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Nancy Kim  
*California Western School of Law*, [nsk@cwsl.edu](mailto:nsk@cwsl.edu)

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## REASONABLE EXPECTATIONS IN SOCIOCULTURAL CONTEXT

Nancy S. Kim\*

*If . . . [c]ontract (though I surely hope not quite “as we have known it”) is to continue with us, powerful and vast, into an indefinite future, then we are faced with a body of doctrine about day to day transactions which originated in Elizabeth’s time, which was built out heavily in a 19th Century that had only begun to foreshadow modern conditions, and which has never at any stage been critically restudied as a whole in terms of wherein it serves well, wherein it is out of joint. Surely such a body of doctrine vitally needs such critical restudy. The United States has work to do; and legal machine tools also have a function.<sup>1</sup>*

—K.N. Llewellyn

### INTRODUCTION

Llewellyn wrote those words over half a century ago, and in this era of email, text messages, and cell phones, they may be even more true. A globalized marketplace and technological advancements have resulted in greater diversity between and among contracting parties inside and outside the United States. The parties to a contract do not always share the same set of cultural references, vocabulary, or business practices.<sup>2</sup> Technology brings together

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\* Visiting Professor, Ohio State University, Moritz College of Law, and Associate Professor, California Western School of Law. A version of this Article was presented at the Contracts in Context: Identity, Power, and Contractual Justice Symposium at Wake Forest University School of Law, Winston-Salem, North Carolina, March 26–27, 2010. I offer sincere thanks to Dean Blake Morant and Professor Larry DiMatteo for organizing this symposium and for inspiring the contextual contracts movement. I greatly appreciate the diligent efforts of the symposium editors of the Wake Forest Law Review and the helpful comments of the attendants and participants at the symposium. I also thank Natalie Watson for her excellent research assistance.

1. K.N. Llewellyn, *On the Complexity of Consideration: A Foreword*, 41 COLUM. L. REV. 777, 782 (1941).

2. Elsewhere I have discussed the need for a more dynamic approach to contract interpretation for these reasons. See Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 531–39 (2005).

parties of different experiential reference points by greatly facilitating transactions across vast geographical distances. It also increases the likelihood of substantive misunderstandings by creating novel contracting situations that often reveal implicit or unexpressed assumptions held by the parties.

The goal of contract law is often said to be the enforcement and protection of the reasonable expectations of the parties.<sup>3</sup> Unlike the purpose of criminal law or tort law, the underlying purpose of contract law is not enforcement of societal standards or norms (other than the norm that if you make a contract, you should keep it). A contract is not enforced solely or even primarily because the substance of what the parties have agreed to is normatively desirable,<sup>4</sup> nor does contract law force parties into contracts to which they have not agreed, even if those contracts would be socially beneficial. A contract is enforced because the parties have agreed to it.<sup>5</sup> They have consented.<sup>6</sup> One of the main objectives of contract law, then, is furthering personal autonomy—the “freedom to contract.”<sup>7</sup> An extension of this idea is that our judicial system may force the breaching party to keep his or her promise—or pay damages for failing to do so—because the other party wants him or her to keep the promise, not because the particular thing the party promised to do is normatively desirable.<sup>8</sup>

There is also a societal benefit and objective in enforcing contracts. In a credit economy, parties must be able to depend upon

3. See, e.g., ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION § 1, at 2 (1952).

4. For a discussion of the various views regarding the origins of the binding nature of contracts, see LARRY A. DIMATTEO, CONTRACT THEORY 7–11 (1998). DiMatteo notes:

The entire task of the law of contracts has been to find the appropriate dividing line between the morally binding and the legally binding promise. The bindingness of promise varies among the perspectives of morality, religion, and culture. (The essence of contract law is the determination of which of life's many promises are not to be recognized as legally enforceable.)

*Id.* at 8.

5. See CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 57 (1981) (noting that “the parties are bound to their contract because they have chosen to be”).

6. See generally; Randy E. Barnett, *Some Problems with Contract as Promise*, 77 CORNELL L. REV. 1022 (1992) [hereinafter Barnett, *Some Problems*] (arguing in favor of a consent theory as opposed to a promise theory of contract); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986) [hereinafter Barnett, *A Consent Theory*] (discussing consent as an essential moral component of contracts).

7. See Barnett, *Some Problems*, *supra* note 6, at 1023–24.

8. See Jules L. Coleman, *Some Reflections on Richard Brooks's “Efficient Performance Hypothesis,”* 116 YALE L.J. POCKET PART 416 (2007), <http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/scholarship/some-reflections-on-richard-brooks%e2%80%99s-%e2%80%9cefficient-performance-hypothesis%e2%80%9d/>.

the promises made by others.<sup>9</sup> A buyer, for example, who is able to purchase equipment on credit with thirty-day payment terms can generate revenue during that thirty-day period. Credit benefits both the buyer and the seller by greasing the wheels of commerce.

A determination of the reasonable expectations of the parties should capture the intent of the parties in entering into a contract and balance the parties' intent with any countervailing societal considerations. Intent, however, is a multifaceted concept. Elsewhere, I proposed that there are three facets to the concept of contractual intent.<sup>10</sup> Volitional intent captures a party's willingness to enter into an agreement.<sup>11</sup> A party entering into an agreement under duress, for example, lacks volitional intent. Cognitive intent refers to a party's understanding of the proposed contract.<sup>12</sup> A party entering into an agreement that contains terms that he or she does not understand lacks cognitive intent. Contextual purposive intent captures a party's motive for entering into a contract, including the relevant circumstances under which a contract is made.<sup>13</sup> For example, a party who rents out a house on a certain street in order to view a parade has the contextual purposive intent of viewing the parade.<sup>14</sup>

Under the objective theory of contract, courts interpret the intent of the parties in adopting a particular contractual term according to the reasonable meaning of that term, or the meaning that a reasonable person would assign to that term.<sup>15</sup> Courts adopt the objective theory to determine all aspects of the understanding between the parties—from the determination of contract formation, to an evaluation of the meaning of written or spoken terms, to an assessment of contract performance.<sup>16</sup> In a series of articles,

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9. See Robert A. Prentice, "Law & Gratuitous Promises, 2007 U. ILL. L. REV. 881, 933 (2007).

10. See generally Nancy Kim, *Mistakes, Changed Circumstances and Intent*, 56 U. KAN. L. REV. 473 (2008) (proposing an expanded intent analysis in basic assumption defenses).

11. *Id.* at 480.

12. *Id.* at 480–81.

13. *Id.* at 481.

14. See *Krell v. Henry*, [1903] 2 K.B. 740, 746–50 (Eng.).

15. See CORBIN, *supra* note 3, § 106, at 156.

16. Professor Melvin Eisenberg describes the rationale for the classical contract approach:

Psychologically, the assumption underlying the embrace of the classical model seems to have been that everyone knows, or can fairly be taken to know, the law. For some, the model may also have reflected a behavioristic theory that assumes either that subjective states of mind are nonexistent or that because they are unobservable they are unknowable, so that we must accept conventional objective signs as tokens of the interior states to which the signs normally correspond.

Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1109 (1984).

Professor Melvin Eisenberg explained how modern contract law evolved from the will theory to the classical model, and from the classical model to a more responsive and dynamic model.<sup>17</sup> This Article argues in favor of such a progression. An objective theory of contract erroneously replaces the parties' intent with a reasonableness standard. Reasonableness should be the product of weighing subjective intent against societal considerations, not a factor used to make such a determination.<sup>18</sup> When one of the parties lacks the requisite subjective intent, a court may nevertheless enforce a contract when a failure to do so would cast doubt on the security of transactions and thus endanger our credit economy.<sup>19</sup>

A dynamic approach better serves a dynamic society. In the modern global and technologically driven marketplace, the objective theory of contract incompletely captures—in fact, in some cases, even undermines—contract law's objective of promoting individual autonomy. This Article further argues that in order for modern contract law to be truly "dynamic," it must take into consideration the social and cultural backgrounds and social identities of the parties.<sup>20</sup> This Article proceeds in four parts. Part I discusses the role that social identity and experience play in contract law and introduces the tension between sociocultural dissonance and an

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17. See Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743 (2000) (examining the shift from static to dynamic rules of contract); Eisenberg, *supra* note 16, at 1111 (reconceptualizing contract law based upon "considerations of fairness," and "a functional analysis of the relevant issue in terms of fairness and policy"); Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640 (1982) (proposing a reconstruction of the doctrine of consideration along modern lines); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982) (arguing that limits on the bargain principle are justified in certain cases). Larry DiMatteo makes a similar observation when he notes that "[a]ctual thought was replaced by manifested thought." DIMATTEO, *supra* note 4, at 12.

