



Review Essay: The Liberal Legal Individual Accused: The Relational Case

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Jennifer Nedelsky

Law's Relations: A Relational Theory of Self, Autonomy and Law New York: Oxford University Press, 2011. 542 pp.

Jocelyn Downie and Jennifer J. Llewellyn

Being Relational: Reflections on Relational Theory and Health Law Vancouver: University of British Columbia Press, 2012. 331 pp.

We can think of human beings as discrete individuals, fully independent of one another and preferring it that way, because others cause worry: they pose a threat to property and personal security. Such nervous, self-isolating beings need law to keep others at bay. They do best—are most autonomous, even happy—when left to their own devices. This way of thinking about persons may seem quite natural because it has been so influential in our Western liberal legal and political tradition. However, it creates a caricature of real life, because no one can survive without nurture, and humans, like other animals, cannot reproduce without intimate contact. The fully independent individual is a Weberian ideal type;¹ it does not capture, or seek to capture, the complex truths of the human condition. And yet, it does orientate our thinking about persons, and it does so in a manner with which lawyers, in particular, will be familiar. It directs our attention to certain human purposes and needs (among them, protection from the unwanted advances of others) and it underplays others (notably, love and care).

We can also think of human beings as inseparable from their relations. The guiding idea is that we are formed through relations—the mother-child bond provides an obvious one—and that we move through life within, and more importantly *as*, a great shifting constellation of relations. Within relations we become what we are as persons; here, we must make sense of our lives, which in turn must be understood by scholars who wish to explain us. There is never a full separation between persons, and indeed, human beings draw their very identity from their relations. When they work well, relations are not only formative (and unavoidable) but also conducive to human autonomy and to the flourishing of the individual. It follows that the role of law is to regulate relations rather than to ward them off. Law's job is to ensure that they run smoothly and that they neither oppress nor harm us.

¹ Max Weber, "The Ideal Type," in K. Thompson and J. Tunstall, eds., *Sociological Perspectives* (Harmondsworth: Penguin 1971).

The avowed purpose of the two books under review is to shift our way of thinking about what it is to be human. The authors seek to change our orientation and redirect our focus, from the individual as the center of analysis and meaning and action, to the relations that make possible the human being and provide the opportunities for sense, meaning, and freedom or un-freedom. We cannot be understood, they say, apart from our relations. They want to make us see the deficiencies of individualism and the benefits of relational theory. How do they attempt to do this, and do they convince?

Law's Relations

Jennifer Nedelsky, a relational theorist working in the adjacent fields of law and philosophy, has sustained and developed her ideas over a long and distinguished career. In *Law's Relations*, her declared purpose "is to advance a shift of presumption about the self and its core values so that a relational perspective becomes a routine part of theorizing about justice, equality, dignity, security, or autonomy" (p. 9).

Nedelsky's title signals the concern of her book: it is *law's* relations. Law, she says, institutionalizes an individualistic understanding of the person. She wishes to replace the prevailing "habits of individualistic thought" with "habits of relational thought" (p. 25) and to do so "in everyday conversation, in scholarship, in policy making, and in legal interpretation" (p. 4). She hopes to speak to a broad audience, "simultaneously to lawyers, judges, legal scholars, and the engaged, non-academic public" (p. 11). However, most of her examples come from North America, and her interest lies in "Anglo-American liberalism" (p. 11).

In her first main chapter, Nedelsky locates her target: the liberal "self," which she says is best characterized by the idea of boundary. According to Nedelsky, "the image of protective boundaries as essential to the integrity and autonomy of the self is deep and pervasive in Western culture" (p. 98). The ability to defend an area of non-interference by others, an area of exclusive private property, has therefore assumed great symbolic importance. The most autonomous individual is the one with the strongest right to secure separation from others: to exclude others from one's person and property. The framers of the US Constitution were preoccupied with property, Nedelsky claims, precisely because of this presumed connection between property rights and personhood (p. 94).

This view of people as proprietors of their own personal domains has, we are told, unfortunate psychological implications—especially, it would seem, for the male psyche. It fosters a controlling and possessive nature, as the male individual is intent on securing dominion over himself and his own. He who can best isolate himself from others becomes the most successful, autonomous being. To Nedelsky, the result is an impoverished and undesirable model of a person around whom to build a law or, more accurately, to instantiate through law, for this "bounded self" is an artifact of law.

