

Michigan Journal of Gender and Law

Volume 24 | Issue 1

2017

A Relational Feminist Approach to Conflict of Laws

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Recommended Citation

Roxana Banu, *A Relational Feminist Approach to Conflict of Laws*, 24 MICH. J. GENDER & L. 1 (2017).
Available at: <http://repository.law.umich.edu/mjgl/vol24/iss1/1>

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A RELATIONAL FEMINIST APPROACH TO CONFLICT OF LAWS

*Roxana Banu**

Feminist writers have long engaged in critiques of private law. Surrogacy contracts or the “reasonable man” standard in torts, for example, have long been the subjects of thorough feminist analysis and critique. When private law issues touch on more than one jurisdiction, Conflict of Laws is the doctrine that determines which jurisdiction can try the case and—as separate questions—which jurisdiction’s law should apply and under what conditions a foreign judgment can be recognized and enforced. Yet, there are virtually no feminist perspectives on Conflict of Laws (also known as Private International Law). This is still more surprising when one considers that feminist approaches to Public International Law have been developing for over a quarter century.

In this Article, I show that there is a fundamental need to rethink the image of the transnational individual in Conflict of Laws theory and methodology. It is here, I argue, that feminism—specifically relational, often known as cultural, feminism—has an important contribution to make to Conflict of Laws. I develop a relational feminist approach to Conflict of Laws and apply it to a pressing contemporary issue, namely transnational surrogacy arrangements.

Overall, this Article shows how relational feminism can illuminate the problems of adopting an atomistic image of the individual in a transnational context, as well as provide an outline for an alternative—a relational theory of the self that redefines autonomy and the law, creating an important shift in how Conflict of Laws perceives its regulatory dimensions. The Article connects three of relational feminism’s core insights—the notion of relational autonomy, the focus on relationships, and relational theories of judging—to Conflict of Laws theory and methodology.

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INTRODUCTION

Feminists, as Robin West noted, seek both to “deconstruct so as to expose the hidden politics of dominant conceptions of justice” and to “construct or re-imagine alternatives with care.”¹ Feminist writers have reconstructed and reimagined key issues and areas of law, as well as the key jurisprudential categories underlying them, including rights,² contractual freedom,³ autonomy,⁴ the social contract metaphor,⁵ and many other concepts of traditional legal and political theory. Feminist approaches have long

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1. Robin West, *Re-Imagining Justice*, 14 *YALE J.L. & FEMINISM* 333, 344 (2002).
 2. See, e.g., Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 *REV. CONST. STUD.* 1 (1993).
 3. Robin West, *The Right to Contract as a Civil Right*, 26 *ST. THOMAS L. REV.* 551 (2014).
 4. Christine Di Stefano, *Autonomy in the Light of Difference*, in *REVISIONING THE POLITICAL: FEMINIST RECONSTRUCTIONS OF TRADITIONAL CONCEPTS IN WESTERN POLITICAL THEORY* 95 (Nancy J. Hirschmann & Christine Di Stefano eds., 1996).
 5. See Jean Hampton, *Feminist Contractarianism*, in *VARIETIES OF FEMINIST LIBERALISM* 159 (Amy Baehr ed., 2004).

been applied in the analysis of national private law—family law,⁶ contract law,⁷ and tort law.⁸ In international law, feminist approaches have developed more slowly.⁹ This may be because concerns for equality and empowerment do not map cleanly onto the classical inter-sovereign framework of Public International Law. Nonetheless, some success has been achieved in developing a feminist approach to international law.¹⁰

Between national and international law, public and private law, Conflict of Laws (also known as Private International Law) has a remarkable impact on the regulation of interpersonal relationships in the transnational realm. Yet it has remained insulated from the astute lens of feminist jurisprudence. Although the issues are similar to those in the purely domestic setting, and although feminist approaches have existed in Public International Law for a quarter century, feminist approaches to Conflict of Laws are virtually nonexistent.¹¹

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6. *E.g.*, Katharine Bartlett, *Feminism and Family Law*, 33 *FAM. L.Q.* 476 (1999); *FEMINIST PERSPECTIVES ON FAMILY LAW* (Alison Diduck & Katherine O'Donovan eds., 1st ed. 2007).
 7. *See, e.g.*, Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985); Mary Joe Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *AM. U. L. REV.* 1065 (1985); Debora L. Thredy, *Feminists & Contract Doctrine*, 32 *IND. L. REV.* 1247 (1999).
 8. *E.g.*, Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. LEGAL EDUC.* 3 (1988); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 *YALE J.L. & FEMINISM* 41 (1989); Carl Tobias, *Gender Issues and the Prosser, Wade, and Schwartz Torts Casebook*, 18 *GOLDEN GATE U. L. REV.* 495 (1988).
 9. *See, e.g.*, Hilary Charlesworth, Christine Chinkin & Shelley Wright eds., *Feminist Approaches to International Law*, 85 *AM. J. INT'L L.* 613, 614 (1991).
 10. Feminist writers are particularly interested in the application of egalitarian principles of justice in the private realm and are avid critics of the private/public dichotomy. *See, e.g.*, Carol Pateman, *Feminist Critiques of the Private/Public Dichotomy*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281 (S.I. Benn & G.F. Gaus eds., 1983).
 11. Notable exceptions are Ivana Isailovic, *Political Recognition and Transnational Law, Gender Equality and Cultural Diversification in French Courts*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 318 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2015); Karen Knop, *Relational Nationality: On Gender and Nationality in International Law*, in *CITIZENSHIP TODAY: GLOBAL PERSPECTIVES AND PRACTICES* 89 (T.A. Aleinikoff & D. Klusmeyer eds., 2001); Horatia Muir Watt, *Future Directions?*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 343 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2015) (recovering a framework of recognition inspired, among others, by feminist writings); Annalise Acorn, *Gender Discrimination in the Common Law of Domicile and the Application of the Canadian Charter of Rights and Freedoms*, 29 *OSGOODE HALL L.J.* 419 (1991) (regarding dependent domicile); Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 *MICH. J. INT'L L.* 523 (2001) (regarding dependent nationality).

This Article aims to create an initial bridge between feminism, especially relational feminism,¹² and Conflict of Laws by showing the ways in which relational feminism can reform Conflict of Laws and center it on a relational image of the individual in the transnational realm.

A bewildering variety of interpersonal relationships with a foreign element fall under the regulatory scope of Conflict of Laws, such that a large part of our transnational existence is impacted by Conflict of Laws norms. Conflict of Laws determines which law (not necessarily that of the forum) should apply to an interpersonal relationship touching upon different legal systems (e.g. cross-border contracts, transnational adoptions, family relations between individuals of different citizenship or domiciled in different jurisdictions, transnational torts, etc.), which court has jurisdiction to hear such disputes, and whether or not a judgment rendered in a transnational legal matter can be recognized abroad. Viewing a Conflict of Laws issue through the lens of feminist theory exposes the imbalance of power and wealth and the variety of oppressive relationships for people, especially women, in the transnational realm.

Feminist theory, particularly the relational variation I discuss in this Article, not only centers the analysis on gender hierarchies but also “envisages authority from *within* structures of power and authority” and is “sensitive to structural inequities in the position of differently situated women and members of social groups whose opportunity to shape their lives in self-determining directions are often meager and inadequate.”¹³ Critics claim that current Conflict of Laws norms have directly contributed to systemic inequality and injustice on a global level.¹⁴ Feminist jurisprudence would

12. Relational feminism represents one of several feminist perspectives. For a good introduction to relational feminism, see Mary Becker, *Patriarchy and Inequality, Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (1999). For an overview of different feminist perspectives, see Laws Lacey, *Feminist Legal Theory and the Rights of Women*, in GENDER AND HUMAN RIGHTS 13 (Karen Knop ed., 2004).

13. Anne Donchin, *Autonomy and Interdependence: Quandaries in Genetic Decision Making*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 236, 240 (Catriona Mackenzie & Natalie Stoljar eds., 2000) [hereinafter RELATIONAL AUTONOMY].

14. See, e.g., Horatia Muir Watt, *Introduction*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 1, 1 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2015):

Despite the contemporary juridification of international politics, private international law has contributed very little to the global governance debate, remaining remarkably silent before the increasingly unequal distribution of wealth and authority in the world. Under the aegis of the liberal divides between law and politics and between the public and the private spheres, it has developed a form of epistemological tunnel-vision actively providing immunity and impunity to abusers of private sovereignty.

therefore be ideally suited to redevelop Conflict of Laws theory and methodology in a way that would allow it to address, rather than perpetuate, global inequality and injustice.

This position is in tension with a growing movement to focus on the state rather than on the individual. Contemporary critics of Conflict of Laws interested in its potential as a form of global governance¹⁵ find that individual autonomy is unchecked in Conflict of Laws and that this is due to the field's individualism as a form of *private* law.¹⁶ This prompts them to advocate focusing on states rather than individuals. Critics also take aim at Conflict of Laws' "neutral" and apolitical stance, which is supposedly the result of Conflict of Laws' liberalism and insulates the field from the systemic, global implications of the world's current injustices and abuses brought or sustained by the operation of its norms.¹⁷ Since Conflict of Laws' problem is thought to be its individualism, it is no surprise that many global governance projects in Conflict of Laws recommend focusing on the state, incorporating regulatory policies, and reconnecting Private to Public

15. See, e.g., Private International Law as Global Governance (PILAGG), <http://blogs.sciences-po.fr/pilagg/> (last visited Jan. 29, 2017) (a program based at the Sciences Po Law School and co-directed by Horatia Muir Watt and Diego P. Fernández Arroyo). For different perspectives on how to think about and incorporate a global governance dimension in private international law, see Jacco Bomhoff, *The Constitution of the Conflict of Laws*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 262, 263 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2015); ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW (2009); Horatia Muir Watt, *Private International Law Beyond the Schism*, 2 TRANSNAT'L L. THEORY 347, 350 (2011).

16. See, e.g., Bomhoff, *supra* note 15, at 262 ("the appeal to constitutionalist ideas pursued in this chapter is one attempt to restoratively invoke some form of 'the public' in the face of increasing threats of private hegemony"). See also Muir Watt, *supra* note 15, at 387:

[T]he liberal paradigm favors an approach to legal problems in terms of the 'micro' or the individual—individual civil or political rights; private property; discrete contracts; non-mass torts. In addition, 'private' law adopts a backward-looking perspective, providing the tools for solving inter-subjective conflicts *ex post*, on a case-by-case basis. Issues relating to collective goods often tend to be confiscated or occulted by private conflicts. Private international law has internalized these limitations and disconnected from the macro-perspective which focuses on the surrounding social and political context.

17. See, e.g., Muir Watt, *supra* note 15, at 360, n. 62 ("The supposed 'naturalness' of the principles of private international law owes an initial debt to Von Savigny's great *Treatise of Roman Law System des heutigen Römischen Rechts*, 1849, whose famous chapter VIII is believed to be the fount of modern conflicts methodology").

International Law.¹⁸ Issues of Conflict of Laws, according to its critics, should be understood as conflicts of state authority, state interests, state sovereignty, or state resources, rather than conflicts of individuals' rights, interests, or reasonable expectations.¹⁹ Yet this call to move away from an individual-centered perspective is in tension with claims that Conflict of Laws fails to recognize relationships that are vital for individuals' dignity, security, autonomy, and sense of self-worth.²⁰ Even critics pleading for a state-centric vision of Conflict of Laws understand the dangers of excluding the agency and autonomy of individuals.

In other words, there is a tension within critical projects in Conflict of Laws. On the one hand, these projects underscore a real and significant threat of abuses of private power and illuminate the injustice and stark economic and social disparities that an individualistic outlook in Conflict of Laws may generate.²¹ On the other hand, these works draw attention to the dangers of eliminating individuals' space for contestation, and pleas for justice, recognition, and inclusion.²²

18. See, e.g., Bomhoff, *supra* note 15, at 263 (arguing for a shift from the private to a public paradigm); Muir Watt, *supra* note 15, at 350 (arguing for a move from the private law paradigm in Conflict of Laws to a connection with the politics of Public International Law); MILLS, *supra* note 15 (arguing for a reconnection between Conflict of Laws and Public International Law and a departure from the framework of justice in the individual case based in part on individuals' reasonable expectations).

19. For an examination of different state-centric, as opposed to individual-centered perspectives, see *infra* Section I.A.

20. Horatia Muir Watt, *Future Directions?*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 343, 367 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014).

21. The scholarship of contemporary European scholars focusing on Conflict of Laws' global governance function thus intersects with similar arguments made by American realist scholars in Conflict of Laws between 1930 and 1960. See *supra* notes 15–16 and accompanying text. See DAVID F. CAVERS, *THE CHOICE OF LAW: SELECTED ESSAYS, 1933–1983* (1985); BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Walter Wheeler Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 COLUM. L. REV. 368 (1931); Ernest Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1923).

22. See Ralf Michaels, *Economics of Law as Choice of Law*, 71 LAW & CONTEMP. PROBS. 73, 100 (2008) [hereinafter Michaels, *Economics of Law*]:

[The international law model] views choice of law as a mere subset of international law, and questions of the conflict between laws are not essentially different from conflicts between different policies more generally. . . . The vertical scope of state power over individuals is ignored. In an international-law model in which states are viewed as unitary actors, the problem of inefficient domestic rules cannot exist because those disadvantaged by such

It is no surprise then that on both sides of the Atlantic neither individualistic nor state-centric projects have been entirely satisfactory. Instead, the projects constantly operate in tension with each other, simultaneously challenging one another and borrowing from each other's insights.²³

I suggest that, once acknowledged, this tension should not translate into the familiar and constant pendulum between state-centric and individualistic perspectives in Conflict of Laws. Rather, what is needed is a rethinking of the image of the transnational individual in Conflict of Laws theory and methodology. It is here that feminism—specifically relational feminism, also known as cultural feminism²⁴—can contribute to a rethinking of Conflict of Laws. This article shows that relational feminism illuminates the

norms, private parties, are simply absent from the analysis, or rather, their interests are subsumed into those of states.

For European projects drawing attention to the dangers of eliminating individual agency, see AXEL FLESSNER, INTERESSENJURISPRUDENZ IM INTERNATIONALEN PRIVATRECHT (1990); Gerhard Kegel, *Begriffs- und Interessenjurisprudenz im internationalen Privatrecht*, in FESTSCHRIFT HANS LEWALD: BEI VOLLENDUNG DES 40. AMTSJAHRES ALS ORDENTLICHER PROFESSOR IM OKTOBER 1953 ÜBERREICHT VON SEINEN FREUNDEN UND KOLLEGEN MIT UNTERSTÜTZUNG DER BASLER JURISTISCHEN FAKULTÄT (Hans Lewald ed., 1953); Alexander Lüderitz, *Anknüpfung im Parteiinteresse*, in INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG IM AUSGANG DES 20. JAHRHUNDERTS: BEWAHRUNG ODER WENDE? FESTSCHRIFT FÜR GERHARD KEGEL 31 (Alexander Lüderitz & Jochen Schröder eds., 1977). Various American scholars also challenged the state-centric ideology of Brainard Currie and attempted to introduce a stronger focus on individual agency and autonomy. See, e.g., Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277 (1989); Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191 (1987); Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987).