18. See *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147–48 (Ind. 1971) ("The law should seek the truth or the subjective understanding of the parties in this more enlightened age. . . . Only in this way can justice be served and the true meaning of freedom of contract preserved.").

19. As Lon Fuller observes:

The principle of private autonomy, properly understood, is in no way inconsistent with an "objective" interpretation of contracts. Indeed, we may go farther and say that the so-called objective theory of interpretation in its more extreme applications becomes understandable only in terms of the principle of private autonomy. It has been suggested that in some cases the courts might properly give an interpretation to a written contract inconsistent with the actual understanding of either party. What justification can there be for such a view? We answer, it rests upon the need for promoting the security of transactions.

Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 808 (1941).

20. Larry DiMatteo has stated, "Each person's past experiences prior to entering the particular contractual relationship help mold their personal understanding of the contract." DIMATTEO, *supra* note 4, at 54.

objective approach. Part II analyzes the difference that culture makes by examining a recent case involving two Korean-born businessmen. Part III analyzes the difference that gender makes by examining a case involving divorce and in vitro fertilization. This Article concludes that courts should consider contextual factors, including the background and identity of the parties, in order to better achieve the goal of contract law—to protect the reasonable expectations of the parties.

## I. SOCIOCULTURAL IDENTITY, LEGAL FORMALITIES, AND CONTRACT LAW

### A. *Reasonableness as Credibility (and Vice Versa)*

Courts enforce properly formed and otherwise valid contracts, provided that one of the parties seeks enforcement; on the other hand, courts will not enforce contracts that neither party wants to perform, even if the contractual performances would be socially beneficial.<sup>21</sup> Furthermore, parties can freely rescind or modify their agreements provided that both do so voluntarily.<sup>22</sup> While the general rule is that modifications require consideration, this is somewhat imprecise. It is not criminal to modify a contract without consideration. If both parties want to modify their contract and seek the same modification, the courts will not stop them.<sup>23</sup> Contract law technically requires consideration, but the requirement of consideration is intended primarily to evidence that both parties in fact wanted to modify the contract—that is, that there was no deception or coercion.<sup>24</sup> Courts intervene in private matters only when one of the parties denies the modification or changes his or her mind about it.

In the context of a contract dispute then, the nonbreaching party asks the court to enforce the terms of the contract that the parties allegedly had agreed to at a particular moment in time. The intent of the parties that is relevant to the courts is their intent at the time of contract formation.<sup>25</sup> If the parties never wanted the

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21. Lon Fuller notes:

Among the basic conceptions of contract law the most pervasive and indispensable is the principle of private autonomy. This principle simply means that the law views private individuals as possessing a power to effect, within certain limits, changes in their legal relations. . . . When a court enforces a promise it is merely arming with legal sanction a rule or *lex* previously established by the party himself.

Fuller, *supra* note 19, at 806.

22. ROGER E. MEINERS ET AL., *THE LEGAL ENVIRONMENT OF BUSINESS* 317 (5th ed. 1994).

23. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 4.1, at 167 (4th ed. 1998).

24. See *id.* § 5.15, at 241.

25. DIMATTEO, *supra* note 4, at 56.

same thing, then the contract lacked mutual assent.<sup>26</sup>

Yet, the application of the doctrine of mutual assent does not fully capture what may happen when two parties enter into a contract. In some cases, one party does not agree with the other party's version of events and thus there was no mutual "in-sync" moment. This would be the case if, for example, one of the parties was joking.<sup>27</sup> Nevertheless, the courts may enforce the contract under the objective theory.<sup>28</sup> Or, there may have been a mutual "in-sync" moment but at a later time, one of the parties wants to escape performance and raises a legal basis, such as mutual mistake, for avoiding or rescinding the contract.<sup>29</sup> In both types of situations, the judge or jury decides whether the contract is enforceable.<sup>30</sup> How and what they decide usually depends on a determination of reasonableness.

The determination of reasonableness depends on the version of events that is most credible to the decision maker, be it judge or juror.<sup>31</sup> An example of this is the reasonableness standard in interpretation. In determining reasonableness, the decision maker likely uses himself or herself as a reference point, in effect asking, "Is this how *I* would have acted?"<sup>32</sup> If one party was acting unreasonably (i.e., differently from how the decision maker would have acted in the same situation), the decision maker is less likely to believe that party. If the offeree was acting unreasonably and the offeror was acting reasonably, the decision maker is more likely to believe the offeror.<sup>33</sup> If both parties are acting unreasonably, the decision maker will likely believe neither party and will probably conclude that there was no mutual assent.<sup>34</sup> If both parties are acting reasonably, the decision maker probably will not be able to decide who to believe and will likely find no mutual assent.<sup>35</sup>

Reasonableness and credibility play important roles even when the contractual dispute does not involve contract interpretation or formation (rife though the formation question may be with possible interpretation issues in determining mutual assent and terms of an

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26. *Id.* at 11.

27. *See, e.g.*, *Lucy v. Zehmer*, 84 S.E.2d 516, 522 (Va. 1954) (enforcing a contract to sell a farm that the seller intended to offer for sale only as a joke).

28. *See id.*

29. *See Kim, supra* note 2, at 512.

30. *See, e.g.*, *Lenawee County Bd. of Health v. Messerly*, 331 N.W.2d 203, 208 (Mich. 1982).

31. *See DiMATTEO, supra* note 4, at 133 (noting courts' reference to community values when applying legal standards such as the reasonable person).

32. *Id.* at 135.

33. *Cf. RESTATEMENT (SECOND) OF CONTRACTS* § 201 (1981) (explaining contract interpretation rules when the parties disagree about the meaning of terms).

34. *Cf. id.* §§ 20, 201.

35. *Cf. id.*



offer). When one of the parties raises a contract defense, such as mistake or nondisclosure, the success of such an argument often hinges, even if not expressly, on the decision maker's determinations of reasonableness and credibility.<sup>36</sup> For example, in determining whether a vendor has an affirmative duty to disclose material facts when one party labors under a mistaken basic assumption, the court considers factors including whether a failure to disclose would amount to "a failure to act in good faith and in accordance with reasonable standards of fair dealing."<sup>37</sup>

Reasonableness in contract law conflates two different concepts—believability/credibility and social conformity/normality.<sup>38</sup> Contract law's use of reasonableness as a standard seeks both to enhance the accuracy or truthfulness of the parties' claims and to situate a claim as one that is or is not normatively desirable.<sup>39</sup> But a problem arises when the determination of truthfulness or accuracy depends on the normative desirability of the claim or action.

In a situation in which one party has misconstrued the meaning of a contract, societal considerations should determine the outcome of the dispute because the divergent understandings or the "intent" and "expectations" of each party should be given equal weight.<sup>40</sup> The reasonableness standard works appropriately here to uphold contract law's objectives. In another type of situation, however, the parties may share the same understanding of the contract but one of the parties may later wish to invalidate the contract.<sup>41</sup> The problem in the latter situation is not that the parties misunderstood each other or the terms of the contract; it is that one party is using a legal formality, such as the requirement of consideration or the statute of frauds, to escape a promise that he or she intended to make.<sup>42</sup> Contract formalities may serve useful purposes, but too often those purposes are not in the service of determining or effectuating contractual intent, as I further explain in the next Subpart.

### B. *Intent and Contract Formalities*

In a classic article, Professor Lon Fuller identifies three purposes underlying legal formalities: evidentiary, cautionary, and channeling.<sup>43</sup> The requirement of consideration is "intended to

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36. See *Hill v. Jones*, 725 P.2d 1115, 1118 (Ariz. Ct. App. 1986) (examining certain instances of nondisclosure in terms of reasonableness).

37. *Id.*; accord RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

38. See DIMATTEO, *supra* note 4, at 80, 137.

39. *Id.*

40. See Kim, *supra* note 10, at 486–88 (calling for a dynamic approach to contractual intent and enforcement to promote "society's interest in the security of transactions").

41. See *id.* at 509–10.

42. Cf. Fuller, *supra* note 19, at 799 (giving the rationale for contract formalities and for allowing parties to renege when formalities are lacking).

