Relational Vulnerability: Law, Myths, and Homemaking Contributions in Cohabiting Relationships

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ABSTRACT

In this thesis, I examine the law applicable to unmarried couples on relationship breakdown through the lens of vulnerability theory, developing a framework of 'relational vulnerability' which argues that as a result of the state's expectation of and preference for economic self-sufficiency, the homemaker becomes vulnerable. Relational vulnerability is defined as *the broad susceptibility to harm that arises as a result of an individual existing within an uneven or unequal relational framework.*

Firstly, I argue that relational vulnerability is primarily caused by the way that the state, through law, prioritises autonomy and rationality at the homemaker's expense. Her inability to live up to the economic ideal causes her harm on an economic, emotional, and spatial level.

Secondly, I argue that legal understandings of homemaking (i.e. care and domestic work) are influenced by myths of altruism and domesticity, labelling it as gendered, sentimental, and privatised. As a result of this, the homemaker struggles to assert an interest in the family home on relationship breakdown.

Thirdly, I argue that the state owes an obligation to redress relational vulnerability by promoting resilience. In the final chapter, I examine three hypothetical responses to vulnerability, evaluating the extent to which these are able to make the homemaker resilient.

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CHAPTER 1: COHABITATION, RELATIONSHIP-GENERATED DISADVANTAGE, AND VULNERABILITY

Introduction: Relationship-Generated Disadvantage

My thesis analyses the ways that intimate relationships and more importantly, our position and status within them, the roles we take on, and the tasks we perform, can render us susceptible to harm, or 'vulnerable'. The context of my thesis is the legal framework applicable to unmarried cohabiting couples on relationship breakdown. In the context of marriage, English family law has come to recognise a concept called "relationship-generated disadvantage".[1] This refers to the fact that those who give up or compromise their economic earning power to perform 'homemaker contributions' (i.e. unpaid caregiving and domestic work), are likely to suffer economic disadvantage upon relationship breakdown. In *SRJ v DWJ,* Hale J explained that:

> [the wife] gave up her place in the world of work to concentrate upon her husband, her home and her family. That must have been a mutual decision from which they both benefited. It means that the marriage has deprived her of what otherwise she might have had.[2]

Where the parties are married, it is now a recognised principle that redistribution of assets on divorce[3] can include a compensatory element to redress relationship-generated disadvantage.[4]

Where the parties are unmarried, there exists no legal mechanism of compensation for relationship-generated disadvantage. This is despite many cohabiting relationships being

[1] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24, [140] (Baroness Hale)
[2] *SRJ v DWJ* [1999] 3 FCR 153, 160 (Hale J)
[3] Matrimonial Causes Act 1973, s 25
[4] *Miller v Miller; McFarlane v McFarlane* (n 1)

functionally very similar to marriage.[5] Instead, any disputes fall to be decided under ordinary principles of property law and equity, as set out in more detail below. Property and trusts law struggles to value homemaker work, preferring the certainty of economic contributions. The failure to acknowledge and seek to redress the imbalance that can result upon relationship breakdown has led to the accusation that the current law is manifestly unfair to the cohabiting homemaker.[6] The Law Commission of England and Wales recommended reform in its 2007 report on the basis of either the applicant's "economic disadvantage", or the respondent's "retained benefit" as a result of the relationship, but this reform has never been implemented.[7]

Scholars have further remarked that the law is discriminatory because women are still much more likely than men to be homemakers.[8] Therefore, while there are of course exceptions, relationship-generated disadvantages tend to affect women disproportionately.[9] The case law itself demonstrates that judges acknowledge the harsh nature of the legal rules but declare themselves powerless to effect substantial change. For example, Toulson LJ in *Curran v Collins* explained that:

> Sadly the appellant found herself in the classic position of a woman jilted in her early fifties, having very much made her life with the respondent for over 30 years. The law of property can be harsh on people, usually women, in that

[5] See Anne Barlow et al, Cohabitation, Marriage and the Law: Social Change and Legal Reform in the 21st Century (Hart 2005); and Elizabeth Cooke, Anne Barlow and Thérèse Callus, Community of Property-A Regime for England and Wales? (Nuffield Foundation 2006)

[6] Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 Modern Law Review 24

[7] Law Commission *Cohabitation: The Financial Consequences of Relationship Breakdown* ((Law Com No 307), 2007), para 4.33

[8] See Anne Bottomley and Simone Wong, 'Shared Households: A New Paradigm for Thinking about the Reform of Domestic Property Relations' in Alison Diduck and Katherine O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge 2006); and Anne Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in John L. Dewar and Susan Bright (eds) *Land Law, Themes and Perspectives* (Oxford University Press 1998)

[9] This is borne out by research into the longer-term financial consequences of divorce, e.g. Hayley Fisher and Hamish Low 'Recovery from Divorce: Comparing High and Low Income Couples' (2016) 30 International Journal of Law, Policy and the Family 338. See also John Eekelaar and Mavis Maclean *Maintenance After Divorce* (Clarendon Press 1986), 102, which found a significant adverse impact on the earning capacity of mothers as a result of "interruption of their employment pattern".

> situation… Bluntly, the law remains potentially unfair to people in the appellant's position, but the judge was constrained to apply the law as it is[10]

Conversely, other academics have defended the current law. Ruth Deech has been particularly vocal in her opposition to the extension of the legal rights of cohabitants. Deech's position is based on the principle of individual autonomy and she is critical of placing obligations on couples who, in her view, have made a deliberate decision not to enter into marriage.[11] Furthermore, she has argued that, far from protecting female homemakers, law reform may have the effect of encouraging economic inactivity and is therefore excessively paternalistic and patronising towards women.[12] Others have argued that cohabitation is qualitatively distinct from marriage, especially in term of its level of commitment, seen for example in Rowthorn's argument that "if heterosexuals choose to cohabit instead of getting married this indicates something about the likely stability of their relationship".[13] Because Rowthorn sees cohabitation as inherently less stable than marriage, he argues that the state should not support it in the same manner.

Regardless of one's position in the above debate, it is undeniable that the legal status of cohabitation is an issue that affects a significant section of the population.[14] Nearly a third of all children born in England and Wales in 2017 were to cohabiting parents.[15] The majority

[10] *Curran v Collins* [2013] EWCA Civ 382, [19], (Toulson LJ)
[11] Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 International and Comparative Law Quarterly 480
[12] Ruth Deech, 'Cohabitation' (2010) Family Law 39, 40. Auchmuty has also made this point (see Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196)
[13] Robert Rowthorn, 'Marriage as a Signal' in Robert Rowthorn and Anthony Dnes (eds) *Law and Economics of Marriage and Divorce* (Cambridge University Press 2002), 145
[14] The Office for National Statistics reported that in England and Wales in 2017, "approximately 1 in 10 people were living in a couple having never been married or civil partnered. A further 2.6% were cohabiting having previously been married or in a civil partnership." (ONS *Population Estimates by Marital Status and Living Arrangements,* July 2018) https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/bulletins/populationestimatesbymaritalstatusandlivingarrangements/2002to2017 (accessed 5 August 2018)
[15] The Office for National Statistics reported that 51.9% of all births in England and Wales in 2017 were to married or civil partnered parents, but 67.3% of births born outside of marriage or civil partnership were to parents who lived together, meaning that approximately 32% of all children are born to cohabiting couples.

of people who marry will have cohabited for a period of time, calling into question the apparent bright-line distinction in terms of commitment between marriage and cohabitation. While it is dangerous to generalise and suggest that all cohabiting relationships are functionally identical to marriage, the focus in this thesis is on those relationships that have produced disadvantages as a result of one person undertaking a homemaker role, i.e. looking after the home or the family. The argument that these relationships are so different in nature to marriage as to justify ignoring homemaker contributions in the former, but acknowledging them in the latter, is a very weak one because these relationships *are* functionally similar to marriage.

Throughout my thesis, I acknowledge that the way the legal framework and wider society understand homemaking work is both gendered and heteronormative.[16] However, although I use the female pronoun throughout to refer to persons of either sex, I do not suggest that *all* homemakers are women, nor that relational vulnerability only occurs in heterosexual relationships. My argument is not that all homemakers *are* heterosexual women, but rather that the legal framework, through its reliance on gendered myths of care and domestic work, *presumes* that homemaking is a female endeavour and confined mainly to heterosexual relationships.

(ONS, *Births in England and Wales*, July 2017) https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2017 (accessed 22 July 2018)

[16] See Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 Edinburgh Law Review 311; and Fisher and Low (2016), (n 9). While relational vulnerability can arise in same-sex relationships, especially where there are children or mutual caring obligations, research has often shown that same-sex relationships are more equal, both in terms of financial resources and the division of unpaid labour (see for example Kenneth Norrie, 'Marriage is for Heterosexuals-May the Rest of us be Saved From it' (2000) 12 Child & Family Law Quarterly 363).

The Aims of my Thesis

The starting position of my thesis is that the current law is unsatisfactory and unfair towards cohabiting homemakers. I do not actively engage in the 'autonomy versus protection' debate set out in the previous section, as this has been covered extensively in the existing literature.[17] Instead, I explore the nature and extent of the unfairness towards homemakers, analysing how their disadvantage arises, its impact, and how it should be addressed by the state and by law. I examine these issues through the prism of vulnerability theory, a body of work that has been largely spearheaded by the US feminist scholar, Martha Fineman.[18] Fineman's theory is based on inherent and *universal* human vulnerability, an inescapable condition that affects all citizens rather than just selected groups. I build on Fineman's universal theory by exploring and theorising additional vulnerabilities that result from the inescapable fact that all humans need to be cared for and supported by others to some extent. The problem is that responsibility for this care and support is not evenly distributed and imbalances can arise as a result, both within interpersonal relationships and between individuals and the state. I use the term *relational vulnerability* to refer to the range of harms that can result from the imbalances, focusing on cohabiting relationships as an example where those undertaking a homemaker role are particularly disadvantaged. Unlike inherent vulnerability, relational vulnerability is avoidable, and the state is capable of reducing or eliminating it.

[17] See e.g. Douglas et al (n 6); and Bottomley and Wong (2006) (n 8)

[18] See e.g. Martha Albertson Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013); Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Routledge 2013); Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251; and Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1

The term relational vulnerability has been employed by scholars in other contexts but is used in a novel way in this thesis. Bridgeman's version of relational vulnerability focuses on the vulnerabilities "that arise from attachments, emotional connections and the affective nature of the self."[19] Bridgeman concentrates predominantly on the natural emotions that derive from human interconnectedness, including feelings of guilt that arise where a third party has caused harm to a dependent loved one.[20] By contrast, while I acknowledge the role of emotion in vulnerability, I argue that the causes of relational vulnerability are largely external and state-created. Additionally, Kabeer's version of relational vulnerability turns to harmful and malevolent relationships, involving abuse and violence against women.[21] She explains that domestic violence should be viewed as "embedded in highly asymmetrical social relations and the associated dependencies", but sees these asymmetries as resulting primarily from the intentional and malevolent act of one person against another.[22] Although relational inequality and imbalance is also central to my theoretical position, this differs to Kabeer's argument in that I focus on how structures *external* to the intimate relationship (including state institutions, law, ideologies, and social discourses) come to impact upon the power dynamics between the parties and render them unequal.

I define relational vulnerability as the broad susceptibility to harm that arises as a result of an individual existing within an uneven or unequal relational framework. Although relational vulnerability incorporates what the family jurisprudence understands as relationship-generated disadvantage, I argue that it is a much more wide-ranging concept

[19] Jo Bridgeman, 'Relational Vulnerability, Care and Dependency' in Julie Wallbank and Jonathan Herring (eds) *Vulnerabilities, Care and Family Law* (Routledge 2014), 200
[20] Ibid, 204
[21] Naila Kabeer, *Violence Against Women as 'Relational' Vulnerability: Engendering the Sustainable Human Development Agenda* (United Nations Development Programme 2014)
[22] Ibid, 1

than currently understood, encompassing not only economic harms, but also emotional and spatial ones.

I make the novel claim that relational vulnerability must be understood as state-produced, rather than privately created as a result of individual choices made by the parties. Cohabiting relationships where one party undertakes a disproportionate share of homemaking work are inherently unequal and imbalanced. This is because the state, through its various institutions, and particularly through law, systematically and consistently marginalises homemakers and devalues their work, rendering their intimate relationships unequal. While this devaluation is particularly explicit and extreme in the case of cohabitation, the broader context is that homemaking work has a low status throughout society (and on a global level), regardless of the relational context in which it is performed.[23] The difference in English law is that, where the couple is married, law will at least ascribe some value to it when making financial provision on divorce.[24] I make this point to highlight that the problems raised and discussed in this thesis extend more widely than the context that is examined. The devaluation of homemaking and homemakers is ubiquitous.

In analysing cohabitation through the vulnerability lens, I address what I perceive to be two weaknesses in the current understanding of cohabitation in legal and political discourse. The first is the assumption that inequalities in cohabiting relationships arise because the parties have freely chosen to organise their lives in a manner that creates dependency and financial precarity. This may be the perception of many unmarried couples, but choices and decisions are always made within a broader context. It is no coincidence that it is overwhelmingly

[23] Shirin M Rai, Catherine Hoskyns and Dania Thomas, 'Depletion: The Cost of Social Reproduction' (2014) 16 International Feminist Journal of Politics 86

[24] See Anne Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse In and Around the Family' (2007) 58 Northern Ireland Legal Quarterly 251

women who make the 'choice' to undertake homemaking work.[25] In Chapters 4 and 5, I examine the way both caring labour and housework have historically been socially constructed as emotional and sentimental work that is suited to women's nature and psyche, a position that is still reinforced by the legal framework. This contributes towards the unequal division of homemaking work.

The second issue is that law's understanding of relationship-generated disadvantage has tended to focus nearly exclusively on *economic* harm. While this is undoubtedly the easiest to measure, I argue that homemakers are susceptible to a wider range of harms and that these also arise *during* the relationship rather than simply upon its end. Homemaker vulnerability is thus extensive, often permanent, and even relatively short relationships can have a life-altering impact on the homemaker in terms of "[depriving] her of what otherwise she might have had."[26]

Research Questions

I address three broad research questions. Firstly, what is the cause of relational vulnerability? In Chapter 2, I argue that relational vulnerability needs to be understood as state-created, through the way that the state, through law, consistently prefers and expects economic self-sufficiency while ignoring and devaluing homemaking work. This difference in status between homemaking and income-earning is presented as natural and common sense but is based on pervasive and harmful 'myths' that prioritise autonomy and marginalise and 'other' the homemaker. Secondly, how does relational vulnerability manifest itself? This is the focus of chapters 3, 4, and 5. In answering this question, I go significantly beyond the existing focus on economic disparity. I argue that relational vulnerability causes harms that

[25] For problems with the presumption of free choice in intimate relationships, see Anne Barlow and Simon Duncan, 'Supporting families? New Labour's Communitarianism and the 'Rationality Mistake': Part I' (2000) 22 Journal of Social Welfare & Family Law 23

[26] *SRJ v DWJ*, (n 2), 160 (Hale J)

are emotional and spatial, as well as economic, reflecting the individual subject's inherently embodied, emotional, and relational nature. The third question is how the state (and more specifically, law) should respond to vulnerability? In Chapters 6 and 7, I explore and theorise the concept of resilience, meaning not a complete absence of vulnerability, but the resources that the homemaker needs to enable her to withstand the harms brought about by her relational vulnerability. The aim here is not to propose a definitive legal solution in the form of draft legislation, but to develop a homemaker-centred, normative framework (based on the norms of relational autonomy and substantive equality), against which proposed law reform can be measured.

By employing the vulnerability lens, I aim to shift the parameters of the existing debate around the status of homemakers in cohabiting relationships. Vulnerability theory illuminates how the state, through its institutions and through law, creates conditions of inequality within intimate relationships by consistently devaluing and privatising homemaking work. It enables us to see that homemaker vulnerability is inevitable rather than a result of the parties' own decisions. Through the relational vulnerability framework and the understanding of the individual as embodied, emotional, and relational, I develop a more holistic and context-specific understanding of homemaker disadvantage than has been previously possible. I thus contribute both to family law scholarship, in terms of moving the debate around cohabitation in a new direction, but also to the emerging legal scholarship on vulnerability. My relational vulnerability framework demonstrates that, while vulnerability in the general sense is a useful unifying concept for legal analysis, the existing theory requires further development for use in specific contexts.

I do not suggest that my thesis offers a solution to all the current problems that are posed by unmarried cohabitation. Instead, I aim to provide new insights into the way the current legal

framework impacts on homemakers, and in doing so, to raise new questions to be addressed by future law reformers. Ultimately, I hope that my thesis will provide a starting point and springboard for further research, taking the issue of cohabitation and relationship-generated disadvantage in new directions.

Methodology

My thesis is a theoretical study. I outline and develop a framework through which existing law can be analysed, exposing the myths and assumptions that underlie property and trusts law. I draw primarily on the existing feminist vulnerability scholarship. However, in developing the relational vulnerability lens, I incorporate a number of further perspectives to advance the understanding of vulnerability. Some of these are underdeveloped in existing legal scholarship or have not been used in the same context that I employ them in my thesis. For instance, in Chapter 2, I draw on legal storytelling[27] and discourse analysis,[28] to highlight how the current legal framework exhibits a strong preference for economic contributions. In Chapter 3, I bring in perspectives from critical legal geography[29] and sociological understandings of ontological security[30] to explain the homemaker's precarious relationship to her home. In the same chapter, I also use temporal legal analysis[31] to explain how vulnerability comes to impact on the homemaker throughout her life and highlighting the

[27]E.g. Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Michigan Law Review 2411; and Lisa Sarmas, 'Story Telling and the Law: A Case Study of *Louth v Diprose*' (1993) 19 Melbourne University Law Review 701

[28] See Bruce Lincoln, *Discourse and the Construction of Society: Comparative Studies of Myth, Ritual, and Classification* (Oxford University Press 2014)

[29] See Katherine Brickell, ''Mapping'and 'Doing'Critical Geographies of Home' (2012) 36 Progress in Human Geography 225; and Allison Williams, 'Changing Geographies of Care: Employing the Concept of Therapeutic Landscapes as a Framework in Examining Home Space' (2002) 55 Social Science & Medicine 141

[30] See Anthony Giddens, 'The Consequences of Modernity ' (1990) 53 Polity 245; and Peter Saunders, 'The Meaning of 'Home' in Contemporary English Culture' (1989) 4 Housing Studies 177

[31] See Carol J Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 Yale Law Journal 1631; and Janna Thompson, 'Being in Time: Ethics and Temporal Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014)

temporal incompatibility between family law and property law. Throughout the thesis, I interweave vulnerability theory with relational theory,[32] theories of law and emotion,[33] and scholarship on embodiment,[34] highlighting through this the inadequacy of classical liberal and neoliberal understandings of personhood.

There are both advantages and disadvantages to this approach, which Martin has termed "magpieism",[35] whereby the researcher utilises a mixture of theoretical perspectives and methodologies, or "anything that attractively glints"[36] when addressing the research questions. The major advantage of magpieism is the ability to add originality and depth by drawing on a range of viewpoints. The originality of my thesis lies largely in the combination of theories that have not previously been considered together and the application of these to the existing legal framework. Mixed methodologies and interdisciplinary research can breathe life into legal scholarship, prompting new questions to be asked and new directions to be taken. Indeed, it is "a process that can transform the very identity of a discipline itself".[37] Transformation of this kind is certainly overdue in the cohabitation debate. It is an area that has been discussed and debated for decades[38] and is ripe for a change of direction.

[32] See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011); and Robert Leckey, Contextual Subjects: Family, State and Relational Theory (University of Toronto Press 2008)
[33] E.g. Susan A Bandes and Jeremy A Blumenthal, 'Emotion and the Law' (2012) 8 Annual Review of Law and Social Science 161
[34] See Sara Ahmed, 'Deconstruction and Law's Other: Towards a Feminist Theory of Embodied Legal Rights' (1995) 4 Social & Legal Studies 55
[35] Priscilla Martin, 'Chaucer and Feminism: A Magpie View' in J Dor (ed) *A Wyf Ther Was: Essays in Honour of Paule Mertens-Frock* (University of Liege Press 1992), 235
[36] Susan Carter, 'The Methodology of Magpies' (2014) 37 International Journal of Research & Method in Education 125, 12
[37] Douglas W Vick, 'Interdisciplinarity and the Discipline of Law' (2004) 31 Journal of Law and Society 163, 173
[38] See e.g. AAS Zuckerman, 'Ownership of the Matrimonial Home: Common Sense and Reformist Nonsense'' (1978) 94 Law Quarterly Review 26; Ursula Riniker, 'The Fiction of Common Intention and Detriment' (1998) Conv PL 202; Deech, (1980); and Rebecca Probert, 'Cohabitation in Twentieth Century England and Wales: Law and Policy' (2004) 26 Law & Policy 13

Conversely, the mixed approach is not without its problems, particularly when drawing insights from non-legal disciplines. One of these is that a project may be perceived to lack the rigour of traditional doctrinal scholarship. By attempting to fuse multiple theories, there is a risk that the result will lack depth and will instead merely be a combination of relatively superficial insights drawn from a range of areas but lacking a unifying thread. There is of course also the inherent danger of the researcher misunderstanding other disciplines and theories as a result of studying them in insufficient depth. As Vick warns, "the assumptions underlying the theoretical precepts or research techniques of other disciplines are often so subtle that they escape the non-specialist."[39]

While I am aware of these potential pitfalls, I believe that they are tempered by the fact that, while I combine a range of theories, vulnerability is a constant and unifying thread running through the thesis, acting as a focal point. My use of alternative viewpoints is methodical and undertaken in order to enhance and develop current understandings of vulnerability in a specific context. My methodology is therefore neither superficial, nor haphazard. Instead, it resembles, in Carter's words, "a nest-building labour, where each twig is carefully considered, tucked into place, and supplanted by the next. These tiny twigs…are retrieved only through a great deal of work reading, thinking, and checking."[40]

As this is a theoretical rather than an empirical study, a fundamental aspect missing from my thesis is the homemaker's own voice. While this means that some of the conclusions drawn will inevitably be subjective and to some extent reflect the viewpoint of the author, I do not intend to speak for all homemakers in this thesis. Instead, my aim is to draw out new perspectives and prompt new questions that can be used in further research. I intend to use

[39] Vick (2004) (n 37), 185
[40] Carter (2014) (n 36), 13

this study as a platform from which to conduct empirical research and test some of the conclusions of this thesis.

The Horror Stories of Cohabitation

Law's unfair treatment of cohabitants is often highlighted in legal scholarship through the telling and re-telling of 'horror stories', demonstrating the harsh impact of the current law. The most famous of these, the fate of Valerie Burns, is familiar to both family and trusts lawyers.[41] Valerie, or 'Mrs Burns', as the Court of Appeal referred to her, was in fact not married to her partner, Patrick Burns. However, to the outside world, they lived as a married couple, including Valerie taking Patrick's surname. Valerie was the primary carer to the parties' two children, while Patrick took on the role of breadwinner. When the children were older, she did undertake some paid work, although her childcare responsibilities restricted the hours she was able to work.[42] Crucially, her family did not need or depend on any income she did earn: it was hers to spend as she wished.[43] When the relationship broke down after 19 years, Valerie was unable to establish an interest in the family home, held in Patrick's sole name. In her claim for a constructive trust, she could show neither an express agreement for the beneficial interest to be shared, nor could such an agreement be inferred, because Valerie had not made any direct financial contributions to the property. She therefore left the relationship with no assets. In fact, the law reports omit that Valerie was quite literally left with nothing when she left the family home. A subsequent interview with BBC's Panorama programme reveals that she was forced to live for some time in her car parked in

[41] See *Burns v Burns* [1984] Ch 317
[42] Ibid, 328 (Fox LJ)
[43] Ibid, 330 (Fox LJ)

a roadside layby, having insufficient funds to secure housing.[44] Had she been married, the outcome would, of course, have been very different.

It is perhaps tempting to dismiss the *Burns* case as symbolising a bygone era. After all, women today are more likely to be engaged in paid work compared to the position in the early 1980s and are also more likely to be legal co-owners of the family home. Probert has therefore questioned whether Mrs Burns is representative of the experience of a modern-day cohabitant[45] and Auchmuty has emphatically said that she is not.[46] However, the more recent case, *Thomson v Humphrey*,[47] decided 24 years later, shows that it would be a mistake to entirely consign *Burns* to the annals of history, as injustices of this kind still take place today.

Jane Thompson started a relationship with Roy Humphrey in 1993. As was the case in *Burns*, the parties' home was purchased in Mr Humphrey's sole name, using his money. In her evidence, Jane explained that she carried out cooking, cleaning, and general housekeeping for which she received no payment. Effectively she took the role of what each of them described as a "traditional wife".[48] She also provided care for Mr Humphrey's elderly mother. Jane had given up her job when the relationship became serious, explaining in evidence that "Mr Humphrey did not wish her to work".[49] Warren J explained that "cases of this nature are to do with application of some quite strict legal principles, and not with imposing some standard of fairness."[50] He emphasised that *Burns* had established that

[44] See 'Valerie Burns' http://news.bbc.co.uk/1/hi/programmes/panorama/2504297.stm (accessed on 23 March 2018)
[45] Rebecca Probert, 'Trusts and the Modern Woman-Establishing an Interest in the Family Home' (2001) 13 Child and Family Law Quarterly 275, 275
[46] Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196
[47] *Thomson v Humphrey* [2009] EWHC (Ch) 3576
[48] Ibid, [39] (Warren J)
[49] Ibid, [60] (Warren J)
[50] Ibid, [35] (Warren J)

domestic contributions were by themselves "insufficient to give rise to any interest."[51] As a result, Jane Thompson's claim for a beneficial share failed. In her evidence, she powerfully described her disadvantaged position as a result of the relationship:

> I have lost the opportunity of working for 13½ years throughout my relationship with Roy. Therefore, at Roy's request, I have given up the ability to earn a salary and have made a significant contribution towards Roy and Church Farm. I have lost the chance of a mortgage. 13½ years ago, I could have got a mortgage and have paid this off over the timeframe. However, now I do not feel that I will be able to get a mortgage. I have therefore lost that to my detriment that I have suffered for Roy's benefit and that now I have lost the opportunity to obtain a mortgage. I believe Roy has made no sacrifice on my behalf.[52]

Thus, the issue was not simply that the parties were left in grossly unequal financial positions following the relationship breakdown, but that the very existence of the relationship meant that time in which to acquire assets and to build an earning capacity had been lost forever. This lost opportunity is particularly difficult to quantify, and law is traditionally cautious of the uncertainty and conjecture involved in such an exercise.[53]

The Changing Face of the Homemaker

In the 1970s and 1980s, a global feminist movement, originating in Italy and known as the 'Wages for Housework' initiative, campaigned for social and legal reform of women's roles as homemakers.[54] The Wages for Housework feminists highlighted that women's confinement to the home, and the expectation that they perform unpaid domestic work, amounted to a pervasive form of exploitation. Employing Marxist feminist theoretical

[51] Ibid, [29] (Warren J)
[52] Ibid, [91] (Warren J)
[53] See Carol J Rogerson, 'The Causal Connection Test in Spousal Support Law' (1989) 8 Canadian Journal of Family Law 95
[54] See e.g. Mariarosa Dalla Costa and Selma James, *The Power of Women and the Subversion of the Community* (Falling Wall Press Bristol 1973); Silvia Federici, *Wages Against Housework* (Falling Wall Press 1975); and Ann Oakley, *The Sociology of Housework* (Pantheon 1974). For a modern approach, see Donatella Alessandrini, 'Immaterial Labour and Alternative Valorisation Processes in Italian Feminist Debates: (Re)Exploring the 'Commons' of Re-Production' (2012) 1 feminists@ law 1. I discuss this further in Chapter 5.

frameworks, they argued that women's position was based on an artificial division between productive and unproductive labour, which ignored the fact that economic production cannot take place unless a sector of the population undertakes caregiving and homemaking work. The Wages for Housework initiative sought to liberate women from the home, campaigning for measures such as employment protections, the right to work outside the home, anti-discrimination measures, maternity protection, and state payments for socially reproductive work.[55]

The position of the modern-day homemaker is undeniably different to that of her 1980s counterpart. Many of the employment protections fought for by the Wages for Housework campaign now exist on paper, although their operation in practice is a different matter.[56] The traditional housewife who does not work outside the home is significantly less common today,[57] unless the couple can afford to live on only one wage. Women's participation in the workplace has increased since the *Burns* era and it will be relatively unusual for one party to a relationship to have undertaken no paid work at all.[58] The homemaker in my thesis is therefore increasingly likely to combine her work in the home with paid work at points during the course of her relationship. However, her responsibilities in the home mean that

[55] See Federici (1975), ibid

[56] See e.g. Olivia Smith, 'Litigating Discrimination on Grounds of Family Status' (2014) 22 Feminist Legal Stud. 175, who argues that employment initiatives aimed at flexible working and support for caregivers still presume that the caregiver is female.

[57] ONS figures show an increase in economic activity among women with dependent children. In 1996, the percentage of women with dependent children who were in employment was 61.9%. By 2017, this had increased to 73.7%. (See ONS *Families and the Labour Market 2*017, www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/datasets/familiesandthelabourmarketenglandlfsandapsdatasets). The total overall number of women in work (regardless of family status) has also increased over time. At the end of 2017, 71% of women aged between 16 and 64 were employed in some capacity, compared with just 52.7% in 1971. See ONS *UK Labour Market*, May 2018, www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/may2018).

[58] Probert (2001), (n 45), 281

her career path is more likely to be compromised, interrupted, and sometimes abandoned altogether to meet the needs of her family and dependents.

Furthermore, the state's expectations of women have shifted since the 1980s. As Smith argues, the previous 'male breadwinner' model has given rise to an 'adult worker' model, whereby both partners to a relationship are expected to be economically active.[59] While this has improved women's financial autonomy, it has brought about a new set of challenges and debates.[60] It has not eliminated the inequality faced by homemakers, but it has added a new layer of complexity to them; one which must be interrogated as part of any modern-day analysis of homemaking work.

The adult worker model has made homemaking work even less visible, hidden within the private family. While women are more likely to be employed, homemaking work remains gendered, with women providing the vast majority of it.[61] However, women are now subject to dual demands; expected to be caregivers while also being economically active. This is played out against the backdrop of an increasingly neoliberal state; neoliberalism being characterised by an emphasis on personal responsibility, market liberalism, and individual economic self-sufficiency.[62] The rhetoric of personal responsibility means that becoming a homemaker is viewed, not as an act of oppression by state policies that place women in the home, but as a 'lifestyle choice' for which the state should not be expected to take responsibility.[63] The challenge in this thesis is to construct a theoretical framework that takes

[59] Olivia Smith (2014), (n 56), 176
[60] See Judy Fudge, 'The New Dual-Earner Gender Contract: Work-life Balance or Workingtime Flexibility' in Joanne Conaghan and Kerry Rittich (eds) *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005)
[61] See e.g. Rosemary Crompton and Clare Lyonette, 'Who Does the Housework? The Division of Labour Within the Home' (2008) 24 British Social Attitudes 53
[62] See Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017)
[63] See discussion in Alison Diduck and Katherine O'Donovan, 'Feminism and Families: Plus Ça Change?' in Alison Diduck and Katherine O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge 2006)

into account this changing nature of homemaking and is alert to the new complexities that continue to emerge as the state adopts increasingly neoliberal policies that are also reflected in law.

Homemaker Contributions in the Legal Framework

In the absence of a statutory scheme applicable to cohabitants, any disputes over property fall to be decided under ordinary property and trusts law, through a claim for constructive trust or proprietary estoppel. As I show in this section, the courts have always struggled to accommodate non-financial homemaking contributions.

The Constructive Trust

In English law, the constructive trust is based on the parties' common intention to share beneficial ownership of a property, usually the home.[64] Applications for an order declaring the parties' respective beneficial shares in the home are brought under s 14 of the Trusts of Land (Appointment of Trustees) Act 1996. The trust arises in one of two scenarios. In the first, one cohabitant solely holds legal title to the home and the other seeks to assert a beneficial interest. In the second, title is jointly held, but the parties disagree over the size of their respective shares.

Sole Ownership

There are two ways in which a claimant can show evidence of a common intention. First, the claimant can rely on express discussions between the parties relating to ownership of the property in question.[65] Additionally, the claimant must show that she relied on these discussions to her detriment.[66] Detrimental reliance can comprise a range of actions, including making financial contributions to the household,[67] performing unpaid work in a

[64] *Gissing v Gissing* [1971] AC 886
[65] *Lloyds Bank v Rosset* [1991] 1 AC 107; *Culliford & Another v Thorpe* [2018] EWHC (Ch) 426
[66] *Smith v Bottomley* [2013] EWCA Civ 953
[67] *Grant v Edwards* [1986] Ch 638

family business,[68] or giving up a right-to-buy under a council tenancy.[69] The key is that the claimant must show that she would not have embarked on the conduct had it not been for the agreement that she would have an interest.[70] Although unpaid work can constitute detrimental reliance, case law suggests that any unpaid homemaker contributions must be "out of the ordinary"[71] and not motivated by other factors such as natural affection or wanting to improve the parties' relationship.[72]

The court can also infer a common intention from the parties' conduct where there is no evidence of an express agreement. This area has generated considerable controversy.[73] *Lloyds Bank v Rosset* displayed a very restrictive approach in Lord Bridge's comment that he was "extremely doubtful whether anything less than direct contributions to the purchase price by the partner who is not the legal owner"[74] would suffice in order for the court to infer that there was a common intention. Baroness Hale has since made obiter comments suggesting that *Rosset* is no longer good law and that the test for inferring intention is now a less stringent one:

> The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it.[75]

[68] *Hammond v Mitchell* [1991] 1 WLR 1127
[69] *Thompson v Hurst* [2012] EWCA 1752
[70] *Grant v Edwards*, (n 67), 648 (Nourse LJ)
[71] *Thomson v Humphrey*, (n 47) [44] (Warren J). See also *Cox v Jones* [2004] EWHC 1486; and *Lloyds Bank v Rosset* (n 65)
[72] *Thomson v Humphrey* (n 47); *James v Thomas* [2007] EWCA Civ 1212
[73] For critique, see Anna Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16 Legal Studies 218, and Simon Gardner, 'Rethinking Family Property' (1993) 109 Law Quarterly Review 263
[74] *Lloyds Bank v Rosset*, (n 65), 133 (Lord Bridge)
[75] *Stack v Dowden* [2007] UKHL 17, [60] (Baroness Hale). See also *Abbott v Abbott* [2007] UKPC 53

However, it is far from clear precisely to what extent law has moved on, bearing in mind that *Rosset* has not been expressly overruled.[76] Additionally, sole ownership cases have been interpreted inconsistently by the lower courts, some expressly relying on *Rosset,*[77] with others taking a more holistic approach to divining common intention.[78]

Thus, it appears that homemaking contributions seem unlikely *by themselves* to generate a proprietary interest. The sole ownership scenario is therefore particularly problematic for the cohabiting homemaker, presenting a significant risk of disadvantage upon relationship breakdown. It must also be borne in mind that actions under the Trusts of Land (Appointment of Trustees) Act 1996 are very costly and carry a significant risk of costs orders if the claimant is unsuccessful.[79] Public funding is generally not available for these disputes.[80]

Joint Ownership

Where the legal title is held jointly, the court's task is "to ascertain the parties' shared intentions"[81] about beneficial ownership. There has been relatively recent judicial activism in this area, which has recognised that the court should not treat disputes between cohabitants in the same manner as commercial transactions. In *Stack,* Baroness Hale

[76] For a detailed discussion of the approach post-*Stack* and the subsequent case of *Jones v Kernott* [2011] UKSC 53, see Brian Sloan, 'Keeping up with the *Jones* Case: Establishing Constructive Trusts in 'Sole Legal Owner' Scenarios' (2015) 35 Legal Studies 226

[77] See e.g. *Thomson v Humphrey* (n 47) and *Smith v Bottomley* (n 66)

[78] See e.g. *Culliford & Another v Thorpe* (n 65) and *Curran v Collins* [2015] EWCA Civ 404

[79] Actions under the Trusts of Land (Appointment of Trustees) Act 1996 are governed by the Civil Procedure Rules 1998 ('CPR') rather than the Family Procedure Rules 2010 ('FPR'), which apply to proceedings in the Family Court. Under Part 44 of the CPR, the losing party will usually be ordered to pay the winning party's costs, although the court retains a discretion. By contrast, under Part 28 of the FPR the general rule is that the court will not make an order for costs in family proceedings.

[80] Under section 2 of The Civil Legal Aid (Family Relationships) Regulations 2012, disputes under the Trusts of Land (Appointment of Trustees) Act 1996 that arise out of a "family relationship" are treated the same as other private family law matters, meaning that public funding will only be available if there is evidence of domestic violence (s 12 of Schedule 1 to the Legal Aid Sentencing and Punishment of Offenders Act 2012).

[81] *Stack v Dowden*, (n 75), [60] (Baroness Hale)

emphasised that "the domestic context is very different from the commercial world".[82] The term 'domestic context' does not appear to be limited to conjugal or 'couple' relationships and applies where the party have used the property in question as their home.[83] However, it is clear that the nature of the parties' relationship will affect the assumptions that the court makes as to their intentions.[84]

Stack represented a significant shift, described as introducing an element of communitarianism into the legal framework and being more attuned to the realities of family life.[85] It established that, in the domestic context, there is a strong presumption that the parties also intended the equitable interest to be held in equal shares. Significantly, this presumption will operate even if the parties have made unequal financial contributions, recognising that a homemaker may not be able to contribute equally. Therefore, in the case of joint ownership at least, the traditionally rigid law of property appears to have softened somewhat, taking greater account of family law-based principles.[86] The subsequent Supreme Court case, *Jones v Kernott*, referred to the presumption of equal shares based on the "strong indication of emotional and economic commitment to a joint enterprise" that purchasing a home together entails.[87] Lord Hope recognised that "living together is an exercise in give and take" and that "who pays for what in the home has to be seen in the wider context of their overall relationship".[88]

[82] Ibid, [69] (Baroness Hale)
[83] *Adekunle v Ritchie* [2007] EW Misc 5 EWCC
[84] *Gallarotti v Sebastianelli* [2012] EWCA Civ 865
[85] Simon Gardner and Katharine Davidson, 'The Supreme Court on Family Homes' (2012) 128 Law Quarterly Review 178, 182
[86] For discussion, see Andrew Hayward, ''Family Property'and the Process of 'Familialisation'of Property Law' (2012) 24 Child and Family Law Quarterly 284; and Elizabeth Cooke, 'Community of Property, Joint Ownership and the Family Home' in M J Dixon and G L L H Griffiths (eds) *Contemporary Perspectives on Property, Equity and Trusts Law* (Oxford University Press 2007)
[87] *Jones v Kernott*, (n 76), [19] (Lord Hope)
[88] Ibid, [3] (Lord Hope)

As the above discussion shows, homemakers who are joint owners fare better than their counterparts in the sole ownership scenario. There is also some (albeit limited) reference to homemaking contributions and childcare in *Stack*, suggesting a more family-centred approach.[89] However, this falls far short of a judicial declaration that homemaking is equally valuable to breadwinning. The other limitation of joint ownership cases is that they do not address relationship-generated disadvantage, even if they would usually entitle the homemaker to a half share. As such they overlook the point that Baroness Hale made in *Miller v Miller;McFarlane v McFarlane,* that "[g]iving half the present assets to the breadwinner achieves a very different outcome from giving half the assets to the homemaker with children."[90] This is especially true where the homemaker is dependent on state benefits following a separation, and the award of a half-share may affect her eligibility for payments if she is unable to afford to purchase another property.[91]

Proprietary Estoppel

The doctrine of proprietary estoppel occupies a residuary role in cohabitee disputes over the home but, in practice, it is more likely that cohabitants will use the law of constructive trusts. To establish a claim, the claimant must show that the legal owner has made an assurance or representation to the effect that the claimant is to have some form of proprietary interest in the land.[92] The claimant must then demonstrate that she has relied on the assurance to her detriment or changed her position as a consequence. Finally, the court must be satisfied that it would be unconscionable not to grant relief. As mentioned in *Cobbe v Yeoman's Row*, the

[89] *Stack v Dowden*, (n 75) [69] (Baroness Hale)
[90] *Miller v Miller; McFarlane v McFarlane*, (n 1) [136] (Baroness Hale)
[91] Certain state benefits, including Housing Benefit and Universal Credit are subject to a capital limit of £16,000, meaning that those who have capital above this amount will be ineligible. See https://revenuebenefits.org.uk/universal-credit/guidance/entitlement-to-uc/capital-rules/ (accessed 12 May 2018)
[92] See *Taylor's Fashions Ltd v Liverpool Victoria Trustees* [1982] QB 133 and *Thorner v Major* [2009] UKHL 18

consequence of allowing the defendant to renege on his assurance must be sufficient to "shock the conscience of the court".[93]

There is significant overlap between proprietary estoppel and the sole ownership constructive trust, both of which require and assurance coupled with detrimental reliance.[94] However, a key difference is that successful establishment of proprietary estoppel only means that the court must do the minimum to satisfy the equity.[95] It does not entitle the claimant to any particular remedy and could result in a personal, rather than a proprietary, remedy being granted. The minimum to satisfy the equity does not mean that the claimant's expectations must be satisfied.[96] Therefore, it is less remedially certain in comparison to the constructive trust.

Despite remedial uncertainty, estoppel can be pleaded in the alternative by homemakers or used where it is not possible to establish a constructive trust. In *Southwell v Blackburn*,[97] the defendant had assured the claimant that she would have a home for life. This very promise negated the suggestion that she was a beneficial owner (as no such assurance would be necessary if that were the case). However, she succeeded under a claim for estoppel, based on her significant unpaid contributions. Similarly, where the promise relates to making provision for the claimant in a will (again indicating that there is no current beneficial ownership), estoppel has been able to provide a remedy.[98]

In summary, the current legal framework has struggled to accommodate the family context and the performance of homemaking work as the basis for a claim to a beneficial share. This

[93] *Cobbe v Yeoman's Row Management Ltd* [2008] UKHL 55
[94] As recognised in *Oxley v Hiscock* [2004] EWCA Civ 546
[95] *Crabb v Arun District Council* [1976] Ch 179
[96] See Mark Pawlowski, 'Proprietary Estoppel- Satisfying the Equity' (1997) 113 Law Quarterly Review 232
[97] *Southwell v Blackburn* [2014] EWCA Civ 1347
[98] See *Thorner v Major,* (n 92); *Culliford & Another v Thorpe*, (n 65); and *Davies and Another v Davies* [2016] EWCA Civ 463

is especially true where the home is solely owned, where a homemaker who has made no financial contributions will struggle to establish an interest. Even where the home is jointly owned, the court has no power to compensate a party for relationship-generated disadvantages.

