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CONTRACT CONSENTABILITY: AUTONOMY THREATS, BENEFITS, AND FRAMING

*Eric A. Zacks**

Nancy Kim's framework in *Consentability: Consent and its Limits*¹ provides an excellent guide through the problem of consent in evolving aspects of modern life. In particular and of most interest here, she compares and contrasts the idea of consent with the legal conception of consent, the problem of which is often criticized but rarely, if ever, solved. Thus, the legal conception of consent as "an all or nothing concept where the actions of the parties are considered objectively and statically . . . provides no guidance regarding which acts should be consentable."² Kim, however, is able to go further by illustrating the actual autonomy interests at stake with respect to transactions and contractual promises. This, first, demonstrates why the hard cases are "hard." Further, in doing so, she demonstrates how an accurate assessment of autonomy interests, together with a balancing of societal harms and benefits associated with the activity, provide a more complete picture of what it means to consent and when consent is appropriate and valid.

This brief piece intends to address three different issues raised by Kim's book. Part I will apply Kim's framework to consumer transactions and examine whether it provides useful insights regarding consumer contract regulation. Part II will question Kim's differentiation between autonomy threats, which are treated as a threshold question with respect to whether an act is consentable, and autonomy benefits, which are treated as a secondary issue in terms of societal and individual benefits to be weighed against societal costs associated with an activity. Part III concludes by discussing the possible effects of the identity,

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1. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* (2019).
2. *Id.* at 3.

ideology, and moral beliefs, as well as the cognitive biases and judgment heuristics, of someone utilizing Kim's consentability framework. In particular, we should be careful to suppose that any ex post judgment process regarding the appropriateness and effectiveness of consent, no matter how carefully developed, can avoid the impact of the same issues that infect (as Kim so competently details) the consent decision-making process in the first place.

I. CONSUMER TRANSACTIONS—A REAL THREAT TO AUTONOMY?

Kim's autonomy framework aptly explains why the law has been slow to address consumer law concerns. The low bar for consent in the consumer contract context makes contract formation an "easy" process.³ In other words, consumer contracts are generally clearly "consentable," even if that consent sometimes is less than perfectly voluntary and knowing. Despite the ease of formation, contract law makes it difficult to avoid liability under a contract, meaning that consumers often find themselves stuck with unfortunate, or to use Kim's term, regrettable, terms and transactions. This again may reflect law's underlying belief that threats to economic interests posed by most consumer transactions, in terms of the duration of the threat, its impact, and the type of pain suffered by such transactions, do not threaten the consumer's ability to act in an autonomous fashion in the future. Thus, to many, consumer transactions inherently will never present hard cases because they do not involve permanent, severe, and painful physical and mental threats.

Accordingly, applying Kim's framework,⁴ we see that the autonomy interests in a consumer transaction are not typically viewed as substantial. The threats in ordinary consumer transactions, whether rental cars, payday loans, or even home mortgages, facially involve a threat to someone's economic interests. These property interests appear at the lower end of Kim's hierarchy of autonomy interests, which intuitive and appropriately ascribes a higher threat (in terms of autonomy

3. Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 200-01, 203-04 (2009) (describing modern contract formation requirements).

4. For these purposes, it is most helpful to refer to Figures 3.4 Hierarchy of Autonomy Interests and 3.5 Relevant Factors in Assessing Threat Level of Autonomy. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 75 (2019). See generally *id.* at 71-90.

interests) to those that threaten physical pain or injury. For example, an individual may agree to unfavorable home mortgage loan terms, which threatens the borrower's economic well-being and may also threaten the borrower's residence. The economic well-being is threatened by the homeowner being compelled in some sense to allocate more of her wages towards homeownership as opposed to food, clothing, or other essential needs, and the residence is potentially threatened by foreclosure, or complete loss in the event that the homeowner cannot make timely loan payments. These threats, however, again are limited to property rights (one's money and home) and how one chooses to alienate them (by making promises to pay and pledging one's house).

Certainly, the borrower's "bodily integrity" is not threatened, nor is the borrower physically compelled to work or occupy her time in a particular setting or manner by virtue of the transaction (other than potentially needing a job with a certain level of compensation to be able to pay for the loan), and the individual's civil and political rights have not been threatened. Even when examining the economic interests on the lower end of the autonomy interests scale, there are some limits on the consumer, though an examination quickly demonstrates why these transactions might be deemed to be weak autonomy threats.