23. For an argument that neither perspective, in isolation, is satisfactory for Conflict of Laws theory, see *Economics of Law*, *supra* note 22 at 102; Andreas Bucher, *La dimension sociale du droit international privé: cours general*, 330 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE EN LIGNE 1, 99 (2009) (available at http://dx.doi.org/10.1163/1875-8096_pplrdc_ej.9789004185098.009_526); Spyridon Vrellis, *Conflit ou coordination de valeurs en droit international privé a la recherche de la justice*, 328 RECUEIL DES COURS DE L'ACADÉMIE DE LA HAYE EN LIGNE 189, 196 (2007) (available at http://dx.doi.org/10.1163/18758096_pplrdc_ej.9789004172890.175_486).
24. For a general outlook on cultural feminism within feminist legal theory, see Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 872–77 (1990); Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1499–1501 (1992). Some representative perspectives of cultural—also known as “hedonic”—feminism are Mary Becker, *Patriarchy and Inequality, Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21 (1999) (coining the phrase “relational feminism”); Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987). For a more expanded understanding of relational feminism, see Symposium, *Feminist Theories of Relation in the Shadow of the Law*, 17 WIS. WOMEN'S L.J. 1 (2002).

issues posed by adopting an atomistic image of the individual in a transnational context and provides an alternative theory of the self, autonomy, and law.

Furthermore, relational feminism provides Conflict of Laws with a language to critique individualism that is itself individual-centered. As I explain in the following pages, relational feminists, unlike Conflict of Laws critics of individualism, are equally skeptical of state-centric or communitarian theories that uncritically subsume the individual under the state or the nation, and under state interests and collective preferences. Relational feminists' critique of individualism, unlike that of Conflict of Laws scholars, is not premised on the authority of the community over the individual by virtue of her belonging to such community, but rather on a rich and contextual description of human nature. The individual is—according to relational feminists—inherently social and constituted by the web of relationships in which she is embedded at different points in her life. By revealing and critically assessing this relational web in the transnational context, relational feminism enriches Conflict of Laws doctrine.

In the first section of this Article, I take stock of Conflict of Laws' individualistic and state-centric imaginaries. I show the way in which Conflict of Laws adopts the image of the isolated atomistic transnational agent in its theories of fairness, consent, and impartiality, as well as its notions of vested rights and formal autonomy. I then reveal two state-centric biases underlying Conflict of Laws theories that project transnational legal matters either as conflicts of sovereignty or of state interests.

This sets the stage for the connection that I forge between relational feminism and Conflict of Laws in the second part of the Article. My goal is to illuminate how core insights of relational feminism help to articulate some of Conflict of Laws' inherent tensions and “formulate a language” that centers Conflict of Laws theory and methodology on relational beings and autonomy.²⁵

To reveal how relational feminism could instruct the field of Conflict of Laws, I focus on three of relational feminism's core insights: its notion of relational autonomy which generates skepticism towards both individualistic and state-centric perspectives (II.A); its focus on networks of relationships, while emphasizing both their virtue and their perils (II.B); and the

25. JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF THE SELF, AUTONOMY AND LAW* 10 (2011) (“My hoped-for audience also includes those who have long seen things in relational terms but have not yet found an adequate language for articulating this perspective. One of the purposes of political theory, in my mind, is to help people formulate a language for how they see the world. When people's frameworks do not fit with the dominant one, they can be rendered inarticulate.”) [hereinafter NEDELSKY, *LAW'S RELATIONS*].

way in which relational feminism links a fluid relational analysis and methodology with judicial self-consciousness (II.C). I show how these analytical moves challenge both the individualistic and state-centric imaginaries of Conflict of Laws to project an entirely different analysis of Conflict of Laws matters centered on the patterns of relationships that Conflict of Laws norms structure in the transnational realm.

Throughout this Article, I outline the different lessons Conflict of Laws could learn from relational feminism by reference to international surrogacy arrangements. Surrogacy agreements arise between a woman who agrees to carry a baby (with the understanding that she will not keep him/her) and the intended parents of the baby.²⁶ The transnational nature of this agreement usually arises when, due to legal restrictions in the state of domicile/citizenship, the intended parents enter into an agreement with a woman of different citizenship and/or domicile. Often, either one or both of the intended parents will send their genetic material to the place of domicile of the surrogate mother or will travel to give such genetic material.²⁷ After the birth of the baby, the intended parents usually request, from the consulate of their country at the place of the child's birth, a travel document allowing them to bring the child into the intended parents' country and to register him/her as their child. Either at that stage or upon the child entering the country of the intended parents, authorities in countries that disallow domestic surrogacy agreements must decide whether to recognize the transnational surrogacy.

Conflict of Laws continues to struggle with the proper way of conceptualizing and analyzing such transnational legal matters. It also struggles to capture the diverse and interlocking interests involved in such matters. My goal is to show how a relational feminist analysis helps expose and problematize those interests, as well as the transnational regulatory model to which it might point. I therefore map the three core insights of relational feminism mentioned above onto three central Conflict of Laws issues involved in the analysis of transnational surrogacy arrangements.

First, Conflict of Laws often constructs and struggles to reconcile a perceived tension between autonomy and public policy. For transnational

26. *E.g.*, *In re Matter of Baby M*, 537 A.2d 1227, 1240 (N.J. 1988).

27. There are two types of surrogacy: traditional and gestational surrogacy. In traditional surrogacy cases, the surrogate mother becomes pregnant with the sperm of the intended father or is inseminated with donor sperm. In gestational surrogacy, an embryo is created by IVF, using the egg of the intended mother (or a donor egg) and the sperm of the intended father (or a donor sperm). For a description of different types of surrogacy, see *General Report on Surrogacy*, in *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 440 (Katarina Trimmings & Paul Beaumont eds., 2013).

surrogacy arrangements this translates into a tension between a state's policy to disallow surrogacy arrangements and the autonomy of the parties to enter into such an agreement and/or choose a law that validates such agreement. Relational perspectives on autonomy challenge and reconstruct this tension by offering a perspective on autonomy that differs from the classical market-based view.

Second, Conflict of Laws struggles to find adequate ways to resolve clashes between national and international policy, often involving human rights norms. In transnational surrogacy arrangements, conflicts between a state policy of disallowing such arrangements and the human rights of the child, or between a national policy of allowing such arrangements and the human rights of the surrogate mother seem to stymie much of the Conflict of Laws reasoning. Relational theories of judging illuminate important ways of referencing and balancing various community values.

Third, Conflict of Laws struggles with characterizing transnational surrogacy arrangements, which involve, for example, questions of filiation, contracts, and adoption. Relational feminism would provide a more nuanced perspective on the issue of characterization in Conflict of Laws. It instructs decision makers in Conflict of Laws to choose the legal category based on the particular kind of relationship it would structure between individuals in the transnational realm given the difference in the substance of the laws in conflict.

Transnational surrogacy arrangements represent a fruitful place of inspiration from relational feminism for Conflict of Laws. However, the value of relational feminism for Conflict of Laws is not limited to family and identity issues. Therefore, this Article concludes by briefly referencing ways in which relational feminist approaches in Conflict of Laws are equally valuable for transnational matters involving complex economic considerations, such as transnational torts of multinational corporations.

I. CONFLICT OF LAWS IMAGINARIES

A. *State-Centric Imaginaries*

Because a Conflict of Laws case involves not only individuals, but also their states, some scholars tend to see the issue as a continuation of private law and thus a matter between two individuals, while others see the conflict as between the different states whose laws are implicated in the legal issue.²⁸ For example, the question is often asked whether the recognition of international surrogacy arrangements is premised on international comity among

28. For a description of such perspectives in classical Conflict of Laws theories and in recent economic theories in Conflict of Laws, see *Economics of Law*, *supra* note 22.

states²⁹ or on parties' autonomy via consent to the agreement or the choice of law validating such agreement.³⁰

As Ralf Michaels pointed out, Conflict of Laws continuously struggles with such questions as:

Is choice of law about conflicts between states and their desires to regulate? (as the governmental-interest analysis dictates it?) Or is it about conflicts between private rights acquired in one state and public regulation in another (as in vested-rights theory)? Or is it not about conflicts at all, but merely about the technical designation of the applicable law?³¹

Conflict of Laws hosts a state-centric bias that is rarely critically examined. In light of recent fears of individualistic autonomy, Conflict of Laws' own state-centrism has been even less questioned and rethought. Yet at least two prominent traditions show the entrenched state-centric directions of Conflict of Laws.

A first variation of state-centrism is seen in the nineteenth century association between Conflict of Laws and Public International Law, which combined the imagery of Conflict of Laws with Public International Law's division of sovereignty.³² Conflict of Laws matters became inquiries into the limits of "personal" or "territorial" sovereignty in broad categories of Conflict of Laws relations. The "state-centric ethic" Conflict of Laws acquired through its association with Public International Law³³ advanced the proposition that it is "entirely wrong to assume that the individual has a right to the application of a certain law, because the limits of the authority of law

29. See Steven H. Snyder, *United States of America*, in INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL 387, 387 (Katarina Trimmings & Paul Beaumont eds., 2013).

30. See Mary Keyes, *Cross-Border Surrogacy Arrangements*, 26 AUSTL. J. FAM. L. 28 (2012) for such a perspective in Australian decisions on international surrogacy arrangements.

31. Michaels, *Economics of Law*, *supra* note 22, at 78.

32. For a general discussion of the nineteenth century internationalist school of thought focused on state sovereignty, see André Bonnichon, *La notion de conflit de souverainetés dans la science du conflits de lois*, pt. 1, 39 REV. CRIT. DR. INT. PRIVÉ 615 (1949) [hereinafter Bonnichon, *Pt.1*]; André Bonnichon, *La notion de conflit de souverainetés dans la science du conflits de lois*, pt. 2, 40 REV. CRIT. DR. INT. PRIVÉ 11 (1950) [hereinafter Bonnichon, *Pt.2*].

33. For the proposition that Conflict of Laws should move past the state-centric ethic borrowed from Public International Law, see H. Patrick Glenn, *The Ethic of International Law*, in THE ROLE OF ETHICS IN INTERNATIONAL LAW (Donald Earl Childress ed., 2012).

are not fixed by consideration to private interests but result from the limits of the public powers which enacted them.”³⁴

The Conflict of Laws determination was imagined in these terms: “The litigating parties disappear for a while: instead there are only two sovereigns in attendance and their respective rights and obligations can only be determined by Public International Law.”³⁵ For a representative number of nineteenth century Conflict of Laws scholars, it was clear that “we are not dealing with individuals, but with states,”³⁶ and that Conflict of Laws, as doctrine, was limited to settling relationships between states and establishing the limits of their respective legislative competence with respect to rights and private interests.³⁷ In its more extreme variations, the state-centric perspective made it almost impossible to account for the agency of the litigating parties. Their appeals to the application of a particular law had to be made “in the name of a sovereign.”³⁸ In the nineteenth century, Mailhé de Chasset argued that when a court is asked to recognize the application of foreign law and rights granted by such law, the request does not come from “a person, a simple individual,” but rather “a foreign sovereign,” and failure to apply this law would result in “an infringement of the public law of the foreign sovereign.”³⁹

Although this state-centric paradigm structured around a universal distribution of state sovereignty is not as explicitly articulated now as in the quotes above, it is no nineteenth century relic. In 1950, it was still perceived as the dominant theory of Conflict of Laws, at least in civil law jurisdictions.⁴⁰ Recently, it has been revived in projects aiming to reconnect Private to Public International Law.⁴¹ Furthermore, as I show in another Article, courts often decide cross-border transnational tort matters in a way that resembles nineteenth century state-centric theories focused on a formalist

34. Antoine Pillet, *Droit international privé considéré dans ses rapports avec le droit international public* [Private international law considered in its relations with public international law], in ANNALES DE L'ENSEIGNEMENT SUPÉRIEUR DE GRENOBLE [A.L.S.G.] 309, 335 (1892).

35. *Id.*

36. *Id.*

37. See ANTOINE PILLET, PRINCIPES DE DROIT INTERNATIONAL PRIVÉ 56 (1903) (connecting Conflict of Laws with Public International Law and conceptualizing Conflict of Laws matters as conflicts of state sovereignty).

38. Mailhé de Chasset, *Traité de statuts (lois personnelles, lois réelles), d'après le droit anciennes et le droit modern*, in DROIT INTERNATIONAL PRIVÉ [D.I.P.] 214 (1845).

39. *Id.*

40. Bonnichon, *Pt. 1, supra* note 32, at 615.

41. See MILLS, *supra* note 15.

notion of state sovereignty.⁴² Under this paradigm, transnational torts of multinational corporations are generally submitted to the law of the place of tort on the assumption that this country should have the authority to regulate all torts in its territory. This solution appeals to the principles of neutral distribution of authority. However, it ignores the stark imbalance of power and resources between different states implicated in the international investment regime. It also ignores or excludes considerations of imbalance of power between multinational corporations and the local population.

A second variation of the state-centric argument was articulated in the United States in the nineteen-sixties by Brainerd Currie, who imagined Conflict of Laws matters as conflicts of state interests.⁴³ In his account, judges should determine Conflict of Laws matters by discerning legal policies underlying potentially applicable laws and then distinguishing between true conflicts (in which all states have an interest in regulating the matter), false conflicts (in which only one state has an interest), and unprovided-for cases (in which neither state has an interest).⁴⁴ While Currie's approach replaced nineteenth century formalism with a policy-oriented examination of state interests, the "state-centric ethic" remained largely intact.⁴⁵ While the formalism that nineteenth century scholars attributed to state sovereignty was replaced by a policy oriented examination of state interests, the "state-centric ethic" had not changed much.⁴⁶ The assumption was still that only two sovereigns are in attendance in this struggle over divergent state interests and that the voice of the litigating parties or other affected individuals and groups are comfortably reflected in the judges' articulations of states' policies deduced from statutory interpretation.⁴⁷ Individuals' agency in articulating their appeals to justice through the application of one law or another were explicitly excluded, since Conflict of Laws matters are perceived

42. Roxana Banu, *Assuming Regulatory Authority for Transnational Torts: An Interstate Affair? A Historical Perspective on the Canadian Private International Law Tort Rules*, 31 WINDSOR Y.B. ACCESS JUST. 197, 210–11 (2013).

43. See BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

44. *Id.* at 107, 119, 163, 189, 726.

45. *Id.* at 83, 86, 103, 141 n. 53, 292.

46. For two prominent critiques of the state-interest methodology and its state-centric premises, see Brilmayer, *supra* note 22; Dane, *supra* note 22.

