

# USING FEMINIST RELATIONAL CONTRACT THEORY TO BUILD UPON CONSENTABILITY: A CASE STUDY OF PRENUPS

*Dr. Sharon Thompson\**

## I. INTRODUCTION

Imagine you are successful in business, but your fiancé does not have a career. Instead, he has decided to spend some time writing a novel while you are supporting him financially. You decide to get a prenuptial agreement, or “prenup,” because you are earning a high income. The agreement stipulates that your partner can keep what he makes and receives, and you are going to keep what you make and receive. You marry, and your spouse sits in coffee shops and libraries and writes the equivalent to a new Harry Potter novel. The marriage doesn’t work out. When you made the agreement, it seemed fair. Now, years later, it may not seem so fair. But in law, you consented to it.

This example, given by a New York attorney when interviewed about prenups, exposes only some of the many issues inherent in treating these agreements like business contracts.<sup>1</sup> Parties sign a prenup before marriage and do not know how their circumstances will change in the event of divorce. But there are other further complications. It does not elucidate the complex web of (often gendered) power relations affecting prenups, which can evolve over time. Neither does it show how damaging a prenup can be when it does not factor in the cost and value of care (such as for a child or other family member). Yet it does reveal, on a more fundamental level, that treating consent to prenups as

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\* Senior Lecturer in Law (Associate Professor), Cardiff University, UK. I would like to thank Professor Russell Sandberg and the reviewers of this paper for their helpful comments.

1. This example was given by an attorney in a study on prenuptial agreements reported in SHARON THOMPSON, PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE 196 (2015).

binding and fixed does not reflect the reality in which these agreements are made and enforced.

Nancy Kim's consentability framework allows us to parse the discourse around consent to prenups, and the limitations of its meaning in law. Consentability, Kim says, is distinct from legal consent because, while legal consent is an essential condition for consentability, it is not enough. Instead, consentability is determined by "assessing the effect of an activity upon both the individual and society."<sup>2</sup> It requires evaluating consent in the context of its wider relational effects. It is inextricably linked to understanding how autonomy is exercised and exhibited when agreements are made in law. Therefore, consentability is a particularly useful concept in the context of agreements made in intimate contexts like marriage, where decision making is affected by factors Kim highlights as being important, such as: the options available to the consenting party, their emotional state, what they know, and the other party's actions.<sup>3</sup> As Kim incisively states: "Too often, the fact of a manifestation of consent is used to substitute for valid consent, and the issue of whether consent in any given case maximizes self-interest or promotes (or diminishes) autonomy is ignored."<sup>4</sup> This is a fitting explanation of how in the realm of prenups, where consent is frequently treated as being a binary choice, the inevitable inequalities and hierarchies of family life that permeate the decision-making process are obscured.

This paper applies Kim's consentability framework to prenups for the first time with particular focus on prenups in New York. It draws upon my original empirical work and develops Feminist Relational Contract Theory (FRCT), a model I have written about previously<sup>5</sup> and apply here to explore how consentability and FRCT compare and converge. I argue that Kim's consentability framework is a valuable tool for exposing the flaws of legal consent in the context of prenups because it shows that consent can be a smokescreen behind which power inequalities, changing circumstances, gendered consequences, and even subsequent feelings of regret are commonplace.<sup>6</sup>

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

3. *Id.*

4. *Id.* at 218.

5. Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45 J.L. & SOC'Y 617 (2018).

6. See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreement and How we Think about Marriage*, 40 WM. & MARY L. REV.

After applying Kim's theory to prenups, I then use the alternative theoretical approach of FRCT to deal with some of the concerns raised by consentability. While consentability highlights the dynamism of consent and consequently helps sharpen the diagnosis of issues that are gendered, I argue that FRCT takes this further by adopting an explicitly feminist approach to redress these issues and their effect upon intimate agreements. Finally, the potential consequences of using FRCT to build upon consentability are explored, revealing practical ways of enforcing and adjudicating prenups to appreciate the many variations of consent as an alternative to current practice, whereby courts frequently assume how individuals make decisions and enter into prenups. Through this new lens, a more complete understanding of consent is possible that looks past a signature on a page to the relationship dynamics of the parties instead. Beyond uncovering an alternative way of evaluating prenups in practice, this makes us ask different questions when evaluating power imbalances, changing expectations over time, and the wide variety of agreements affected by gender.

## II. EXPOSING PRENUPTIAL PROBLEMS THROUGH KIM'S CONSENTABILITY FRAMEWORK

The legal status and nature of prenups differs greatly around the globe. In some civil law jurisdictions, an agreement analogous to a prenup enables a couple to select from a menu of options the set of rules which will apply to their property,<sup>7</sup> while in other community property jurisdictions, spouses can use a prenup to opt out of automatic pooling of assets.<sup>8</sup> This type of agreement is very different in nature to a prenup agreed to in a common law jurisdiction like England and Wales,<sup>9</sup> Australia,<sup>10</sup> or New York. In these jurisdictions, the default position is not dictated by a formula or property regime mandating automatic division, but instead depends on a judge's discretionary

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145 (1998); SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* (2015).

