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SURROGACY AND DIGNITY: RIGHTS AND RELATIONSHIPS

KATE GALLOWAY*

In this Journal, Rachel Kunde shared her experiences as an altruistic surrogate, advocating for greater government support for surrogate mothers. Based on personal experience, her argument focusses on the recognition of women's bodily autonomy, and suggests that surrogacy arrangements need not impair the dignity of the surrogate mother. In particular, her advocacy appears to presuppose reproductive rights, both in the intending parents to found a family, and for the surrogate to bear a child. This article responds to Kunde. While acknowledging the importance of Kunde's contribution to the discourse through her personal narrative, it takes a broader approach to the question of regulation. This article first addresses the question of rights for each of the intending parents and the surrogate mother, suggesting that even if reproductive rights have some standing at law, they are not sufficient to justify liberalisation of altruistic surrogacy. Instead, it examines an alternative rationale to altruistic surrogacy based on a relational approach to regulation, looking beyond the individualised rights-based experience to that of national, and indeed global, relationships. Central to this position is articulating dignity and autonomy as the principal values at stake.

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CONTENTS

I	INTRODUCTION.....	36
II	THE PROBLEM FOR LAW	39
	A. <i>Intending Parents</i>	42
	B. <i>Surrogate Mother</i>	45
III	THE CHALLENGE FOR SURROGACY	47
V	CONCLUSION	50

I INTRODUCTION

In this *Journal*, Rachael Kunde has written of her relationship with two couples as an altruistic surrogate.¹ Her choice to become a surrogate, she says, was made on the basis of these relationships. Kunde writes of the desire of the two couples to complete their family, and to have a family, respectively.² She describes the barriers they faced, preventing them from fulfilling their desire. She is pleased to have assisted these couples to create their families, and in doing so, to extend her own family.

In making a case for improved and somewhat freed-up regulation of altruistic surrogacy in Australia, Kunde presents surrogacy as an affirming act for the surrogate mother, saying she ‘believe[s her] decision to become an altruistic surrogate mother was the epitome of true autonomy.’³ She sees great value in the role she has played in assisting couples to create a family, and suggests that reforms allowing for compensation and subsidised IVF procedures would make surrogacy more achievable and more widely available in Australia.⁴ She argues that promoting accessible, altruistic, compensated surrogacy in Australia would stem the tide of the more problematic international surrogacy arrangement.⁵ Kunde distinguishes between commercial surrogacy, where

¹ Rachel Kunde, ‘Australian Altruistic Surrogacy: Still a Way to Go’ (2015) 3 *Griffith Journal of Law and Human Dignity* 227.

² *Ibid.*

³ *Ibid* 238.

⁴ *Ibid* 241–2.

⁵ See, for an overview of international surrogacy and human rights, John Tobin, ‘To Prohibit or Permit: What is the (Human) Rights Response to the Practice of International Commercial Surrogacy?’ (2014) 63(2) *International and Comparative Law Quarterly* 317.

the pregnancy is generally managed by the intending parents and for which the birth mother might charge a fee; and compensated surrogacy, where the birth mother remains in control of her pregnancy and can lawfully recover the costs associated with pregnancy and birth.⁶ This article responds to arguments for compensated surrogacy only.

Although not expressly stated, I have interpreted Kunde's story to be founded on an assumption that consenting adults have the freedom to procreate and that the law should therefore support — indeed promote — surrogacy as an expression of this freedom.⁷ For Kunde, the surrogacy arrangement was 'something [she] felt [she] needed to do.'⁸ The second couple she assisted had been looking into 'other possible options to create their family' when Kunde met them,⁹ and so Kunde considers that her 'family has helped create other families'.¹⁰ In arguing against the legal restrictions on altruistic surrogacy, on my reading, Kunde implies that existing laws inhibit the freedom of those involved to either become parents, or to carry someone else's child.¹¹ Government support through *legal* "protection" of the intending parents and rebates for counselling,¹² from an Anglo-Australian legal perspective, requires justification based on an underlying right or freedom.

This article responds to the thrust of Kunde's article, expanding on the themes I see arising from her case in favour of government support for surrogacy. Despite the positive *personal* experiences of Kunde and other surrogate and gestational mothers, I suggest that there is a much wider context for considering the regulatory framework of surrogacy that needs to centre on the values at stake — wider than what I see expressed as personal rights to procreate. There is little to be gained through an individualistic, rights-based approach to surrogacy.