43. *Id.* at 800–01.

remove the hazards of mistaken or perjured testimony which would attend the enforcement of promises for which nothing is given in exchange."<sup>44</sup> Similarly, as the name indicates, the purpose of the statute of frauds is to guard against false or fraudulent claims.<sup>45</sup> The cautionary function also addresses presumed weaknesses in the manner in which a promise is made.<sup>46</sup> The requirement of consideration invalidates gratuitous promises that are assumed to be made impulsively and rashly.<sup>47</sup> Written agreements are assumed to require more forethought and deliberation than oral agreements.<sup>48</sup>

While the evidentiary and cautionary functions of legal formalities are self-explanatory, the channeling function is more obscure. Fuller refers to the "channeling function of form" as a way to mark off or signal the enforceability of a promise.<sup>49</sup> Form, then, can provide a "legal framework into which the party may fit his actions."<sup>50</sup> The evidentiary, cautionary, and channeling functions of the law are interrelated in that a form that accomplishes one of these purposes usually accomplishes one or both of the others.<sup>51</sup>

Legal formalities promote contract law's objective of ensuring autonomous decision making by providing certain formal safeguards to ensure that an agreement was in fact entered into, and that it was entered into deliberately.<sup>52</sup> Personal or private autonomy has been understood to mean that the "will of the parties sets their legal relations."<sup>53</sup> Consequently, enforcement of a contract accomplishes that objective only if the contract was actually an exercise of that party's autonomy and not the result of coercion or duress.<sup>54</sup>

Both the doctrine of consideration and the statute of frauds aim to protect and promote the multifaceted intent of the parties. The evidentiary and channeling functions address the parties' volitional intent.<sup>55</sup> A bargained-for exchange and a written agreement both evidence that the parties had the volitional intent to enter into the

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44. *Id.* at 799.

45. *See id.* at 800-04.

46. *Id.* at 799-800.

47. *Id.* at 799. Fuller notes, however, that:

[T]he enforcement of gratuitous promises is not an object of sufficient importance to our social and economic order to justify the expenditure of the time and energy necessary to accomplish it. Here the objection is one of "substance" since it touches the significance of the promise made and not merely the circumstances surrounding the making of it.

*Id.* at 799-800.

48. *Id.* at 800.

49. *Id.* at 801.

50. *Id.*

51. *Id.* at 803.

52. *Id.* at 806-07.

53. *Id.* at 807.

54. *See Kim, supra* note 10, at 480.

55. *See id.*

contract.<sup>56</sup> Both the requirement of a writing and the requirement of a bargain serve a cautionary function which aligns with cognitive and contextual purposive intent.<sup>57</sup> The promise to make a gift, for example, is often done impulsively, emotionally, and with limited knowledge of relevant factors, which is presumably one of the reasons that such promises are not enforceable.<sup>58</sup> Promises to make gifts do not stimulate and perpetuate a credit economy in the way that bargain promises do (unless such promises are relied on, in which case courts may enforce them under the doctrine of promissory estoppel).<sup>59</sup>

Inherent in the doctrine of consideration are societal norms and standards of what constitutes reasonable behavior in certain situations. A reasonable person, for example, would document a real estate transaction in writing because such transactions are typically for substantial financial amounts and involve conveyances that must or should be recorded.<sup>60</sup> Similarly, the requirement of consideration effectively treats promises to make outright gifts as unreasonable or at least unworthy of state enforcement.<sup>61</sup> The contextual purposive intent for a promise to make a gift is assumed to be something other than the simple desire to give the gift.<sup>62</sup> An ulterior motive for making the promise is assumed, such as a desire to assuage guilt or curry favor, and such emotions and desires are viewed as too transient to be worthy of judicial enforcement.<sup>63</sup> A completed gift, however, rebuts this presumption of transitory desires and the courts will not step in to reverse acts (as opposed to promises) of generosity absent extenuating circumstances.<sup>64</sup> A completed gift also has a greater impact on the economy as the recipient of the gift may have exercised acts of ownership or used the gift in a way that generates further commercial exchanges, such as selling or renting the gifted item.<sup>65</sup> By contrast, a promise to make a gift sets off no chain of commercial activity, unless the promisee relies upon the promise. In theory then, both the statute of frauds and the doctrine of consideration reflect the two primary contract law objectives of furthering the multifaceted intent of the parties and promoting commerce in a credit economy by ensuring the security of transactions.

In his treatise on contracts, Arthur Corbin questions whether a

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56. *Id.*

57. *Id.* at 480–83.

58. *See Fuller, supra* note 19, at 799.

59. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

60. *See id.* § 125.

61. Fuller, *supra* note 19, at 799.

62. CORBIN, *supra* note 3, § 115, at 172.

63. *Id.* § 114, at 170, § 115, at 172.

64. *Id.* § 114, at 170–71.

65. *See* Prentice, *supra* note 9, at 933.

definition of consideration is practicable:

[T]here never was any specific and definite “origin” to be discovered, that no particular definition can (or ever could) be described as the only “correct” one, and that there has never been a simple and uniform “doctrine” by which enforceability can be deductively determined. Nevertheless, the use of the term can not [sic] be avoided; but, in making use of it, it is necessary to consider the purpose for which it is used and to make sure that justice is not being defeated by using it in accordance with some narrow and limited definition.<sup>66</sup>

In *Consideration and Form*, Fuller also notes the problems with the doctrine of consideration, but states:

What needs abolition is not the doctrine of consideration but a conception of legal method which assumes that the doctrine can be understood and applied without reference to the ends it serves. When we have come again to define consideration in terms of its underlying policies, the problem of adapting it to new conditions will largely solve itself.<sup>67</sup>

The observations of these two giants of contract law are especially relevant where sociocultural dissonance exists, either between the parties or between the parties and the decision maker.

### C. *The Role of the Judge in Contract Disputes*

Whether born from experience or inherent physiological or cultural differences . . . our gender and national origins may and will make a difference in our judging. . . . *I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.*<sup>68</sup>

During her confirmation hearings, Supreme Court Justice Sonia Sotomayor was questioned by several senators about what the media referred to as the “wise Latina woman” comment.<sup>69</sup> While it is unsurprising, given the political nature of the hearings, that she qualified and recast the meaning of her remarks,<sup>70</sup> the portion of her

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66. CORBIN, *supra* note 3, § 109, at 161.

67. Fuller, *supra* note 19, at 824.

68. Sonia Sotomayor, *A Latina Judge's Voice*, 13 LA RAZA L.J. 87, 92 (2002) (emphasis added).

69. See, e.g., Peter Baker & Neil A. Lewis, *Republicans Press Judge About Bias and Activism*, N.Y. TIMES, July 15, 2009, at A1 (noting that “Republican senators sparred with Judge Sonia Sotomayor” about her speeches, including the “wise Latina” line that “has drawn the most attention”).

70. In response to questioning about her “wise Latina woman” comment, Sotomayor dismissed it as a “rhetorical flourish that fell flat” and that left the wrong impression. *Id.*

speech cited above captures a viewpoint that is both controversial and obvious. This perspective is controversial because the role of the judiciary is typically viewed as a dispassionate one,<sup>71</sup> and yet is obvious because the judges that comprise the judiciary are flesh and blood human beings. Factual interpretation—and justice—in any given case may be a matter of perspective. Two recent studies support this view.

The first study researched the relationship between the race of a judge and the outcomes in cases alleging racial harassment in the workplace.<sup>72</sup> It found that on average “plaintiffs before African American judges are 3.3 times more likely to win than before White judges.”<sup>73</sup> The second study found that “gender and judicial ideology (as measured by party of the appointing President) significantly affected the results” of sexual harassment and sex discrimination cases,<sup>74</sup> and that “both liberal and conservative female judges were more likely than their male counterparts to support plaintiffs” in sexual harassment cases.<sup>75</sup> An awareness of the influence that judges’ experiences may have on their decision making underscores the need to recognize sociocultural dissonance in certain cases. When a judge lacks experience or familiarity, he or she may disregard certain facts or neglect to appreciate their importance.<sup>76</sup> Sotomayor made this observation when she stated, “Personal experiences affect the facts that judges choose to see.”<sup>77</sup>

Yet, observing that one’s experiences shape one’s viewpoints and opinions is not the same thing as suggesting that one is unable to transcend those experiences in order to apply law to facts without prejudice, nor does it mean that all members of one sociocultural or socioeconomic group will view things in the same way.<sup>78</sup> The facts and rules applicable to a particular case determine the acceptable range of judicial discretion. There are many areas in which the law

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71. The idea that the law is neutral and can be applied in an objective manner has been disputed by critical legal studies scholars. *See generally* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) (examining tensions between mechanical rule application and ad hoc analysis); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987) (critiquing the rigid mindset of modern legal practice).

72. Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases*, 86 WASH. U. L. REV. 1117 (2009).

73. *Id.* at 1156.

74. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1769 (2005).

75. *Id.* at 1777.

76. *See id.* at 1781–84 (noting that male judges might reach different results if they are persuaded by or defer to their female colleagues who are perceived to be more knowledgeable about the subject in controversy).

77. Sotomayor, *supra* note 68, at 92.

78. For example, the judge who decided *In re the Marriage of Witten*, 672 N.W.2d 768 (Iowa 2003) was a woman. *See infra* Part III.A–B.

expressly invites consideration of subjective experiences, at least to a certain extent.<sup>79</sup> One of these areas is contractual intent and interpretation.<sup>80</sup> As Dean Blake Morant has stated, “[I]n many controversies involving principles of contract, factors of race, ethnicity, or gender can play a tangential, if not pivotal, role in the formation and adjudication of many binding obligations.”<sup>81</sup> Power in contracts, then, can mean more than socioeconomic leverage; it includes the power of shared assumptions, understandings, and world views with those who adjudicate contract disputes.

In the same “wise Latina woman” speech that received so much attention, then-Judge Sotomayor made another observation that received much less attention, but that is especially relevant in understanding why context is so important to contractual intent:

[W]e should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable. . . . However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others.<sup>82</sup>

The remainder of this Article will focus on two cases that illustrate how sociocultural dissonance between a judge and a contracting party may affect the outcome in a particular case.

## II. CONSIDERATION AND CULTURE IN CONTEXT: THE CASE OF THE BLOOD CONTRACT

### A. *Kim v. Son—Just the Facts?*

Stephen Son operated a South Korean company, MJ, Inc. (“MJ”) of which he was also the majority shareholder.<sup>83</sup> In addition, he was the sole owner of a California corporation, Netouch International Inc. (“Netouch”).<sup>84</sup> Jinsoo Kim invested 100 million won and also loaned 30 million won to MJ.<sup>85</sup> Additionally, Kim loaned \$40,000

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79. An example is criminal law, in which courts will consider a claimant's subjective belief that he was in danger when analyzing a claim of self-defense, and in which many states recognize diminished capacity, insanity, and battered women's syndrome as mitigating circumstances or defenses. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 221–22, 313–44 (3d ed. 1995).

80. See, e.g., Blake D. Morant, *Law, Literature, and Contract: An Essay in Realism*, 4 MICH. J. RACE & L. 1, 5–6 (1998).

81. *Id.* at 7.

82. Sotomayor, *supra* note 68, at 92.

83. *Kim v. Son*, No. G039818, 2009 WL 597232, at \*1 (Cal. Ct. App. Mar. 9, 2009).

84. *Id.*

85. *Id.* (noting also that the won is the unit of currency in South Korea).

(U.S.) to Netouch.<sup>86</sup> These businesses failed.<sup>87</sup>

In October of 2004, Son and Kim met in a sushi bar where, the court notes, they “consumed a great deal of alcohol.”<sup>88</sup> Son obtained a safety pin from a waiter, used it to prick his finger, and wrote a note in his own blood which, translated from Korean, stated: “Sir, please forgive me. Because of my deeds you have suffered financially. I will repay you to the best of my ability.”<sup>89</sup> At some time that day, he also wrote, in ink, “I hereby swear [promise] that I will pay back, to the best of my ability, the estimated amount of 170,000,000 [w]ons to [Kim].”<sup>90</sup> He gave both notes to Kim.<sup>91</sup>

In June 2006, Kim sued Son claiming, among other things, that Son had agreed to pay Kim 170 million won, or the equivalent of \$170,000.<sup>92</sup> The trial court ruled in Son’s favor, finding that the “blood agreement lacked sufficient consideration because it ‘was not a result of a bargained-for-exchange, but rather a gratuitous promise by [Son] who took personally that [Kim], his good friend, had a failure in his investments that [Son] had initially brought him into.’”<sup>93</sup> The California state appellate court agreed, finding that Kim’s alleged forbearance to sue was not good consideration because his claims against Son were “wholly invalid.”<sup>94</sup> The court noted that “it was undisputed the corporations (MJ and Netouch) were valid separate corporate entities and those businesses received Kim’s loans and investment money.”<sup>95</sup> Because the trial court found that Son did not personally guarantee the loans to the corporations, the appellate court concluded that he was not legally liable for any claims that Kim may have had against the corporations.<sup>96</sup> The appellate court concluded that “Kim’s forbearance in filing a meritless lawsuit cannot supply adequate consideration for Son’s gratuitous promise.”<sup>97</sup>

### B. Consideration in Context

The appellate court in *Kim v. Son* analyzed the facts of the case without regard to the cultural background and understanding of the parties. An obvious observation in the court’s defense is that the cause of action was brought in a California courtroom, so the court’s

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86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* (alteration in original).

91. See Appellant’s Opening Brief at 1, *Kim v. Son*, 2009 WL 597232 (Cal. Ct. App. 2009) (No. G039818).

92. *Son*, 2009 WL 597232, at \*1.

93. *Id.* (alteration in original) (citing to trial court decision).

94. *Id.* at \*2.

95. *Id.*

96. *Id.*

97. *Id.*

application of U.S. norms in interpreting the facts is neither surprising nor controversial. Furthermore, cultural factors were not raised in the parties' appellate briefs.<sup>98</sup> Yet, in order to understand the actions and intent of the parties fully and properly, one must view them in proper context.<sup>99</sup>

In this case, the appellant-promisee was a Korean businessman.<sup>100</sup> He loaned money to, and invested in, two companies controlled by the appellee-promisor.<sup>101</sup> These two companies operated children's clothing boutiques in Korea.<sup>102</sup> One of the companies, MJ, was a South Korean company.<sup>103</sup> The name "MJ" derived from the appellee-promisor's legal name, Myung Joo.<sup>104</sup> The promissory note was written in Korean characters.<sup>105</sup> The two men had known each other since the early 1990s.<sup>106</sup> The rest of this Subpart discusses how attention to the parties' relationship and Korean cultural background may enable a better understanding of the parties' actions and the facts of the case, which may, in turn, enable a better application of relevant doctrine.

### 1. *Kim v. Son: The Facts in Cultural Context*

Lon Fuller writes that legal formalities should be reserved for relatively important transactions. He notes that inherent in some situations are the safeguards that the doctrine of consideration aims to provide:

The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises—including in these "forces" the habits and conceptions of the transacting parties.

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98. See Appellant's Opening Brief, *supra* note 91; Respondent's Brief, *Kim v. Son*, 2009 WL 597232 (Cal. Ct. App. 2009) (No. G039818). The author did not have access to the briefs that were filed with the trial court to determine whether any cultural factors were raised at the trial court level.

99. See Lilian Miles, *The Cultural Aspects of Corporate Governance Reform in South Korea*, 2007 J. BUS. L. 851, 858 ("Cultural differences have the potential to create conflict and may affect the extent to which Anglo-American practices are successfully implemented in Korean companies. The fundamental issue is simply this—individuals from different cultures perceive, understand and judge situations differently. Cultural disparity leads to differing mindsets, the prioritising of different principles and the pursuit of different values.").

100. Respondent's Brief, *supra* note 98, at 4.

101. *Id.*

102. *Id.*

103. Appellant's Opening Brief, *supra* note 91, at 4.

104. *Id.*

105. See *id.* at 5.

106. *Id.* at 4.



Whether there is any need, for example, to set up a formality designed to induce deliberation will depend upon the degree to which the factual situation, innocent of any legal remolding, tends to bring about the desired circumspective frame of mind.<sup>107</sup>

The ritual of drawing blood with a pin might seem to be one that would make anybody deliberate before acting further. Yet, the circumstances of this particular transaction—at first blush—appear not to be particularly conducive to circumspection. Both men had consumed a large amount of alcohol. They were in a sushi bar rather than in a conference room or an office. Without taking into account the cultural background of the parties, the decision maker might make assumptions about what happened. For example, it might appear that the promisee took advantage of the promisor by getting him drunk and then pressuring him to draft the promissory note. Given the environment, the form of the contract reinforces such fears. The safety pin is retrieved from a waiter, indicating that there was no forethought to drafting such a note, and the note is written in blood, a rather dramatic and emotional gesture. The judge is inclined to analogize the situation to one within his or her own cultural frame of reference—that of someone waking up with a bad hangover and a mysterious tattoo.