7. See Alexander Flos, *Prenuptial and Tenancy Agreements as Relational Contracts*, in *EMBEDDING THE PRINCIPLES OF LIFE TIME CONTRACTS* 163, 175 (Luca Ratti ed., 2018).

8. Assets subject to community property rules are owned jointly by both spouses. See LA. CIV. CODE ANN. art. 2336 (2020).

9. SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* 14 (2015).

10. Belinda Fehlberg & Bruce Smyth, *Binding Pre-Nuptial Agreements in Australia: The First Year*, 16 INT'L J.L. POL'Y & FAM. 127, 127-28 (2002).

assessment of what is fair. And so, by signing a prenup in one of these common law jurisdictions before the marriage, the couple is contracting out of what the court deems fair at the end of the marriage, when circumstances might have changed considerably. These jurisdictional differences mean that when generalisations are made about prenups without acknowledgement of the legal system in which they are situated, some of the most important contextual issues with these agreements are missed and misrepresented.

As a result, the focus of this paper is on common law jurisdictions, with particular emphasis on New York, which proffers a rich experience of prenups given that the highest proportion of millionaires in the world live there<sup>11</sup> and that some of the most famous nuptial agreements have been created and litigated there.<sup>12</sup> In a New York divorce, without a prenup, property is divided according to the doctrine of equitable distribution. This is considered to be an extremely onerous procedure and is light heartedly referred to by practitioners as the “Full-Employment Act for Accountants, Actuaries[,] and Appraisers”<sup>13</sup> because it requires the creation of an inventory of all tangible and intangible assets belonging to the parties, including their qualifications. Against this complicated backdrop of equitable distribution, the enforcement of prenups is viewed as being an important way of attaining certainty in the event of divorce. As Schechter notes, many people “attempt to forestall unhappy contingencies, even as they enter marriage with hope in their hearts,” because of the perception that in New York, divorce rates are high and equitable distribution is complex (and therefore costly).<sup>14</sup>

In most common law jurisdictions, including New York, prenups are contracts because they must be contractually valid. But they are also not like contracts made in the course of everyday business because they are made in a different context and characterised by different issues of power, involving factors like unpaid care, domestic labour, changing circumstances, and career sacrifice. For this reason, prenups are ripe for reanalysis

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11. *Global HNW Analysis: The High Net Worth Handbook*, WEALTH-X (Jan. 16, 2019), <https://wealthx.com/report/high-net-worth-handbook-2019/>.

12. *See Trump v. Trump*, 179 A.D.2d 201 (N.Y. App. Div. 1992) (concerning the nuptial agreements between Donald J. Trump and Ivana Trump).

13. SARA P. SCHECHTER, *NEW YORK FAMILY LAW* 265 (2d ed. 2006).

14. *Id.*

through consentability, a term employed by Kim to refer to “[i]ssues regarding whether someone should be permitted to consent to an act or activity.”<sup>15</sup> In New York, entering a prenup is a “consentable” act because it is permissible under law, but determining *consentability*, according to Kim, also requires assessment of “the effect of an activity upon both the individual and society.”<sup>16</sup> Consentability for prenups, then, means consideration of a range of complex factors which not only affect parties’ ability to consent to the terms of a prenup when it is signed but also influence how consent to that agreement changes over time and/or is influenced by the constellation of relationships the parties are in. These are aspects consentability considers but legal consent often does not. There *is* evidence that, in law, the “special nature” of prenups as distinct from contracts in commerce is recognised, shown by the broader range of factors considered by the court. For instance, in New York, prenups must be fair and reasonable when made and must not be unconscionable when enforced, which provides some flexibility to account for agreements that would result in hardship.<sup>17</sup> On the other hand, legal ideas of consent as described by Kim still dominate how prenups are adjudicated in practice because only abnormal, shocking power imbalances appear to be taken into account by the court,<sup>18</sup> which is problematic given my research shows how power imbalances affect most prenups, and so are usually not grievous enough to affect consent.<sup>19</sup>

As a result, prenups appear to be best conceptualised as quasi-contracts, to which features of legal consent apply. They are infused with competing concerns, with fairness and unconscionability placed in opposition to one’s right to protect their own property in the event of divorce. One of the values to

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15. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 2 (2019).

16. *Id.* at 3.

17. N.Y. DOM. REL. LAW § 236B(3) (McKinney 2019). The statute provides in part that “[a]n agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action . . . provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment.” *Id.*

18. See *Morad v. Morad*, 27 A.D.3d 626, 627 (N.Y. App. Div. 2006).

An unconscionable bargain is one which no person in his or her senses and not under delusion would make on the one hand, and no honest and fair person would accept on the other, the inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense.

*Id.* (citing *Yuda v. Yuda*, 143 A.D.2d 657, 658 (N.Y. App. Div. 1988)).

19. SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* (2015).

emerge from this tension through the adjudication of prenups in recent years is the idea of autonomy. Commentators like Alison Diduck have identified the prioritisation of unregulated choice in the family sphere through prenups (and other family law agreements) as being linked to policy and fiscal austerity, which has led to assumptions of individual autonomy.<sup>20</sup> Parties are assumed to have exercised autonomy when they have not. Yet these assumptions often mean the gendered dimension to agreements made in the family law context is rendered invisible. As Diduck put it:

The “it is up to you” idea of justice is devoid of a theory of power and uses the sophisticated and seductive language of autonomy to return family living and therefore family justice to the private sphere where the risks and often realities of structural and individual inequality are not the law’s concern.<sup>21</sup>

These assumptions of autonomy, this “seductive language” of individuals deciding matters for themselves without court intervention—this is at the heart of Kim’s consentability critique, and why applying her framework to prenups is important and useful. According to Kim, consent and autonomy are intertwined because consent is “the protector and implementer of autonomy.”<sup>22</sup> But, she says, the way in which autonomy is conceptualised is problematic when it is based on the fictional ideal of the isolated, self-interested person rather than the interdependent and often unpredictable relationships that are part of the context in which prenups are made. And so, when concepts of consent and autonomy are employed in law based on the assumption that everyone is individually capable of what Kim refers to as “self-government,”<sup>23</sup> power inequalities are overshadowed and exacerbated. Yet by recognising, as Kim has put it, that “[d]ecision-making does not occur in a vacuum,” consentability opens up the possibility of recognising issues of power in a way that is different from current practice, which in turn can provide space to recognise how and when consent and autonomy are exercised. This is what the rest of this article will

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20. Alison Diduck, *Autonomy and Family Justice*, 28 CHILD & FAM. L.Q. 133, 134 (2016). Though Diduck is writing about England and Wales, this is also the case in the United States. See Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 152 (1993).

21. Diduck, *supra* note 20, at 148.

22. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 53 (2019).

23. *Id.*

explore, first by identifying in more detail some of the problems with prenups that are susceptible to falling under the radar of legal consent (but not consentability), and second by using my Feminist Relational Contract Theory (FRCT) to develop an alternative approach to prenups that builds upon consentability.

### A. THE GENDER DIMENSION

Kim's concern that definitions of autonomy and consent are "blinkerred and incomplete" and associated with "rugged individualism and self-sufficiency"<sup>24</sup> are shared by others in the context of prenups and other similar forms of intimate agreements.<sup>25</sup> An important problem with such definitions is that the gendered power dimension of prenups is obscured. My research has shown that gender is a pervasive and central influence on how prenups are negotiated, and the effect they can have on divorce.<sup>26</sup> As Gail Brod explains in the U.S. context, prenups "adversely affect the economic and social wellbeing of many women, they contribute to the financial vulnerability of women as a class, and they magnify society's unequal distribution of resources along gender lines."<sup>27</sup>

Atwood corroborates this view on prenups with evidence that the wife challenges prenups in 85 per cent of cases.<sup>28</sup> As my earlier empirical work on prenups in New York has shown, attorneys' experiences of such agreements identified a gender dimension to prenups, even though they were not asked directly whether gender affected the balance of power between parties to an agreement.<sup>29</sup> I found that prenups are often conceived on an unlevel playing field, with the wealthy spouse seeking to ring fence their assets. Also, the wealthy spouse, especially in cases where assets were not generated through family money, was the husband-to-be. Attorneys employed phrases like "non-moneyed spouse" and wife interchangeably, typically qualifying these

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24. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 73 (2019).

25. For example, see JONATHAN HERRING, *RELATIONAL AUTONOMY AND FAMILY LAW* (2014); Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45 *J.L. & SOC'Y* 617 (2018).

26. SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* (2015).

27. Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 *YALE J.L. & FEMINISM* 229, 241 (1994).

28. Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 *J. LEGIS.* 127, 133 (1993).

29. THOMPSON, *supra* note 9, at 81.

statements by adding: “I say the woman because it almost always is.” As one attorney put it: “societally speaking [the wealthy party] is still more often male than female.”<sup>30</sup> This power imbalance is gendered in its effect. In the absence of a prenup, the judge has power to recognise the value of unpaid work in the home, such as reproductive or domestic labour, by making appropriate financial provision for the spouse who has undertaken this work. For obvious reasons, this is typically the lesser income-producing spouse. However, research demonstrates that empirically, prenups operate to contract out of any entitlements generated by non-financial contributions within marriage, including care-giving contributions, which are inevitably gendered.<sup>31</sup> This also supports Atwood’s assertion that, in the U.S. context, prenups “may work to the ultimate economic disadvantage of women” if strictly enforced, because “men generally occupy a position of economic superiority.”<sup>32</sup>

Nevertheless, this gender dimension does not directly affect the weight given to prenups. For instance, in the New York case *Cron v Cron*, though the wife made the gendered decision to give up her career during the marriage to support the family, the agreement was not varied because she had received appropriate legal advice.<sup>33</sup> Indeed, most gendered power disparities are so endemic and “normal” that by definition they will not reach the threshold of unconscionability that requires abnormal inequality. And so, when issues of power affecting nuptial agreements are normalised and invisible, relegated to the private sphere and out of the court’s reach, the relationship of power between parties entering such agreements can be reproduced and reinforced, particularly on gender lines. When traditional legal ideas of consent marginalise these inequalities, they are further buttressed. By widening the frame as to what context is relevant surrounding the moment of consent to an agreement, consentability can help reveal this pervasive gender dimension especially when combined with an approach like Feminist Relational Contract Theory that explicitly focuses on gender.