The first part of this paper articulates the problem for law from the perspective of legal rights and freedoms. It not only identifies the limits of a rights-based approach for the

⁶ Kunde, above n 1, 241.

⁷ Ibid 241–2 (Kunde suggests extending Medicare rebates to IVF to 'encourage couples to undergo domestic surrogacy').

⁸ Ibid 234.

⁹ Ibid.

¹⁰ Ibid 236.

¹¹ Ibid 239.

¹² Ibid 240.

intending parents in particular, but also for the surrogate in entering the surrogacy arrangement. While the welfare of the child is often at the forefront of the surrogacy debate, instead the focus here assumes the child's dignity and welfare are addressed,¹³ and discussion will revolve around the relationship between intending parents and the surrogate as the key tension to be navigated.

The following part then situates the individual experience of reproductive freedom within a relational framework, picking up on Kunde's theme of the importance of relationships in her own experience.¹⁴ Nedelsky's relational approach to analysing law focuses on the way in which the law supports relationships that either foster or inhibit autonomy. In a relational approach, rights per se do not promote autonomy. Instead, values such as autonomy depend upon a structuring of relationships — nested relationships — that generate the capacity for people to be autonomous. In a surrogacy arrangement these "nested relationships" include the mother, intending parents, and the child, but also encompass the relationships that touch people beyond those directly involved in the surrogacy arrangements.

Central to a relational approach is rejection of the central role of boundaries in the law.¹⁵ Thus to the extent that the law operates to promote a bounded or "separative" self, it inhibits our capacity to focus on the relationships it is actually structuring. Therein lies the crux of Nedelsky's approach: it is relationships that generate our capacity to be autonomous beings, rather than isolation.

This article thus questions whether "legal rights" are an appropriate foundation for a regulatory framework. Instead, it posits that the law should focus on relationships in pursuance of values.¹⁶ Establishing the values of dignity and autonomy as paramount, this article creates a framework from which to critique the way the law structures the parties' relationships. Further, it is likely to offer a more rounded framework within which rights might then be considered.

¹³ For issues affecting children, see, eg, Tobin, above n 5.

¹⁴ See, eg, Kunde, above n 1, 229.

¹⁵ See also the earlier work of Jennifer Nedelsky, 'Law, Boundaries and the Bounded Self' (1990) 30 (Spring) *Representations* 162.

¹⁶ See generally Nedelsky's relational method in Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).

My reading of Kunde and the framing of my response both arise from my reading of her narrative, and the law, as a non-Indigenous woman. I have limited my analysis to an Anglo-Australian socio-legal perspective.

II THE PROBLEM OF LAW

Surrogacy offers a problem for the law not because it is a new practice, but because it operates in a largely “negative” legal space. Apart from the rights of the child, it is difficult to identify clearly positive legal rights that subsist in any of the parents. Indeed, the roles generally ascribed to parents by the law — and therefore also their rights and responsibilities — are deliberately disassembled in surrogacy. The elements traditionally understood as integral to parenthood: a procreative act, genetic inheritance, gestation, and the social roles of mother and father, are no longer united. Aligned with the law’s habituated control over women’s bodies, particularly as to their reproductive agency, it is perhaps also inevitable that the law tends towards restriction of surrogacy. I think Kunde’s article, however, presupposes some kind of extant right or freedom invested in both the surrogate and the intending parents. Her own experience indicates a view that the surrogacy arrangement gives expression to reproductive freedom for all parties.

There is a general tendency in the literature to use the concept of reproductive freedom in the context of a woman’s right to “bodily self-determination”, or “control over one’s body”.¹⁷ It is discussed, for example, in the context of constraints on sexual behaviours, contraception, abortion, and sterilisation of women,¹⁸ as well as reproductive health and obstetric care.¹⁹ Hernández-Truyol points out that it comes into play both when a woman chooses to have an abortion, and when she chooses not to. The context for her analysis is the imposition of State regulation on women’s reproductive choices.²⁰

More broadly, reproductive freedom might be considered to cover the full gamut of choices made by a person in relation to their procreative capacity, from choosing sexual

¹⁷ See, eg, Rosalind Pollack Petchesky, ‘Reproductive Freedom: Beyond “A Woman’s Right to Choose”’ (1980) 5 *Signs* 661, 663; See also Tobin’s interpretation in Tobin, above n 5, 324.

