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CROSS-CULTURAL READINGS OF INTENT: FORM, FICTION, AND REASONABLE EXPECTATIONS

Deborah Waire Post∗

In her article, *Reasonable Expectations in Sociocultural Context*, Professor Nancy Kim tackles the problems created by an objective theory of contract in a pluralistic society and a global economy. She is a proponent of an "expanded intent analysis," which she says would require courts to consider facts "in cultural context."[1] Her test for contractual intent, which she has named "contextual purposive intent," would include the social identities of the parties to the contract.[2] I have chosen to focus on her analysis of *Kim v. Son*,[3] an unpublished California appellate court decision in which the plaintiff's claim was denied for lack of consideration, and her argument that a contextual purposive intent analysis would have changed the outcome and produced a more just result in that case.

I. THEORIZING CULTURE IN CONTRACT

Professor Kim places contract theory in a sociocultural context. An examination of culture and law is multifaceted, operating on various levels and in multiple sites. There is the cultural context that is present in a particular dispute, the ideological and cultural content of contract theory, as well as the culture and institutional norms that are internalized by the judiciary.

While there is an emerging consensus that cultural competence is a skill and ethical obligation of practitioners, it is much harder to find articles promoting a judicial ethic of cultural competence.[4] The

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1. Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641, 659 (2010).
2. *Id.* at 643–44.
3. No. G039818, 2009 WL 597232 (Cal. Ct. App. Mar. 9, 2009).
4. *See, e.g.*, Sylvia E. Stevens, *Cultural Competency: Is There an Ethical Duty?,* 69 OR. ST. B. BULL., Jan. 2009, at 9, 9–10 (discussing three justifications for cultural competency including competitive advantage, access to justice, and access to legal services). Using the Oregon Rules of Professional Conduct, Stevens finds this ethical obligation in the duty to provide competent representation, the duty to pursue the client's objectives, and the duty to communicate. *Id. See also* Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers,* 8 CLINICAL L. REV. 33 (2001) (explaining that

ethical identity of judges is deeply rooted in a value system and ideology that creates social distance between the members of the bench and those who appear before them. For judges, objectivity and neutrality are core values associated with the ideals of fairness and justice. Critical scholars have condemned "colorblind" jurisprudence as "pluralistic ignorance" that masquerades as neutrality and perpetuates structures of subordination and oppression.[5] There is not much evidence that the judiciary has taken this criticism to heart except, perhaps, in a very limited and sometimes misguided way in criminal cases.[6]

The relevance of culture to contract has been explored by relational scholars,[7] but that does not mean that there is a general recognition among judges or practitioners of the way their perceptions and judgments about contract are rooted in a particular belief system or worldview. An objective test for reasonableness in contract may be presumed to be hegemonic—the imposition of a meaning derived from the cultural lexicon of the dominant group in

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cultural competence is considered a skill that can and must be taught to law students as well as part of the ethical and professional identity of lawyers); Katherine Frink-Hamlett, *The Case for Cultural Competency,* N.Y. L.J., Apr. 25, 2011, http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202491042907 &slreturn=1 (arguing that cultural competency can have a significant impact on legal services and should thus be incorporated into law school curricula); Amy Timmer & John Berry, *The ABA's Excellent and Inevitable Journey to Incorporating Professionalism in Law School Accreditation Standards,* 20 PROF. LAW., no. 1, 2010, at 1, 17–19 (proposing that law schools can and should foster an environment which teaches cultural competency).

5. *See, e.g.*, Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L REV. 1, 2–3 (1991); Dwight L. Greene, *Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in* Bostick v. Florida, 67 TUL. L. REV. 1979, 1980–81 (1993).

6. Pluralistic ignorance has been used in two ways in legal scholarship. I am referring to the use made by critical race scholars who describe pluralistic ignorance as the "erroneous cognitive beliefs shared by one group regarding other individuals or groups." Greene, *supra* note 5, at 1981 n.4. More precisely, it is ignorance of the particular facts, the lived experience of subordinated communities, which can or should be used to judge the reasonableness of the interpretations, choices, and judgments made by members of that community. *See id*. Pluralistic ignorance is used by law and economics scholars in discussions of norms and their influence on human behavior. "Under conditions of pluralistic ignorance, normative influence leads to the entrenchment of suboptimal, as opposed to welfare-enhancing behaviors." Alex Geisinger, *Are Norms Efficient? Pluralistic Ignorance, Heuristics, and the Use of Norms as Private Regulation,* 57 ALA. L. REV. 1, 16 (2005).