47. For an argument that state policies should be disaggregated to distinguish between different interests (individual, group, and public), see Robert Kramer, *Interests and Policy Clashes in Conflict of Laws*, 13 RUTGERS L. REV. 523, 526 (1959) (arguing that the task of state interest analysis should be "identifying and separating from each other the various interests—individual, group, social" and understanding the way in which the respective law is trying to reconcile "conflicts among or between the identified interests").

as clashes between the interests of the states, not the litigating parties.⁴⁸ This particular state-centric theory is not a relic of the sixties either. Rather, this perspective has been recast in more recent theories focused on game-theoretical models of maximizing state interests.⁴⁹

B. Individualistic Imaginaries

State-centric imaginaries in Conflict of Laws have always been challenged by countervailing individualistic alternatives. Nineteenth century formalist state-centric theories operated in tension with early nineteenth century vested rights theories arguing that the existence of a right in the transnational context is determined “not by submission under a law, but is a direct consequence of autonomy. Foreign law is applied therefore simply because this is what the parties want.”⁵⁰ Whether a right is vested “does not depend on a particular legal order, but on natural law and autonomy.”⁵¹ “If a court applies forum law over the law desired by the individuals, it offends not foreign law and the foreign state, but the individual and her rights vested in accordance with party autonomy. It would falsify her will.”⁵² Under this perspective, in transnational tort matters it was thought that the law of the place where the tortious act occurred would apply simply because the tortfeasor manifested his/her will to act in that territory which in turn creates a vested right to the application of such law.⁵³

Today, variations of this theory focusing on individual autonomy and choice are on the rise in Conflict of Laws.⁵⁴ The notion that individuals may simply choose the law applicable to their transnational relations, or that

48. For a critique along these lines see David Cavers, *A Correspondence with Brainerd Currie, 1957-1958*, 34 MERCER L. REV. (SPECIAL CONTRIBUTION) 471, 485 (1982) [hereinafter Cavers, *A Correspondence*].

49. Michaels, *Economics of Law*, *supra* note 22, at 83–84.

50. HORST MÜLLER, DER GRUNDSATZ DES WOHLERWORBENEN RECHTS IM INTERNATIONALEN PRIVATRECHT 184 (1935), referencing Friedrich Wilhelm Tittmann, *De competentia legum externarum et domesticarum in defendis potissimum iuribus coniugum* (1822).

51. *Id.* at 185.

52. *Id.*

53. *Id.* at 188.

54. See Ralf Michaels, *Party Autonomy in Private International Law—A New Paradigm Without a Solid Foundation?*, 15 JAPANESE Y.B. INT’L L. 282, 282 (2013) (noting the increasing importance attributed to party autonomy in Conflict of Laws and contesting its traces to the main Conflict of Laws theories) [hereinafter Michaels, *Party Autonomy*]; Sagi Peari, *Savigny’s Theory of Choice-of-Law as a Principle of Voluntary Submission*, 64 U. TORONTO L.J. 106, 106 (2014) (for a Kantian reading of Savigny’s Conflict of Laws theory as premised on freedom of choice); Horatia Muir Watt, *“Party Autonomy” in International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 6 EUR. REV. CONTRACT L. 250, 250 (2010)

such choice can be deduced from their actions, is a common slogan in Conflict of Laws theory.⁵⁵ Prominent contemporary economic theories of Conflict of Laws focus on party autonomy and the alleged efficiency of premising Conflict of Laws on an express or implied choice of law by the parties.⁵⁶

To counter Brainard Currie's theory, which focused on regulatory policies and state interests, scholars have referenced the Rawlsian division between justice and fairness,⁵⁷ the Dworkinian metaphor of rights as trumps,⁵⁸ and the notion of formal equality.⁵⁹ Terry Kogan, for example, explained that "[f]airness contacts are unrelated to state interests or regulatory policies,"⁶⁰ and Lea Brilmayer argued that a Conflict of Laws "[r]ights analysis only establishes what Robert Nozick has called 'side constraints,' namely principled limits, based on fairness, on what the state may do."⁶¹ Therefore, determinations of which law to apply in a transnational legal matter should not be based on appreciations of different regulatory policies under different laws, but rather on formal bases of legitimate authority. In Brilmayer's account, for example, a state may only impose its authority on its domiciliaries and not on foreigners, even if their conduct may affect domiciliaries or the local economy.⁶² Notions of political legitimacy grounded in the social contract, therefore, should serve as trumps to the authority of a state in transnational legal matters.⁶³

II. THE PROMISE OF A RELATIONAL FEMINIST ANALYSIS FOR CONFLICT OF LAWS

In 2008, Ralf Michaels tested—and contested—the value of economic theories of Conflict of Laws, which are now prominent in the United

(criticizing the increasing tendency to accredit freedom of choice as the foundational principle in Conflict of Laws).

55. Michaels, *Party Autonomy*, *supra* note 54, at 282.

56. *See, e.g.*, MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 12–13, 29 (2001); Erin O'Hara & Larry Ripstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1186–87 (2000); Gisela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKLEY J. INT'L L. 801, 802 (2006).

57. Terry S. Kogan, *Toward a Jurisprudence of Choice of Law: The Priority of Fairness over Comity*, 62 N.Y.U. L. REV. 651 (1987).

58. *See* Brilmayer, *supra* note 22, at 1277.

59. Kogan, *supra* note 57, at 699 nn. 255 & 257.

60. *Id.* at 679.

61. Brilmayer, *supra* note 22, at 1279.

62. *See id.* at 1292–95.

63. *See id.* at 1279–80.

States.⁶⁴ He demonstrated that economic theories merely replicate, rather than reconcile, the individual-centered/state-centered duality that underlies classical Conflict of Laws theories. Thus, current economic theories of Conflict of Laws simply choose either an individual-centered or a state-centered paradigm and provide “an economically substantiated answer to their chosen question”⁶⁵ but will neither justify their preference for one or the other paradigm,⁶⁶ nor engage with the critique against an absolute focus on party autonomy or on public policy, on individualism or on communitarianism.⁶⁷

In Michaels’s view, the failure of economic theories of Conflict of Laws is what is most instructive about them. “The isolation of certain values in the economic analysis, especially those of private and public ordering, respectively, shows that it is the combination of, and the conflict between, these values that defines the field [of Conflict of Laws].”⁶⁸ But the failure is nevertheless regrettable precisely because it is a combination of individual-centered and state-centered perspectives that Conflict of Laws would need most. In Michaels’s view, “[t]his is a combination that traditional doctrine [of Conflict of Laws] has not yet addressed adequately and one in which economics can make a true contribution.”⁶⁹

In the following section, I argue that a relational feminist approach to Conflict of Laws provides precisely such a combination of individual-centered and state-centered, private and public, perspectives. Relational feminism has already articulated powerful critiques of both extreme positions in various areas of domestic law and in Public International Law. Relational feminism’s articulations of relational identity and autonomy, between the individualistic and communitarian paradigms, inject a much-needed balance between individual-centered and state-centered considerations in Conflict of Laws theory and methodology.

64. See Michaels, *Economics of Law*, *supra* note 22.

65. *Id.* at 78.

66. See *id.* at 76, 78.

67. See *id.* at 75.

68. *Id.* at 76.

69. *Id.* at 102. I have argued at length that Conflict of Laws’ nineteenth century intellectual history hosts a “relational internationalist” theoretical perspective that aims to create a blend between individual-centered and state-centered perspectives. See Roxana Banu, *From Conflicts of Sovereignty to Relationships: Recovering Nineteenth Century Relational Internationalist Perspectives in Private International Law* (dissertation, defended June 2016 at the University of Toronto) (in contract with Oxford University Press, forthcoming 2018 in the series THE HISTORY AND THEORY OF INTERNATIONAL LAW). I also argue that Conflict of Laws’ nineteenth century relational internationalist perspectives should be connected to contemporary relational feminist theories (unpublished paper, awarded the American Society of International Law for Best Text in Private International Law in 2016) (on file with author).

A. *Introducing Relational Feminism to Conflict of Laws*

Relational feminism situates itself precisely at the juncture of the individualistic and state-centric paradigms. At that intersection, neither the atomistic image of the individual, nor the idealization of community and of the public interest is embraced as such. At the same time, neither image is entirely refuted. As Jennifer Nedelsky explains:

Feminism appears equivocal in its stance toward liberalism because it simultaneously demands a respect for women's individual selfhood and rejects the language and assumptions of individual rights that have been our culture's primary means of expressing and enforcing respect for selfhood. This apparent equivocation is not the result of superficiality or indecision. On the contrary, it reflects the difficulties inherent in building a theory (and practice) that adequately reflects both the social and the individual nature of human beings.⁷⁰

Relational feminism is premised on the centrality of relationships in people's lives. It pleads for the nurturing of relationships that are valuable for people, as well as for legal and social intervention into relationships that harm people. Relational feminism starts from a thorough reflection on human nature, as well as the different ways in which women and men experience personhood, though insistence on one or the other often creates different visions of relational feminism. Relational feminism is sometimes premised on the view of female identity, based on Carol Gilligan's work, that women *tend to* see themselves as linked to and even responsible for many other individuals.⁷¹ As a result, their moral reasoning references an

70. Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8 (1989) [hereinafter Nedelsky, *Reconceiving Autonomy*].

71. Relational feminism has been criticized for essentializing women's alleged different voice across cultures and for underappreciating that the care paradigm, in large part, has been attributed to women because of subordination under patriarchy, rather than because of biological differences. See Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 115, (1989) (arguing against essentialism and for recognition of differences even within the relational feminist paradigm); *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 25–28 (1985) (Catherine McKinnon, in conversation with other feminist scholars, arguing that we cannot attribute a genuine care voice to women under conditions of persistent subordination and patriarchy). Several feminist scholars have tried to argue for a less gender-based care theory. See Annette C. Baier, *Hume, The Woman's Moral Theorist?*, in WOMEN AND MORAL THEORY 37 (Eva Kittay & Diane Meyers eds., 1987); Joan C. Tronto, *Beyond Gender Differences to a Theory of Care*, 12 SIGNS 644, 644–45, 658–59 (1987). However, Leslie Bender has rejected a humanist, rather than femi-

“ethic of care.” Alternatively, men *tend to* be motivated by an ethic of justice, premised on rights reasoning and a vision of self-made and self-sufficient individuals.⁷² When linked to an ethic of care, relational feminism is not just an analytical relational method that opens up the context under legal analysis allowing for a wide range of possible outcomes. Rather, it also becomes a plea for “increased valuation of caretaking, accommodation of caretakers’ needs in employment settings, and breaking the link between sex and gender roles.”⁷³ Furthermore, in Robin West’s powerful articulations, “the ethic of care embedded in the female labor of attending to intimate relations is a principled moral stance . . . and therefore might express a moral ‘point of view’ of importance in all areas of life, and not just the familial.”⁷⁴ West shows powerfully how resurfacing women’s distinctive sensibilities of the ethic of care that have remained undervalued and even

nist, theory of care and has responded to many of the critiques brought against relational feminism. Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and the Ethic of Care in Law*, 15 VT. L. REV. 1 (1990). As will hopefully become apparent from the analysis in this Article, it is not necessary to unequivocally attribute the paradigm of care only to women, or to consider this paradigm universally valid, in order to highlight the contributions that relational feminism could bring to Conflict of Laws. While I do not argue that the care theory applied to Conflict of Laws needs to be exclusively associated with women’s experiences, I do argue that the moral theory developed from the feminist theory of care, focusing on increased empathy, responsibility, and care, should be applied to the analysis of transnational legal matters.

72. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). For criticism of Gilligan’s work, see MARILYN FRIEDMAN, *WHAT ARE FRIENDS FOR: FEMINIST PERSPECTIVES ON PERSONAL RELATIONSHIPS AND MORAL THEORY* (1993); JEAN GRIMSHAW, *PHILOSOPHY AND FEMINIST THINKING* 190–94 (1986); Barbara Houston, *RESCUING WOMANLY VIRTUES: SOME DANGERS OF MORAL RECLAMATION*, in *SCIENCE, MORALITY & FEMINIST THEORY* (Marsha Hanen & Kai Nielsen eds., 1987). See also Nancy Chodorow’s psychoanalytic account of masculine and feminine psychic development. NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978).
73. Becker, *supra* note 12, at 45. See also Julie White & Joan Tronto, *Political Practices of Care: Needs and Rights*, 17 *RATIO JURIS* 425, 449 (2004) (arguing for the recognition of an entitlement to participate in relationships of care and receive adequate care, as well as participate in the public process determining those entitlements). Prominent care ethics theories include: VIRGINIA HELD, *FEMINIST MORALITY* (1993); EVA FEDER KITTAY, *LOVE’S LABOR, ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999); RITA C. MANNING, *SPEAKING FROM THE HEART* (1992); NEL NODDINGS, *CARING* (1984); SARA RUDDICK, *MATERNAL THINKING* (1989); JOAN TRONTO, *MORAL BOUNDARIES* (1993).
74. ROBIN WEST, *CARING FOR JUSTICE* 6 (1999) [hereinafter WEST, *CARING FOR JUSTICE*].

marginalized under patriarchy⁷⁵ can also be extrapolated to help us “re-imagine” justice⁷⁶ and create more solidarity and empathy.⁷⁷

Further, relational feminism can be disconnected from cultural feminism and the ethic of care, providing a more general analytical framework, rather than a moral theory.⁷⁸ Jennifer Nedelsky argues in *Law's Relations: A Relational Theory of Self, Autonomy, and Law* that “there is value to the relational methodology as such”⁷⁹ and that the relational approach extends beyond personal relationships, to refer to structural and institutional relations,⁸⁰ and even that this approach should be “methodologically available to those whose relational stance is not primarily feminist.”⁸¹ In Nedelsky’s account, the relational lens is not extracted from an appreciation of the difference in women’s hedonic lives, “whether culturally induced, or shaped by such physical experiences as pregnancy and nursing.”⁸² Rather, in her view, “relationships are equally constitutive of males and females.”⁸³ The dual descriptive/prescriptive nature underlying Nedelsky’s relational feminism therefore includes both an argument about how autonomy actually works sociologically/psychologically⁸⁴ and, on this basis, another argument about what the law *should* promote/protect⁸⁵ and how the law should

75. *Id.* at 9.

76. ROBIN WEST, RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY, RIGHTS, AND THE RULE OF LAW (2003) [hereinafter WEST, RE-IMAGINING JUSTICE].

77. WEST, CARING FOR JUSTICE, *supra* note 74, at 126.

78. For a very useful distinction between relational feminism as a method and relational feminism as a feminist moral theory, see ROBERT LECKEY, CONTEXTUAL SUBJECTS: FAMILY, STATE, AND RELATIONAL THEORY (2008). See also NEDELSKY, LAW’S RELATIONS, *supra* note 25, at 87:

The ethic of care focuses on the particular rather than the abstract principle and attends to context and to relationships in particular. Identifying this form of moral reasoning—as genuine reasoning—was an important contribution. And it is obvious why people would see similarities in our approach. However, I do not see my work as creating a moral theory, which is the case for most theorists who work with the care framework. . . . [M]y primary interest is the role of relationship, institutional as well as personal, in enabling core values. Thus, relationship in my terms is not exclusively, or even primarily, about personal relationship.