¹⁸ See, eg, Stephen L. Isacacs, ‘Reproductive Rights 1983: An International Survey’ (1983) 14 *Columbia Human Rights Law Review* 311; Berta E. Hernández-Truyol, ‘To Bear or Not to Bear: Reproductive Freedom as an International Human Right’ (1991) 17 *Brooklyn Journal of International Law* 309.

¹⁹ See, eg, Petchesky, above n 17.

²⁰ Hernández-Truyol, above n 18.

partners, contraception and sterilisation, pregnancy, pregnancy termination, gamete donation, artificial reproductive technologies ('ART'), surrogacy, adoption, obstetric care, and sexual health. In exercising choices relating to the capacity to become a parent, free from State intervention, one is exercising one's reproductive freedom.

Where the law protects such freedoms, they tend to take the form of rights. The UN considers reproductive rights as human rights:

[R]eproductive rights embrace certain human rights that are already recognized in national laws, international laws and international human rights documents and other consensus documents. These rights rest on the recognition of the basic rights of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health. It also includes the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human rights documents.²¹

Reproductive freedom is not limited to women's experiences. It would similarly breach a man's reproductive freedom, and his right to bodily integrity, to coerce his sterilisation. However, although both men and women can experience hardship and conflict at law through gamete donation, women's biological role in procreation where it extends to gestation and labour, is unique to women — and conflicted at law. The pregnant woman is often characterised by law as two people instead of one, resulting in a conflict of rights as between woman and foetus.²² Thus, women's claims for reproductive freedom as a form of bodily autonomy diverge from those of men whose body is always seen by the law as singular — even where the law might remain problematic concerning sperm donation.

Beyond the biological process of conception and gestation, and integral to the consideration of reproductive freedom, is the social construction of motherhood specifically, and parenthood more broadly. Reproductive freedom subsists in an

²¹ Office of the United Nations High Commissioner for Human Rights, *Reproductive Rights are Human Rights: A Handbook for International Human Rights Institutions* (2014) <<http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>> 13.

²² Anne Morris and Susan Nott, 'The Law's Engagement with Pregnancy' in Jo Bridgeman and Susan Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth, 1995) 53, 56; For an example of the separate treatment of mother and foetus, see discussion about 'Zoe's Law' in *Foetal Personhood Bill* ("Zoe's Law") (20 November 2014) Women's Legal Service New South Wales <<http://www.wlsnsw.org.au/law-reform/past-campaigns/zoes-law/>>.

individual, but within a social context. Procreation is an inherently social act, as well as an intensely personal one. Thus Petchesky points out that ‘woman's reproductive situation is never the result of biology alone, but of biology mediated by social and cultural organization’.²³

The social aspects of surrogacy are borne out by Kunde's narrative which provides a case study of arrangements involving a set of differentiated parental relationships, freed from the nexus of a sexual encounter and mediated instead by technology.²⁴ Not only can surrogacy consist of reproduction without sex, in contrast to a ‘traditional’ conception between heterosexual partners — mother and father — in a surrogacy arrangement there are actors who variously embody genetic, gestational, and social elements of parenthood.²⁵ For this reason, the legal implications of surrogacy cannot be considered in the same terms as ‘conventional’ conception.

In discussing the case of baby Gammy, the child born to a Thai mother and abandoned by the Australian intended parents,²⁶ Kunde agrees that surrogacy ‘can go wrong’, but counters that any conception can go wrong. She draws an analogy with abandoned babies born from ‘conventional’ conception, suggesting that ‘circumstances like this happen in every day life’ and that when they do, ‘the nature of their conception is never called into question’.²⁷ Kunde fails to explain that baby Gammy's mother took on the pregnancy at the behest of the intending parents, through invasive medical procedures, using their genetic material, for their benefit, in exchange for payment. The mother came from a poor background and was left with a baby who had health problems, without the means to pay for medical assistance. It is difficult to see this as an “every day life” occurrence. Women do of course give birth to children with specialist medical needs, and indeed may even have been coerced into intercourse and subsequently abandoned. However, the expression of women's agency in the case of a surrogacy arrangement is mediated through and serves different relationships from those of a sexual encounter in

²³ Petchesky, above n 17, 667.

²⁴ “Technology” here extends from self-insemination through to ART.

