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Gaps and Shadows in the Common Law

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Mark P. Gergen, Privity's Shadow: Exculpatory Terms in Extended Forms of Private Ordering, 43 **Fla. St. U. L. Rev.** 1 (2015).

It's hard to think of anyone who analyzes the interstices of the common law better than Mark Gergen, an expert in an almost improbable number of legal fields. By interstices, I mean the spaces that don't fall neatly into single subjects like contract, tort, or property—for example, the economic torts and the interface between contract and restitution. In *Privity's Shadow: Exculpatory Terms in Extended Forms of Private Ordering*, Professor Gergen brings his knowledge of the boundaries of these subjects to bear on a specific recurring pattern of problems: whether exculpatory terms in a contract should prevent a negligence action by a victim who wasn't a party to the contract.

So, for example, if the standard form contract between FedEx and its customers purports to limit FedEx's liability to $100, does that term prevent full recovery by a child physically injured when FedEx negligently fails to deliver the child's hospital's shipment of the child's blood samples? [1] Even this relatively straightforward example shows the potential complexity of the problems in this area.

The article is long and intricate, and for that reason it may not have ended up on everyone's reading list in this age of Twitter and attention-grabbing headlines. But unlike a lot of modern legal scholarship, it helps solve an important problem that courts face, and it does so without gimmickry, stodgy conceptualism, or overly grand and impossibly simple theories.

Professor Gergen aims first to draw attention to the factors that matter in deciding these cases: the reasons for imposing tort liability (on one hand) and what he calls the "quality" of the assent to the exculpatory term (on the other). He analyzes these reasons contextually, in place of courts' traditional formalistic rules in this area. Courts long have addressed the effects of exculpatory clauses on third parties with conceptualistic principles like "a third-party beneficiary can't have greater rights than a contract creates" or "a contract cannot eliminate the rights of someone who isn't a party to the contract"; as Gergen points out, these rules may seem self-evident in some situations, but they make too much turn on often arbitrary determinations, like whether a claim sounds in contract or in tort.

Instead of accepting uncritically that a contract is "either conclusive or irrelevant to the issue of the availability of a tort claim," Professor Gergen offers a nuanced, context-specific analysis. Among other things, he shows the potential relevance of contract-law terms to a duty analysis in tort law, several possible roles that informational costs might play in analyzing the effects of third parties on the contracting process, and the (tentative) relevance of property law and the doctrine of equitable notice.

The interstices I mentioned are a ripe area for analysts of the common law, and Professor Gergen's upcoming work in this area is sure to be equally—or even more—important. For example, at a few recent conferences, Professor Gergen has presented a novel transactional technique by which companies like Google and Facebook might be able to protect the privacy of customer information that falls into the hands of third parties. Analyses of privity, in this light, may cast an even more significant shadow.

1. See *Hampton v. Federal Express Corp.*, 917 F. 2d 1119 (8th Cir. 1990). [?]

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