The Theoretical Lens: Vulnerability

Theories of Vulnerability

Vulnerability is a broad term that has been used in various legal contexts. Some of the scholarship has focused on specific groups that are considered to be particularly vulnerable, explaining why additional obligations are owed to them.[99] This has been referred to as the 'narrow' view, where vulnerability is thought only to affect certain individuals or groups.[100] One significant critique of narrow accounts is that they risk pathologising vulnerability, implying that those who do not share the characteristics of the vulnerable group are *in*vulnerable.[101]

Recent vulnerability theory scholarship in the field of critical legal studies has been influenced by Fineman's theory of universal vulnerability.[102] Under this account, vulnerability "should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury and misfortune".[103] The universal theory regards vulnerability as a condition that is fundamentally biological and corporeal. Furthermore, Fineman distinguishes vulnerability from *dependency*. The subject's embodied nature

[99] See for example Helen Carr and Caroline Hunter, 'Managing Vulnerability: Homelessness Law and the Interplay of the Social, the Political and the Technical' (2008) 30 Journal of Social Welfare & Family Law 293, and Sandra Walklate, 'Reframing Criminal Victimization: Finding a Place for Vulnerability and Resilience' (2011) 15 Theoretical Criminology 179

[100] Paul Formosa, 'The Role of Vulnerability in Kantian Ethics' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014), 88

[101] Ibid

[102] See among others Fineman (2008), (n 18), Fineman (2010), (n 18), and Fineman (2013), (n 18)

[103] Fineman (2008), (n 18), 8

means her degree of dependency on the care of others will fluctuate throughout her life course. While dependency is temporary and episodic, vulnerability is constant and enduring.[104]

Vulnerability theory is attractive for feminist scholars because it directly challenges some of the problematic and flawed conceptions of personhood proffered by traditional liberal philosophical accounts[105] (on which so-called 'neoliberal' political theory in Western society is based). Feminists have been particularly troubled by liberal theory's construction of the human subject as inherently individualistic and autonomous.[106] In very generalised terms, liberal legal and political theories tend to view the individual as innately possessing a free will and inner moral agency.[107] As a result, the individual is presumed to act in a self-interested manner. This viewpoint struggles to explain relationships of affection and care, where people frequently make decisions that do not appear to be in their own interests, motivated by their relational connections to other people. Dependency and vulnerability pose problems for the liberal account as they appear inconsistent with autonomy. The dependent individual cannot be truly free and those who care for dependents are restrained

[104] Ibid, 11

[105] Liberal individualism is strongly associated with the work of Kant and his theory of internal moral law Immanuel Kant, *Kant: The Metaphysics of Morals* (first published 1797, Cambridge University Press 1996), but also more contemporary jurisprudential scholarship such as Rawls' theory of justice (John Rawls, *A Theory of Justice* (Harvard University Press 1971)), Raz's liberal perfectionism (Joseph Raz, *The Morality of Freedom* (Oxford University Press 1986)), and Dworkin's theory of individual freedom (Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988))

[106] See Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Automony, Agency, and the Social Self* (Oxford University Press 2000), and Linda Barclay, 'Autonomy and the Social Self' in Catriona Mackenzie and Natalie Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Automony, Agency, and the Social Self* (Oxford University Press 2000)

[107] See Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013)

in the choices that they can make. As a result, liberal and neoliberal accounts often regard vulnerability as a weakness and a failure to attain autonomous personhood.[108]

Vulnerability theory sees the state as being responsible both for creating conditions that lead to inequality and for responding to human vulnerability.[109] Fineman describes the imagined "responsive state" as one that:

> recognises that it and the institutions it brings into being through law are the means and mechanisms whereby individuals accumulate the resilience or resources that they need to confront the social, material and practical implications of vulnerability.[110]

By contrast, liberal models of law and citizenship regard state power as potentially harmful to individual autonomy.[111] The ideal liberal state is the minimal 'night-watchman state', whose role is restricted to protecting individual rights but not interfering further in citizens' lives.[112]

While the universal thesis deems vulnerability to be primarily biological, it also recognises the role played by structural inequalities. Fineman fully accepts that not all individuals experience their inherent vulnerability in the same way.[113] However, rather than drawing distinctions between vulnerability and invulnerability, she uses the concept of *resilience* to describe the resources that citizens have at their disposal to mitigate the impact of their inherent vulnerability.[114] Resilience includes access to financial and material resources (such as home ownership), education, and membership of social networks. The difference

[108] See David Chandler and Julian Reid, *The Neoliberal Subject: Resilience, Adaptation and Vulnerability* (Rowman & Littlefield 2016), 15
[109] Fineman (2013), (n 18)
[110] Ibid, 17
[111] John Stuart Mill, *On Liberty* (first published 1869, Longman 1998)
[112] Robert Nozick, *Anarchy, State, and Utopia* (Basic Books1974)
[113] Fineman (2010), (n 18)
[114] Ibid. I discuss resilience at length in Chapter 6.

is that the universal thesis does not believe that redressing inequality will completely eliminate vulnerability because vulnerability is an ever-present part of being human.

Fineman's thesis has been used as a basis for further analysis of a number of areas in critical and feminist legal analysis, including cuts to legal aid in family law,[115] approaches to housing and homelessness,[116] and care and dependency.[117] Fineman herself has advocated that vulnerability be employed as an "heuristic device" in critical legal scholarship, to draw attention to the many inequalities that are hidden and normalised by the dominant liberal perspective.[118] The vulnerability lens thus serves an illuminating function; highlighting and exposing unfairness.[119]

Fineman's theory has been instrumental in decoupling vulnerability from victimhood and weakness. This is of particular importance in the context of cohabitation, in moving away from the narrative that cohabiting homemakers have failed in some manner; failed to protect their property rights, or failed to get married. However, the universal account is guilty of treating vulnerability in a general fashion, focusing almost exclusively on inevitable biological aspects, rather than recognising other forms of harm that can result from a state that chooses to ignore the reality of the human condition. As Mackenzie et al have argued, the universal model risks overlooking other forms of vulnerability, particularly those that are socially created and *are* capable of being reduced or eliminated.[120]

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[115] Alison Diduck, 'Autonomy and Vulnerability in Family Law: The Missing Link' in Julie Wallbank and Jonathan Herring (eds) *Vulnerabilities, Care and Family Law* (Routledge 2014)
[116] Helen Carr, 'Housing the Vulnerable Subject: The English Context' in Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)
[117] Bridgeman (2014), (n 19)
[118] Fineman (2013), (n 18), 20
[119] Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers and Julie Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014)
[120] Ibid, 38

I view Fineman's theory as a starting point rather than a complete solution. Scholars can apply and adapt the theory to fit specific contexts, recognising that vulnerability itself is a multifarious concept with many causes. The common thread of vulnerability is an important one, but the experiences and needs of cohabiting homemakers in England and Wales will inevitably be very different to the citizens of a country ravaged by civil war, for example. This is by no means a criticism of Fineman's seminal work, rather it acknowledges the inherent difficulties in a 'one-size-fits-all' theoretical approach. Alternative accounts of vulnerability should be understood as complementary rather than contradictory to her work. An example of theorists using Fineman's work as a building block or starting point can be seen in Mackenzie et al's taxonomy of vulnerability, which distinguishes between *inherent* vulnerability, occurring as a result of biological processes, and *situational* vulnerability, in which external circumstances, such as war or incarceration, operate to render the subject temporarily vulnerable.[121] Additionally, they identify *pathogenic* vulnerability, a form of situational vulnerability arising as a result of adverse social conditions, such as oppression or oppressive interpersonal relationships.[122] Relational vulnerability is a form of pathogenic vulnerability.

Relational Vulnerability

In this thesis, I view homemaker vulnerability as relational, meaning that it arises out of the way her intimate and broader relationships are structured.[123] I use the term 'relationship' in a broad sense, drawing on Nedelsky's concept of "nested relations".[124] Nedelsky argues that analysis of relationships cannot be isolated to the individual's immediate family and

[121] Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014)
[122] Ibid, 9
[123] Here, I draw on the work of relational theorists, including Nedelsky (2011), (n 32); Rosie Harding, *Duties to Care: Dementia, Relationality and Law* (Cambridge University Press 2017); and Leckey (2008), (n 32)
[124] Nedelsky (2011), (n 32)

friendship circle. Instead, it must extend to "structural and institutional relations",[125] including the individual's connection with the state and its various institutions. It is thus an examination of how broader relational structures come to affect intimate ones.

I argue that the homemaker is inevitably situated within an unequal relational network, which renders her susceptible to harm. Her relational network is an unequal one because the state devalues and marginalises homemaking work, instead expressing a clear preference for economic contributions. This impacts on the homemaker's status, both as a citizen and in relation to an economically stronger partner.

Core Claims

My framework of relational vulnerability rests on three core claims that run through the thesis. Firstly, homemaker vulnerability and disadvantage must be understood as a state-created problem rather than a private one. Secondly, the individual must be understood as fundamentally relational, meaning that she makes decisions within the context of her network of relationships. Thirdly, the individual should be construed as simultaneously embodied and emotional.

A State-Created Problem: The Role of Myths

Relatively little scholarly attention has been given to the way broader structures, including law, influence the power dynamics between cohabiting partners. Instead, it is often argued that cohabitation sits 'outside the law'.[126] Deech has relied upon this claim to argue against law reform for cohabitants. She says that "there ought to be a corner of freedom for such couples to which they can escape and avoid family law."[127] This assumes that cohabitation (in contrast to marriage) is uninfluenced by law, reflecting Napoleon's apparent comment

[125] Ibid, 81
[126] Deech (1980), (n 11)
[127] Ibid, 483

on unmarried couples; "they do not want law, law pays no regard to them."[128] This view is also demonstrated in Auchmuty's comment that "the problem is not the law but the fact that family relationships are still so often unequal."[129] My response to this (developed in Chapter 2) is that the two issues are inherently interlinked, namely that law directly contributes to inequality and that progress cannot be made before this fact is recognised. Relationships do not develop entirely organically or independently of law and society.[130] They are shaped by powerful legal and social discourses, or *myths*, around the role of care, understandings of gender, personhood, and the role of the state and law. Certain myths characterise homemaking work as sentimental and unproductive, while others emphasise the expectation of economic self-sufficiency in the public sphere. Therefore, even though cohabitation lacks the formal legal status of marriage, it is by no means free from the influence of discourses around the ideal family and its gendered roles.[131]

As I show in Chapter 2, the vulnerability lens illuminates the socially constructed nature of concepts that are accepted within the legal framework as natural and inherent, particularly the family and the work that takes place within its boundaries. It exposes the subtle techniques that are used to create legal and social truths through myths and ideologies. This enables scrutiny of how existing societal and relationship structures seek to serve and protect dominant societal interests at the direct expense of marginalised sectors of the population. Society has a significant vested interest in homemaking work, which serves to sustain the economic and social wellbeing of individuals and communities.[132] After all, if the state were

[128] Claude Martin and Irène Théry, 'The PACS and Marriage and Cohabitation in France' (2001) 15 International Journal of Law, Policy and the Family 135, 142
[129] Auchmuty (2016), (n 46), 1219
[130] See Nedelsky (2011), (n 32)
[131] Robert Leckey, 'Judging in Marriage's Shadow' (2018) Feminist Legal Studies 1 See also Brenda Cossman and Bruce Ryder, 'What is Marriage-Like Like?-The Irrelevance of Conjugality' (2001) 18 Canadian Journal of Family Law 269
[132] Silvia Federici, *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (PM Press 2012)

forced to take responsibility for the work performed by homemakers, the financial costs would run into the billions.[133]

Relationality

Like other feminist theorists,[134]I recognise that the individual is fundamentally relational, meaning that she, her actions, and her decisions, are always situated within an extensive network of connections to others. Personal choices are not made in a vacuum, but within the context of the individual's relational network. As a result, legal analysis that does not take into account an individual's relational context is likely to be inadequate. In this thesis, I consider the ways in which the current legal framework impacts on the homemaker's relationships with other individuals and with the state.

Relationality has emerged as a response to the individualism present in mainstream legal scholarship, which are broadly based on liberal theoretical accounts.[135] It directly challenges the assumption that individuals act in a self-interested manner. The assumption of self-interest and autonomy is problematic because it means that decisions that are contrary to self-interest are often written off as being irrational or coerced, when neither of these may be the case.[136] Individualistic accounts are fundamentally unable to accommodate or explain decisions that do not seek to directly benefit the decision-maker, without resorting to denying the latter's agency.

[133] Brian Sloan, *Informal Carers and Private Law* (Hart 2012), 94

[134] E.g. Nedelsky (2011), (n 32); and Rosie Harding, 'Care and Relationality: Supported Decision Making Under the UN CRPD' in Rosie Harding, Chris Beasley and Ruth Fletcher (eds) *Revaluing Care in Theory, Law and Policy* (Routledge 2017)

[135] Jennifer Nedelsky,'Reconceiving Rights as Relationship' (1993) 1 Review of Constitutional Studies 1; and Catriona Mackenzie, 'Imagining Oneself Otherwise' in Catriona Mackenzie and Natalie Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Automony, Agency, and the Social Self* (New York: Oxford University Press 2000

[136] Rosemary Auchmuty, 'Men Behaving Badly: An Analysis of English Undue Influence Cases' (2002) 11 Social & Legal Studies 257; and Sarmas (1993), (n 27)

Appeals to relationality are significantly broader and more complex than a demand that law should have regard to and respect for an individual's interpersonal relationships.[137] Not all relationships are positive or constructive ones. As I argue in Chapter 6, relational theory does not deny individual autonomy, it merely recognises that genuine autonomy is only possible where this is supported by the individual's network of relationships. Therefore, relationality can be distinguished from communitarianism. Communitarianism *defines* the individual by her relationships, placing joint or group interests above individual ones.[138] It thus assumes that all relationships are inherently good, failing to scrutinise these with reference to the extent to which they support the individual subject.[139] The reality is that no relationship is free from external influences and certainly no relationship is beyond law. Law does not only govern and regulate; it also operates in more subtle ways, setting and reinforcing norms and standards of behaviour among its subjects. It can lend credence to socially constructed concepts, reinforcing them as true and incapable of challenge. As Gordon argues, legal discourses "help us make sense of the world…fabricate what we interpret as reality. They construct roles for us…and tell us how to behave in those roles."[140] As I show in this thesis, the current legal framework constructs a relational reality for the homemaker where she is marginalised and unequal.

Embodiment and Emotion

My third claim is that the individual is both embodied and emotional. As with relationality, embodiment and emotion are largely absent from liberal visions of law. As Young has argued, the neutrality and impartiality of Western legal systems is directly reliant on

[137] In particular, see Harding (2017), (n 134)
[138] An example of a communitarian approach to cohabitation reform can be seen in Gardner (1993), (n 73)
[139] See Elizabeth Frazer and Nicola Lacey, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate* (University of Toronto Press 1993)
[140] Robert Gordon, 'Law and Ideology' (1988) 3 Tikkun 14, 15

"expelling desire, affectivity and the body".[141] The hypothetical legal subject is therefore 'disembodied' in the sense of being unaffected and unconstrained by corporeal realities and limitations, including illness, ageing, pregnancy, and disability.[142] Because law denies embodiment, it also struggles to recognise the inevitable dependencies and connective relationship that flow as a direct result of the fragile body.[143]

Similarly, the relationship between law and emotion is, as Maroney argues, "a rocky one".[144] Emotions, passions, and desires threaten to disrupt legal order.[145] As is the case with relationality, where the subject does show evidence of emotion, it can work to her detriment, providing evidence that she is incapable of logical reason, perhaps even denying her status as a legal subject.[146] It may also paint her as a victim. For instance, English law recognises that intimacy and affection may expose individuals to threats of undue pressure or exploitation, from which they require protection,[147] but this takes the form of 'othering' the subject, depicting her as particularly weak and thereby justifying a more compassionate approach.[148]

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[141] Iris Marion Young, 'Impartiality and the Civic Public: Some Implications of Feminist Critiques of Moral and Political Theory.' in Seyla Benhabib and Druscilla Cornell (eds) *Feminism as Critique* (University of Minnesota Press 1987), 207. See also Sarah Lamble, 'Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women's Bathhouse Raid' (2009) 18 Social & Legal Studies 111

[142] Ahmed (1995), (n 34), 56. Naffine also comments that "[the liberal subject] is never pregnant, for this would threaten his physical integrity" in Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 Modern Law Review 346, 365

[143] Fineman (2008), (n 18)

[144] Terry A Maroney, 'Law and Emotion: A Proposed Taxonomy of an Emerging Field' (2006) 30 Law & Human Behavior 119, 120

[145] Bandes and Blumenthal, (2012), (n 33). See also David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and the Common Law* (Blackwell 1986)

[146] E.g. if the subject is found to lack capacity

[147] For example, in *Barclays Bank v O'Brien* [1994] 1 AC 180, concerning the doctrine of undue influence in surety transactions.

[148]See *Barclays Bank v O'Brien* (ibid), 467, where Lord Browne-Wilkinson describes "the 'tenderness' shown by the law to married women".

The legal sphere's exclusive emphasis on rationality and individualism is particularly troubling for feminists because women have historically been associated with both embodiment and emotion to their detriment. Their supposedly fragile and nurturing psychological nature was used as a justification to marginalise them from public life.[149] Furthermore, the biological reality of female bodies has operated to label them as 'other', because the fictional legal subject's body is male.[150] As Nedeslky has argued, the male body is seen as bounded, representative of the divide between the public and the private, the internal and the external.[151] Transcending the physical boundary of the male body represents a violation or an assault, protected against by law. By contrast, Nedelsky argues that "women's boundaries seem indistinct in other ways: they blur with nature, with their children, their families, their lovers. Their contours do not seem hard, clearly defined or well protected."[152] This is particularly true in the case of childbearing, which necessitates transcendence of physical boundaries, and the total dependence of one body on another, and is a process that marks the female body out as innately different to the male norm. In this thesis, I am particularly concerned with the manner in which embodiment has contributed to the gendering of homemaking labour. I discuss this in further detail in Chapter 4, exploring how women's capacity for biological functions such as pregnancy and breastfeeding have been used as evidence of their natural propensity towards nurturing.[153] I argue that constructions of disembodied and rational personhood marginalise and exclude

[149] Linda K Kerber, 'Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History' (1988) 75 Journal of American History 9, 11 and Mary Jane Mossman, 'Feminism and Legal Method: The Difference it Makes' (1986) 3 Australian Journal of Law and Society 30

[150] Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge 2007), 45, and Naffine (2003), (n 142)

[151] Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) Representations 162, 170

[152] Ibid

[153] See Laura T Kessler, 'Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work' in Martha Albertson Fineman and Terence Dougherty (eds) *Feminism Confronts Homo Economicus* (Cornell University Press 2005), 386

the homemaker. Instead, law and policy must be reconfigured in order to recognise the inherently corporeal and interconnected nature of humanity.

I also use embodiment and emotion in a second sense, to examine the homemaker's relationship to her home. This rejects the dominant understanding of the home as merely a financial asset and instead explores the notion of 'ontological security', or the physical, emotional, and psychological connections that an individual develops to her home, and the extent to which home comes to represent her identity.[154] These embodied and emotional connections to home are almost invisible within the traditional doctrines of property law. However, when they are exposed, it is possible to see that the homemaker often has a precarious relationship to her home, one which exposes her to potential harm. While gendered discourses and myths depict her as naturally belonging in the home, she remains at constant risk of losing her home and being unable to acquire an alternative.

I am conscious that feminist scholarship is traditionally cautious of suggestions that women's identity is defined by their homes, arguing that this reinforces both the notion of separate spheres and the ideological view of home as a sanctuary rather than a site of oppression.[155] However, these concerns are largely based on the idealised view of home as symbolic of domesticity and the married family. Once this perspective is rejected, it is possible to see the home's potential as a source of resilience and an insurance policy against future hardships. As Young argues, viewing the home as a source of identity is not inherently

[154] For writings on ontological security, see Giddens, (1990), (n 30); and Shelley Mallett, 'Understanding Home: A Critical Review of the Literature' (2004) 52 The Sociological Review 62

[155] Gill Jones, 'Experimenting with Households and Inventing'Home'' (2000) 52 International Social Science Journal 183; Sarah Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 Social & Legal Studies 423; and Julia Wardhaugh, 'The Unaccommodated Woman: Home, Homelessness and Identity' (1999) 47 The Sociological Review 91

incompatible with the feminist project if one accepts that the home "does not fix identity but anchors it in physical being that makes a continuity between the past and the present."[156]

The Concept of Resilience

The vulnerability lens is not merely a tool for exposing the state's creation of relational vulnerability and its impact on the homemaker but can also provide guidance on how to redress some of the imbalances that have resulted from an excessive focus on individualism. In the final two substantive chapters of the thesis, I deal with the notion of resilience, questioning how the state should respond to relational vulnerability in order to empower the homemaker. This does not take the form of proposing a new legislative framework that would solve all the current problems. Instead, I seek to locate the underlying normative content of resilience, namely what values it should foster and what results it should aim to achieve. This makes a useful contribution to the existing vulnerability literature, where resilience has been notably under-theorised.[157]

I argue that relational resilience should seek to promote both equality and autonomy for the homemaker. Rejecting the liberal individualistic definition of autonomy as self-sufficiency, I draw on a feminist reformulation of autonomy labelled 'relational autonomy' that argues that it is the individual's relationships and connections to others (including the state) that operate to render her autonomous.[158] In recognising that autonomy is not ultimately synonymous with individualism, but about constructive relationships, it is possible to locate it as a key component of relational resilience. I employ the normative framework of

[156] Iris Marion Young, 'House and Home: Feminist Variations on a Theme' in Iris Marion Young (ed), *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press 2005), 139
[157] Mianna Lotz, 'Vulnerability and Resilience: A Critical Nexus' (2016) 37 Theoretical Medicine and Bioethics 45
[158] Mackenzie and Stoljar (2000), (n 106)

resilience as autonomy and equality and apply this to three hypothetical state responses to vulnerability.

Chapter Outlines

In Chapter 2, I address the ways in which the neoliberal state, through the current legal framework, promotes economic self-sufficiency while marginalising care and homemaking. I argue that the law is based on three dominant myths: autonomy (understood in an individualistic sense), the inviolability of property rights, and state restraint. Although these myths are socially constructed, they are presented as being unquestionably true and incapable of challenge. Within the constructive trust and estoppel framework, individuals are presumed to be rational, self-interested, and self-sufficient. The homemaker, who cannot conform to this ideal, is depicted as an outsider, her experiences relegated to the private realm where law cannot intrude. She is seen as a threat to legitimately acquired property rights. If homemakers are to succeed in their claims, their experiences often have to be rewritten into more acceptable commercial language by the courts. The cases where the courts have done this have often involved male homemakers or carers, revealing the ever-present influence of gender in the construction of homemaking.

In Chapter 3, I outline my relational vulnerability framework. Relational vulnerability transcends mere economic hardship and arises during the course of the intimate relationship. It becomes publicly visible upon relationship breakdown, but much of the homemaker's vulnerability relates to the uncertainty of her future, and much of the harm may not manifest until later in life. I argue that relational vulnerability has three components: economic, emotional, and spatial. I analyse the way that these dimensions of relational vulnerability develop and change throughout the relationship, upon its breakdown, and in the future.

In Chapters 4 and 5, I apply the above relational vulnerability framework to two contexts: care and homemaking. While most scholars conflate the two, I examine them separately, as each reveals distinct issues and challenges. Chapter 4 deals with unpaid informal care. Just as myths are relied upon to determine property rights, there are also myths that construct the imagined private sphere. Judicial understandings of care are influenced by an 'altruistic carer' myth, whereby care is seen as a private, sentimental, and gendered endeavour. The myth consists of a 'gender-contract', whereby women are expected to perform caregiving work as part of a heterosexual relational role. Analysis of the constructive trust cases reveals the way courts routinely deny compensation for carers by relying on the depiction of care as motivated by love and altruism. Where care challenges the gendered boundaries and is carried out by men or outside the idealised heterosexual context, courts are more likely to acknowledge its value. The altruistic carer myth is also reinforced on a spatial level, through so-called "geographies of care",[159] whereby care is designated to the home, normalising its status as a private and sentimental endeavour.

In Chapter 5, I apply the relational vulnerability framework to domestic work in the home. Domestic work encompasses a broad range of tasks including ordinary housework, construction and renovation work, and unpaid work in a family business. Here, the judiciary is influenced by another myth; that of domesticity. Domesticity is also based on the gender-contract, and sees women as being naturally orientated towards the home. The legal framework reveals a hierarchy of domestic work. Work that has an economic connection or takes the form of building or construction is considerably more visible than the ordinary daily work that is predominantly performed by women. As with care, courts appear to struggle more with women's work, even when it falls into the more traditionally 'male'

[159] See David Conradson, 'Geographies of Care: Spaces, Practices, Experiences' (2003) 4 Social & Cultural Geography 451

categories of economic work or construction. Women must show that their work is exceptional and goes above and beyond what is expected of them under the gender-contract. Domesticity is also reinforced through the spatial configuration of the home. Daily housework is typically spatially concealed, whereas construction is given more prominence.

Chapter 6 attempts to theorise state responses using the concept of resilience. Resilience is the means by which individuals can withstand the impact of vulnerability. It is a concept that is under-explored in the existing vulnerability literature, where it is treated almost as an after-thought. Drawing on social psychology literature, as well as Fineman's view of resilience as a set of state-provided assets, I argue that while resilience is predominantly an external set of material resources, it must also have an internal normative commitment, ensuring that state responses to vulnerability enhance the homemaker's relational autonomy and substantive equality.

In Chapter 7, I apply the normative resilience framework to three hypothetical state responses to relational vulnerability. These are state subsidy (through basic income or payments for homemakers), judicial discretionary redistribution on separation, and deferred community of property, giving the homemaker a defined (and sometimes compensatory) share in the home. For each response, I evaluate the extent to which it addresses relational vulnerability and can be said to make the homemaker resilient.

Finally, in Chapter 8, I draw together all the strands of this research project, reflecting on the implications of reconfiguring the cohabitation debate through the vulnerability lens. I also consider various ways in which the findings in this thesis can be used as a platform for further research, both in the context of cohabitation and in other areas of family law.

CHAPTER 2: LEGAL MYTHS AND THE STATE'S ROLE IN THE CREATION OF VULNERABILITY

Introduction

In this chapter, I return to the key claim I made in Chapter 1; that the state is responsible for the creation of relational vulnerability. I argue that, through law and legal processes, the state produces and reinforces conditions of inequality whereby economic work is consistently favoured over homemaking work, leading to the homemaker becoming marginalised and devalued. Here, I am interested in the *process* by which this marginalisation is able to take place, and the way that homemaking's low status comes to be accepted as normal and inherent.

I predominantly focus on state power exercised through law; the relations its shapes, and the truths that it creates. I draw on Berkovitz's argument that:

> law embodies and expresses specific social ideologies through its assumptions about society and its various members. At the same time, law also plays an active role. Through its discourse it reproduces and constitutes both the societal subjects and their interrelations.[1]

As I outlined in Chapter 1, intimate relationships must always be considered within their wider context.[2] Law's reinforcement of ideologies and reliance on particular discourses operates to influence interactions between citizens and, crucially, creates power structures within interpersonal relationships. The state has decreed that economic work is valuable and important whereas homemaking work is unproductive and of low value.[3] Therefore, when one party undertakes a disproportionate share of homemaking work, compromising her

[1] Nitza Berkovitch, 'Motherhood as a National Mission: The Construction of Womanhood in the Legal Discourse in Israel' (1997) 20 Women's Studies International Forum 605, 607

[2] See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011)

[3] See Nancy Fraser, 'After the Family Wage: Gender Equity and the Welfare State' (1994) 22 Political Theory 591; and Katharine Silbaugh, 'Turning Labor into Love: Housework and the Law' (1996) 91 Northwestern University Law Review 1

earning capacity as a result, she is inevitably in an unequal position in relation to an economically stronger partner. As I argue in this chapter, the legal framework strongly favours and empowers those individuals who can conform to a fictitious idealised 'autonomous liberal subject'.

Exposing and challenging the power structures created by law is not an easy task. It is complicated by the fact that law maintains a veneer of equality, insisting that it treats all its subjects equally. Instead the low status of homemaking work and its gendered distribution across the population are presented as natural and inherent facts that lie beyond state or legal control. Marginalisation and discrimination become hidden due to law's ability to present itself as a rational system of logic, "separated from the complex realities of everyday life".[4] I argue that this illusion of neutrality is made possible through law's reliance on what Fineman has termed "foundational myths"; dominant narratives that reinforce particular ideas as truths.[5] It is three of these myths that form the basis of this chapter; the autonomy myth, the myth of inviolable property rights, and the myth of the restrained state. These myths form a background framework against which the seemingly neutral legal rules are interpreted.

I begin by analysing the way that legal myths allow the state to exercise a subtle form of power over its citizens, focusing on law's power to create truth and authority. I then go on to examine this process in the context of the cohabitation case law, focusing on the way that the above three myths are expressed through legal language, unspoken assumptions, and continuous reinforcement of norms. In this chapter, I concentrate on the myths that underpin the current legal framework and which uphold an image of legal subjects as autonomous and

[4] Margaret Davies, 'Law's Truth and the Truth About Law: Interdisciplinary Refractions' in Margaret Davies and Vanessa Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013)
[5] Martha Albertson Fineman, 'Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency' (2000) 8 American University Journal of Gender, Social Policy and the Law 13

self-interested. However, I return to the concept in Chapters 4 and 5 when discussing the additional myths underpinning the legal understanding of care and domestic work.

Law's Power: The Production and Reinforcement of Myths

What are Legal Myths?

The word 'myth' itself suggests something that is fanciful and untrue. It can be used to describe untruths that many people believe, but can in fact be easily disproven. For example, the cohabitation scholarship has highlighted the 'common law marriage myth',[6] referring to the popular but erroneous belief that cohabitants acquire rights similar to married couples if they live together for a sufficient period of time. In this example, the myth in question represents a falsehood that derives from non-legal sources (such as the media), but which is easily disproven by law.

The legal myths discussed in this chapter are different in nature to the 'myth as untruth' because they are given authority by law and the legal system itself. The legal setting of the myths enhances their force, and they produce what Lincoln describes as "a narrative making truth-claims with credibility and authority".[7] However, myths are not what we understand to be 'law' itself, such as primary legislation or the ratio decidendi of cases. Instead, they are the principles, storylines, narratives, language, and characters that are woven through the legal framework. They constitute a background tapestry, providing context and reference points for judges when interpreting legal rules and analysing human behaviour.

Because myths do not constitute the black letter of the law, they are usually unarticulated and simply assumed to be true. This is both powerful and dangerous. The truth of many

[6] See e.g. Anne Barlow and Simon Duncan, 'Supporting families? New Labour's Communitarianism and the 'Rationality Mistake': Part I' (2000) 22 Journal of Social Welfare & Family Law 23

[7] Bruce Lincoln, Discourse and the Construction of Society: Comparative Studies of Myth, Ritual, and Classification (Oxford University Press 2014)

myths is highly questionable, and this certainly is the case in respect of the myths exposed in this chapter, which bear little resemblance to the lived reality of the relational, emotional, and embodied individual. Like law itself, myths are socially constructed concepts. They invariably reflect a particular viewpoint, usually one that serves dominant societal interests, while marginalising others. As previously emphasised, the state has a vested interest in keeping homemaking work unpaid and privatised as it allows an abdication of financial responsibility for this work.[8] The state's vested interest undoubtedly informs policies, principles, and discourses around homemaking.

Myths are dangerous because they are both pervasive and extremely difficult to challenge. They create hierarchies that discriminate among citizens yet they simultaneously deny doing so. *Legal* myths are even more pernicious because the legitimacy afforded by law means that mere opinion or conjecture can attain significant force solely by being proclaimed in a judicial setting.[9] Myths thus permit power structures and inequalities to remain hidden and unchallenged. A useful example of a legal myth that pervades family law is that of the heterosexual, married nuclear family, which is comprised of distinctly gendered roles.[10] This is assumed to be the ideal family form in English law, and legislation and case law is constructed around this image.[11] The ideal family is also presented as a natural way in which individuals choose to order their lives, rather than being the product of the state, which

[8] See Chapter 1, p 29

[9] See Mary Jane Mossman, 'Feminism and Legal Method: The Difference it Makes' (1986) 3 Australian Journal of Law and Society 30; Davies (2013), (n 4)

[10] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004); and Carol Smart, *The Ties that Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (Routledge & Keegan Paul 1984)

[11] See Rosie Harding, 'Parenting after Equality: (Re)Inscribing the Heteronormative Family' in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2015); and Robert Leckey, 'Judging in Marriage's Shadow' (2018) Feminist Legal Studies 1

benefits significantly from its existence because the family assumes primary responsibility for caregiving.[12]

The private family myth is subtle because family law itself claims to be neutral to issues of gender, sexuality, or preferred family form.[13] Modern family law denies that it employs any presumptions that men and women naturally occupy different roles within the family.[14] Indeed, black letter law does not use the language of mothers and fathers, or husbands and wives; nor does it explicitly suggest that certain roles or tasks can only be performed by particular individuals. Instead, it employs neutral terms such as 'parent', 'applicant', or 'spouse', thus denying that any discrimination takes place.[15] This is coupled with the fact that significant progress has been made in the past 20 years in terms of accepting alternative family forms.[16] It becomes a difficult argument to make that continuing gendered splits within the family are in any way attributable to the laws governing it.

However, family law cannot operate in a moral vacuum. Whilst law claims to be neutral, judges, lawyers, and policy makers still draw heavily on notions of the ideal family and the best interests of the child. This inevitably reflects dominant social understandings of intimate relationships and the family. The danger is that it may simultaneously legitimise and reinforce views that are gendered or heteronormative.[17] Concepts such as 'reasonableness',

[12] Martha Albertson Fineman, 'Feminism, Masculinities, and Multiple Identities' (2013) 13 Nevada Law Journal 101

[13] See Richard Collier, 'Fathers' Rights, Gender and Welfare: Some Questions for Family Law' (2009) 31 Journal of Social Welfare and Family Law 357. For critique of the supposedly gender-neutral language used in child arrangements cases, see Sue Wharton, 'Women and Children First? Potential Gender Bias in a Legal Text in the UK' (2009) 32 Women and Language 1

[14] See Wharton (2009), (n 13)

[15] E.g. under the Children Act 1989

[16] E.g. in *Re M* [2017] EWCA Civ 2164, Sir James Munby explained that "We live in a plural society, in which the family takes many forms, some of which would have been thought inconceivable well within living memory." [60]

[17] See e.g. Charlotte Bendall, 'A 'Divorce Blueprint'? The Use of Heteronormative Strategies in Addressing Economic Inequalities on Civil Partnership Dissolution' (2016) 31 Canadian Journal of Law and Society 267; and Frances Olsen, 'The Politics of Family Law' (1984) 2 Law & Inequality 1

'fairness', and 'welfare' appear innocuous but by their very nature demand reference to a background framework of norms and understandings of human behaviour. For example, the welfare or 'paramountcy' principle[18] that operates in cases concerning the upbringing of children offers a flexible and child-centred unit of measurement but has also been criticised for acting as a "smokescreen" behind which prejudices can hide unchecked.[19]

Although law has moved towards embracing a broader range of family relationship, the ideal heterosexual family remains as an image in the background against which these alternative domestic set-ups are judged.[20] Alternative families need to show that they conform to the heteronormative ideal. While judicial understandings of welfare and parenting are now couched in language centred on the importance of close and loving relationships,[21] historically, child welfare and best interests was used as a reason to restrict the rights of same-sex parents, under the guise of protecting children.[22] Equally, the nebulous concept of fairness that operates in financial remedy cases on divorce has shifted to mean that husbands pay their wives enough to meet their 'reasonable requirements' but no more,[23] to the "yardstick of equality of division" with no gender discrimination.[24]

[18] This principle is set out in the Children Act 1989, s 1(1) providing that:
When a court determines any question with respect to—
(a) the upbringing of a child; or
(b) the administration of a child's property or the application of any income arising from it,
the child's welfare shall be the court's paramount consideration.
[19] Helen Reece, 'The Paramountcy Principle' (1996) 49 Current Legal Problems 267, 296
[20] See Leckey (2018), (n 11); Bendall (2016), (n 17); Harding (2015), (n 11)
[21] Harding (2015), (n 11)
[22] See *Re C (A Minor)* [1991] 1 FLR 223, discussed in Reece (1996), (n 19) which held that, while a mother's lesbianism by itself did not render her an unfit parent, it nonetheless was an "unusual background in which to bring up a child", which could cause potential problems for the child. (p 228, Glidewell LJ).
[23] See *O'D v O'D* [1976] Fam 83
[24] *White v White* [2001] 1 AC 596, 605 (Lord Nicholls)

The above examples also demonstrate law's fluid and constantly evolving nature.[25] The meaning of welfare and fairness have changed significantly over time, reflecting shifts in social norms and understandings. Legal reasoning is by its nature subjective and constantly vulnerable to unconscious biases and misconceptions. The problem is not law's fallibility and subjectivity, rather it is the manner in which it declares itself *in*fallible and unaffected by human emotions and biases. As Bandes has argued, "law fancies itself a closed system, that creates categories which deprive it of crucial knowledge and overestimates its ability to set its own parameters."[26] In doing so, it denies the extent to which it is shaped by myths and discourses.

Law's truth-creating powers

Law has a unique ability to construct 'truth' and lend legitimacy and authority to particular principles and points of view, even where these are mere uninformed or biased opinions.[27] In its affirmation of certain principles and its rejection of others, law also silences and marginalises conflicting viewpoints. As Smart argues, "law exercises its power not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences."[28] It is the utterance of assumptions and opinions in a judicial setting that gives them credibility.[29] They become true and incapable of challenge unless this is done by a higher judicial authority. An example is the significance given to Lord Bridge's famous comments about domestic work in *Lloyds Bank v Rosset*. He expressed his own opinion that:

> it would seem the most natural thing in the world for any wife, in the absence of her husband abroad, to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room, in doing all

[25] See Carol J Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 Yale Law Journal 1631, who argues that "The 'law' thus accumulates, but it never passes; at any instance, it represents a totality. It is by definition complete, yet its completeness does not preclude change." (p 1640)
[26] Susan Bandes, 'What's Love Got to do With It' (2001) 8 William & Mary Journal of Women & the Law 97, 97
[27] Davies (2013), (n 4)
[28] Carol Smart, *Feminism and the Power of Law* (Routledge 1989), 11
[29] Ibid

> she could to accelerate progress of the work quite irrespective of any expectation she might have of enjoying a beneficial interest in the property[30]

Lord Bridge's speech cannot represent anything other than his own observations and interpretations of human behaviour in a specific relational context (marriage). He did not, for instance, rely on any external evidence in the form of empirical studies that justify him holding that view. It was not even an observation formed after hearing Mrs Rosset's evidence as to her own personal motivations, which he has in turn generalised. Instead, it was a belief that all women who find themselves in Mrs Rosset's position would behave in a similar manner, thus excluding the possibility of any other inference being drawn from her behaviour. Although heavily criticised by the academy,[31] this view remained for a number of years and was applied by the lower courts. In *Stack v Dowden*, Baroness Hale opined that things had "moved on" since *Rosset*.[32] Lord Bridge's previous opinion on how women behave within an intimate relationship has now been replaced by Baroness Hale's new view that cohabiting relationships are generally more akin to an equal partnership. This shows the ease with which judicial viewpoints are accepted as truth, even when they contradict previously stated 'truths'.

This is by no means an accusation that the judiciary inappropriately exceeds its remit in these cases. Judges must constantly interpret human behaviour, and this will inevitably involve drawing on a number of factors, including the judge's personal experiences, opinions, and beliefs. Despite the illusion of the judge as a super-human rational being, judges all have individual histories and backgrounds that shape their reasoning-process.[33]

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[30] *Lloyds Bank v Rosset* [1991] 1 AC 107, 131 (Lord Bridge)

[31] See Leo Flynn and Anna Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance' (1995) 3 Feminist Legal Studies 105; and Anna Lawson, 'The Things We Do for Love: Detrimental Reliance in the Family Home' (1996) 16 Legal Studies 218

[32] *Stack v Dowden* [2007] UKHL 17, [60] (Baroness Hale)

[33] See Erika Rackley, 'Representations of the (Woman) Judge: Hercules, the Little Mermaid, and the Vain and Naked Emperor' (2002) 22 Legal Studies 602

My discomfort lies with the ease with which opinions become authority and truth, their subjective nature denied. Interrogation of myths is not permitted because law is presented as an ordered and rational system, unaffected by emotions and biases. To say otherwise would be to challenge its very legitimacy. As Rackley has argued:

> The merest glimmer of recognition that judges may be political actors with substantial power and opportunity to enact their personal political preferences surely threatens to render unstable the whole edifice of law, introducing unsavoury elements of arbitrariness and partiality into a system which rests on its distance from such human/system failings.[34]

Thus, for law to maintain its authority, it is necessary to mask or blur the background against which judicial decisions are made. Instead, myths are continuously told, re-told, and reaffirmed, through judges, barristers, solicitors, and other actors within the legal arena. Naffine has argued that this continuous legal storytelling process serves to create "a sense of security and order",[35] or as Lincoln suggests, "to [help] maintain society in its regular and accustomed forms."[36] However, the consequence of this repeated affirmation of legal authority is that its production of inequality remains hidden.

I now turn to the three main myths (autonomy, property, and state restraint) that underlie the constructive trust and estoppel framework applicable to cohabitants upon relationship breakdown. My central argument is that these reinforce the state's clear preference for an economically self-sufficient and autonomous individual, whereby dependencies and care are privatised and placed outside state concern. The homemaker is inevitably unable to conform to this ideal. Her work is unpaid and therefore she is likely to be financially dependent, either on her partner or on the state. When she attempts to assert rights to her home, she does so from a marginalised position. If she is to succeed, her motivations and work often need to

[34] Ibid, 616
[35] Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25 Journal of Law and Society 193, 196
[36] Bruce Lincoln, *Discourse and the Construction qf Society* (Oxford University Press 1989), 25

be rewritten to conform to the autonomous ideal. The overall impact of the myths is that the homemaker becomes 'othered' within property law, her lived reality either obscured or revised into a more acceptable form.

Autonomy

Law assumes that legal subjects are inherently rational, independent, and self-interested.[37] The autonomy myth is woven throughout English law, with references to a hypothetical legal subject, the 'reasonable man' (now the 'reasonable person'),[38] serving as a standard against which those who come before the law are judged.[39] The hypothetical autonomous legal subject plays a central role in the narratives underlying the property law framework. Upholding law's veneer of equality and impartiality, the autonomous legal subject purports to be neutral, devoid of gender, race, sexuality, and class. However, beneath the surface lies a clear preference for a particular type of individual; one who can conform to the neoliberal ideals of self-interest and self-sufficiency. The use of the autonomous legal subject as a frame of reference also has the effect of silencing those voices that do not conform. As I argue in this section, the homemaker's failure to live up to the autonomous ideal means that she is depicted as an "outsider" within the constructive trust and estoppel framework.[40]

The most obvious example of the autonomy myth in the constructive trust framework is its quasi-contractual requirement for common intention.[41] The court must find evidence of intention; it cannot impose its view of what is fair, even if the result appears excessively

[37] See Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004)
[38] For analysis of the evolution of this concept, see John Gardner, 'The Many Faces of the Reasonable Person' (2015) 131 Law Quarterly Review 563
[39] See Catharine A MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence' (1983) 8 Signs 635
[40] Lorna Fox-O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism'' (2014) 62 Current Legal Problems 409
[41] See Simon Gardner and Katharine Davidson, 'The Supreme Court on Family Homes' (2012) 128 Law Quarterly Review 178, 182

harsh or inegalitarian.[42] The need for a common intention reinforces a foundational principle of English property law; that existing property rights may not be removed or interfered with without the owner's consent. It also upholds the principle of freedom of contract, namely that where the owner has entered into a bargain or agreement with another individual, this should be upheld and enforced by law.[43]

Concepts such as freedom of contract and enforcement of bargains rely on a vision that humans are "free and equal owners of commodities who are all similarly equipped to engage in transactions which will redound to [their] personal advantage."[44] Furthermore, they create a false conception of a level playing field in which the parties are imbued with equal power and ability to assert their own self-interest. This is particularly evident in the sole ownership scenario in cohabitation, where the court ignores the fact that one party holds all the cards while the other holds none.

The Functions of the Autonomous Subject

The hypothetical autonomous subject bears little resemblance to the lived reality of ordinary citizens, particularly women.[45] This fictitious individual merely represents a snapshot, taken at a time in life when the adult subject is financially independent and unburdened by the effects of ill health, or the ageing process.[46] For example, the helplessness of childhood is seen merely as "a stage that the liberal subject has long ago transcended or left

[42] As pointed out e.g. in *Curran v Collins* [2013] EWCA Civ 382, [9] (Toulson LJ)
[43] See Anne Barlow and Grace James, 'Regulating Marriage and Cohabitation in 21st Century Britain' (2004) Modern Law Review 143, 169
[44] Elizabeth Kingdom, 'Cohabitation Contracts and the Democratization of Personal Relations' (2000) 8 Feminist Legal Studies 5, 10
[45] Rosemary Hunter, 'Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism' in Margaret Davies and Vanessa Munro (eds) *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate 2013), 14; and Ngaire Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 Modern Law Review 346, 365
[46] See Naffine (2003), (n 45)

behind."[47]This therefore denies the embodied and vulnerable reality of the human life course which is, as Fineman argues, inevitably punctuated by periods of dependency and the constant susceptibility to accident and injury.[48]

It is, of course, necessary for law to have frames of reference of human behaviour when interpreting behaviour and filling the gap between the black letter of the law and everyday reality. This exercise inevitably involves making certain generalisations about how individuals behave. However, by relying on an unrealistic conception of personhood, law constructs the lived experiences of those who fail to conform as being contrary to the norm. Returning to my core claims in Chapter 1, I view the individual subject as fundamentally relational, emotional, and embodied. The relational and embodied reality of personhood means that, for significant periods of her life, the legal subject is wholly dependent on others for her survival. The population could not survive without the caregiving and supportive labour performed by homemakers. However, the liberal subject is the antithesis of this; individualistic, rational, disembodied, meaning that relationality and interconnectedness are dismissed as unimportant. While this may be an appropriate approach in discrete arms-length transactions,[49] it is, as critics have remarked, completely inadequate as a basis on which to judge behaviour in intimate relationships.[50]

Despite the liberal subject's unrealistic nature, law continues to rely on and promote this image of personhood. After all, it serves an important purpose for the state, helping to

[47] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251, 265
[48] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 10
[49] John Wightman, 'Intimate Relationships, Relational Contract Theory, and the Reach of Contract' (2000) 8 Feminist Legal Studies 93
[50] See Simon Gardner, 'Rethinking Family Property' (1993) 109 Law Quarterly Review 263; and Simone Wong, 'Constructive Trusts Over the Family Home: Lessons to be Learned from Other Commonwealth Jurisdictions?' (1998) 18 Legal Studies 369, 375

reinforce the fundamental tenet of justice that all citizens are equal before the law. As Grear argues, the removal of context and the subject's body produces:

> a mythic, 'even', juridical surface upon which law's equally mythic actors…glide upon a grid of linear, smooth, mutual and neutral interactions in order to operationalise a putatively unproblematic formal legal equality.[51]

Equality itself can mean different things. In its barest sense, it can be equated to sameness of treatment, meaning that all citizens should be treated the same, regardless of individual circumstances. It can also mean substantive equality, referring to individuals being given equal opportunities, even if this means treating some differently to others.[52] The equality that is reinforced by the autonomy myth is very much the formal version, under which opportunities are presented as being available to all, ignoring crucial factors that impede some individuals from being able to access them, such as unequal bargaining power or economic resources.