Typically, a home mortgage loan will have a number of events of default, meaning that the borrower may not engage in certain activities. The borrower is now required to make regular payments towards the loan. Although being compelled in some sense to use her wages to pay down debt does constrain the borrower's behavior, it does not appear that she would have less "freedom to move, act or think without assistance or constraint." The borrower can still decide how to decorate the house, how to pay for the home loan, and so on.

The homeowner also typically is restricted from selling the home without paying off loan. This precludes the homeowner from making certain decisions with respect to property (i.e., alienating it). If property values go down, she may be unable to sell it because the lender will not release the lien on the property until the lender is paid in full or she may face paying the deficiency of the loan in the event the sale proceeds are not sufficient to pay off the loan balance.

Even these restrictions, however, must be viewed in light of the consequences of contractual breach. The homeowner is constrained in the sense that there is a penalty for not complying

with the contract. In the U.S., however, a breach generally gives rise to money damages, not specific performance. The homeowner is not literally compelled to pay the loan. The homeowner, though, would have to suffer the contractual consequences, which could include foreclosure, default interest rates, attorney fees, court costs, and so on. Other than foreclosure, even these consequences may be avoidable to some extent if the homeowner already is judgment-proof or declares bankruptcy.

Foreclosure does, of course, represent a loss of property rights. The future loss of one's home associated with foreclosure could perhaps be seen as inhibiting one's ability to move or act independently. The loss of one's home potentially represents a significant economic loss, and losing one's residence can impact many areas of life, including most obviously shelter but also other significant areas such as work (preparing for, and commuting to, work) and schooling (for the borrower or the borrower's children).

The stakes, and particularly the pain potentially involved, with these economic interests also may be substantial. In the home loan context, the homeowner is compelled to make the loan payments or risk losing her *home*. Losing one's home can obviously inhibit one's autonomy as defined by Kim (the ability to move and act independently). Although you may not be told where to go, you will have nowhere to go if you do not comply. As mentioned above, there are also psychic injuries associated with the possibility of losing one's home. The feelings of shame and hopelessness can preclude an individual from being able to make optimal future decisions. These duration and pain factors associated with consumer contracts' threats to autonomy, despite their economic roots and interests, are perhaps what is missed in the legal response to consumer transactions.

In addition, and perhaps more significantly, the duration and pain associated with certain consumer transactions should not be ignored. Home mortgage loans, for example, may have terms extending to thirty years, meaning that the homeowner's ability to utilize wages for different activities, including saving, spending on other activities, or building equity in the home may be diminished. In a period where real estate values are not increasing, a prohibition on sale clause may trap a borrower into paying money towards an underwater asset for many years. The literature suggests that many homeowners feel compelled to continue paying such mortgages and feel shame at their possibility or probability of

being unable to do so.⁵ Accordingly, the loss of social capital and the emotional impact associated with potential foreclosure could also be seen as a threat to one's autonomy.

Similarly, the perpetual cycle of debt associated with payday or other subprime lending increases the threat to autonomy for consumers. If consumers' wages are consistently eaten up or threatened by the high interest and fees charged by certain lenders, then consumers will be unable to act in their own best interests in other areas. They may forego health insurance, medical expenses, clothing or other necessary spending to service indebtedness that is not designed to be paid off (such as loans with high interest rates with minimum payments only paying interest and fees). If particular transactions are designed to create a permanent relationship, such as payday loans that are almost impossible to repay based on particular wage levels, then the threat to autonomy necessarily is increased and should raise concerns about consent.

As explained by Kim and others, though, legal conceptions of contractual consent in the commercial context are often static and do not explore the context or dynamic nature of how and why one consents or whether the nature of the activity threatens the validity of the consent. This static conception is often based upon objective manifestations of consent as opposed to an examination of overall contexts in which the consent was made. This has resulted, for example, in an over-reliance on the consumer's act (e.g., clicking "I agree") as opposed to the context of the transaction (e.g., no one reads the text box accompanying the "I agree" clicking). Objective manifestations based on an all-or-nothing interpretation of assent make it easier to find and sustain contractual consent, which is important for the market economy and the security of transactions. Kim's framework, however, rightly cautions against perfunctory conclusions regarding consent and instead suggests a method to differentiate between different types of activities, including different types of contractual transactions. Consumer transactions, therefore, might suggest a different level or robustness of consent based upon the nature of the transaction and the autonomy threats involved.