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30. SHARON THOMPSON, PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE 82 (2015).

31. Gail F. Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 241 (1994).

32. Barbara Ann Atwood, *Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 129-30 (1993).

33. *Cron v. Cron*, 780 N.Y.S.2d 121, 122 (App. Div. 2004). The court did modify the agreement to increase the wife’s housing allowance to prevent a drastic change in the children’s lifestyle. *Id.*

## B. CONSENTABILITY AND REGRET

Another useful aspect of the consentability framework is its inclusion of what Kim refers to as the “regret principle,”<sup>34</sup> the notion that regret is relevant to agreements because it limits or damages our *future* autonomy in a significant way. In other words, it is perfectly plausible to consent to something and to later regret it. Intervention by the court must be justified because it limits freedom of contract.<sup>35</sup> But it is well established that defects with “consent” can justify intervention by the court into agreements,<sup>36</sup> because closer inspection of why an agreement is regretted may reveal, for example, “bad conduct” on the part of the respondent,<sup>37</sup> which could render consent, or at the very least, consentability, defective. This is important if the broader context in which prenups are made is to be recognized. These agreements are signed before the marriage, when research shows individuals are unrealistic about the probability of divorce,<sup>38</sup> are overly sanguine,<sup>39</sup> and often want to assert their own financial independence<sup>40</sup> despite financial dependency that usually accumulates during marriage. In short, parties to a prenup often do not know how circumstances will change and, when circumstances do change, this is frequently to the detriment of the spouse undertaking the domestic and reproductive labour in the relationship.

To properly appreciate the relevance of the regret principle and the impact regretting a transaction can have, it is crucial to look beyond the circumstances prevailing at the time the agreement was made and to move away from a binary idea of either consenting or not consenting to a prenup.<sup>41</sup> However, this is difficult to do when the court perceives recognition of the flaws

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34. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 57 (2019).

35. STEPHEN A. SMITH, *CONTRACT THEORY* 317 (2004).

36. *Id.*

37. M. Chen-Wishart, *Undue Influence: Beyond Impaired Consent and Wrongdoing Towards a Relational Analysis*, in *MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS* 203 (Oxford University Press eds., 2006).

38. Lynn Baker & Robert Emery, *Why Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, in 17(4) *LAW AND HUMAN BEHAVIOR* 439, 439 (1993).

39. Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreement and How we Think about Marriage*, 40 *WM. & MARY L. REV.* 145 (1998).

40. SHARON THOMPSON, *In Defence of the ‘Gold-Digger,’* in 6(6) *OÑATI SOCIO-LEGAL SERIES* 1225, 1241 (2016).

41. See Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45 *J.L. & SOC’Y* 617 (2018).

of an agreement as detracting from respect for individual autonomy and agency to contract. Acknowledging that an agreement was not equally bargained could be seen as disempowering, because the power to enter a binding prenup is taken away. The solution to properly accounting for gendered power inequalities should not be to deny women the agency to contract, and so Gillian Hadfield has asked whether it is possible “to protect women from oppressive consequences or harmful constrained choices without divesting women of agency[.]”<sup>42</sup>

Addressing this question requires a reassessment of contract and this is where consentability can assist. Instead of a binary situation whereby individuals either agree or do not and where women are either protected or empowered, consentability conceptualizes consent as a sliding scale.<sup>43</sup> Consent is not fixed; it is relative. As Kim puts it, this recognises that “tension exists not only between and among individuals, but within individuals who usually have conflicting desires and interests.”<sup>44</sup> This is important, because if consent is not conceptualized in this way, it risks diminishing the autonomy exercised by the parties.<sup>45</sup> If consent and autonomy in relation to prenups are to therefore be assessed according to this sliding scale, the enforcement of these agreements must appreciate *how* autonomy is exercised over the course of a relationship. There must be a way for contract to accommodate an individual’s changing circumstances and choices over time. One option is to follow an alternative theoretical approach to prenups named Feminist Relational Contract Theory (FRCT). This is explored in the next section to argue that FRCT could be used in tandem with Kim’s consentability framework to illuminate issues with power and autonomy in prenups and to better understand how individuals make decisions when determining the financial consequences of relationship breakdown.

### III. CONSENTABILITY AND FEMINIST RELATIONAL CONTRACT THEORY (FRCT)

Kim’s consentability framework uncovers a problem with how the exercise of consent and autonomy is measured in law.

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42. Gillian K. Hadfield, *Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1236-37 (1998).

43. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 50 (2019).

44. *Id.* at 73.

45. *Id.* at 51.

This section investigates whether the aims of consentability can be supplemented by FRCT, a framework I have previously developed in relation to family property agreements.<sup>46</sup> In exploring this possibility, FRCT is set out as a model compatible with consentability but that focuses explicitly on gendered issues of power, which are often inextricably linked to parties' regret and changing circumstances. Consentability through FRCT is then applied to prenups in Part IV, with particular focus on the New York context.

So far, I have argued that when Kim's concept of consentability is applied to the context of prenups, it supports the view that a binary view of consent is problematic in practice. A prenup is taken as evidence of parties' consent provided the parties are appropriately informed and neither party has unlawfully been pressured into signing it. As one New York attorney in my earlier study put it: "there is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties."<sup>47</sup> This "heavy presumption" of consent and, by extension, autonomy is based on the fact an agreement has been made, while contextual factors such as how and why the agreement was made are of little relevance. Such assumptions also mean the question of *why* an individual would knowingly sign a bad agreement is not asked. But the context in which choices are made must be appreciated if the meaning of consent is to be properly understood. This means that consent should not be assumed simply because the consenting party has been properly informed, because as Kim has argued, other factors can destroy consent, like changes in conditions or circumstances, or additional information that was not available at the time consent was constructed.<sup>48</sup> As a result, Kim is clear that informed consent is not consentability because while it relates to competence, it does not ensure her requirements of intentional manifestation of consent, knowledge, and voluntariness. A prenup signed with proper legal advice and disclosure *ostensibly* satisfies these conditions, but it does not explore the complex and dynamic nature of consent. This is because, as Kim explains, "too often, artificial notions of autonomy are used to justify governmental laissez-faire which is

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46. Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45 J.L. & SOC'Y 617 (2018).

47. SHARON THOMPSON, PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE 94 (2015).

48. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 15 (2019).

at best uncaring and at worst, harmful and perpetuates inequality.”<sup>49</sup> In short, Kim’s consentability analysis reveals the need for law to go further to capture the realities of human interdependence in agreements like prenups. However, while importantly providing a new lens through which prenups can be examined, Kim does not purport to provide a one size fits all approach, or easy solutions.<sup>50</sup>

A potential way forward for consentability, prenups, and the many types of agreements affected by gender is to consider how FRCT could help further the aims of consentability in practice. FRCT is a model proposed for adjudicating and understanding intimate agreements like prenups. It builds upon established relational approaches to contract by adding an explicitly feminist lens so that the gendered power imbalances discussed in Part II can be recognised and addressed. Unlike orthodox understandings of consent and autonomy explored so far in this paper, FRCT does not suppress the relational context affecting the balance of power between contracting parties. Instead, it is consistent with Kim’s “relative consent”<sup>51</sup> approach, which states that the complex and dynamic nature of consent must be recognized to better promote the value of autonomy. By employing relational approaches, FRCT can recognize long-term changes over the course of the marriage that frequently leave one spouse more economically vulnerable than the other.

There are already established relational approaches to contract.<sup>52</sup> One of the most notable is known as relational contract theory, which FRCT builds upon. Relational contract theory, or RCT, was developed by Ian Macneil<sup>53</sup> and is a model that examines the contract as a whole. It can be distinguished from orthodox approaches to contract because instead of focusing on the transaction, which can distract from the inequalities often arising from intimate relationships, RCT looks first to the relationship between the parties *before* looking to the transaction. In short, orthodox approaches consider context, but do not prioritise context as RCT does. An important difficulty recognised by RCT is when long-term contracts deal with the

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49. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 73 (2019).

50. *See id.* at 219.

51. *See id.* at 72-73.

52. CATRIONA MACKENZIE & NATALIE STOLJAR, RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF (2000).

53. IAN MACNEIL, CONTRACT: EXCHANGE TRANSACTIONS AND RELATIONS (1978).

future as if it were the present, which is termed “presentation” by Macneil. Prenups are examples of presentation because they bind a situation that may or may not happen in future—divorce. In spite of this, consent to a prenup is based on the present circumstances of the parties, which is a time before marriage and when they most likely consider the probability of divorce to be non-existent.<sup>54</sup> Through the lens of RCT, it therefore becomes clear that there are many unforeseeable ways in which the marriage may develop after the prenup has been signed. For instance, applying Kim’s regret principle, a change in conditions or circumstances could in many cases lead the parties to change their minds, as exemplified by the vignette outlined by a New York attorney at the beginning of this paper. From this perspective, RCT is well suited to the aims of consentability because, like consentability, it promotes the idea of consent as elastic and context dependent.<sup>55</sup>

RCT can be a valuable way of understanding marriage and transactions made within it. When applied by Robert Leckey,<sup>56</sup> RCT illuminates the marital obligations that arise over time from a combination of parties’ interaction, tacit agreement, and statute. Yet when a prenup is considered without reference to its relational context, these changing conditions are not accurately reflected in its terms. In other words, it is only by focusing on the relationship between the parties, and by looking beyond any written terms fixed at a particular moment in time, that the implicit understandings affecting consent can be seen. This underscores the force of RCT’s potential to align with the aims of consentability.