Formal equality is also foundational to classical liberal theories of law and philosophy. For example, Rawls' theory of justice relies on his hypothetical legal subject operating behind a 'veil of ignorance' to ensure that equal opportunities are afforded to all citizens.[53] Although there has been recognition in more recent times that certain sections of the population possess particular characteristics that justify protective measures from the state to prevent unfair treatment (e.g. sex, disability, or age), Fineman has noted that the comparator remains

[51] Anna Grear,'Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject' in Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundations for Law and Politics* (Ashgate 2013), 44

[52] See further discussion in Chapter 6. See also Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017), 9

[53] John Rawls, *A Theory of Justice* (Harvard University Press 1971)

the rational, disembodied, liberal subject.[54] Thus, protected characteristics are effectively depicted as weaknesses, deviating from the self-sufficient norm.

The construction of the liberal subject as representative of legal equality enables the state to deny that it privileges some citizens over others. Instead, as Fineman argues, those citizens "who manifest the realities of dependency because they are unable to mask it by retreating into contrived social institutions such as the family, are rendered deviant by our discourse."[55] Those who display vulnerability are blamed for their misfortune. While Fineman's writing is focused predominantly on the US legal and political system, similar patterns are evident in English law and policy, whereby neoliberal individualism has gained increasing prominence. Diduck argues that:

> It seems to me…that the responsibility rhetoric has now shifted; there is a new strain entwined with it. In previous work I explored a similar shift in the discourse of ancillary relief on divorce, from traditional patriarchy to quality to individual responsibility. Here, I see a similar process at work: the language has again shifted. It is now that of autonomy.[56]

Similarly, Barlow et al have noted the increasing predominance of neoliberalism as a political philosophy informing modern English family law policy and reform, evidenced by the state's encouragement of private, out-of-court, settlement of family disputes, together with the severe restriction of legal aid funding.[57] The 'neoliberal turn' in family law can also be seen in increasingly permitting couples to contract out of protective legal regimes through the use of prenuptial agreements, with the underlying assumption that all individuals have

[54] Martha Albertson Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013). English discrimination law under the Equality Act 2010 also relies on the hypothetical comparator who does not share the claimant's protected characteristics (see Equality Act 2010, s 13(1)).
[55] Martha Albertson Fineman, 'The Nature of Dependencies and Welfare 'Reform'' (1996) 36 Santa Clara Law Review, 291
[56] Alison Diduck 'Autonomy and Vulnerability in Family Law: The Missing Link' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Routledge 2014), 203
[57] Barlow et al (2017), (n 52), 2-6

equal capacity and power to enter into such bargains and will benefit equally from their existence.[58]

As is the case with the inviolability myth discussed below, the autonomy myth reinforces law's boundaries. It marks the divide between the legal and the non-legal as well as outlining the expected behaviour of citizens in the public sphere. Liberal legal theories do not deny the existence of a 'private self' and the display of characteristics such as love, intimacy, friendship, and altruism. However, they consign them to the private realm, reinforcing the idea that the subject is dual: it has a public side and a private side.[59]

Stories and Counterstories: The Rational and the Emotional Voice

I now examine how the autonomy myth, told through the image of the autonomous liberal subject, takes on the form of an ever-present character and storyline within the constructive trust and estoppel framework. This analysis also exposes the process by which the homemaker becomes 'othered' and excluded from the dominant legal discourse.

Returning to the point that legal myths represent a background framework, a narrative, and a recurring plotline in law, I draw on the concept of legal storytelling in exposing law's hidden preference for economic value. This involves recognising, as Sarmas argues, that "the process of judicial adjudication is viewable not as the application of objective rules to objective facts, but as the adoption of a particular story to resolve a case."[60] What follows is therefore an illumination of how autonomy has become a story that serves to exclude the homemaker from the legal framework, but which simultaneously denies doing so. As

[58] Sharon Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart 2015)
[59] This private side is discussed in more detail in Chapters 4 and 5
[60] Lisa Sarmas, 'Story Telling and the Law: A Case Study of *Louth v Diprose*' (1993) 19 Melbourne University Law Review 701, 702

Delgado argues, "[s]tories make us believe that the way things are is inevitable… Alternative visions of reality are not explored, or, if they are, rejected as extreme or implausible."[61]

Close attention to the judicial language employed in cohabitation disputes reveals that the hypothetical liberal subject speaks in a language that is logical, neutral, and unemotional. The narrative of the liberal subject has the power to sanitise disputes that, for the parties, may be messy and fraught with emotion. This dominant narrative is reinforced in the case law and it informs the way the judiciary interprets the parties' behaviour. As well as dominant legal stories that reinforce legal myths, the legal framework also contains what Delgado terms "counterstories".[62] Counterstories provide an alternative to dominant stories and represent the voices of those that are marginalised or suppressed by the mainstream ideology. Below, I argue that the homemaker's role in the legal framework is such a counterstory and illuminates her position as an outsider. Her presence within the legal framework serves to reinforce her non-compliance with the autonomous ideal. As Delgado points out, "stories or narratives told by the *ingroup* remind it of its identity in relation to *outgroups* and provide it with a form of shared reality in which its own superior position is seen as natural."[63] The homemaker thus represents such an outgroup.

In the cohabitation framework, I term the dominant narrative the 'rational voice'. It is the voice of the autonomous subject, who makes decisions based on commercial self-interest, unrestrained by relational or emotional concerns. The liberal subject is able to freely enter into bargains that are then upheld by law. The rational voice that represents the liberal

[61] Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87 Michigan Law Review 2411, 2417
[62]See ibid, 2414 (emphasis added)
[63] Ibid, 2412

subject is framed in neutral and unemotional language. While the rational voice dominates the case law, it is not the only voice that is present.

The homemaker's counterstory in the cohabitation framework is the 'emotional voice'. While the rational voice represents the legal subject's 'public self', the emotional voice is one who has allowed the private to spill over into the public. The emotional voice is unable to regulate itself and speak in law's prescribed code. The emotional voice's presence in the case law helps to reinforce the idea that those who do not conform to the autonomous ideal are the authors of their own misfortune. While they may become objects of pity or sympathy, they are nonetheless to blame for their position. Evidence of this sentiment can be seen in Auchmuty's argument that "no woman today should be so blinded by love or loneliness as to give up all her assets just because a man asks her to do it."[64] Thus, those that embody the emotional voice are depicted as having been have been so 'blinded'.

Fox-O'Mahony has argued that analysing law from the point of view of those who are marginalised by it (i.e. the 'outsiders') requires reflection on "who we understand property law and property scholarship to be 'for'."[65] In the cohabitation framework, it is clear that law primarily protects the interests of those who can conform to the self-interested ideal. The interrogation of the marginalised counterstories demonstrates the way they subtly draw the borders around property law, declaring what belongs there and what does not.

In *Geary v Rankine*,[66] the claimant's counterstory was recounted through the snippets of her witness evidence included in the judgment. The parties had been together for 19 years and had a child together. Part of Mrs Geary's case was that she alleged that the respondent had

[64] Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196, 1217
[65] Fox-O'Mahony (2014), (n 40), 426
[66] *Geary v Rankine* [2012] EWCA Civ 555

been financially controlling towards her, refusing to share the profits of the business that they both worked in. In her evidence, Mrs Geary said that:

> throughout our relationship the Respondent was mean with money and reluctant to allow me to spend […] If I asked the Respondent for money to spend on myself other than small amounts, there would always be an argument and he would become angry so I eventually did not ask[67]

The emotional nature of this account is evident, with reference made both to Mr Rankine's anger and his meanness in relation to money. That Mrs Geary viewed herself in terms of her relationships, particularly her role as a mother, and took a relational approach to the case can also be seen when she said that "[a]s the years went by, I kept asking him what security he was going to provide for me and my son should anything happen to him."[68]

Mr Rankine's witness evidence was not directly cited in the judgment. However, it was clear that he spoke with the same voice as the court. He had consistently refused to put the business and the investment property in joint names. He had exhibited market-based, individualistic behaviour through his desire to protect his own business interests rather than share with the claimant. His refusal to relinquish control over his own finances worked in his favour. Responding directly to the allegation that the respondent had been controlling and refused to share, Lewison LJ thought that "those points to my mind contradict any conclusion that [the claimant] had an entitlement to a share in profits of the business."[69] Therefore, the only relevance of what could legitimately be described as economic abuse of one party by another, was to confirm that there was no intention to share. The fact that Mrs Geary was in a position without leverage, concerned about her own future and that of her child, was not relevant to this inquiry.

[67] Ibid, [7]
[68] Ibid, [8]
[69] Ibid [13] (Lewison LJ)

The analysis of the counterstory in *Geary* reveals that part of Mrs Geary's problem was that she framed her case in the wrong language. She mistakenly believed her own position within the relationship (with regard to securing her own and her child's financial future) to be relevant to the issue of ownership. She also thought it relevant that she had not been able to persuade Mr Rankine to put the property in joint names because of the way that he treated her. However, she discovered that neither of these issues belonged in the rational, unemotional domain of property law. By way of contrast, Mr Rankine's self-interested conduct chimed with law's own language.

Another counterstory told in the emotional voice can be seen in *Curran v Collins*.[70] Here, the parties had been together off and on for over twenty years, yet all assets were in Mr Collins' name. It is clear that Ms Curran was aware of her marginalised status and described this in emotional terms. In his judgment granting leave to appeal, Toulson LJ explains that "[s]he describes herself as "a nobody", but with a profound sense that what has happened is not just" and that "the result of the judgment [at first instance] is to make her feel utterly worthless."[71] In the Court of Appeal judgment, Ms Curran's inability to be detached went against her. Her evidence was criticised because "[s]he had strong emotions causing her to be overemphatic."[72] The trial judge had also noted her "loose use of language" when giving her evidence.[73] An example given was that she had said that she had "done all the paperwork" for the parties' business, when in fact she had not done the accounts, only some insurance forms. This was used as evidence of her unreliability as a witness.

What was particularly notable in this case was that the defendant, Mr Collins, was found to have lied on oath about his financial affairs and to have given inconsistent accounts, yet his

[70] *Curran v Collins* [2015] EWCA Civ 404; *Curran v Collins* [2013], (n 42)
[71] *Curran v Collins* [2013], (n 42), [13] (Toulson LJ)
[72] *Curran v Collins* [2015], (n 70), [27] (Arden LJ)
[73] Ibid, [24] (Arden LJ)

evidence was still preferred as more reliable because he did not exhibit high emotions and was able to be dispassionate and "capable of being very calculating"[74] when recalling events in the parties' relationship. As was the case in *Geary*, Mr Collins' direct voice in the form of his witness evidence was absent from the judgment, but it was clear that it was the rational, logical one that chimed with that of the court.

Law's "linguistic code"[75] thus acts as a lens of neutrality and rationality, through which actions and events are viewed. It has a transformative effect in terms of being able to change the significance of a particular interaction by infusing it with legal meaning. This legal language can then operate to silence other accounts of the same event, which are told in a different, more personal, language. Those that can speak in the commercial language of the court are inevitably advantaged. However, the commercial is often artificial and bears little semblance to the parties' relationship, as seen in in *Smith v Bottomley*.[76] Here, the property in dispute was owned by a limited company (of which Mr Bottomley was the sole shareholder). His argument was that any assurances that he gave to Ms Smith as to making provision for her were irrelevant because he was not the legal owner.[77]

The relational account of the interactions was seen in Ms Smith's evidence: "he said everything we have is 50/50; he did not go into detail. The company *was* Mr Bottomley."[78] However, the court's strict reliance on the separation between Mr Bottomley and his company is evident where Sales J explained that:

> unless it can be said that the Company shared responsibility with Mr Bottomley for the relevant promise regarding ownership of the Barn and that Ms Smith relied to her detriment in a serious way upon such promise by the

[74] *Curran v Collins* [2015], (n 70), [17] (Arden LJ)
[75] Delgado (1989), (n 61)
[76] *Smith v Bottomley* [2013] EWCA Civ 953
[77] For the foundations of the corporate legal personality doctrine, see *Salomon v Salomon* [1897] AC 22
[78] *Smith v Bottomley*, (n 76), [14]

> Company, there is no good ground on which it can be said that Ms Smith has the benefit of an equitable interest[79]

The use of the legal fiction of separate corporate personality in the intimate relationship context demonstrates the inherent conflict between the commercial and the personal. The corporate subject in *Smith* was one that was not even human**,** yet the authority that it was afforded allowed it to extinguish Ms Smith's claim to ownership on the basis of promises made to her. The reluctance of the court to 'pierce the corporate veil' furthermore demonstrates law's preference for abstract rules and certainty. It also highlights the extent to which economically stronger individuals are permitted to hide behind artificial and legally constructed entities to avoid individual responsibility.

Rewriting Homemaker Contributions: Commercialising the Personal

The emphasis on individual autonomy means that the legal framework struggles to justify why homemaker contributions should lead to an interest in the home. Law makes use of the public/private dichotomy, explaining that non-financial contributions that take place in the context of an intimate relationship (such as caring for a dependent) were not performed with the expectation of financial recompense.[80] Instead, homemaking labour is attributed to love or altruism and therefore falls outside the realm of legal concern.[81]

The analysis below focuses on a number of cases where the courts have decided that there *should* be some form of compensation for care or domestic work. This has in turn led to the relationship needing to be recast into a commercial framework to portray the claimant as

[79] Ibid, [57] (Sales J)
[80] See Gardner (1993), (n 50) and further discussion in Chapters 4 and 5.
[81] See for example Professor Unger's view that "the family circle differs from the market place in that it is not the setting for bargaining but for exchanging gifts and gratuitous services". J Unger, 'Intent to Create Legal Relations, Mutuality and Consideration' (1956) 19 Modern Law Review 96, 97. See also Ian R Macneil, 'The Many Futures of Contracts' (1973) 47 University of Southern California Law Review 691; and Beverly Horsburgh, 'Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs' (1992) 25 University of Michigan Journal of Law Reform 423

motivated by financial gain. Financial compensation or desert is generally only recognised where the caregiver has gone 'above and beyond' the moral duty or expectation of altruism. Expectations of altruism will differ depending on the nature of the parties' relationship and, as I argue below, on the homemaker's gender. Often where the relationship is spousal or tantamount to spousal, homemaking contributions performed by women are seen as natural or inevitable and therefore incapable of giving rise to property rights.[82] However, where the parties are not in a conjugal relationship, or where the work is performed by men, there may be a greater inclination on the part of the judiciary to accept that the claimant should receive some form of recompense for the work.

In the estoppel case *Thorner v Major*,[83] the claimant, David Thorner, assisted his father's cousin, Peter Thorner, in his farming business for a period of nearly 30 years. This involved the claimant working on the farm unpaid but also providing companionship and assistance to Peter. Some years after the claimant had started work on the farm, Peter implied to him that he would inherit the farm. The claimant continued to work on the farm until Peter died in 2005. Despite his assurance regarding inheritance, Peter died intestate and the farm was distributed according to the statutory intestacy rules, meaning that the claimant received nothing. In allowing the claimant's appeal, the House of Lords focused on the link between the assurance given by Peter, and the claimant carrying on the unpaid work. Even though the claimant had already been working unpaid for several years when Peter gave the assurance about inheritance, it was suggested that the claimant's work was conditional on his inheritance. This conflicted with the additional finding that the claimant would probably not have raised any objections had the farm needed to be sold to pay for Peter's nursing

[82] See *Lloyds Bank v Rosset*, (n 30), and *Thomson v Humphrey* [2009] EWHC (Ch) 3576
[83] *Thorner v Major* [2009] UKHL 18

care.[84] In addition, the claimant also worked on his parents' farm for a nominal amount of 'pocket-money'.[85] These two factors could be taken to suggest that the claimant was not motivated by financial gain and instead carried out the work out of a sense of loyalty and affection for Peter and for his parents. However, if using the autonomous legal subject as a frame of reference, it would be difficult to incorporate the caring on the basis of the claimant's affection for his relatives, or his sense of moral duty. As a result, the caring elements of the relationship needed to be downplayed in favour of commercial considerations.

In *Wayling v Jones*,[86] the male claimant was in a long term same-sex relationship with the deceased. During the course of the relationship, he carried out a significant amount of unpaid work in hotels owned by the deceased. The deceased had on several occasions made assurances to the claimant that he stood to inherit the hotels on his death, a promise that he failed to honour. In holding that the deceased's estate was estopped from denying the claimant an interest, the Court of Appeal held that, had it not been for the assurances made by the deceased, the claimant would not have carried out the work. In his evidence, the claimant said that if the deceased had told him that he was no longer to receive an interest, he would have left the relationship.[87] However, he also said that if the deceased had never made the promise of a share, this would not have affected his decision to have a relationship with him.[88]

Flynn and Lawson have remarked on the court's commercial analysis of the parties' relationship in *Wayling*. They argue that the reason the claimant would have left the

[84] Ibid, [19]
[85] Ibid, [23]
[86] *Wayling v Jones* [1995] 69 P & CR 170
[87] Ibid, 172
[88] Ibid, 173

relationship, had he been told that he would no longer receive a share, was because it would represent a betrayal by the deceased and demonstrate that the claimant's work was not valued.[89] Flynn and Lawson's argument thus illuminates the differences between an economic and a relational analysis, which can also be seen in the contradictory statements made in *Thorner*. The market-based model sees an inherent conflict between a denial of financial motivation on the one hand, and a feeling that one has been exploited on the other hand. However, recognising the inherent relationality of human nature allows an examination of the quality of the relationship in question. In both *Thorner* and *Wayling*, had the deceased been penniless, this may well not have affected the claimants' motivation to perform care out of feelings of loyalty, love, or affection. This does not invalidate or impact on their sense of feeling aggrieved when the deceased behaved in a selfish manner, failing to reciprocate, and thus devaluing the claimants' caring contributions.

The recent case, *Culliford v Thorpe*,[90] which involved a male same sex couple, reveals that the tension between commercial and personal remains. Shortly before Christmas in 2016, Jocelyn Thorpe was served with notice of possession proceedings in respect of the home he had shared with Rodney Culliford during their relationship, title to which was in Mr Culliford's sole name. Mr Culliford had died intestate some nine months prior to this, his estate being inherited by his brother and sister. The appeal concerned Mr Thorpe's counterclaim for a constructive trust and proprietary estoppel in respect of the home. In support of his counterclaim, Mr Thorpe, whom the judge described as "more practical" than his partner,[91] relied on the fact that he had carried out a significant amount of unpaid work in the home, including repairing the boiler and decorating the main bedroom.[92] He said that

[89] Flynn and Lawson (1995), (n 31)
[90] *Culliford & Another v Thorpe* [2018] EWHC (Ch) 426
[91] Ibid, [19] (HHJ Paul Matthews)
[92] Ibid, [19] (HHJ Paul Matthews)

he had carried out this work in reliance on a conversation that he had with the deceased in 2012, when the deceased told him words to the effect that "what is mine is yours and what it yours is mine."[93]

Despite witness evidence that the deceased frequently complained of Mr Culliford's lack of contribution to the relationship,[94] HHJ Paul Matthews found that "the defendant would not have done the work he did if there had not been an agreement of this kind between them".[95] Thus, the agreement (which consisted of a casual conversation when the parties were moving house) was given significant force within the judgment. HHJ Matthews stressed that the court was "implementing the agreement- the informal bargain- between them."[96] The emphasis was thus on the unconscionability that would result from the estate reneging on the agreement; a distinctly contractual approach.

The reasoning in *Thorner*, *Wayling* and *Culliford* shows that the judiciary feels the need to reframe the terms of the parties' relationship to make it more compatible with the economic arms-length ideal. For example, in *Thorner*, it was emphasised that the claimant had "other opportunities"[97] that he was considering and had missed out on, although the details of these were not elaborated on. Despite the fact that the claimant had already been helping his relative and was also working largely unpaid for his parents, the House of Lords' judgment suggests that he would consider the work alongside other employment opportunities and take the most lucrative one. The idea that the claimant might feel motivated by other factors to assist his relative, irrespective of whether he was financially rewarded, would not fit with the autonomous ideal.

[93] Ibid, [26] (HHJ Paul Matthews)
[94] Ibid, [43] (HHJ Paul Matthews)
[95] Ibid, [32] (HHJ Paul Matthews)
[96] Ibid [78] (HHJ Paul Matthews)
[97] *Thorner v Major*, (n 83), [4] (Lord Hoffman)

One pertinent point (and one which I return to in Chapters 4 and 5 when discussing the way that law constructs domestic work and caregiving) is the gendered dimension of these cases. Flynn and Lawson noted this in relation to *Wayling v Jones*, namely that the court appeared more willing to commercialise the relationship where men were demanding recompense, whereas women who undertook homemaking work were simply thought to be fulfilling their natural role.[98] *Wayling*, *Thorner*, and *Culliford* all involved male claimants. Although some of this may be attributed to the law moving on since *Rosset*, it is notable that female claimants in recent cases have not fared as well as their male counterparts.[99] In these cases, the courts have struggled to connect the performance of homemaking work with the expectation of an interest in the home.[100] Again, I pursue this gendering of homemaking work in more detail in Chapters 4 and 5. However, it seems that women (who have traditionally been associated with emotion)[101] find it more difficult to fit into the rational and dispassionate moulds created by the legal framework.

As I have argued above, law does not explicitly discriminate against the homemaker. Homemakers are understood to have the same opportunities to bargain for property rights. However, law ignores the wider social context in which homemaking or indeed any form of socially reproductive work is consistently devalued and privatised, enabling the state to avoid taking responsibility for its performance. Within the constructive trust and estoppel

[98] Flynn and Lawson (1995), (n 31), 117

[99] E.g. *Curran v Collins* [2015], (n 70); *Smith v Bottomley*, (n 76); and *James v Thomas* [2007] EWCA Civ 1212

[100] E.g. in *James v Thomas*, (n 99), in reference to the claimant's unpaid work, Sir John Chadwick explained that "The true position, as it seems to me, is that she worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas were making their life together as man and wife. The Cottage was their home: the business was their livelihood. It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest." [36]

[101] See discussion in Chapter 1, p 32

framework in particular, these wider issues are completely eschewed, giving the impression that judges are simply applying the rules in an ordered and logical manner.

The Inviolability of Property Rights

The second myth refers to the force and status given to private property rights within legal discourse. This reflects the libertarian position that property is a powerful symbol of individual autonomy and a necessary protection against unwarranted state interference.[102] As with the autonomy myth, it betrays the state's preference for economic self-sufficiency. I argue that law's reverence for private property is problematic for three reasons. Firstly, it allows the state to mask inequality and power imbalances between citizens. Secondly, it reinforces the homemaker's marginalisation, presenting her as a direct threat to the logical and neutral order of property rights. Thirdly, the property myth, and particularly its tendency to ignore relational contexts, stifles development of this area of law, preventing consideration of broader issues of fairness and distribution of resources.

The Manifestation of the Inviolability Myth

Private property is afforded significant power in liberal legal and political theories and within the neoliberal state.[103] The status of ownership is thought to provide the individual with protection against interference from the state and from other citizens. As a result, state redistribution of private property tends to be regarded with extreme caution, other than when the owner can be said to have consented to it.[104] Nourse LJ in *Re Polly Peck (no 2)* confirmed that "you cannot grant a proprietary right to A, who has not had one beforehand, without

[102] Craig Rotherham, *Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights* (Hart 2002), 197
[103] See Margaret Davies, *Property: Meanings, Histories, Theories* (Routledge 2007)
[104] See e.g. Robert Nozick, *Anarchy, State, and Utopia* (Basic Books1974)

taking some proprietary right away from B. No English court has ever had the power to do that."[105]

Liberal accounts of private property view it as symbolic of individual autonomy, a necessary feature of self-sufficiency. As Singer argues, the liberal model primarily constructs property as a boundary of protection against state intervention.[106] It comes to represent the physical divide between the autonomous subject's inner realm and the province of state power. Within this vision, ownership is also depicted as constitutive of the self and a necessary precondition for autonomy. For example, Waldron has argued that:

> [p]eople need private property for the development and exercise of their liberty; that is why it is wrong to take all of a person's private property away from him, and that is why it is wrong that some individuals should have had no private property at all.[107]

Ownership thus confers political power and affirms an individual's citizenship status.[108] Historically, suffrage rights were available only to those (men) who owned land, and were denied to the remainder of the population.[109] Although the importance of land ownership has diminished in modern times, it nonetheless continues to be associated with increased social status, denoting "standing, responsibility and self-control".[110] Those that own occupy a privileged position compared to those who do not. Within certain liberal accounts of property, rights of ownership are depicted as pre-legal or pre-social, suggestive of a *moral* right to ownership. For example, Locke's theory sees the right to property as arising in a "state of nature",[111] meaning that it exists prior to and irrespective of law.[112] Under the

[105] *Re Polly Peck International (No 2)* [1998] 3 All ER 812, 831 (Nourse LJ)
[106] Joseph William Singer, 'Property and Social Relations' in Charles Geisler and Gail Daneker (eds) *Property and Values: Alternatives to Public and Private Ownership* (Island Press 2000), 11
[107] Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988), 329
[108] See Davies (2007), (n 103), 1
[109] Nicholas Blomley, 'Remember Property?' (2005) 29 Progress in Human Geography 125, 126
[110] Ibid, 126
[111] Peter Laslett (ed) *John Locke: Two Treatises of Government (1690)* (Cambridge University Press 1988)
[112] See also M Morgan (ed) *Hobbes: Leviathan (1651)* (Hackett Publishing 1968)

Lockean account, ownership is imbued with morality, reinforcing the sense that violation of individual property rights is fundamentally wrong.

The mythical power of property is evident in the constructive trust framework. It is reiterated that the court's role is limited to "identifying the true beneficial owner or owners, and the size of their beneficial interests"[113] rather than engaging in a judicial redistribution exercise.[114] The requirement for intention which was discussed above also reflects the notion that consent is the only legitimate basis upon which the court is able to interfere with the owner's property rights.[115] Lord Morris in *Gissing v Gissing* stressed that the court had no power to interfere with property rights due to "the mere circumstance that harmony has been replaced by discord."[116]

Although the liberal position does recognise that property rights can never be absolute,[117] it generally sees the individual right as coming before any appeals to the public good or social goals such as equal distribution, relationship, or need.[118] In fact, Nozick has argued that enforced state redistribution of private resources to meet external goals would be tantamount to slavery.[119] This position presents problems for those whose claim to ownership does not fall into the narrow recognised categories of acquisition, but is instead based on a broader moral assertion that they should be entitled to the home by virtue of their relationship with the owner or the work they have performed within the relational context.

[113] *Stack v Dowden*, (n 32), [37] (Lord Walker)
[114] *Gissing v Gissing* [1971] AC 886
[115] Rotherham (2002), (n 102), 197
[116] *Gissing v Gissing*, (n 114), 898 (Lord Morris)
[117] Rotherham (2002), (n 102), 9
[118] See ibid, 46
[119] Nozick (1974), (n 104)

The State's Role in Property Distribution

The inviolability myth acts as a smokescreen, allowing property law's socially constructed nature to remain obscured and unchallenged.[120] All systems of property law, whatever form they take, are inevitably dependent on the state for their effective function and enforcement.[121] Property rights do not arise in a state of nature; the state determines the manner in which they are conferred on individuals. Any appeals to natural law simply hide the state's motivations for a particular system of property. As Davies argues: "[w]hat is 'natural' generally turns out to be very much in the eye of the beholder in her or his cultural, religious or political context."[122] In the case of the cohabitation framework, this context is the state's strong preference for economic self-sufficiency, at the expense of broader relational considerations or ontological security.

The myth therefore masks the wider social context in which law operates. Because the power of property ownership is presented as inherent, the fact that it is unequally distributed among citizens is not open to challenge. Instead, the inviolability myth allows property law to be presented as a neutral, rational and coherent set of rules that are capable of existence and enforcement without reference to political motivations.[123] In reality, property law empowers certain individuals and privileges certain behaviours, whilst excluding others.[124] Not all citizens have an equal opportunity to acquire property and some will *never* acquire it, a point that I return to in Chapter 3. Yet, the state is able to maintain the illusion that ownership is

[120] See Alistair Hudson 'The Cost of Everything and the Value of Nothing: Rights in the Family Home' (Conference Paper, University of Kent, June 2003); and John Locke, 'Of Property (from Chapter V of Locke's 'Second Treatise of Government')' in Crawford Brough Macpherson (ed), *Property,Mainstream and Critical Positions*, vol 214 (University of Toronto Press 1689/1978), 201
[121] Davies (2007), (n 103), 16
[122] Ibid, 16
[123] Fox-O'Mahony (2014), (n 40)
[124] See Sarah Keenan, 'Smoke, Curtains and Mirrors: The Production of Race through Time and Title Registration' (2017) 28 Law & Critique 87

potentially available to all, and that the fact that not all citizens are owners is due to individual failure to become self-sufficient.

The inviolability myth also seeks to uphold the principle of equality before the law, discussed above.[125] Because the discourse of property denies the state's role in determining who can be an owner and who cannot, it also denies the significant power that is exercised by owners over non-owners.[126] As Keenan has argued, property is based on the rights afforded to certain individuals to exclude others from certain spaces.[127] Property ownership inevitably depends on the fact that others are *not* owners. In the cohabitation context, property discourse conceals considerable inequalities, whereby ownership is only a realistic prospect for a relatively wealthy section of the population and is denied to others. Yet, the discourse is framed in such a way as to render this fact unimportant, a feature that lies beyond the concern of property law's search for order and rationality. Appeals to social justice are seen as a threat to property law's supposed doctrinal purity.[128]

Much of this relies on a positivist definition of law, whereby property is thought to be comprised of a body of legislation and case law that can be easily identified, but where the role of the lawyer or the judge is limited to being able to identify the rules and the circumstances in which they apply.[129] The positivist account desires certainty in the sense that rights should be easily identifiable. There is no need, as Waldron argues, for the lawyer to 'look behind' the law in order to identify some higher meaning as to how the rules are

[125] See Roger Cotterrell, 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' (1987) 14 Journal of Law and Society 77, 82
[126] Ibid
[127] Sarah Keenan,'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 Social & Legal Studies 423, 423
[128] Rotherham (2002), (n 102), 198
[129] Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 University of Western Australia Law Review 1

applied.[130] We are told that the legal owner of land is the person whose name appears on the title register or deeds. There is, therefore, limited opportunity to question whether the formalities required for ownership represent or protect the interests of a particular group of people or promote a particular viewpoint.

As well as obscuring the state's role in unequal distribution of assets, the inviolability myth shapes the parameters of disputes involving homemakers. The primacy given to property rights reinforces this. In sole ownership cases, the strength afforded to the legal title operates as a "hurdle"[131] over which the homemaker must jump in order to show that she has a right to her own home. She starts on the back foot, having to convince the court that this is an unusual case where the title should be interfered with. The inviolability myth reinforces the homemaker's low status within the legal framework. Property is, as outlined above, symbolic of autonomy, a source of protection against the tyranny of the state. Property law doctrine does not view the parties in equal terms. The homemaker is depicted as a threat, someone "seeking to claim a windfall against the rightful owner",[132] unless she can establish that she too is an owner and therefore deserving of legal protection.

The Family/Property Dichotomy: Stifling Judicial Development

The inviolability myth stifles judicial development of cohabitation law. A major cause of this is the way that property law demarcates itself from other areas of law. As Fox-O'Mahony argues, "[g]uarding its boundaries tightly, [property law] is presented to non-initiates as difficult, technical and inaccessible."[133] The perception of property as a "closed

[130] Waldron (1988), (n 107), 51
[131] See *Thomson v Humphrey*, (n 82), [25] (Warren J)
[132] Fox-O'Mahony (2014), (n 40), 444. See also John Mee, '*Burns v Burns*: The Villain of the Piece?' in Stephen Gilmore, Jonathan Herring and Rebecca Probert (eds) *Landmark Cases in Family Law* (Hart 2010); and Sharon Thompson, 'In Defence of the 'Gold-Digger'' (2016) 6 Onati Socio-Legal Studies 1225
[133] Fox-O'Mahony (2014), (40), 419

system of logic"[134] prevents the infiltration of principles from other areas of law. The issues surrounding cohabitation are often viewed as being inappropriate for resolution by property principles.[135] The inviolability myth bolsters this perception that property law and family law have different aims and are therefore fundamentally incompatible. As Auchmuty notes, "family lawyers and property lawyers are talking about different things".[136] The tension between the two areas of law means that cohabitation scholarship tends to align itself with either the property or the family perspective, which prevents the divide between the two disciplines from being interrogated and bridged. It is an artificial gap that exists as a result of the belief that law fits neatly into tightly bounded categories. This allows questions of property rights to become divorced from the more nebulous realm of 'the family' and the obligations that exist between its members. In reality, all families live somewhere and the issue of rights in the home must surely be logically intertwined with the relationships that are played out there. It is further evidence of the liberal tendency to view the legal subject as disembodied and unconnected to her surroundings. Property, in its pure sense, is only understood as a series of abstract and hierarchical rights, ignoring, and blurring the many other connections that people have to the places that they live in.[137]

It is also worth noting that law's reliance on dichotomies is hierarchical and is often associated with gender roles.[138] The perceived separation between family and property allows property law to maintain its status as a 'superior' and more cerebral area of law. As Dewar has remarked of the perceptions of family law both from the academy and in practice:

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[134] Kevin Gray and Susan Francis Gray, 'The Rhetoric of Realty' in J Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (Oxford University Press 2003), 204

[135] Joanna Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) 23 Legal Studies 624, 628

[136] Auchmuty (2016), (n 64)

[137] See Keenan (2017), (n 124)

[138] Frances Olsen, 'Feminism and Critical Legal Theory: An American Perspective' (1990) 18 International Journal of the Sociology of Law 199, 199

> it is often described as a free for all in which there are too few rules, too much untrammelled discretion by decision-makers, too much attendance to the detailed particulars of each case and too much reliance on expert evidence.[139]

Whereas law generally represents typically masculine traits of impartiality, justice and rationality, family law is one of the few areas that is associated with women and the feminine, and is therefore devalued.[140] It is perceived as lacking the intellectual rigour and the integrity of other areas, including property law.[141] Instead, family law is seen as operating in a paternalistic, often chaotic, fashion to protect those who have displayed weakness (and have thus failed to live up to the autonomous ideal of citizenship).[142] The unwillingness to bridge the divide and to fully marry together principles of property and family law is unfortunate. It is an unrealistic position, when issues of home ownership and relational obligations are in constant interaction in daily life.

The Restrained State

The final myth is the restrained state, which refers to the principle against state intervention into citizens' lives. State restraint dominates English property and trusts law because private property is ultimately symbolic of the limit of state powers.[143] State restraint is also intertwined with the autonomy myth, because the individualistic definition of autonomy necessarily demands that the state is largely absent.[144] My objection to the restrained state myth is twofold. Firstly, it represents a fiction that allows the neoliberal state to avoid responsibility for its citizens. Secondly, and particularly worryingly for the homemaker, it

[139] John Dewar, 'The Normal Chaos of Family Law' (1998) 61 Modern Law Review 467, 469
[140] Olsen (1990), (n 138), 201
[141] Martha Minow, 'Forming Underneath Everything That Grows: Toward a History of Family Law' (1985) Wisconsin Law Review 819, 819
[142] Dewar (1998), (n 139)
[143] Blomley (2005), (n 109), 126
[144] Ibid

relies on a rhetoric of personal responsibility that attributes blame to those who manifest visible vulnerabilities and dependencies.

A restrained state is one that is seen to exercise limited powers over its citizens, because such powers would encroach on their autonomy. In very generalised terms, this means that while the state has a fundamental duty to safeguard and enforce the rights and freedoms of its citizens, it cannot forcibly impose policies in pursuit of some version of the public good. In political terms, state restraint is associated with neoliberalism and is characterised by market freedom, freedom of contract, strong private property rights, and liberal policies around taxation.[145] It promotes individualism rather than collectivism or socialism. The restrained state views individual autonomy as inherently beneficial and of greater importance than social welfare or equitable distribution of resources. Private ordering is a key feature of the restrained state, whereby agreements and contracts derive their normative force from being created by individual citizens, rather than from their content.[146] Thus, the state will enforce a bargain because it was freely entered into rather than because it fulfils particular beneficial goals.

The policy of state restraint is by no means confined to the cohabitation framework. As Barlow et al have argued, state restraint is a major feature of the neoliberal political philosophy that has dominated the entire political landscape of the United Kingdom since the late 1970s.[147] As they argue, this is heavily reflected in family law, particularly in recent years with a move towards promoting private ordering, alternative dispute resolution, and out of court settlements, with an unquestioned assumption that these are useful and

[145] See David Harvey, *A Brief History of Neoliberalism* (Oxford University Press USA 2007)
[146] See Margaret Jane Radin and R Polk Wagner, 'The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace' (1998) 73 Chicago Kent Law Review 1295
[147] Barlow et al (2017), (n 52), 2. See also Harvey (2007), (n 145)

beneficial.[148] However, within the constructive trust and estoppel framework, the policy of state restraint is particularly pronounced.

State Restraint in the Cohabitation Framework

The constructive trust provides a clear example of the 'hands-off' approach of the English judiciary; an affirmation of the principle that the state will not directly get involved to adjust property rights, other than in accordance with the owner's consent. This emphasises the notion that the parties themselves create property rights through agreement, rather than them being imposed by law. The principle of state restraint complements the inviolability myth by reinforcing the notion that private property can only be interfered with in exceptional circumstances and certainly not to fulfil social goals.

State restraint is evident in the foundational principle that in English law, the constructive trust is viewed as an *institution* rather than a *remedy* (as is the case in several other Commonwealth jurisdictions).[149] Rather than being a solution imposed upon parties in appropriate circumstances, the institutional trust upholds the property owner's intention to create a trust.[150] The institutional constructive trust depends on a degree of legal fiction to explain its operation. It ostensibly comes into being at the moment when the parties form an intention to share the beneficial interest (or perform the acts from which an intention can be inferred). This is even though it is only 'officially' recognised at a later stage, when the

[148] Barlow et al (2017), (n 52), 4

[149] For a discussion of the judicial approaches in Australia, Canada and New Zealand, see Rotherham (2002), (n 102)

[150] My thesis deals only with the common intention constructive trust of the home. Equity recognises a constructive trust in a number of other circumstance, which is beyond the scope of this work. For detail, see chapter 12 of James Glister and James Lee, *Hanbury and Martin Modern Equity* (Sweet & Maxwell/Thomson Reuters 2015)

matter comes to court.[151] As discussed above, it reflects the view that property rights are so sacred that the state cannot interfere with them to achieve some broader aim of social justice.

By contrast, the remedial constructive trust involves judicial discretion to grant *de novo* property rights in satisfaction of a wrong. This involves a more active role for the judiciary and, therefore, the state. For example, the constructive trust in Canada, which provided a remedy for cohabitants prior to the enactment of specific legislation,[152] responds to the defendant's unjust enrichment. Once unjust enrichment has been established, the court has a discretion as to whether to impose a constructive trust; it does not arise as of right. La Forest J explained in *Lac Minerals v Corona*:

> [t]he constructive trust awards a right in property and should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from recognition of a right of property.[153]

In Australia, the constructive trust is imposed where it would be unconscionable to deny the plaintiff relief through the constructive trust.[154] Both these jurisdictions therefore acknowledge that, in the case of the constructive trust, property rights flow from their judicial creation rather arising automatically from an agreement between the parties.

While English property law appears to view redistribution of unmarried couples' property, other than in accordance with their intentions, as a fundamental violation of autonomy, the position under the European Convention on Human Rights is considerably more flexible. Under Article 1 of the First Protocol of the European Convention on Human Rights, the state

[151] See M Halliwell, 'Equity as Injustice: The Cohabitant's Case' (1991) 20 Anglo-American Law Review 500, 519

[152] For further information on the development of the Canadian law on cohabitation, see Robert Leckey, 'Cohabitation, Law Reform, and the Litigants' (2017) 31 International Journal of Law, Policy and the Family 131

[153] *Lac Minerals v International Corona Resources* [1989] 2 SCR 574

[154] See *Muschinski v Dodds* [1985] 160 CLR 583, *Baumgartner v Baumgartner* [1967] 164 CLR 137 and *West v Mead* [2003] NSWSC 161

is prohibited from depriving an individual of peaceful enjoyment of possessions.[155] On the face of it, this could be seen to support the inviolability myth, preventing redistribution of legitimately acquired assets upon relationship breakdown. However, Article 1 makes clear that this is not an absolute right and must always be balanced against public interest. Furthermore, the European Court of Human Rights in *Bramelid and Malmström v Sweden* emphasised that:

> laws governing private law relations between individuals contain provisions which determine, so far as property is concerned, the effects of those legal relations and, in certain cases, oblige one person to surrender to another property of which the former has hitherto been the owner… Rules of this kind, which are indispensable for the functioning of society under a liberal regime, cannot in principle be considered as breaching article 1 of protocol no 1.[156]

It is therefore unlikely that human rights arguments could be employed to argue that reform of cohabitation law constitutes a violation of rights to private property, as it could be justified as being in the public interest.[157] However, the strong nature of property rights in English law reveals a state that values private ownership rights particularly highly.

The English position reflects the fundamental belief underlying the legal framework; that judges should not be permitted to interfere with legitimately created property rights to achieve some vague notion of justice or fairness.[158] It thus reinforces the almost sacred status of property in English law, as a representation of individual autonomy and a shield against state interference. It places the court in a passive role, limited to identifying what is already

[155] Article 1 to the First Protocol of the ECHR provides that "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law." This is, however, a qualified right as paragraph 2 explains that "(2) The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

[156] *Bramelid and Malmström v Sweden* (1983) 5 EHHR 249, 256

[157] This was also the view of the Law Commission in its 2007 report. See Law Commission Cohabitation: The Financial Consequences of Relationship Breakdown ((Law Com No 307), 2007), para 3.80

[158] See Rotherham (2002), (n 102)

there, rather than permitting an evaluation of whether the distribution of property actually achieves fairness between the parties.

State Restraint in Family Reform Debates

The myth of the restrained state is also prevalent in the understanding of cohabitation as a relationship that operates outside the boundaries of law. As discussed in Chapter 1, political debates around the property rights of cohabitants upon relationship breakdown frequently assume that relationship-generated disadvantage arises due to the private choices made by the parties. These include the decision not to get married, not to enter into a deed of trust to secure their respective rights, and the decision of allocating homemaking unequally between themselves.[159]

In neoliberal legal discourse, the family and intimacy are usually consigned to the private realm, away from legal scrutiny and regulation.[160] Nonetheless, the state is understood to have a stake in marriage, which has been described as "a contract for which the parties elect but which is regulated by the state, both in its formation and in its termination by divorce, because it affects status upon which depend a variety of entitlements, benefits and obligations."[161] The state's supposed vested interest in marriage is used as a justification for legal regulation governing its beginning and end.[162] However, even in the case of marriage, the state claims to be restrained and relatively unconcerned with what takes place *during* the relationship.[163]

[159] For discussion, see Anne Barlow and Simon Duncan, 'New Labour's Communitarianism, Supporting Families and the 'Rationality Mistake': Part II' (2000) 22 Journal of Social Welfare & Family Law 129
[160] Simone Wong, 'Would You Care to Share Your Home' (2007) 58 Northern Ireland Legal Quarterly 268, 275
[161] *Bellinger v Bellinger* [2001] EWCA Civ 1140, [128] (Thorpe LJ)
[162] See also Robert Rowthorn, 'Marriage as a Signal' in Robert Rowthorn and Anthony Dnes (eds) *Law and Economics of Marriage and Divorce* (Cambridge University Press 2002)
[163] Historically, the state's reluctance to interfere in the marital relationship was particulalrly prevalent, evidenced for example by its lack of prohibition of domestic violence and marital rape. See also Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985), 12.

Notions of non-interference have also been used in the debate over cohabitation reform. A common argument is that it would be inappropriate to extend the legal regime applicable to spouses (even for functionally similar relationships) because this would interfere with the parties' choice to be unregulated. For example, Deech has argued that:

> [the Cohabitation Bill] … puts a widespread choice of lifestyle—cohabitation—into lockdown. If it were to be enacted …cohabiting couples…will find that they are snared unaware in a trap of laws from which there is no escape, save for the opting-out provisions of the Bill. Almost the entire panoply of marriage law is to be lowered on to them by the Bill once they have spent two years cohabiting—two years is the average length of a cohabitation—or if they are parents of a child. People often use the phrase "bedroom tax" but, if enacted, this Bill would be the real bedroom tax: share your bedroom and you will be taxed for ever more.[164]

Deech draws heavily on principles of state restraint here, emphasising the apparent tyranny of allowing the state to impose unchosen obligations on cohabitants. She describes cohabitation as a lifestyle choice, one that is freely and openly chosen by those who wish to escape the legal paternalism of marriage. She positions individual freedoms as being in constant threat from an oppressive state. This strongly reflects the neoliberal belief that individual freedom is always beneficial, whereas state interference that affects this freedom is always undesirable. However, it is also a gross simplification of the nuanced nature of intimate relationships and the extent to which individuals are truly free from the state. As I explore in the next section, a lack of legal obligations between individuals does not necessarily equal freedom. It simply means that the state chooses to permit power imbalances between individuals to go unchecked.