To a westerner, the setting in which Son signed the promissory note appears to be one in which parties might act rashly and inconsiderately, as business in the United States is usually not conducted in sushi bars after heavy drinking. Yet Korean businessmen typically conduct business under exactly those circumstances.<sup>108</sup> Business relationships in Korea are based upon personal relationships, and heavy drinking is an integral part of developing those relationships.<sup>109</sup> The U.S. Commercial Service, the trade promotion agency of the U.S. Department of Commerce, advises that, in Korea, “[t]he heavy drinking of the Korean alcohol, Soju, beer, scotch, or other liquor is commonplace in establishing a personal, business relationship.”<sup>110</sup> After-hours drinking is viewed as an important part of doing business in Korea.<sup>111</sup> For Koreans, drinking is an important part of social and work life and an

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107. Fuller, *supra* note 19, at 805.

108. See U.S. Dep’t of Commerce, Commercial Serv., Doing Business in Korea, <http://www.buyusa.gov/korea/en/doingbusinessinkorea.html> (last visited Sept. 7, 2010).

109. *Id.*

110. *Id.*

111. See Clayton DeGeorgio, *Dos and Dont’s of Global Biz Etiquette*, THE SEOUL TIMES, available at <http://theseoultimes.com/ST/?url=/ST/db/read.php?idix=1432> (last visited Sept. 7, 2010) (“Many South Koreans talk business while drinking, considering that drinking is an extension of their work.”); Tom Kuntz, *Word for Word/Drinking Etiquette Abroad: How to Succeed in Business By Getting Really Bombed*, N.Y. TIMES, Oct. 26, 1997, at WK7.

important way to develop relationships.<sup>112</sup> When viewed in cultural context, the circumstances under which the blood contract was made are not unusual and do not raise the same suspicions that they would without an understanding of the business and social norms guiding the parties' conduct.

The idea of a contract itself is different in Korean culture. "Friendly negotiations" or agreements to confer in "good faith" are much more common than written contracts.<sup>113</sup> The appellant may have given the loans to the appellee with the understanding that specific negotiations regarding repayment would occur at a later date. Philip McConnaughay writes:

[B]ecause the very notion of assigning firm consequences to conduct or events long before the conduct or events occur (if they occur at all) is counterintuitive to traditional Asian commercial practices, written contract terms professing such an exercise commonly are viewed as not carrying determinative weight. Instead, there frequently is a strong expectation that relational and circumstantial considerations will prevail over (or at the very least, qualify and inform) specific written contract terms in determining the response of commercial parties to various events and contingencies as their relationship unfolds. Mutual adjustment and accommodation is expected.<sup>114</sup>

Even a written agreement does not conclude a transaction but is viewed as the "beginning of negotiations with a Korean partner, not the end of discussions"<sup>115</sup> and the parties should be "prepared to modify the meanings of the terms afterwards, as conditions change."<sup>116</sup> Given the importance of personal relationships and trust

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112. See Dong Wook Lee et al., *Korean Working Adults' and Undergraduates' Attitudes Towards, and Self-Efficacy in, Joining Drinking Parties*, 34 SOC. BEHAV. & PERSONALITY 487, 488 (2006).

113. Philip J. McConnaughay, *Rethinking the Role of Law and Contracts in East-West Commercial Relationships*, 41 VA. J. INT'L L. 427, 445-49 (2001).

114. *Id.* at 447-48.

115. Paul Steinberg & Gerald Lescatre, *Beguiling Heresy: Regulating the Franchise Relationship*, 109 PENN ST. L. REV. 105, 156 (2004) (quoting U.S. DEP'T OF STATE, COUNTRY COMMERCIAL GUIDES (KOREA) 6 (1998)), [http://www.state.gov/www/about\\_state/business/com\\_guides/1999/eastasia/korea99\\_four.html](http://www.state.gov/www/about_state/business/com_guides/1999/eastasia/korea99_four.html) (last visited Sept. 7, 2010)); see also Miles, *supra* note 99, at 861 ("Unlike business relationships in the west, businesses in Korea do not typically rely on contract or legal rules to conclude a business deal."); Yong-Jin Song et al., *Success and Failure of Business Negotiations for South Koreans*, J. INT'L & AREA STUDIES, Dec. 2004, at 45, 59 (noting one expert's comment that "Americans think that a contract is a law and a final product. Koreans, however, think that a contract is a beginning. After signing a contract, Koreans think that they are now ready to do something. They think, 'We can flexibly apply later. We can handle problems case by case in our mutual trust as problems come up.'").

116. Steinberg & Lescatre, *supra* note 115, at 157 (quoting U.S. DEP'T OF

in Korean business transactions, Kim may have assumed that Son would act in good faith to address the issue of repayment in the event that the business did not perform as the parties expected. The subsequent “blood contract” could be viewed as a way for Son to show his good faith by promising to repay the original loan amounts. The drawing of blood then may be understood as a way to show sincerity rather than as evidence of extreme intoxication, mental instability, or coercion.

The order of events in the case—with money given before the specifics of repayment were addressed—appears backwards compared to the way business is typically conducted in the United States, with the written promise of repayment preceding the disbursement of money.<sup>117</sup> The terms of the loan were neither definite nor put in writing. Yet the nature of the transaction is erratic only when compared to a typical loan or investment in the United States. Trust and sincerity have particular importance in establishing Korean business relationships,<sup>118</sup> unlike in the United States where arms-length negotiations are the norm. One group researching South Korean business negotiations states, “Trust building is important. If two partners set up trust, paper contracts are not that important for Koreans.”<sup>119</sup> Thus, neither the form nor the manner of the transaction would be unusual in Korea, where neither the doctrine of consideration nor the statute of frauds exists in contract law.<sup>120</sup>

Finally, even the determination of the existence of a bargain itself may be affected by cultural preconceptions and biases. Both the trial and appellate court in *Kim v. Son* concluded that Son’s promise was not bargained for because he did not receive anything in exchange for his promise.<sup>121</sup> Son had already received, and presumably spent, the money from Kim.<sup>122</sup> The courts recognized that which has measurable, monetary value, reflecting western law’s separation between the public and private spheres.<sup>123</sup> Such a

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STATE, *supra* note 115, at 7).

117. See U.S. DEP’T OF STATE, *supra* note 115, at 7 (noting that the primary objective in Korean contract negotiations is “reaching a common understanding . . . of each party’s responsibilities,” with the subsequent objective of putting that understanding in contract form).

118. See Song et al., *supra* note 115, at 56 (finding that “South Koreans seem to believe that sincerity could move the mind of their counterpart” in business negotiations).

119. *Id.*

120. Oh Seung Jin, *Overview of Legal Systems in the Asia-Pacific Region: South Korea* (Apr. 2004), [http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1006&content=lhs\\_lsapr](http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1006&content=lhs_lsapr).

121. *Kim v. Son*, No. G039818, 2009 WL 597232, at \*2 (Cal. Ct. App. Mar. 9, 2009).

122. *Id.* at \*1.

123. Feminist theory often criticizes the public/private distinction evident in western legal liberalism, as further discussed *infra* Part III.A.

view, however, fails to recognize that the parties may attach significant value to nonmonetary gain.<sup>124</sup> Some studies have indicated that while western businesspeople prioritize profit and business growth, Asian businesspeople, influenced by Confucian philosophy, regard reputation and “saving face” as more important.<sup>125</sup> While generalizations about cultural differences run the risk of being overbroad or simplistic,<sup>126</sup> such generalizations may prompt one to recognize and reconsider one’s own cultural assumptions that are inaccurate or inappropriate in a given context. Korea has been referred to as a “shaming culture,”<sup>127</sup> one where shame is a societal trait used to render judgment and reinforce norms.<sup>128</sup> In making his promise of repayment, Son was “saving face,” trying to rid himself of the guilt and shame that accompanies a moral—if not legal—obligation. His shame was so great that it motivated him to write his promise with his own blood. The court, however, did not include in its calculus the social and cultural value of saving face, effectively concluding that relief from shame fails to constitute a legal benefit.