7. For a discussion of the work of Macneil and Macaulay, see generally Menachem Mautner, *Contract, Culture, Compulsion, or: What is So Problematic in the Application of Objective Standards in Contract Law?*, 3 THEORETICAL INQUIRIES IN L. 545, 547 (2002) ("[C]ulture was brought to the center stage of the contract process by Stewart Macaulay and Ian Macneil.").

society. Unless the judge is that "wise Latina,"[8] or one whose cultural identity has predisposed him to cultural sensitivity, it is unlikely that a judge will measure the reasonable expectations of the parties to a contract by any other standard. The acculturative effects of participation in legal institutions like law school, law firms, bar associations, and the judiciary suggest that identity is not always a reliable indicator of cross-cultural or multicultural competence.[9] In contract disputes, the commitment to objectivity on the part of the judiciary may be even more deeply ingrained. This commitment is tied to market ideology, a belief that individual agency in bargaining and market exchange is preserved by judicial restraint and the use of formal rules.

Contract law has been theorized as an internally inconsistent body of law because it embraces rules that vindicate both an individualist and a collectivist ethos.[10] Enforcement of subjective expectations and desires seems more consistent with a commitment to individual liberty, while a reasonableness or collectivist standard is believed to limit individual freedom.

This dichotomy in contract law theory between an individualist and a collectivist approach is, of course, inherently misleading. Contract law is about relationships and whenever a contractual relationship ends in a dispute, resolution by a court of law limits the freedom of one or both parties. Contract has been theorized as a liberty because the role of the state is made to seem attenuated, enforcing only the duties created by the parties under circumstances

8. Professor Kim refers to the skirmish over the article Justice Sotomayor wrote in which she referred to the importance of her identity and her expectation and hope that this would make her a "wise Latina" judge. Justice Sotomayor brings a different perspective to the Court not only because her life history is different, but also because of her identity as a Latina and her exposure to beliefs, ideals, and values rooted in the experiences of a community, not just her experiences as an individual. While news media faithfully reported the public relations releases that portrayed Justice Sotomayor as a woman whose success was an "American story," Republican legislators suggested that her gender and her ethnicity meant that she would be "biased." Kim, *supra* note 1, at 650–51.

9. There have been some attempts to determine whether identity affects the decisions of judges. The common assumption is that it does, or at least that is the argument of those who argue for diversity on the bench and in the bar. *See generally* Greene, *supra* note 5. One should be careful about using identity as a predictor. For instance, Professor Kim criticizes the decision of Judge Marsha Ternus in *In re Marriage of Witten* because the two biological parents were treated the same even though the woman's investment or contribution to the creation of the preembryos and her inability to procreate if she remarried meant that she and her ex-husband were in very different positions. Kim, *supra* note 1, at 660–68.

10. Jay M. Feinman, *Critical Approaches to Contract Law,* 30 UCLA L. REV. 829, 830, 838–39 (1983).

which signal assent to legal enforcement.[11] The rules of contract law are not concerned with the vindication of one individual's desire or freedom, but address the freedom of all the parties to the agreement. If more than one person is involved, some means must be devised to determine the meaning both parties assigned to various communicative acts. The element of intersubjectivity removes the agreement beyond the realm of the individual.[12]

Professor Kim seeks to replace the objective theory of contract, as it is presently understood, with one that considers the social and cultural identity of the disputants. She argues that an objective test "erroneously replaces the parties' intent with a reasonableness standard."[13] I agree with Professor Kim that a reasonable person test is coercive when the perceptions and the expectations of the parties to a contract are analyzed in the abstract. The reasonable person test should be an acknowledgement of community—the human connections that support and constrain individual choice and agency. For that reason, *Contracting Law*, the casebook I co-authored with Amy Kastely and Nancy Ota, presents the "reasonable person" standard methodologically as a continuum that ranges from the most abstract conception of reasonableness to one which is local and particular, a "situated reasonableness" test.[14] A contextual purposive intent test or a situated reasonableness test is not abandonment, but redefinition, of the reasonable person test. A reasonable person test may even have liberatory potential when "community" is defined appropriately.

Hegemony in contract law is most often expressed in universal principles that are justified in terms of powerful sentiments like freedom and liberty. The legal realists and critical scholars, however, have argued that freedom is not enhanced and liberty interests are not protected when the legitimate expectations are defeated.[15] Those who argue for a situated reasonableness approach

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11. "[T]he 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." Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806 (1941).