The Fiction of State Restraint

The myth of state restraint is a fiction that permits the state to avoid taking responsibility for creating conditions of inequality. As feminist academics have argued, complete restraint is

[164] Baroness Deech, Hansard debate 12 December 2014, vol 757

an impossibility, as the state is always present in some form in the lives of its citizens. Olsen observes that "as long as the state exists and enforces any laws at all, it makes political choices."[165] Even in the case of private ordering, the status and enforceability of individual agreements derives from the state. In doing so, the state makes an active choice as to which bargains are deemed worthy of enforcement and which are not.[166] Contract law and property law, both heavily based on notions of autonomy and minimalist state interference, are constructed by the state and would be unable to exist without its backing.

Instead, the restrained state, along with the other myths, creates an illusion behind which the its true political motivations are hidden. As I argued above, property is primarily a form of publicly sanctioned private power. To be an owner imbues an individual with the ability to exclude all others from a particular right. As Cohen argued, "we must not overlook the fact that dominium over things is also imperium over our fellow human beings."[167] State restraint permits and encourages this imperium by some citizens over others, as it is reluctant to intervene in order to ensure that private individuals do not exploit the power they have been awarded. The state could, if it did disapprove, intervene to prevent this imbalance, yet it chooses not to do so in the context of cohabitation. This is particularly evident in the constructive trust framework, which gives significant normative force to the parties' intentions, even where there are substantial power imbalances between the parties and the economically stronger party effectively holds all the bargaining chips. In my above analysis of the dominance of the commercial voice in constructive trust claims, I noted that excessively individualistic behaviour by owners, even that which could be described as

[165] Frances E Olsen, 'The Myth of State Intervention in the Family' (1984) 18 University of Michigan Journal of Law Reform 835, 836

[166] For example, where agreements are made in the context of domestic relationships, parties are often presumed to lack an intention to create legal relations. See Peter Goodrich, 'Friends in High Places: Amity and Agreement in Alsatia' (2005) 1 International Journal of Law in Context 41

[167] Morris R Cohen, 'Property and Sovereignty' (1927) 13 Cornell Law Quarterly 8

selfish or abusive, was tolerated, provided it was clearly communicated to the non-owner. Law (and therefore the state) does not concern itself with the broader moral question of whether it is ever appropriate, in the context of a long-term intimate relationship, for one party to leave that relationship with nothing. The state could prevent homemaker disadvantage, but in hiding behind the myth of restraint, it makes an active choice to prioritise the power it gives to property owners.

Blaming the Vulnerable: The Rhetoric of Personal Responsibility

As I have highlighted, the myth of restraint significantly alleviates the state's financial burden. It therefore has a significant interest in ensuring that dependencies remain privatised, hidden within the private sphere. In this sense, it is always in the state's interest to promote a world view where individual freedoms trump social welfare, even if this results in hardship for some citizens. The notion of personal responsibility is used to denote the ideal citizen, an individual who has availed themselves of the opportunities freely available to all. As Fineman argues, the restrained state mandates that it is "the personal responsibility of each individual to provide for himself or his family, which is similarly conceived as an autonomous unit."[168]

The upshot of a rhetoric of personal responsibility is that those who fail to conform to the ideal are personally blamed for their hardships. The homemaker is a casualty of this. When she inevitably displays evidence of dependency, she is stigmatised, derided as having failed in some way. This line of thinking is evident in the societal hierarchy of family relationships, whereby marriage is lauded as a public good,[169] whereas cohabitation, along with single parenthood, is dismissed as unstable and socially harmful.[170] One reason why marriage is so

[168] Martha Albertson Fineman, 'Equality and Difference-The Restrained State' (2015) 66 Alabama Law Review 609, 617
[169] Rowthorn (2002), (n 162)
[170] Ibid. See also Ruth Deech, 'Cohabitation' (2010) Family Law 39

favoured within neoliberal policies is that it severely limits the state's financial obligations. It ensures that financial dependencies and hardships remain private, even after divorce. Cohabitation, on the other hand, produces more visible disadvantages. However, not all are disadvantaged by cohabitation to the same extent. Those individuals who conform to the autonomous ideal are able to draw substantial benefit from a legal system that protects their property rights above all else. Deech's warning to her male students demonstrates the individual advantage that can be gained from employing principles of rationality and self-interest:

> Years ago, I used to urge my students at Oxford to conduct their love affairs in silence. I told them that the laws that govern property ownership might depend on the way in which the title of their home is registered, but also on what is said in a relationship. So if those young men said to a woman: "Come and live with me and I will take care of you – you don't need your own place", they might have found that they were in debt to the tune of half the property when love came to an end. At least my students knew the pitfalls. [171]

Instead, the blame for cohabitation breakdown falls on those who become reliant on the state as a result. Single mothers have long been demonised in societal discourse, supposedly representing irresponsibility and a sign of moral decline.[172] The state's issue is that single mothers cannot conform to the economically self-sufficient family ideal and thus are more likely to be dependent on welfare benefits than married mothers, who are dependent on men. However, within this discourse, little attention is given to the broader context; that society is structured in such a manner so as to always disempower those performing homemaking work. The married mother is no less dependent than the single mother; the difference is simply that her dependency is hidden behind the structures of the ideal family.

[171] Ruth Deech 'Couples Don't Need the Law to Tell Them how to Live Together' (*The Guardian*, 22 November 2009)

[172]See Julie Wallbank, 'An Unlikely Match? Foucault and the Lone Mother' (1998) 9 Law & Critique 59

Conclusion

In this chapter, I explored the way in which the state, through legal processes and regulation, seeks to consistently marginalise and exclude the homemaker. I argued that the legal framework applicable to cohabitants on relationship breakdown is based on three foundational myths: autonomy, the inviolability of property rights, and the restrained state. These myths are woven through the legal framework, acting as a background frame of reference against which judges make their decisions.

Myths are both powerful and dangerous. They purport to be true and they operate to promote and support certain viewpoints while discrediting and marginalising others. Within the legal setting, their power is such that they can lend credibility to mere opinions and beliefs, rendering them almost incapable of challenge. The combination of the three myths in the current legal framework reflects the state's preference for a particular type of legal subject: one that is self-sufficient and self-interested. By analysing legal discourse, I argued that the court and the ideal autonomous subject speak in a 'commercial voice', one in which the question of property ownership is approached in a rational and logical manner. The homemaker's problem is that she is unable to conform to the commercial ideal. Her voice instead operates as a 'counterstory', an emotional voice that is to be pitied and sympathised with, but which ultimately does not fit with the established logic and neutrality of property law.

This chapter has concentrated on the myths that underlie property ownership and thus operate within what would be termed the 'public sphere'. I return to the notion of myths in Chapters 4 and 5 of this thesis, exploring the ways in which the private sphere and understandings of homemaking work are also heavily influenced by discourses and images of domesticity and the ideal (female) carer and homemaker. In the next chapter, I examine

the impact on the homemaker of her marginalisation, the ways in which the dominant myths operate to exclude her in various ways.

CHAPTER 3: RELATIONAL VULNERABILITY

Introduction

In this chapter, I outline my theory of relational vulnerability. Relational vulnerability is, as I explained in Chapter 1, a form of situational and pathogenic vulnerability[1] and refers to the broad susceptibility to harm that arises as a result of an individual being placed by the state into an uneven or unequal relational framework. In the case of the cohabiting homemaker, her relational vulnerability is caused by the state's consistent preference for economic work, at the expense of homemaking labour. This in turn produces relationships that are characterised by inevitable inequality.

I have two main aims in this chapter. Firstly, I seek to locate my theory of relational vulnerability within the existing vulnerability scholarship, arguing that while it relies on a different definition of vulnerability to Fineman's universal theory, it is not entirely incompatible with her focus on inherent vulnerability. As I explained at the outset of my thesis, I use Fineman's universal theory as a building block and a starting point for a more nuanced and contextual understanding of vulnerability that arises in a specific setting.

Secondly, I explore the impact of relational vulnerability on the homemaker, engaging directly with what I perceive to be a fundamental gap in existing legal scholarship around cohabitation and relationship breakdown generally; namely an almost exclusive focus on *financial* disadvantage. While I do see financial disadvantage as a significant component of relational vulnerability, it is a more holistic and extensive concept than mere economic imbalance. Drawing on my core claim that the individual must be understood as relational,

[1] Under Mackenzie et al's taxonomy of vulnerability **(**see Catriona Mackenzie, Wendy Rogers and Susan Dodds, *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014))

embodied, and emotional, I argue that there are three interlinked aspects to relational vulnerability; economic, emotional, and spatial.

In developing my relational vulnerability framework, I also address the tendency for the law to confine understandings of relationship-generated disadvantages to a relatively narrow time period, focusing on the point at which the relationship breaks down.[2] I argue that relational vulnerability is inherently temporal, a condition that develops and intensifies during the relationship, but which at the time is hidden behind the structures of the private family. When the relationship breaks down, the homemaker's vulnerability and dependency become publicly visible, but their impact can continue throughout her lifetime. In my analysis below, I examine relational vulnerability in three temporal stages; during the relationship, upon relationship breakdown, and future vulnerability.

Relational Vulnerability

As stated, the homemaker is relationally vulnerable as a result of the state's continuous promotion of economic self-sufficiency and its privatisation and devaluing of homemaking work. In neoliberal society, the private family is expected to take responsibility for care and dependency, and at the same time be economically independent.[3] Yet, it is only the economic role of breadwinner that is valued and given status in a wider social sense. Homemaking and those who perform the work are not equally respected, and therefore the homemaker's relationship with her partner cannot be one of genuine equality.

My argument about inequality centres on the parties' wider social status and the degree of power with which the state imbues them. It does not refer to individual perceptions of inequality. Nor does relational vulnerability necessarily refer to abusive or deliberately

[2] See Chapter 1, p 36
[3] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004)

exploitative relationships (although I recognise that unequal relationships certainly produce conditions in which abuse and exploitation can more easily occur). My blame for vulnerability does not fall on the breadwinner (although I acknowledge that the state permits the breadwinner to benefit at the homemaker's expense); it falls on the state. Relational inequality is not something that results from 'bad behaviour' by one party to a relationship. Instead, it derives from external conditions; the status and respect the parties are afforded by the state and by society.[4] Even when the parties to a cohabitating relationship treat one another with the utmost respect and pool all resources, inequality remains if their social status is not equal.

The danger of concentrating on homemakers as an identifiable vulnerable group is that I may be accused of implying what Fineman has been so critical of, that a focus on vulnerable groups rather than the population as a whole implies "victimhood, deprivation, dependency".[5] To that I would respond that my relational vulnerability framework neither denies nor contradicts Fineman's central thesis, which is that all humans are inherently vulnerable, constantly susceptible to potential harms throughout their lifetime.[6] Indeed, the relational vulnerability of homemakers arises precisely *because* the state fails to acknowledge the vulnerable human condition and instead prefers to imagine that all citizens are equally capable of economic self-sufficiency. It is because we are all inherently vulnerable, susceptible to needing the care of others for our survival, that the state is equally

[4] See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011)

[5] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1, 8. For further critique of focusing on vulnerable groups, see Florencia Luna, 'Elucidating the Concept of Vulnerability: Layers not Labels' (2009) 2 International Journal of Feminist Approaches to Bioethics 121; and discussion in Mackenzie, Rogers and Dodds (2014), (n 1), 6

[6] Fineman (2008), (n 5)

as dependent on homemaking work as it is on economic labour. It simply chooses to assert that only the latter is of any value.

The unequal and gendered distribution of homemaking work is a global phenomenon.[7] Effectively, some sectors of the population are permitted to flourish as a result of the state's predominant focus on economic work, whereas others are expected to make significant financial sacrifices. It is therefore, in my view, not controversial to recognise that some sectors of the population do not experience the state's policies in the same way and that some are, in Sellman's words, "more-than-ordinarily vulnerable" in that they are susceptible to forms of harm that others are not.[8] This does not deny the underlying inherently vulnerable human condition, which impacts on all citizens. The homemaker is more-than-ordinarily-vulnerable due to unequal relational structures, but these arise because the state chooses to view individuals in an artificial way, as disembodied, rational, and individualistic.

Nor does my relational vulnerability framework suggest weakness or victimhood on the part of the homemaker. It can be contrasted to welfare-based or paternalistic theories which aim to protect particular vulnerable groups.[9] Welfare-based accounts will call on the state to protect vulnerable groups, but they do not expose the state and its institutions as the creator of specific disadvantages. The homemaker in my thesis is not a weak person. She should not be presented, as she frequently is in the case law,[10] as an object of pity, a victim of her love and misplaced trust in a man, who then cruelly casts her aside later in life.[11] Her disadvantage

[7] See Catherine Hoskyns and Shirin M Rai, 'Recasting the Global Political Economy: Counting Women's Unpaid Work' (2007) 12 New Political Economy 297

[8] Derek Sellman, 'Towards an Understanding of Nursing as a Response to Human Vulnerability' (2005) 6 Nursing Philosophy 2, 2

[9] See discussion in Mackenzie, Rogers and Dodds (2014), (n 1), 6

[10] For a fascinating analysis of the portrayal of female claimants in the constructive trust case law, see Anne Bottomley, 'Women and Trust(s): Portraying the Family in the Gallery of Law' in John L. Dewar and Susan Bright (eds) *Land Law, Themes and Perspectives* (Oxford University Press 1998)

[11] See for example Toulson LJ's description of the claimant as being "in the classic position of a woman jilted in her early fifties" in *Curran v Collins* [2013] EWCA Civ 382

is not a consequence of poor life choices or bad luck; it is an inevitable result of a state that arbitrarily chooses to ascribe fundamentally different values to equally essential tasks.

I now go on to outline the theoretical framework, arguing firstly that relational vulnerability must be viewed as a temporal condition; one that arises during the course of a relationship and develops over time, often with lifelong consequences, and secondly that its impact on the homemaker is not merely economic, but also emotional and spatial.

Vulnerability and Temporality

In this section, I want to consider the *temporality* of relational vulnerability. This includes questions of *at what point* relational vulnerability can be said to arise, and *how long* it can be said to last. It also addresses a broader question of the way that vulnerability is inherently infused with questions of time and temporality. Although she does not specifically focus on time, Fineman's universal theory is tied to temporal scales: the life course, the occurrence of predictable events such as childhood, adulthood, and old age; but also, the unpredictability of time; the way that an inability to see into the future is a fundamental part of the human condition.

There is an increasing focus on temporality within critical legal scholarship, adding depth and complexity to our understanding of law.[12] As Kotiswaran has argued "rendering temporalities visible… adds a crucial dimension to the project of critique, because the analytical material becomes immensely richer."[13] In this chapter, I want to render the temporalities of the homemaker's relational vulnerability visible, exposing its nature as a fluctuating condition that arises during the course of the relationship and often has life-long

[12] See e.g. Emily Grabham *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press 2016); Mariana Valverde *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge 2015); and Michelle Bastian, 'Time and Community: A Scoping Study' (2014) 23 Time & Society 137

[13] Prabha Kotiswaran, 'Valverde's Chronotopes of Law: Reflections on an Agenda for Socio-Legal Studies' (2015) 23 Feminist Legal Studies 353, 354

consequences, meaning that the homemaker experiences the ordinary unpredictability of life more intensely than others. Her marginalisation and lack of resources can make her future more uncertain than most. Juxtaposed with this, I want to examine how time exists within the legal framework. Law's preference for certainty, predictability, and the way it views property rights as being 'fixed' in time, is at odds with the fluctuations of relational vulnerability, meaning that the latter is not fully addressed by the legal framework.

Legal Time: An Instinctive Concept

I now turn to the way that temporality has been interpreted in family law, arguing that the relevance of time is often under-explored, but that in the context of cohabitation, family law has a preference for temporal certainty, which renders the full extent of the relational vulnerability that the state produces, invisible.

Grabham has argued that:

> it is possible to understand time-related concepts as having distinct legal functions and consequences, forming the conceptual backdrop that shapes practical legal solutions to social problems, for example, or putting limits on how people can use law and what people need to do to access rights[14]

Family law frequently refers to time and temporal scales, but often without the concept of time being fully articulated and explored. This is particularly true in respect of the question of post-relationship financial obligations. In very general terms, longer relationships are thought to generate greater post-separation obligations. However, the relevance of relationship-length is often treated as being obvious and undeserving of any further analysis, even if the case law sometimes reveals inconsistencies of approach. The family law jurisprudence does not, in my view, adequately answer whether time itself is relevant to

[14] Grabham (2016), (n 12), 10

post-separation obligations (i.e. in the sense of accumulating a share of assets over time),[15] or whether it is simply that other factors (such as needs or contributions) are more likely to be present after a lengthy relationship. For example, Lord Nicholls in *Miller v Miller* refers to an "*instinctive* feeling that parties will generally have less call upon each other on the breakdown of a short marriage".[16] However, while this may be true for most marriages, the courts have at times been confronted with cases that challenge this instinctive feeling. In *C v C*,[17] it was recognised that even short marriages can generate considerable long-term disadvantages that need to be redressed. Here, the parties' relationship had broken down shortly after the birth of their child. The wife's earning capacity was also considered to be limited due both to her childcare obligations and her mental health issues, which had been exacerbated by the divorce and the husband's conduct during this time. Although its facts were stressed to be "highly unusual",[18] *C v C* demonstrates that caution needs to be exercised in placing too much emphasis on arbitrary measures of time and suggests that perhaps it is not always time itself that justifies a legal remedy. Additionally, the distinction between long and short relationships was blurred somewhat in *Miller* itself, where the House of Lords emphasised that the starting point for financial division in short marriages is the same as for long ones.[19]

Marriage is traditionally understood a lifelong union.[20] By contrast, cohabitation is more temporally uncertain in that it does not involve a lifelong commitment at its outset. Therefore, legal systems that recognise de-facto spousal relationships use measures of time in the form of minimum duration requirements in order to distinguish between 'deserving'

[15] For this view, see John Eekelaar, 'Asset Distribution on Divorce: The Durational Element'' (2001) 117 Law Quarterly Review 552
[16] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24 [24] (Lord Nicholls), (emphasis added)
[17] *C v C (Financial Relief: Short Marriage)* [1997] 2 FLR 26
[18] Ibid, 28 (Ward LJ)
[19] *Miller v Miller* (n 16)
[20] See *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130

and 'undeserving' claimants.[21] The Law Commission's 2007 report also recommended a minimum qualifying period.[22] This was thought necessary in order to prevent spurious claims after very short unions. However, the Law Commission's opinion that the minimum duration could be anywhere between two and five years demonstrates the subjective nature of temporal measures such as 'long-term' and 'committed'. These terms will inevitably mean different things to different people. They are also socially constructed, reflecting the ideal of the lifelong union of marriage and the private family. Longer unions are thought to be more deserving because they more closely resemble the marital relationship. As Greenhouse argues, "[t]ime could never be socially neutral, even where it appears to Western eyes to be closest to the 'givens' of birth and death".[23]

I am not suggesting that time in the form of relationship-length is irrelevant. However, it is important that its meanings are clarified. The relevance of duration is better explained in terms of the idea that interpersonal relationships have long-term and transformative effects on individuals that necessitate some form of adjustment upon relationship breakdown. A relationship and the roles performed within it can have a profound impact on an individual's life course, especially in terms of creating economic needs. In general, these needs are greater following a longer relationship because a status quo has been established that will be

[21] In Canada, the eligibility requirements vary from province to province. Most require a minimum period of cohabitation (1 year in Newfoundland, 2 years in British Columbia, Nova Scotia, Saskatchewan, Prince Edward Island and Northwest Territories, 3 years in Alberta, Manitoba, New Brunswick and Ontario. Yukon merely requires some permanence to the relationship whereas Quebec does not state a minimum cohabitation requirement). Nearly all provinces allow for the court to waive the time requirement if the parties have children together. Since 2009, Australian de facto couples have been able to apply under federal law for provision similar to married couples under the Family Law Act 1975 (other than in Western Australia, where separate legislation exists). There is a minimum cohabitation requirement of 2 years which can be departed from if the parties have a child or if one partner made substantial financial or non-financial contributions to a property and serious injustice would result if an order were not made. One exception is the Family Law (Scotland) Act, which does not have a minimum duration requirement.

[22] Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown* ((Law Com No 307), 2007), Para 3.63. The Law Commission recommended that the minimum period could be set anywhere between two and five years, other than in cases where the couple had children together.

[23] Carol J Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 Yale Law Journal 1631, 1633

more difficult to change than had the relationship been short.[24] Therefore, a greater degree of legal intervention may be required for the individual to recover from the impacts of her relationship.

Age is another temporal measure used in family law jurisprudence. The respective ages of the parties to a marriage is one of the factors the court must consider when making a financial order on divorce.[25] Rather than being an exclusionary measure, the reference to age reflects an understanding of the interrelationship between temporality and vulnerability. Thompson has employed the term "temporal power", arguing that an individual's dependency on others fluctuates throughout her lifetime. Youth brings with it certain temporal powers because the individual is more likely to be self-sufficient, whereas increased age is more likely to be marked by at least some degree of dependency on others.[26] By contrast, the liberal conceptions of personhood that underlie the property law framework rely on a snapshot of the legal subject, taken during a time when she was temporally powerful. A vulnerability-based approach must recognise the interrelationship between vulnerability and time.

Time and Relational Vulnerability

Relational vulnerability arises and intensifies during the course of the relationship, comes into public view upon relationship breakdown, and then continues into the future, potentially indefinitely. Relational vulnerability thus moves through different temporal phases, and the harm to which the homemaker is susceptible will differ depending on the phase. It is only by examining vulnerability across the homemaker's lifetime that the full extent of her disadvantage as a result of her role can be understood.

[24] Ibid
[25] Matrimonial Causes Act 1973, s 25(2)(d)
[26] Janna Thompson, 'Being in Time: Ethics and Temporal Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014)

Fundamentally, relational vulnerability concerns the immediate, medium-term, and long-term impact that relational roles and structures have on the individual. Although these are often tied to the length of the relationship itself, this is not true in every case. Even very short-term relationships and interactions can have a lasting effect in terms of altering the homemaker's life course. For example, the birth of a disabled child following a very brief relationship means that the homemaker's caring obligations are likely to last for the length of that child's lifetime. In that case, relationship length should be of little to no importance. However, longer relationships will *generally* generate a greater degree of vulnerability, and this vulnerability is likely to continue for a longer time and be harder for the homemaker to recover from. But, as argued above, the existence of the vulnerability itself should be the relevant factor, rather than the chronological length of the relationship.

Where time *is* directly relevant to relational vulnerability is through the inherent uncertainty brought about by the passage of time. A key component of universal human vulnerability is the inability to predict or fully insure oneself against the occurrence of future harms. Fineman's attention to the human body's "ever-present possibility of harm and misfortune" reflects the individual's inability to have complete control over what happens throughout the life course. In this sense, she emphasises the universal nature of this risk; after all, nobody is immune to the possibility of disease or accident. However, in a temporal sense, the homemaker is more-than-ordinarily vulnerable because she has a reduced ability to even attempt to insure herself against future harm. While Fineman argues that "[u]nderstanding vulnerability…begins with the realisation that potential harm is beyond human control",[27] this perhaps downplays that at least *partial* control over the future is a possibility for those who have the means to do so. As I argue in more detail below, there are various financial

[27] Ibid, 9

ways of securing one's future to prevent future hardship, but the issue is that the homemaker is excluded from many of these. The homemaker's lack of future security means that her experience of later life and old age will be significantly different to someone who is able to put in place security in the form of economic resources.

There is a further temporal dimension to relational vulnerability, namely that upon relationship breakdown, homemakers often experience sense of 'lost' time or indeed wasted time, in that opportunities that were foregone in order to pursue the relationship have now disappeared forever. The end of a long-term relationship involves starting afresh, trying to reclaim some of the chances that were not pursued during the relationship. Examples of lost chances include career opportunities, promotions, acquiring a home of one's own, accumulating savings, and even the chance of pursuing more successful and stable relationships with others.[28] While the breakdown of any intimate relationship will bring about some degree of lost time, this is likely to be particularly strongly felt by homemakers, who will have foregone more opportunities than those who have not made significant career sacrifices.

Temporal Tensions Between Property Law and Family Law

There is a temporal tension between property law and family law, making property law particularly unsuitable for resolving the issues arising out of the breakdown of intimate relationships. As Miles has argued, family law is generally future-orientated, focusing on the parties' current and future needs.[29] By contrast, property law is retrospective. Both the constructive trust and proprietary estoppel involve a survey of the parties' relationship, evaluating their contributions and conduct for evidence of an assurance or common

[28] For example, in *Smith v Bottomley* [2013] EWCA Civ 953, [62], Sales J discussed the fact that the claimant, by being a relationship with the defendant, had lost the opportunity of marrying somebody else.
[29] Joanna Miles, 'Property Law v Family Law: Resolving the Problems of Family Property' (2003) 23 Legal Studies 624

intention. Miles argues that this temporal incompatibility means that property law is incapable of resolving the issues that arise from family breakdown.[30]

Auchmuty has argued that "family lawyers and property lawyers are talking about different things."[31] I think this statement is especially true in terms of how the two areas of law differ in their perception of time. Property law is focused around the individual's (and law's) power over time. It allows rights to be fixed, rendering them largely impervious to the passage of time. For example, where parties have entered into a valid express deed of trust, the terms of this will be binding upon them even if events have intervened to significantly change the circumstances.[32] Keenan has described the system of land registration as a "time machine", emphasising the power that is exercised through the temporal ordering of interests in land, excluding those persons that do not conform to the formalities of ownership.[33] Property law mandates that it must at all times to be possible to determine the extent of the relevant interests affecting a particular title. Property lawyers would therefore argue that fixing-in-time is essential, as it provides certainty. Linear concepts of time are necessary to determine priority between competing interests.[34]

By contrast, family law can be said to recognise the converse; the power of time over the individual. While property law sees us being able to control and influence time and the future, family law's flexible jurisdiction and its emphasis on needs, recognises the extent to which we are all helpless to time's passage. Predicting the future is impossible, but family law has traditionally attempted to make provisions that are capable of future change, such

[30] Ibid, 646
[31] Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196, 1201
[32] For example, an express trust will be binding on the parties despite a change in circumstances. See *Pankhania v Chandegra* [2012] EWCA Civ 1438; *Goodman v Gallant* [1986] Fam 106
[33] Sarah Keenan, 'Smoke, Curtains and Mirrors: The Production of Race through Time and Title Registration' (2017) 28 Law & Critique 87
[34] Ibid

as permitting applications for variation of orders, making long-term maintenance orders, and providing for sharing of pensions. While property law sees fixing in time as essential, family law has traditionally viewed fixing as leading to potential injustice.

Despite the above observation about the temporal flexibility of family law, there has been an increasing move towards individualism and certainty and this has had an impact on the way that temporality is used. The recognition of pre-nuptial agreements in *Radmacher v Granatino*[35], and the increased assumption that contract is an effective means of securing and determining rights on relationship breakdown (e.g. through cohabitation contracts)[36] has heralded a new legal approach to time in family law. The prenuptial agreement, like the constructive trust, is a form of fixing interests and obligations in time, protecting them against the occurrence of future events. *Radmacher* confirmed that the court does retain jurisdiction to set prenuptial agreements aside where they lead to unfairness, but their general recognition (and indeed, celebration) signals that family law is moving towards a different approach to time; one that allows the individual to control time rather than vice versa.

Interestingly, there have been corresponding developments in property law, but in terms of recognising a more fluid approach to fixing in time. In *Jones v Kernott,* the House of Lords referred to the "ambulatory constructive trust",[37] whereby the law acknowledges that intentions about property ownership can change over time. The acceptance of the trust as potentially ambulatory represents a significant shift in the way that time is viewed in the context of rights in the home, one that is more attuned to the inherent uncertainties of its

[35] *Radmacher v Granatino* [2010] UKSC 42
[36] I consider cohabitation agreements in further detail in Chapter 7 (page 270 onwards)
[37] *Jones v Kernott* [2011] UKSC, [14]

passage and more closely resembles family law's flexibility.[38] Although these developments in property law are welcome, as a discipline, it still remains wedded to a rigid conception of temporality. It is relatively unclear precisely in what circumstances the court will find that intentions have changed,[39] and the passage of time will not by itself be enough to persuade a court to set aside an existing agreement. Family law and property law therefore remain temporally incompatible, serving to exacerbate the homemaker's disadvantage. However, family law's creep towards increasing temporal certainty is a concern for the homemaker and is inherently incompatible with a vulnerability approach.

The Impact of Relational Vulnerability

I now turn to the various manifestations of relational vulnerability. I preface this by noting that relational vulnerability merely relates to a *susceptibility* to harm.[40] Not all homemakers will experience relational vulnerability in the same manner, and for some, the below forms of harm may not be visible within their relationship. By viewing vulnerability as a fluid and temporal concept, I address how it arises during the relationship, changing in nature when the relationship breaks down, and often continuing into the future.

Economic Vulnerability

This form of vulnerability is the easiest to measure objectively. Homemakers are susceptible to financial hardship through their reduced access to economic resources, both in the form of income and capital. Even if the homemaker is not objectively 'poor', it is likely that her financial position is worse than that of an economically active partner, and certainly worse in contrast to what her position could have been had she not taken on predominant

[38] See Andrew Hayward, ''Family Property'and the Process of 'Familialisation'of Property Law' (2012) 24 Child and Family Law Quarterly 284

[39] *Pankhania v Chandegra* (n 32) confirms that an express trust cannot be interfered with simply because circumstances have changed.

[40] Mackenzie et al seek to distinguish between vulnerability that is "dispositional" and that which is "occurrent", highlighting that not all individuals will experience vulnerability in the same way. See Mackenzie, Rogers and Dodds (2014), (n 1), 7

responsibility for homemaking. Economic vulnerability becomes particularly apparent upon relationship breakdown but, as I shall argue below, it also arises during the relationship, although this latter aspect is usually masked by the structure of the private family and the policy against state and legal intervention.

It is widely recognised that homemaking activities have a significant impact on an individual's career path and income-earning ability.[41] Even though the modern day homemaker is much more likely to be employed than her mid to late 20th century counterpart, she still faces a greater likelihood of restrictions in terms of hours and location of work, and a direct impact on career progression and wages.[42] She is more likely to be precariously employed, employed part-time, and is less likely to be promoted.[43] Within the workplace, there is an inherent tension and incompatibility between paid work and obligations in the home. This is despite the fact that an increasing number of employers claim to offer flexible working initiatives, and legislation mandates employers to at least consider employee requests for flexible working.[44] In spite of these attempts at inclusivity in the workplace, the ideal worker is still viewed as someone who is unburdened by caring obligations and household responsibilities.[45] Upon relationship breakdown, a person who has undertaken the bulk of the homemaking labour is therefore likely to be in a significantly weaker financial position in comparison to someone who has been free (very often by virtue of her

[41] See Rebecca Bailey-Harris, 'Law and the Unmarried Couple-Oppression or Liberation?' (1996) 8 Child and Family Law Quarterly 137; Anne Barlow and Janet Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) 22 Child and Family Law Quarterly 328; and Hayley Fisher and Hamish Low 'Recovery From Divorce: Comparing High and Low Income Couples' (2016) 30 International Journal of Law, Policy and the Family 338

[42] Heather Joshi, 'The Cost of Caring' (1987) Women and Poverty in Britain 112

[43] See e.g. Damian Grimshaw and Jill Rubery, *The Motherhood Pay Gap: A Review of the Issues, Theory and International Evidence* (International Labour Office, Geneva 2015); and Emma Hitchings and Joanna Miles *Financial Remedies on Divorce: The Need for Evidence-Based Reform* (Nuffield Foundation 2018)

[44]See Employment Rights Act 1996, Part 8A for further details

[45] For further discussion, see Olivia Smith, 'Litigating Discrimination on Grounds of Family Status' (2014) 22 Feminist Legal Studies 175 and Emily Grabham, 'Doing Things with Time: Flexibility, Adaptability, and Elasticity in UK Equality Cases' (2011) 26 Canadian Journal of Law & Society 485

partner's labour) to pursue her career without the constraint of obligations in the home. Conversely, the breadwinner benefits both in the short term and long term from being relieved of homemaking obligations. As Sir Jocelyn Simon once described the economic impact of separate relationship roles: "[t]he cock bird can feather the nest precisely because he does not have to spend most of his time sitting on it."[46]

Even if the homemaker only gives up work for a period of time, for instance to care for a young family or an elderly relative, re-entry at her previous level will be difficult or sometimes even impossible.[47] The full impact of this may not be felt immediately but will instead become apparent further into the future. The very significant long-term career implications of homemaking, in terms of future financial security, are summed up by Baroness Hale in *Miller v Miller; McFarlane v McFarlane:*

> Even if they do their best to re-enter the employment market, it will often be at a lesser level than before, and they will hardly ever be able to make up what they have lost in pension entitlement.[48]

Reflecting the liberal concepts autonomy and self-determination, judicial discourse often paints role-specialisation as an active choice made by the parties with overall family welfare in mind. However, unequal division of homemaking work is more of an inevitability than an active choice. Within the neoliberal state, the private family has a dual function of economic self-sufficiency and responsibility for caregiving and dependency, relieving the state of the burden of both of these.[49] The inherent incongruence between work and home referred to above means that it is very likely that there will be some extent of division and specialisation by the parties to an intimate relationship. Couples will often take the

[46] Sir Jocelyn Edward Salis Simon 'With All My Worldly Goods' (Holdsworth Club Lecture, University of Birmingham, 20 March 1964)
[47] See Grimshaw and Rubery (2015), (n 43)
[48] *Miller v Miller; McFarlane v McFarlane,* (n 16), [138] (Baroness Hale)
[49] Fineman (2004), (n 3)

economically sensible view that only one career should be sacrificed rather than both.[50] However, this leads to role specialisation and the homemaker suffers disproportionately as a result of this specialisation, even if she does also engage in some form of paid work.

The incompatibility of the worker model with homemaking means that an individual's career progression is often conditional on being unrestrained by obligations in the home, i.e. being able to put in place reliable professional care. Even assisted by government subsidies, costs of professional care to enable return to the workplace are often prohibitively high. At the same time, it is usually not cost-efficient for *both* partners to reduce their paid work obligations. Despite apparently gender-neutral measures offering shared parental leave and flexible working, it is still overwhelmingly women's rather than men's careers that are compromised in this manner.[51] For example, recent figures on the uptake of shared parental leave (whereby both parents can take a period of time off after the birth of a child),[52] reveal that only 2% of eligible couples have applied for this right.[53] Certain careers, for example the legal and medical professions, are particularly difficult to juggle with homemaking obligations, requiring long hours, often at short notice, and difficulty in taking time off in the case of a dependent's illness. This means that even high-earning individuals who could afford professional care may give up or reduce their role to focus on their family responsibilities.

[50] As recognised by Lord Nicholls in *Miller v Miller; McFarlane v McFarlane*, (n 16), [85]
[51] Smith (2014), (n 45)
[52] Under the Shared Parental Leave Regulations 2014 (SI 2014/3050)
[53] Press Release *New Share the Joy Campaign Promotes Shared Parental Leave Rights for Parents* (12 February 2018) https://www.gov.uk/government/news/new-share-the-joy-campaign-promotes-shared-parental-leave-rights-for-parents (accessed 17 April 2018)

During the Relationship

Economic vulnerability that arises during the course of the relationship is an under-analysed area within sociological and socio-legal scholarship.[54] As with all forms of relational disadvantage, intra-familial economic disparities are often masked during the relationship. Instead, there is a presumption that the family operates as an egalitarian unit, whereby resources are shared between household members.[55] This has echoes of romantic assumptions of unselfishness and sharing within the family unit and the private sphere generally. In some cases, the state makes this sharing presumption is made very explicit, such as under the new Universal Credit regulations, where the benefit is paid to the 'household head' rather than separately to the individual adults in the home.[56] Undoubtedly, the Universal Credit model primarily aims to reduce the state's total welfare bill, and the head of household provision enables less money to be paid than if each adult had a separate claim. However, it also demonstrates the inherent danger of presuming equality. If the head of the household fails to voluntarily share the money, there is no recourse for other, financially weaker, family members to ensure that they have access to resources. The state thus demands that family money is divided equally, yet offers no means of enforcement. Ostensibly, the state appears to have met its obligations to its citizens but, in reality, it has not. It also illustrates that the state is primarily concerned to limit its financial liability towards dependent citizens in any way possible, rather than take active responsibility for their welfare.

[54] But see e.g. Jan Pahl, 'Earning, Sharing, Spending: Married Couples and Their Money' in R Walker and G Parker (eds) *Money Matters* (Sage 1988), and Jan Pahl *Money and Marriage* (Macmillan 1989)
[55] See e.g. Simone Wong, 'Would You Care to Share Your Home' (2007) 58 Northern Ireland Legal Quarterly 268, 271
[56] See 'Universal Credit: How You're Paid' https://www.gov.uk/universal-credit/how-youre-paid (accessed 22 July 2018)

The presumption of intra-familial equality is also reinforced by the language of interdependence in family law discourse, with the notion that parties to an intimate relationship occupy separate yet equally important roles and share all resources.[57] For example, Lord Nicholls in *White v White* argued that "there is no place for discrimination between husband and wife and their respective roles. Typically a husband and wife share the activities of earning money, running their home and caring for their children".[58] Underlying this observation is a clear assumption that the spouses are mutually reliant on each other for the family's wellbeing and that the work of both is of equal importance.

The 'separate but equal' narrative is also present in much of the debate around cohabitation reform. Arguments in favour of extending legal rights to cohabitants or reforming existing property law have often focused on the fact that their relationships are more akin to a partnership, interdependent and intertwined. For example, Gardner argues that financial relief for cohabitants should focus on whether their relationship can be described as a 'materially communal' one. He explains that this means that "[the parties] pool their resources (including money, other assets and labour)".[59] This perception has strong echoes of the approach taken in *White*. It is an approach based on the ideal of marriage, the egalitarian family, and the idea of the spouses 'becoming one' upon marriage.[60]

Furthermore, the communitarian, presumed-equality approach was echoed in both *Stack v Dowden* and *Jones v Kernott.* In *Jones*, the "emotional and economic commitment to a joint enterprise"[61] was explained to be the underlying justification for the presumption of

[57] For communitarian accounts, see Simon Gardner, 'Rethinking Family Property' (1993) 109 Law Quarterly Review 263; Simon Gardner and Katharine Davidson, 'The Supreme Court on Family Homes' (2012) 128 Law Quarterly Review 178
[58] *White v White* [2001] 1 AC 596, 605 (Lord Nicholls)
[59] Simon Gardner and Emily MacKenzie, *An Introduction to Land Law* (Hart 2015), 3.7
[60] For critique of Gardner's communitarian account, see Bottomley (1998), (n 10)
[61] *Jones v Kernott*, (n 37), [19]

intentions of equal shares in domestic cases. In *Stack*, the issue of intermingling of finances was seen as being of particular importance in demonstrating the parties' intentions with regards to ownership of the home. In *Stack* itself, the fact that the couple had kept their finances "rigidly separate"[62] meant that the presumption of equal sharing was rebutted, because the parties' relationship was not one that was characterised by interdependence.

While communitarian understandings of relationships may appear at first glance to be far preferable to, and more realistic than, artificial notions of individual autonomy, the assumption of interdependence is not unproblematic and can mask significant inequalities behind a veneer of domesticity. It is based on an idealised view of family life, which may well be at odds with the reality of how many cohabitants organise their lives. In fact, research has shown that cohabitants are less likely than married couples to merge their finances and operate a joint account.[63] This is not necessarily a sign of a lack of commitment. However, according to the majority in *Stack*, the keeping of separate accounts was thought to be "very unusual",[64] showing the strong influence of the ideal marriage-model on judicial reasoning. It is dangerous to draw generalised assumptions about the meaning of how parties manage their finances. While separate finances *may* be a sign of autonomy and independence where the parties have equal access to financial resources, a refusal to share can have serious repercussions for the carer who is less likely to have financial independence. Simply proclaiming that the income earner and homemaker are equal is false, because it ignores that

[62] *Stack v Dowden* [2007] UKHL 17, [92]
[63] See Vivienne Elizabeth, 'Managing Money, Managing Coupledom: A Critical Examination of Cohabitants' Money Management Practices' (2001) 49 The Sociological Review 389; and Carole Burgoyne, Victoria Clarke and Maree Burns, 'Money Management and Views of Civil Partnership in Same-Sex Couples: Results from a UK Survey of Non-Heterosexuals' (2011) 59 The Sociological Review 685
[64] *Stack v Dowden*, (n 62), [92] (Baroness Hale)

care and homemaking has a lower social status than economic work.[65] As Lister has argued, true interdependence is not possible while the homemaker role remains undervalued.[66]

Idealised perceptions of interdependence mask the reality of *dependence* during the course of the relationship. Because homemaking labour is not remunerated and because it impacts on the homemaker's ability to participate in the workforce, a degree of what Fineman terms "derivative dependency" [67] is inevitable, meaning that the homemaker usually directly depends on her partner for financial support. Derivative dependency can produce significant inequality within the relationship, especially if the homemaker does not have access to a shared account and has to ask her partner for funds. If the homemaker does not have access to finances, she may in fact live in relative poverty during the relationship, but such poverty will be largely invisible, hidden behind the structure of the private family. However, hidden poverty is a reality for many homemakers. Empirical research on marriage and marriage-like relationships suggests that, on the whole, women have less access to spending-money than men, and may even spend less on food for themselves than other members of the household.[68]

The homemaker's own perception and experience of her economic vulnerability will undoubtedly be influenced by what system of financial management the couple employs. Where all money is pooled, the homemaker has greater access to resources and may not perceive herself to be economically vulnerable at all during the course of the relationship. Conversely, separate accounts can lead to a highly imbalanced relationship between the partners, seen for example in in *Geary v Rankine*,[69] where the defendant was reluctant to

[65] Eva Feder Kittay, *Love's Labor* (Routledge 1999), 43-44
[66] Ruth Lister, 'Women, Economic Dependency and Citizenship' (1990) 19 Journal of Social Policy 445, 447
[67] See Fineman (2004), (n 3), 35
[68] See Sara Cantillon, 'Measuring Differences in Living Standards Within Households' (2013) 75 Journal of Marriage and Family 598
[69] *Geary v Rankine* [2012] EWCA Civ 555, [13]

give the claimant any money to spend on herself.[70] In *Geary*, it was incorrect to speak of a joint decision to keep finances separate. Instead, the keeping of separate accounts was itself indicative of the unbalanced nature of the parties' relationship. However, the court failed to address the issue of financial dependence (and the weak bargaining position this placed the claimant in), preferring instead to focus on the incompatibility between separate finances and an intention to share the beneficial interest in the property.

Relationship Breakdown

There is no legal obligation to financially maintain one's unmarried partner after the relationship has broken down. It is therefore at this point that the homemaker's susceptibility to economic harm becomes apparent and visible. She is no longer able to depend on her partner, and therefore her dependency may shift to the state unless she is able to be financially self-sufficient. With state welfare programmes in the neoliberal state comes a significant degree of stigma and scrutiny of the homemaker's life choices. If the homemaker has not worked during the relationship, it is at this point that she may seek to re-enter the workplace, potentially discovering significant obstacles in the way of her doing so.

Where the relationship breaks down, the homemaker may experience difficulties in financially adjusting to the separation, especially compared to her partner.[71] She may also face stigma when seeking financial assistance from the state.[72] The state support network is increasingly limited and fraught with insecurity. For example, the Universal Credit proposals include a mandatory waiting period of five weeks to process claims, leaving claimants in potential financial peril.[73] Research also suggests that homemakers have a

[70] See Chapter 2, p 55 for discussion of this case

[71] See Hayley Fisher and Hamish Low, 'Financial Implications of Relationship Breakdown: Does Marriage Matter?' (2015) 13 Review of Economics of the Household 735. See also Fisher and Low (2016), (n 41)

[72] See e.g. Eleanor Wilkinson and Iliana Ortega-Alcazar, 'A Home of One's Own? Housing Welfare for 'Young Adults' in Times of Austerity' (2017) Critical Social Policy 329

[73] See https://www.gov.uk/universal-credit/how-youre-paid (accessed 17 April 2018)

reduced ability to recover from the financial impact of the relationship unless they form a new long-term union and become wholly or partly dependent upon another person.[74]

The Future

Even if economic assets are divided equally between the parties upon relationship breakdown, the homemaker still faces significant disadvantage in her ability to protect herself against long-term hardship through making financial provision for old age. The impact of homemaking, long-term caring obligations, and career sacrifice on a person's future financial security should not be understated.[75] The cohabiting homemaker also lacks the remedies available to her married counterpart that can help mitigate against future financial vulnerability.[76] However, even for married couples, law displays a tendency towards focusing largely on the parties' immediate and relatively short-term future positions. There is a clear policy towards a clean break wherever possible,[77] as well as consideration given towards terminating ongoing obligations at the earliest opportunity.[78] The clean break policy reflects the state's expectation that financial recovery, even for homemakers, is possible and that it should be achieved in a relatively short period of time. The current climate of clean breaks and private agreements also reinforces that certainty, rather than welfare, is becoming an increasingly important goal of family law and policy.