5. Brent White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 971-2 (2010).

II. AUTONOMY-ENHANCING CONSUMER TRANSACTIONS

Focusing on potential negative aspects of consumer transactions, in this instance with respect to autonomy, should not obscure autonomy-enhancing aspects associated with such transactions or lead one to overlook the normative judgments involved with permitting or prohibiting such activities. Kim addresses the social benefits of particular activities as a separate question within her framework (i.e., are the social harms outweighed by the social benefits of the activity?), though one could imagine comparing the autonomy benefits associated with a potential transaction directly with the autonomy threats.

For example, consider a subprime lender of last resort for used automobiles, meaning that the lender is only utilized when the dealer cannot find anyone else to finance a particular consumer's purchase of a car (presumably because of the consumer's poor credit history). The loan rates associated with such loans may exceed twenty percent, and the automobile is subject to being repossessed in the event that the loan is not repaid. The threats to autonomy associated with losing one's mode of transportation may be significant and similar to those discussed above with respect to mortgage foreclosure and losing one's home. One is compelled to pay the loan or else risk losing one's ability to get to work, to drive children to school, and so on. Because of the consumer's limited choice, the dealer is presented with the opportunity to provide an automobile of substandard quality, knowing that the consumer will largely be unable to pursue legal action in the event there is a problem with the automobile (suggesting the threats to autonomy are more likely to be realized).

Assume also that default rate for such loans is fifty percent. The social consequences of such subprime lending are that fifty percent of the borrowers lose their automobile because of their inability to pay the high interest rates. Such borrowers are now left without a mode of transportation, as indicated above, and their already poor credit may be further damaged, which could limit their ability to secure transportation and other consumer goods in the future. Kim proposes an "Opportunism Corollary," which provides "that the state should prevent individuals from benefiting through actions which knowingly harm or exploit others."⁶ If the lender knows that fifty percent of the borrowers will default, lose

6. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 69 (2019).

their automobiles, and harm their credit, is it exploitative to engage in such transactions?

On the other hand, a default rate of fifty percent also means that fifty percent of consumers were able to repay their loans. Their ability to repay their loans means that they were able to secure transportation during the loan period and now own the automobile free and clear for the post-loan period as well. Repaying the loan also can help such consumer's credit score, which can obviously benefit them in the future with respect to securing other goods and services.⁷ These transactions then have the potential to be autonomy-enhancing and represent a positive "threat" to autonomy. If such transactions were prohibited or if consent was difficult to secure or demonstrate, then one's autonomy is diminished; put another way, autonomy threat assessments depend on the baseline one uses.

If the baseline is that everyone should be permitted consent to any activity that might enhance their future autonomy (their ability to move and act independently without help), then any restriction upon that activity (whether by requiring a particular level of consent or otherwise) represents a threat to autonomy. Although one's current level of autonomy has not been diminished, it is perhaps lower than it otherwise would have been in the absence of such restrictions. Viewed in this way, restricting subprime automobile loans harms not only the consumers who ultimately would be able to repay the automobile loans but also those consumers who might not have been able to do so. Since we cannot know in advance which consumers will be unable to repay the loans, all consumers are harmed when the restrictions are imposed. Having the chance (or opportunity) to repay is thus autonomy-enhancing.⁸ It is unclear why these autonomy benefits should not be accounted for together with the autonomy threats in consentability assessments.

7. Some lenders advertise this as a benefit associated with their subprime loans. For example, the website for Credit Acceptance Corp. (slogan "We change lives"), a subprime lender for used automobiles, notes that "Making on-time payments can improve your credit score. Credit Acceptance reports to the 3 major credit bureaus, which means you have the opportunity to improve your credit score through on-time payments on your Credit Acceptance financing." *What consumers should know*, CREDIT ACCEPTANCE, <https://www.creditacceptance.com/what-consumers-should-know> (last visited Aug. 6, 2019).

8. This is presumably a more compelling case the higher the likelihood (in this instance, greater than fifty percent) that a particular consumer will be able to repay the loan.