12. Intersubjectivity is defined as "involving or occurring between separate conscious minds." Merriam Webster, MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 613 (10th ed. 1996).

13. Kim, *supra* note 1, at 644.

14. *See generally* AMY KASTELY, DEBORAH POST & NANCY OTA, CONTRACTING LAW (4th ed. 2006).

15. One phrasing of that argument:

> That portion of the field of law that is classified and described as the law of contracts attempts the realization of reasonable expectations that have been induced by the making of a promise. . . . Reasonableness is no more absolute in character than is justice or morality. Like them it is an expression of the customs and

to intent, or a contextual purposive test for intent, as Professor Kim has expressed it, are advocating for an approach that recognizes the relationship between the individual and the collective. Professor Kim is asking whether the measure of reasonableness in *Kim v. Son* involved facts that were not in evidence because the Korean identity of the two parties was ignored. The objective test in this case should reference the beliefs and expectations of members of the Korean or Korean American community.

II. CULTURAL COMPETENCE AND THE BURDEN OF PROOF

Advocates for "cultural competence" or for the eradication of "pluralistic ignorance" in the administration of justice in the United States will find in *Kim v. Son* a deafening silence. There was no meaningful discussion of the shared identity of the disputants as Koreans. The identity of the parties was revealed in the facts of the case, but was not acknowledged in the application of the law or in the discussion of the doctrines or rules of law that determine the outcome.

In the context of *Kim v. Son*, we might ask who bears the responsibility for addressing the issues of pluralistic ignorance. The responsibility ought to be shared by legal counsel and the judiciary. At a minimum, judges need to examine critically any evidence presented of cultural practices and the relevance or generalizations that can be drawn from that evidence. The greater burden, however, lies with the attorney representing a client whose expectations are likely to be dismissed as unreasonable and illegitimate because they are shaped or framed by a different culture. Since culture is often invisible—consisting of beliefs that are perceived to be self-evident and incontestable—only the introduction of testimony or evidence about a competing worldview will serve to make culture visible as a "truth" that can be contested.

I see no reference in the appellate brief submitted by Kim's lawyer to any cultural information that might support his client's claim.[16] If cultural evidence had been introduced, the burden ought to have shifted to the judges to consider the reliability and the relevance of this information. Cross-cultural or comparative analysis may seem straightforward, but it seldom is.[17] A

> mores—the customs and mores that are themselves complex, variable with time and place, inconsistent and contradictory.

1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1.1, at 2, 4 (rev. ed. 1993).

16. *See* Appellant's Opening Brief, Kim v. Son, 2008 WL 39993686 (Cal. Ct. App. 2008) (No. G039818).

17. An abject lesson in the use of anthropologists as experts would be the testimony by Burton Pasternak, a cultural anthropologist, in *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988). *See* Cynthia Lee, *Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense*, 49 ARIZ.

sociocultural analysis at trial or on appeal would be easier if people understood what culture is, but even scholars use the term promiscuously, so that the concept has a fuzziness about it that makes it an awkward analytical tool. Culture is best described as a "worldview," a sense of the way things are and the way they should be, the way people should behave, and the social significance of the relationships between them. Everything else is elaboration—the symbols we use, the myths we perpetuate, and the material culture we produce.

The issues raised in the representation of members of culturally diverse communities are complex. As one anthropologist explained it, when evidence of culture is introduced, there is a risk that this evidence will create or reinforce an "essentialist understanding of cultural communities as clearly bounded and internally homogeneous."[18] While anthropologists claim to "treat ambiguity and complexity as immanent aspects of all real life situations," the methodology employed by most courts is "to prune away 'extraneous' details."[19] The risk inherent in this methodology is an essentialist representation, the "othering" of a cultural community and the particular litigant.[20]

The relevance of culture is easy to see in a case where two Korean men bring their dispute into a U.S. court and the evidence adduced by the plaintiff is a contract signed in blood. We are surprised by the practice, if practice it is, of recording a promise in blood, but not because blood oaths are unknown to us. There is a practice that is commonplace in American culture, a way people create fictive fraternal relationships with ritual behavior that involves a mixing of blood.[21]

But these expressions of loyalty take place in private ceremonies that have nothing to do with commercial transactions.[22] And while much is made of the practice in Asia of business

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L. REV. 911, 941–42 (2007); Leti Volpp, *(Mis)Identifying Culture: Asian Women and the "Cultural Defense,"* 17 HARV. WOMEN'S L.J. 57, 65 (1994).