To demonstrate its utility, Nedelsky proceeds to apply her theory to a variety of laws. She reflects on the deficiencies of American administrative law, in particular its demeaning treatment of welfare recipients, and suggests that bureaucrats need a better mode of relating to their clients that enhances the autonomy of the weaker party. She suggests that the parent-child relationship offers one such model and the teacher-student relation another (p. 153).

Nedelsky then turns her attention to criminal law and, in particular, to the law of self-defense as a reply to a charge of murder. She wishes to render intelligible the lethal actions of women who kill their abusive partners when the latter are sleeping or have their backs turned, and she seeks to do so in a manner that will satisfy the legal requirements of self-defense. Canadian law requires that the defensive killer possess a reasonable belief that her life is threatened and that she needs to use lethal force in response to that threat. The difficulty for the defense, in these circumstances, is partly one of contemporaneity. These women do not kill at the precise moment when they are threatened; rather, they do so later, when they seem to be in a position of relative safety. Thus, they would appear to have other options, especially in light of their delayed response, and this further weakens the defense case. Surely, one might argue, the woman did not need to kill when she did: she could have left or gone to the police. And if she had so badly misjudged the situation, could she have reasonably concluded that killing was her only option?

As Nedelsky explains, the invocation of battered woman syndrome creates its own difficulties. It weakens the argument of reasonable belief in the need for lethal response and suggests, instead, an impaired capacity to reason. And yet, the woman must not appear to engage in a calculated exercise of future risk-management by eliminating a brutal husband when opportunity arises. Such reasoning defies the point of the defense.

Nedelsky suggests that the Canadian Supreme Court, in the landmark cases of *Lavallee*² and *Malott*³, employed a type of relational theory to make sense of the female defendant's delayed lethal actions and to fit them to the requirements of self-defense. The judges considered what was reasonable from the perspective of the woman, in light of her experiences in the violent relationship and her assessment of the practical alternatives. The female defendant, thus placed, was understandably skeptical of the state's ability and willingness to provide her with protection if she simply left. As Justice Wilson instructed in *Lavallee*: "I think the question the jury must ask itself is whether, given the history, circumstances and perceptions of the appellant, her belief that she could not preserve herself from being killed by Rust except by killing him first was reasonable" (p. 179). Nedelsky finds this rich contextual approach compatible with her theory. It tells us, chillingly, that women in such circumstances can become experts in violence and the art of the possible: self-defense is an available option only when the man is asleep or his back is turned, and it is necessary because the state does not afford adequate protection to a woman if she manages to leave. A skeptic might say that the judges in these cases merely displayed good judgment in action: they paid proper attention to the particular relationship between victim and accused, and to its social setting, which imbues it with meaning. The full apparatus of relational theory may not be needed to make sense of the courts' reasoning.

Elsewhere, Nedelsky turns to the Canadian law on sexual assault to show the benefits of relational theory. Prior to 1992, an accused man's subjective, even unreasonable belief that a woman consented to sex meant that he lacked the necessary incriminating mental element. His responsibility for the crime therefore

² *R v Lavallee* [1990] 1 SCR 852.

³ *R v Malott* [1988] 1 SCR 123.

depended on *his* understanding of the event. In 1992, a failure to take reasonable steps to ascertain whether the other person was consenting became a sufficient *mens rea*. Nedelsky's convincing point is that the reformulation of the mental element of the law not only calls for a change in male sexual behavior (now, he must take reasonable measures to ascertain that he has consent), but also places a burden on the woman to communicate her wishes. The law requires a positive communication so that the woman, too, must be forthcoming about her desires. The unequal and unwholesome sexual relation, implicitly rejected by the new law, is that of the commanding, coercive male and the coy or equivocal female, whose sole responsibility is to withhold her favors or, being sufficiently persuaded, to passively submit. Mutuality of response is now required (that is, at least according to the formal law).

