rarely understand it, and none would be able to negotiate for modifications with any particular company. Boilerplate also tends to be repeated through entire industries in World B. Hence, consumers lack meaningful alternatives for similar products with different fine print from other companies.

Let me add one further stipulation, and suggest that—like us—the people in World B depend heavily and ineliminably on markets for their basic functioning and livelihood. If so, then the purported option to "opt out" of market activity altogether is not a very real one. To suggest otherwise would invite the same type of criticism that Hume famously leveled against Locke's arguments from tacit consent. In his discussions of this concept, Locke essentially sought to interpret the ordinary 17th century villager's decision to remain in his or her state of birth as a free act, which expressed tacit consent to its standing political regime. In doing so, Locke thereby made much too much out of something over which most ordinary people had no real choice. Here are some basic facts that made this purported choice unreal in the 17th century: linguistic barriers, transportation costs, the need for land and work at the destination, and the typical dependence of 17th century villagers on local social networks for their basic livelihood and survival. The people in World B are not 17th century villagers, but they *have* become highly dependent on markets for their basic functioning and livelihood. Hence, these people have no real choice but to engage the marketplace.

Whether the real world is more like World A or B is, of course, an empirical question. With respect to the vast majority of modern contracts between corporations and consumers, the empirical facts are, however, fairly clear. As Radin persuasively argues, modern consumers are deeply entrenched in a World of Boilerplate. Hence, a great number of terms that result from private negotiations in the real world are not, in fact, the product of free choice in anything like the same robust sense of World A. This fact provides the central backdrop for Radin's larger line of argument.

The next step for Radin is to establish that this fact poses a general threat to modern contract theory. Radin does this by walking through all of the major normative theories of contract, and pointing out that each hinges its central justification for contract enforcement on the purportedly free and voluntary nature of the underlying transactions. For autonomy theorists (like Kant), contract enforcement is justified by respect for autonomous choice; for promise-based theorists (like Charles Fried), it is conditioned on the existence of a voluntary promise; for reliance-based theorists (like Patrick Atiyah), only voluntary promises that are relied upon should give rise to contractual liability; for neo-Aristotelian theorists (like James Gordley), the capacity for free choice is viewed as having a particular natural function (*viz.*, it aims at human flourishing), but some exercise of this capacity is still needed to form a contract; and for people who would root contractual enforcement in the logic of property transfer (like Peter Benson), a transfer must still be voluntary to be legally recognized. As Radin observes, voluntary choice even plays a key role in the central economic justification for contract enforcement because economists view voluntary choice to reveal preference. Voluntary agreements therefore produce information about the routes to mutual preference satisfaction, and their enforcement should tend to promote efficiency. To this, an important Hayekian insight is often added: this information about the routes to human preference satisfaction, which is produced so easily and naturally by free negotiation, is often very difficult (or even impossible) to produce through centralized state planning.

What this means, however, is that *all* of the prevailing normative contract theories offer central patterns of justification that apply best to World A, but not—or at least not directly—to an increasing number of terms that are produced by unregulated markets in the real world. There is—in other words—a quite generalized lack of fit between the justificatory centerpieces of these theories and the world. When this lack of fit goes unnoticed, these theories often profit illicitly from a perceived normative halo, which arises from the continued presumption of a connection between private contract and liberty.

Because of these facts, Radin suggests that enforcing boilerplate in the real world should be presumed to involve some "normative degradation". Notice that this diagnosis does not depend on any particular normative theory of contract, and instead follows from premises that are shared by all dominant theories. Hence, the presumption should be in one sense quite robust. At the same time, however, not every theory takes liberty (or freedom of choice) to be equally foundational, and so the presumption will also be defeasible on some grounds and theories. Consider, for example, the quite plausible view that democratically passed legislation has the authority to trump personal liberty in some circumstances. If so, then legislation might in principle cure some of this normative degradation. The problem for boilerplate produced by unregulated markets is, however, that it tends to reflect neither the joint product of private parties' robust free choice nor the democratic will. Radin therefore argues that its enforcement can involve not only "normative" but "democratic" degradation.

Contract theorists who seek to justify the enforcement of boilerplate have two main options at this stage. Either they must try to shoehorn boilerplate into the category of the freely chosen, or they must develop justifications for its enforcement that are not conditioned on assumptions of free choice.

The first tack is by far the most common, and Radin discusses a number of different variations of the theme. All start with the same basic observation: even if real world boilerplate is not freely chosen, it often has other properties that may seem related. Ordinary consumers might, for example, still be "on

notice" of the risks of boilerplate; or their voluntary choice to enter agreements with known terms might be construed as expressing their "blanket assent" to a range of unknown terms (or perhaps only to those unknown terms that are not "unreasonable"); or it may be that the average consumer "would have chosen" some boilerplate terms even though they did not in fact choose them; and so on. Contract theorists who try to extend their basic theories to boilerplate often point to facts like these, but typically with an air of afterthought. They act as if the arguments reflect only minor appendages to their main theory, which is still of the "central case" of purely voluntary exchange.

Radin's response to all of these moves is simple enough. She points out that none of these properties is literally equivalent to being freely chosen. Hence, none of these moves can justify the enforcement of boilerplate without a fairly major revision of the central pattern of justification offered for enforcement in the standard case.

Theorists who try to take this first tack are thus surreptitiously taking the second: they are making implicit appeal to a pattern of justification that is no longer premised on assumptions of voluntariness or free choice. With one major exception described below, Radin argues that none have, however, offered the kind of explicit alternative theory needed to do the relevant work. Perhaps this is because boilerplate is still viewed as peripheral, but Radin argues that—given the realities of the modern marketplace—contract theorists can no longer treat the enforceability of boilerplate as an afterthought. The second tack must be explicitly broached if the challenge of boilerplate is to be truly met.