[74] See Fisher and Low's research that found that repartnering (either cohabitation or marriage) was a crucial factor determining the extent to which women were able to recover from relationship breakdown. (Fisher and Low (2016), (n 41)

[75] Debora Price, 'Pension Sharing on Divorce: The Future for Women' (2003) 15 Social Policy Review 239. See also John Eekelaar and Mavis Maclean *Maintenance After Divorce* (Clarendon Press 1986), which reported that the full impact of career sacrifice is often not felt by mothers until later in life, when child support obligations have come to an end (p 102).

[76] Under Matrimonial Causes Act 1973, s 25B-G

[77] See Matrimonial Causes Act 1973, s 25A(1)

[78] Matrimonial Causes Act 1973, s 25A(2)

Homemakers, and particularly female cohabiting homemakers, are at significant disadvantage in terms of making provision for retirement and old age.[79] Women are more likely than men to experience poverty in old age, something that has been attributed to their greater likelihood to have engaged in homemaker roles, including childcare and elder care.[80] Additionally, while women are now more likely to be engaged in paid employment, there is a well-publicised gender pay gap, including a substantial inequality between men and women in terms of access to an employer pension scheme that will alleviate financial hardship in old age.[81] For the cohabiting homemaker, risks of future poverty are exacerbated because there exists no mechanism by which pension benefits can be transferred between cohabiting partners upon separation. Arguably, therefore, pension inequality is more of a pressing problem for cohabitants than spouses, due to the lack of availability of pension sharing on separation. However, married homemakers do not necessarily fare significantly better, despite the existence of a remedy.[82] Research on pension sharing, both early[83] and more recent,[84] suggests that women often 'trade off' claims to a spouse's pension in favour of readily available liquid assets.[85] Necessity frequently demands that the homemaker must predominantly focus on her immediate position, such as being able to house herself and her

[79] J Conrad Glass and Beverly B Kilpatrick, 'Gender Comparisons of Baby Boomers and Financial Preparation for Retirement' (1998) 24 Educational Gerontology 719

[80] See D Erkerdt and J Hackney, 'Workers' Ignorance of Retirement Benefits' (2002) 42 The Gerontologist 543; and Nancy A Orel, Ruth A Ford and Charlene Brock, 'Women's Financial Planning for Retirement: The Impact of Disruptive Life Events' (2004) 16 Journal of Women & Aging 39

[81] Orla Gough, 'The Impact of the Gender Pay Gap on Post-Retirement Earnings' (2001) 21 Critical Social Policy 311

[82] See Price (2003), (n 75), 240

[83] Jay Ginn and Debora Price, 'Do Divorced Women Catch up in Pension Building?' (2002) 14 Child & Family Law Quarterly 157

[84] Ricky Joseph and Karen Rowlingson, 'Her House, His Pension? The Division of Assets Among (Ex-) Couples and the Role of Policy' (2011) 11 Social Policy and Society 69

[85] See ibid, 71. The Ministry of Justice figures for 2017 reveals that pension sharing orders were made in approximately one quarter of applications for a financial remedy, an increase of over 40% since 2016 (Ministry of Justice Annual Family Court Statistics (2017))

dependents, rather than considering the long-term inequality that she faces in terms of retirement income.

The homemaker also faces the risk of her future becoming punctuated by what Orel et al term "disruptive life events".[86] These include obligations of care for elderly parents or other relatives, which will come to impact on any future earning capacity. Dominant societal discourse still places an expectation on women to undertake elder care, often in conjunction with still caring for dependent children.[87] This expectation will undoubtedly increase if the current neoliberal trend continues and the welfare state and healthcare services continue to diminish or become completely privatised.

To summarise, economic vulnerability cannot simply be analysed at the point at which the relationship breaks down, but must be set in the temporal context of the homemaker's life course. It is only then that a more realistic picture of the extent of her financial vulnerability becomes visible. It also highlights the inadequacy of schemes based on equal financial division where the parties are not in equal positions to be able to recover from the financial impact of their relationship. Awarding the homemaker half the equity in the home is unlikely by itself to come anywhere close to addressing the true extent of her lifelong disadvantage.

Emotional Vulnerability

Emotional vulnerability refers to the psychological and emotional impact on the homemaker of her marginalisation and of her low status, both within the intimate relationship, and in a wider sense, as a citizen. It also includes the psychological impact of performing homemaking work that is often isolating and gruelling.[88]

[86] Orel, Ford and Brock (2004), (n 80)
[87] See Nancy Hooyman et al, 'Feminist Gerontology and the Life Course' (2002) 22 Gerontology & Geriatrics Education 3
[88] I return to this in more detail in Chapters 4 and 5

As I set out in Chapter 1, emotions do not generally form a part of legal discourse and are not thought relevant in the legal sphere. Law, and property law in particular, prefers to keep emotions consigned to the private realm, away from legal involvement. As Bandes and Blumenthal have argued, emotion is considered contradictory to the rationality and logic that law claims for itself.[89] The hypothetical legal subject that I discussed in Chapter 2 is necessarily free from emotion in order to be able to make rational decisions without being impacted or dictated to by her feelings.

Within the intimate relationship, the structures of financial dependency operate to disempower the homemaker. As I discuss below, she may lack decision-making power within the relationship, even if she has equal access to pooled resources. However, this is not the full extent of her reduced status, which includes "harm to citizenship entitlements"[90] that occurs when the state expects all its citizens to conform to an ideal of economic self-sufficiency, and where inability to do so is viewed as "evidence of a failing to attain or retain autonomous agency".[91] The result is, as Young argues, "normatively privileging independence … and making it a primary virtue of citizenship implies judging a huge number of people in liberal societies as less than full citizens".[92]

Measuring emotional vulnerability is inherently difficult because it is a highly subjective and nebulous concept. It is therefore understandable that it is frequently overlooked in favour of the more easily quantifiable economic vulnerability. In this section, I draw on a range of existing research which suggests that homemakers are particularly susceptible to emotional

[89] Susan A Bandes and Jeremy A Blumenthal, 'Emotion and the Law' (2012) 8 Annual Review of Law and Social Science 161
[90] Shirin M Rai, Catherine Hoskyns and Dania Thomas, 'Depletion: The Cost of Social Reproduction' (2014) 16 International Feminist Journal of Politics 86, 92
[91] Susan Dodds, 'Depending on Care: Recognition of Vulnerability and the Social Contribution of Care Provision' (2007) 21 Bioethics 500, 501
[92] Iris Marion Young, 'Mothers, Citizenship, and Independence: A Critique of Pure Family Values' (1995) 105 Ethics 535, 547

vulnerability, but I want to avoid making broad sweeping generalisations or suggesting that these experiences apply to *all* homemakers. This is therefore an area where future empirical research is likely to offer further insight into individual experiences. For now, my focus is on examining how existing research on the psychological impact of marginalisation could also apply to cohabiting homemakers.

During the Relationship

As with the other forms of vulnerability, the private family works as a façade, masking inequalities between its members. The restrained state is relatively uninterested in the dissatisfactions, power imbalances, and struggles that go on behind this façade. Emotional vulnerability and economic vulnerability are intertwined concepts because economic power also brings with it emotional and psychological powers. Money, and who earns it, are far from neutral concepts. Money is a source of social power that extends to other aspects of the relationship.[93] The structures of financial dependency and the homemaker's reduced access to resources mean that she lacks autonomy within her relationship, and imbalances in economic status can manifest themselves in power inequalities between the parties. For example, the primary earner is more likely to also be the primary decision-maker in the household.[94] Illustrating this point, Pahl's research on married couples discovered that gendered power imbalances were often directly tied to the parties' respective economic positions. She found that "[h]usbands were more likely to dominate in decision-making where the wife did not have a job… conversely wives who were dominant in decision-making were usually in paid employment."[95] Barlow and Smithson's more recent research on cohabitants also identified a number of so-called "uneven couples".[96] The authors found

[93] For research on money and its social meanings, see Viviana A Rotman Zelizer, *The Social Meaning of Money* (Princeton University Press 1997)
[94] See Young (1995), (n 92), 545
[95] Pahl (1989), (n 54), 174
[96] Barlow and Smithson (2010), (n 41)

that these uneven couples usually also had a disparity in financial strength. However, the factor that made them particularly problematic was the manner in which *"[p]sychologically*, the contract between the parties is skewed in favour of the more financially powerful one".[97] The uneven couples in Barlow and Smithson's study arguably represent an extreme form of relational imbalance, and it should be noted that not all the couples in the sample fell into this category. However, the identified link between psychological power and financial status[98] shows the increased risk to homemakers, even if not all of them will experience this in the same manner.

Research has also shown a link between earning money and increased self-esteem. Pahl's study of housewives found that the ability to contribute even small amounts of money was sufficient to raise feelings of self-worth and importance.[99] It must also be noted here that many modern-day homemakers *are* economic contributors to the relationship rather than relying solely on the wages of their partner. However, research reveals that within dual-earning heterosexual couples, there is often a tendency to allocate spending in a gendered manner. Men's wages are more likely to spent on 'important' items such as mortgage payments and bills, whereas women's wages are more likely to meet day to day expenditure such as food and childcare, and more 'frivolous' expenditure, such as holidays and entertainment.[100] Zelizer's research also revealed the tendency to treat female homemakers' lower earnings as 'pin-money' rather than an important contribution to the household.[101]

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[97] Ibid, 341 (emphasis added)

[98] See also Jan Pahl, 'The Allocation of Money and the Structuring of Inequality within Marriage' (1983) 31 Sociological Review 237; and Catherine T Kenney, 'The Power of the Purse: Allocative Systems and Inequality in Couple Households' (2006) 20 Gender & Society 354

[99] Pahl (1989), (n 54)

[100] See Anne Morris and Susan Knott, *With All My Worldly Goods: A Feminist Perspective on the Legal Regulation of Wealth* (Dartmouth 1995), 190-192. I also pursue this point further in Chapter 5.

[101] Viviana A Zelizer, 'The Social Meaning of Money: 'Special Monies'' (1989) 95 American Journal of Sociology 342, 366. See also Michael Argyle and Adrian Furnham, *The Psychology of Money* (Routledge 2013)

Since cohabitants are less likely than married couples to pool resources,[102] the risk of emotional vulnerability due to financial imbalances is particularly high, especially if there is this gendered pattern of spending within the household. Additionally, keeping a joint bank account does not necessarily offer protection from this. As Burgoyne has argued, even where couples pool their financial resources, the homemaker's access to resources does not bring about an equal level of control.[103] Her research found that, where the parties were not equal contributors to a joint account, there was still a perceived imbalance, even if the lower earner was doing a greater amount of unpaid homemaking work. As she notes,

> it is very difficult to 'forget' about the source of the money even when it 'disappears' into a joint account. Somehow it retains a psychological 'label' identifying the person who brought the money into the household and conferring special entitlements on the earner.[104]

It seems, therefore, that even those relationships that conform to the interdependent, marriage-based ideal struggle to be truly equal.

In some cases, the psychological impacts of unequal earning power can be more sinister than a mere imbalance in decision-making power. Economic dependency has been shown to be linked to an increased risk of domestic abuse within intimate relationships.[105] In particular, it can operate as a significant factor preventing women from leaving their partner, believing it to be preferable to remain in an abusive or unhappy relationship rather than face poverty and potential homelessness.[106] While it is far from the case that all economically imbalanced relationships are abusive, the broader power differential produced by financial inequality

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[102] See Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 Modern Law Review 24

[103] Carole B Burgoyne, 'Money in Marriage: How Patterns of Allocation both Reflect and Conceal Power' (1990) 38 The Sociological Review 634

[104] Ibid, 167

[105] See Nancy R Rhodes and Eva Baranoff McKenzie, 'Why do Battered Women Stay?: Three Decades of Research' (1999) 3 Aggression and Violent Behavior 391

[106] See Laura Goldsack, 'A Haven in a Heartless World? Women and Domestic Violence' in Tony Chapman and Jenny Hockey (eds) *Ideal Homes?: Social Change and Domestic Life* (Routledge 1999)

can allow abusive behaviour to take root and flourish. With this in mind, the state's presumption of intra-relational sharing to avoid direct intervention and support, is particularly harmful, as it directly facilitates financially abusive patterns of behaviour within intimate relationships.

As well as the repercussions of power inequality, emotional vulnerability also incorporates the psychological toll of performing homemaking work, often exacerbated by having to fit this alongside paid work. The homemaker is likely to have less free time than other family members, particularly where she is also employed outside the home.[107] Research on human happiness and satisfaction has identified an element of 'play' or leisure time,[108] which is essential to prevent the individual's resources being depleted.[109] It is during leisure time that both the body and the mind are rejuvenated, offering respite from the stresses of paid or unpaid work. The working homemaker's combined responsibilities in the workplace and in the home will mean that leisure time is sacrificed, in turn leading to increased risk of physical and psychological harm. Even where the homemaker is not employed outside the home, the constant nature of her work (which is not divided into clear time periods in the same way as paid work is) can also adversely impact on leisure time.[110]

The idealised view of the home presents it as a place of bodily recuperation, where the individual can 'recharge her batteries' in order to be able to function well in the public economic sphere.[111] However, this ideology around the home fails to acknowledge that, for

[107] Prabha Kotiswaran, 'The Laws of Social Reproduction: A Lesson in Appropriation' (2013) 64 Northern Ireland Legal Quarterly 317, 319
[108] Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press 2001)
[109] See Rai, Hoskyns and Thomas (2014), (n 90)
[110]See Shelley Coverman, 'Role Overload, Role Conflict, and Stress: Addressing Consequences of Multiple Role Demands' (1989) 67 Social Forces 965
[111] Tony Chapman and Jenny Hockey, 'The Ideal Home as it is Imagined and as it is Lived' in Tony Chapman and Jenny Hockey (eds) *Ideal homes? Social Change and Domestic Life* (Routledge 1999)

the homemaker, the home is simultaneously a workplace and that the sanctuary of home can only be achieved at the expense of the homemaker's constant work. The ideology hides the often gruelling and physically exhausting nature of homemaking work.

The expectation on modern-day homemakers to also undertake full or part-time employment means that the workplace aspect of the home has become particularly invisible. The second-shift phenomenon refers to the homemaker's double duties in the home and in the workplace.[112] The temporal demands of homemaking work, coupled with the absence of personal space, means that the homemaker is constantly 'on-call' and is denied the restorative benefits that the home can bring. Instead, the double demand on her time is likely to increase her likelihood of physical and psychological harm.[113]

Relationship Breakdown

Where the relationship breaks down, the cohabiting homemaker is at increased risk of stigma and blame for her situation, which can also have a psychological impact. As I outlined in Chapter 1, the restrained state expects all citizens to be economically self-sufficient, and an inability to attain this is depicted as failure. This stems from the state's unwillingness to acknowledge and take responsibility for both inherent and state-created vulnerabilities. Cohabitation carries an additional risk of stigma because social discourse views it as being less stable than marriage, and thus an inferior family form that is more likely to lead to state dependency.[114] The current legal structures make it relatively easy for economically stronger parties to walk away from the relationship with limited financial consequences, meaning that the blame for its breakdown effectively falls on the homemaker because she is the one

[112] Arlie Hochschild and Anne Machung, The Second Shift: Working Families and the Revolution at Home (Penguin 2012)
[113] See Rai, Hoskyns and Thomas (2014), (n 90)
[114] See Robert Rowthorn, 'Marriage as a Signal' in Robert Rowthorn and Anthony Dnes (eds) *Law and Economics of Marriage and Divorce* (Cambridge University Press 2002)

seeking assistance from the state. Unmarried single mothers, for example, are stigmatised, yet are expected to shoulder sole responsibility for their children without support.[115] While 'feckless fathers' are supposedly castigated, the procedure for collecting child support payments from non-resident parents is cumbersome and filled with flaws, with an estimate that 52% of non-resident parents pay no child support at all.[116] The expectation is that parents should reach an agreement themselves with a fee being payable if the resident parent wishes to use the Child Maintenance Service.[117] This measure seeks to punish and stigmatise the single parent seeking support rather than the uncooperative non-resident parent. Another example is that new tax credits claims are limited to two children, unless it can be proved that any additional children were conceived without the mother's consent.[118] Here, blame and potential financial sanction is directed at the resident parent unless she can prove that her pregnancy was coerced in some manner. By placing responsibility for hardship with the homemaker, examining and criticising her past decisions, the state is able to maintain the myth of restraint. While it will provide a baseline level of financial support, it is made clear that this is due to the homemaker's personal failure to live up to the economically self-sufficient ideal of citizenship.

The Future

As argued above, the homemaker is vulnerable to the uncertainties of the future, largely because she has a reduced ability to put in place financial measures that will alleviate future hardship. This lack of long-term security can in turn lead to emotional and psychological distress. Loxton's work on single mothers in Australia found that worries about an uncertain

[115] See Julie Wallbank, 'An Unlikely Match? Foucault and the Lone Mother' (1998) 9 Law & Critique 59, 60
[116] See Gingerbread *Maintenance Matters* https://www.gingerbread.org.uk/policy-campaigns/our-campaigns/maintenance-matters/ (accessed 20 December 2017)
[117] This fee is not payable in certain circumstances, including where the resident parent has been the victim of domestic violence
[118] See 'Claiming Benefits for two or More Chilrden' https://www.gov.uk/guidance/claiming-benefits-for-2-or-more-children (accessed 20 December 2017)

financial future were a common theme, motivated partly by an inability to make long-term financial provision by way of savings or home ownership.[119] As she explains, "sole mothers described their futures as 'bleak', 'scary', 'daunting' and 'not good'."[120] The long-term emotional toll of financial precarity is usually overlooked in legal and political discourses, but represents a real risk for the homemaker if she lacks access to the resources that can alleviate future hardship.

Another part of future emotional vulnerability is the homemaker's lack of control over her financial position. Where she is reliant on the state for financial support, she is at constant risk of a change in political climate that will lead to existing support being withdrawn. For the past 40 years, the state has tended increasingly towards neoliberal policies.[121] In practice, this has meant that welfare provisions have been gradually eroded, with an enhanced emphasis on self-sufficiency and personal responsibility. Access to state benefits has become ever-more restricted, aimed at providing only the very minimum in terms of assistance rather than ensuring quality of life. It is thus conceivable that such a political climate can be a source of concern and stress for the homemaker, who is uncertain whether current schemes for assistance, such as the state pension, will even exist in the future.

Another source of stress may come from knowledge and fear of the reality of the human life course. Ageing is inevitable and brings with it an increased likelihood of some level of dependence on others. Where the homemaker lacks the financial resources to pay for future care, she is at the mercy of the state to meet her needs. Her worries may also extend to other family members for whom she has an obligation to care.[122] The increasing shift in caring

[119] Deborah Loxton, 'What future?: The Long Term Implications of Sole Motherhood for Economic Wellbeing' (2005) Just Policy: A Journal of Australian Social Policy 39, 40
[120] Ibid, 42
[121] See Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017), 2
[122] See Elaine M. Brody, 'Parent Care as a Normative Family Stress' (1985) 25 The Gerontologist 19

responsibilities from the state to the private sphere combined with an ever-growing ageing population is likely to mean that for many homemakers, their obligations to provide care will not end when their children reach adulthood.

Spatial Vulnerability: The Homemaker's Relationship to the Home

Spatial vulnerability refers to the potential harm that can arise as a result of the homemaker's relationship with her home. As a concept, spatial vulnerability relates to the inherently embodied and emotional nature of personhood, recognising that individuals form connections not only to other people, but to the spaces that they occupy, and that a secure home is a necessity of wellbeing. In this section, I argue that the homemaker's relationship to her home is not always straightforward and often does not reflect the way home is idealised in discourse, as a place of security and sanctuary. For the homemaker, the home can be a site of conflicting emotions. It is simultaneously a haven and a workplace; both a source of security, and at constant risk of being lost. However, this emotional and embodied connection is lost in a legal framework that prefers to focus on property as a set of abstract rights, entitlements, and exclusions.[123]

Meanings of Home

'Home' can be described as a complex network of relationships between geographical space, social ideology, legal rights, and human emotions. As Davies argues, home is "not only our physical location and connections, but also our own interior architecture, our own psychology- home is in this sense who we are."[124] Law tends to ignore this wider conception of home, focusing largely on abstract legal rights and financial value.[125] Here, home

[123] See Sarah Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 Social & Legal Studies 423
[124] Margaret Davies, 'Home and State: Reflections on Metaphor and Practice' (2014) 23 Griffith Law Review 153, 154
[125] Lorna Fox, 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' (2002) 29 Journal of Law and Society 580

becomes merely a financial asset, easily replaceable with its monetary value. In particular, the emotions that people have in relation to their homes are thought to be at odds with a legal doctrine that characterises itself in terms of neutrality and reason.[126] Additionally, Blomley has argued that questions of physical space, and the ways humans occupy that space, are often treated by lawyers as something that is unimportant, merely incidental to the broader question of legal rights.[127] This, he argues, overlooks that:

> The spatial environments we move in- the homes, workplaces, streets, neighbourhood, shops and so on- can serve to reflect and reinforce social relations of power, through complex and layered spatial processes and practices that code, exclude, enable, stage, locate and so on.[128]

In this section, I am particularly interested in the way emotional aspects of home, the psychological connection an individual develops to a familiar place, are generally consigned to the private sphere, and therefore beyond legal concern.[129] In being marginalised from the legal realm, the homemaker's personal experiences of her home are rendered both invisible and unimportant.

Because law views home in a narrow, abstract manner, relatively little attention has been given to the fundamental role that it plays in shaping individual experiences of home and structuring the power relations that are played out at the site of the home. Law shapes home experiences by either upholding or denying an individual's relationship with the space.[130] As Waldron argues, property law "[provides] a basis for determining who is allowed to be where".[131] Law has the power to render particular relationships with the home particularly visible, while denying the importance, or even the existence, of others. As was discussed in

[126] Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007), 118
[127] Nicholas Blomley, 'Remember Property?' (2005) 29 Progress in Human Geography 125
[128] Nicholas Blomley, 'Landscapes of Property' (1998) 32 Law & Society Review 567, 569
[129] See Lorna Fox-O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism''(2014) 62 Current Legal Problems 409, 414
[130] Keenan (2017), (n 34)
[131] Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39 UCLA Law Review 295, 296

Chapter 2, the liberal conception of property law is as a system of exclusion, thereby producing a hierarchy of power among legal subjects, with the legal owner at the top of that hierarchy.

Despite its apparently private nature, home is inevitably infused with, and shaped by, ideology.[132] In liberal discourse, home is traditionally depicted as a sanctuary, symbolic of the private sphere, into which the state (and law) does not intrude. As Chapman and Hockey have remarked:

> That tired old adage, 'an Englishman's home is his castle', suggests that while individuals and families might face a lifelong struggle for survival in the hot-house of public life, the private home is a 'haven' or 'retreat' where we are free to express our individualism in whatever way we choose.[133]

Valverde has argued that discourse around the home centres around the conception of the idealised "single family detached", which is owner-occupied rather than rented.[134] This is symbolic of "the paradigmatic domestic life form of the home-owning, morally respectable nuclear family."[135] Indeed, this image of home largely eclipses other forms of housing,[136] seeking to reinforce the state's preference for the private and economically self-sufficient family.

Home as Security

Sociologists and critical geographers have focused on the existence of 'ontological security', which refers to the way that the individual's sense of self is shaped by her connections to places, including the home.[137] In essence, ontological security is based on the home as

[132] Nicholas Blomley, 'Performing Property: Making the World' (2013) 26 Canadian Journal of Law & Jurisprudence 23, 27
[133] Chapman and Hockey (1999), (n 111), 4-5
[134] Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge 2015), 19
[135] Ibid, 19
[136] Blomley (2013), (n 132), 27
[137] Peter Saunders, 'Beyond Housing Classes: The Sociological Significance of Private Property Rights in Means of Consumption' (1984) 8 International Journal of Urban and Regional Research 202; and Anthony Giddens, 'The Consequences of Modernity' (1990) 53 Polity 245

"familiar and secure space within a strange and insecure world."[138] Scholars have also drawn on the idea of home as a source of identity, arguing that home shapes this, both in an embodied and an emotional sense.[139] In an embodied sense, the individual's home environment and personal belongings support her routines and functions, reflecting her needs and tastes.[140] In Young's words, "a person's home is a space in which he or she dwells, carries out everyday activities of caring for self and others, plays, celebrates, plans, and grieves."[141] In an emotional sense, the belongings and layout of the home can "carry sedimented personal meaning as retainers of personal narrative."[142] Gurney found that for women in particular, their perception of the home was fundamentally bound up with relational narratives and events that had played out there, including childbirth and relationship breakdown.[143]

The dominant ideology of home as sanctuary attempts to impose a homogenised and idealised view of the individual's relationship with home. In fact, there can be great variation between the experiences of different family members in relation to the same space.[144] However, the view of home as a sanctuary coupled with a policy against state intervention into the family means that the homemaker's experiences of home are likely to be obscured. The homemaker's experiences are influenced by a number of factors, including her legal status, her embodied and emotional experience of the home as a workplace as well as a

[138] Julia Wardhaugh, 'The Unaccommodated Woman: Home, Homelessness and Identity' (1999) 47 The Sociological Review 91, 93
[139] Iris Marion Young, 'House and Home: Feminist Variations on a Theme' in Iris Marion Young (ed), *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press 2005), 139
[140] Ibid
[141] Iris Marion Young, 'A Room of One's Own: Old Age, Extended Care, and Privacy' in Beate Rossler (ed), *Privacies: Philosophical Evaluations* (Stanford University Press 2004),
[142] Young (2005), (n 139)
[143] Craig Gurney *The Meaning of Home in the Decade of Owner Occupation: Towards an Experimental Research Agenda* (University of Bristol 1990); and Craig M Gurney '"… Half of me was Satisfied": Making Sense of Home Through Episodic Ethnographies' (1997) 20 Women's Studies International Forum 373
[144] See Peter Saunders and Peter Williams, 'The Constitution of the Home: Towards a Research Agenda' (1988) 3 Housing Studies 81

sanctuary, and the difficulties that she faces in acquiring a new home upon relationship breakdown.

During the Relationship

Experiences of home will vary significantly between individuals, but the homemaker's relationship towards her home will often be different to that of her partner. One of the factors that comes to bear on the relationship is the homemaker's degree of control over her home. Ridgway et al have argued that "empowerment … comes from controlling access to personal space, from being able to alter one's environment and select one's daily routine, and from having personal space that reflects and upholds one's identity and interests."[145] The question is the extent to which the homemaker does exert genuine control over the home. On the one hand, she has traditionally been associated with having responsibility for the private domain of the home. She ensures the smooth running and organisation of the home, oversees household chores, directs other family members. On the other hand, there is a substantial difference between responsibility and control.[146] The homemaker carries the burden of organising the home, not only for herself, but for other members of the household. However, this responsibility to others can mean that her own control over the home becomes diminished, particularly if her occupation or claim to ownership is not upheld by law.

Young has powerfully argued that the homemaking role is largely dedicated to shaping the identity of others, and that in the process, the homemaker's own identity can become lost. She argues that "women serve, nurture and maintain so that the bodies and souls of men and children gain confidence and extensive subjectivity to make their mark on the world. However, this homey role also deprives women of support for their own identity and

[145] Priscilla Ridgway et al, 'Home Making and Community Building: Notes on Empowerment and Place' (1994) 21 The Journal of Behavioral Health Services and Research 407, 413
[146] See e.g. Young (2005), (n 139), 10

projects."[147] This statement is reflective of the fact that homemaking involves frequently being dictated to by the routines and requirements of other people, including partners and children. The homemaker is thus often expected to prioritise these over her own leisure time in the home.[148] The traditional image of the female homemaker controlling and presiding over the private sphere relates largely to responsibility rather than true control. This is also borne out in the home's spatial ordering. Critical geographical research on the home's layout has indicated that whereas there has been an increased move in architecture towards creating private spaces within the home (such as own rooms for children), women in fact have less personal and individual space than other occupants.[149] Therefore, while the homemaker may be in charge of the home, often it cannot truly be said to be *hers*.

The homemaker is also spatially vulnerable due to her potentially precarious legal position, which also comes to directly impact on her level of power and control within the home. Law's power operates to either uphold or deny individual relationships to home. In this sense, even the home-*less* live somewhere at any given time, even if this location is transient.[150] The difference between homelessness and other types of dwelling is that law does not recognise the homeless individual's right to be in a particular place and indeed may operate to directly exclude the individual. By contrast, owner-occupation offers a strong sense of belonging and validation of the relationship between the owner and her home.

I mentioned above that law tends to view the home as an abstract bundle of rights rather than an emotional and embodied connection to a particular place. In the narrow realm of property law, legal rights are thought of as quite separate from the psychological and security aspects

[147] Ibid, 1
[148] See e.g. Barbara Adam, 'When Time is Money: Contested Rationalities of Time in the Theory and Practice of Work' (2003) Theoria: A Journal of Social and Political Theory 94
[149] See Maureen H Fordham, 'Making Women Visible in Disasters: Problematising the Private Domain' (1998) 22 Disasters 126
[150] See Waldron (1991), (n 131)

of home, and, within the cohabitation context, it is a question that is infrequently (if ever) considered. However, sociological research suggests that legal rights are directly relevant to how an individual perceives her home. For example, Saunders' work on home as a source of ontological security and identity suggested that it is *ownership* rather than other forms of occupation, that engenders a particularly strong sense of individual rootedness and belonging to a place.[151] More recent research has also found that wellbeing results from a sense of long term security and a sense of control, for example in terms of being able to modify the space.[152]

In cases where the homemaker is not a legal owner, her relationship to her home is particularly insecure. In contrast to married couples,[153] cohabitants do not acquire a legal right of occupation unless they can also demonstrate legal or beneficial ownership of the home. The non-owner homemaker's right to occupy is therefore directly dependent on her relationship continuing (and on the goodwill of her partner). Should the homemaker be excluded from her home, she could apply to the court for an occupation order, but even this would only grant her a short period of occupation and is reliant on the court exercising its discretion.[154] The non-owner homemaker is therefore particularly vulnerable to the termination of her relationship, because this would also bring to an end the basis for her occupation of the home.

Where the home is jointly owned, the homemaker obviously has a stronger spatial relationship than in sole ownership cases, but I would argue that it remains an undependable

[151] Saunders (1984), (n 137)
[152] Hazel Easthope, 'Making a Rental Property Home' (2014) 29 Housing Studies 579; and Hazel Easthope et al, 'Feeling at Home in a Multigenerational Household: The Importance of Control' (2015) 32 Housing, Theory and Society 151
[153] See Family Law Act 1996, s 30
[154] See Family Law Act 1996, s 36. Under s 36(10), an occupation order can be granted for an initial period not exceeding six months and can be extended on one further occasion for a period not exceeding six months.

one where she is financially reliant on her partner. This means that she is still vulnerable to her relationship breaking down even if she is a co-owner because she would be unlikely to be able to keep the home on her own. The breakdown in the relationship would still be likely to lead to the loss of her home and a potential struggle to find an alternative one, due to the difficulty in securing a mortgage.

Relationship Breakdown

Upon relationship breakdown, the homemaker faces the loss of the home unless she has the financial means to buy her partner out and remain there.[155] An adequate home is of fundamental importance to the homemaker, particularly if her role includes caring obligations. Rotherham has argued that the homemaker is likely to feel the loss of her home particularly acutely, more so than her partner.[156] Malos and Hague have echoed this sentiment in their study of women who leave the home upon relationship breakdown, arguing that "the need for safe, secure housing, of "a place to call their own" is particularly important because they are traditionally assigned to the care of the home and family."[157]

The homemaker's dependency on a safe and secure home affects her adaptability to relationship breakdown and, if suitable housing is not forthcoming, she is likely to feel the effects of relationship breakdown more strongly than someone who does not have these obligations. In the UK, there is a well-publicised shortage of public housing.[158] Those in receipt of welfare benefits are often forced to rent in the private sector, despite its hostility

[155] Under the Trusts of Land (Appointment of Trustees Act 1996, s 15, the court can postpone sale for a period of time, including where the property is being used as a home for a minor child (s 15(1)(c)). However, it is unlikely that the homemaker would be able to remain in the home if she was unable to meet mortgage payments or other outgoings.

[156] Craig Rotherham, Proprietary Remedies in Context: A Study in the Judicial Redistribution of Property Rights (Hart 2002)

[157] Ellen Malos and Gill Hague, 'Women, Housing, Homelessness and Domestic Violence' (1997) 20 Women's Studies International Forum 397, 398

[158] See http://england.shelter.org.uk/campaigns /why we campaign/the housing crisis/what is the housing crisis (accessed 20 April 2018)

towards housing benefit or Universal Credit claimants.[159] If they are given social housing, they may be placed in unsuitable temporary accommodation for extended periods until a suitable property becomes available.

Within political discourse, the owner-occupied home is given significantly higher status than rented accommodation.[160] However, the difference between ownership and occupation is not merely an ideological one. With the decline in secure social housing tenancies,[161] home ownership now offers the most secure form of accommodation within the private sector. Tenants are vulnerable to termination of assured shorthold tenancies at short notice[162] and are often prohibited from making physical alterations to their homes, reducing their levels of control and autonomy.[163] It is, as Hulse et al have remarked, no accident that we use the terminology of 'buying a home' as opposed to 'renting housing'.[164]

The homemaker's reduced financial status and dependency also operates as an obstacle to her being able to secure adequate accommodation. Significant numbers of private landlords refuse to let homes to those in receipt of welfare benefits.[165] Waiting lists for public housing or housing association tenancies are oversubscribed and offer little choice in terms of the nature of the home. If the homemaker is in the position of being able to obtain mortgage funding, the amount available to her is likely to be affected by the presence of dependents.

[159] Ryan Powell, 'Housing Benefit Reform and the Private Rented Sector in the UK: On the Deleterious Effects of Short-term, Ideological "Knowledge"' (2015) 32 Housing, Theory and Society 320
[160] See Margaret Jane Radin, 'Residential Rent Control' (1986) Philosophy & Public Affairs 350
[161] See Suzanne Fitzpatrick and Hal Pawson, 'Ending Security of Tenure for Social Renters: Transitioning to 'Ambulance Service' Social Housing?' (2014) 29 Housing Studies 597
[162] Under the Housing Act 1988
[163] See David Clapham, 'Happiness, Well-Being and Housing Policy' (2010) 38 Policy & Politics 253
[164] Kath Hulse, Vivienne Milligan and Hazel Easthope, *Secure Occupancy in Rental Housing: Conceptual Foundations and Comparative Perspectives* (Australian Housing and Urban Research Institute 2011), 141
[165] See Kim McKee and Jennifer Elizabeth Hoolachan, 'Housing 'Generation Rent'' (2015) CHR Briefings no. 2, University of St Andrews

It is therefore clear that relationship breakdown can represent a significantly turbulent and worrying time for the homemaker, something that is likely to continue into her future.

The Future

Spatial vulnerability also includes susceptibility to future harm in terms of one's access to a safe and secure home. The home operates as a conduit between the past and the future, preserving memories of events and relationships that took place there.[166] I also view the home as an anchor to the uncertain future, a means for the individual to secure and insure herself against the harms that the passage of time may bring. It is therefore particularly concerning that the homemaker's financial status often operates to effectively exclude her from home ownership throughout her lifetime.

This issue needs to be viewed with the homemaker's lifelong need for housing in mind, something that is generally overlooked in neoliberal state policies. If the homemaker has young children and limited financial means, she may be a priority for accommodation during the children's minority. This will meet her short-term needs but does not address her long-term housing situation and the extent to which it may be compromised by her homemaking work in her younger years. The lack of a secure home in old age is likely to impact severely on the homemaker's wellbeing. She may find it more difficult to retire and may be forced to work into old age to continue to be able to pay rent. Home ownership, or lack of it, also has an impact on an individual's experience of ageing.[167] If the individual requires care in old age, the setting of this care can come to impact on her wellbeing. The capital value of the home may also provide a source of funds to pay for a higher standard of elderly care than what is provided by the state. The non-owning homemaker may be forced into sub-standard

[166] See e.g. Gurney (1997), (n 143)
[167] See Young (2004), (n 141)

or otherwise unsuitable housing at a time in her life when ontological security and the maintenance of a connection to the past is of particular importance to her.

Conclusion

The purpose of the chapter was to devise a theoretical framework of vulnerability that would form the basis of useful analysis of homemaking in the cohabitation context. I outlined the foundations of relational vulnerability, which focuses on the various impacts on the homemaker of unequally structured relationships. Furthermore, I sought to locate relational vulnerability on the broader spectrum of existing vulnerability scholarship, explaining that developing vulnerability theory in specific contexts enables a deeper and more nuanced understanding of the multiple causes and effects of vulnerability.

Relational vulnerability is not contradictory to, or incompatible with, Fineman's universal theory. Instead, it seeks to fill some of the gaps that remain when the universal theory is applied to the context of homemaking. I argued that the state's choice to construct an artificial, idealised version of personhood, in which the legal subject is invulnerable, is the root cause of the homemaker's vulnerability. I seek to expose that the state's presumption of autonomy and invulnerability affects the homemaker particularly negatively. In this context, the homemaker is more than ordinarily vulnerable.

As I outlined, relational vulnerability is significantly broader than mere economic harm. Drawing on the foundational vision of the individual as simultaneously relational, emotional, and embodied, relational vulnerability has economic, emotional, and spatial elements. Economic vulnerability has traditionally been the focus of debates around cohabitation reform because it is easier to measure and quantify. However, as I argued in this chapter, financial disempowerment has other, more subtle, and nebulous impacts that

need to be brought to the forefront if a full understanding of homemaker vulnerability is to be gained.

I also argued that homemaker vulnerability must be viewed in a broader temporal context. It does not merely arise upon relationship breakdown and it is not necessarily capable of being remedied through reallocation of assets. Instead, my framework views relational vulnerability as arising during the relationship, becoming visible upon relationship breakdown, and potentially impacting on the homemaker throughout her lifetime. When outlining the economic, emotional, and spatial parts of relational vulnerability, I also focused on the extent to which these fluctuate and change over time. I also argued that excessive focus on relationship length is not always helpful and can act as a distraction whereby claimants are categorised as either deserving or undeserving based on arbitrary time-frames. That is not to say that relationship length is irrelevant to the question of relational vulnerability. Rather, my point is that the existence of vulnerability should be the guiding factor rather than references to narrowly-drawn temporal measures.

CHAPTER 4: RELATIONAL VULNERABILITY AND UNPAID CARE

Introduction

In this chapter and the next one, I apply the relational vulnerability framework in the context of two types of homemaker contributions: informal care (this chapter) and unpaid domestic work (Chapter 5). In this chapter, I argue that, just as the public realm of property rights is socially and legally constructed to prioritise an artificial version of personhood that is represented by the autonomous liberal subject; care, which is deemed to take place in the private sphere, is also constructed by myths and discourses. These discourses are based around the imagined 'altruistic carer', who operates as a foil, or the 'counterstory'[1] to the rational, disembodied legal subject explored in Chapter 2. As with the autonomous subject, the altruistic carer is also a myth. Her purpose is to designate care to the private realm, largely away from state or legal concern. The presence and enforcement of the altruistic carer myth in the legal framework also contributes to broader societal perceptions of care. As Mundlak and Shamir have argued:

> Law constitutes a set of communications that moulds the way in which we perceive reality. It prompts us to ask some questions rather than others. It shapes our point of view. In its allegedly neutral and professional manner, it conveys value laden views on the desirable nature of society, and seeks to distance them from criticism.[2]

In reliance on the altruistic carer myth, the constructive trust and estoppel cases construct caregiving as gendered and sentimentalised. Because the carer myth is inherently incompatible with the autonomy myth that governs property law, caring contributions are seen as similarly incompatible with the notion of rights in the home. Care is deemed too remote, necessarily motivated by love rather than pecuniary gain, and outside the tightly bounded realm of property law. The altruistic carer, as she is imagined in the case law, is

[1] See discussion in Chapter 2, p 54
[2] Mundlak and Shamir (2008), (n 35), 161

inevitably female, reflecting that, within intimate relationships, women are *expected* to perform socially reproductive labour without compensation. As with the other legal myths, this is presented as a matter of common sense; a natural phenomenon rather than a social construct that is actively harmful to a significant sector of the population.

The altruistic carer myth is not confined to the case law. It operates on a broad societal level, evident in political and social policies surrounding caregiving. It also assumes a material form, reflected in the way care is spatially organised. Drawing on the concepts of "geographies of care"[3], I argue that the neoliberal practice of designating the home as the ideal setting for care marks it as a 'safe' space for carers, away from the potential dangers of the outside world. However, as I argue, this comes at a price. Although the homemaker will often have a strong attachment to her home, it can also serve to isolate her from the remainder of society. Her experiences of meeting the needs of another person are often hidden or transformed into a more appropriate form. Caregiving inevitably leads to "derivative dependency"[4] whereby the homemaker becomes financially dependent either on her partner or the state. The decoupling of care from economic value in the cohabitation case law means that the homemaker is placed in a precarious position whereby she is expected to meet the needs of others but does not have her own needs met.

I begin by situating my analysis within the broader literature on caregiving. I then explain the way that the myth of the altruistic carer has come to impact on how the courts view caring contributions within the property and trusts context, focusing also on how the myth is reinforced through the spatial ordering of the home. Finally, I analyse the impact that the

[3] See David Conradson,'Geographies of Care: Spaces, Practices, Experiences' (2003) 4 Social & Cultural Geography 451

[4] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004), 20

dominance of the altruistic carer has on the homemaker and the way in which it obscures her lived reality, making her economically, emotionally, and spatially vulnerable.

Contexts of Care

The academic scholarship on care is broad and varied, covering a multitude of potential settings and relationships. Because care is such an extensive term, attention to context is important to avoid homogenisation. Paid care performed by healthcare professionals in an institutional setting[5] raises different legal, moral, and ethical considerations to unpaid, informal care in the home. Equally, the process of performing care, and the relationships it produces, can be examined from different angles. For example, scholarship on the experiences of those receiving care[6] has a different focus to that which examines the experiences of those providing care.[7] The experiences and challenges of carrying out childcare will also vary from, for example, the work of caring for an adult with disabilities or dementia.[8] However, no matter in what context care takes place, it is always a relational activity, and the caregiver is always dependent on effective external structures of support, in the form of her network of relationships with other individuals, and with the state and its institutions.[9]

Concern about informal care, and particularly concern about those that perform it, traditionally lay beyond the state and law.[10] However, in recent years there has been a move towards a more public recognition of the role of carers. Whereas in the past, the majority of care performed by non-professionals in the home was almost entirely privatised and

[5] See John Costello, 'Dying Well: Nurses' Experiences of 'Good and Bad' Deaths in Hospital' (2006) 54 Journal of Advanced Nursing 594
[6] Brenda Roe et al, 'Elders' Needs and Experiences of Receiving Formal and Informal Care for Their Activities of Daily Living' (2001) 10 Journal of Clinical Nursing 389
[7] See Rosie Harding, *Duties to Care: Dementia, Relationality and Law* (Cambridge University Press 2017)
[8] Ibid
[9] See Jonathan Herring, *Caring and the Law* (Hart 2013), 23
[10] Mary Daly and Jane Lewis, 'The Concept of Social Care and the Analysis of Contemporary Welfare States' (2000) 51 British Journal of Sociology 281

unregulated, the Care Act 2014 now enables carers for adults to apply to the state for an assessment to get financial relief and respite.[11] As Stewart argues, this has led to some carers starting to gain a distinct legal status, shifting the traditional divide between public and private.[12] However, as she notes, "[t]hey still have a rather ethereal existence: occasionally flitting into sight in labour law and then out of it; appearing on the outer reaches of property law, emerging into the light within social welfare law, but overshadowed by disability rights discourse." While the Care Act may indeed herald a new state approach towards care, it is unlikely to have a significant impact on cohabiting homemakers, who are much more likely to fall into the "shadowy group"[13] of people who perform informal unpaid care that is *not* overseen or rewarded by the state in any way. It is this informal caregiving that forms the focus of this chapter. I recognise that the most common scenario will be childcare for the parties' joint children, but that some of the cases discussed involve elderly care and those with disabilities, which may bring about different experiences and challenges.