Nedelsky's conception of the mature, autonomous, relational self takes form slowly over the course of the book, and in her penultimate chapter, she puts flesh on its bones, employing a variety of psychoanalytic theory. Her obverse of "the bounded self" is a non-controlling, respectful person who creatively engages in mature relations with others as equals. This person no longer obsessively polices personal boundaries; instead, that person engages in open and constructive mutual relations.

In her last main chapter, Nedelsky again voices a concern, found throughout the book, about male violence against women, especially in the domestic sphere. This violence, she says, is widespread, endemic, and brutal, and the "bounded self" is a significant part of the problem. From the "authoritative" writing on such violence, however, one does not learn of its brutal nature (p. 310). Nor does one discover its complexity and profundity: its deep roots and high level of acceptance in society. The close association between a controlling style of masculinity and violence, and the "vast structure of social practices—from war to entertainment [...] built around male violence" (p. 333), deepen the problem. The "bounded self," it seems, can assume an ugly character.

Nedelsky insists that basic institutional, social, and legal changes are required, including the transformation of relations between men and women in order to equalize their powers and promote mutual respect, especially in their sexual relations. She is, therefore, justifiably nervous about suggestions by prominent legal scholars (notably Janet Halley⁴ and Duncan Kennedy⁵) that what is needed in sex assault law reform is greater toleration of sexual ambiguity and rough sex play, and that the law should recognize the eroticization of domination and control. (This disturbing recommendation has received serious attention in the scholarly literature on international criminal law.) As Nedelsky insists, this recommendation has dangerous implications in a society in which men still exercise so much physical and social power over women, and it returns us to ancient arguments that what a woman really wants is a strong, coercive man.

⁴ Janet E. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton: Princeton University Press, 2006).

⁵ Duncan Kennedy, "Sexual Abuse, Sexy Dressing, and the Eroticization of Domination" (1992) 26 *New Eng L Rev* 1309.

Throughout her work, Nedelsky is keen to make plain that her relational theory is not simply a plea for greater community, closer social relations, or tighter social bonds or connections. It is not even, necessarily, a plea for greater care, what Carol Gilligan calls an “ethic of care,”⁶ though it seems that Gilligan provides Nedelsky with an important source of ideas about relational thinking. More interestingly, Nedelsky’s relational theory offers an account of how humans come into being and sustain meaning within and as relations. Relations may be positive and beneficial and promote autonomy, but they can also be oppressive and even cruel. Sometimes, an ability to sever certain relations may mean the difference between life and death.

Nedelsky does not sacrifice choice, agency, and autonomy in the move from individualistic to relational thinking. There remains a meaning-maker, someone making sense of the relations that make up one’s life. Autonomy is enhanced when the meaning-maker is alert to the complexity of life’s relations—to how they operate, how power influences their operation, and how autonomy depends on constructive relations and not on innate characteristics of the individual. It follows that there is a dynamic, creative dimension to the making of a person and the making of a life.

Each person must carve out a life course through a dense thicket of relations and thus make sense of existence. Notwithstanding often-thwarted opportunities, we must tell a story about ourselves and so render our lives meaningful and coherent. Paradoxically, perhaps, we have no choice but to do this. Persons who find themselves at the disvalued end of a series of intersecting relations—persons who are poor, female, racialized—have their job cut out for them. But sense must be made of the person—by the person and by the student of persons—within a web of relations that may be damaging or conducive to the welfare of the person.

It is difficult to do justice to the many and varied arguments of this discursive and idiosyncratic book, which shoots off in different directions but always returns to the subject of relational theory and its benefits. The book offers a rich trove of thoughts and reflections; it is more a group of intriguing essays, to be dipped into at any point for interesting insights, than a conventional scholarly treatise with a sustained, linear argument.

Being Relational

The essays brought together by Jocelyn Downie and Jennifer J. Llewellyn in *Being Relational* also concern relational theory and are all written by subscribers to that theory. The collection comprises two parts: one theoretical, the other practical. In the first part, prominent exponents of relational theory summarize their bodies of work and develop them in some way. In the second, contributors apply relational theory to health law and policy.

Llewellyn and Downie introduce their collection with an account of the “relational conception of the self,” which forms the foundation of these essays: “The human

⁶ Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge: Harvard University Press, 1982).

self in this view is constituted *in and through* relationships with others” (p. 4). Though our relations make us what we are, the self is not wholly determined by them. There remains “an individual self with agency who is able to reflect and choose but cannot do so alone” (p. 5).