²⁵ Enohumah Kingsley Osagie, ‘Surrogacy: Whose Child Is It?’ (2010) 1 *Journal of Medicine and Medical Sciences* 505.

²⁶ See, eg, Kate Galloway, ‘Surrogacy: Whose Reproductive Liberty?’ *Right Now* (online), 13 October 2014 <<http://rightnow.org.au/writing-cat/surrogacy-whose-reproductive-liberty/>>.

²⁷ Kunde, above n 1, 237.

a way that challenges the law's default — and traditional — understanding of parenthood.

Kunde thus neatly sidesteps the issues that lie at the heart of the surrogacy arrangement and challenge the construction of surrogacy necessarily as an expression of reproductive freedom. Becoming pregnant as a result of a sex act involves only two parties in whom traditionally recognised elements of parenthood converge. Conception may be planned or unplanned, but regardless each party has a well-defined legal relationship with the child. The State will enforce the relationship and certain obligations, recognising without more the status of each of the two parents as such. The law does not however recognise obligations as between the two parents,²⁸ unless they have a recognised marriage or marriage-like relationship.²⁹

In contrast, a surrogate pregnancy involves an agreement between various possible parents, designed deliberately to fragment and then reorder the traditional Anglo-Australian elements of parenthood that are implicit in an understanding of reproductive freedom. It does so by providing privately for rights and obligations between parents and child as well as between the parents, in relation to that child. For better or worse, the relationship between surrogate mother and intending parents is not, without more, a relationship known to the common law. In contrast with conventional conception from a sex act, whether intended or not, the intentional distributed parentage upsets the law's traditional attribution of responsibilities for children, and challenges assumptions about reproductive freedom. This freedom, however, takes a different form as between intending parents and the surrogate mother.

A Intending Parents

Kunde's story tells of two couples that wished to complete their family, but were unable to. Central to her advocacy is the desire to assist couples to have a family. Yet while couples are entitled to have a family, it appears that going beyond their personal reproductive capacities poses a challenge for the law. The law has for some time catered for gamete donation — the genetic component of parenthood. However, regulation has

²⁸ Except for a biological mother's right to seek costs relating to gestation and birth from a biological father in some situations (see *Family Law Act 1975* (Cth) s 67B).

²⁹ Marriage and de facto relationships are governed variously according to the *Family Law Act 1975* (Cth) and state *de facto* legislation.

for a long time fallen short of the introduction of an embodied reproductive service, or the gestational component of motherhood. Part of the challenge for intending parents is whether there can be said to be any *right* to enlist the assistance of a surrogate. In Kunde's terms, such a right might be to engage in a surrogacy arrangement in the first place, free from state interference, but also to seek state assistance and support to exercise that right.

Individuals in jurisdictions with constitutionally protected individual rights, such as the US, might have a claim to legal protection of a 'right to reproduction'. For example, it is on the basis of a tradition of constitutionally enshrined individual freedoms (the freedom of personal action and personal expression without state intervention) that Robertson argues for married couples' right to procreate within a sexual relationship. He suggests that this right to beget and rear children,³⁰ regardless of whether they are biologically related to the parent,³¹ extends to artificial reproductive techniques and to surrogacy.

Also within a rights-based framework, Article 16 of the *Universal Declaration of Human Rights* ('UDHR') provides specifically for a right to family, although it does not provide for a right to procreate *per se*.³² Although dealing with "family" and therefore potentially concerning procreation, the meaning of this right in terms of surrogacy is unclear. Without more it is difficult to interpret this as a positive right to engage a surrogate. To illustrate the boundaries of the right by analogy, the law protects property rights without investing in citizens the inherent right to a distribution of property. Property rights exist only once the citizen has acquired property. In the same way, arguably, the right to a family might exist once one has a family. The form the family takes pursuant to the right is less uncertain.

In contrast, Tobin suggests that there may be a right to contract for surrogacy services. He cites *dicta* in a decision of the Grand Chamber of the European Court of Human Rights,³³ in which he analogises from the issue of a right to an assisted pregnancy, to

³⁰ John A Robertson, 'Liberalism and the Limits of Procreative Liberty: A Response to My Critics' (1995) 52 *Washington and Lee Law Review* 233.

³¹ John A Robertson, 'Embryos, Families and Procreative Liberty: The Legal Structure of the New Reproduction' (1986) 59 *Southern California Law Review* 939.

