Resisting Contract Law's Paradigm Slip Through Shared Meaning

Author : Nancy Kim

Date : May 17, 2018

Robin B. Kar & Margaret J. Radin, *Pseudo-Contract & Shared Meaning Analysis*, 132 **Harv. L. Rev.** (forthcoming 2019), available at SSRN.

By now, it's old news that contracts have undergone a transformation in the couple of decades and not for the better. Just thirty years ago, it was a relatively rare occasion when the average American entered into a contract. It may have been a lease or a home purchase, or maybe a car rental agreement. But to purchase a shirt at the mall did not require signing a contract unless it was to sign one's name on a credit card slip. What a difference the Internet makes. Now, people routinely are deemed to have entered into "contracts." In their article, Robin Bradley Kar and Margaret Jane Radin address this phenomenon, putting the term "agreement" and "contract" in scare quotes to underscore how these types of "contracts" have "fundamentally different meanings" from their traditional counterparts. (P. 5.)They come up with a more appropriate term for these types of unread, ubiquitous contracts – pseudocontracts – and note the importance of using a different term to describe a different concept because the "use of homonymous terms for concepts that have evolved to have different meanings can mislead one to think that there is no fundamental difference" between the traditional contracting scenario and the one that online consumers routinely encounter. They write that "one must consider how contemporary methods of communication have altered the way parties use language during contract formation."

Kar and Radin article is both normative and descriptive in that it describes how contract law should address interpretation issues and explains what courts have been doing – at least when they do it correctly (i.e. before *ProCD* and its ilk mucked things up and made teaching 1L Contracts so much more difficult). Their article is lengthy and chock-filled with terms which neatly capture hard-to-explain concepts. For example, they describe the incremental changes that contract law has undergone to doctrinally accommodate digital contracts as a "paradigm slip" which has the overall result of fundamentally changing core doctrinal concepts such as assent. They explain that their approach – "shared meaning analysis" is not "an alien approach to contract interpretation" but is "consistent with long-standing approaches that are rooted in a nuanced and careful assessment of the shared meaning that private parties produce when they use language to form contracts." (P. 8.) This is basically the same "contextual" approach adopted by the Restatement (Seconds) of Contracts and the Uniform Commercial Code, but which courts have applied in an uneven and erratic manner. Their approach does more than explain what courts have done (when they are applying interpretation rules correctly); it provides more transparency and "precision to traditional approaches by building on the well-known linguistic distinction…between what sentences mean (including any sentences delivered in boilerplate text) and what people mean when they use language to communicate with one another (including to form contracts.") (P. 9.) Kar and Radin turn to the work of Paul Grice, a philosopher of language, who distinguished between the meaning of a sentence and what a speaker means when using that sentence within a particular context.

Kar and Radin hone in on what "context" means, explaining that sometimes speakers mean something different or additional to what is expressly said. An example they give is a lackluster recommendation which damns with faint praise, such as a "recommendation" for a Supreme Court clerkship which notes

that the applicant engaged in a "great amount of independent legal research and writing" and "showed up for class on time on every single day." Even though the letter does not expressly say anything negative about the student, the letter clearly implies that the student is unqualified for a Supreme Court clerkship." The information is conveyed by "conversational implication" meaning that it was part of the *professor's* meaning, but not the meaning of any *sentence*.

The authors then move to the cooperative norms that govern language to form contracts and explain how these norms explain doctrinal concepts, such as the implied duty of good faith which is part of the performance of every contract. The problem with boilerplate is that it is too long and violates various linguistic/conversational maxims (e.g. the Maxim of Quantity, the Maxim of Manner, etc). Because boilerplate is not actually created as a result of cooperative conversation during contract formation, they argue that much of it – though not all – "currently fails to produce any actual agreement with shared meaning during contract formation." (P. 22.) Consequently, "(b)oilerplate text that is never cooperatively communicated cannot contribute anything to a 'common meaning of the parties' produced during contract formation." (P. 22.)

Kar and Radin then dissect how shared speaker meaning is produced in classic offer-and-acceptance scenarios and contrast that with boilerplate text which may have both contractual and non-contractual purposes. They propose a three-stage (actually four) approach to help courts distinguish the actual agreement of the parties from non-contractual text. They suggest that courts "simply imagine that all of the written and digital text exchanged during contract formation is converted into oral form and contributes to a face-to-face conversation between the relevant parties." Then courts should ask: "Could this boilerplate text have contributed to an oral conversation that adds terms to a contract while preserving the presupposition that both parties are observing the cooperative norms that govern language use to form contracts?" This "thought experiment" would help courts manage boilerplate text as follows. First, the boilerplate text that falls within this boundary is part of the parties' actual agreement and is enforceable unless an applicable contract law defense applies. Second, court may better be able to assess "potential hidden conflicts" such as arbitration provisions, waivers and exculpatory clauses which might be inconsistent with the parties' actual agreement. Third, courts can evaluate remaining boilerplate text which may be neither part of the actual agreement nor in conflict with it.

The shared meaning analysis provides an alternative to generalist or blanket assent approaches to boilerplate. By focusing on shared speaker meaning, Kar and Radin are essentially doubling down on the core of contract law being about the intent of the parties. Of course, the intent of the parties and their reasonable expectations are where contract law should have been all along and where it was before the onslaught of digital boilerplate. Kar and Radin's article is thoughtful and thought-provoking and should be read by those who might otherwise be tempted to succumb to the paradigm slip which threatens to undermine contract law's very essence.

Cite as: Nancy Kim, *Resisting Contract Law's Paradigm Slip Through Shared Meaning*, JOTWELL (May 17, 2018) (reviewing Robin B. Kar & Margaret J. Radin, *Pseudo-Contract & Shared Meaning Analysis*, 132 **Harv. L. Rev.** (forthcoming 2019), available at SSRN), https://contracts.jotwell.com/resisting-contract-laws-paradigm-slip-through-shared-meaning/.