Importantly, however, FRCT develops this model even further. As I have argued previously,<sup>57</sup> RCT does not explicitly address gendered power dimensions in prenups. This is not to deny RCT’s *capability* to address the consequences of gendered power in intimate relationships. Indeed, by looking to the gains and losses flowing from the relationship as Leckey does, RCT can recognise the connection between divorce and poor economic

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54. See Lynn Baker & Robert Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17(4) LAW AND HUM. BEHAV. 439, 445-48 (1993).

55. See NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 81 (2019).

56. See Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL L.J. 1, 9 (2002).

57. Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45(4) J. LAW SOC. 617 (2018).

conditions as a result of gendered changes and choices made during the marriage.<sup>58</sup> On the other hand, RCT has been treated with caution by feminist scholars as it is not *explicitly* feminist.<sup>59</sup> Indeed, John Wightman has argued that RCT could open up interesting possibilities for feminist commentators but must first be developed further. Wightman explains that the norms that commercial contracts draw on come from a particular contracting community into which prenups and other intimate agreements do not fit.<sup>60</sup> Furthermore, the norms on which relationships are built, and which RCT pays attention to, have the potential to favour some individuals and exploit others. Therefore, as I have argued, an approach based on RCT alone cannot adequately critique the gendered structures surrounding prenups.<sup>61</sup> Although RCT has now been developed outside its original commercial context, this context continues to constrain it, and it continues to be shaped by the priorities, assumptions, and values of liberal values. As RCT advocate David Campbell notes, these values, which are implicit in RCT, are incompatible with the prioritisation of feminist equality.<sup>62</sup> This underscores the need for FRCT. FRCT is designed to overcome this incompatibility by discarding the liberal values implicit in RCT and applying an explicitly feminist approach which develops RCT to pay attention not only to the tacit understandings affecting intimate relationships, but to also critique and subvert them.

As Part II discussed, viewing prenups through the lens of consentability helps problematize these agreements as gendered by paying attention to the destruction of consent through power imbalances and changing circumstances. Empirical data on prenups in New York indicates that these changes and imbalances are gendered because they often operate to protect the assets of the moneyed spouse and contract out of recognising the economic value of gendered roles such as reproductive and

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58. See Robert Leckey, *Relational Contract and Other Models of Marriage*, 40 OSGOODE HALL L.J. 1, 14-18 (2002).

59. See Máiréad Enright, *Contract Law*, in GREAT DEBATES IN GENDER AND LAW 1, 11 (Rosemary Auchmuty ed., 2018).

60. See John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUDIES 93, 106-07 (2000).

61. Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45(4) J. LAW SOC. 617 (2018).

62. David Campbell, *Afterward: Feminism, Liberalism and Utopianism in the Analysis of Contracting*, in FEMINIST PERSPECTIVES ON CONTRACT LAW 161, 165 (Linda Mulcahy & Sally Wheeler eds., 2005).

domestic labour.<sup>63</sup> An orthodox approach to contract that does not align with consentability would be gender neutral, suggesting that inequalities affecting prenups are determined by the choices of self-interested, liberal individuals, rather than recognising the unequal and gendered structures of society. Therefore, the aim of the “F” in FRCT is to provide an alternative analysis of traditional doctrinal concepts in contract and to give them new meaning. A feminist perspective can take us away from a binary view of choice towards an understanding of the many and varied ways in which people really make decisions, and the social, economic, and legal pressures they are under when making these decisions. It ensures that disparity of power between the parties is a central rather than residual consideration. A feminist approach alters the lens through which we see law and the social world by shedding light on structural and entrenched gendered disadvantages that are perpetuated. Without a feminist approach, the gendered assumptions embedded in legal and social arrangements are rendered invisible.<sup>64</sup>

Feminist perspectives can facilitate recognition of power imbalance, challenge the binary notions of consent/non-consent criticised by Kim, and appreciate the context and (gendered) material realities of parties to agreements.<sup>65</sup> This context is important because research shows that women’s experiences of relationship breakdown in the US are often different to those of men.<sup>66</sup> Where RCT has the *capacity* to appreciate these lived realities, FRCT ensures such gendered inequities are brought to the fore.

FRCT also confronts the accusation of paternalism discussed in Part II because its feminist perspective places particular emphasis upon agency and challenges traditional understandings of this concept. This is because FRCT does not abandon agency by combining feminist understandings of power with RCT and consentability’s understanding of context. FRCT does not view choice simply as saying “yes” or “no” to a bad agreement and argues instead that it is possible to follow a third route:

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63. See SHARON THOMPSON, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* (2015) (referencing chapter 3 specifically, and the empirical data articulated therein).