While the foregoing analysis explains certain disparities between Korean business culture and U.S. business culture, one difference is not the blood contract itself. Korean businesspeople do not typically enter into contracts written in their own blood any more often than do western businesspeople.<sup>129</sup> But the fact that the contract was made in blood should not thereby invalidate it. The gruesome method of contracting may have lent the entire transaction a freakish, exotic quality that might have overshadowed

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124. One commentator notes the differences in cultural attitudes between Asian and western businesspeople as follows:

[R]ecent research shows that businessmen from different cultures attribute different levels of importance to the same set of business goals. Those from Asian countries (including Korea) regard respect for ethical norms, long-term orientation, patriotism, national pride, honour, saving face and reputation, and showing a responsibility toward society as more important than the pursuance of immediate profit and growth of the business. Businesses in the west, on the other hand, prioritise the pursuit of short-term profit. Wealth is considered the prime measure of success and human worth.

Miles, *supra* note 99, at 858–59.

125. *Id.* at 858.

126. Ilhyung Lee, for example, notes that while Koreans traditionally prefer nonlegal settlement over court adjudication, they are becoming “more willing to advance legal claims, and more willing to resort to the courts.” Ilhyung Lee, *Korean Perception(s) of Equality and Equal Protection*, 31 B.C. INT’L & COMP. L. REV. 53, 72 (2008) (citation omitted).

127. Ilhyung Lee, *The Law and Culture of the Apology in Korean Dispute Settlement (with Japan and the United States in Mind)*, 27 MICH. J. INT’L L. 1, 28 (2005).

128. *Id.* at 27–28.

129. See MSNBC.com, *Contract in Blood Still Open to Interpretation*, May 30, 2006, <http://www.msnbc.msn.com/id/13050591>.

other, more relevant aspects of the case, including that the promise was *also* written much more conventionally with an ink pen.<sup>130</sup>

An expanded intent analysis provides focus and direction when considering facts in cultural context.<sup>131</sup> One might question whether volitional and cognitive intent were lacking given Son's state of intoxication and the personal relationship between the parties. Considering that business among Korean businessmen who have a personal or social relationship is commonly conducted while drinking, it seems less likely that Son did not know or could not control what he was doing. The promise was made in writing twice, in pen and in blood, further indicating that Son did in fact know what he was doing, and could control his actions. There is no evidence that the notes showed indicia of mental impairment, such as illegibility or misspelled words.<sup>132</sup> Finally, Son's promise of repayment fulfilled his contextual purposive intent, which was to "save face" and preserve his reputation and relationship with Kim.<sup>133</sup>

Cultural context affects the way that we understand contract's form and function. The contract between Son and Kim was made in writing, both in pen and in blood, satisfying the evidentiary function.<sup>134</sup> Similarly, the cautionary and channeling functions appear to be satisfied, as jabbing oneself with a safety pin and scribbling a promise in blood would likely induce deliberation even while intoxicated.<sup>135</sup> The note written in ink also satisfies the channeling and cautionary functions.<sup>136</sup> The blood note's words are promissory but primarily appear to serve the function of an apology and to manifest Son's good and sincere intentions: "Sir, please forgive me. Because of my deeds you have suffered financially. I will repay you to the best of my ability."<sup>137</sup> The note written in ink, on the other hand, is devoid of the emotionality of the note written in blood: "I hereby swear [promise] that I will pay back, to the best of my ability, the estimated amount of 170,000,000 [w]ons to [Kim]."<sup>138</sup>

As an ancillary matter, while an analysis of the facts of the case in cultural context would likely yield a different conclusion regarding the existence of consideration, additional facts are needed in order to determine whether Son breached the contract. Both notes state that Son would repay Kim to the "best of [his] ability,"<sup>139</sup>

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130. *Kim v. Son*, No. G039818, 2009 WL 597232, at \*1 (Cal. Ct. App. Mar. 9, 2009).

131. *See Kim*, *supra* note 10, at 476–77.

132. *See Son*, 2009 WL 597232, at \*1.

133. *See Kim*, *supra* note 10, at 481.

134. *See Fuller*, *supra* note 19, at 800.

135. *See id.* at 800–01.

136. *See id.*

137. *Son*, 2009 WL 597232, at \*1.

138. *Id.* (alteration in original).

139. *Id.*

and the parties do not discuss whether or not he attempted to repay the debt or to what lengths he went to do so. In conclusion, while the facts in sociocultural context seem to support a finding of consideration, a court would still need to determine whether the contract was breached.

### III. THE DIFFERENCE THAT GENDER MAKES

In Part II, I examined the effect of cultural disparities in applying the doctrine of consideration. In this Part, I analyze the difference that gender makes<sup>140</sup> in a case involving in vitro fertilization.

#### A. In re the Marriage of Witten—*Selecting Facts, Selecting a Story*

Arthur (“Trip”) Witten and Tamera Witten had been married for approximately seven-and-a-half years when Trip filed for divorce.<sup>141</sup> During the marriage, the parties had undergone the process of in vitro fertilization.<sup>142</sup> Prior to commencing the in vitro fertilization process, the parties signed informed consent documents prepared by the University of Nebraska Medical Center (“UNMC”), which included an “Embryo Storage Agreement” (“the Agreement”).<sup>143</sup> The Agreement provided as follows:

Release of Embryos. The Client Depositors [Trip and Tamera] understand and agree that containers of embryos stored pursuant to this agreement will be used for transfer, release or disposition only with the signed approval of both Client Depositors. UNMC will release the containers of embryos only to a licensed physician recipient of written authorization of the Client Depositors.<sup>144</sup>

The Agreement had one exception to the requirement that both parties sign to release the embryos, and that was “upon the death of one or both of the client depositors.”<sup>145</sup> Another provision of the Agreement set forth the following contingencies that would terminate UNMC’s obligation to store the embryos: “(1) the client depositors’ written authorization to release the embryos or to destroy them; (2) the death of the client depositors; (3) the failure of the client depositors to pay the annual storage fee; or (4) the

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140. Feminist legal scholars have long challenged the notion of gender neutrality and objectivity in the law. For an anthology of feminist legal theory, see *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (Martha Albertson Fineman & Nancy Sweet Thomadsen eds., 1991).

141. *In re Marriage of Witten*, 672 N.W.2d 768, 772 (Iowa 2003).

142. *Id.*

143. *Id.*

144. *Id.* (alteration in original).

145. *Id.*

expiration of ten years from the date of the agreement.”<sup>146</sup>

After undergoing in vitro fertilization, Tamera and Trip filed for divorce. As part of the dissolution proceedings, Tamera requested that she be awarded the embryos.<sup>147</sup> Trip did not want her to use them, even though he did not want the embryos destroyed, and asked the court to enforce the mutual consent provision in the Agreement.<sup>148</sup> Tamera claimed that the Agreement was against state public policy because it allowed Trip to evade “his prior agreement to become a parent.”<sup>149</sup>

In considering Tamera’s argument, the judge framed the issue as “whether there is any public policy against an agreement allowing a donor to abandon in vitro fertilization attempts when viable embryos remain.”<sup>150</sup> The framing of the issue is misleading in that Tamera was not requesting Trip’s continued involvement in any in vitro fertilization attempts; on the contrary, she did not want him to interfere with *her* efforts to implant the embryos in her or in a surrogate mother.<sup>151</sup> Furthermore, Tamera had testified that she would allow Trip to exercise his parental rights or to have them terminated.<sup>152</sup>

The court’s opinion considers the case using an equality framework, which assumes that both parties are on equal footing. It states: “[I]t would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos.”<sup>153</sup>

This equality approach ignores that the parties are not, in fact, equally situated. The in vitro process requires much more physical involvement from the woman than from the man.<sup>154</sup> The opinion summarily describes the process as follows: “Because Tamera was unable to conceive children naturally, they had eggs taken from Tamera artificially fertilized with Trip’s sperm. Tamera then underwent several unsuccessful embryo transfers in an attempt to become pregnant. At the time of trial seventeen fertilized eggs remained in storage at [UNMC].”<sup>155</sup>

What is most revealing is not what the opinion says, but what it omits. Contrary to what the court’s breezy summary might suggest, in vitro fertilization is a painful process for the woman that involves

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146. *Id.*

147. *Id.*

148. *Id.* at 773.

149. *Id.* at 779.

150. *Id.* at 780.

151. *Id.* at 772.