79. NEDELSKY, LAW’S RELATIONS, *supra* note 25, at 78.

80. *Id.* at 81.

81. *Id.* at 84.

82. *Id.* at 32.

83. *Id.* at 33.

84. *Id.* at 34–38 (discussing the truth claim behind human dependency and relationality).

85. *Id.* at 70 (“law is *currently* structuring relations in ways that undermine women’s equality, and a change in the law could structure more equal relations between men and women”).

conceive of rights.⁸⁶ As a method, relationality “will clarify what is really at stake” in every legal determination and “clarify the nature of the substantive disagreement.”⁸⁷ It expands and reveals the context in which legal claims are articulated and adjudicated by exposing the web of nested relationships which interact with each other and in which individuals are constantly embedded.⁸⁸ And while context in Nedelsky’s relational methodology includes structural and institutional relations, it also moves beyond a pure contextual analysis by “asking the question of how law structures relationships” and by holding law and adjudicators accountable to the pattern of relationships they construct.⁸⁹

Regardless of whether Nedelsky is correct that many substantive commitments of the care and cultural feminists will flow from the relational method,⁹⁰ I argue that Conflict of Laws would benefit not just from the relational method itself, but also from engaging with the many premises of a moral relational feminist theory. Incorporating the relational method into Conflict of Laws would fundamentally shift Conflict of Laws’ framing of its regulatory function from recognizing vested rights or states’ interests to constructing just patterns of interpersonal relationships in the transnational realm. Furthermore, it would perceive litigating parties’ appeals to the application of one or the other law as a means of recognizing, restructuring, or transcending various types of relationships in the transnational realm—whether personal, structural, or institutional. This means, finally, that self-consciousness of one’s positionality,⁹¹ as well as empathy, would need to inform judicial determinations in Conflict of Laws, rather than the usual

86. *Id.* at 74:

Rights structure relations of power, trust, responsibility, and care. This is as true of property and contract rights as it is of rights created under family law. All claims of rights involve interpretations and contestation. My argument is that these inevitable debates are best carried on in the following relational terms. First, one should ask how existing laws and rights have helped to construct the problem being addressed. What patterns and structures of relations have shaped it, and how has law helped shape those relations? The next questions are what values are at stake in the problem and what kinds of relations enhance rather than undermine the values at stake.

87. *Id.* at 78.

88. *Id.* at 81.

89. *Id.* at 81.

90. *Id.* at 83 (explaining that the commitments of care “flow from the relational approach, though they are not my primary subject here”). For a broader explanation of how feminist normative commitments relate to the relational method, *see id.* at 84–85.

91. For a definition of “positionality,” *see infra* note 176 and accompanying text.

neutrality and deference to Conflict of Laws technicalities and “linguistic parallels.”⁹²

In addition, Conflict of Laws would benefit greatly from the more substantive claims of relational feminism premised on the ethic of care. Relationality should be more than a method for the field of Conflict of Laws. Robin West’s call to extend an “intersubjective sensitivity to the needs of others” such that various relationships—including those subject to Conflict of Laws analysis, I argue—“can be infused, simply, with care,”⁹³ would inject a much-needed reflection on interpersonal responsibility in transnational relations.⁹⁴ And if the sympathetic engagement with the wellbeing of others is extended to decision makers in Conflict of Laws—including judges—then it becomes clear that judges should reassess what at first sight appears as a clear individual choice or a clear public policy in the transnational realm, in light of individuals’ actual lived and complicated experiences.⁹⁵ This will also inject moral responsibility into Conflict of Laws decision-making that challenges the often-entrenched position that the main concern of Conflict of Laws is to select the applicable law, rather than consider the substantive outcome.⁹⁶

B. Relational Autonomy and the Feminist Critique of Both Community and the Atomistic Image of the Individual

At the heart of relational feminism is a project of reconstructing and re-imagining the central concept of liberalism—autonomy.⁹⁷ Relational

92. NEDELSKY, *LAW’S RELATIONS*, *supra* note 25, at 78–79.

93. WEST, *CARING FOR JUSTICE*, *supra* note 74, at 278.

94. For an interesting feminist perspective on responsibility partly inspired by the ethic of care, see Margaret Urban Walker, *Picking up Pieces. Lives, Stories, and Integrity*, in *FEMINISTS RETHINK THE SELF* 62, 64 (Diana Tietjens Meyers ed., 1997) (“The basic theme is that specific moral claims on us arise from our contact or relationship with particular others whose interests are vulnerable to or dependent on our actions and choices. We are *obligated to respond* to particular others when circumstances or ongoing relationships render them especially, conspicuously, or peculiarly dependent on us.”).

95. See generally Robin West, *Taking Preferences Seriously*, 64 *TUL. L. REV.* 659 (1990) (arguing for judicial paternalism exemplified in a surrogacy case); Robin West, Comment, *Rationality, Hedonism, and the Case for Paternalistic Intervention*, 3 *LEGAL THEORY* 125 (1997) (arguing for paternalism).

96. WEST, *RE-IMAGINING JUSTICE*, *supra* note 76, at 27 (“Judicial abdication of responsibility for the justice of ill consequences of a decision is never warranted, it is, rather, an act of bad faith.”).

97. See Marilyn Friedman, *Autonomy and Social Relationships*, in *FEMINISTS RETHINK THE SELF* 40 (Diana Tietjens Meyers ed., 1997) (“As an alternative, some feminists in the 1980s began recommending a relational concept of autonomy, one that treats social relationships and human community as central to the realization of autonomy.”).

feminist perspectives share the conviction “that persons are socially embedded and that agents’ identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity.”⁹⁸ The focus of a relational approach is “to analyze the implications of the intersubjective and social dimensions of selfhood and identity for conceptions of individual autonomy and moral and political agency.”⁹⁹

In a relational feminist account, autonomy is neither a capacity that individuals exercise in isolation and apart from any social context, nor a capacity that is inevitably defined by one’s membership in one particular community.

In the relational feminist’s view, autonomy fluctuates depending on the general context in which a person may find herself at any given moment. This construction makes many feminists skeptical of attempts to conflate choice and consent with autonomy.¹⁰⁰

Precisely because relational feminism takes account of a much wider range of relationships in which the individual is embedded at any given time, it problematizes consent much more thoroughly than libertarian or law and economics theories.¹⁰¹ In *Conflict of Laws*, an indigenous population’s implied or presumed intent to have the local law applied to the benefit of the corporation in transnational torts, or, similarly, a surrogate mother’s consent to the surrogacy contract (as well as to the application of the law that validates it) are not presumed as autonomous acts when viewed from a relational feminist lens. The social context of autonomy, as demon-

The 1990s, accordingly, are witnessing a renewed feminist interest in autonomy—but as relationally conceived.”) [hereinafter Friedman, *Autonomy and Social Relationships*].

98. Catriona Mackenzie & Natalie Stoljar, *Introduction* to RELATIONAL AUTONOMY, *supra* note 13, at 3–4.

99. *Id.*

100. See Susan Dodds, *Choice and Control in Feminist Bioethics*, in RELATIONAL AUTONOMY, *supra* note 13 at 213, 215. (“In making a rational choice in a pressing health-care context, an individual would usually consider the currently available alternatives; her current understanding of her values, desires, and goals; and what action or choices she believes, based on the information she has, would be most likely to bring about their realization. Her rational choice, however, may reflect heteronomously acquired values, desires, and goals; her medical condition may affect her understanding of herself and her priorities; the available information and alternatives may be the result of autonomy-limiting policies and practices; and so on.”).

101. On the ethic of consent, see generally Robin West and her engagement with Richard Posner. Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Richard Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); Robin West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

strated in the stark imbalance of power between the actors implicated in these relationships, as well as the vast economic disparities between the countries involved in the dispute, immediately challenge the presumption of consent present in Conflict of Laws discourse.

On the other hand, autonomy is not immediately presupposed *by virtue of* one's membership in a community. In the initial articulations of relational autonomy, feminism registered ambivalence "between thinking that autonomy should sometimes *give way* to relational values and thinking that autonomy *is itself* relational."¹⁰² This prompted feminist thinkers to theorize the complex connections between autonomy and the "social,"¹⁰³ such that one could explain how autonomy "comes into being" but is also "harmed through relationships with parents, teachers, and employers."¹⁰⁴

In Nedelsky's account, autonomy is an important "capacity" for individuals that is only "made possible by constructive relationship[s]."¹⁰⁵ This means that as much as there is "a social component built into the meaning of autonomy"¹⁰⁶ this is not an "*unqualified* assumption that social relationships are necessary to the realization of autonomy."¹⁰⁷ Relationships can be nurturing, but also oppressive.¹⁰⁸ In the next section, I explain the way in which relational feminists ponder on the particular types of relationships that may provide one or the other form of embeddedness. Here, I want to point out that relational autonomy registers skepticism not just about particular kinds of relationships, including personal relationships, but the general concept of community, including national community.¹⁰⁹

102. Friedman, *Autonomy and Social Relationships*, *supra* note 97, at 55.

103. *Id.* at 56.

104. NEDELSKY, *LAW'S RELATIONS*, *supra* note 25, at 3 (parentheses removed).

105. *Id.* at 39. *See also id.* at 124 ("The necessary social dimension of the vision I am sketching has two components. The first is the claim that the capacity to find one's own law can develop only in the context of relations that nurture this capacity. The second is that the 'content' of one's own law is comprehensible only with reference to shared social norms, values, and concepts.").

106. Nedelsky, *Reconceiving Autonomy*, *supra* note 70, at 36.

107. Friedman, *Autonomy and Social Relationships*, *supra* note 97, at 55–56.

108. *See* NEDELSKY, *LAW'S RELATIONS*, *supra* note 25, at 122.

109. *See* Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in *RELATIONAL AUTONOMY*, *supra* note 13, at 23 ("[F]eminists should be wary of an alliance with communitarianism since the communitarian view that we are so constituted by social relations and shared values that we are unable to reconsider our attachment to them is incompatible with a feminist commitment to communities of choice."). *See also* Linda Barclay, *Autonomy and the Social Self*, in *RELATIONAL AUTONOMY*, *supra* note 13, at 67 ("It has been noted by a number of feminists that communitarian valorization of 'traditions,' 'community,' 'tribe' and 'nation' frequently ignore their sexist and racist practices and the multifarious ways in which they contribute to gender oppression, the subjugation of certain ethnic groups, the exclusion of gays, and so on.").

Since relational feminists reject the image of the atomistic, isolated individual, one might assume that feminists would feel more comfortable referencing a social community, the state or state sovereignty. But precisely because feminists understand the potential limitations and constraints that the social context imposes on human, and especially women's, empowerment, "feminists are particularly unlikely to romanticize 'community.'"¹¹⁰ Indeed, feminists rebuke claims to authority merely in the name of the community. As Katharine Bartlett explained, feminism includes:

[A] commitment to the notion that there is not one, but many overlapping communities to which one might look for "reason." Feminists consider the concept of community problematic because they have demonstrated that law has tended to reflect existing structures of power. Carrying over their concern for inclusion from asking the woman question, feminists insist that no one community is legitimately privileged to speak for all others.¹¹¹

In 1993 when feminism had "yet to develop a sustained and direct critique of the sovereign state in international law,"¹¹² Karen Knop catalogued the ways in which feminism can be used to challenge notions of state sovereignty in Public International Law.¹¹³ First, relational feminism might accept an analogy between the state and the individual but argue that, just like the individual, the state should be understood in relational terms.¹¹⁴ Another type of feminist critique against sovereignty underscores the tendency to equate sovereignty with power rather than justice, such that interstate recognition and cooperation is premised on power and consent, rather than the level of justice states provide to various constituents, including women.¹¹⁵

Although feminist critiques have yet to focus on Conflict of Laws, the substance of these initial critiques of Public International Law are familiar and well-entrenched in Conflict of Laws theory and methodology. The argument that states do not exist in isolation, but must instead recognize each other and, implicitly, each other's laws, rests at the core of most internation-

110. NEDELSKY, *LAW'S RELATIONS*, *supra* note 25, at 122.

111. Bartlett, *Feminist Legal Methods*, *supra* note 24, at 855.

112. Karen Knop, *Borders of the Imagination: The State in Feminist International Law*, 88 A.S.I.L. PROC. 14, 14 (1994).

113. Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONT. PROBS. 293 (1993) [hereinafter Knop, *Re/Statements*].

114. *Id.* at 323.

115. *Id.* at 328–30.

alist theories in Conflict of Laws.¹¹⁶ It has even been accepted by particularist theories under the recognition that each state must have *some* set of Conflict of Laws rules.¹¹⁷ In turn, public policy has served as a correcting factor to this cosmopolitan premise of interstate cooperation and recognition. Although it may still not be in line with many feminist theories, the principle behind this public policy is that a state would not recognize a foreign rule of law if its application would lead to a result that is inconsistent with the fundamental values and principles of the jurisdiction of the court hearing a legal matter. Feminist theories would have much to contribute to a debate about what should be included in this category. Recently, Ivana Isailovic showed the complex analysis informed by feminist insights that must be applied when French courts adjudicate questions regarding veil wearing.¹¹⁸ Although the public policy exception remains a contentious matter in Conflict of Laws, at least in part the rationale behind its existence mirrors the feminist critique that recognition of sovereignty and interstate cooperation should include a way to question the justice, not just the power of another state.

My interest, however, lies in the third possibility of feminist critique that Karen Knop identifies under the heading “breaking down the state.”¹¹⁹ Knop writes that:

In the post-modern cacophony of the late twentieth century, it is clear that whatever the analogic conventions of international law, the State is not a unified self. It encompasses a variety of groups and performs a variety of functions. These functions do not necessarily serve the interests of all groups. For some functions, the advantaged group may be the entire population, while for others,

116. For a general account of the internationalist school of thought, see Henri Batiffol, *Principes de droit international privé*, 97 RECUEIL DES COURS 431 (1959). For a broad tracing of this school of thought and a critical note, see Arthur Nussbaum, *Rise and Decline of the Law-of-Nations Doctrine in the Conflict of Laws*, 42 COLUM. L. REV. 189 (1942).

117. See Franz Kahn, *Abhandlungen aus dem internationalen Privatrecht*, 40 JHERINGS JAHRBÜCHER FÜR DIE DOGMATIK DES BÜRGERLICHEN RECHTS 1, 40–42 (1899) (arguing that states are in principle free to adopt whatever rules of Conflict of Laws they wish, but states must have some system of Conflict of Laws, must not commit “abuses under international law,” and that there may be “certain concessions that states might make towards the international community”).

118. See Ivana Isailovic, *Political Recognition and Transnational Law, Gender Equality and Cultural Diversification*, in PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE 318 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2015).