64. See Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J. LAW. SOC. 351, 359 (2000).

65. See CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

66. JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* (2014).

negotiating an agreement that is beneficial for both parties. And so, while an orthodox approach might view signing a bad agreement as an irrational choice, FRCT can see that *for that individual*, signing might have been the most rational thing to do under the circumstances. Indeed, it might not be rational or practical, from their perspective, to walk away from the marriage. This is not to say that this individual has been incapable of consent or has lacked agency, but it does recognise how parties' unequal opportunity to exercise power in the relationship affects nuptial agreements. In short, the advantage of FRCT is that it does not prioritise autonomy over all other considerations, unlike both orthodox contract and relational autonomy. This is consistent with Kim's account too: "As important as the autonomy interest of the consenting party is," she notes, "it is not always the paramount interest and rarely the only interest implicated in an act involving consent."<sup>67</sup> And so, by instead prioritising the parties' relationship, contracts can be negotiated and given effect in diverse ways with consentability through FRCT.

#### IV. A NEW APPROACH FOR PRENUPS AND OTHER INTIMATE AGREEMENTS

In New York, prenups are valid if they are fair and reasonable when made and not unconscionable when enforced. While this appears to set prenups apart from other types of business contracts, my earlier work revealed that in practice, concepts like unconscionability are narrowly constrained and enforcement can be stringent even when attorneys believe an agreement was unfair. This is reflected in New York jurisprudence such as *Eckstein v. Eckstein*, where the court stated that "a duly executed [prenup] is given the same presumption of legality as any other contract, commercial or otherwise."<sup>68</sup> The problem with this approach is that it seems as if the prenuptial problems discussed in Part II cannot be addressed at the same time as requiring parties to abide by what they have agreed. It does not factor in the aims of consentability which require close scrutiny of Kim's requirements of voluntariness and knowledge that ensure adequate consent and prevent exploitation.<sup>69</sup> This is why FRCT is important in practice. The tools of FRCT can be used to rethink how prenups and other intimate agreements can be given effect in a way that is consistent with the aims of

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67. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 73 (2019).

68. *Eckstein v. Eckstein*, 129 A.D.2d 552, 553 (N.Y.S.2d 1987).

69. See NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 190 (2019).

consentability. This section discusses two practical ways an approach based on FRCT can capture, as Kim has put it, the “sliding scale nature of consent”<sup>70</sup> by rethinking contractual vitiating factors and by following what is known as a “non-bargain” approach,<sup>71</sup> that shifts focus away from the moment in which the agreement was consented to.

### A. RETHINKING CONTRACTUAL VITIATING FACTORS

The first practical way of following an FRCT based approach is for the court to adopt a more expansive interpretation of vitiating factors like undue influence. Undue influence ensures that the influence of one person over another is not abused.<sup>72</sup> Therefore, if the consent of one party is obtained in a way the law finds unacceptable, the transaction will not be allowed to stand. The aim of undue influence is not only to police consent; the doctrine is also about preventing “victimisation of one party by the other.”<sup>73</sup> Relying on this doctrine requires the affected party to prove that their free will was overborne in the circumstances as a result of improper pressure from the respondent. The problem is that pressure must be abnormal and exceptional to justify vitiation of an agreement because gendered power imbalances are often considered to be an ordinary consequence of intimate transactions by the court.<sup>74</sup> Research shows that prenups are frequently characterised by power disparity, and so in many cases the relevant pressure will be considered normal.<sup>75</sup>

However, if undue influence is considered from the perspective of FRCT, this is not necessarily the case. Instead of measuring the prevalence of undue pressure in intimate relationships to calculate whether it is exceptional or not, an approach consistent with FRCT distinguishes between normal and abnormal pressure according to the experiences of individual couples. The feminist approach is distinct from RCT because it does not draw on norms prevalent in commercial contract and pays explicit attention to issues of gender as explained in Part III. By taking specific relationship dynamics into account, power

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70. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 94 (2019).

71. John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEM. LEG. STUD. 93 (2000).

72. See RESTATEMENT (SECOND) OF CONTRACTS § 177 (AM. LAW INST. 1981).

73. *National Westminster Bank plc v Morgan*, [1985] 1 All ER 821 (Eng.).

74. See *Delorean v Delorean*, 211 N.J. Chan. 432 (N.J. 1986).

75. Sharon Thompson, *PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE* 109 (2015).

imbalances can be explained because they do not fit within the context of what is “normal” for that couple. However, while this could be an effective way of detecting the impact of illegitimate pressure on the decision to make a nuptial agreement, it does not adequately address Kim’s regret principle or account for unforeseen changes in circumstance after the agreement is made.