³² *United Nations Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc. A/810 (10 December 1948).

³³ *SH and Others v Austria* (2011) 3 Eur Court HR.

suppose a right also to surrogacy — all based on the right to a private life.³⁴ While possible, and with respect, the proposition is likely to be largely speculative at this stage.

In the absence of any articulated rights at law, it would be strained to argue in the present Australian context for any kind of substantive, positive reproductive right (including in Robertson's or Tobin's extended sense), or positive right to have a family.³⁵ There is however growing public sympathy for 'the childless' and consequently public support for women who use artificial reproductive technologies to conceive, and for both surrogacy and international adoption.³⁶ In recent years, this has translated into parliamentary recognition in Queensland of the 'liberty of consenting adults to conceive a child and to parent'.³⁷ A Committee was established to 'investigate and report to the Parliament on the possible decriminalisation and regulation of altruistic surrogacy in Queensland'. The recommendations resulted in the enactment of the *Surrogacy Act 2010* (Qld).³⁸ While not expressing a positive right to reproductive freedom, it might be argued that increasingly the Australian regulatory framework surrounding altruistic surrogacy is warming to the idea.

If intending parents have no clearly identifiable reproductive freedom that includes surrogacy, they might be considered under classical liberal theory to have a right to enter into contract. It is this contractual element that has traditionally been the focus of the regulation of surrogacy, rather than any procreative right or freedom implied at law. The problem for the law with this right, which is one known to the common law,³⁹ is the object of the contract. For many writing about surrogacy, the critical and analytical focus is on the child as the contractual object, and concerns tend to lie in the potential for commodification of the child, stemming from the possibility of the sale of children, and trafficking, both of which are unlawful.⁴⁰ For example, there is a raft of Australian

³⁴ Tobin, above n 5, 324.

³⁵ Following the decision in *McBain v Victoria* [2000] FCA 1009 (28 July 2000), it is possible to suggest a right not to be refused access to reproductive services, for those with characteristics of a protected class under anti-discrimination legislation.

³⁶ See, eg, Surrogacy Australia, *Home* <<http://www.surrogacyaustralia.org/>>; Australian Families for Children, *About Us* <<http://www.australiansadopt.org/AboutUs.php>>.

³⁷ Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Report* (2008) 22.

³⁸ *Ibid* 1.

³⁹ This right is normally referred to in a commercial context (see, eg, *Knightsbridge Estates Trust Ltd v Byrne* [1940] AC 613).

⁴⁰ See, eg, Kajsa Ekis Ekman, *Being and being bought: prostitution, surrogacy and the split self* (Suzanne Martin Cheadle trans, Victoria Spinifex Press, 2013) ch 4 [trans of: *Varat och varan: Prostitution, surrogatmödraskap och den delade människan* (first published 2010)].

legislation criminalising human trafficking, which is supported at international law.⁴¹ The courts would thus tend, even in the absence of legislation, to find the contract void as against public policy — and resultantly unenforceable.

The present regulatory framework in Australia permits intending parents a limited freedom to contract in relation to the subject matter of procreation, but to an extent that this remains short of a positive procreative right. While Kunde was not explicit in identifying a normative basis for government support of surrogacy, her own motivations lay in assisting couples to have a family. A curtailed right to contract does not afford a right to have a family.

For Kunde's argument of government support for surrogacy to be taken up, the law requires a clear rationale for surrogacy itself. As the existing legal framework stands, it is not sufficient simply to declare that a couple (or a single person) wants to start a family. To interrupt the law's traditional, heteronormative understanding of parental relationships as a legal construct with legal implications requires something stronger: an underlying rationale to explain the purpose of the law and allowing full consideration of the multiple parties' interests.

B Surrogate Mother

Since the notorious *Baby M* case in the US,⁴² the position of the surrogate mother has, in addition to the rights of the child, drawn commentary both in terms of her role as a party to the arrangement, and also as its object.⁴³ Both roles converge in considering whether the surrogate mother has some kind of reproductive right, which she exercises through the arrangement.

As with the intending parents, Australian law cannot be said to recognise a reproductive right per se in the surrogate mother. But her position is quite different from that of the

⁴¹ See, eg, *Convention against Transnational Organized Crime*, opened for signature 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003); *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003).

⁴² *In re Baby M*, 109 NJ 396 (1988).