The one major exception to this insufficient attention arises in the law and economics literature, where this second tack is often consciously broached. Here one finds not only genuine focus on the problem of boilerplate but also quite a few attempts to justify its enforceability based solely on considerations of efficiency and without any accompanying assumptions of free choice. One particularly common suggestion is that boilerplate makes contracting less costly, and thereby creates benefits for both corporations and consumers. This suggestion depends on the empirical assumption that saved costs are systematically passed on to consumers in the form of lower prices.

Another (really just slightly more formal) version of this suggestion is often framed in terms of the Coase theory, transaction cost theory and the well-known distinction between property and liability rules. Property rules protect entitlements that can only be divested from parties with their explicit consent, whereas liability rules protect entitlements that can be divested absent consent so long as adequate compensation is paid. Because of these facts, property rules—but *not* liability rules—tend to force private negotiation before entitlements are transferred. From here, one need only invoke the Coase theorem to generate the standard economic recommendation that private entitlements be protected by property rules by default. Under the Coase theorem, free markets should automatically tend to produce an efficient allocation of resources so long as transaction costs are zero, and efficiency considerations should therefore favor the use of property rules by default to force private market negotiation. The natural corollary to this is, however, that in circumstances where transaction costs are sufficiently high, efficiency considerations will sometimes favor the use of liability rules instead. One of Radin's key observations in *Boilerplate* is that courts effectively treat entitlements as protected by mere liability rules when they enforce boilerplate, because boilerplate tends to divest parties of entitlements without their true consent. This treatment might be economically justified—but only on the empirical assumption that it saves sufficient transaction costs, which are systematically passed on to consumers.

Radin's detailed arguments against these and number of related economic arguments really need to be read to be fully appreciated. One important response nevertheless hinges on the distinction between economic arguments for the use of liability rules in exceptional cases of market failure and their more pervasive use when boilerplate is generally enforced. Where, as in the latter case, liability rules have become more the rule than the exception, their use significantly undermines the more central economic

justification for contract enforcement—which still depends on voluntary choice to reveal preference. The commonly presumed connection between contract enforcement and liberty has also been largely severed. Hence, one can no longer place heavy emphasis on the Coase theorem, or on any Hayekian insights about the indispensability of voluntary agreements to produce information about the routes to private welfare. Divested of this standard garb, the economic argument for enforcing boilerplate would thus seem to reduce to a fairly straightforward empirical claim: the use and enforcement of boilerplate—which is typically generated by self-interested corporations and is neither freely chosen by consumers nor expressive of the democratic will—nevertheless tends to promote the welfare of all parties involved *as a general matter.*

Let us take a closer look at this empirical claim. Economists who make empirical claims generally fall into one of two basic camps. Either they try to predict the consequences of legal rules based on economic modeling, or they turn to econometric methods to investigate empirical phenomena more directly. As Radin notes, however, very little direct empirical support has ever been produced for the claim that enforcing boilerplate promotes the welfare of all parties involved as a general matter. More often than not, the claim is simply assumed to be economically plausible because private markets are thought efficient by default; or it is suggested (based on economic modeling) that a well-informed subset of consumers will naturally push prices toward efficiency. The problem with the former assumption is that it draws most of its perceived plausibility from the standard economic model of contracting (in which free choice and perfect market competition render all privately negotiated terms subject to the laws of supply and demand), which has been shown inapplicable to the case of boilerplate. Radin argues that the latter suggestion is also problematic because it depends on unrealistic views about consumer rationality and the limitations of corporations to engage in price discrimination and market segmentation. Radin's point here is not that the empirical facts speak clearly and uniformly against the enforcement of boilerplate in all cases; but rather that the empirical facts need to be investigated much more responsibly because a blanket empirical assumption of efficiency almost certainly gets things wrong in many cases.

If there is one weakness in this last argument, it is that Radin never goes on to try to answer these important empirical questions more definitively. To see this as a weakness is, however, to misconstrue the deeper import of the argument. Radin's argument functions more like an opening salvo, or call to empirical investigation, which proceeds by casting doubt on the generality of a critical empirical assumption that has played a powerful but outsized role in the academic literature. To exhibit the openness and complexity of a critical question, which many have presumed answered, is purpose enough for her argument.

So where does this all leave us? Radin herself goes on to discuss a number of potential solutions to these problems in, but here I have been focusing on the implications of her book for normative contract theory. Let me thus end by suggesting a general moral for the field.

When theorizing about contract law, one of the most common approaches has been to start with the simple types of voluntary exchanges that pervade the hypothetical World of Agreement, and then try to build a theory around them that accounts for the basic contours of contract law doctrine. This task has proven difficult enough in practice that many despair of its ever being met. (But see my work on contractualism about contract law, which purports to meet this challenge.) Still, the basic hope is that once a satisfying theory has been produced for these easy cases, it can later be extended with minor modifications to the more complex cases of the real world. To begin in this way is, however, to credit a particular picture of how modern markets operate at their core—*viz.*, as paradigmatic realms of personal liberty and free choice. This picture is elegant and intuitive, and is meant to produce understanding. But it is ultimately a snapshot of World A, and the real world has changed. The picture thus ends up producing as much distortion as illumination.

One of the things I like so much about *Boilerplate* is that it clarifies just how deep and pervasive this problem is for modern contract theory as a whole. By casting doubt on one of the most common starting points in modern contract theory, Radin in effect forces us to reflect on the basic object of the inquiry. She thereby challenges us to produce either better theories or a better world, and to do so based on the facts rather than fanciful pictures of the market.

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