Although there may be contexts where the homemaker could apply for a state assessment (if she is caring for an adult), I will assume in this chapter that she has not done so. In any event, the most common caring scenario in the cohabitation context is childcare, for which a Care Act assessment is not available. Additionally, while wider state recognition of carers as a group is to be welcomed, my primary concern in this chapter is the specific way in which care is treated when it is used as a basis for a claim to property rights in the home. Here, my approach also differs from Sloan's work on informal carers and private law.[14] Sloan is largely concerned with the scenario where the *recipient of care* has made a promise to reward the carer in some manner, which is later not forthcoming. Conversely, the imagined scenario

[11] Ann Stewart, 'Carers as Legal Subjects' in Rosie Harding, Chris Beasley and Ruth Fletcher (eds) *Revaluing Care in Theory, Law and Policy* (Routledge 2017); and Harding (2017), (n 7)
[12] Stewart (2017), (n 11)
[13] Ibid, 158
[14] Brian Sloan, *Informal Carers and Private Law* (Hart 2012)

in this chapter is third party care, where the homemaker takes on the majority of what is a joint caring obligation of the parties, allowing her partner to focus on income-earning.

Ethics of Justice and Ethics of Care

The altruistic carer and her foil, the autonomous liberal subject, are symbolic of a fundamental tension within the legal and political system between an 'ethic of care' on one hand, and an 'ethic of justice' on the other. These terms derive from the psychologist Carol Gilligan's work, *In a Different Voice,*[15] which asserts that men and women display a fundamental difference in their moral reasoning. Women, Gilligan argues, are primarily characterised by an ethic of care, which "is based on connections and relationships rather than separation and abstraction".[16] Men, on the other hand, tend to place rationality, impartiality, and logic at the forefront of their reasoning, suggesting a morality that is fundamentally more individualistic in nature.

Within Gilligan's work, the two moralities are very much posited as polarised opposites. This view of care and justice as incompatible is endemic in the English legal and political system. There is little room for nuance; law expects the subject to be all or nothing; either an autonomous agent, or an altruistic carer. The legal arena is characterised by rationality, state-restraint, and autonomy and therefore cannot accommodate anyone that appears to contradict this. Those people become 'othered', often consigned to the private, emotional realm.[17] Similarly, as I argue in this chapter, in the imagined private sphere, the legal framework struggles to process the idea that care could merit recompense or reward.

[15] Carol Gilligan *In a Different Voice* (Harvard University Press 1982)
[16] Ibid, 174
[17] See discussion in Chapter 2

So-called 'difference-feminists' have argued that the problem is that we live in a society that only values the ethic of justice.[18] This, they contend, is directly tied to female oppression because care is a female morality and it, like women themselves, is marginalised and excluded in the legal and political system.[19] The solution for difference-feminists is to reframe law and politics in order to centre the ethic of care rather than the ethic of justice. For example, much of Fineman's pre-vulnerability theory work advocates prioritising caregiving relationships in the family justice system, which, she argues, is predominantly based around a sexual union (i.e. the idealised married family).[20] Difference-feminists therefore seek to eliminate the individualism that is so evident within the system.

By contrast, liberal feminists have argued that, while the ethic of care may be apt for describing relationships in the private sphere, the ethic of justice remains the appropriate manner for regulating public life. The problem, according to liberal feminists, is not the promotion of the virtues of individualism and rationality, but rather the assumption that women have a separate morality and are incapable of embodying the ethic of justice.[21] For instance, Deech's position with regards the rights of cohabitants focuses on the dangers of infantilising and patronising women by painting them as helpless and financially dependent.[22] For Deech, the inclusion of care ethics into the law would represent an ultimately harmful insinuation that women are unable to take care of themselves and need to depend on men.[23]

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[18] See e.g. Eva Feder Kittay 'Welfare, Dependency, and a Public Ethic of Care' (1998) Social Justice 123; and Nel Noddings *Caring: A Feminine Approach to Ethics and Moral Education* (University of California Press 1984)

[19] Noddings (1984), ibid

[20] Martha Fineman *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Psychology Press 1995)

[21] See e.g. Barbara Houston, 'Rescuing Womanly Virtues: Some Dangers of Moral Reclamation' (1987) 17 Canadian Journal of Philosophy 237, 259

[22] See Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 International and Comparative Law Quarterly 480

[23] See also Ruth L Deech, 'The Principles of Maintenance'7 Family Law 229

The third approach, which is ultimately the one that I favour, is that care and justice are not *by themselves* incompatible.[24] They are indeed irreconcilable with one another in their current and caricaturised forms, i.e. the autonomous liberal subject who is completely disembodied and devoid of a relational context, and the altruistic carer who lacks all ability to prioritise her own needs. However, this is not because care and justice can never co-exist, but results from the way that care and justice has been interpreted in the legal and political arena. Prioritising caring relationships without considering the interests of the individuals engaged in them can be very dangerous.[25] Like communitarianism, it assumes that all caring relationships are positive or autonomy-supporting ones.[26] Recognition of relationality in the legal system is insufficient without ways in which the *quality* of our relationships, and their impact on us as individuals, can be assessed.[27] This recognises, as Friedman has argued, "that morally adequate care involves considerations of justice."[28]

I return to this interplay between care and justice when discussing resilience later in the thesis in terms of considering the extent to which seemingly justice-based concepts of autonomy and equality should nonetheless be employed within the vulnerability framework in order to provide the means of evaluating specific relational contexts.[29] However, in this chapter, I am concerned with how care is constructed, through reliance on the altruistic carer myth, as the fundamental opposite to the justice-based notion of property rights.

[24] For further discussion, see Susan Moller Okin, *Gender, Justice and the Family* (Basic Books1989); and Diemut Elisabet Bubeck *Care, Gender, and Justice* (Clarendon Press 1995)
[25] John Eekelaar 'Family Justice: Ideal or Illusion? Family Law and Communitarian Values' (1995) 48 Current Legal Problems 191
[26] See discussion of communitarianism in Chapter 1
[27] See Rosie Harding, 'Care and Relationality: Supported Decision Making Under the UN CRPD' in Rosie Harding, Chris Beasley, and Ruth Fletcher (eds) *Revaluing Care in Theory, Law and Policy* (Routledge 2017)
[28] Marilyn Friedman, 'Beyond Caring: The De-Moralization of Gender' (1987) 17 Canadian Journal of Philosophy 87, 90
[29] See Chapters 6 and 7

The Altruistic Carer Myth

I now turn to the manifestation of the altruistic carer myth in the constructive trust and proprietary estoppel case law. The legal framework consistently draws on an image of caregiving as performed by women within a heterosexual relational context, and for altruistic reasons. It is thought to be motivated by sentiment and affection rather than financial gain. This produces an artificial and privatised image of care, whereby it is seen to have little to no value outside the immediate family context. It is placed outside the realms of property law; too imbued with emotion to warrant the award of property rights. As I show below, the altruistic carer myth is woven tightly through the legal framework and is frequently referenced without being expressly acknowledged.

The Gendering of Care: The Gender-Contract

In legal, political, and societal discourses, women are represented as natural carers, possessing the necessarily qualities and temperament to undertake caring work.[30] As Walker has argued, "their idealized role conforms to the principles of Victorian womanly values: self-sacrifice and service to others."[31] This reinforces the idea that men and women's different biology extends to them possessing inherently separate moralities.[32] Historically, women were almost completely relegated from the public realm, unable to vote or to own property in their own names. This was defended on the basis that the female psyche was unsuited to public endeavours and would take her away from her true vocation in the home as a mother and a carer.[33]

[30] Hazel M. MacRae, 'Women and Caring' (1995) 7 Journal of Women & Aging 145
[31] Alan Walker, 'The Relationship Between the Family and the State in the Care of Older People' (1991) 10 Canadian Journal on Aging 94, 109 (cited in MacRae (1995), (n 30), 161)
[32] Joan C Tronto 'Beyond Gender Difference to a Theory of Care' (1987) 12 Signs 644, 645
[33] See Dorothy E Roberts, 'Spiritual and Menial Housework' (1997) 9 Yale Journal of Law & Feminism 51, 55

Whereas women are no longer directly excluded from the public sphere, the narrative that women are natural carers has not vanished.[34] Across the globe, care continues to be overwhelmingly performed by women.[35] Government use of gender-neutral language in schemes such as parental leave or flexible working appears to have a relatively limited effect on the gender split. Even in professional settings, where care is remunerated, women tend to perform the 'hands-on' jobs such as home carer, nurse, nursery nurse, and midwife. These jobs are associated with women and men performing them is often seen as being out of the ordinary.[36] Professional caregiving roles that are traditionally associated with men are generally of a higher status and more distant from the embodied caregiving experience, such as doctor, head teacher, or surgeon. In heterosexual couples, it is still the female partner who takes the majority of parental leave and is more likely to take primary responsibility for childcare (as well as other domestic work).[37] The gendered division of caregiving also lends credence to other commonly held beliefs such as that women are by nature more emotional and less rational than men. Because care is thought to be bound up with emotion and affection, women are thought to be ideally placed to perform it. It also reinforces the traditional view of men as cerebral and women as embodied, particularly in terms the use of their bodies to sustain infant life.

Like the autonomy-based myths that characterise the public sphere, the gendered construction of care is difficult to challenge. It is ingrained in the social and legal fabric to such an extent that it is accepted as a natural phenomenon. Care understood as a feminine

[34] Brenda Cossman and Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (University of Toronto Press 2002), 25-26
[35] Guy Mundlak and Hila Shamir, 'Between Intimacy and Alienage: The Legal Construction of Domestic and Carework in the Welfare State' in Helma Lutz (ed), *Migration and Domestic Work. A European Perspective on a Global Theme, Ashgate* (Routledge 2008)
[36] See e.g. Mark Loughrey, 'Just how Male are Male Nurses..?' (2008) 17 Journal of Clinical Nursing 1327
[37] Rosemary Crompton and Clare Lyonette, 'Who Does the Housework? The Division of Labour Within the Home' (2008) 24 British Social Attitudes 53

virtue reflects what Fudge has termed a "gender contract", which comprises "a set of normative understandings, practices and policies about the appropriate roles and expectations of, and rewards for men and women that is institutionalised in sites like families, firms, schools, state policies and the market."[38] Under the gender contract, women are expected to perform care as part of their relational role and by consequence, it cannot have any value beyond the private family context.

Despite the considerable shift in terms of women's participation in the paid workforce, the gender-contract remains. The continued unequal distribution of care along gendered lines demonstrates that there has not been a corresponding shift in the private sphere. Instead, the problem has arguably intensified through increased reference to personal choices. The idea that women are ostensibly free to pursue a career path, yet still perform the majority of informal care, lends credence to the altruistic carer myth. It appears to offer proof that women are simply naturally better suited to being carers and make active lifestyle choices to care.

The response to this is that women become carers largely because they are socialised to do so, rather than due to an inherent biological suitability for the task.[39] Individuals are, as Friedman suggests, "moralized" from a very young age and encouraged to develop conduct and characteristics that are typically 'male' or 'female'.[40] Care is socially reproductive. It sustains people but, equally importantly, it sustains and reproduces ideology and myths.

[38] Judy Fudge, 'The New Dual-Earner Gender Contract: Work-life Balance or Workingtime Flexibility' in Joanne Conaghan and Kerry Rittich (eds) *Labour Law, Work and Family: Critical and Comparative Perspectives* (Oxford University Press 2005), 265. See also Carole Pateman *The Sexual Contract* (Polity Press 1988)

[39] Laura T Kessler, 'Is There Agency in Dependency? Expanding the Feminist Justifications for Restructuring Wage Work' in Martha Albertson Fineman and Terence Dougherty (eds) *Feminism Confronts Homo Economicus* (Cornell University Press 2005), 387

[40] Marilyn Friedman, 'Beyond Caring: The De-Moralization of Gender' (1987) 17 Canadian Journal of Philosophy 87, 90

Women are taught from infancy that they are caregivers, and throughout their lives, they are defined by their relational roles in a manner that men are not. Women who perform childcare in the home are also socialising the next generation of women to become carers and to take over responsibility for sustaining society. This indirect socialisation is necessary for society to continue to reap the benefits of women's unpaid work. The state is therefore reliant on female caregiving being presented as a natural phenomenon, preventing excessive probing as to who ultimately benefits from its unequal distribution.

Gendered Care in the Case Law

The image of care as a female endeavour and the stereotypical carer as a woman is woven deeply through the constructive trust and estoppel case law, referred to by the judiciary in both implicit and explicit terms. In Chapter 2, I argued that the judiciary was open to accepting some caregiving and domestic contributions, but that these necessitated rewriting into more acceptable, commercial terms.[41] However, the cases where this rewriting took place; *Thorner v Major*,[42] *Culliford v Thorpe*,[43] and *Wayling v Jones*, all involved male claimants.[44] As I show below, women appear to be less able to convince the court that they had commercial motivations for performing care, and their intention is often deemed to be relational instead; referable to the gender-contract and to societal expectations.

In *Thomson v Humphrey*, which was discussed in Chapter 1, over the course of their relationship, the female claimant had provided unpaid care for the defendant's elderly mother until she went to live in a retirement home. The claimant argued that she had performed this work without compensation and that she would not have done so did she not

[41] Chapter 2, p 59
[42] *Thorner v Major* [2009] UKHL 18
[43] *Culliford & Another v Thorpe* [2018] EWHC (Ch) 426
[44] *Wayling v Jones* [1995] 69 P & CR 170

think that the defendant would make some provision for her. Warren J dismissed this as evidence of an intention to share the beneficial interest in the home, reasoning that:

> There is absolutely nothing to link this conduct with the fact, if it be a fact, or with an understanding by the claimant that she had an interest in [the property]. The reason she looked after the defendant's mother was surely because she lived with the defendant and did this because of her relationship with him and perhaps, for all I know, and this is pure speculation, because she got on with and liked the defendant's mother and did it for her.[45]

The reference here to affection and the parties' relationship is telling. Affection is deemed to be the primary motivation for the claimant's contribution, although the judge simultaneously admits that this is "pure speculation". It hints at the gender-contract governing the altruistic carer. In her relational role, Ms Thomson is expected to perform unpaid work, not only for her partner, but also his family members. The suggestion is also that motivation is *either* affection *or* monetary gain; there is no attempt to reconcile the two, reflecting the notion of the autonomous liberal subject and the altruistic carer (and the ethics of justice and care) as polarised opposites. It furthermore betrays judicial discomfort with the idea that women in heterosexual relationships could expect compensation for their work. As the judge in remarked in *Rubin v Dweck,*[46] involving a wife's demand that the family home be transferred into her name to reflect the financial sacrifice she had made by repaying some of her husband's debts, this "had the potential to present a mercenary approach…which would not fit easily into the context of a loving family."[47]

In *Coombes v Smith,*[48] the plaintiff relied on the fact that she had borne and cared for the defendant's chid, giving up her prospects of paid employment as a consequence. The influence of the altruistic carer image and the gender-contract is evident in the judgment. As

[45] *Thomson v Humphrey* [2009] EWHC (Ch) 3576, [43] (Warren J)
[46] *Rubin (Trustee of Dweck) v Dweck and Another* [2012] BPIR 854
[47] Ibid, [48]
[48] *Coombes v Smith* [1986] 1 WLR 808

the defendant's counsel submitted, "this is simply a case of a woman being housed by a man over a number of years, and bearing his child. …there is nothing exceptional in this case at all."[49] The judge, Jonathan Parker QC, agreed with this. As he noted:

> it would be wholly unreal, to put it mildly, to find…that the plaintiff allowed herself to become pregnant by the defendant in reliance on some mistaken belief as to her legal rights. She allowed herself to become pregnant because she wished to live with the defendant and to bear his child.[50]

Here, Ms Coombes is being held to her end of the gender contract, reinforcing the passive role that it ascribes to women. According to the judge, Ms Coombes "allowed herself to become pregnant", but emphasises that this does not entitle her to anything beyond being housed for the duration of the relationship. The reference to exceptionality demonstrates that women's relational roles are clearly demarcated within the discourses, legal myths, and ideology. If they seek anything more in the form of property rights in the home, they must show that their contributions are sufficient to take them outside the paradigm of the heterosexual family.

That female contributions need to be "exceptional" was further reinforced in *Ottey v Grundy*,[51] an estoppel case. Here, the claimant had nursed the deceased through alcoholism as well as being his partner for a number of years. He had failed to make provision for her in his will despite promising to do so. The court referred to the claimant's "extraordinary efforts",[52] pointing out that she was "a carer as much as a girl friend".[53] The claimant was thus able to show that her work broke free of the boundaries imposed by the altruistic carer myth and the gender-contract. The expectations of her relational role did not extend to providing care of the nature that she did. It was thus exceptional. The rather frivolous term

[49] Ibid, 817
[50] Ibid, 819 (Jonathan Parker QC)
[51] *Ottey v Grundy* [2003] EWCA Civ 1176
[52] Ibid, [5] (Arden LJ)
[53] Ibid, [25] (Arden LJ)

'girl friend' itself is quite curious given that Ms Ottey was 43 at the time of the appeal and had been living with the deceased for a number of years in a stable relationship. It may be that the court felt the need to trivialise the relationship to justify the finding that Ms Ottey went above and beyond. Perhaps she would have been expected to do more had she been a 'partner' or 'de-facto spouse'.

The approach is markedly different in the male caregiver cases. Rather than relying on the gender-contract and expectations tied to a particular relational role, the court tends to downplay the intimate relationship and, as Flynn and Lawson have argued, make use professional comparisons to elevate the male carer to a higher social position and distance him from the female caregiving role.[54] They note that in *Wayling*, the court referred to the claimant as a "companion and chauffeur" rather than the deceased's life partner.[55] There was thus no need to consider what might be expected of a male caregiver in the context of a same-sex relationship because his role had been rewritten to one where financial reward would be a given.

In *Campbell v Griffin*,[56] the claimant, a single man, moved in with an elderly couple as a lodger in the late 1970s. Although it was initially a commercial arrangement; over the years, the relationship changed significantly and in his evidence, the claimant explained that he was eventually treated by the couple "as a son" and that he no longer paid them rent for his room.[57] The relationship between the claimant and the couple lasted over 20 years, during which time he performed significant and increasingly burdensome unpaid caregiving for the couple until they went into respite care. The court again struggled to reconcile the presence

[54] Leo Flynn and Anna Lawson, 'Gender, Sexuality and the Doctrine of Detrimental Reliance' (1995) 3 Feminist Legal Studies 105, 116
[55] Ibid
[56] *Campbell v Griffin* [2001] EWCA Civ 990
[57] Ibid, [19]

affection with the commercial motivation necessary to be awarded a proprietary interest. It is notable that at first instance, the judge had remarked that

> The motivation [the claimant] claims for doing the jobs… was that he had been told that he had a home for life. However, in giving his evidence, he further went on to say that the reasons why he cooked meals for Mr and Mrs Ascough, undertook shopping and cleaning and gardening, was friendship.[58]

This finding was used to deny relief to the claimant, demonstrating that his close and personal relationship with the couple directly contradicted the expectation of some reward. Robert Walker LJ in the Court of Appeal disagreed with the trial judge's conclusion, but in the process, reverted to casting the claimant in a more distant role of lodger or professional career, despite the evidence that neither party saw the other in these terms. He explained that "a lodger does not normally cook his landlords' evening meals or delay going to work or go short of sleep in order to look after them, or clean up after incontinence."[59] He further compared the claimant to a live-in carer who would, in his view, "be expected to be paid a very substantial wage."[60] The court did not therefore have to consider the level of care that would be reasonable in an affective context, because it removed the claimant from that context before assessing his work. Instead, he was to be rewarded because he was performing a professional service.

The same-sex relational dimension of *Wayling* and *Culliford* also merits consideration in terms of what it reveals of judicial attitudes to different forms of intimacy. In 1995, Flynn and Lawson suggested that the court commercialised Mr Wayling's relationship due to discomfort and unfamiliarity with the idea of a sexual relationship between two men.[61]

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[58] Ibid

[59] Ibid, [24] (Robert Walker LJ)

[60] Ibid. The reference to a substantial wage betrays a lack of realism on the part of the judge: home carers are notoriously underpaid. See LJB Hayes, Stories of Care: A Labour of Law: Gender and Class at Work (Palgrave 2017)

[61] Flynn and Lawson (1995), (n 54), 115

However, it is difficult to level the same accusation at the court in *Culliford*, where the parties' relationship was described as "a committed, intimate relationship where two people decided to spend the rest of their lives together."[62] Yet, Mr Thorpe was not defined by what the court deemed to be his relational role in the same way as the female claimants discussed above were. Meaningful comparison is hampered by the fact that there are few to no appellate cases involving caregiving contributions in the context of a female same-sex relationship.[63] *Tinsley v Milligan*[64] did involve a lesbian couple, but it was a resulting trust claim based on monetary contribution. *Tinsley* itself showed a similar discomfort with the sexual nature of the parties' relationship to that seen in *Wayling* (e.g. Ms Tinsley and Ms Milligan were described as "two single women"[65] in the headnote) but, as with *Culliford*, it is doubted that this would happen today. Flynn and Lawson have speculated that lesbian claimants, although not situated within the heterosexual family paradigm, would still be held back by their gender, and the social expectations on them to be carers. They conclude that "neither [a lesbian, nor a heterosexual woman] is as well situated, doctrinally, as a gay man."[66]

It is also worth speculating on the reason for the absence of cases involving lesbian caregivers or indeed male heterosexual caregivers. As I have argued, I do not suggest that unequal role division and resultant relational vulnerability exclusively occurs in heterosexual relationships.[67] However, the gendered, heteronormative dimension of care and

[62] *Culliford v Thorpe* (n 43) [62], (HHJ Matthews)
[63] At the time of writing, *Ladwa v Chapman* [2018] EWCC (unreported) appeared in the press. This was a joint names case involving a same-sex female couple where the defendant sought to argue that she had been coerced into putting the home into joint names. The claimant had assumed a homemaker role during the relationship. There is no transcript of the judgment but, as it was a County Court case and the result does not seem remarkable given the presumption in *Stack v Dowden*, this case is unlikely to add anything significant to the understanding of lesbian homemakers within the constructive trust and estoppel framework.
[64] *Tinsley v Milligan* [1993] 1 WLR 126
[65] Ibid, 340
[66] Flynn and Lawson (1995), (n 54), 120
[67] Chapter 1, p 4

homemaking generally, is very strong. The altruistic carer is bound up with the notion of the gender contract, which exists, not just in the case law, but on a wider societal level. It is therefore unlikely to be a coincidence that the majority of cases involving female caregivers and significant economic disparity between the parties, are in the heterosexual context. As Auchmuty has argued, "intimacy is a factor in women's vulnerability, but much more significant is the gendered dynamic of the heterosexual relationship."[68]

Care as Sentiment

As well as perpetuating the idea that women are natural carers, the altruistic carer myth also sentimentalises care, whereby its reality is marginalised from view and replaced by a romanticised ideal. This should not be interpreted as a denial that care has an emotional element. On the contrary, it is an inherently relational activity, "always encompassed with emotional bonds",[69] and people usually decide to be carers because they are motivated at least in part by feelings of love, affection, or a sense of moral obligation.[70] Over the course of a caring relationship, emotional ties will inevitably form between carers and their dependents, even in more professional settings. Additionally, many people are happy to perform unpaid caring tasks for friends and close family members, but would not do so for strangers. Sentimentalisation is something different entirely. It is where emotion is used in dominant discourse as a direct reason to deny the carer any form of remuneration or compensation for her work. By depicting care as a natural expression of emotion (especially within certain relationships), it denies the reality of care as labour and downplays the carer's sacrifice.

[68] Rosemary Auchmuty 'When Equality Is not Equity: Homosexual Inclusion in Undue Influence Law' (2003) 11 Feminist Legal Studies 163, 174

[69] Janet Finch and Dulcie Groves, *A Labour of Love: Women, Work, and Caring* (Routledge 1983), 4

[70] See Hilary Graham, 'Caring: A Labour of Love' in Janet Finch and Dulcie Groves (eds) *A Labour of Love: Women, Work and Caring* (Routledge 1983); and Eva Feder Kittay, *Love's Labor* (Routledge 1999)

An example of sentimentalisation of a specific caring context is the mother-child relationship, which Herring argues has been "glorified" both legally and socially.[71] Good mothers are expected to be altruistic, loving, and self-sacrificing, putting the needs of their children ahead of their own. Those that fail to live up to this ideal can find themselves stigmatised.[72] As McGlynn has argued, the ideology of motherhood "elevates certain biological facts of female reproduction to the status of 'universal truths' about women, which preserve women's subordination in the gendered division of labour in the home."[73] Sentimentalisation, in combination with gendering, also implicitly excludes women from the workplace and the public sphere by reinforcing their natural role within the home.[74]

The understanding of care as a sentiment means that it is always assumed that it is undertaken freely and voluntarily. This, in turn, denies the influence of other factors such as the social pressure to become a carer (particularly for women), the lack of availability of adequate state-provided care, and the prohibitive expense of professional care. Although some carers may be motivated purely by emotional connections, people care for a variety of other reasons.[75] Affection is likely to be one, but it is certainly not the only one. Fundamentally, care is essential labour and, as Graham argues, "must continue even if the love falters."[76] However, this lack of choice for many individuals is obscured by sentimentality, which depicts caring as an active choice.

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[71] Ibid, 5, 6

[72] Ibid. See also the policy decision in *McFarlane v Tayside Health Board* [2000] 2 AC 59 to disallow a tortious claim by parents in respect of the wrongful birth of a healthy child. The Lords reasoned that recovery would be contrary to the morality of ordinary persons, who would consider that the joys of a child outweighed the financial cost.

[73] Clare McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 European Law Journal 29, 33

[74] Ibid. See also Lucinda M Finley, 'Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate' (1986) 86 Columbia Law Review 1118

[75] See Harding (2017), (n 7), 143

[76] Graham (1983), (n 70), 16

Sentimentalisation uses emotion to deny the embodied reality of caregiving. It conceals some of the most physically demanding and emotionally challenging aspects of care, maintaining the myth that women freely undertake to be carers, and what is more, actively enjoy the experience. This contrasts with the reality of care as often involving time-consuming and often repetitive and unstimulating activities.[77] It can involve physically arduous and unpleasant work in terms of tending to the bodily functions of the dependent.[78] Although many carers derive significant pleasure and joy from their work, they may also feel exhausted and socially isolated at times. However, the altruistic carer myth does not recognise any of the negative aspects of caregiving when it is being performed by women in the context of an intimate relationship.

Sentimentalisation in the Case Law

The case law reveals that gender and sentimentality are indeed very closely intertwined, because not all caring labour is sentimentalised. It is women rather than men who are assumed to possess the emotional nature required for caregiving. If care can be placed outside the gendered norm, it often loses its sentimental gloss in the process. I return here to *Campbell v Griffin*, which was discussed above, and which involved a male caregiver. It was notable that the court gave visibility to the significant emotional and physical toll that caring for an elderly couple had on the claimant. A spotlight was shone on the embodied and less pleasant aspects of his work. In particular, Robert Walker LJ focused on the claimant having to clean up after incontinence, one of the least attractive features of caregiving[79] and one which is usually hidden behind the façade of sentimentality. Robert Walker LJ was also attentive to the physical toll on the claimant, referring to his "going short

[77] Graham (1983), (n 70), 20 and Roberts, (1997)
[78] See Stewart (2017), (n 11), 154, who argues that 'body-work', involving attending to the dependent's bodily function has a particularly low status and is most likely to be undertaken by vulnerable individuals.
[79] See Stewart (2017), (n 11), 154

of sleep" [80] as a result of frequently having get up in the night to tend to the elderly couple's needs, highlighting the often-constant nature of the work involved in looking after another person. By contrast, the female caregiver scenario in *Thomson v Humphrey* also involved elderly care, and presumably many of the same issues, but the judge did not engage in any detailed discussion of intimate or bodily tasks that the claimant performed for her mother-in-law; she merely "looked after" her.[81] The difference in how their caring work was described can be linked to the roles they were ascribed in the respective judgments. Mr Campbell was likened to a "professional carer" whereas Ms Thomson was a "traditional housewife",[82] the latter being a term heavily laden with ideology around women's natural propensity for caregiving. It was thought unnecessary to remark on the individual tasks performed by Ms Thomson and the effect they may have had on her. After all, her marriage-like relationship meant that she was expected to carry out care for free. Mr Campbell was not bound by this gender-contract and his work was therefore akin to that performed by a professional.

Similar attention to the reality of caregiving was seen in *Jennings v Rice*, involving a male caregiver assisting an elderly woman over a number of years. Aldous LJ took care to list the claimant's tasks, explaining that "Mr Jennings helped [the deceased] go to the toilet, made sure she had food and drink available and did some work in the garden".[83] The case also showed an unusual display of consideration of some of the complex emotions involved in elderly care; not all of which are positive. Robert Walker LJ referred to "the detriment of an ever and increasing burden of care for an elderly person, and of having to be subservient to his or her moods and wishes".[84] His observations reflect Herring's point that "caring can be

[80] *Campbell v Griffin*, (n 56), [24] (Robert Walker LJ)
[81] *Thomson v Humphrey*, (n 45), [43] (Warren J)
[82] Ibid, [39] (Warren J)
[83] *Jennings v Rice* [2002] EWCA Civ 159, [7] (Aldous LJ)
[84] Ibid, [11] (Robert Walker LJ)

exhausting and frustrating",[85] something that is frequently lost within the gendered rhetoric of sentimentality. However, the perfunctory manner in which elderly care was treated in *Thomson* paid no such attention to the emotional dynamics between carer and dependent and its impact on the former.

Within the altruistic carer myth, gender and sentimentality mask the embodied and emotional reality of caregiving. It is instead given a romanticised gloss, depicted as freely chosen and, indeed, a female vocation. Both gender and sentimentality are reflections of the gender-contract. Women are expected to perform caregiving work in the heterosexual relational context. If they expect recompense, they must show that their work went beyond what was expected of them. Sentimentality adds a further reason for denying reward; the experience is constructed as a freely chosen and pleasant one- an expression of affection rather than real work. Men are not constrained in the same way. The presence of affection (e.g. in *Campbell*, where there was a quasi-familial relationship between the parties) is not fatal to their claims in the same way as it is for women. It also means that the embodied and emotional aspects of their work are rendered visible in a way that that does not occur with women's work.

Geographies of Care: Reinforcement of Ideology

The ideologies of care evident in the case law also manifest themselves on a material level, through the spatial ordering of caregiving. The spaces of care support the construction of the image of the altruistic carer myth, reflecting Proshansky et al's argument that "places as bounded locales imbued with personal, social and cultural meanings, provide a significant framework in which identity is constructed, maintained and transformed."[86] It also echoes

[85] Herring (2013), (n 9), 79

[86] Harold M Proshansky, Abbe K Fabian and Robert Kaminoff 'Place-Identity: Physical World Socialization of the Self' (1983) 3 Journal of Environmental Psychology 57, 59

Lefebvre's theory that spaces are socially constructed rather than occurring naturally, but that dominant understandings of space are consistently presented as being indisputable reality.[87] Here, my focus is on the home and the way that it is imagined as a natural space for caregiving as well as being a feminine domain. While this helps the state to avoid responsibility for care, it also takes women's relationships to their homes outside the legal sphere. Ideology depicts them as 'belonging' in the home, but law's eschewal of relationality and sentimentality means that women's claims to their homes are dismissed unless they can demonstrate conformity with the marketplace behaviour of bargains and monetary payments.

Neoliberal society views care as very much the responsibility of the private family rather than the state. This is reinforced through the state's designation of the home "as the primary setting for care".[88] The home is the spatial embodiment of the private sphere, a place seemingly free of state intrusion. While the idea that care should ideally take place in private homes may appear one that is logical and natural, it also serves an important purpose in terms of reinforcing the restrained state myth, suggesting that care cannot be a state concern because the home is an entirely private space. Thus, the liberal notion of separate spheres creates not only an ideological separation, but also a geographical divide between the public and the private realm.[89]

The home is labelled as a caring environment, regardless of whether this matches the lived reality of those who occupy it. This is reinforced through the architectural design of the home as a safe space that is kept geographically separated from the perceived danger of

[87] Henri Lefebvre (trans D Nicholson-Smith) *The Production of Space* (Blackwell 1991), 289
[88] Allison Williams, 'Changing Geographies of Care: Employing the Concept of Therapeutic Landscapes as a Framework in Examining Home Space' (2002) 55 Social Science & Medicine 141, 142
[89] Suzanne Mackenzie, 'Restructuring the Relations of Work and Life: Women as Environmental Actors, Feminism as Geographic Analysis' (1999) 6 Gender, Place & Culture 417

public spaces. The physical layout of the home tends to support and facilitate caring activities in a way that public spaces do not. It may have been specially adapted to further support care, whether that is in the form of 'child-proofing', or the installation of specific disability aids. The idealised detached family home[90] is thought to provide the ideal space for caring in the family context, offering space designed for the nurturing of children as well as privacy from the outside world.

By making care 'belong' in the home, it is simultaneously reinforced that it does *not* belong in the public realm. Public spaces are constructed without caregivers and their dependents in mind. Day's research on women's experiences of public spaces demonstrates that these can present as a threat or danger.[91] In particular, she found that the physical layout of many public spaces made them difficult and perilous for the carer and her dependents to navigate, leading to a natural confinement to the perceived safety of the home. Often there was an absence of facilities to enable caring to take place effectively in the public space. As she argues, the planning and construction of public spaces is "based on the assumption that women will stay home in the suburbs, caring for children and the home".[92] On the other hand, public spaces are largely built with able-bodied adults in mind, specifically those who do not have caring responsibilities. By making the public arena an inaccessible space, the state seeks to implicitly exclude care and those who perform it from public view.

Home as a Feminine Space

Home comes to be understood as a feminine space, thus normalising, and reinforcing the gendered caregiving myth. For instance, Darke has argued that "many of us, men and women, identify the home with the fantasy 'good mother', a place where we are accepted

[90] See Margaret Jane Radin, 'Residential Rent Control' (1986) Philosophy & Public Affairs 350, 364
[91] Kristen Day, 'The Ethic of Care and Women's Experiences of Public Space' (2000) 20 Journal of Environmental Psychology 103
[92] Ibid, 109

for what we are, that nurtures us and restores us so that after a time we can go out into the judgemental world again."[93] The home thus becomes synonymous with societal ideals of womanhood, which are heavily based on biological essentialism. Price has argued that:

> the imagery and vocabulary that feminize that space is subtly ubiquitous in the images of enclosure, protection, and warmth that connote both the womb and the vagina in a masculine imagination of enclosing safety, security, and dreamy warmth, that is simultaneously a point of origin and a desired goal.[94]

This idealisation of home and its links with femininity, nurture, and reproduction help to designate it as a sacred and mythical place, far removed from the harsh reality of the marketplace, or indeed the courtroom. These public spaces are thought of as cold and stark in contrast to the warmth of the home, reinforcing once more that neither the home, nor the altruistic carer who occupies it, belongs in the legal or commercial realm.

Like the sentimentalisation of care evident in the case law, infusing the space of the home with emotion marks it out as incompatible with work and financial reward.[95] As Fox has remarked, English property law (which is based around ideals of autonomy and rationality) tends to view the home in abstract terms, as no more than a financial asset.[96] At the same time, legal discourses romanticise women's relationship to the home, using this as a justification to deny them an equitable interest. The court's rejection of female caregiving contributions in *Coombes v Smith* and *Thomson v Humphrey* sends the additional message that, for women, the home is primarily an emotional space; the arena in which their relational duties are performed, rather than the financial investment that it usually represents for men. Their relationship to the home is often framed in terms of their caring obligations. For

[93] Jane Darke, 'Women and the Meaning of Home' in Rose Gilroy and Roberta Woods (eds) *Housing Women* (Routledge 1994), 21
[94] Joshua M Price, 'The Apotheosis of Home and the Maintenance of Spaces of Violence' (2002) 17 Hypatia 39
[95] See Eileen Boris, 'The Home as a Workplace: Deconstructing Dichotomies' (1994) 39 International Review of Social History 415
[96] Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart 2007), 27

instance, in *Coombes v Smith*, the court acknowledged that the plaintiff was entitled to live in the home until her child was 17, but that thereafter, she would have no further interest in it.[97] Thus, she was permitted to continue to perform her social role as a mother, raising the parties' joint child on her own, but once this had come to an end, she would have no further relationship to the place that she had occupied and worked in for nearly two decades.

Caregivers' Relational Vulnerability

This section turns to the impact that the romanticised ideal of the altruistic care has on the homemaker. As shown above, the altruistic carer myth presents a façade to the outside world, whereby caregiving is seen purely as a source of joyful fulfilment rather than as an embodied, emotional form of labour, situated in the context of a network of relationships, and comprising both moments of joy and times of frustration. The altruistic carer myth largely conceals the economic, emotional, and spatial aspects of the specific harms to which caregivers are exposed. This section seeks to illuminate them.

Economic Vulnerability: The Problems with Compensation

Those who perform informal care in the home are at increased risk of becoming economically vulnerable because informal care is unpaid. It is unpaid because care is thought to be inherently incompatible with, and incapable of, financial valuation and because it is performed within the context of an intimate relationship. There are two aspects to the perceived incompatibility between care and remuneration that demand further interrogation. Firstly, under the altruistic carer myth, it is not thought possible to care *and* demand economic recompense because financial motivations can never be truly caring ones. Secondly, care is not thought to *have* an economic value because it is unproductive and benefits only the immediate family and not wider society.

[97] *Coombes v Smith* (1986) (n 48)

The idealisation of the heterosexual married family and its designation in social policy as the ideal source of care perpetuates the myth that certain individuals are 'predestined' to be carers. For example, rhetoric of the natural bond that exists between mothers and children means that the work performed by a mother is not considered in economic terms at all.[98] As Barlow writes, reflecting the existence of the gender contract, care is seen as "the moral duty of the good wife, mother or daughter, with no economic value as such but which is performed in exchange for the male breadwinner's legal and/or moral duty to provide financial support."[99]

As Jonathan Parker QC iterated in *Coombes v Smith,* it is "wholly unreal, to put it mildly"[100] to suggest that motherhood itself should entitle a woman to a share of her partner's assets. The unpaid nature of care is presented within the legal framework as natural; a matter of common sense. As Roberts argues, "wherever there is intimacy, there is no compensation".[101] Evidence of this attitude can be seen in Lord Hodson's comments in *Pettitt v Pettitt*, where he opined that "[t]he conception of a normal married couple spending the long winter evenings hammering out agreement about their possessions appears grotesque".[102]

Even if it were accepted that caring labour performed by cohabitants should be compensated in some way, there would be significant issues with regards to how precisely the financial value of this work can be calculated. Hoskyns and Rai have gone so far as to argue that socially reproductive labour, including care, is fundamentally "incapable" of being

[98]See Herring (2013), (n 9), 6
[99] Anne Barlow, 'Configuration(s) of Unpaid Caregiving within Current Legal Discourse In and Around the Family' (2007) 58 Northern Ireland Legal Quarterly 251, 251
[100] *Coombes v Smith* (1986), (n 48), 819 (Jonathan Parker QC)
[101] Roberts (1997), (n 33), 79
[102] *Pettitt v Pettitt* [1970] AC 777, 810 (Lord Hodson)

measured in purely economic terms.[103] This illustrates that it is not sufficient to merely say that carers should be compensated. The basis for their compensation needs to be carefully considered.

The case law reveals that the judiciary struggles with the idea of valuing care in economic terms where it is performed in a family setting. Instead, the language of need and obligation is used to place a responsibility on economically stronger parties to make provision for those who have provided care. As Lady Hale commented about childcare in the Scottish case *Gow v Grant,"*[i]t may be very difficult to say that the other party has derived any economic advantage from those sacrifices, but it is entirely fair that he should compensate the children's carer for the disadvantages that she has suffered."[104] Although the position in *Gow* represents an improvement on the position of unmarried carers in English law, it still denies that care *by itself* may have any financial value.

The struggle to value care is symptomatic of a wider problem, which is that the dominant myths and discourses have always separated caregiving from any notion of economic production. In reality, care and economic work are inextricably linked, and one cannot function without the other. Caregiving can only take place with the assistance of economic resources and economic work can only take place if other members of the population undertake to care for those who are unable to be economically productive. Yet, in liberal society, this link is downplayed or completely hidden from view. Additionally, care is devalued, not just in Western society, but on a global level.[105] This does not simply extend to informal care in the home. The majority of professional care is performed by individuals

[103] Shirin M Rai, Catherine Hoskyns and Dania Thomas, 'Depletion: The Cost of Social Reproduction' (2014) 16 International Feminist Journal of Politics 86, 87
[104] *Gow v Grant* [2012] UKSC 29, [51] (Lady Hale)
[105] See Catherine Hoskyns and Shirin M Rai, 'Recasting the Global Political Economy: Counting Women's Unpaid Work' (2007) 12 New Political Economy 297

who are *already* economically vulnerable and socially marginalised. Most aspects of professional care are considered low-skilled and the work is overwhelmingly carried out by women, often migrant women from the Global South.[106] The sentimentalisation of care does not just operate in the family home, but has also placed a huge additional burden on professional carers.[107] Despite their low pay, they are expected to 'care' in the emotional sense of the word, performing not only the gruelling manual aspects of care, but having a good 'bedside manner' in addition. The media frequently informs us of 'uncaring carers' who neglect their charges and patients, making little mention of the extent to which the persons who perform this work are underpaid and socially marginalised and often work in the most difficult of conditions. Therefore, even in the professional sphere, the image of the altruistic carer dominates and there is an expectation to care without sufficient recompense.[108]

The devaluation of care means that even if the court attempted to place an economic value on work performed by the cohabiting homemaker, it would be likely to use the low wages of professional carers as a yardstick. This ignores that the true economic value lies in *not* having to care, or rather, not having to care in a material sense. Here I am referring to the theoretical distinction made between *caring for* and *caring about*.[109] As Ungerson has noted, it is possible to *care about* an individual without having to expend any time on physical labour in the way that *caring for* someone requires.[110] Men are often able to merely *care about* family members, whereas the same would be insufficient for women, who are

[106] See ibid, and Ann Stewart, 'Who Do we Care About? Reflections on Gender Justice in a Global Market' (2007) 58 Northern Ireland Legal Quarterly 358
[107] See Hayes (2017), (n 60)
[108] Ibid
[109] See Joan C Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (Psychology Press 1993); Clare Ungerson 'Why do Women Care?' in J Finch and D Groves (eds), *A Labour of Love: Women, Work and Caring* (Routledge 1983); and Herring (2013), (n 9)
[110] Ungerson (1983), (ibid), 32

expected to perform caregiving work. Those that are relieved of the burdens of care (through the work of others) have an invaluable asset. It enables freedom to progress one's career, the ability to acquire material resources, both long-term and short-term. It provides the best guarantee possible of a future that will be unmarred by concerns about housing, poverty, and healthcare. Therefore, the real focus should not necessarily be on how we can measure care in monetary terms, but rather on the enormous financial benefit that is gained by non-carers, who are still able to enjoy family life, but with relatively limited associated financial sacrifice.

Direct financial dependency of carers becomes almost an inevitability.[111] The allocation of responsibility for care to the private family means that the dependencies that it creates will be obscured from public view and instead the homemaker will be reliant on her partner rather than on the state. Where the parties are married, this dependency may also continue post-divorce in the form of spousal maintenance. Sentimentalised discourses of care seek to obscure this economic element of caregiving, pretending that affection is the only necessary ingredient for care. In fact, effective caregiving can only take place if there are sufficient material resources in the form of food, clothes, heating, and healthcare. It is no coincidence that those that the state deems unable, or unfit, to care usually come from the lowest socio-economic groups.[112]

Currently, the only way in which the cohabiting homemaker could obtain provision to meet her own derivative needs is if she is a resident parent who makes a claim under Schedule 1 of the Children Act 1989. Here, the judiciary has engaged in creative interpretations of the statute to justify financial awards to parent carers.[113] While this is not an avenue available

[111] See Finch and Groves (1983), (n 69), 24
[112] E.g. those parents whose standard of care falls below the threshold standard set out in s 31of the Children Act 1989
[113] See also *A (A Minor: Financial Provision)* [1994] 1 FLR 657 and *H v C* [2009] 2 FLR 1540

for all caregivers, the judicial approach in this area merits some attention, as it demonstrates an awareness of the deeply interconnected nature of carer and dependent needs, something that is often overlooked in the dominant discourse of the altruistic carer that exists in the constructive trust and estoppel case law.

In *Re P (Child: Financial Provision)*, Thorpe LJ commented that:

> the court must recognise the responsibility, and often the sacrifice, of the unmarried parent (generally the mother) who is to be the primary carer for the child, perhaps the exclusive carer if the absent parent disassociates from the child. In order to discharge this responsibility, the carer must have control of a budget that reflects her position and the position of the father, both social and financial.[114]

The above shows explicit recognition of derivative dependency. Care is not a mere sentiment, and more than love is needed for it to be performed to a satisfactory standard. The Schedule 1 cases have used rights-based arguments to justify enhanced awards. In *Re P*, Bodey J explained that "[o]ne of the "... financial needs of the child..." …is for him or her to be cared for by a mother who is in a position, both financially and generally, to provide that caring."[115] This approach contrasts to the neoliberal political policies that expect the private family to perform its caregiving obligations without adequate support.