⁴³ See, eg, Margaret Radin, 'What, if Anything, is Wrong with Baby Selling?' (1995) 26 *Pacific Law Journal* 135; Michael J Sandel, 'What Money Can't Buy: The Moral Limits of Markets' (The Tanner Lectures on Human Values delivered at Brasenose College, Oxford, 11–12 May 1998) <http://tannerlectures.utah.edu/_documents/a-to-z/s/sandel00.pdf>; Phyllis Chesler, 'Mothers on Trial: Custody and the "Baby M" Case' in Dorchen Leidholdt and Janice G Raymond (eds) *The Sexual Liberals and the Attack on Feminism* (Pergamon Press, 1990) 95.

intending parents. She is both effectively extending her own family as Kunde put it,⁴⁴ and is also contributing to the family of another couple. She is entitled to become pregnant and thus to exercise her bodily autonomy. However, in legal terms because of the intention to relinquish the child to the intending parents, entry into the surrogacy arrangement is not exercising a right to a family. In the absence of specific (surrogacy) legislation, nor is she generally permitted by law to relinquish her child pursuant to a private arrangement. Without a legal framework as to parentage, generally she will remain the child's guardian with the legal responsibilities that entails.⁴⁵ The call for the law's intervention by those such as Kunde, is for the State to enforce and support a private parentage arrangement. In one sense, this is perhaps more an argument for enacting freedom of contract than support for any other freedom, including reproductive freedom.

In contrast to this positivist interpretation, Kunde's assertion of her own autonomy through her surrogacy experiences is her performance of freedom, if not articulated legal rights. As an individual, she freely decided to carry children who would grow up with other parents. Such action is clearly at the heart of the liberal project, permitting the flourishing of individuals through self-determination. Additionally, Kunde had rationalised possible harms to herself and to others, meeting any objections to the exercise of her own autonomy.

In making her recommendations for reform, Kunde expands on these concepts seeking active government support for surrogacy, intending a more concrete and institutionalised approach to reproductive freedom. The legislative support for surrogacy that she seeks implies (though need not enact) a legal reproductive right. Problematically, the right must vest both in the intending parents and the surrogate mother herself. This requires lawmakers to look beyond the individual experiences of people such as Kunde, and to consider the broader contexts within which such arrangements might occur. In doing so, questions of freedom and its relationship to autonomy become significantly more complex.

⁴⁴ Kunde, above n 1, 242.

⁴⁵ See *Family Law Act 1975* (Cth) pt VII.

III THE CHALLENGE FOR SURROGACY

Kunde's article is a personal account of her experience, and argues a case for improved government support of surrogacy as a positive expression of personal rights. She addresses the underlying value of dignity through her having experienced personal bodily autonomy from acting as surrogate. Further, she summarily dismisses arguments against surrogacy as failing to comprehend the complexity of dignity.⁴⁶ While I agree with Kunde's assessment of complexity, I disagree that objections can be so easily dismissed. In view of the normative importance of dignity, a value that should underpin and inform the law,⁴⁷ this part explores the values at stake in the surrogacy arrangement that should inform the regulatory approach.

Kunde has staked her own argument on her experience of personal liberty and personal autonomy. In invoking the concept of autonomy, I take Kunde to have implicitly raised the conceptual framework of liberalism and its attendant rights as a means of supporting her case for surrogacy and State support for those who undertake it. Autonomy is central to a western conception of the individual and their personhood, implicated in both politics and the law. However various feminist theories have raised alternative accounts of autonomy as it is traditionally understood within liberalism. Rather than relying on an atomistic individualism that prefigures society and relationships, a feminist critique of liberalism recognises the omission from this account of relations of dependence and interdependence.⁴⁸

Self-determination and autonomy for women are, for many, at the heart of feminism. Yet the liberal construct of "individual" and its associated form of autonomy, pervasive in the Western liberal context, are inimical to the "social" — and to relationships. Part of the challenge for feminisms in the West has been to navigate these pervasive tenets of liberalism in a way that gives voice to women. This requires a reframing of the very meaning of these central ideas so as to reflect women's experience.

⁴⁶ Kunde, above n 1, 236–7.

⁴⁷ See, eg, Kate Galloway, 'Theoretical Approaches to Dignity, Human Rights and Surrogacy' in Paula Gerber and Katie O'Byrne (eds), *A Human Rights Perspective of Surrogacy* (Ashgate, 2015) 13.