Again, the individual spurned is the “traditionally liberal self,” seen here as rational, self-maximizing, economic man, plucked out of his social context, abstracted from his social relations, implausibly independent, intent on pursuing his personal preferences (p. 7). The individuals who are claimed and defended are social beings through and through; they cannot be known outside of their many constituting social relations but do not reduce to solid social conglomerates or passive products of the people who made them. Relational selves ideally sustain an ability to judge the health of their relations, though the more oppressive the relation, the more difficult the task of self-government.

The book’s first substantive chapter, by Susan Sherwin, explains this paradoxical idea of “relational autonomy.” It is not the same as “agency,” which is the exercise of choice within a constrained, even demeaning, range of possibilities that may still serve to confirm the low social standing of the individual. For example, the decision of a woman to undergo cosmetic surgery may be the rational choice of an agent in societies such as ours, which judge women by their appearance. But the woman with relational autonomy adopts a different stance. She takes a critical view of the social practice itself and even endeavors to change the social conditions that reduce women to the supposed beauty of their features. A woman cannot do this alone through sheer strength of will or critical acumen; she requires social policies that broaden her options or make cosmetic surgery less appealing. Relational autonomy depends on social institutions and practices. Both the powerless and the powerful can be “caught up in patterns of behavior that are contrary to their deeper interests” (p. 27).

Nedelsky’s chapter examines autonomous relational judgments that manage to transcend the partialities of judges’ own defining relations. These judgments entail a concerted effort to make sense of the points of view of other social groups through an “iterative process of comparing our judgments with others,” (p. 45) a process that results not in a simple compilation of points of view but in a growing awareness of one’s own and others’ pre-suppositions and frames of reference. Necessarily, this calls for a community of persons willing to engage in a communicative exercise.

Some of the scholars here reveal a touch of zeal in their efforts to convert the reader to the relational approach. Llewellyn, in her chapter on restorative justice, perhaps takes a step too far in an effort to proclaim the benefits of relational theory. She asserts that the very goal of justice “is the establishment of relationships that enable and promote the well-being and flourishing of the parties involved,” a claim that might come as a surprise to criminal lawyers (p. 91). The more conventional legal view is that criminal justice entails the identification and punishment by approved means of a criminal wrong, which has the distinct benefit of limiting the extent to which the state can interfere in the lives of those accused of a crime. “From a relational perspective,” Llewellyn tells us, “what is relevant is harm to relationships and not whether such harm is labelled a crime or a tort” (p. 96). The legitimate concern of relational justice apparently extends beyond the

determination of any specific wrongdoing to the harm done to all relevant relationships. This puts great faith in law, as it potentially extends its reach greatly.

Some authors make perhaps excessive claims for the novelty of relational theory. For example, Christine Koggel, in her discussion of poverty and inequality at the global level, asserts that “we need to move away from an analysis that begins with individuals,” and with their needs and capabilities, “to an analysis that examines the relationships in which individuals are situated and embedded” (p. 65). But social historians would do this as a matter of course.

Françoise Baylis offers a relational account of personal identity, which entails a shifting mix of self and other ascription: “[W]e are who we say we are and who others will let us be” (p. 128). Oppression is the imposition of the damaging ascription of others (what they think we are) and the eclipse of the person’s own self-assessment: “There is no true self, only a dynamic socially, culturally, and politically constituted self that is historically constituted” (p. 123). This is an interesting insight but one that social historians have already accepted.

It is common to think of conscience as one of the most private, personal, and individual of matters and, therefore, as a secure feature of liberal individualism. Conscience is also especially important to bioethics. Carolyn McLeod persuasively argues that a relational interpretation of conscience casts doubt on this dominant liberal view (p. 163) and reveals the social dimensions of conscience. Her point is that the socially powerful are better placed to nurture and assert their values in the name of moral integrity and unity, and thus to enhance their moral and social status. The powerless may find that with conscience comes disunity and loss of position, as occurs in the case of the nurse, discussed in this chapter, who whistles on bad medical practices. In an unequal world, personal doubt, disunity, and a loss of social respect and position may be the costs of good conscience.