The above discussion is somewhat tied to Kim's careful point about the difficulty in attaching importance to the robustness of the consent in difficult contexts. Changing the requirements for consent would not change the underlying need or desire for the different transactions, suggesting that solutions aimed at consent are potentially misplaced.⁹ If we changed the requirements for disclosure in subprime loans, such as by requiring plain English, requiring disclosure of the high default rate for borrowers or indicating to a borrower how much in interest will be repaid over the life of the loan, those changes would not impact the borrower's need to engage in that transaction.¹⁰ In the subprime automobile lending transaction above, where the lender was the only source available (because no other lenders were willing to underwrite the loan based upon the borrower's credit), the borrower is unlikely to be swayed by the nature of the contractual disclosure if the automobile is needed. Alternatively, one could ban the subprime loans or restrict the interest rates that could be charged for such loans. The latter could have the same effect as the former, as the subprime lender might be unwilling to lend at all at a lower interest rate because it determined that it would not be adequately compensated for the risk of lending to consumers with inferior credit.¹¹ Either way, such restrictions or regulation could restrict the consumer's access to capital but would not address the fact that the consumer needs that access to capital.¹² Accordingly, permitting such transactions may not be autonomy-enhancing, but neither is restricting such transactions, particularly if the transactions will still be engaged in (illegally or otherwise) or if such restrictions would not alleviate the underlying condition necessitating the desire for the transaction.

9. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 128 (2019) (citing Omri Ben-Shahar for the idea that "the problem is often not that there is insufficient disclosure, it is a lack of options").

10. Indeed, Kim notes that at least one study found that the "the effectiveness of salient credit card disclosures . . . had little to no change on consumer behavior and the reduction of consumer debt").

11. There also is some evidence that loan rates are higher in states where the foreclosure process is more cumbersome for lenders. See Dustin Zacks, *The Grand Bargain: Pro-Borrower Responses to the Housing Crisis and Implications for Future Lending and Homeownership*, 57 *LOY. L. REV.* 541, 569 (2011) ("[O]ne can say with some degree of certainty, given the Meador and the Zhu and Pace studies, that interest rates on all future borrowers are raised when lenders face longer foreclosure times.").

12. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 43 (2019) (describing, in the context of bodily integrity exchanges, how "our non-ideal world creates a 'double-bind' because banning [such exchanges] won't resolve the underlying desperation and the social conditions which cause it").

III. THE LIMITS OF PROCESS

Kim's framework expertly explains why the hard cases are so hard and does present a logical guide for resolution. Nevertheless, there are limits to the utility of any framework. A framework is a tool—a process or procedure that is intended as a helpful guide. Individuals might be expected to apply the framework to a hard case differently, either because each individual reaches different conclusions regarding the questions within the framework (e.g., how great is the threat to autonomy in this particular situation?) or based on the individual's particular sense of logic or facts.

As a general matter, the same biases, heuristics, and other deviations from rationality that affect the consent process will impact one's assessment of autonomy threats, voluntariness of consent, societal harms and benefits, and so on.¹³ Our emotional responses could influence our construction of consent, for example.¹⁴ Alternatively (or in addition), since people generally “underestimate the effect that external influences have upon human behavior,”¹⁵ this could lead to overreliance upon outward manifestations of consent in determining voluntariness of consent instead of carefully examining the context in which the consent is given. Similarly, the assessment of negative outcomes in hindsight with respect to particular transactions might lead one to overestimate their frequency and societal harm. As with other assessments or adjudications, such determinations are subject to manipulation by other actors.¹⁶

An individual's starting beliefs and assumptions also presumably will influence the application of the framework and her ultimate conclusion. In other words, one's normative judgment about the desirability of the activity will influence one's construction of consent and whether it is possible to validly consent

13. Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 333 (2003) (noting that “[j]udges, juries, and legislators are as vulnerable to these cognitive biases as anyone else”).

14. Our emotional responses to a particular type of transaction, for example, may color our assessment of consent. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 43 (2019) (noting that in bodily integrity transactions, “[e]mpathy, sympathy or disgust may make it difficult to believe that the individual actually consented and wasn't coerced or exploited”).

15. *Id.* at 14.