Although the recognition of derivative dependency in the Schedule 1 cases is positive, the language in which this is framed is troubling. Sir George Baker in *Haroutunian v Jennings* reasoned that "the mother may well be forced and rightly forced to give up employment or not to take employment in order to look after a child. It seems to me perfectly proper that that should be reflected in a maintenance order for the child."[116] There are clear references to the altruistic carer myth in Sir George Baker's comments. He mentions that the mother

[114] *Re P (Child: Financial Provision)* [2003] 2 FLR 865, [49] (Thorpe LJ)
[115] Ibid, [67] (Bodey J)
[116] *Haroutuian v Jennings* [1980] 1 FLR 62, 65 (Sir George Baker P)

(and the cases on derivative dependency almost invariably concern female carers) is "rightly forced" to give up her earning capacity, reflecting the gender-contract and the expectation of female self-sacrifice. Notably, any order must be expressed as being for the benefit of the child, rather than for the mother herself. This is not a criticism of the judiciary; the statute only enables orders for the child's benefit and, indeed, the judicial creativity in this area should be commended. However, it betrays a tendency within the altruistic carer myth for the caregiver's identity to cease to exist in its own right and simply be subsumed within that of her dependent and her relational role. In *Haroutunian*, the claimant is merely a 'mother'. Her own needs are not considered important.

Emotional Vulnerability: The Burdens of Caregiving

Those who provide care are also at risk of emotional vulnerability. The issues relating to the homemaker's lack of decision-making power within the relationship that were discussed previously will be applicable here.[117] However, there are a number of issues that are particularly relevant to the caring context.

As argued in Chapter 1, the individual always makes decisions in a relational context, taking account of how her choices will affect those contained within her relational network. Arguably, this is even more pronounced in the case of care, where the homemaker has to consider not only potential harm to herself, but also potential harm to someone who is directly dependent on her. This is evidence of what Kittay has termed "derived dependencies", defined as the "psychological, political and social dependency" that accompanies economic dependency.[118] This derived dependency may cause the caregiver to lose a certain degree of autonomy within her relationship. She will be particularly dependent

[117] See Chapter 3, p 107
[118] Kittay (1999), (n 70), 42

on the survival of the relationship because its breakdown will affect not just her but also her dependents.

Young has described autonomy as involving the ability "to make choices about one's life and to act on those choices without having to obey others, meet their conditions, or fear their threats and punishments".[119] This is especially relevant in those relationships that can be characterised as harmful, where the inherent imbalances between the parties manifest themselves as physical, sexual, emotional, or financial abuse. The homemaker's financial dependency is already a factor that may prevent her from leaving these relationships if they are unhappy or abusive.[120] However, this may be exacerbated where she also needs to consider the position of her dependents. While she may feel able to withstand potential harm to herself if she left the relationship, she may feel less able to do so if those that she cares for would also be subjected to harm. For instance, research on domestic abuse suggests that 'staying for the sake of the children' is a significant factor preventing women from leaving violent or otherwise abusive relationships.[121]

Emotional vulnerability can also arise from the perceived societal lack of value of care in certain relational contexts. As argued above, the sentimentalisation and privatisation of care means that it is categorised and assigned a value depending on the relationship in which it is performed, with the married heterosexual family at the top of this hierarchy. Certain caring contexts are more likely than others to be marginalised. For example, parenthood (especially motherhood) within ideal married family, is generally held in higher esteem by society than

[119] Iris Marion Young, 'Mothers, Citizenship, and Independence: A Critique of Pure Family Values' (1995) 105 Ethics 535, 548
[120] Susan Moller Okin, *Gender, Justice and the Family* (Basic Books1989)
[121] See Michael J Strube and Linda S Barbour, 'The Decision to Leave an Abusive Relationship: Economic Dependence and Psychological Commitment' (1983) Journal of Marriage and the Family 785, 788

others forms of care, such as elder or disability care.[122] Barlow has further argued that there is a "sliding scale" of the value of care within different forms of intimate relationship.[123] Within the context of marriage, law has made a clear policy statement that caring for a dependent is to be treated as being of equal value to financial contributions,[124] although as Barlow points out, "its value is only realisable on divorce",[125] and does not bring with it rewards during the course of the relationship. Therefore, even though the married caregiver may suffer a loss of autonomy during the marriage, she can gain a degree of resilience on its breakdown. Conversely, caregiving within unmarried relationships is not given the same proclaimed value as that within marriage, despite the unmarried family performing similar social functions to the married one. Law's failure to permit property redistribution upon relationship breakdown means that any financial disparity between the homemaker and her partner is likely to continue after the relationship has ended.

Finally, the way the sentimentalised discourses of care obscure its embodied reality means that the homemaker may experience negative emotions in relation to her work. The nature of caregiving in the home environment means that the homemaker is constantly 'on duty' and gets little respite. In contrast to economic work, which is contained into the working day and free time, caregiving is constant and relentless. This is likely to pose particular problems where the homemaker is also engaged in paid work outside of the home. The 'second shift' phenomenon is especially relevant in the context of care, whereby the homemaker frequently suffers the effects of having to juggle her simultaneous commitments of the home and at work. As McKie et al argue:

[122] Olivia Smith, 'Litigating Discrimination on Grounds of Family Status' (2014) 22 Feminist Legal Studies 175
[123] Barlow (2007), (n 99), 252
[124] *White v White* [2001] 1 AC 596
[125] Barlow (2007), (n 99), 253

> Women live out the contradictions of their identification and preoccupation with both care and their paid work in their daily activities. Worrying about what to cook for supper or organizing the children's dental appointments can intrude on work time while the concerns of work can impinge upon both mothers' tempers and their caring time at home.[126]

The psychological impact of being required to be in two places at the same time is something that is not experienced by those who are relieved of the majority of their caring obligations. To be a model employee, the homemaker must ensure that her responsibilities in the home do not spill over into the public sphere. If they do, she is accused of not pulling her weight. Yet, she is also criticised and made to feel guilty if she prioritises her career over family life, as this does not fit with the narrative of the altruistic 'good mother'. The result of this inherent conflict and dual expectation is a fraught existence in which the homemaker is expected to be all things to all people, but with a permanent sense that she can never be enough.

Spatial Vulnerability: A Sense of Confinement

Although neoliberal discourse designates the home as the setting for informal care, much of this is focused on the perceived advantages to the *dependent* to be cared for in her own home.[127] The home provides security, dignity, familiarity, and the presence of the dependent's own belongings, all of which enhance the caring experience. In the case of elderly care, the home setting is also depicted as offering the dependent a degree of autonomy that is not present in institutions.[128] By contrast, relatively little attention is given to whether the home in fact represents the ideal location for those who perform caring work. The non-owning cohabitant will be especially vulnerable to the loss of her home. Her relationship is her only claim to her presence there. Where care takes place in the

[126] See Linda McKie, Susan Gregory and Sophia Bowlby, 'Shadow Times: The Temporal and Spatial Frameworks and Experiences of Caring and Working' (2002) 36 Sociology 897, 913
[127] Williams (2002), (n 88)
[128]See Iris Marion Young, 'A Room of One's Own: Old Age, Extended Care, and Privacy' in Beate Rossler (ed), *Privacies: Philosophical Evaluations* (Stanford University Press 2004)

homemaker's own home, the dependent will of course also lose her home when the homemaker's relationship breaks down. This means that the homemaker and her dependents are particularly dependent on the relationship surviving.

There are other aspects of the spatial organisation of care that can render the homemaker particularly vulnerable. For the dependent (whether childcare, elderly care, or care for those with disabilities), the home setting is connected with enhanced wellbeing and autonomy.[129] However, for those who provide care, the home as the setting for care can have the opposite impact and lead to a feeling of entrapment and social isolation. Because public spaces are not designed with the caregiving relationship in mind, caregivers may hesitate to venture too far from the familiarity of the home, leading to geographical confinement. Madigan et al have remarked that the spatial segregation between residential and non-residential areas can have a claustrophobic effect on women, who are encouraged to remain in the safe suburbs, rather than entering economic and public zones.[130] In effect, a 'caring zone' is created, protecting those who reside within it, but also preventing them from breaking free of its boundaries.[131] The geographical boundaries of the caring relationship impact on the extent to which caregivers can participate in the economic sphere, because they are expected to spatially orientate themselves around their dependents and never to be too far away.

The home and its spatial location and boundaries also reinforces the dominant sentimentalised discourse around care. For example, the image of the ideal mother is one who cares for her children in the home, rather than delegating some caring responsibilities to state institutions. This romanticised view of motherhood seeks to encourage women to

[129] See Williams (2002), (n 88)
[130] Ruth Madigan, Moira Munro and Susan J Smith, 'Gender and the Meaning of the Home' (1990) 14 International Journal of Urban and Regional Research 625
[131] See Francis Michael Longstreth Thompson, *The Rise of Suburbia* (Burns & Oates 1982)

remain in their homes and to be constantly available to their children.[132] This is further reinforced by the high price of professional care, meaning that moving care outside of the home, and giving the homemaker a chance of getting respite, is often not a realistic option. Designating care to the home effectively creates a geographical boundary, limiting the extent to which homemakers can undertake paid work. Yet the state ignores the existence of this and instead expects "a seamless shift from home to work",[133] overlooking the spatial struggles that caregivers experience while trying to navigate the boundaries between the public and the private. It is a further example of the state's impossible demand that the homemaker be simultaneously fully present in both the home and the workplace.

The homemaker's lack of her own private space is also problematic where caregiving takes place in her home. The rise in private spaces within the home, including own rooms for children, has not extended to giving women private space, but rather that they are expected to 'make room' for other family members.[134] Whitehorn has argued that "[w]omen have real difficulty in knowing what if anything is their own exact territory. In one sense a woman controls the whole house: but in another she may feel she owns nothing personally but her side of the wardrobe".[135] The homemaker's lack of ownership and control of the home space is also indicative of the way that adopting the role of homemaker forces one to abandon a part of one's identity.[136] Instead, the homemaker's identity is subsumed within that of other people: her partner and her dependents. To fit with the dominant image of the altruistic carer, women are expected to give up not only their earning capacity, but also part of themselves

[132] See Petra Büskens, 'The Impossibility of 'Natural Parenting' for Modern Mothers: On Social Structure and the Formation of Habit' (2001) 3 Journal of the Motherhood Initiative for Research and Community Involvement 75
[133] McKie et al (2002), (n 126), 898
[134] Ruth Madigan and Moira Munro, 'Gender, House and 'Home': Social Meanings and Domestic Architecture in Britain' (1991) 8 Journal of Architectural and Planning Research 116, 127
[135]Katharine Whitehorn 'What's Ours is Really Mine' (*The Observer*, 4 October 1987), discussed in Josephine Little, *Gender, Planning, and the Policy Process* (Pergamon Press 1994), 155
[136] Iris Marion Young, 'House and Home: Feminist Variations on a Theme' in Iris Marion Young (ed), *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press 2005), 1

to assume the socially constructed identity of the good mother, wife, or daughter.[137] This is further reinforced by homespaces that provide confinement instead of privacy and refuge.

The loss of home in connection with relationship breakdown will have a particularly significant impact where the homemaker has ongoing caring obligations and has to find a new home not only for herself, but for her dependents. The lack of permanence associated with private rented accommodation can make caregiving difficult and can be a source of stress. Valverde has likened homes to "containers" that are designed to fit particular human contents.[138] For example, the idealised 'single family detached' home is constructed with the heterosexual nuclear married family in mind, whereas apartments are deemed to be more suited to single people. Upon relationship breakdown, the homemaker may be forced to occupy accommodation into which she does not easily 'fit', leading to a sense of failing to live up to social expectations. Her lack of fit may also impact on the accommodation available to her, with private landlords preferring to rent to financially affluent professionals, and mortgage companies employing restrictive lending practices. Additionally, being confined to rented accommodation upon relationship breakdown may restrict some of the aspects that are thought to be psychologically beneficial for dependents, especially in the case of childcare. For instance, the ability to decorate bedrooms or keep pets, is often prohibited in rented accommodation.[139]

Conclusion

The aim of this chapter was to apply the relational vulnerability framework in the context of caring labour in the home. I was particularly concerned with the way law treats those who attempt to rely on caring contributions to found a claim to a share in the home, as well as

[137] Ibid
[138] Mariana Valverde, Chronotopes of Law: Jurisdiction, Scale and Governance (Routledge 2015)
[139] See Hazel Easthope, 'Making a Rental Property Home' (2014) 29 Housing Studies 579

the specific ways in which the dominant legal and societal construction of care comes to impact on the homemaker.

Informal care performed in the context of an intimate relationship has traditionally been consigned to the private sphere. Whereas this imagined private sphere is often described as a place free from legal intervention, I argued that, like the public sphere, the private realm is laden with ideology and myth, operating to shape legal and political understandings of care. The influence of the ideal of the altruistic carer is particularly strong in the private sphere, operating as a contrast to the autonomous liberal subject identified in Chapter 2. Through reference to an imagined altruistic caregiver, law constructs care as simultaneously gendered, sentimentalised, and private. This is reinforced not only through case law, but also on a material level, through the geographical separation between the public and the private sphere.

As analysis of the case law demonstrated, courts are particularly uncomfortable with the notion that female carers should be economically motivated. This reflects the strong association of caregiving with femininity, the former being understood as a natural part of being a woman. To gain a share in the home, female caregivers must go above and beyond what is expected of them. By contrast, male carers operate as a challenge to the dominant paradigm and the court is more prepared to find that money rather than affection motivated their acts.

Finally, I examined the way that the idealised construction of care impacts on the homemaker. I argued that the reconstruction of her experiences through the prism of the altruistic carer operated both to deny the day-to-day realities of caring as well as the wider public value of care as a means of sustaining the population. However, this is an unsurprising

symptom of the neoliberal state's understanding of the individual as rational, autonomous, and individualistic.

CHAPTER 5: RELATIONAL VULNERABILITY AND DOMESTIC WORK

Introduction

This chapter applies the relational vulnerability framework to the context of domestic work. There is a significant overlap between care (discussed in the last chapter) and domestic work, but the two are conceptually distinct and merit separate consideration. Care refers to the socially reproductive work of sustaining people, whereas domestic work involves the creation and maintenance of the home, as well as the support of economic production. While in recent years, there has been increased legal attention to the rights of carers and their experiences,[1] daily domestic tasks such as cleaning, food preparation, and home maintenance remain firmly consigned to the private realm and out of sight. With women's role in the workplace becoming more prominent, their work in the domestic sphere is no longer thought to be as relevant, even within the feminist literature.[2] As Valverde has noted, "the 'hidden in the household' everyday subjectivity or consciousness… does not now appear nearly as interesting as the far less individualised situation of people in locales that are so far removed from the writer's own".[3] This abandonment of domestic work is problematic. The requirement for the constant and arduous labour involved in 'making the home' has by no means lessened as women have become more economically active. Instead, housework is simply expected to be fitted around working hours, adding a significant burden to the homemaker's workload.

Working in the home, or indeed working *on* the home by constructing it or maintaining it does not guarantee an individual a beneficial interest. However, some types of work are preferred to others. As I show in this chapter, the constructive trust and estoppel cases reveal

[1] See discussion in Chapter 4, p 131
[2] Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and* Governance (Routledge 2015), 20
[3] Ibid, 106

that there is a hierarchy of domestic work, both in terms of value and visibility. These hierarchies are also visible on a material level, through the home's layout and organisation. Work that is legally visible and valuable, such as building, construction, or renovation of the home, tends to also have visibility in a real sense, in that it creates changes to the nature of the home rather than merely maintaining its value. By contrast, the equally vital daily routines of producing and maintaining the home, ensuring that it is a place of comfort for other family members, and preserving the memories contained within its confines, is invisible both legally and materially. Not coincidentally, it is the latter invisible form of work that is predominantly undertaken by women. Building and construction, on the other hand, remains a largely male domain.[4]

As in the previous chapter, my aim in this chapter is to expose the myths and ideologies underlying the way that domestic work is viewed in the legal framework and the impact this has on the homemaker. Although the distinctions that are drawn between different forms of work are depicted as a matter of common sense within the cases, they betray adherence to an ideology, or myth of "domesticity",[5] Like the altruistic carer myth in the previous chapter, the domesticity myth is heavily gendered and proclaims that women are naturally orientated towards the home and have primary responsibility for the daily tasks of maintenance and preservation of the space. Women's increased presence in the public realm workplace has not caused the influence of domesticity to disappear.[6] Women still perform the majority of household work, especially if they also perform caring labour.[7]

[4] Iris Marion Young, 'House and Home: Feminist Variations on a Theme' in Iris Marion Young (ed), *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press 2005), 5
[5] Ruth Madigan, Moira Munro and Susan J Smith, 'Gender and the Meaning of the Home' (1990) 14 International Journal of Urban and Regional Research 625, 629
[6] See Brenda Cossman and Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (University of Toronto Press 2002), 25-26
[7] See Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 Edinburgh Law Review 311

Below, I chart the manifestation of domesticity within the case law. As with caregiving labour, judicial discourses frequently seek to reconceptualise domestic work as gendered, sentimentalised, and privatised. When women perform domestic work, it becomes a 'labour of love' rather than unwaged work; a relational endeavour that is considered too remote from the question of property rights to merit an interest in the home. Even where women's work falls into more traditionally commercial categories, such as working in a family business, the influence of domesticity remains strong, and financial reward often eludes them. As with the carer myth, the domesticity myth leaves the homemaker open to various economic, emotional, and spatial harms, both during the relationship and upon its breakdown.

The Legal Status of Domestic Work

In law's eyes, domestic work is generally not 'work' at all. Labour laws and protections (such as minimum wage, equal pay, working time, and maternity provisions) do not apply to work that is carried out in the worker's own home and for the main benefit of the worker and her family. It is considered to be unproductive and without value outside of the immediate private family.[8] As Silbaugh argues, this is not merely due to its unpaid nature, but also its geographical location and relational context.[9]

The separation of domestic work from paid work rests on the notion that it is possible to easily divide home life (the private sphere) from work life (the public sphere).[10] The separation of work and home also impacts negatively on professional homeworkers, i.e. those who undertake paid work within the setting of another person's home,[11] reflecting

[8] Jeanne Boydston *Home and Work: Housework, Wages, and the Ideology of Labor in the Early Republic* (Oxford University Press USA 2009)
[9] See Katharine Silbaugh, 'Turning Labor into Love: Housework and the Law' (1996) 91 Northwestern University Law Review 1
[10] See Sherry B Ahrentzen, 'Home as a Workplace in the Lives of Women' in Setha M Low and Irwin Altman (eds) *Place Attachment* (Springer 1992), 113
[11] LJB Hayes, Stories of Care: A Labour of Law: Gender and Class at Work (Palgrave Macmillan 2017), 5

law's struggle to reconcile the idea of the home as both a place of privacy and a workplace. Straddling the public and the private realms, homeworkers tend to have fewer legal protections than those whose work takes place outside the home-setting.[12] Domestic work in the worker's *own* home on the other hand lies completely outside the realm of labour law. It is considered a completely private endeavour, any question of remuneration for past work arising only when the family relationship breaks down.

Legal Categories and Hierarchies of Domestic Work

Within the umbrella of 'domestic work', there are three conceptually distinct subcategories evident in the constructive trust and estoppel case law, each with a different level of perceived value and legal visibility. The first subcategory is what Philipps terms "unpaid market labour".[13] This is work that is carried out in the context of a family business or enterprise. The work in question has an economic link, but the homemaker who performs it is not personally remunerated for it because the business is not in her name. Several of the constructive trust and estoppel cases involve unpaid market labour, including *James v Thomas*[14] (agricultural building and drainage), *Curran v Collins*[15] (dog kennels and show breeding), and *Geary v Rankine*[16] (running a guest house). As I explore in greater detail below, courts have shown a tendency to be more comfortable and familiar with rewarding unpaid market labour than other types of domestic work.[17] It is arguably easier to quantify and to value than the other two types, especially given the court's ability to compare a claimant to an employee or a business partner and thus evaluate her contribution.

[12] Ibid and Ahrentzen (1992), (n 10)
[13] Lisa Philipps, 'Helping Out in the Family Firm: The Legal Treatment of Unpaid Market Labor' (2008) 23 Wisconsin Journal of Law, Gender and Society 65
[14] *James v Thomas* [2007] EWCA Civ 1212
[15] *Curran v Collins* [2015] EWCA Civ 404
[16] *Geary v Rankine* [2012] EWCA Civ 555
[17] See also Philipps (2008), (n 13), 83

In the second category, I use the term 'construction' to refer not only to building-work or renovation of a dwelling house, but also significant DIY work and repairs, redecoration, or improvement to the family home performed by one of the parties to an intimate relationship. It is clear from the case law that courts are at least prepared to consider that the performance of construction work has some tangible value and can constitute evidence of a common intention or detrimental reliance. For example, in *Stack v Dowden*,[18] Baroness Hale used the example of "where one party has financed (or constructed himself) an extension or substantial improvement to the property, so that what they have now is significantly different from what they had then",[19] and suggested that this could give rise to the inference of an intention that the parties intended to share beneficial ownership of the property. Renovation work was also discussed in *Aspden v Elvy*,[20] where HHJ Behrens said in relation to the claimant's renovation work, which he did not regard as "trivial",[21] that "it is at least arguable that the work carried out by Ms Elvy gives rise to an inference that the common intention of the parties had changed so that it was intended that Ms Elvy should have some interest."[22] What primarily distinguishes construction from the below category of ordinary housework is that it involves *adding* something of value to the home rather than merely preserving it. Furthermore, and in contrast to ordinary housework, construction can often be seen as bringing personal fulfilment and the possession of an element of creative skill. For example, Bowlby et al argue that interior decoration and choosing furniture is depicted as "a major leisure activity that brings couples together."[23]

[18] *Stack v Dowden* [2007] UKHL 17
[19] Ibid, [70] (Baroness Hale)
[20] *Aspden v Elvy* [2012] EWHC 1387
[21] Ibid, [109] (HHJ Behrens)
[22] Ibid, [110] (HHJ Behrens)
[23] Sophie Bowlby, Susan Gregory and Linda McKie, ''Doing home': Patriarchy, Caring, and Space' (1997) 20 Women's Studies International Forum 343, 347

The third category is ordinary housework. This consists primarily of the daily routines of cleaning, cooking, washing clothes, and food shopping. Certain other tasks may need to be performed less frequently, including ordinary maintenance to the house and garden. The daily housework tasks are the ones that are afforded the lowest social status and legal visibility, and are the tasks least likely by themselves to lead to a finding of an interest in the home.[24] As Nedelsky argues, housework is widely viewed as the kind of work "anyone can do",[25] with the implication that it does not require any particular skill. As Roberts has argued, care, particularly caring for children, is often romanticised and described as "spiritual", while ordinary domestic work is deemed to be "menial", contributing to its marginalisation and devaluation in social discourse.[26]

The temporality of housework contributes to its low status. The daily routines of homemaking involve restoring order and tidiness, but seldom producing something tangible or long-lasting which can be pointed to in the future as evidence of a contribution. Furthermore, much of the homemaker's work will be carried out for immediate consumption, for example cooking a family meal. Work such as cleaning and laundry needs to be repeated daily or even more frequently and does not leave evidence of having improved the home. In the context of establishing rights in the family home, the court is simply left with the homemaker's account of what she did, rather than any visible evidence of it.

Housework is often conflated with care, as many of the tasks will be performed at the same time as carrying out caring labour.[27] This reduces the visibility of housework even further because care, as a 'spiritual' endeavour, is considered to be of higher moral value and social

[24] See *Burns v Burns* [1984] Ch 317
[25] Jennifer Nedelsky, 'The Gendered Division of Household Labor: An Issue of Constitutional Rights' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds) *Feminist Constitutionalism: Global Perspectives* (Cambridge University Press 2012), 24
[26] Dorothy E Roberts, 'Spiritual and Menial Housework' (1997) 9 Yale Journal of Law & Feminism 51
[27] Ibid, 79

importance (albeit still unpaid) than housework.[28] Additionally, because informal care usually has an emotional component, its assimilation with housework often means that the latter is often not perceived as work by those who perform it. For instance, Luxton has suggested that homemakers are likely to underestimate the time that they spend on household tasks where these overlap with caring for and spending time with family members, e.g. cooking a meal for others and then consuming it.[29] This can lead to difficulties in obtaining an accurate reflection of the exact amount of time that the homemaker spends on daily housework.

Some housework, such as cleaning, is highly commodified, and those who can afford it are able to pay others to perform at least some of it. Therefore, it can be easily delegated to those of a lower social status.[30] Commodification of domestic work was traditionally offered as a chance for women to escape the demands of the home.[31] However, 'farming out' housework reduces its value even further because a distinction is created between those who are able to delegate housework and those who have to do it themselves. It also reinforces the supposedly menial nature of housework, the idea that it really can be done by 'anybody'. As Meagher has remarked, "by paying others to do work of self-maintenance, we are paying to enhance our social status."[32] Delegation can also downplay the gendered division of housework because affluent women with greater social status and privilege will not carry out the same amount of work as poorer ones. However, delegation is not an adequate solution for homemakers, as it merely shifts the problem to lower socio-economic groups and people who are already at the margins of society.

[28] Ibid
[29] Meg Luxton 'The UN, Women, and Household Labour: Measuring and Valuing Unpaid Work' (1997) 20 Women's Studies International Forum 431
[30] Roberts (1997), (n 26), 54
[31] See Meagher (2002), (n 32)
[32] Gabrielle Meagher, 'Is it Wrong to Pay for Housework?' (2002) 17 Hypatia 52, 57

The above analysis highlights the homemaker's disadvantage where her work takes the form of ordinary housework. This is afforded low status and lacks visibility within legal discourse. Conversely, the homemaker who can show that her work has a link to economic value, either work in a family business or construction work, is likely to have more success in arguing that it should merit a share of the family home. However, as I show in the next section, the dominance of the gendered domesticity myth means that, even where the work is objectively valuable, its gendered and relational context can operate to deny the homemaker a remedy.

The Myth of Domesticity: Domestic Work in Legal and Social Discourse

The legal status of domestic work, and the hierarchies within it, reflects an underlying ideology or myth of domesticity in which the home is constructed as a place of privacy and sanctuary that is operated and controlled by women. This myth perpetuates the belief that women are naturally placed to look after the home. In a similar manner to the altruism myth within the discourses surrounding care, the notion of domesticity permeates the case law, depicting domestic work as gendered, sentimental, and private. Like the altruistic carer myth, the domesticity myth is also based on the existence of the gender-contract, whereby women look after the home and perform unpaid work in fulfilment of their relational roles.

Domesticity rests on the existence of various binaries, including masculine and feminine, the home and the workplace, and the public and the private.[33] It gained particularly widespread influence during the nineteenth century, described by Folbre as a "cult",[34] supporting the notion that men and women possessed inherently different temperaments, which governed their suitability for different tasks. According to the ideology prevalent during the 19th century and the early part of the 20th century, women's delicate, nurturing,

[33] Jessie Bernard *The Female World* (Free Press 1981), 91
[34] Nancy Folbre, 'The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought' (1991) 16 Signs: Journal of Women in Culture and Society 463, 465. See also Boydston (2009), (n 8)

and caring nature, while not inferior, was distinct from men's inherent rationality and assertiveness. Thus, women were directly excluded from the public realm (including the right to vote) 'for their own good'.[35]

The rise in domesticity was accompanied by the advent of capitalism in the middle of the 19th century, leading to production being moved out of the home and into a geographically separate workplace. Homemakers were thus relegated to the status of 'dependent' and their work in the home ceased to have any perceived greater value beyond the immediate family.[36] Furthermore, the home was no longer seen as a site of production and work, but as a place of leisure; a retreat from the hardships of working life. Although she was considered unproductive, the Victorian housewife was praised for reinforcing moral and spiritual values, and the proper social role of women.[37] Female identity thus became anchored in the home; the ideal Victorian woman was described as the "Angel in the House": passive, nurturing, and motivated above all by attending to the needs of her family and creating the ideal home.[38]

Times have of course moved on from the Victorian era, and indeed the 1970s and 1980s when the 'unproductive housewife' very much represented the social expectations of women.[39] Today's homemaker is not barred from entering the public sphere, and indeed often combines homemaking and income-earning. It is tempting to believe that the influence of domesticity has disappeared. As I show below, this is not the case. It has simply become

[35] Joan Perkin *Women and Marriage in Nineteenth-Century England* (Routledge 2002)
[36] Folbre (1991), (n 34), 465
[37] See Carol Christ, 'Victorian Masculinity and the Angel in the House' in Martha Vicinus (ed), *A Widening Sphere: Changing Roles of Victorian Women* (Routledge 2013)
[38] Nicky Gregson and Michelle Lowe, ''Home'-making: On the Spatiality of Daily Social Reproduction in Contemporary Middle-Class Britain' (1995) Transactions of the Institute of British Geographers 224. The term 'Angel in the House' comes from a poem by Coventry Patmore, published in 1854 and dedicated to his wife, whom he believed typified the ideal Victorian housewife.
[39] See the discussion of the Wages for Housework movement in Chapter 1, p 15

increasingly hidden; its existence denied through rhetoric of choice and autonomy. However, domestic work in the case law continues to be viewed in terms that strongly echo the historical ideal of the woman in the home. Domestic work is gendered, with women being expected to perform it as part of their relational role in a way that men are not. The courts artificially sentimentalise women's work by deeming it motivated by affection rather than financial gain. Finally, domestic work is privatised, obscuring its public and performative role in reinforcing, and normalising the myth of domesticity.

A Gendered Pursuit

While both sexes work in the home to some extent, research shows that women generally do more and tend to specialise in the most time-consuming and unpleasant daily tasks such as cooking, cleaning and laundry.[40] In heterosexual relationships, it has also been observed that women carry more of a 'mental load' than men, referring to the fact that even where tasks are relatively evenly allocated between partners, women are usually the ones to assume ultimate responsibility for coordinating and overseeing the running of the house.[41] This gendered division is evident in both married and unmarried relationships, particularly if the couple has children.[42] Whilst the involvement of men in household labour tends to stay fairly constant across the course of a marriage or a marriage-like relationship, empirical research suggests that parenthood has a significant impact on the amount of unpaid housework performed by women, causing them to taken on even more of what is already an unequal division.[43] This suggests that the taking on of caring responsibilities seems to entail an

[40] See e.g Clare Lyonette and Rosemary Crompton, 'Sharing the Load? Partners' Relative Earnings and the Division of Domestic Labour' (2015) 29 Work, Employment and Society 23

[41] See Christine Everingham, 'Engendering Time: Gender Equity and Discourses of Workplace Flexibility' (2002) 11 Time & Society 335, 342

[42] Rosemary Crompton and Clare Lyonette, 'Who Does the Housework? The Division of Labour Within the Home' (2008) 24 British Social Attitudes 53

[43] Janeen Baxter, 'Gender Equality and Participation in Housework: A Cross-National Perspective' (1997) Journal of Comparative Family Studies 220

corresponding automatic assumption of daily housework. Where men do work in the home, their tasks are often of a different nature to women's and are less likely to involve a substantial depletion of leisure time. For example, Silbaugh argues that activities such as DIY, gardening, or non-urgent repairs to the home are less time-consuming and better able to be postponed, and therefore more easily combined with paid economic work.[44]

The visibility and social status of men's work also differs to women's. Construction is an area where women's presence is still almost negligible.[45] On the whole, women do not build; they preserve and maintain what has been constructed by men. Yet, it is only the construction element of making a home that is given social status and visibility. Indeed, building is viewed as a fundamental component of personhood, establishing the individual's position in the world, and shaping the landscape. Young, critiquing Heidegger's work on 'dwelling',[46] has noted that:

> Heidegger says that dwelling is man's mode of being. We dwell by making the places and things that structure and house our activities. These places and things establish relations among each other, between themselves and dwellers, and between dwellers and the surrounding environment…However, Heidegger points out that building in the sense of preserving and nurturing is not making anything.[47]

Housework, under Heidegger's definition, is viewed as a passive activity, simply restoring what is already there, rather than the more assertive activity of producing something new. The high regard for construction can be traced back to Locke's classical theory of property[48] where ownership is justified based on so-called 'labour-mixing'. This is where an individual

[44] Silbaugh (1996), (n 9), 12
[45] Margaret Davies, 'Home and State: Reflections on Metaphor and Practice' (2014) 23 Griffith Law Review 153, 157
[46] Martin Heidegger 'Building, Dwelling, Thinking' in M Heidegger, *Poetry, Language, Thought*, A Hofstadter (trans) vol 154 (Harper Books 1971)
[47] Iris Marion Young, 'House and Home: Feminist Variations on a Theme' in Iris Marion Young (ed), *On Female Body Experience: 'Throwing Like a Girl' and Other Essays* (Oxford University Press 2005), 4
[48] John Locke 'Of Property (from chapter V of Locke's 'Second Treatise of Government') (1689)' in CB Macpherson (ed), *Property: Mainstream and Critical Positions*, vol 214 (University of Toronto Press 1978)

is deemed to have property in her own person and therefore her labour, which is then subsequently 'mixed' with the land through the process of construction. As with Heidegger's work, domestic work is excluded from Locke's theory and English property law generally views housework as being too remote from the question of property rights.[49]

Even where women's work *is* connected to an economic venture, and therefore potentially capable of being assessed in financial terms, they often face a disadvantage in terms of the *type* of work they perform. Again, there is a distinction made between work that, akin to construction, is considered to have direct value to a commercial venture, and that which, like maintenance, is considered peripheral. Finch has argued that a wife's involvement in her husband's business venture often involves performing tasks that are typically viewed as 'women's work', such as cleaning the premises, entertaining, or building relationships with clients and employees.[50] As Phillips has noted, this work means that it is more prone to being overlooked as a real business contribution and is instead viewed "as part of a wife's traditional role in the family business".[51]

The division of domestic work along gendered lines that also conveniently correspond to its perceived social value, has contributed to female oppression throughout history.[52] In her writings as part of the Wages for Housework movements, Federici described unpaid female housework as "one of the most pervasive manipulations, most subtle and mystified forms of violence that capitalism has perpetrated against any section of the working class."[53] That statement was made in 1975 and, as I have noted, any modern analysis of the status of

[49] *James v Thomas*, (n 14)
[50] Janet Finch, *Married to the Job* (George Allen & Unwin 1983)
[51] Philipps (2008), (n 13), 96
[52] See Ann Oakley, *Woman's Work: The Housewife, Past and Present* (Vintage 1974); and Silvia Federici, *Wages Against Housework* (Falling Wall Press 1975)
[53] Federici (1975), ibid, 76

domestic work has to take account of the social shifts that have taken place since then.[54] The question is whether modern women are still being manipulated by the domesticity myth in a time when equality legislation appears to have removed any existing barriers to entering the workplace. The answer is that there is a marked disparity between the legal position (i.e. that an employer is not permitted to discriminate on the grounds of sex) and the reality of women's employment. In terms of crude numbers, women indeed participate in paid work in a higher proportion compared to the 1980s. However, a gender pay gap exists, whereby women do not reach the top of their professions in the same numbers as men. The legal profession is a prime example. At undergraduate level, female law students far outnumber male ones.[55] In the case of both solicitors and barristers, there are more women than men entering the profession at the point of qualification.[56] The gap only becomes evident at a later stage.[57] Of the 119 new Queen's Counsel appointed in 2018, only 32 were female, representing just over one quarter of those appointed.[58]

The neoliberal response is that women choose to take on fewer responsibilities at work and indeed, in the case of barristers, there were only 50 female applications for silk, representing a relatively high success rate for those who did apply.[59] What is often lost in the choice-based rhetoric is the correlation between women doing more work in the home and earning lower wages in their employment. Research has indicated that women's dual burden in the

[54] See Chapter 1, p 15
[55] See Law Society of England and Wales *Entry Trends (2016)* http://www.lawsociety.org.uk/law-careers/becoming-a-solicitor/entry-trends/ (accessed 13 August 2018), which showed that, in 2016, 67.5% of undergraduate law students were female and 32.5% were male.
[56] According to the Law Society *Entry Trends* (ibid), of the newly qualified solicitors entered on the roll in the year preceding 31 July 2016, 61.5% were female and 38.5% were male. At the Bar, the ratio of pupils in 2017 was 51.7% female and 48.3% male (see Bar Standards Board *Report on Diversity at the Bar 2017* (January 2018)).
[57] According to the *Report on Diversity at the Bar 2017*, ibid, only 37% of practising barristers were women. In 2017, women made up 14.8% of all Queen's Counsel.
[58] Ministry of Justice Press Release *Lord Chancellor Welcomes Promotion of New Silks* (21 December 2017) https://www.gov.uk/government/news/lord-chancellor-welcomes-promotion-of-new-silks (accessed 13 August 2018)
[59] Ibid

home and workplace often prevents progression in the economic sphere. For example, Hersch and Stratton found that responsibility for tasks that constituted a daily routine, such as cooking and cleaning, was the most likely to contribute to the continuing gender pay gap at work, preventing women from moving up the career ladder by limiting the hours they can work and the responsibilities they can assume.[60] In the case of the English Bar, discussed above, the Bar Council itself acknowledges that competing demands in the home and at work are to blame for a lack of female representation, noting that "the self-employed nature of the profession is a significant barrier to those who wish to have a family and stay in practice".[61] The myth of domesticity, which associates women with the home operates to restrict them from conforming to the imagined autonomous ideal, which presumes that the individual moves seamlessly between public and private and is constantly available to the employer.[62]

'Women's Work' in the Case Law

Within the constructive trust and estoppel case law, judges frequently draw on ideological and mythical visions of how a woman 'should' behave, using these stereotypes to justify certain inferences regarding intentions about ownership. Even where the judiciary strives to achieve equality by proclaiming gender-neutrality, the vision of the ideal family, and specifically the ideal wife, looms large in the background, acting to the significant detriment of the female homemaker.

The most explicit example of judicial endorsement of inherent gender roles and the domesticity myth is undoubtedly Lord Bridge's statement in *Lloyds Bank v Rosset*[63] about

[60] Joni Hersch and Leslie S Stratton, 'Housework and Wages' (2002) Journal of Human Resources 217
[61] Bar Council *Gender and Diversity at the Bar* 23 July 2015 https://www.barcouncil.org.uk/media-centre/news-and-press-releases/2015/july/gender-and-diversity-at-the-bar/ (accessed 13 August 2018)
[62] See e.g. See Linda McKie, Susan Gregory and Sophia Bowlby, 'Shadow Times: The Temporal and Spatial Frameworks and Experiences of Caring and Working' (2002) 36 Sociology 897
[63] *Lloyds Bank v Rosset* [1991] 1 AC 107

Mrs Rosset's "natural" desire as a wife "to spend all the time she could spare and to employ any skills she might have, such as the ability to decorate a room."[64] Here, the possibility of Mrs Rosset having an intention or expectation of a share of the home was expressly negated by what was her innate wifely duty under the gender contract, to decorate and furnish the house in her husband's absence. This was deemed incompatible with financial gain because, according to the domesticity myth, the private realm is governed by altruism rather than self-interest.

Similar appeals to natural gender roles were also used in the controversial (and since overruled) Canadian case *Murdoch v Murdoch*,[65] where the appellant, Mrs Murdoch, was denied a share of her husband's ranch upon divorce following a long marriage and significant farm labour. Mrs Murdoch had run the ranch single-handed while her husband was away for several months each year. She had also performed all the household labour throughout the marriage and reared the parties' children. The majority in the Supreme Court of Canada agreed with the trial judge that "what the appellant had done, while living with the respondent, was the work done by any ranch wife".[66] Even the sole dissenting judge, Laskin J, did not disagree that there are certain social expectations of wives; he merely believed that Mrs Murdoch had exceeded these, explaining that "the wife's contribution, in physical labour at least, to the assets amassed in the name of the husband can only be characterised as extraordinary."[67] Like Mrs Rosset, Mrs Murdoch's work was viewed through the lens of domesticity. Her relational role as a wife meant that certain tasks were expected from her, rendering her unable to demand any compensation for them. It is also notable in *Murdoch* that it was Mrs Murdoch's physical labour on the ranch (a commercial

[64] Ibid, 131 (Lord Bridge)
[65] *Murdoch v Murdoch* [1975] 1 SCR 423
[66] Ibid, 436
[67] Ibid, 439 (Laskin J)

venture) rather than her work in the home (traditionally the woman's domain) that Laskin J considered to be extraordinary. Her housework remained invisible to the judges.

Whereas ordinary housework is unlikely to be sufficient to lead to an inference of an intention to take a share in the home, even when women have performed unpaid market labour and construction, they are held back by domesticity and the gender contract. Evidence of this can also be seen in the way that the court approaches domestic contributions in the context of marriage. In the landmark case *White v White,*[68] the parties were farmers and, throughout their long marriage, had built up assets worth approximately £4.6 million. While both the Court of Appeal and the House of Lords took care to refer to the parties as "equal partners" in the farming business,[69] it was notable that the wife's case had initially not been argued on this basis at all. At first instance, Holman J had viewed the wife's plans to acquire a farm in her own name as unrealistic and fanciful, despite her lifetime of farming experience. He dismissed her plans as having "strong emotional, but little financial, sense."[70] Conversely, the husband, in his view, "does…reasonably require to be able to continue farming in a worthwhile way."[71] While the first instance decision was criticised by the higher courts, who confirmed that a starting point of equal division was appropriate in a case such as this,[72] their speeches reveal that the wife continued to be predominantly defined by her domestic role rather than by her position as a farmer with a long working history. Lord Nicholls explained that, "within the home it was the wife who primarily brought up the children"[73] and, almost as an afterthought, he noted that "she also worked hard in all sorts

[68] *White v White* [2001] 1 AC 596
[69] *White v White* [1999] Fam 304, 312 (Thorpe LJ) and *White v White* [2001], (ibid), 600
[70] Reproduced in *White v White* [1999], ibid, 310
[71] Reproduced in ibid, 311
[72] Although it should be noted that Mrs White did not receive an equal share in this case as the House of Lords considered that her award of £1.5m lay within the acceptable ambit of judicial discretion. For discussion, see Rebecca Bailey-Harris, 'Dividing the Assets on Family Breakdown: The Content of Fairness' (2001) 54 Current Legal Problems 533
[73] *White v White* [2001] (n 69), 602

of ways on the farm."[74] Despite the fact that the children were long since grown up by the time the marriage broke down, Mrs White struggled to break free of the image of housewife. Lord Nicholls clearly placed her in a different realm to her husband when he commented that "if, *in their different spheres*, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets."[75] Even though *White* changed the way that marital assets were divided, moving towards the norm of equal division, Mrs White's status (despite her wealth of farming experience) remained problematically linked to domestic ideology and her role in the home rather than in the commercial sphere.

Women who cross the boundary between public and private and perform domestic work more commonly associated with men may be able to persuade the court that their work should be classed as extraordinary and therefore deserving of recompense. *Eves v Eves*[76] is familiar to family lawyers and property lawyers alike. Here, the plaintiff, Janet Eves, referred to rather disparagingly as the defendant's "mistress" in the headnote, carried out a large amount of renovation work on the home. Lord Denning commented that she "broke up concrete" and "demolished a shed and put up a new shed".[77] In his view, this was "quite an unusual amount of work for a woman" and "much more than most women would do".[78] Thus, a key indicator for valuing the work appeared to be the plaintiff's gender as well as the relational context in which she was performing it. Others in her situation would have done less, so she was able to rely on this work to form the basis of her case. Additionally, she was a 'mistress', meaning that maybe what was expected of her was not as much as that

[74] Ibid
[75] Ibid, 605 (Lord Nicholls) (emphasis added)
[76] *Eves v Eves* [1975] 1 WLR 1338
[77] Ibid, 1340
[78] Ibid

expected of a wife.[79] The problem is that the benchmarks for what is 'to be expected' and what is 'extraordinary' appear to be entirely subjective.

Other cases reveal that even where women appear to exceed expectations in the way that Janet Eves did, a share of the home is not guaranteed, and their domesticity can act as a barrier. As previously discussed, the male same-sex partner in *Culliford v Thorpe*,[80] who renovated the home and helped with the building of an extension found it relatively easy to argue that there was clearly an intention between the partners to share ownership of the home equally, with the claimant's conduct constituting detrimental reliance.[81] By contrast, the female partner in *Coombes v Smith*, described by the judge as "quite the handywoman",[82] had redecorated the home throughout a number of times, installing wooden beams and a central heating system. She had also cleared and tidied the garden.[83] However, these acts were not viewed as constituting detrimental reliance, with the explanation that they "were done by the plaintiff as occupier of the property, as the defendant's mistress, and as [the parties' child's] mother, in the context of a continuing relationship with the defendant."[84] *Coombes* displays the extent to which the evaluation of the plaintiff's work was rooted in her gendered roles; as mother, and as the defendant's lover. These roles defined what others could legitimately expect of her in a way that was not experienced by the claimant in *Culliford*.