119. Knop, *Re/Statements*, *supra* note 113, at 332.

a group within the State or spread across State boundaries may be disadvantaged.¹²⁰

From this realization, Knop asks, “regardless of whether sovereignty ultimately resides in the government or the people why should there be a single sovereign order coterminous with the State? Why not have overlapping sovereignties, fragmented sovereignties, layered sovereignties?”¹²¹

Relational feminism demonstrates that a critique of individualism should not blind us to the perils and injustices of state-centrism. Rejecting individualism and private abuse should not translate into an over-idealization of the state and an uncritical deference to state sovereignty or state interests.

As described above, Conflict of Laws critics have argued that the state interest analysis does not respect legitimate bases of authority generated by the social contract metaphor nor does it respect notions of formal equality. Relational feminism brings an entirely different—as well as more consequential—critique of state interest analysis, namely that it tends to reflect and re-assert the interests of the more powerful.¹²²

Relational feminism incorporates both the self-centered and communitarian components of autonomy. In the context of transnational surrogacy disputes, relational feminism would encourage a Conflict of Laws theory that takes into account the fact that the surrogate mother’s autonomy cannot be defined either through choice and consent in all circumstances, nor through her membership in a community that regards consent as the only prerequisite to the validity of surrogacy arrangements. Courts hearing disputes regarding international surrogacy arrangements often reason that the national public policy declaring such arrangements illegal is trumped by the consent of the parties to such arrangements, even when the conditions of such consent are dubious on classical liberal accounts.¹²³

120. *Id.* at 333.

121. *Id.*

122. For this rare perspective in Conflict of Laws, see Kramer, *supra* note 47, at 523. See also Bartlett, *Feminist Legal Methods*, *supra* note 24, at 861 (discussing the ways in which courts should engage in a very detailed analysis of state interests with the eye to understanding whose view and interests are thereby subordinated or marginalized).

123. For an argument that judges should see themselves as, first and foremost, respecting parties’ state preferences, see West, *Taking Preferences Seriously*, *supra* note 95. For an account of the increasingly important weight given to consent in transnational surrogacy cases in Australia, even when the circumstances of such consent are dubious, see Keyes, *supra* note 30, at 42. The court must often balance public policy concerns against the best interests of the child, and the best interests of the child often prevail. *Id.* at 42–43.

Relational feminism would disavow the alleged tension constructed in the Conflict of Laws reasoning between a state's public policy of disallowing surrogacy arrangements and the autonomy of the parties (including the surrogate mother) to enter into such arrangement elsewhere. Jennifer Nedelsky explains that while "there often seems to be a tension between the desire to enhance individual women's scope for choice, control, or autonomy on the one hand, and meeting collective goals such as equality for all women or optimal conditions for children on the other," this tension merely arises from the uncritical association of autonomy with market exchange.¹²⁴ In contrast, "if we shift our attention to what makes it possible for everyone's capacity for autonomy to flourish and develop, some of the tension will disappear or be recast."¹²⁵

A court in a jurisdiction with a policy against surrogacy arrangements might very well interpret such a policy as meant to ensure the surrogate mother's autonomy where such autonomy is not equated with market transactions over reproductive services.¹²⁶ Not all market transactions can be seen as equally valuable and representative of one's autonomy. For example, declaring some such transactions, including the sale of people or slavery contracts, as illegal is precisely a way of ensuring autonomy. As Robin West argues:

My inclination to consent to a surrogacy contract may indeed accurately reflect my "preferences," but my preference for money over the exclusive use of my reproductive capacities may itself be a product of a culture that excessively (and to my detriment) commodifies aspects of my being—including my labour, as well as my sexuality and reproductive life.¹²⁷

Recasting this alleged tension between a policy preventing surrogacy arrangements and parties' autonomy to enter such arrangements might in-

124. Jennifer Nedelsky, *Property in Potential Life? A Relational Approach to Choosing Legal Categories*, 6 CAN. J.L. & JURIS. 343, 356 (1993) [hereinafter Nedelsky, *Property in Potential Life?*].

125. *Id.*

126. For the view that surrogacy contracts should be viewed as any other type of contracts for services, see Richard Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995). For the opposite view from a relational perspective, see West, *Taking Preferences Seriously*, *supra* note 95. For a perspective within Conflict of Laws that surrogacy contracts should not be analogized to commercial contracts see Antoon (Teun) V. M. Struycken, *Surrogacy, A New Way to Become a Mother? A New Private International Law Issue*, in CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW 368 (K. Boele-Woelki et al. eds., 2010).

127. West, *Taking Preferences Seriously*, *supra* note 95, at 671.

struct a court hearing a dispute over a transnational surrogacy arrangement to consider the conditions in which the surrogate mother consented and might even provide for visitation rights or other forms of contact between the child and the surrogate mother.¹²⁸

C. Embracing, Restructuring, Transcending Relationships

Thus far, I have argued that the perception of the regulatory function of Conflict of Laws is channeled primarily through an individualistic or a state-centric perspective. I have also shown that relational feminists' reconstruction of autonomy offers firm theoretical ground on which to rethink the premises and value of both the individualistic and the state-centric perspectives. But does it offer an alternative for rethinking the central questions Conflict of Laws asks and how it perceives its regulatory function? In this section, I argue that it does when we insist that Conflict of Laws norms, like all legal norms, be drafted with an eye to relationships among people in the transnational realm. This initial proposition reveals that, for a field that is central to the regulation of transnational interpersonal relationships, Conflict of Laws theory and methodology fail almost entirely to engage with the relationships themselves and with the relational nature of transnational life. In this section, I argue that relational feminism would refocus traditional Conflict of Laws norms on the patterns of relationships they currently structure or help maintain. To incorporate this insight, Conflict of Laws would need to analyze the private law relationships in dispute in a much larger social context and would need to appreciate the litigating parties' appeals to the application of particular laws as appeals to the recognition, restructuring, or transcending of particular patterns of relationships in the transnational realm.

Conflict of Laws would first need to incorporate Jennifer Nedelsky's insight that:

[Individuals are embedded in] networks of relationships . . . networks that range from intimate relations with par-

128. In a recent comparative study on national practices and rules on transnational surrogacy arrangements, Katarina Trimmings and Paul Beaumont argued for the adoption of an international instrument of coordination among national central authorities, similar to the Hague Convention on Intercountry Adoptions. The authors argue that there should be a pre-approval mechanism in which adequate safeguards for all parties would be checked and ensured, including the conditions of consent and a grace period for the surrogate mother. See Katarina Trimmings & Paul Beaumont, *General Report on Surrogacy*, in *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 439, 531 (Katarina Trimmings & Paul Beaumont eds., 2013) [hereinafter *General Report*].

ents, friends, or lovers to relations between student and teacher, welfare recipient and caseworker, citizen and state, to being participants in a global economy, migrants in a world of gross economic inequality, inhabitants of a world shaped by global warming.¹²⁹

Individuals are embedded in a wide range of relationships, such that “the formative relations of parent and child, among siblings, and between husband and wife are all shaped by the wider societal, cultural relations of which they are a part.”¹³⁰ This means that the individuals within the private law relationships in dispute are each part of a much larger network of relationships. Conflict of Laws would need to grapple with the position of these individuals and their relationships in this much wider social web.

Yet it is precisely in this relationship between individuals and the social context that relational feminists register the ambivalence discussed above. Relational feminists recognize that there is no “core ‘inner self’ untainted by social influence.”¹³¹ But relational feminism is not prepared to embrace communitarians’ substitution of autonomy for the common good or to accept “inherited relationships” as the inevitable makeup of one’s identity.¹³² As Penny Weiss argues, “communitarians are concerned with the *loss* of ‘traditional boundaries,’ while feminists are concerned with the *costs* of those boundaries, especially for women.”¹³³ For feminists, “[t]he truth that selves are socially determined carries with it a certain *liberating* potential, a denial that social roles *need* be fixed and a repudiation of the claim that selves have an immutable nature that determines their roles.”¹³⁴

Therefore the particular contribution of feminism to relational theory is that the feminist lens can both recognize relationships that foster and enhance individual autonomy *and* restructure or even transcend oppressive, unjust relationships. Conflict of Laws should incorporate this relational feminist insight as a tool to recognize, restructure, or transcend particular relationships.

129. NEDELSKY, LAW’S RELATIONS, *supra* note 25, at 19.

130. *Id.* at 20.

131. See Linda Barclay, *Autonomy and the Social Self*, in RELATIONAL AUTONOMY, *supra* note 13, at 59.

132. See *id.* at 67.

133. Penny A. Weiss, *Feminism and Communitarianism: Comparing Critiques of Liberalism*, in FEMINISM AND COMMUNITY 161, 167 (Penny A. Weiss & Marilyn Friedman eds., 1995).

134. See Linda Barclay, *Autonomy and the Social Self*, in RELATIONAL AUTONOMY, *supra* note 13, at 67.

1. Recognizing Valuable Relationships

Horatia Muir Watt criticized Conflict of Laws recently for failing to provide a methodological approach that would ensure the recognition of relationships in the transnational realm that are vital for one's identity and relational self. "In a nutshell, the idea is that personal relationships created elsewhere, under a foreign law (and according to a potentially different understanding of their meaning and content), should be given a place (within the society and under the law of the forum) as such, respecting their specific, initial characteristics."¹³⁵ She notes that "for the moment, recognition in private international law is perceived largely as a competing, and opposing, methodological approach to individual trans-border relationships, for which traditional tools have had to make room, owing to the direct vertical and horizontal effects of hard-core human rights instruments."¹³⁶ For example, in the EU context, a human rights-based perspective is necessary in order to achieve the "cross-border continuity of a parent-child relationship on the dignitarian ground of the right to a normal family life"¹³⁷ or to obtain the recognition of a family name across borders as the corollary of the necessary "coherence of individual status of mobile citizens within the internal market."¹³⁸

The paradigm of recognition that Muir Watt seeks to introduce into Conflict of Laws focuses on "social reality,"¹³⁹ rather than dogmatic and abstract notions of law and rights; on fluid notions of reasonable expectations, rather than methodological play;¹⁴⁰ on "open-textured and deliberative normative modes, sensitive to life experiences with which it interacts" rather than "formal rationality of the law";¹⁴¹ and on "a method of care, respect for alterity, protection of dignity and identity, which are to a large extent excluded by the abstraction of private international law methodology."¹⁴² But Muir Watt is also cautious in suggesting that recognition should be limited to "personhood and family relationships."¹⁴³ Her intui-

135. See Muir Watt, *supra* note 11, at 367.

136. See *id.* at 369.

137. See *id.* at 369 (discussing two judgments from the European Court of Human Rights and European Court of Justice).

138. *Id.* at 369 ("If concerns for individual and collective dignity and identity, associated in other disciplinary fields with the recognition paradigm, have made a recent entrance into private international law, it has been through the transnational effects of fundamental rights.").

139. *Id.* at 372.

140. *Id.* at 373.

141. *Id.* at 375.

142. *Id.* at 378.

143. *Id.* at 367, n. 102 (explaining "[t]he scope of recognition cannot be defined dogmatically, in the way in which traditional methodological tools determine their pur-

tion might be that recognition may be confused with an overly liberal, possibly individualistic concept. If applied to the wide variety of Conflict of Laws matters, it could simultaneously achieve the recognition of identity and dignity, as well as individualistic property and contract claims.

But relational feminism would enable Conflict of Laws to recognize all types of relationships. While recognition of family and personal relationships might be more common, some may certainly wish to rely on Conflict of Laws rules to escape inequitable or violent personal relationships. And while critical projects might now be more attuned to the way in which many might wish to rely on Conflict of Laws rules to contest inequitable contract and property relationships, many feminist projects show the potential empowering nature of such relationships for many otherwise disadvantaged individuals.¹⁴⁴

2. Restructuring Oppressive Patterns of Relationships

Conflict of Laws often imagines the choice of law question in transnational tort matters as a question of vested rights, formal equality, or conflicts of sovereignty or state interests. However, Conflict of Laws can be used to restructure oppressive relationships. For example, by pleading for the application of the higher standard of care and damage quantum under the tort law of the jurisdiction of a corporation's headquarters, indigenous populations may attempt to restructure an investment relationship characterized by inequality in wealth and bargaining power. In a recent decision in the famous Chevron saga, the Canadian Supreme Court struggled to tweak comity, the rules of international jurisdiction, and enforcement of foreign judgments, due to its acknowledgment that the indigenous population was "seeking assistance" in Canadian courts.¹⁴⁵ But the court made no comments of what kind of assistance was sought beyond or implicit in the recognition and enforcement of the monetary debt and failed to engage entirely with the argument that human rights considerations might be in-

view, for the epistemological reasons that will be explained later. Recognition responds, rather, to a need stemming from the denial of identity, which will tend to circumscribe its use to personhood and family relationships. . . . A tort or criminal case may ALSO involve issues of recognition, if only through procedural issues of standing, for example.").

144. See generally PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (Harvard Univ. Press 1991); A.A. Alyetoro & Adrienne Davis, *Historic and Modern Social Movements for Reparations: The National Coalition of Blacks for Reparations in America (N'COBRA) and Its Antecedents*, 16 TEX. WESLEYAN L. REV. 687 (2010).

145. *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69, paras. 8, 19 (Can.).

volved.¹⁴⁶ Through a relational feminist lens we may see that implicit in these requests to apply one law or another, or to recognize a judgment abroad, are actions to restructure relationships built on inequality.

3. Transcending Oppressive or Undesired Relationships and Communities

One of the main ways in which Conflict of Laws norms have allowed individuals to transcend oppressive laws and oppressive regimes might have been through the application of domicile versus citizenship. Karen Knop argues forcefully that the principle of domicile gives rise to a kind of “private citizenship” which allows individuals to integrate themselves in communities other than those of nationality and have the law of the state of domicile applied to a variety of their claims in private law.¹⁴⁷ As she explains in a recent piece, domicile requires a different kind of relationship of individuals generally, and women particularly, to the state. Hence women could establish domicile simply because they were caregivers in the home, even if they had no presence in the public life of the state.¹⁴⁸ Knop’s feminist analysis encourages Conflict of Laws to acknowledge that the choice to adopt domicile over citizenship may empower individuals to transcend oppressive communities and relationships.

However, in Conflict of Laws, the domicile versus citizenship debate has often been understood as a civil law versus common law divide or a preference for territorial or personal elements of state sovereignty. For this reason, late nineteenth century attempts to pursue divorce proceedings by changing domicile were often described as affronts to sovereignty or evasions of ethical considerations common in one’s community—where community affiliation was described by reference to citizenship.¹⁴⁹ By contrast, relational feminism would allow us to see that Conflict of Laws debates about choosing domicile over citizenship, or the place of the tort over the

146. The International Human Rights Program at the University of Toronto, MiningWatch Canada, and the Canadian Centre for International Justice filed a Factum as joint interveners, but the court did not engage with their arguments in its decisions. The Factum is available at: http://ihrp.law.utoronto.ca/utfl_file/count/PUBLICATIONS/KLIPPENSTEINSChevronFactum%20-OTT_LAW-4722211-v1.pdf.