⁴⁸ See, eg, Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004); Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7.

For some feminists, the shortfall of the individualism practised by the law and more broadly in the liberal tradition, is its negation of relationships. Aligned with communitarian accounts (broadly speaking), feminist critiques of law recognise the self as a relational being, deriving self-expression and indeed autonomy through society: that is, society prefigures the individual, not vice versa. Relationships thus constitute us and it is through the expression of relations that we experience autonomy.⁴⁹

I see this relational experience as featuring strongly within Kunde's analysis, which recognises the social aspects of reproduction. Her story is not only about her, but also about how she has related to intending parents, her partner, and her children. Her proposed policy amendments are directed at facilitating familial and parenting relationships for others who would otherwise not have the opportunity to do so.

But at the same time I see Kunde's analysis — if not necessarily her story — as deeply individualistic. On one level, and aligned with a feminist approach of promoting women's bodily autonomy, Kunde has (in her own words) achieved self-determination through her reproductive agency. However I see Kunde's experience reflecting a more atomistic individualism when seen in a broader social context — or through what Nedelsky calls 'nested relationships'.⁵⁰

In using this term, Nedelsky recognises the multiple networks of relationships to which each of us is a party. Within Kunde's story, for example, she paid attention to her relationship with her partner. She developed a relationship with the commissioning parents, and she was attentive to her relationship with her children. These relationships all co-existed, informing and informed by each other.

From her story, it appears that the decisions that Kunde made were also inevitably shaped by other "nested" relations. Her role in society, her views on motherhood and family, her earning capacity and her other economic relations will all have worked towards the reproductive choices Kunde describes. According to this view, the fact of Kunde's reproductive autonomy is an aspect of her social positioning. Similarly, the intending parents have been shaped by their own nested relations including society's

⁴⁹ Nedelsky, above n 16.

⁵⁰ Ibid, 45.

views on parenthood, the social construction of family, and perhaps also embedded understandings of self as constituted through familial relations.

This is not to say that the parties to a surrogacy arrangement are not autonomous or exercising autonomy. The point is more that autonomy is exercised relationally and must be understood within a social context. Thus despite her dismissal of concerns for dignity, Kunde's experience does not resolve structural questions around the practice of surrogacy and women's selves constituted within nested relationships and a society that continues to embody unequal and gendered power relations.⁵¹

The challenge for surrogacy therefore is not so much one of enacting individual rights. Rather, it is one of justifying the practice through recognising the need to mediate power relations in private parenting arrangements, to uphold values of dignity. The need to do so arises not from a rights basis, but from the reality of human practices and relationships, and the consequences for dignity itself. In Nedelsky's terms, regulation of surrogacy recognises the need for the law to structure relationships that will foster the desired values — in this case, dignity.⁵²

There is no inherent reason that surrogacy is inimical to dignity.⁵³ Conversely, not all who engage in surrogacy arrangements are exercising the freedom expressed by Kunde. This is particularly the case where autonomy, and with it dignity, is eroded through structural disadvantage and unequal power relations, either tacit or express. In response to such concerns, Kunde has outlined a number of suppositions about best practice in negotiating surrogacy arrangements that reflect a commitment to procedural fairness. For example, she proposes that: the intending parents have no input into the pregnancy; there is no payment for the service, but that compensation is provided; the surrogate mother has a safety net in relation to medical risk; and there is a process to ensure informed consent before embarking on the arrangement.

The need for reform of Australian surrogacy regulation is recognised, including dealing with the question of relative bargaining power between the parties. Millbank, for

⁵¹ See, eg, Kate Galloway, 'The Unwritten Rules' (2013) 40 *Griffith Review* 1; Janice G Raymond, *Women as Wombs: Reproductive Technologies and the Battle over Women's Freedom* (Melbourne Spinifex Press, 1993); Susan Moller Okin, *Justice, Gender, and the Family* (Basic Books, 1989); Debra Satz, *Why Some Things Should Not be for Sale: The Moral Limits of Markets* (Oxford University Press, 2010).

⁵² Nedelsky, above n 16, 236.

⁵³ Galloway, above n 47.

example, identifies the UK's 'broader and more flexible' approach as preferable to that in Australian jurisdictions.⁵⁴ She points out that while Australian surrogacy reforms have been inspired by those in the UK, Australian jurisdictions have introduced increasing complexity and consequently have departed considerably from the UK framework.