Jocelyn Downie pursues the problem of conscience in the provision of abortion and its billing. She questions why the conscience of the health provider should take precedence over the needs and moral preferences of the pregnant women seeking affordable and geographically accessible terminations. *Being Relational* includes a number of other interesting applications of relational theory, offering essays on policy development and indigenous health (Constance MacIntosh); psychiatric treatment and decision-making capacity (Sheila Wildeman); the allocation of resources in health care (Diane Pothier); reparation for historic harms (Sue Campbell); and the use of animals in medical research (Maneesha Dekha).

Identifying and Curing the Problem of Individualism

For all the theorists featured in these books, relationality goes to the very center of the person. It is therefore best that one not think of the individual as located or positioned *within* or inside a set of relations, as this might suggest a fixed person of stable character who is distinct from his or her roles and relations. For individuals and their relations cannot be severed, and this is perhaps the most important intellectual, moral, and political point of relational theory, and the one that is most disconcerting and unsettling. People cannot be divorced from their relations, put under the social microscope, and explained, as they often are in the prevailing individualist tradition. Much as David Hume discovered when he tried to experience

his individual self, if one tries to concentrate on the essence of a person, the essence evaporates and leaves little of interest or meaning.⁷ Instead, one must attend to the relations that are both the making of the person and the materials with which the person makes his or her own self.

When the scientific spotlight is trained on the human individual, it may seem that the analyst can discover the individual's attributes and nature through hard thought and sustained scientific observation. But as soon as one gives the individual social and legal meaning, which one cannot help but do if a person is to be more than an object, then the individual ceases to be a discrete unit and comes to be defined by his or her relations. All of the scholars represented in these books offer this important and consistent message.

A potential weakness of both volumes is the intense commitment to relational theory and the absence of a conventional liberal thinker who might offer a dissenting viewpoint. The authors tend to presume and proclaim, rather than argue, investigate, and establish, the existence of a socially constricted individual, who is said to be the product of classical liberal legal theory and is placed at the center of liberal laws. But liberal individualism comes in a variety of forms, and its critics need to recognize these varieties in order to identify their targets accurately. Because these books include no classical or even softer liberals to explain and defend the liberal individual, there is a risk of criticism becoming caricature.

The individual portrayed here is an unattractive creature consumed by self-interest and seemingly insensitive to the needs and lives of others. To Baylis, this individual is "independent, rational, self-aware, self-reliant, self-interested" and "thoroughly (if not obsessively) engaged in the pursuit of his own interests" (p. 112); to Koggel, this person is "independent, fully autonomous and self-sufficient" (p. 70); and to Nedelsky, he or she is a "bounded self." Depicted as emotionally impoverished, with a poor appreciation of the extent of his or her true dependency on the good offices of others, this person has a deeply flawed personality, is essentially self-regarding, and has a bad case of false consciousness.

In truth, the liberal idea of the individual assumes not only a variety of characters, not all of which are obsessively selfish, but also a variety of modes or forms. The idea of the individual can be abstract, formal, and conceptual (a piece of conceptual artifice, a deliberate contrivance); methodological (the basic unit or object of analysis is the individual); descriptive (humans are depicted as individuals); and normative (to classical liberals, it is morally right to think of the individual, rather than the group or the collective, as the unit of analysis). To which variety of individualism do these writers object?

None of these scholars seem to be writing about legal fictions, or about the legal abstractions that are rights and duties and constitute the legal person understood as a legal fiction, as a device of law. They tend neither to employ the artificial vocabulary of law nor to invoke the virtual world of law, which does not have a particular and necessary relation with the world of non-law.⁸ Rather, they wish to

⁷ David Hume, *A Treatise of Human Nature* (London: Penguin Classic, 1985).

⁸ For an account of the virtual world of the legal individual, see Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Oxford: Hart, 2009).

divine “the very nature of human selves” (Nedelsky, *Law’s Relations*, p. 55). They place human beings at the center of law and lawmaking, and they try to explain the nature of those beings—their development, the conditions that enable them to flourish, and, especially, the relations that make for a diminished and devalued existence and those that enhance autonomy. They tend not to countenance the possibility that legal rights and duties need not be assigned according to a developed theory of human nature; that law need not seek to honor the nature of the human; that law’s purposes may, themselves, be various; and that law does not have a consistent character.