147. Karen Knop, *Citizenship Public and Private*, 71 LAW & CONTEMP. PROBS. 309, 319–20. (2008).

148. See Karen Knop, *Feminism and the Lost Private Side of International Law* (unpublished Article) (on file with author).

149. See JOSEPHUS JITTA, THE RENOVATION OF INTERNATIONAL LAW ON THE BASIS OF A JURIDICAL COMMUNITY OF MANKIND, SYSTEMATICALLY DEVELOPED 106 (Martinus Nijhoff 1919) (critiquing precisely this disempowering of people, especially women, by not allowing them to change their domicile and thereby have a favorable law applied to their petitions for divorce).

place of incorporation, as connecting factors for the determination of the applicable law in large private law categories are futile. Neither domicile, nor citizenship, neither the place of tort, nor the place of incorporation, are preferable connecting factors as such. Relational analysis does not endorse a particular connecting factor; rather, it selects a particular connecting factor dependent on the structure of relationships that one wants to achieve.

Relational feminists' focus on the patterns of relationships structured through law would not only be useful at the stage of determining the applicable law and opting for one connecting factor over another. It should also inform the Conflict of Laws analysis at an earlier and often crucial analytical step, namely characterization.

Because each private law category has its own choice of law norms, the Conflict of Laws analysis usually starts by characterizing the legal matter as a contract, family law matter, tort, etc. Courts have struggled to characterize transnational surrogacy agreements from among the three options referenced by the Report on Transnational Surrogacy Matters drawn up by the Permanent Bureau of the Hague Conference on Private International Law: contract, filiation, or adoption.¹⁵⁰

It is at this initial stage that relational feminism could contribute substantially to Conflict of Laws reasoning. Jennifer Nedesky has argued for a relational approach to choosing legal categories. Specifically, she has demonstrated the way in which creating a property right in various forms of potential life creates a variety of patterns of relationships (e.g. women with their bodies, the intended parents with the child and/or the surrogate mother, and among women in different countries).¹⁵¹ She concludes that "the choice of property as a legal framework will entail a choice of a particular vision of autonomy, one which has inequality embedded in it."¹⁵² Nedelsky argues that when choosing a legal category for different forms of potential life, we need to have in mind the types of relationships we want to structure, which she identifies as threefold: relationships of respect and appreciation for children, relationships of respect for women and honoring of their reproductive capacities and labor, and relations of equality between people of all classes and backgrounds, and specifically, between men and women.¹⁵³ This initial relational lens raises doubts about the suitability of

150. Hague Conference Report, The Permanent Bureau, Private International Law Issues Surrounding the Status of Children, Including Issues Arising From International Surrogacy Arrangements (2011), <https://assets.hcch.net/docs/f5991e3e-0f8b-430c-b030-ca93c8ef1c0a.pdf> [hereinafter Hague Conference Report].

151. See Nedelsky, *Property in Potential Life?*, *supra* note 124.

152. *Id.* at 350.

153. *Id.*

placing surrogacy under any of the three categories, and further, illuminates the proper process of choosing between them.

Analyzing surrogacy as a contract might express a conviction that there is nothing particularly different about a contract for carrying and giving birth of a child from an agreement for goods or services.¹⁵⁴ It would also place surrogacy under a presumed ethic of consent that is prevalent in contract matters. This might entrench the presumption that Robin West criticized at length that “[a]ll our contracts reflect our private preferences that in turn reflect our private desires, which, if satisfied, will produce value.”¹⁵⁵ From a relational feminist perspective, this would mean simplifying, indeed eliminating, the entire contextual framework in which surrogacy contracts occur: the fact that many surrogate mothers come from extremely poor countries, while intended parents often reside in wealthier countries;¹⁵⁶ that because of the disparity of wealth, the sum paid to a surrogate mother might be several times higher than her husband’s yearly income;¹⁵⁷ that many women may indeed be coerced, trafficked, raped, or utterly misinformed about the entire process and of their rights.¹⁵⁸ Similarly, if surrogacy arrangements were categorized as contracts, deference would most likely be given to the parties’ decisions regarding choice of law in Conflict of Laws disputes.

154. For the view that surrogacy should be treated as a matter of contract law, *see generally* Epstein, *supra* note 126. For the view that surrogacy matters should be analyzed in relationship to adoption matters, *see* Susan Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 443 (2004).

155. *See* West, *Taking Preferences Seriously*, *supra* note 95, at 661.

156. *See* Hague Conference Report, *supra* note 150, at para. 12. *See generally* Richard F. Storrow, *Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory*, 57 HASTINGS L.J. 295 (2005) (showing how developed countries create a market for surrogacy arrangements in less developed countries).

157. *See* Hague Conference Report, *supra* note 150, at para. 34; Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 54 (2008).

158. *See* Child Exploitation and Online Protection Centre & British Embassy in Hanoi, *The trafficking of women and children from Vietnam*, 12 (2011), https://ceop.police.uk/Documents/ceopdocs/NPM_CEOP_FCO_report_-_trafficking_of_Vietnamese_women_and_children.pdf (describing “a baby selling ring operating out of Bangkok, Thailand and Phnom Penh, Cambodia”). Reporting:

They were connected to a Taiwanese surrogacy service which profiled the surrogate mothers on their website. During the investigation, 14 trafficked Vietnamese women were identified as being exploited as surrogate mothers for this company. The women were forcibly impregnated with other women’s embryos or raped. The service was designed for wealthy Taiwanese couples with the total process costing \$32,000.

Id.

Characterizing the recognition of surrogacy agreements as questions of “filiation” would bring the matters into the realm of the family, and simultaneously exclude the issues of contract characterization described above. But questions of filiation generally refer to the establishment of parental rights of one parent, often the father, in relation to the child.¹⁵⁹ Especially in cases in which the intended father, but not the intended mother, offered genetic material, questions of filiation will create a gendered reference to paternal rights, leaving the intended mother merely with the option of “adoption.”¹⁶⁰ More importantly, when categorized as filiation, Conflict of Laws reasoning will inevitably break the multiparty relationship into one-to-one categories with often inconsistent and inconsiderate results.¹⁶¹

A similar tendency to split and separate the interests involved can be seen in courts’ increasing focus in transnational surrogacy matters on “the best interests of the child.”¹⁶² Given that Conflict of Laws matters involving surrogacy often arise at a late stage in which the child is already born, and in

159. See generally *General Report*, *supra* note 128, at 527. Finding that:

In relation to legal parenthood these remedies normally offer partial solutions only, whereby merely the position of the intended father is regularised. The position of the intended mother (or the intended father in the case of gay intended parents) remains uncertain, with often no or only limited options of acquiring legal parenthood.

Id.

160. See *id.* at 518 (noting how, in several countries including Germany, Switzerland, and France, acknowledgments of paternity would be recognized, although this avenue is not available for the intended mothers. In particular, the [French] Conseil d’Etat suggested that “the prohibition of the establishment of maternity between the intended mother and the child should be maintained.” However, “acknowledgment of paternity should become the main alternative to the prohibition of surrogacy.”).

161. See *id.* at 501. Finding that:

In some cases, the intended father was able to establish his legal parenthood using the avenue of ‘acknowledgment of paternity.’ Nevertheless, in none of these cases was the intended mother (even if genetically related to the child) able to regularise her relationship with the child. As a result, the intended mother was placed in a very vulnerable position, especially in the event of a custody dispute or paternal death.

Id.

162. See *id.* at 528. Finding that:

In jurisdictions where the ad hoc, partial remedies have been crafted, there is a clear trend to focus primarily on the best interests of the child, with the result that the welfare principle trumps the public policy concerns that surround cross-border (in particular commercial) surrogacy. . . . Given the absence of a regulatory framework, this line of reasoning is considered reasonable. . . . This is not to say, however, that the current situation is desirable or satisfactory.

Id.

those cases there is often no evidence that the surrogate mother would want to maintain the child, it is entirely reasonable for courts to focus on the “best interests of the child” and to rule in favor of the intended parents obtaining parental rights. However, if the surrogate mother wishes to exercise parental rights, this standard is less helpful. Relational feminists have argued that the “best interests of the child” standard tends to ignore pre-existing relationships between the child and one or the other parent and disrupts such relationships when it is argued that it is in the “best interests of the child” to be placed with another parent.¹⁶³

In the context of custody disputes, Katherine Bartlett argues that while the best interest of the child is an advancement over emphasis on parents’ rights or interests, the standard merely substitutes the interest of one party over another, instead of focusing on “what kind of children and families—what kind of relationships we want to have.”¹⁶⁴ A “re-expression of parenthood,” argues Bartlett, would need to focus on “responsibility, relationship, and identification.”¹⁶⁵ Relational feminism would allow Conflict of Laws decision-makers to realize that neither arguments about the rights of individual parents due to their genetic material,¹⁶⁶ nor the “best interests of the child” standard, should obscure an analysis of what kind of relationships among and between the child, the birth mother, and the intended parents would be best to construct in particular cases, and how determining that one law or another is applicable will impact that outcome.

In its 2012 report on transnational surrogacy arrangements, the Hague Commission highlighted that characterizing the relationship as one of adoption has proven strenuous as a practical matter.¹⁶⁷ This is because many of the conditions of the Hague Convention on Inter-country Adoptions, including the requirement that the gestational mother give consent *after* the birth of the child, seemed inapplicable to surrogacy matters.¹⁶⁸ But from a relational feminist perspective, express or legal terminological analogies be-

163. See Nina Camic, *Putting the Relational into the Heart of Family and Juvenile Court Proceedings*, 16 WIS. WOMEN’S L.J. 198–99 (2002). For a very interesting relational perspective on how an uncritical focus on the best interests of the child combined with a prevailing shared parenting norm creates unreasonable burdens on women’s autonomy, see Susan B. Boyd, *Autonomy for Mothers? Relational Theory and Parenting Apart*, 18 FEM. LEG. STUD. 137 (2010).

164. Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 303 (1988).

165. See *id.* at 298–99.

166. For a detailed analysis of the increased focus on genetic factors in courts’ analysis of international surrogacy arrangements, see Samantha Ashenden, *Reproblematizing Relations of Agency and Coercion: Surrogacy*, in GENDER, AGENCY, AND COERCION 195 (Sumi Madhok, Anne Phillips & Kalpana Wilson eds., 2013).

167. See Hague Conference Report, *supra* note 150, at para. 43.

168. See *id.* at para. 43.

tween surrogacy and adoptions matter less. Instead, the portrayal of transnational surrogacy arrangements as similar to transnational adoption matters would structure more equitable and just relationships between all parties involved. Viewed in that way, relational feminists might welcome a possible analogy between transnational surrogacy agreements and adoptions within the field of Conflict of Laws.

For example, Patricia Williams and Mary Lyndon Shanley argue that not allowing the surrogate mother to reassess her initial decision to surrender the baby after giving birth equates surrogacy arrangements to enslavement.¹⁶⁹ Reading a mandatory grace period into transnational surrogacy arrangements might therefore increase the surrogate mother's autonomy and respect the bond she has formed with the child during the nine months of pregnancy.

Similarly, Mary Lyndon Shanley argues that only "gift" surrogacies should be allowed and that they could be "treated like pre-adoption agreements that leave the birth mother free to decide not to relinquish custody at birth."¹⁷⁰ Doing so would recognize the full range of interpersonal relationships that are constructed in the context of surrogacy.

Comparing fertility tourism (including for surrogate agreements) with sex tourism and international adoptions, while exploring "interconnections between the global and the local dynamics of phenomena that implicate the place of women in society," Richard Storrow argues that this "comparison disturbingly reveals more parallels between fertility tourism and sex tourism, forms of global commerce to which the international community has been largely indifferent, than between fertility tourism and international adoption, concerns about which have received sustained international attention and response."¹⁷¹

Many have already pointed out that the stringent restrictions for transnational adoptions would increase the number of transnational surrogacy arrangements for which there is far less and far murkier regulation.¹⁷² Applying the level of stringency used for transnational adoptions to transnational surrogacies would at least strongly discourage the proliferation of transnational surrogacy arrangements over adoptions. Informed by rela-

169. Ashenden, *supra* note 166, at 630; Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5, 15 (1988).

170. Mary Lyndon Shanley, "Surrogate Mothering" and Women's Freedom: A Critique of Contracts for Human Reproduction, 18 SIGNS 618, 624 (1993) (arguing that "only payment of medical and living expenses would be allowed," while also acknowledging, "I am ambivalent about whether any further payment should ever be permitted.").

171. Storrow, *supra* note 156, at 329–30.

172. Rengachary Smerdon, *supra* note 157, at 15.

tional feminist perspectives, the analytical step of characterization within Conflict of Laws can contribute precisely to such leveling of regulatory oversight between transnational surrogacy and adoption arrangements.

D. Fluid Analysis and Judicial Self-Consciousness

Since the feminist relational method complicates both the notion of the self and any notion of responsibility, it inevitably encourages a very fluid legal analysis. And as Nedelsky candidly admits, it may be that “the downside, or limitation, of the relational approach . . . is exactly its fluidity. The resistance (not imperviousness) to reification and simplified absolutism or certainty comes at the cost of the uncertainty inherent in ongoing, open-ended inquiry.”¹⁷³ Under the relational methodology, “there is an inevitable element of uncertainty, even speculation, in the claims that a given form of law would promote a certain structure of relations.”¹⁷⁴ It is precisely the complexity of relational analysis that prompts feminist scholars to reflect more deeply on the process of decision making in light of increased complexity.

Katherine Bartlett, for example, wondered how feminists could provide “knowledge” and “truth” and thereby unequivocally identify the victim, the oppressor, the deceiver, the liar, etc.¹⁷⁵ She argued in favor of positionality, “which acknowledges the existence of empirical truth, values and knowledge, and also their contingency.”¹⁷⁶ According to this perspective, truth itself is “situated in that it emerges from particular involvements and relationships. These relationships, not some essential or innate characteristics of the individual, define the individual’s perspective and provide the location for meaning, identity, and political commitment.”¹⁷⁷ The key to extending knowledge then “lies in the effort to extend one’s limited perspective. Self-discipline is crucial.”¹⁷⁸

Iris Young argued that impartiality expresses a crude desire to subsume human nature under the rational and disembodied model. Thus, “the will to unity expressed by this ideal of impartial and universal reason generates an oppressive opposition between reason and desire or affectivity.”¹⁷⁹ This means that a particular conceptualization of reason implied in the process of

173. NEDELSKY, *LAW’S RELATIONS*, *supra* note 25, at 344.

174. *Id.* at 344.

175. Bartlett, *supra* note 24, at 880.

176. *Id.*

177. *Id.*

178. *Id.* at 881.