18. Anthony Good, *Cultural Evidence in Courts of Law*, 14 J. ROYAL ANTHROPOLOGICAL INST. S47, S52 (Supp. 2008).

19. *Id.* at S51.

20. The best example of the misuse of culture in lawyering and the "othering" of an immigrant is the much criticized case of *People v. Dong Lu Chen*, No. 87-7774 (N.Y. Sup. Ct. Dec. 2, 1988). *See* Lee, *supra* note 17; Volpp, *supra* note 17; Carwina Weng, *Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness,* 11 CLINICAL L. REV. 369, 388 (2005) (concluding that the testimony of the anthropologist offering evidence of Chinese culture "began and ended on the premise of an essentialized Chinese man, rooted in a culture completely foreign from American culture").

21. *See, e.g.*, Clifford Krauss, *"Blood Oath" Sealed Stanford Deal, Court is Told*, N.Y. TIMES, Aug. 28, 2009, at B1.

22. One exception might be the "blood brother" relationship that is alleged to exist between R. Allen Stanford, who was being prosecuted for his operation of a fraudulent Ponzi scheme, and his banker in Antigua, Leroy King. *Id.*

transactions that are preceded by or negotiated in social settings that involve consumption of alcohol, such practices are not unknown in the United States either. Whether it is the "three martini lunch," the golf game followed by cocktails at the country club, or the baseball game at which huge quantities of beer are consumed, the use of alcohol to lubricate the wheels of commerce is not unknown in American culture. After all, generations of law students have cut their conceptual teeth on a case involving two men who were "high as a Georgia Pine" when they wrote out a contract on a paper napkin and a court had no problem finding contractual intent in that case.[23]

The difficulty in attempts to find cross-cultural similarities is the risk inherent in cultural translation, the temptation to find something analogous in both cultures and treat them as equivalents. Inappropriate cultural translation is not the problem in *Kim v. Son*. There are inferences drawn by the court that disregard Korean cultural practices Professor Kim documents in her article, specifically the conclusion that Son was "extremely intoxicated" when he promised to repay the money to Kim.[24] On the other hand, the criticism implicit in the court's legal conclusion—a meritless suit against a "friend" is not consideration—may represent some sort of cultural convergence. In this case, the American tradition of condemning litigious behavior might produce the same result as a presumed preference for alternative dispute resolution in some Asian countries.[25]

Professor Kim is cognizant of the risk of essentialism and othering effect of the blood contract; she is worried that its "freakish, exotic quality" might have distracted the judges in the case from an examination of the aspects of Korean culture more relevant to the dispute.[26] She is careful to point out the deliberation with which the parties created two versions, the one written in pen and ink and the other written in blood, but she also includes some discussion of scholarship that characterizes Korean culture as one in which honor and shame matter.[27]

She does not speculate about Korean culture or engage in inappropriate "translations." Instead she provides insight into Korean culture using documentary sources. Professor Kim cites to a U.S. Department of Commerce publication, Korean and U.S. news articles, American scholarly materials about Asian and U.S. conceptions of contract, including the absence of doctrines like

23. Lucy v. Zehmer, 84 S.E.2d 516, 519, 522 (Va. 1954).

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

25. See generally the discussion of cultural convergence in Lee, *supra* note 17.

26. Kim, *supra* note 1, at 658–59.

27. *Id.*

consideration or rules like the statute of frauds.[28] The issue most germane to the question of volitional intent in *Kim v. Son* would be the article claiming that Koreans do not recognize consideration as a requirement for the formation of a contract.

III. THE MISSING LINK: CULTURE, CONSIDERATION, AND THE CORPORATE PERSON

The outcome in *Kim v. Son* is not simply a function of pluralistic ignorance or lack of cultural competence. That deficiency might have been cured by a test for intent that considered the social identity of the parties and the cultural context in which the transaction took place. The problem in *Kim v. Son* cannot be addressed by an intent test because, to use Lon Fuller's dichotomy, the issue is not consideration as "form" but consideration as "substance."[29] The doctrine of consideration is sometimes explained or justified in terms of its function, which is why Professor Kim discusses the cautionary, channeling, and evidentiary effects of the writing in this case.[30] But a situated reasonableness test or a volitional intent test in the United States cannot save a transaction memorialized in writing by the parties even if the writing serves the evidentiary and cautionary functions. *Kim v. Son* is a case in which the court gives notice to the parties that form must be satisfied; consideration doctrine performs a categorical function, sorting legal from nonlegal transactions.[31]