16. I argue elsewhere that many contractual features are often designed with reinforcing an adjudicator's assessment of the freedom of the non-drafting party's consent. See Eric Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169 (2012).

to the proposed activity. In the subprime automobile loan example from the previous section, one is weighing a fifty percent default rate (presumably an overall negative event for fifty percent of borrowers) against the fifty percent full repayment rate (a positive event for fifty percent of borrowers) and the social consequences of those different outcomes. One's initial beliefs about the desirability of the activity will necessarily precede any examination of the autonomy threats, and that examination of the autonomy threats is likely to be accordingly colored by such beliefs. In other words, regardless of the proposed framework, the judgment process for humans often involves not an objective assessment of facts followed by a conclusion, but instead an initial conclusion followed by a selective assessment of facts that supports that initial conclusion.¹⁷ Similarly, application of Kim's Opportunism Corollary, which would act to restrain wrongful behavior, requires a normative judgment about whether one's actions, such as making a subprime automobile loan with fifty percent aggregate default rates, knowingly harms and exploits others.

Accordingly, the judgment process can obscure, and in many cases enable, the subjective and particular underlying beliefs of the framer involved in a particular situation. How we choose to answer particular questions in the framework's process is subjective and reflects a personal choice. Labeling something as a minor threat to body and mind can be wrong or at least debatable to the extent that it ignores or downplays certain threats. For example, if a framer values bodily integrity more than mental integrity, then a threat to one individual's body integrity will obviously be seen as a more serious threat than the threat to the counter-party's mental integrity. Similarly, whose consent counts and to what extent can reflect personal or communal beliefs that can similarly prejudice outcomes as the framework is applied.

For example, Kim's book throughout largely accepts, within the framework, the consentability of abortion. Kim rightly identifies, for example, the threats to body integrity involved with being forced to continue with an undesired pregnancy, including threats to health (particularly as compared with the threat posed

17. Rebecca K. Helm, Andrew J. Wistrich, & Jeffrey J. Rachlinski, *Are Arbitrators Human?*, 13 J. EMPIRICAL LEGAL STUD. 666, 682 (2016) (describing the confirmation bias, noting that "[p]eople frequently do not test their beliefs thoroughly, but instead seek out information consistent with what they already believe").

by an abortion).¹⁸ Within the context of a minor's ability to consent to an abortion, she also describes the limited utility of parental consent.¹⁹ The framework, however, in this instance does not address or help solve the primary question for many concerning abortion, namely, the nature of the fetus. Starting beliefs about the nature, status, and rights of a fetus likely will influence one's application of the consentability framework.²⁰ In this instance, what one believes about the nature of the fetus should (unsurprisingly) impact one's conclusions about whether a fetus, like the mother, has "bodily integrity" that requires protection (i.e., rights with respect to actions threatening such integrity). Accordingly, the autonomy framework merely shuttles the underlying starting belief differences through a different tunnel and the respective conclusions still inevitably will reflect these differences.²¹

How we frame an issue, in other words, belies our moral judgments. The above process/substance critique is perhaps somewhat encompassed by Kim's apt recognition that "[c]onsent is only part of the equation when it comes to consentability Where the proposed activity has disturbing or harmful implications for the consenter or third parties, it has a destabilizing and detrimental effect on social relations and hinders the attainment of individual goals for other members of society."²² Our assessment of these implications, as suggested above, is probably not objective and may precede any processed examination of consent; that is, our particular underlying beliefs regarding the positive and negative nature of any proposed activity influence our constructions and conclusions regarding consent and consentability.

18. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 134-35 (2019).

19. *Id.* at 140 (noting the problems that could arise from compelling a teenaged girl to reveal an unplanned pregnancy to her parents).

20. At this point, it is important to emphasize that this piece's outline of a contrasting presumed application of Kim's framework to abortion is not offered as an entry in the debate over abortion. Any process's malleability to substance, however, is precisely the point. Two people can apply the same framework, and starting beliefs and values can (intentionally or not) and often will influence their respective conclusions.

21. Kim's note that "owning the rights to one's body does not mean that one can do whatever one wants with it . . . [and that] [a] property owner must still respect the rights of others" might beg the question, at least for abortion opponents, regarding who is an "other" possessing rights. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 42 (2019).

22. *Id.* at 218.