152. *Id.*

153. *Id.* at 781.

154. See DONNA DICKENSON, PROPERTY IN THE BODY: FEMINIST PERSPECTIVES 63–64 (2007).

155. *In re Witten*, 672 N.W.2d at 772.

hormonal treatment intended to stimulate the ovaries to produce multiple follicles (as opposed to a single follicle) and the surgical and often dangerous removal of the ova for fertilization.<sup>156</sup> Stimulation of the ovaries has dangerous potential side effects, including clotting disorders, production of cysts, kidney damage, stroke, and ovarian twisting.<sup>157</sup> One court described in vitro fertilization as “a complicated, expensive, and somewhat dangerous process. . . . The process requires frequent visits to the doctor, especially to avoid a condition called ‘hyperstimulation,’ in which the ovaries become swollen. This condition can be life-threatening to the mother because of possible interference with kidney and liver function.”<sup>158</sup>

The *Witten* court’s summary omits the pain involved in undergoing the in vitro fertilization process. It ignores the likelihood that Tamera would not have agreed to the painful hormonal therapy and extraction process if she knew her husband would prohibit her from implanting the embryos. It pretends that Tamera and Trip are similarly situated when they are not. It would be one thing if Tamera were trying to force Trip to continue his participation by, for example, extracting additional sperm; it is quite another to let Tamera continue with the implantation process without any further participation—legal or physical—from her ex-husband. Trip had already contributed his sperm so Tamera’s use of the embryos would not force any further physical participation from Trip. Tamera testified that Trip’s legal and financial participation could also terminate, if he so wished.<sup>159</sup> Trip was not opposed to the use of the embryos in principle.<sup>160</sup> He testified that he “would not oppose donating the embryos for use by another couple”—he just “did not want Tamera to use them.”<sup>161</sup>

The opinion also ignores the expense and the improbability of Tamera being able to repeat the in vitro process. Trip’s brief claims that Tamera is “still producing eggs and will for an estimated eight to ten additional years [and that]. . . . [t]he same procedure used by Tamera and [Trip] to attempt to have children can be used by Tamera in the future.”<sup>162</sup> But as Tamera’s brief states, she was over thirty-five years old and, due to a tumor and scarring in her Fallopian tubes, could probably not naturally conceive.<sup>163</sup>

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156. See ANDREA L. BONNICKSEN, *IN VITRO FERTILIZATION: BUILDING POLICY FROM LABORATORIES TO LEGISLATURES* 147–48 (1989); DICKENSON, *supra* note 154, at 63–64.

157. DICKENSON, *supra* note 154, at 64.

158. *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001).

159. *In re Witten*, 672 N.W.2d at 772.

160. *Id.* at 773.

161. *Id.*

162. Appellee/Cross-Appellant’s Brief at 3, *In re Witten*, 672 N.W.2d 768 (No. 03-0551), 2003 WL 24314607.

163. Respondent-Appellant’s/Cross-Appellee’s Brief at 8, *In re Witten*, 672



Furthermore, the process is expensive and costs thousands of dollars.<sup>164</sup> Tamera earned an average income of around \$3000 a year.<sup>165</sup> Her low income was due in large part to long periods of unemployment necessitated by her attempts to get pregnant.<sup>166</sup> The court neglects to mention the infeasibility of Tamera undergoing the process again due to these factors.

The omission of the court might seem particularly striking since the presiding judge was Judge Marsha Ternus, who has since become the first female Chief Justice of the Iowa Supreme Court.<sup>167</sup> But it would be misguided to suggest that gender similarities override socioeconomic or other sociocultural disparities and naive to think that all women share the same perspective, beliefs, and experiences.<sup>168</sup> A woman who has risen to the pinnacle in a male-dominated environment,<sup>169</sup> makes a comfortable salary, and enjoys an elevated social status<sup>170</sup> might not necessarily identify with someone in Tamera Witten's position simply because they are both women. It would also be inaccurate to suggest that women are impervious to the male bias prevalent in society.<sup>171</sup> My critique in

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N.W.2d 768 (No. 03-0551), 2003 WL 24314606.

164. See *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758, 762 (W.D. Mich. 2001) (noting that the cost of the process "often exceeds \$10,000").

165. Respondent-Appellant's/Cross-Appellee's Reply Brief at 2, *In re Witten*, 672 N.W.2d 768 (No. 03-0551), 2003 WL 24314608.

166. See *id.*

167. See Jeff Eckhoff, *Woman To Lead Highest Court in Iowa*, DES MOINES REG., Sept. 6, 2006, at A1.

168. See Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1046 (1992) (analyzing the gendered nature of legal discourse by comparing three texts on the impossibility doctrine and acknowledging that the "stereotypes [Frug] associated with gender may not be every woman's or every feminist's").

169. Prior to being appointed the first female Chief Justice, Ternus was only the second woman to serve on Iowa's Supreme Court. Eckhoff, *supra* note 167, at A8.

170. Even including her ex-husband's salary, Tamera Witten would have not been close to being in the same income bracket as Judge Ternus. In 1999, Trip had an income of \$37,850 and Tamera had an income of \$3087. Respondent-Appellant's/Cross-Appellee's Reply Brief, *supra* note 165, at 2. In 2000, Trip's income was \$41,010, and Tamera's income was \$3069. *Id.* In 2001, Trip had an income of \$40,474, and Tamera had no income. *Id.* In 2002, Trip had an income of \$44,584.33, and Tamera had an income of \$15,623.27. *Id.* While Judge Ternus's salary for the same period was not readily available, it is known that Iowa judges "collect above-average salaries" compared to judges in other states. Grant Schulte, *Judges' Pay Tops U.S. Average*, DES MOINES REG., Dec. 25, 2009, at 1B. An Iowa Supreme Court justice in 2007 earned approximately \$146,890. *Id.* at B2. Judge Ternus's husband, Dennis Drake, is "the general counsel of Iowa Health System, the state's largest chain of hospitals and clinics." *Drake's Bid To Dismiss Charge Is Rejected*, DES MOINES REG., Oct. 15, 2009, at 2A. He has been employed by the company since 1986. See Iowa Health System, Executive Team, <http://www.ihs.org/body.cfm?id=46> (last visited Sept. 7, 2010).

171. For example, an interesting study revealed that female artistic

this Subpart is aimed not at the gender of the decision maker but at the gendered nature and bias inherent in the decision. Judge Ternus's gender does not forgive the gendered nature of her discourse.

In order to create the seventeen embryos that were in storage,<sup>172</sup> Tamera underwent two egg retrieval surgeries and seven transfers.<sup>173</sup> Several attempts were made following fertilization to implant the embryos, and all but one were unsuccessful.<sup>174</sup> The sole implanted embryo attached outside the uterus and ultimately resulted in a loss.<sup>175</sup> The opinion concludes that the "contemporaneous mutual consent" model pursuant to which "no transfer, release, disposition, or use of the embryos can occur without the signed authorization of both donors," should be adopted in this case.<sup>176</sup> It further rules that these seventeen embryos will be stored indefinitely "unless both parties can agree to destroy the fertilized eggs. Thus, any expense associated with maintaining the status quo should logically be borne by the person opposing destruction."<sup>177</sup>

The contemporaneous mutual consent model ignores the difference in nature of the contributions of a man and a woman in the in vitro fertilization process. The woman will *always* suffer more physical pain and risk more to her health than the man. To assume equality in this context ignores the disparate nature of their participation in the in vitro process. The court reasons that "it would be against the public policy of this state to enforce a prior agreement between the parties in this highly personal area of reproductive choice when one of the parties has changed his or her mind concerning the disposition or use of the embryos."<sup>178</sup> Thus, the court recognizes Trip's ability to change his mind—something that is

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directors were *more* likely than male artistic directors to assign lower ratings to purportedly female-written scripts. Emily Glassberg Sands, *Opening the Curtain on Playwright Gender: An Integrated Economic Analysis of Discrimination in American Theater* 104 (Apr. 15, 2009) (unpublished B.A. thesis, Princeton University) (on file with Mudd Library, Princeton University), available at <http://graphics8.nytimes.com/packages/pdf/theater/Openingthecurtain.pdf>. The female artistic directors did not report believing that female-written scripts were of lower quality, but that such works would have "poorer economic prospects" and would face "customer" and "worker discrimination." *Id.* at 77. The author of the study stated that "perhaps as a result of the perceived customer and worker discrimination" against female-written scripts, female artistic directors "deem a script bearing a female pen-name to fit less well with their theaters." *Id.* at 77-78.