Courts have not adopted a standard that looks exclusively at the actual intent of the parties. With the exception of the UCC where consideration is no longer required for options or modifications,[32] the efforts to remedy the injustices that arise from the strict application of the consideration doctrine have led to the creation of very specific exceptions. Promissory estoppel and promise for a past benefit are offered as alternatives to consideration. The naming and categorization of these exceptions may actually have impeded a more fluid approach, one which relies on a less structured examination of reasonable expectations. The quotation from Fuller Professor Kim cites is promising, but I can think of no "forces native to the situation," especially the "habits and conceptions of the transacting parties" that currently render "superfluous" formality in the guise of the consideration doctrine.[33]

The exceptions that have been created, promise for a past benefit and promissory estoppel, are inapplicable in *Kim v. Son*

28. *Id.* at 654–58.
29. Fuller, *supra* note 11, at 799–800.
30. Kim, *supra* note 1, at 648–49.
31. Fuller, *supra* note 11, at 803.
32. *See* U.C.C. §§ 2-205, 2-209 (2010).
33. Fuller, *supra* note 11, at 805.

because of a juridical fidelity to the legal fiction that a corporation is a person. In the eyes of the California courts, Son did not receive a benefit before or after he made the promise because Kim loaned money to and invested money in corporate entities. The court uses a straight doctrinal approach, applying the consideration doctrine to make the promises unenforceable. The real impediment to enforcement in this case is the existence of two corporations, one in Korea and one in the United States. No one, not the court or the lawyers, had much to say about the operation of these entities except to conclude that they were "valid corporations," that the loans and investments went to the corporations and that there was "no evidence that . . . Son received any of the money."[34]

Both of the exceptions to the consideration doctrine are thus made inapposite. A promise for a past benefit is a doctrine that every law student learns in law school. In California, it is statutory as well as a matter of common law.[35] *Mills v. Wyman*, the canonical case instructing law students on the difference between moral obligation and legal obligation, acknowledged that a subsequent promise to perform a contract that had become unenforceable because of some "legal impediment" could be enforced by the promisee.[36] Kim never had a contract with Son; nor did he confer a benefit on Son—unless, of course, investing at his behest in one corporation and loaning money to the other is considered a benefit. The court did not think so. Like Wyman, the dishonorable father in *Mills v. Wyman* who had no legal obligation to pay for a benefit his son received after he came of age even though the father promised to do so, Son had no obligation to pay for a benefit received by his wholly owned corporation.

The only way Son could be responsible for the money he asked Kim to invest or loan to his companies and that he promised to repay would be if he personally guaranteed these debts. Case law in California precludes this as a possibility. A third party cannot guarantee repayment for a loan already advanced unless there is separate consideration for that guarantee.[37] If Kim had threatened to sue the corporations, Son's promise to pay the debt might have

34. Kim v. Son, No. G039818, 2009 WL 597232, *2–3 (Cal. Ct. App. Mar. 9, 2009).

35. Cal. Civ. Code § 1606 (West 2008) ("An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise.").

36. 20 Mass. (3 Pick.) 207, 209 (1825).

37. Cal. Civ. Code § 2792 (West 2008) ("Where a suretyship obligation is entered into at the same time with the original obligation, or with the acceptance of the latter by the creditor, and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases there must be a consideration distinct from that of the original obligation.").

been supported by consideration. But the attorney did not allege a threat to sue the corporations. The pleadings alleged Kim's forbearance in suing Son. The court concluded that forbearance to sue on a meritless claim was not consideration.

In the United States, a written promise may serve an evidentiary function, but it is not sufficient to establish liability without a bargain—a past benefit or reliance. The use of ritual, resorting to symbols intended to signal intent to be legally bound, are ineffective. A ritual act, even if it is used frequently in another culture, is unlikely to subvert the fidelity of U.S. courts to established contract doctrines or to the fictive corporate person. Still, if I were making an argument about reasonable expectations, the aspect of Korean culture that I might explore would be the relative permeability of the corporate form. The doctrine of piercing the corporate veil exists in Korea just as it does in the United States.[38] What I would like to know is not whether Korea has a shaming culture, but whether Korean businessmen and the legal system in Korea expect that they, as the owners of closely held corporations, can create for themselves a binding obligation to pay the debt of the corporation.

38. *See generally* Young-Cheol David K. Jeong, Comments on Piercing Corporate Veil Cases at Korean Courts (Korean) (June 1, 2009) (Working Paper), *available at* http://ssrn.com/abstract=1662862 (stating that Korean courts have accepted the theory of piercing the corporate veil).