### B. A NON-BARGAIN APPROACH

This leads to the second potential way of implementing FRCT in practice—through a “non-bargain” approach.<sup>76</sup> Over time, spouses’ expectations and intentions fluctuate, particularly when there are unforeseeable changes during the marriage that affect couples’ wealth or families. Wightman argues that the bargaining process of agreements is not as important as the intentions shared by the parties over the course of the relationship.<sup>77</sup> Viewing parties’ intentions as developing over time means the focus is on the parties’ relationship instead of the bargaining process at the time the agreement was signed. In practice, the court could consider whether there was any evidence that the parties had an understanding of financial support different from the nuptial agreement and that they consequently relied on this changed understanding. A non-bargain approach would not promote estoppel claims, because estoppel requires the court to consider isolated acts of reliance and specific promises, instead of focusing first on the parties’ relationship with each other.<sup>78</sup> Rather, a non-bargain approach considers parties’ intentions and expectations in the overall context of the relationship. The feminist aspect of this approach is important, because it is particularly sensitive to the fact that career sacrifices or other changes in circumstance may affect women (or men in non-traditional roles) more if the nuptial agreement has not provided for these changes.

In the U.S., there are cases that suggest a non-bargain approach could be effective in practice. In the state of Oregon, the court in *Baxter v. Baxter*<sup>79</sup> held that the parties’ mutual intentions had changed since the prenup was signed. The prenup specified that ownership of the parties’ assets would remain

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76. Sharon Thompson, PRENUPTIAL AGREEMENTS AND THE PRESUMPTION OF FREE CHOICE 182 (2015); John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEM. LEG. STUD. 93 (2000).

77. *Id.*

78. *Id.*

79. *In re Marriage of Baxter & Baxter*, 911 P.2d 343 (Or. Ct. App. 1996).

separate. Though the parties kept their assets separate during the first thirteen years of the marriage, the wife subsequently left her job to work unpaid in her husband's business and paid off some of the business debt using her separate assets. Considering this course of conduct instead of only focusing on the point the agreement was signed persuaded the court to revise the agreement. Therefore, a non-bargain approach could also counteract the high threshold of unconscionability in New York case law, because it would enable the court to recognise a particular course of conduct as evidence that parties' intentions had changed and to vary the agreement accordingly.

## V. CONCLUSION

Consentability is an important perspective because it interrogates whether consent exists in a given situation by asking questions about who the consenting parties are, their knowledge, their behaviour, and the context of their agreement. This stands in marked contrast to orthodox understandings of consent, where consent is often presumed provided the standard requirements of a transaction have been met. The distinction between consent and consentability is important in the context of intimate agreements like prenups. Consent to a prenup is assumed provided both parties received adequate legal advice, proper financial disclosure, and there was no obvious evidence of undue pressure. Consentability probes further. It does not accept that the *appearance* of consent constitutes valid consent and it instead focuses on the web of potential power imbalances surrounding a decision rather than the mere fact an agreement has been legally signed.

While Kim recognises that consentability provides no easy solutions,<sup>80</sup> FRCT is an approach that could lead to some practical ways of adjudicating and enforcing prenups and other intimate agreements. It aligns with consentability and the idea of relative, shifting meanings of consent, that are located on a spectrum instead of conceptualised in a binary way. Furthermore, it builds on consentability by applying an explicitly feminist approach to redress the gendered issues consentability diagnoses. In practice, this has potential to empower contracting parties. By adopting, for instance, an expansive interpretation of vitiating factors and/or a non-bargain approach, FRCT creates a space in which the voices of both parties are heard, not just the party with the

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80. NANCY S. KIM, CONSENTABILITY: CONSENT AND ITS LIMITS 219 (2019).

most bargaining power. However, although FRCT can be used to recognise and mitigate power imbalances between individuals or between individuals and institutions, it still operates within a legal framework criticised by many feminists. As Carole Pateman argues, the roots of contract are based in inequality and informed by a status quo that treats everyone in a neutral way.<sup>81</sup> It is therefore important to note that although FRCT challenges these broader political, legal, and social issues, it does not resolve them. Instead, FRCT looks to how theory can work within the boundaries of law to inform *current* legal practice, so that patterns of power between individuals can be recognised in the context of everyday contracts. At the everyday level of prenups, there are diverse ways in which parties can negotiate power, and alternative insights into how decisions are made when making these agreements. FRCT is already evident in aspects of the law<sup>82</sup> and thus could be developed into a functional judicial framework. As a result, employing this approach in jurisdictions like New York would not require a wholesale transformation of the law, but instead suggests that this new perspective could provide more mutually beneficial solutions to some of the issues of power raised by prenups. Importantly, it would go beyond the legal consent criticised by Kim, as she says: “Legal consent is a conclusion, and without understanding how that conclusion was reached, we cannot determine whether it promotes or diminishes autonomy.”<sup>83</sup> Applying FRCT takes us some way towards this understanding because it does not stop its enquiry at, for instance, the *fact* a bad prenup was signed, it asks *why* someone would knowingly sign a bad agreement. In short, it focuses on the (often gendered) dimensions of intimate agreements affecting the balance of power between the parties to illuminate whether consent and autonomy has been exercised or constrained. In doing so, prenuptial problems can be addressed instead of marginalised.

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81. CAROLE PATEMAN, *THE SEXUAL CONTRACT* 65 (1988).

82. For a discussion of how facets of FRCT can be found in Australian law, see Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45(4) *J. LAW SOC.* 617 (2018).

83. NANCY S. KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 218 (2019).