In addition, despite suggesting a more supportive regulatory environment for surrogacy arrangements, Kunde's conclusion that this will stem the problem of overseas surrogacy arrangements appears to be an assumption only. Notably, in light of the global illegal trade in children and the contemporary social imperative of having children, the question of dignity — and human rights more broadly — of overseas surrogates and children will remain. Any overhaul of Australian surrogacy regulation must align with global efforts to protect both children born to surrogacy and the women who carry them.⁵⁵ It cannot alone stem the tide.

IV CONCLUSION

Kunde's recommendations for opening up altruistic surrogacy necessarily focus on her own experiences within the Australian context — including those of the people for whom she advocates. Her experiences, expressed in her article, are an important addition to the discourse around contemporary surrogacy practices. The purpose here however, has been to broaden those horizons. In the first place it is suggested that a positive rights-based approach to surrogacy fails to conceive of the divergent claims made by intending parents and surrogate mothers. If surrogacy can be considered as an exercise of reproductive liberty, in the absence of an express parliamentary declaration, for the intending parents it is likely a negative liberty alone without a substantial claim to positive legislative support.

In contrast, the surrogate mother might lay claim to both negative and positive liberty. On the one hand, a claim to freedom from legal interference with her capacity to enter into a contract to relinquish a child, but on the other the right to take positive action to become pregnant and give birth. In reality however, a rights focus is unlikely to resolve

⁵⁴ Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or '25 Brick Walls'?' (2011) 35 *Melbourne University Law Review* 165, 186.

⁵⁵ See, eg, John Pascoe, 'State of the Nation - Federal Circuit Court of Australia' (FMCA) [2014] *Federal Judicial Scholarship* 21; Tobin, above n 5.

the inherent tension between the values at stake for the parties to the surrogacy arrangement, quite apart from the welfare of the child.

Considering a rationale for more than a ‘tightly controlled tolerance’ approach to surrogacy regulation,⁵⁶ the issue becomes one of balancing the values at stake in light of the relative power at play within the relationships involved. The solution suggested here is the adoption of a relational approach to considering the legal framework around surrogacy — an approach whose purpose is to structure relationships that foster these values. Drawing on Kunde’s reflection and the debate more broadly, the values at stake include autonomy and dignity. To see these values in an individual sense however, is to ignore the broader or ‘nested’ relationships each of us experiences and to which the law must also pay attention.

To this end, Kunde is right to observe that dignity is possible within the surrogacy arrangement, although this conclusion does not engage with highly problematic questions about what some might consider reification of family and children within contemporary Australian society.⁵⁷ Despite these questions, it is no answer to ban or criminalise surrogacy out of hand on the basis of an assumed exploitation. To do so will not stop exploitation and the consequences for dignity. By all accounts the practice will continue and in doing so without regulatory oversight will instead promote exploitation of both women and children.

We are all constituted by our relationships — including social construction of family and procreation. While there are staunch critiques of the patriarchal nature of institutions including the family,⁵⁸ so too are there arguments for reclaiming the feminine self, including expression of self through pregnancy.⁵⁹ While feminist thought and practice must continue to challenge the status quo and the ongoing imposition of patriarchal structures on women’s autonomy, in the meantime the dilemma remains of women and children who are, unlike Kunde, exploited. Neither of these frames of thought advances the dignity of those most at risk of an existing social practice.

⁵⁶ Millbank, above n 54, 173.

⁵⁷ See, eg, a radical feminist critique in Raymond, above n 51.

⁵⁸ See, eg, Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (Paladin, 1972).

⁵⁹ See, eg, the discussion in Linda M Blum, ‘Mothers, Babies, and Breastfeeding in Late Capitalist America: The Shifting Contexts of Feminist Theory’ (1993) 19 *Feminist Studies* 291.

Kunde's recommendations for uniform regulation of compensated surrogacy, and government assistance for IVF and counselling for surrogate mothers, will go only part of the way towards resolving some of the intractable issues at stake in surrogacy, framed as they are in terms of individual experiences in the domestic context. Now that surrogacy is a global movement carried out in the global context of structural inequality arising from our inevitably nested relationships, dignity and autonomy are likewise at stake on a global scale. The relations to which the law must attend therefore extend beyond those existing neatly within jurisdictional boundaries. In the national context, they extend beyond even the positive experiences of individuals, no matter how liberating.

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