It would seem that most, if not all, of the contributors are intent on developing a (relational) theory of human nature and asserting that law should reflect that (relational) nature in its allocation of rights and duties. Perhaps more than they realize, they align themselves with a natural law tradition in which law derives its character from the presumed nature of the human.

Containing Analysis: Which Relations to Consider?

The theorists under scrutiny believe that we are all part of a great web or network of relations that carry different social significances, different social value and power, and different opportunities. These relations are the material with which we must make meaning, and which always makes us what we are. But there are so many relations, which may expand inquiry without limit. Relational theory thus generates epistemological, legal, and moral problems. How are we to determine which of the many relations that turn us into persons are to be attended to and which are to be excluded? Where do we start and stop in our analysis?

One might think that the sheer density and proliferation of relations would prevent one from attending to everything that affects human action and make any explanation excessively complicated. However, all accounts of what we are must select and abstract from the relations that make a life; decisions must be made about which relations to count as significant, analytically and existentially. The scholar must make these decisions in seeking to explain individual subjects of study, and each person must make these decisions in seeking to make sense of and tell the story of his or her own life. But as a practical matter, as these scholars disclose, a surprisingly small number of relations assume a great deal of significance: specifically, gender, race, and class.

The best, most reflective explanations of human behavior—the scholar’s account of others, and the person’s account of his or her own self—will be conscious of selection and abstraction. They will explore the reasons why some relations are being considered and others neglected. They will then pay careful attention to the significance and operation of each relation. Feminists are likely to consider the workings of those relations that tend to disempower women and empower men, and these relations are certainly an important focus for Nedelsky. Relational feminists, including all of these authors, will also endeavor to attend to the other relations that significantly complicate these effects. They will try to make sense of a web, not just a dyad, of relevant relations, and they will constantly need to defend and explain their selections.

The relational theorist rightly alerts us to the excluded or disvalued relation and also to the balance of power within the neglected relation. Relational theorists further prompt us to reflect on the suppositions, often inexplicit, which underpin decisions of inclusion and exclusion. Their approach therefore does treble service: it asks us to consider the many relations that make us what we are; it alerts us to the role that power often plays in bringing one side of any of those relations to the fore and suppressing another; and it asks for reflection on the silent premises guiding all of these moves.

But law as a practical discipline, ostensibly committed to justice, must set principled limits to the relations it will factor into its determinations. These imposed limits will necessarily be contrived and, often, artificially deemed into being; they are neither natural nor self-evident. For *this* legal purpose, law will say, only *this* set of relations will count, and they will count in *this* way. In this inevitable legal exercise of relation selection, principle will always be compromised, for some relations of significance must be excluded. Law does not attend to all relationships, and it cannot do so. On those occasions when law attempts to escape its artificial world and capture the full truth of life—for example, when law purports to describe and protect the so-called sanctity of human life—real moral dangers emerge, and feminists should be on the alert.

Law's refusal to examine relations may also be positively principled. Under the welfare model of law once applied to juveniles, neglected and delinquent children were subjected to a close inspection of their lives. If a child was thought to be trapped in a network of disadvantageous relations, more intrusive legal intervention and treatment (rather than limited punishment fitting to the crime) were considered justified and appropriate (and this is the necessary implication of Llewellyn's essay). The liberal demand that criminal law confine itself to a person's actions and refrain from inquiring into a person's impoverished social setting can be a mode of restraining state power. It can be progressive rather than regressive.

Wittgenstein maintained that philosophy should strive for clarification: it should seek to clear up misunderstandings, not try to change the world.⁹ These writers implicitly disagree. They set out to do both: to explain where we go wrong in our thinking about the individual and to show how a relational approach can achieve better, fairer outcomes in practical contexts. This is an estimable goal.

To read these books is to be in the company of intelligent women (interestingly, all the authors are female), who are engaged in a sustained conversation about a shared intellectual and moral problem; who speak with openness and subtlety; and who are intent on clearing up confusion and misunderstandings, making intellectual progress, and effecting practical change.

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⁹ Ludwig Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1953).