179. Iris Young, *Impartiality and the Civil Public: Some Implications of Feminist Critiques of Moral and Political Theory*, in *FEMINISM AS CRITIQUE: ON THE POLITICS OF GENDER* 57, 59 (Seyla Benhabib & Drucilla Cornell eds., 1987).

judging and political deliberation, if confined to an ethic of justice, “has implications for access to power and privilege,” such that many individuals who do not conform to the ethic of justice, including some women, would be marginalized in the political process and misrepresented in the process of judging their claims.¹⁸⁰ Furthermore, as Robin West argued, it may discourage judges themselves from referencing an ethic of care, and therefore empathy, towards the litigating parties.¹⁸¹

Jennifer Nedelsky also explains that relational analysis requires a high level of ongoing self-consciousness about “the unavoidable uncertainty not only of imperfect information but also of the predictions involved in the claims of links between law, relations, and values. It asks judges and others invoking rights and projects of transformation to be self-conscious about the contested quality of the values and the uncertainties about what will advance them.”¹⁸²

Properly engaging with Nedelsky’s work on judging and drawing from it for Conflict of Laws theory would require and deserve a separate Article. Here I merely want to reference some of its core insights and sketch what contribution they could make to Conflict of Laws.

Much of Nedelsky’s work on judging is focused on the possibility of impartiality in light of the “inevitability of subjectivity,”¹⁸³ as well as on the reciprocal relation of judgment and autonomy.¹⁸⁴ Drawing partly on Hannah Arendt’s work, Nedelsky argues that judgment is community-based, such that “when one judges, one judges as a member of one’s community.”¹⁸⁵ “Judgment always remains tied to the particular” and is eminently subjective.¹⁸⁶ But this does not mean either that it is inevitably arbitrary or that it inevitably references one’s community standpoint.¹⁸⁷ Since autonomy is relational, autonomous judgment is relational so that “taking the perspectives of others is part of, not a substitute for, judg-

180. Jennifer Nedelsky, *Embodied Diversity and the Challenges to Law*, 42 MCGILL L.J. 91, 99 (1997).

181. West, *Taking Preferences Seriously*, *supra* note 95.

182. NEDELSKY, *LAW’S RELATIONS*, *supra* note 25, at 344.

183. Jennifer Nedelsky, *The Reciprocal Relation of Judgment and Autonomy: Walking in Another’s Shoes and Which Shoes to Walk In*, in *BEING RELATIONAL: REFLECTIONS ON RELATIONAL THEORY AND HEALTH LAW* 35–36 (Jocelyn Downie & Jennifer J. Llewellyn eds., 2012) [hereinafter Nedelsky, *Judgment and Autonomy*].

184. *Id.* at 44.

185. Jennifer Nedelsky, *Communities of Judgment and Human Rights*, 1 THEORETICAL INQUIRIES L. 245, 259 (2000) [hereinafter Nedelsky, *Communities of Judgment*].

186. *Id.* at 258.

187. Nedelsky, *Judgment and Autonomy*, *supra* note 183, at 36 (arguing “the inevitability of subjectivity in judgment should not lead to a collapse into the inevitability of arbitrariness”).

ment.”¹⁸⁸ Autonomous *qua* relational judgment then requires an “enlarged mentality” by constantly tapping into the standpoint of other communities.¹⁸⁹ Furthermore, one needs to be self-conscious about the fact that that standpoint too is “relational, as people stand in different relations to their location.”¹⁹⁰

But “[t]his does not mean that we should simply grant authority to another’s perspective, assume that it requires no further judgment because of the ‘location’ from which it was made (which the crude version of feminist standpoint theory suggests).”¹⁹¹ In this way, “[t]here is not a universal standpoint of humanity that one arrives at, but one’s *own* general standpoint, developed through attention to the particulars of the different standpoints one considers.”¹⁹²

This relational process of judgment challenges the inevitability of the extreme positions of neutral or arbitrary judgment. Furthermore, “the idea of multiple communities and communities sustained in one’s imagination based on past experience and education makes it possible to understand how community-based judgment can judge against one’s community.”¹⁹³

Moreover, community-based judgment allows us to understand how one could claim validity across communities without necessarily choosing between communities of judgment.¹⁹⁴

We do face the question of how claims of validity are to be made across competing communities. But in most instances, a simple choice of one community over the other will not work well, either for the psychological integrity of the judge (assuming some real connection to the conflicting communities) or for the institutional efficacy of rights-enforcing organizations.¹⁹⁵

Much of Conflict of Laws theory and methodology references, directly or implicitly, a particular fear of actual “judging” between competing claims

188. *Id.* at 41, 44.

189. Nedelsky, *Communities of Judgment*, *supra* note 185, at 259.

190. Nedelsky, *Judgment and Autonomy*, *supra* note 183, at 42.

191. *Id.* at 43 (arguing “the way we take another’s perspective into account should be shaped both by the kind of judgment that we think she exercised as well as by our own humility about our capacity to understand standpoints that are very different from our own and consciousness of the asymmetries of power that may interfere.”).

192. Nedelsky, *Communities of Judgment*, *supra* note 185, at 258.

193. *Id.* at 275.

194. *Id.* at 277.

195. *Id.* at 276.

of communities.¹⁹⁶ “Choice of law” as the part of Conflict of Laws determining which law applies to a particular transnational dispute can be understood quite literally.¹⁹⁷ The process is generally premised on the neutral “choice” of a law among competing ones, not “judging” which one is preferable. Theorists have offered varying rationales for rejecting a Conflict of Laws approach that requires judging the relative merits of different laws.

The Savignyan model, at least in its classical understanding, was based on the equality between the litigating parties and between the different legal systems involved.¹⁹⁸ His framework was understood to mean that one should pre-determine which law applies in large categories of private law, such that the applicable law would not depend on the idiosyncrasies of the national court hearing the matter, nor on which party rushes to commence litigation in a particular court.¹⁹⁹ Case-by-case judging seemed incompatible with the initial postulate of formal equality between the litigating parties and the legal systems. Moreover, the acknowledgment that on the same facts different national courts might reach different results and the fear of the cacophony of perspectives that might result in Conflict of Laws seemed to validate the fear of much substantive judging in Conflict of Laws.

196. For a discussion of the way in which Conflict of Laws fails to encourage actual judging between different policies and values under the competing laws, *see generally* FRIEDRICH K. JUENGER, *CHOICE OF LAW AND MULTISTATE JUSTICE* (Martinus Nijhoff ed., 1992).

197. This was one of the main lines of critique of the American realist school in Conflict of Laws, but as I explain below, one of its main protagonists, Brainard Currie, equally discouraged judgment between competing policies. For various arguments within the American realist school against Conflict of Laws’ discouragement of judging which law would be preferable to apply in substantive terms, *see generally* DAVID CAVERS, *THE CHOICE OF LAW: SELECTED ESSAYS, 1933–1983* (1985); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457 (1924); Walter Wheeler Cook, *The Jurisdiction of Sovereign States and the Conflict of Laws*, 31 *COLUM L. REV.* 368 (1931). For two prominent approaches within the American realist school which were proposed as a way of judging which law is better in substantive terms, *see* ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 107 (3d ed. 1977); Luther L. McDougal III, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 *MERCER L. REV.* 483 (1984).

198. For a detailed discussion of the focus on equality between nationals and foreigners and between legal systems in Savigny’s theory, *see* Egon Lorenz, *Zur Struktur des Internationalen Privatrechts* (Duncker & Humblot eds., 1977).

199. Horatia Muir Watt, for example, argued that Savignyan Conflict of Laws thought is premised on a certain ‘naturalness’ of its principles and norms, rather than a principled judging of competing values and policies. *See* Muir Watt, *supra* note 15. I leave out the question whether this was indeed Savigny’s perspective or whether this was the conventional way of understanding Savigny. For a plea to separate “Savigny” from “Savignyanism,” *see* Pierre Gothot, *Simple réflexions à propos de la saga du conflit des lois*, in *LE DROIT INTERNATIONAL PRIVÉ: ESPRIT ET METHODES, MÉLANGES EN L’HONNEUR DE PAUL LAGARDE* 343 (2007).

In the American realist school in Conflict of Laws, Currie explicitly discouraged judgment by simply postulating that if the forum has any interest in the dispute it should apply its own law, and arguing that no other factors but state interests should enter the analysis.²⁰⁰ Different reasons were offered for narrowing the analysis to state interests only and for giving preference to the forum's interest in a case of a true conflict. In a letter to fellow realist David Cavers, Currie argued that the analysis in Conflict of Laws had to be narrowed to state interests in order to provide "a method of general utility"²⁰¹ and to discourage "judicial discretion."²⁰² Furthermore, even within the framework of state interests, he argued courts could not engage in the process of weighing state interests, for political considerations, as well as because of limitations of judgment.²⁰³ How could a court ever find that its state has an interest in the legal matter and yet conclude that a foreign state has an even higher interest? More generally, how could a national court ever conclude that the law of another state is more enlightened, more just, or more efficient?²⁰⁴

Furthermore, Conflict of Laws theories that propose applying a blend of the laws in conflict have either been immediately refuted or simply disregarded, as they presumably overcomplicate rather than simplify the choice of law question and judicial determinations in transnational cases.²⁰⁵

200. See *supra* Section I.A (discussing Currie's theory).

201. *A Correspondence*, *supra* note 48, at 487.

202. *Id.* at 490–91 ("I have never been entirely comfortable with the idea that conflict problems should be resolved through the exercise of a freedom which the court does not enjoy in a domestic case, however.").

203. See *Economics of Law*, *supra* note 22, at 85 (noting "the manipulability of the concept [of state interest] which enables one to always find some interest of the forum and which "has plagued scholars of governmental interests since the theory's inception").

204. See *id.* at 89 (discussing how this question is also posed, and left unanswered, in current economic theories of Conflict of Laws). For an argument that interest analysis struggles with such questions and ways of judging when to defer to the policy of other states, see McDougal, *supra* note 197. For the idea that judges could not assess the better law in terms of justice and reasonability, see WHINCOP & KEYES, *supra* note 56; Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L.J. 883, 893 (2002).

205. Josephus Jitta's version of a relational methodology for Conflict of Laws at the end of the nineteenth century was disavowed in Europe for its implicit complexity, lack of predictability, and an open acknowledgment that different national courts might reach different results on the contentious matters involved in Conflict of Laws disputes because of deep disagreements about core values. See the academic exchange over three Articles, about the complexity and unpredictability of Jitta's method for Conflict of Laws. See generally JOSEPHUS JITTA, DAS WESEN DES INTERNATIONALEN PRIVATRECHTS (1899); LUDWIG VON BAR, NEUE PRINZIPIEN UND METHODEN DES INTERNATIONALEN PRIVATRECHTS (1899); JOSEPHUS JITTA, ALTE UND NEUE METHODEN DES INTERNATIONALEN PRIVATRECHTS (1900).

The implicit assumption—which was never adequately theorized—that judges would not be able to “judge” between competing substantive norms pertaining to different communities broke Conflict of Laws in two ideological camps—the particularists versus the universalists. Both particularists and universalists shared the intuition that judges would inevitably opt for their own law when determining which law is preferable in substantive terms generated various responses. Therefore, universalists advocated for the creation of universal neutral rules; some particularists simply conceded that each court would apply its law whenever it has jurisdiction. Recently, Jacco Bomhoff suggested that current projects to reform Conflict of Laws should focus on encouraging each court to assess the merits of applying a particular law, while avoiding the overly parochial tendencies that are associated with it.²⁰⁶

Engaging with feminist relational theories on judgment would bring a tremendous contribution to such reform projects. In what follows, I merely want to offer a few dimensions of such contribution generally, before showing how it might impact the Conflict of Laws analysis of transnational surrogacy arrangements.

First, relational feminism would allow Conflict of Laws to continue its commitment to a formal principle of equality and equal moral worth, especially since transnational matters involve individuals of different nationalities. But as Robin West and Jennifer Nedelsky both point out, equal moral worth is a benchmark that should underlie notions of the rule of law and equality, not a substitute for contextual and relational perspectives.²⁰⁷ Proper equality and respect for difference can only be granted through the relational methodology. Therefore, while individuals’ equal moral worth and the equal worth of legal systems should be maintained, they should not prevent decision makers in Conflict of Laws from engaging with context and particularities.

Second, Nedelsky’s theory of community-based judgment demonstrates that it is neither inevitable that one chooses one’s community, nor that one will opt for the foreign community because of its location. The possibility that a judge could decide that in the factual circumstances of the dispute, as well as given the social-political transnational context in which it arose, the application of a foreign law is preferable to the application of forum law is left entirely open. Conversely, a court hearing a Conflict of Laws dispute might *properly* reject the application of foreign law when exer-

206. See Bomhoff, *supra* note 15, at 263.

207. See generally NEDELSKY, LAW’S RELATIONS, *supra* note 25, at 161–62; NEDELSKY, RE-IMAGINING JUSTICE, *supra* note 76.

cising proper judgment (not merely because of the court's membership in the national community).

Third, a community-based perspective on judging in Conflict of Laws would challenge the assumption, central to Currie's theory, that judges' community of reference in Conflict of Laws can only be the national one. The links of the dispute and of the parties to different communities should inform judges' responsibility to consult and critically engage with the perspectives of all communities involved (and not only the national ones). This should also increase the level of empathy that judges offer litigants situated in different communities with different standpoints.

Fourth, judges must acknowledge the need to justify their claims of validity across various communities, precisely because they must appreciate the diversity of views of different communities implicated in Conflict of Laws matters. This means that creating links, cross-references, and even a blend between the different laws implicated may be preferable, and sometimes inevitable.

Lastly, relational feminist insights reveal that, despite the extensive geographical implications of Conflict of Laws matters, there is no standpoint of humanity from which to judge them. This confirms, and better explains, the reality that Conflict of Laws determinations among national courts may vary, and often do. Yet relational analysis and community-based judgment would discourage the lamenting that frequently accompanies such situations in Conflict of Laws. Given the complexity of Conflict of Laws matters, and of the transnational realm in which they occur, and their simultaneous embeddedness in different communities, a thorough relational analysis may generate different judgments and therefore expose contested values. But exposing contested values also better illuminates what is at stake and how different national courts and national communities perceive those stakes. If each national court's Conflict of Laws determination becomes a standpoint on how to structure the particular relationship in dispute in the transnational realm, given the communities it touches, Conflict of Laws would have much to gain in transparency and democratic deliberation. If courts and legislators explicitly appeal to the application of the law of the place of tort or the law of the corporations' headquarters as a means of structuring tort relationships in particular ways by reference to particular values, we could debate on the soundness of that pattern of relationships, or debate around the values referenced. Similarly, if courts and legislators justify the application of the law of the surrogate mother's or the intended parents' domicile as a way of structuring a particular kind of relationship among them based on clearly stated values, one can better appreciate and debate what is really at stake in these Conflict of Laws cases.