172. Respondent-Appellant's/Cross-Appellee's Brief, *supra* note 163, at 5.

173. *Id.* at 4.

174. *Id.*

175. *Id.*

176. *In re Marriage of Witten*, 672 N.W.2d 768, 783 (Iowa 2003).

177. *Id.*

178. *Id.* at 781.

generally not recognizable in other contracts<sup>179</sup>—as worthy of protection and prioritizes that over the expectation and reliance interest of Tamera, thus utterly disregarding her physical suffering. The scholar John Robertson captures the unfairness and irrationality of this view when he writes:

Without reliance on the husband's promise to allow the wife to implant the embryos at *Time B*, she never would have undertaken [in vitro fertilization]. Her claim would be that the court's preference for his *Time B* freedom over hers, and over the freedom of both of them at *Time A* to determine what happens in the future, is not a sufficiently compelling ground to justify that infringement, and thus would violate her reproductive liberty. Given her reliance on his promise at *Time A* to undergo bodily intrusions and her loss of reproductive freedom at *Time B* if enforcement does not occur, maximizing his freedom at *Time B* over her freedom at *Time B* is not such a strong personal or societal interest that it justifies overriding her right to reproduce with the embryos created in reliance on his *Time A* promise.<sup>180</sup>

Judge Ternus, writing for the *Witten* court, expresses a “general reluctance to become involved in intimate questions inherent in personal relationships.”<sup>181</sup> Yet, the court does just that when it holds that “agreements entered into at the time in vitro fertilization is commenced are enforceable and binding on the parties, ‘subject to the right of either party to change his or her mind about disposition up to the point of use or destruction of any stored embryo.’”<sup>182</sup> Thus, the court puzzlingly recognizes the legitimacy of agreements that have to do with the very personal process of in vitro fertilization but only until the woman has undergone the painful procedure—in which case, “either party” can change “his or her” mind.<sup>183</sup> The gender neutral language belies that only one of the parties—the woman—will have endangered her health in vain. Furthermore, the court privileges the capriciousness of the male party over the expectation and detrimental reliance of the female party.

Judge Ternus's silence speaks volumes. First, she frames the relevant issue as one involving Trip's right to change his mind,

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179. See DIMATTEO, *supra* note 4, at 69.

180. John A. Robertson, *Precommitment Strategies for Disposition of Frozen Embryos*, 50 EMORY L.J. 989, 1029–30 (2001); see also Robyn L. Ikehara, Note, *Is Adoption the “New” Solution for Couples in Dispute Over Their Frozen Embryos?*, 15 S. CAL. REV. L. & WOMEN'S STUD. 301, 316–17 (2006) (noting that under a “sweat equity theory,” because in vitro fertilization imposes a greater physical burden on the female participant, “the woman is automatically awarded greater dispositional authority because she has relied so heavily to her detriment”).

181. *In re Witten*, 672 N.W.2d at 781.

182. *Id.* at 782 (quoting *J.B. v. M.B.*, 783 A.2d 707, 719 (N.J. 2001)).

183. *Id.*

rather than Tamera's interest in using the embryos.<sup>184</sup> Ternus declines to consider the issue as one involving a contractual gap, even though the agreement did not specifically address what would happen in the event of a divorce.<sup>185</sup> Instead, she considers "the present predicament" as one falling "within the general provision governing 'release of embryos,' in which the parties agreed that the embryos would not be transferred, released, or discarded without 'the signed approval'" of both parties.<sup>186</sup> Ternus also refuses to protect or recognize Tamera's expectation and reliance interests and fails to mention Tamera's physical suffering and the endangerment to her health in undergoing the in vitro process, claiming that the "highly personal area of reproductive choice" is emotionally charged and susceptible to change.<sup>187</sup> Yet, Ternus quickly clarifies that the court's decision "should not be construed . . . to mean that disposition agreements *between donors and fertility clinics* have no validity at all."<sup>188</sup> On the contrary, Ternus finds that "the medical facility and the donors should be able to rely on the terms of the parties' contract"<sup>189</sup> even though that contract has to do with the same "highly personal" subject of reproductive choice, and is similarly "emotionally charged and susceptible to change."

### B. *Intent, Emotions, and Acts of Reliance*

An expanded intent analysis requires a court to consider the facts in context in order to determine whether to enforce a contract.<sup>190</sup> In this case, was there an implied contract between Tamera and Trip whereby each promised the other to do their part to have biological children? Both Tamera and Trip had volitional intent as both seemed to be willing and desirous of entering into the agreement.<sup>191</sup> There was no evidence of coercion and both parties appeared to be legally competent. Both parties also appeared to have cognitive intent as they understood what the process of becoming biological parents would require of each of them.<sup>192</sup> Tamera also appeared to have the contextual purposive intent to become a parent, regardless of what later happened between her

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184. *Id.* at 773-74 ("The only question, then, is whether such agreements are enforceable when one of the parties later changes his or her mind with respect to the proper disposition of the embryos.")

185. *Id.* at 773 ("[T]he agreement had a specific provision governing control of the embryos if one or both parties died, but did not explicitly deal with the possibility of divorce.")

186. *Id.*

187. *Id.* at 781.

188. *Id.* at 782.

189. *Id.*

190. See Kim, *supra* note 10, at 513.

191. See *id.* at 480.

192. See *id.* at 480-81.

and Trip.<sup>193</sup> Trip, on the other hand, seemed to lack the contextual purposive intent to become a parent.<sup>194</sup> He entered into the agreement with Tamera with the understanding that they would remain in a loving, marital relationship. He apparently had not considered what would happen if that relationship ended. If he had considered that possibility, he would have declined to enter into the agreement with Tamera or at least conditioned his consent on the continuation of their relationship.<sup>195</sup> Because Trip lacked contextual purposive intent, the agreement between Tamera and Trip should not be enforced unless there is a strong public policy compelling enforcement.<sup>196</sup>

In this case, refusing to enforce this agreement would not undermine the security of transactions nor would it contravene any established interest of the state, as claimed by the *Witten* court.<sup>197</sup> Therefore, under an expanded intent analysis, there is no enforceable contract.<sup>198</sup> This result makes sense when one considers the consequences of recognizing a legally enforceable contract in this case. In order to protect Tamera's expectation interest, Trip might be compelled to continue participating in the process of becoming a parent, perhaps by contributing additional sperm to create more embryos.

Yet, the undesirability of recognizing as a legal agreement the implied promises between Trip and Tamera does not lead to the inevitable conclusion that Trip's promise should not be enforced *at all*. Under the doctrine of promissory estoppel, a promise may be enforceable if it causes reasonable, detrimental reliance.<sup>199</sup> In this case, Trip made either an express or implied promise to Tamera that he would participate in the *in vitro* process with the goal of becoming a parent. Tamera acted in reliance upon this promise when she underwent the physically demanding procedure. The ultimate question then is whether injustice could be avoided only by enforcement of Trip's promise.<sup>200</sup> The answer, when considering the facts that were omitted in the court's opinion, such as Tamera's financial situation, her age, and her infertility, is yes. To conclude that Trip's promise should be enforceable *to the extent of the reliance* would permit Tamera to use the embryos but would not require Trip

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193. *See id.* at 481.

194. *See id.*

195. *See In re Witten*, 672 N.W.2d at 773.

196. *See Kim*, *supra* note 10, at 515-16.

197. *See In re Witten*, 672 N.W.2d at 780.

198. *See Kim*, *supra* note 10, at 515-16.

199. RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

200. *See id.*

to participate further—financially or physically—as he might be ordered to do if Tamera’s expectation (and not reliance) interest were to be protected.

#### CONCLUSION

Commentators often say that a court’s objective in adjudicating contract disputes is the enforcement of reasonable expectations. In order to enforce those expectations, however, a court must determine what those reasonable expectations are. An expanded intent analysis helps the decision maker view the contracting situation from the standpoint of the parties, not from his or her vantage point. The objective theory of contract, on the other hand, assumes that the standard of reasonableness is neutral, meaning that a determination of reasonableness is unaffected by race, class, economic status, culture, gender, or other social factors. The objective theory unrealistically assumes a truth that is determinate and immutable. In order to remain true to its philosophical objectives, contract law must recognize that reasonableness is not a one-size-fits-all concept, but one best analyzed in sociocultural context.