Conflict of Laws issues are precisely about clashes of policy and values in different communities. Relational feminist theories of judging, which try to capture the inter-community and cross-community nature of judging, are particularly valuable for Conflict of Laws. But Conflict of Laws scenarios do not only feature clashes of policy and values between different national communities. They increasingly show clashes between alleged “universal” values underlying human rights norms and national policy. Transnational tort matters involving multinational corporations, such as the Bhopal disaster, are increasingly perceived as a clash between multinational corporations’ preference to conduct their business in accordance with a low standard of care and the rights and interests of indigenous populations.²⁰⁸ Similarly, transnational surrogacy arrangements often place the national policy of disavowing transnational surrogacy arrangements in tension with human rights norms protecting children and family life.²⁰⁹

Relational feminism complicates the appeal to public policy of the state asked to recognize a surrogacy arrangement entered elsewhere, although such arrangement is prohibited under domestic law. Through a relational feminist lens, Richard Storrow has argued that countries outlawing surrogacy agreements are complicit in creating a market for them elsewhere, in less developed countries:

Local laws that purport to outlaw socially irresponsible forms of procreation have extraterritorial effects that violate the spirit of those same laws. By importing oppression in the form of infertile individuals to travel abroad to exercise what they perceive to be the reproductive rights in the destination countries in ways that oppress women there, these laws turn public oppression in one country into private oppression in another.²¹⁰

In light of the interconnection between laws in different countries, appeals to national public policy can only be made with an eye to the impact such policy has elsewhere.

It is in the realm of appreciating how to judge between national and international public policy that Conflict of Laws struggles most in current

208. See e.g., UPENDRA BAXI, *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* (N.M. Tripathi ed., 1986); UPENDRA BAXI & THOMAS PAUL, *MASS DISASTERS AND MULTINATIONAL LIABILITY: THE BHOPAL CASE* (N.M. Tripathi ed., 1986).

209. See e.g., Yasmine Ergas, *Thinking ‘Through’ Human Rights: The Need for a Human Rights Perspective With Respect to the Regulation of Cross-border Reproductive Surrogacy*, in *INTERNATIONAL SURROGACY ARRANGEMENTS: LEGAL REGULATION AT THE INTERNATIONAL LEVEL* 427 (Katarina Trimmings & Paul Beaumont eds., 2013).

210. Storrow, *supra* note 156, at 329.

times. Horatia Muir Watt, for example, argues that ways of incorporating human rights and human rights reasoning are excluded from classical Conflict of Laws theories and that the field has virtually no internal resources to problematize the impact of human rights norms on its analytics and methodology.²¹¹ But as Jennifer Nedelsky has argued, “the debates over “universal” human rights versus alleged abuses defended in the name of culture and tradition are best understood as conflicts between different communities of judgment.”²¹²

Recently, the European Court of Human Rights (ECtHR) reviewed various judgments issued in transnational surrogacy cases by different European courts for their compliance with human rights norms.²¹³ In one of these cases, the ECtHR rejected the French government and French courts’ argument that France could not recognize a transnational surrogacy arrangement because of its national public policy. Instead, the court argued that it could “not accept the public policy mechanism as such” and that, although typical of Conflict of Laws reasoning, its application must still ensure a proper balance between the interests and values of the French national community expressed in its public policy and the interests of the child “to the full enjoyment of her rights to the respect of her family and private life.”²¹⁴ The court thereby committed Conflict of Laws to a process of judging across “communities of judgment”—considering the national French community and the larger (in this case primarily European) community committed to human rights norms, of which France is certainly a part—and used proportionality and the margin of appreciation criteria to balance the rights and interests involved in this clash of policies.²¹⁵ Where traditional Conflict of Laws allows the application of national public policy when the state has sufficient contact with the dispute, the ECtHR posited a judgment in between and across communities of judgment as the proper method of analysis.

Muir Watt argued that precisely because human rights methodologies seem to offer this fluid and substantive analytical process, it should take over Conflict of Laws reasoning and methodology, such that we may be speaking

211. Muir Watt *supra* note 11, at 348-50.

212. Nedelsky, *Communities of Judgment*, *supra* note 185, at 249.

213. See, e.g., *Paradiso & Campanelli v. Italy*, App. No. 2538/12, Judgment (ECtHR, Jan. 27, 2015) (this decision is not final as it was resent to the Grand Chamber in June 2015); *Hennesson v. France*, App. No. 65192/11, Judgment (ECtHR, June 26, 2014); *Labassee v. France*, App. No. 65941/11, Judgment (ECtHR, June 26, 2014).

214. *Labassee v. France*, App. No. 65941/11, at para. 63.

215. See Ivana Isailovic, *The ECtHR and the Regulation of Transnational Security Arrangements*, EJIL: TALK! (July 25, 2014), <http://www.ejiltalk.org/the-ecthr-and-the-regulation-of-transnational-surrogacy-agreements/> (reviewing recent ECtHR decisions regarding transnational surrogacy).

of “the end of Choice of Law.”²¹⁶ Yet relational feminist theories of judging show that this does not need to be a specifically human rights methodology; rather, it should underlie every legal determination involving different communities of judgment—precisely the bread and butter of Conflict of Laws. And to the extent that Conflict of Laws fails to engage with human rights arguments because they do not fit within the field’s paradigm of clashes between national communities, relational feminist theories will illuminate that human rights norms themselves form a community of judgment.

By expanding the standpoints which courts hearing Conflict of Laws matters need to consider in their “enlarged mentality”²¹⁷ to human rights norms, relational feminism expands the range of communities of judgment that are implicated in many current transnational issues, including surrogacy arrangements. This in turn exposes a much wider set of interests and values involved in such matters, including the autonomy, health, and well-being of surrogate mothers, and of children born as a result of these arrangements.

From a relational feminist perspective, an instrument of cross-border cooperation which mirrors in some respects the Hague Convention on Cross-Border Adoptions, as was recently proposed by Katarina Trimmings and Paul Beaumont,²¹⁸ might be the proper way of dealing with cross-border surrogacy arrangements, at least for the time being.²¹⁹

CONCLUSIONS

Although feminists have thus far never turned their attention to Conflict of Laws, the field cries out for feminist critiques and reconstructions. As in many other legal fields and jurisprudential categories, Conflict of Laws could be entirely re-envisioned through a feminist or, as I have argued here, a relational feminist, lens. Conflict of Laws oscillates between state-

216. Muir Watt, *supra* note 11, at 363–82.

217. Nedelsky, *Communities of Judgment*, *supra* note 185, at 259.

218. See Trimmings & Beaumont, *General Report*, *supra* note 128, at 442. Some of the conditions and protections the authors proposed would be carried through from the adoption convention include: a pre-approval procedure, pre-screening of both intended parents and surrogate mother, automatic recognition of surrogacy arrangements entered into in accordance with the terms of the convention, constructing an exclusive network of national central authorities and assignment of various responsibilities to central authorities in sending and receiving countries, and providing for a period in which the surrogate mother can revisit her decision after birth.

219. Many countries that formerly accepted international surrogacy arrangements have declared or are in the process of declaring them illegal. See Donna Dickenson, *The End of Cross-Border Surrogacy*, PROJECT SYNDICATE (Feb. 25, 2016), <https://www.project-syndicate.org/commentary/crackdown-on-international-surrogacy-trade-by-donna-dickenson-2016-02>.

centric and individualistic perspectives and struggles to conceptualize its regulatory dimensions by reference to individual autonomy, consent, and choice or by reference to state sovereignty, state authority, and state interests.

Relational feminism, as I have argued, would center Conflict of Laws analysis on a social, relational image of the individual in her transnational existence and would hold Conflict of Laws accountable to the patterns of relationships it structures among different individuals and communities in the transnational realm. Understanding autonomy as relational would reveal the fact that Conflict of Laws does not suffer from offering too much autonomy to individuals, but from falsely conceptualizing autonomy as free choice and consent, rather than as a capacity forged in relation to and through valuable relationships with others. Through a relational feminist lens, Conflict of Laws would perceive individuals' claims for the application of one law or another as pleas for the recognition, reconstruction, or transcending of various relationships in which they are embedded. It would adopt and embrace its role in fostering valuable relationships through which individuals can be given a voice and a space to articulate their interests and concerns. Furthermore, by taking a relational approach to judging, decision makers in Conflict of Laws would take an active role in appreciating the needs and interests of all actors and communities implicated in or affected by the transnational legal matters. Conflict of Laws would maintain its commitment to equality between legal systems and between nationals and foreigners, but would no longer use these principles as an excuse for not focusing on a rich contextual analysis of the way in which individuals and their private law relationships are embedded in a wide network of relationships in the transnational realm.

The contributions of relational feminism to Conflict of Laws could certainly go beyond those articulated here. In this Article, I argued that a relational feminist approach would reframe the tension Conflict of Laws often creates between public policy and autonomy and between national and international public policy. Furthermore, it would frame both the choice of "connecting factors" and the "characterization" of transnational legal matters according to the patterns of relationships they create in the transnational realm. All of these aspects, I argued, are pressing in Conflict of Laws' struggle to analyze international surrogacy arrangements.

But relational feminism's relevance for Conflict of Laws is not limited to family law matters and/or to matters involving women. In the remaining paragraphs of these conclusions, I merely want to sketch relational feminism's potential contributions to Conflict of Laws matters outside the realm of family law and identity issues.

For example, transnational tort matters do not seem to implicate such strong personal relationships, difficult decisions, and emotional suffering as surrogacy matters. Furthermore, transnational torts committed by transnational corporations in the course of their mining operation are often thought of as economic and trade issues for which a relational feminist analysis might seem less intuitive. Yet a relational feminist approach would impact the analysis of these issues in Conflict of Laws as well.

The part of the Conflict of Laws analysis called choice of law aims to discern whether we should apply the law of the tort of the corporation's headquarters (usually a highly-developed state) or the tort law of the place where the mining operation was conducted. The need for a choice arises from the fact that both the standard of care and the damage quantum underlying the law of the place of tort are often lower than the standard of care and the damage quantum underlying tort laws of the state of incorporation. I have already noted that this choice of law question is usually framed in one of two ways. The first is to see this as a question of implied choice, autonomy, or vested rights according to which one would ask whether the parties implicitly consented to the application of the law of the tort because it is common to both, or whether the correlative rights and duties of the parties vested at this location because this is where the act and damage occurred. Another would be to frame this as a question of conflicts of state interest, according to which one would ask whether the state of incorporation would have an interest in imposing a higher liability on its corporations abroad.

A feminist relational analysis would prevent such formalist assumptions. It would instead expose the entire complexity of the conflict of interest between the litigating parties. More importantly, it would hold Conflict of Laws accountable to the kind of relationships it structures, such that it would become immediately apparent that applying the law of the place of the tort would place multinational corporations in a position of increased power in relationship to the communities in which their mining operations are centered.

Many relational feminist insights offered for domestic tort law would also be useful in the analysis of transnational tort matters. For example, Leslie Bender, who has provided extensive relational feminist accounts re-examining the "no duty to rescue" and the "reasonable man/person" doc-

trines,²²⁰ as well as mass or toxic torts,²²¹ argues that our standard in tort law should not be “reason, or even caution, but care.”²²²

Furthermore, Bender argues that a relational feminist lens allows us to see that mass torts are often characterized, “[e]ven absent ill will and fraud,” by increased “corporate violence” and unequal bargaining power evidenced in:

[T]he complex organizations and hierarchical structures that distance decisionmakers from responsibilities for and connections to the harms they generate; the pressures of mass production and distribution systems; priorities of competitive profit-making over human health and safety; the secrecy and lack of requirements for public disclosure of risk-creation by corporations; and, in organizations with as many employees and as much force and power as many nations, the absence of democratic processes and accountability for decisions about nonconsensual risk-imposition on different constituencies.²²³

Many of the elements listed by Bender are exacerbated in the transnational context where the complex corporate structure extends over several jurisdictions and where the local populations affected by their mining operations are often disenfranchised not only in relationship to the corporation, but also in relationship to the foreign government, and often even to their own government. In response to this, Bender argues not only that burdens of proof would need to be reversed,²²⁴ but also that “courts are uniquely positioned to assess the resources and information imbalances between litigants in mass tort cases. Courts should, therefore, actively intervene to balance the relative power of the parties for purposes of the litigation.”²²⁵ Overall, Bender argues that what is needed from a relational feminist per-

220. Leslie Bender, *Changing the Values of Tort Law*, 25 TULSA L.J. 759 (1990); Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEG. EDUC. 3 (1988).

221. Leslie Bender, *Feminist Re(torts): Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibility*, 4 DUKE L.J. 848 (1990).

222. Leslie Bender, *Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575, 579 (1993) stating:

Even though the division between reason and care is a false construct, the reason/care paradigm has been useful in feminist legal analysis to illustrate biases, hidden assumptions, and male-centered norms within the legal system and to suggest reconceptualizations that make law more reflective of human experience and more responsive to concerns of justice.

223. *Id.* at 581.

224. *Id.* at 582.

225. *Id.*

spective is “[a] standard of legal responsibility that includes interpersonal caregiving” which in turn would “mak[e] corporate decisionmakers personally responsible for the consequences of their decisions, thus humanizing corporations and their activities.”²²⁶

Peter Bell has also applied a feminist lens to contest neocontractual theories of tort that focus on a hypothetical bargain between the litigating parties.²²⁷ According to Bell, a neocontractual theory of tort fails to offer care and respect to individuals,²²⁸ focuses too much on autonomy, and refuses to account for the experiences and appeals to justice of the injured victims.²²⁹ He posits that a relational and cooperative, rather than consensual, relationship should underlie tort law²³⁰ and that tort law should focus on socially valuable aspects, such as safety, trust, and availability of information for consumers, etc.²³¹

Virtually all these insights generated by a relational feminist perspective would prove useful for the Conflict of Laws analysis of transnational torts of multinational corporations. Relational feminism allows us to see that applying the lower standard of care and damage quantum would not create a relationship between multinational corporations and the communities in which their mining operations are conducted that is characterized by respect, mutual consideration, and actual care for each other’s interests and well-being. Instead, it would create a double standard in which multinational corporations would show a different level of care and consideration to communities located in wealthier, more powerful states than in those with increased poverty, corruption, or that are generally struggling to manage their national resources.

Feminists should be aware of the way in which their methodological and normative commitments are excluded from a field with a wide and extremely important range of application for individuals’ transnational existence. Conflict of Laws scholars should be open to enlarging and revisiting their methodological arsenal in light of feminist methodologies. Both Conflict of Laws and feminist scholars should engage in a fruitful dialogue about ways in which Conflict of Laws could be reimagined and reconstructed in light of feminist insights and critiques. As Ralf Michaels wrote, “choice of law as a discipline indeed yearns for intellectual nurture”²³² and feminism,

226. *Id.* at 583.

227. Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177, 1205–11 (1990).

228. *Id.* at 1179.

229. *Id.* at 1205–15.

230. *Id.* at 1207–10.

231. *Id.* at 1236–46.

232. Michaels. *Economics of Law*, *supra* note 22, at 75.

especially relational feminism, could bring a great deal of such intellectual nurture to Conflict of Laws. ❀