The recent High Court case *Dobson v Griffey*[85] offers a modern illustration of the court's remaining difficulties in reconciling women's work with an expectation or intention of a

[79] Cf the use of the term "girl friend" in *Ottey v Grundy* [2003] EWCA Civ 1176, discussed in Chapter 4
[80] *Culliford & Another v Thorpe* [2018] EWHC (Ch) 426
[81] See discussion in Chapter 2, p 62
[82] *Coombes v Smith* [1986] 1 WLR 808, 811
[83] Ibid, 811
[84] Ibid, 820
[85] *Dobson v Griffey* [2018] EWHC (Ch) 1117

share in the home. *Dobson* is a contrast to the approach taken in *Cullifor*d, where the court was ready to find evidence of a common intention. Interestingly, HHJ Paul Matthews was the judge in both cases, heard within a few months of each other. The claimant in *Dobson* had carried out a significant amount of renovation work on a farm that was solely owned by her partner. She explained that she believed it would be her home for life.[86] However, on the facts, HHJ Matthews was unable to find evidence of a common intention to share ownership, despite the claimant's work. His comments also show a distinct flavour of the approach taken in *Coombes* regarding work undertaken by women in a heterosexual relational context:

> [The claimant's] labour and commitment were understandable in the context of their relationship and their intended long-term future together with children. this was to be her home, and that of her children. It is unnecessary to suppose some quasi-commercial bargain between them to explain it.[87]

Again, domesticity was seen to be in tension with commercial self-interest and, in the court's view, that the parties anticipated having children (conforming to the idealised image of the family) helped to root the claimant's intentions firmly in the private sphere.

As critical legal discourse analysis inevitably uses a small sample, findings could be undermined by arguing that the judges simply made their decisions based on the impressions they formed of the various parties, and that this does not necessarily reveal a pattern of gender discrimination. However, when these cases are viewed as part of a broader framework, particularly when taken together with the caregiving cases in Chapter 4, it is difficult to escape the conclusion that courts experience greater difficulty in justifying recompense where the claimant is female.

[86] Ibid, [48]
[87] Ibid, [84] (HHJ Paul Matthews)

Sentimentalisation of Housework

As well as reinforcing a gendered conception of domestic work, the myth of domesticity reconfigures unpaid work in order to imbue it with affection. In turn, this justifies its unpaid nature, because it is portrayed as an expression of love rather than constituting valid or productive work. As was the case with the altruistic carer myth in the previous chapter, domesticity ensures that work in the home is "transformed into a natural attribute of [the homemaker's] female psyche and personality".[88] Again echoing the caregiving myth, the suggestion that homemakers should be paid for their work is seen by the domesticity myth as unattractive and contrary to women's supposedly natural domestic role.[89]

Sentimentalisation can have the effect of rendering unproductive contributions that would ordinarily have some form of commercial value. In *James v Thomas*, the female claimant performed a significant amount of unpaid work in the context of a jointly-run business. As was illustrated in the judgment, she "drove a tipper, dug trenches, picked up materials, laid concrete, tarmac and gravel".[90] It was work that would fall into the categories of construction or unpaid market labour, both of which have more legal visibility than ordinary housework. However, Ms James was hindered by her relational role in a similar manner to the claimants in *Dobson v Griffey* and *Murdoch v Murdoch*. The influence of domesticity and of the gender-contract were evident in Sir John Chadwick's explanation for the claimant's motivations:

> The true position, as it seems to me, is that she worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas making their life together as man and wife. The Cottage was their home: the business was their livelihood. It is a mistake to think that the

[88] Silvia Federici *Revolution at Point Zero: Housework, Reproduction, and Feminist Struggle* (PM Press 2012), 3
[89] Marcia A. Neave, 'Three Approaches to Family Property Disputes: Intention/Belief, Unjust Enrichment and Unconscionability' in T Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell 1989)
[90] *James v Thomas,* (n 14), [4] (Sir John Chadwick)

> motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest.[91]

References are made to the marriage-like quality of the parties' relationship. They are akin to "man and wife", with the gendered implications this brings. The private sphere is emphasised through the clarification that the property was the parties' home rather than some commercial venture. The use of the phrase "pecuniary self-interest" operates as a juxtaposition to what is expected within the domestic realm of the marriage-like relationship. Ms James is prevented from succeeding in her claim because it would be "a mistake" for the court to suggest that she might be motivated by her own interests and financial future, rather than by the relationship's success.

James is an echo of Lord Browne-Wilkinson's statement in *Grant v Edwards*[92] (also involving a female homemaker) that "setting up home together, having a baby and making payments to general housekeeping expenses…may all be referable to *the mutual love and affection* of the parties and not specifically referable to the claimant's belief that she has an interest in the house."[93] Lord Browne-Wilkinson clarifies the English courts' position that if domestic work is to be rewarded, it must be reframed as a commercial bargain, whereby the parties are effectively cast as arms-length strangers. The domesticity myth makes it difficult to do this in the case of female homemakers unless their work can be demonstrated to fall outside the terms of the gender-contract to which they are expected to adhere.

The Canadian Approach: Overcoming Sentimentalisation

In contrast to the English case law, the issue of sentimentalisation has been directly confronted by the Canadian judiciary, revealing a more pragmatic approach in which

[91] *James v Thomas*, (n 14), [36] (Sir John Chadwick)
[92] *Grant v Edwards* [1986] Ch 638, 657 (Lord Browne-Wilkinson)
[93] Ibid, 657 (emphasis added)

affection and compensation are able to co-exist.[94] In *Peter v Beblow*,[95] Cory J confirmed that "in today's society, it is unreasonable to assume that the presence of love automatically implies a gift of one party's services to another."[96] This view directly challenges the assumption under the domesticity myth that female performance of unpaid work is a core element of intimate relationships. In contrast to the English cases involving male homemakers, the Canadian court did not feel the need to resort to commercialising the relationship or displaying the homemaker as being motivated by financial gain. Instead, the appellant's ordinary housework was given explicit focus, particularly its importance to the family's overall wellbeing.[97] Cory J explained that "couples… will strive to make a home. By that I mean a place that provides safety, security and love and which as well frequently is the place where children will be cared for and nurtured."[98] This express recognition of the material benefits of ordinary housework is particularly notable, as this is missing from the English jurisprudence, where housework is either ignored or dismissed as an expression of affection, but is not highlighted as an essential element for the effective functioning of the family unit.

It should be noted that the Canadian constructive trust is based on unjust enrichment (proof of enrichment in the absence of a juristic reason) rather than intention.[99] Arguably, it is an easier task to objectively determine that one party has been enriched by the other's domestic work, than it is to divine an intention to share ownership from their conduct. However, the

[94] It should be noted that the Canadian provinces now have legislation governing de-facto relationships (see Chapter 3, n 22). The constructive trust cases discussed here simply illustrate the different approaches taken in the two jurisdictions.
[95] *Peter v Beblow* [1993] 1 SCR 980
[96] Ibid, 1014-15 (Cory J)
[97] Ibid, 1002 where the appellant's son gave evidence that "[the appellant] took care of all the duties, cooking and stuff like that, cleaning, laundry. She had her ringer washer. She would do the laundry. She'd worked in the garden, things like that."
[98] Ibid, 1013 (Cory J)
[99] *Pettkus v Becker* [1980] 2 SCR 834

Canadian approach does reveal a different attitude to and conception of intimate relationships.[100] There, the domestic and the commercial elements of family life are able to co-exist without being seen as a threat to the idealised view of family life and without the courts resorting to artificial conceptions of bargaining in an intimate context.

Privatisation: Obscuring the Public role of Homemaking

Although domestic work is understood as private and unproductive within liberal discourse, it has a distinct public element, supporting and sustaining economic production.[101] Both the worker's immediate household, and society as a whole, are heavily reliant on domestic work and the production of the home.[102] The homemaker undertakes many tasks that are considered essential to human wellbeing, such as the cooking and preparation of food, and the provision of clean clothes for herself and family members. If the homemaker did not perform them, the recipients would have to carry out the work instead, impacting on work or leisure time.

The homemaker's labour means that other family members are relieved of the physical and temporal burdens of domestic work. Their time can instead be spent in other ways, both in carrying out economic work and on leisure pursuits. Socialist feminist analyses have focused on the homemaker's role in contributing to the reproduction of labour power and in sustaining the workforce, work that is essential to capitalist modes of production. As Luxton argues, "family-based households produce and sustain their members, ensure that adult income earners are able to return to work."[103] Furthermore, the idealised depiction of the

[100] It should be noted that all the Canadian provinces now have specific legislation applicable to de-facto spouses, meaning that the constructive trust is of less importance in the relational context. I have used the Canadian constructive trust cases merely as an illustration of how the judicial approach to domestic work contrasts to the English position.
[101] See Federici (2012), (n 88)
[102] See Meg Luxton, 'Feminist Political Economy in Canada and the Politics of Social Reproduction' in Kate Bezanson and Meg Luxton (eds) *Social reproduction: Feminist Political Economy Challenges Neo-Liberalism* (Toronto: McGill University Press 2006), 25
[103] Ibid, 38

home as a haven and a retreat is based on the notion of the home having a replenishing function so that workers are able to recharge their batteries before returning to work.[104] However, this view of the home overlooks the fact that it is only through the homemaker's daily cycles of maintenance and repair work that the home is able to be a place to which household-members want to return.

Home has a psychological function as a place of security and belonging for family members.[105] As Young argues, "[the woman] being home gives [the man] comfort and allows him to open on the expanse of the world to build and create."[106] Part of the difficulty is that it is inherently difficult to measure in economic terms the impact of the comfort and support that is provided by homemaking. Furthermore, the private setting of domestic work means that there is no accepted universal standard for its performance.[107] Whereas it is easy to measure the value of an economic contribution, it is more questionable whether there is such a thing as an exceptional domestic contribution. Should a homemaker who does the bare minimum in the home be treated the same as one who takes exceptional pride in her work? In *Thomson v Humphrey,* the claimant's unusually high standards of domestic work were considered, but dismissed:

> The claimant says that were it not for all her work the defendant would have had to employ a cleaner. She does not in fact reveal in her own evidence that the defendant did employ a cleaner. In cross-examination she said that she was not satisfied with the standard of cleaning and had to go around after her putting things to her standard. I find it a fact that the claimant took responsibility for the state of the house, but she did have help to run the house. She carried out the normal domestic chores that house owners have to see are done and which, in relationships where only one partner has a job, are usually carried out by the one who is not working. But there was nothing out

[104] See Peter Saunders, *A Nation of Home Owners* (Unwin Hyman 1990)
[105] See Davies (2014), (n 45), 154
[106] Young (2005), (n 47), 8
[107] Luxton (1997), (n 29), 434

> of the ordinary in what she did and nothing that can lead, anyway, to the acquisition or ownership of a share in a property.[108]

Here, it was evident that the court did not accept that the claimant *needed* to do the additional work and therefore it did not count as a contribution. Whereas the family law jurisprudence recognises the concept of 'special contributions' in the form of paid work where one party has a particular business talent or skill,[109] it is very doubtful whether the same could translate to homemaking or how this could be measured. The high standards of housework carried out in many homes indicates that some individuals *do* draw a psychological benefit from domestic work that is not just the bare minimum but goes above and beyond. However, the privatisation of domestic work means that no distinction is made between a person who cleans for two hours a week and a person who cleans for two hours a day.

In comparison to paid work, domestic work also has an inherently unselfish element. As Silbaugh argues, the homemaker is not able keep her work to herself in the way that a breadwinner can keep wages in a separate bank account.[110] The legal framework currently permits the breadwinner to refuse to share income with the homemaker and this can be used as evidence of an overall lack of intention to share beneficial ownership of the home. In the case of domestic work, the homemaker has no option but to share.[111] While she may refuse to do certain tasks for her partner, jobs such as cleaning the house will have an undoubtable benefit to anyone else who lives there.

As this discussion has outlined, whilst the primary beneficiaries of domestic work are the homemaker's immediate family members, the work has an indirect societal impact in terms of family members' roles and performance in the economic sphere and their broader sense

[108] *Thomson v Humphrey* [2009] EWHC (Ch) 3576, [44]
[109] See *Charman v Charman* [2007] EWCA Civ 503
[110] Silbaugh (1996), (n 9), 34
[111] See *Geary v Rankine,* (n 16)

of wellbeing. It is therefore erroneous to claim that domestic work has no social value; it is simply that its value is hidden within the private family. Society also depends directly on domestic work in terms of reproduction of dominant culture and ideology. It ensures that responsibilities for domestic work pass down through the generations and it also ensures that this work remains unpaid. As Rai et al argue, the norms and stereotypes that continue to surround socially reproductive work "help convince women to accept their low status."[112] In ensuring that the low status of domestic work remains unchanged, homemakers are performing an invaluable service to the state, both in terms of sustaining the working population and in continuing to reinforce the ideology surrounding women's work.

Geographies of Housework

The home is spatially constructed around an idealised view of the family that is presumed to occupy it, and the gendered roles within that family.[113] Although the home is considered to represent the private; a place free of public intrusion and a place to 'be oneself', it is also a socially constructed space and "the site for the creation, reproduction and maintenance of patriarchal relations".[114] As with the geographies of care, the spatial construction of housework operates to normalise the myths and discourses by appearing to provide proof of their truth.

Within the home, there are various gendered zones, with family members oriented to different spaces.[115] For example, women have always been thought to be naturally at home in the kitchen, which thus becomes a 'female' space, whereas much male work takes place

[112] Shirin M Rai, Catherine Hoskyns and Dania Thomas, 'Depletion: The Cost of Social Reproduction' (2014) 16 International Feminist Journal of Politics 86, 91
[113] For further exploration of this, see Valverde (2015), (n 2), 20
[114] Bowlby, Gregory and McKie (1997), (n 23), 345
[115] See Ruth Madigan and Moira Munro, 'Gender, House and 'Home': Social Meanings and Domestic Architecture in Britain' (1991) 8 Journal of Architectural and Planning Research 116

outside.[116] The domesticity myth relies on repeated performance of gendered roles. The kitchen is not inherently female, but it *becomes* female through the repeated performance of particular types of work within its confines. As West and Zimmerman argue, "it is not simply that household labour is designated as 'women's work' but that for a woman to engage in it and a man not to engage in it is to draw on and exhibit the 'essential nature' or each".[117] This echoes Saarikangas' argument that "meanings of space are created in the interaction of the organisation and the use of space, in daily habits and in routines of living: by their acts, movements and gestures".[118] The homemaker's daily tasks in maintaining the space reinforces that domesticity myth, i.e. that the home is her natural habitat and a fundamental part of her identity. The sentimentalising of domestic work also means that it also becomes bound up with notions of caring and nurturing. Rather than being viewed as the performance of discrete tasks, responsibility for the home becomes part of the homemaker's personhood and defined as natural.

Those who do not conform to the geographical zoning of the home can find themselves labelled as subversive, as seen in Bowlby et al's argument that "challenges to socially accepted versions of gender often involve the transgression of spatial as well as other boundaries within the home, for example, the woman in the tool-shed or the man in the kitchen."[119] Within the case law, there is evidence of the impact of the gendered spatiality of housework. Where women's work has been labelled as extraordinary and therefore deserving of financial recompense, it has often defied not only societal norms, but also

[116] See Kirsi Saarikangas, 'Displays of the Everyday: Relations Between Gender and the Visibility of Domestic Work in the Modern Finnish Kitchen from the 1930s to the 1950s' (2006) 13 Gender, Place & Culture 161; and Janet Floyd, 'Coming out of the Kitchen: Texts, Contexts and Debates' (2004) 11 Cultural Geographies 61
[117] Candace West and Don H Zimmerman, 'Doing Gender' (1987) 1 Gender & Society 125, 130
[118] Saarikangas (2006), (n 116), 163
[119] Bowlby, Gregory and McKie (1997), (n 23), 346

spatial ordering. For instance, in *Lloyds Bank v Rosset,*[120] Mrs Rosset's work took place indoors, decorating her children's bedrooms. Therefore, she was located in her expected geographical zone and her work could not be seen to go above and beyond what was expected of her in her relational context. On the other hand, in *Eves v Eves,*[121] Ms Eves had strayed beyond her gendered boundary. Her work was performed outdoors, and she was using equipment that would ordinarily have been used by a man, especially at the time that the case was decided. Where men perform 'women's work', they are quite literally 'out of place', which may also help to explain why courts find it easier to reconceptualise their work and the motivations for it in commercial language.

The home as a geographical space is simultaneously private and highly visible, operating as a symbol of the ideal family unit but concealing much of the work that takes place within its walls. For example, Madigan and Munro have argued that the situating of homes within specially constructed residential zones, such as suburbs, "gives substance to…domesticity."[122] The home can signal to the rest of society that the family is highly functional and economically self-sufficient. On the other hand, families who are considered *dys*functional are often forced to occupy identifiable geographical zones, such as purpose-built social housing, which are recognisable to the outside world as having particular connotations (including dependency on the welfare state). Although standards of housework may vary from home to home, neglect of domestic labour can also operate as a sign that the family has failed, and unacceptable standards of housework can be used as a reason for state intervention into the family.[123]

[120] See n 63
[121] See n 76
[122] Madigan and Munro (1991), (n 115), 118
[123] See Young (2005), (n 47)

Homemaker Vulnerability

Economic Vulnerability: The 'Cashless' Homemaker

The domesticity myth has a direct impact on the homemaker's financial position both during the relationship and upon its breakdown. The fact that domestic work is unremunerated means that the homemaker is likely to be at least partly financially dependent on her partner. Even if the family unit is economically self-sufficient, the homemaker herself may be susceptible to hidden poverty, where she is "cashless";[124] being expected to manage the family budget, but with few resources of her own. Even when the homemaker does perform economic work and has access to financial resources, her lowered status can affect the way her earnings are treated within the family. Zelizer has argued that, far from being the neutral entity that it is presented to be, money is laden with social meaning. This meaning is determined by numerous factors, including how it was acquired and who acquired it.[125] The social meaning attributed to money has an impact on how it is spent within the household.

Zelizer's analysis revealed that women were at a disadvantage even when economically active because their money was treated differently to that earned by their male partners. She found that money earned by women (which she refers to as 'pin-money') tended to be "merged into the family's housekeeping money and usually spent on home and family, for clothing or food".[126] On the other hand, men's wages were more likely to be spent on mortgage or rent.[127] More recent research suggests that gendered allocation of money is still an issue within marriage and cohabitation. For example, Sung and Bennett's research on middle to low income families found that gendered spending remained prevalent, with men

[124] See Katharine Silbaugh, 'Commodification and Women's Household Labor' (1997) 9 Yale Journal of Law & Feminism 81, 105
[125] Viviana A Zelizer, 'The Social Meaning of Money: 'Special Monies'' (1989) 95 American Journal of Sociology 342, 344
[126] See Zelizer (1989), (n 125), 366
[127] Ibid, 367

more likely to be responsible for paying utilities (including the mortgage) whereas women were more likely to pay for food.[128]

As argued, the restrained state is generally uninterested in how resources are distributed between family members during the course of the relationship.[129] Its chief concern is that the family as a whole is financially independent. However, within the constructive trust framework, particularly in sole ownership cases, the court does place importance on who paid for what, which can act to the significant detriment of the homemaker. Lord Bridge in *Rosset* emphasised that, in order for the court to infer a common intention from conduct, a claimant must point to *direct* financial contributions in the form of paying for the mortgage or the deposit.[130] Paying for other expenditure, such as food shopping or utility bills presents greater difficulties in terms of showing a common intention, even if the law has moved on since *Rosset*, because such conduct could also be explained on the basis of "mutual love and affection", as Lord Browne Wilkinson explained in *Grant v Edwards.*[131]

In light of the continued existence of gendered spending patterns in heterosexual relationships, the perceived difference between direct and indirect contributions in the legal framework is concerning. Gendered spending was famously fatal to Mrs Burns' claim.[132] Mrs Burns' money was spent on the household, on gifts and clothes, whereas the purchase of the house and the mortgage payments was financed by her partner. As a result, the court

[128] Sirin Sung and Fran Bennett, 'Dealing with Money in Low-Moderate Income Couples: Insights from Individual Interviews' in Karen Clarke, Tony Maltby and Patricia Kennett (eds) *Social Policy Review 19: Analysis and Debate in Social Policy* vol 19 (Policy Press 2007), 168. For further analsysis of gendered spending, see Catherine T Kenney, 'The Power of the Purse: Allocative Systems and Inequality in Couple Households' (2006) 20 Gender & Society 354; and Pernille Hohnen, 'Having the Wrong Kind of Money. a Qualitative Analysis of New Forms of Financial, Social and Moral Exclusion in Consumerist Scandinavia' (2007) 55 The Sociological Review 748
[129] See Chapter 3
[130] *Lloyds Bank v Rosset*, (n 63), 133 (Lord Bridge)
[131] See *Grant v Edwards*, 657 (n 92)
[132] *Burns v Burns*, (n 24)

was not able to infer an intention to share ownership from her expenditure, because it did not relate directly to the property. Although Auchmuty is confident that if the case were heard today, "Mrs Burns would almost certainly have got something"[133], it is unclear where this certainty comes from. *Curran v Collins* also involved the claimant's indirect expenditure on grocery shopping, but the trial judge found that "her earnings were too small for her to have contributed",[134] a finding that the appellate court did not interfere with. Mrs Burns' problem was that her partner did not *need* her monetary contribution and nor did Ms Curran's partner. It is therefore not possible to be able to assert that the law has moved on to such an extent as to put indirect contributions on a par with direct ones. Even in joint names cases, where the courts examine the whole course of the parties' relationship, direct financial contributions are still of significant importance and can persuade the court that the parties did not intend equal shares.[135] It appears, therefore, that the legal framework still places significant importance on how family money is allocated.

Emotional Vulnerability: Pressures of Producing the Ideal Home

Domestic work, and housework in particular can take an emotional toll on the homemaker. The myth of domesticity paints a picture of contentment, of nurture, and of the female homemaker's pride in her home. However, the homemaker's lived reality can be very different from the ideal. As I noted above, homemaking has a public element; it involves continuously performing and reinforcing socially constructed gendered roles. This subjects the homemaker to a degree of scrutiny and pressure to create the ideal home, ensuring that

[133] Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196, 1210
[134] *Curran v Collins*, (n 15), [9]
[135] *Stack v Dowden*, (n 18)

it conforms to the societal expectations of her role.[136] However, her work is rendered invisible, and recognition and reward for it is not forthcoming.

The homemaker may come to lack autonomy within the home during the relationship, in that other family members and their schedules and demands will operate to shape her duties and her workload. Her work is largely for the benefit of others rather than herself. As Ahrentzen argues:

> Homemakers work within a social ideology that elevates the individualistic, "self-made" man to mythic proportions while they themselves are often involved in work with low social standing, economic dependence, repetitiveness, and a considerable lack of autonomy and control.[137]

This echoes Young's comments that the female homemaker, through her labour, ensures that others (usually males) become autonomous and powerful in the public sphere and the world of work, but does not draw any of the benefits from this herself.[138] As discussed above, her work, even if it has an economic connection, is rendered unimportant, dismissed as merely supportive and to be expected within the context of an intimate relationship. Thus, the homemaker may feel a sense of disempowerment as a result of her role.

The geographical separation between the home and the outside world, and the way in which the home is often imagined in a way that hides the least pleasant parts of domestic work, can make the homemaker feel cut off from the rest of society.[139] Ahrentzen has argued that working in the home "can induce feelings of being controlled, being powerless, being imprisoned."[140] The restrained state myth ensures that the home is an unregulated and

[136] See Jane Darke, 'Women and the Meaning of Home' in Rose Gilroy and Roberta Woods (eds) *Housing Women* (Routledge 1994), 21
[137] Ahrentzen (1992), (n 10), 128
[138] Young (2005), (n 47), 8-10. See also discussion in Chapter 3
[139] A factor noted in the empirical research on homemakers and home workers. (See Ahrentzen (1992), (n 10))
[140] Ibid, 130. See also Sherry Boland Ahrentzen, 'Managing Conflict by Managing Boundaries: How Professional Homeworkers Cope With Multiple Roles at Home' (1990) 22 Environment and Behavior 723

unsupervised space. In doing so, it legitimises severely unequal relations and even denies their existence by relying on the ideology of the harmonious family. The stresses and vulnerabilities of homemakers remain hidden within the home, which is why some feminist scholars have vehemently rejected dominant liberal conceptions of home as a refuge, describing it instead as a "place of tyranny"[141] and the site of numerous gendered exploitations.

Spatial Vulnerability: Hidden Property Relationships

Due to property law's preference for formalities, ensuring that legal and equitable rights to land have been acquired in a prescribed and recognisable fashion, it does not always recognise informal relationships to space that have developed over time (unless these are accompanied by formally recognised modes of acquisition). The mere act of living somewhere and developing an attachment to the land does not *by itself* bring with it any entitlement, and formally acquired and registered rights to land will usually trump less formal ones.

As argued above, the homemaker is excluded from the Lockean concept of labour-mixing, whereby the act of working on the land is rewarded with ownership rights. However, this exclusion ignores that homemaking does indeed involve developing a relationship with one's spatial surroundings through repeated cycles of work of maintaining and preserving the property, engaging in what Keenan has termed "the ongoing performance of estate ownership".[142] However, as she notes, "not everyone's labour has been deemed capable of constituting possession".[143] The notion of labour-mixing does have some basis in reality.

[141] Shelley Mallett, 'Understanding Home: A Critical Review of the Literature' (2004) 52 The Sociological Review 62, 75. See also Ann Oakley, *The Sociology of Housework* (Pantheon 1974)
[142] Sarah Keenan, 'Smoke, Curtains and Mirrors: The Production of Race through Time and Title Registration' (2017) 28 Law & Critique 87, 89
[143] Ibid

Research has suggested that homemakers do often establish a strong psychological connection to their home, especially over a long period of time. For instance, Malos and Hague suggest that where the home is a workplace rather than merely a place of leisure, an individual may come to have a particularly strong connection to it, as "a focus for personal identity."[144]

The homemaker's relationship to her home is a fragile and often legally invisible one. Although much of her existence is orientated around the home, her relationship is often deemed to be too remote from the question of property rights. Her societal and legal status is contradictory. The myth of domesticity decrees that she belongs in the home, yet law excludes her from genuine belonging. She is expected to produce and run the home, yet it is not truly hers and is always at risk of being taken from her. The repercussions of this are significant in terms of the homemaker's sense of self. As Young argues, "home as the materialisation of identity does not fix identity but anchors it in physical being that makes a continuity between past and present. Without such anchoring of ourselves in things, we are, literally, lost."[145] When the relationship ends, the homemaker's anchoring is indeed lost. During the relationship, the home may have provided her with the illusion of material security, but it was never truly secure. As Young poignantly argues "in the end, [the homemaker] is left homeless, derelict with no room of her own".[146]

The point of relationship breakdown represents a temporal shift in the homemaker's spatial vulnerability, and the home loses the meanings it acquired during the relationship. At this point in time, the legal framework recasts the home as an abstract bundle of rights, which is often at odds with the homemaker's experience. The legal process involves conducting a

[144] Ellen Malos and Gill Hague, 'Women, Housing, Homelessness and Domestic Violence' (1997) 20 Women's Studies International Forum 397
[145] Young (2005), (n 47), 24
[146] Young (2005), (n 47), 10

retrospective survey of the parties' relationship, giving meaning to certain events and denying the meaning of others. This survey is conducted under the guise of discovering the parties' intentions as regards ownership. However, it also often amounts to a rewriting of the history of the home in which particular actions are infused with a significance that may not have existed at the time. Other behaviour may be dismissed as unrelated to the issue of property rights or they might not be mentioned at all. For example, as discussed above, the question of whether money was spent on food or mortgage payment suddenly gains an importance that was not appreciated during the relationship. Other behaviour in relation to finances is also analysed and inferences are drawn. For example, the keeping of separate bank accounts in *Stack* was seen as evidence that the parties intended to hold the home in unequal shares, but it was clear from the judgment that the parties did not have an expressly communicated intention as to their respective shares.[147]

The homemaker's difficulty is that the value of her work does not survive the relationship breakdown because she has not created anything of tangible value. Instead, her work was largely concerned with preserving what was already there. The value of domestic work dies along with the relationship. Therefore, the homemaker is particularly vulnerable to losing her home upon relationship breakdown, unless she can show that she has also made financial contributions. Even if the homemaker is able to establish rights, it is likely that the home will need to be sold, to allow both parties to realise their share. Upon sale, the financial effects of performing unpaid work is likely to have an adverse effect on the homemaker. In particular, she may struggle to find an appropriate new home. As Malos and Hague have argued, "[women's] very domesticity may compound their problems [in finding suitable alternative housing after relationship breakdown]".[148]

[147] See *Stack v Dowden*, (n 18)
[148] Malos and Hague (1997), (n 144), 398

The constructive trust and estoppel framework is of course not concerned with achieving parity in terms of post-separation accommodation. However, there is a marked difference in the level of post-separation housing security that is likely to be available to the homemaker compared to the breadwinner. Nothing illustrates this more clearly than the largely unspoken fate of Mrs Burns, referred to in Chapter 1. Having been excluded from the family home, Valerie Burns' anchoring was well and truly lost when she was forced to live in one of the most precarious ways imaginable; in her car at the roadside. This is an extreme form of spatial vulnerability, but it illuminates the significant difference between owner-occupation and other forms of dwelling. It also raises another issue, namely that where the homemaker does not also have current caring responsibilities, she will not be a priority for housing. It may be assumed that homemakers can turn to the state upon relationship breakdown, but where the family is grown up or where the couple had no children, matters are not so straightforward. Being a carer offers a certain buffer in terms of access to state support. However, a homemaker whose sacrifice took the form of working in the home or for her partner is in an especially vulnerable position. And while not all homemakers will become homeless, rental accommodation (which is likely to be the only realistic option if the homemaker cannot acquire a mortgage) is an insecure form of housing, liable to termination at short notice rather than offering long-term stability (particularly into old age) in the way that owner-occupation can.

Conclusion

Examining law's treatment of domestic work as a separate category, rather than as a largely ignored subspecies of care, reveals the existence of gendered hierarchies. Not all domestic work is equal in the eyes of the law, and that which has a connection to an economic endeavour, such as a farm or a family business, is more likely to be recognised as being 'work'. Unfortunately for the homemaker, ordinary housework in the form of cleaning,

cooking, washing, and general maintenance is at the bottom of the hierarchy, understood as menial and devoid of skill. It is generally not capable of generating an inference that the parties intended to share ownership of the home and is instead seen as a natural part of living together.

In Chapter 4, I argued that legal understandings of care are constructed around an idealised image of the 'altruistic carer', representative of an ideology of care than is gendered, sentimental, and private. This is also present in the case of domestic work, influenced by a pervasive myth of domesticity, within which women come to be associated with the home as part of their relational roles. Domesticity is also reinforced through the geographical layout of the home, with domestic work being allocated to various gendered zones.

My analysis of the case law again revealed the tendency of courts to construct domestic work as primarily motivated by love and affection and incompatible with any notion of financial recompense. By sentimentalising domestic work, the court denies its inherent value. A major problem faced by the homemaker is that her work largely consists of maintaining and restoring the space of the home rather than creating something new. Therefore, she is unable to point to an end product, something of tangible value on which to base her claim. The relative invisibility of homemaking work means that its value frequently goes unnoticed and unmentioned.

Finally, I considered the impact of the domesticity myth on the homemaker, arguing as in the previous chapter, that both her lived experiences and the value of her work are masked by the ideology. In particular, there is an irony to the fact that the homemaker spends her time constantly maintaining the home, restoring it to a rejuvenating space, but she gains little of the benefit from herself. Instead, her relationship to her home is often precarious,

dependent on the survival of her relationship. When the relationship dies, so too does the value of the homemaker's work.

CHAPTER 6: CREATING RESILIENCE

Introduction

So far, I have focused on the production and impact of relational vulnerability. However, a vulnerability analysis is incomplete without considering how vulnerability should be addressed, or indeed *redressed*. Relational vulnerability is a form of 'more-than-ordinary vulnerability, meaning that, unlike inherent universal corporeal vulnerability, it *can* be avoided or at least mitigated. This chapter and the next one considers how this can take place.

I use the term resilience, meaning an antidote to vulnerability or, in this context, the means by which recovery from, or avoidance of, the economic, emotional, and spatial elements of relational vulnerability can take place. A weakness in the existing vulnerability literature is that resilience as a concept is distinctly under-explored.[1] This is especially true in the critical legal scholarship, where resilience is dealt with in an almost perfunctory manner, as an afterthought rather than a key component of vulnerability. Therefore, I aim to theorise resilience in the cohabitation context, seeking to answer key questions of what it consists of, who bears responsibility for fostering it, and, in particular, how it can be measured. In this chapter, I set out a normative framework of relational resilience, which I then employ in Chapter 7 as a measure against which potential law reform schemes can be compared for their suitability.

Resilience is a 'buzzword' that has been increasingly employed in neoliberal discourse. Here, it refers to the notion of personal responsibility for hardship, reinforcing the restrained state myth that it is the individual who bears ultimate responsibility for being self-sufficient.

[1] Mianna Lotz, 'Vulnerability and Resilience: A Critical Nexus' (2016) 37 Theoretical Medicine and Bioethics 45, 54

As I argue, this is a very harmful interpretation of resilience, one that is based on blame and stigma, and which does not in fact redress vulnerability in any meaningful way. However, the neoliberal version of resilience has indeed been deployed in the cohabitation context, by putting responsibility on cohabitants to gain awareness of their legal status, and to put in place protective measures to avoid hardship when the relationship breaks down.[2]

The neoliberal discourse should be rejected and instead the state must take responsibility for removing the significant disadvantages that homemakers face under the current legal regime. In developing my theory of relational resilience, I draw on social psychology literature, this being an area of study where the concept of resilience has been explored extensively and is predominantly seen as an internal, but not necessarily innate, state. I then contrast it to the way that Fineman has (albeit briefly) dealt with the concept, as a set of external resources that allow the individual to reduce some of the negative impacts of her inherent vulnerability. I see relational resilience as consisting of both external and internal components. Predominantly, it is a set of external resources that are provided or distributed by the state and which seek to address the economic, emotional, and spatial aspects of vulnerability. However, in order to be a meaningful theoretical concept, I argue that resilience must also have a normative commitment, which I suggest should be autonomy (understood in a relational rather than individualistic sense), and equality (substantive rather than formal). My understanding of resilience therefore differs from Finemans's in that it incorporates an internal element, recognising that this is necessary in order to evaluate its impact on the homemaker.

[2] See e.g. discussion in Anne Barlow 'Legal Rationality and Family Property: What has Love got to do with it?' in Joanna Miles and Rebecca Probert (eds), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009)

I begin by examining the neoliberal understanding of resilience as invulnerability, explaining how it reinforces the restrained state myth. I then sketch out the internalist and externalist approaches to resilience, situating my own theory of relational resilience on this spectrum. Finally, I explore the normative basis of relational resilience; autonomy and equality and the way that these can address the economic, emotional, and spatial aspects of relational vulnerability.

Neoliberal Understandings of Resilience: Personal Responsibility and Invulnerability

The notion of resilience has become increasingly popular in neoliberal political vocabulary, particularly in the context of encouraging citizens to assume personal responsibility for their circumstances.[3] As Joseph argues, this "fits with a social ontology that urges us to turn from a concern with the outside world to a concern with our own subjectivity, our adaptability…and, above all else, our responsible decision making."[4] Neoliberal discourses of resilience reflect the dominant myths that were explored in Chapter 2: the autonomous subject, the inviolability of property rights, and the restrained state. The neoliberal state expects its citizens to be resilient, but it does not pay particular attention to how this is achieved. Instead, it is presumed that the autonomous subject possesses the ability to be resilient without assistance or intervention from the state. Those who cannot attain resilience are categorised either as weak victims, or as irresponsible.

Resilience in the neoliberal sense essentially amounts to invulnerability. The restrained state myth prioritises individual freedom at the expense of a support network. While, the state offers a minimal level of support for those who have suffered hardship, it is continually emphasised that this is temporary, and that the individual should ideally return to a state of

[3] See Jonathan Joseph, 'Resilience as Embedded Neoliberalism: A Governmentality Approach' (2013) 1 Resilience 38
[4] Ibid, 40

self-sufficiency as soon as possible. One example of this is the free childcare scheme, where parents who work at least 16 hours per week are provided with additional childcare hours in order to enable them to increase their working hours.[5]

In promoting the ideal of self-sufficiency, the state labels those who cannot conform to this as less than full citizens. Those who are forced to seek the state's assistance are subjected to both suspicion and surveillance, with an underlying insinuation that they are attempting to take more than their fair share.[6] Distinctions have traditionally between those who are 'deserving' of the state's help because they are not considered to blame for their misfortune (the sick, the elderly, and the disabled), and those who are 'undeserving' and blameworthy (the unemployed, immigrants, and single mothers).[7] However, in an increasingly individualistic society, these lines are starting to become blurred. As Briant et al have noted, even those with chronic illness or disability have begun to be referred to in pejorative terms.[8] They found evidence that media portrayals of disability claimants post-2010 (when the Conservative-led Coalition government came to power) were laden with references to potentially fraudulent disability claims, malingering, and the heavy cost to the public purse of financially maintaining this group of people.[9]

The expectation of self-sufficiency and the narrative of personal responsibility has crept into family law, with an ever-increasing emphasis on privatisation both of financial obligations and of dispute resolution. As Diduck and O'Donovan have remarked of this phenomenon,

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[5] See Government Guidance *Help Paying for Childcare* https://www.gov.uk/help-with-childcare-costs/free-childcare-and-education-for-2-to-4-year-olds (accessed 30 December 2017)

[6] Kayleigh Garthwaite ''The Language of Shirkers and Scroungers?'Talking About Illness, Disability and Coalition Welfare Reform' (2011) 26 Disability & Society 369

[7] See Michael B Katz *The Undeserving Poor: From the War on Poverty to the War on Welfare* (Pantheon Books 1990)

[8] Emma Briant, Nick Watson and Gregory Philo, 'Reporting Disability in the Age of Austerity: The Changing Face of Media Representation of Disability and Disabled People in the United Kingdom and the Creation of New 'Folk Devils'' (2013) 28 Disability & Society 874

[9] Ibid, 875

"old certainties become re-ordered. Formerly social or political problems become recast as private, family problems, solvable by individual family members."[10] The institution of the private family is expected to keep dependencies and vulnerabilities masked, enabling the state to stay restrained. Individuals are expected to be able to resolve their disputes without assistance, and, in any event, the assistance that was previously there has been removed. This is particularly evident through the withdrawal of family legal aid, including for cohabitation disputes.[11] However, as Barlow et al have remarked, the removal of legal aid is glossed over by policies that deem private ordering and alternative dispute resolution to be an unquestionable good, for both the individual and the state.[12] Echoing Diduck and O'Donovan's above comments about the re-ordering of previous certainties, they argue that "legal aid is no longer perceived as an important mechanism for ensuring access to justice and upholding the rule of law, but as a residual welfare benefit available only for the most serious cases."[13]

Individuals are not merely expected to resolve disputes without state assistance; they also have responsibility to ensure that there is no dispute in the first place. In response to concerns over the legal position of unmarried couples, the government launched the Living Together Campaign 2004[14] in an effort to improve the legal awareness of the large section of the population who erroneously believed in the common law marriage myth. The solution was thus deemed to be to educate and encourage cohabitants to protect themselves rather than expecting the state to intervene to do so. Similar sentiments were seen from family lawyers participating in research by Douglas et al, which found that conveyancers were often blamed

[10] Alison Diduck and Katherine O'Donovan 'Feminism and Families: Plus Ça Change?' in Alison Diduck and Katherine O'Donovan (eds), *Feminist Perspectives on Family Law* (2006), 13
[11] See Chapter 1, n 80
[12] Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017), 4
[13] Ibid, 16
[14] See Living Together https://www.advicenow.org.uk/living-together (accessed 18 August 2018)

for failing to give proper advice at the time of purchase of the home.[15] Barlow has extensively critiqued the narrative of personal responsibility, arguing that it points to a "rationality mistake" on the part of policy-makers.[16] The rationality mistake refers to the assumption underlying the policy, namely that people in intimate and emotional relationships are able to reason in a self-interested and commercial manner and to protect themselves appropriately. This reflects the autonomy myth in Chapter 2 and is based on a flawed conception of personhood; one that ignores the complex web of relationships in which all individuals are situated, and which influences the decisions that they make.

The above discussion illustrates that neoliberalism sees resilience purely as a matter of personal responsibility and economic self-sufficiency. Neoliberal resilience is an impossibility, because every single one of us is helpless and dependent on others for at least some part of our life. The resilience that I argue for in this chapter is of a different kind entirely. As critical theorists have argued, resilience does not eliminate vulnerability entirely.[17] Humans are vulnerable in all kinds of ways: as a result of our bodies, our relationship with the state and its institutions, and our connections to other people and the trust we place in them.[18] It would not be possible, or indeed desirable, to eliminate vulnerability. However, I do believe that many of the economic, emotional, and spatial harms that I have discussed in this thesis can at least be reduced, thus empowering the homemaker, and raising her up from her existing marginalised position.

[15] Gillian Douglas, Julia Pearce and Hilary Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (University of Bristol 2007), para 5.22-5.24
[16] Barlow (2009), (n 2), 305
[17] E.g. Catriona Mackenzie 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in C Mackenzie, W Rogers and J Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014), 36
[18] See discussion in Chapter 3

Defining Relational Resilience: Internal Disposition or External Resources?

In this section, I want to address the gap in the vulnerability literature, which is that philosophical and legal theorists often do not fully expand on what they mean by resilience beyond describing it as a way to mitigate against the impact of vulnerability. As Lotz argues, "where [resilience] does receive mention, it receives no elaboration",[19] meaning that while understandings of vulnerability and its causes and effects are, by now, well understood and fully excavated, there is still insufficient attention paid to what can be done to address these. Understanding resilience is particularly crucial in the case of relational vulnerability because it is *not* inevitable or inherent. Rather, it arises because of how the state structures relationships, and therefore focus must be turned to how these can be structured differently in order to mitigate against potential harm. In a bid to address this and better understand resilience, I begin by outlining a spectrum whereby at one end, resilience is an internal capacity and, at the other, a set of external resources.

In contrast to the position in legal and philosophical scholarship, social psychology offers a rich literature on resilience, where it is understood as an internal concept, a human "self-righting capacity",[20] or an ability to withstand or recover from harm. Much of the literature looks not at inherent corporeal vulnerability, but rather the occurrence of trauma or specific hardships that are out of the ordinary. It recognises that not all individuals have equal abilities to deal with stressful events, and research has focused on the specific factors that make one person better able to overcome adversity than another.[21] However, even within the psychological literature, there is no universal consensus as to the meaning of resilience. Some theorists have emphasised the idea of resilience as a disposition or a set of innate

[19] Lotz (2016), (n 1), 54
[20] Emmy E Werner and Ruth S Smith, *Overcoming the Odds: High Risk Children from Birth to Adulthood* (Cornell University Press 1992), 202
[21] See e.g. Gail Wagnild and Heather M Young, 'Resilience Among Older Women' (1990) 22 Journal of Nursing Scholarship 252

individual qualities. For example, Klohnen refers to resilient individuals possessing "optimism, interpersonal insight, warmth and skilled expressiveness"[22], meaning that they have better coping mechanisms than those who do not share the same traits.[23] This helps to explain the lack of uniformity in responses to traumatic events. However, while personality may be one factor governing reactions to adversity, it appears a very simplistic explanation with elements of fatalism, in the sense that one is either resilient or not. Other social psychologists have rejected this account and instead identified resilience as something more complex; a *process* (comprising internal and external factors) rather than a disposition.[24] In particular, more modern psychological literature has begun to recognise the importance of external factors, such as material and social resources (including supportive relationships), in order for individuals to develop coping strategies.[25] Under this view, resilience becomes an interaction between the individual and her surrounding environment, and the external events that help to shape her interior.

The psychological research of course has an entirely different focus and aim from critical theories of law and politics. Certainly, I think it is unhelpful to speak of inherent resilient dispositions in the context of state-created vulnerability. As Evans and Reid have warned, such thinking in a political context shifts the focus away from the state's responsibility to ensure that conditions for resilience exist, and tends to place blame for vulnerability with

[22] Eva C Klohnen, 'Conceptual Analysis and Measurement of the Construct of Ego-Resiliency' (1996) 70 Journal of Personality and Social Psychology 1067

[23] See also Lois B Murphy and Alice E Moriarty, *Vulnerability, Coping and Growth from Infancy to Adolescence* (Yale University Press 1976)

[24] See especially Michael Rutter, 'Psychosocial Resilience and Protective Mechanisms' (1987) 57 American Journal of Orthopsychiatry 316; and Ann S Masten and J Douglas Coatsworth, 'The Development of Competence in Favorable and Unfavorable Environments: Lessons from Research on Successful Children' (1998) 53 American Psychologist 205

[25] See Batya Hyman and Linda Williams, 'Resilience Among Women Survivors of Child Sexual Abuse' (2001) 16 Affilia 198; and Bonnie Leadbeater, Dan Dodgen and Andrea Solarz 'The Resilience Revolution' in R Peters, B Leadbeater and R McMahon (eds), *Resilience in Children, Families, and Communities* (Springer 2005)

the individual.[26] At the same time, I do not entirely reject the internalist account, because it does offer a way of measuring the effectiveness of different forms of resilience by focusing on individual capacities, such as wellbeing, autonomy, and physical health. In my view, these 'measuring factors' are lacking from Fineman's external account of resilience, representing the other end of the spectrum.

Fineman's perception of resilience is state-focused and external and based around an imagined "responsive state" that is structured in such a manner so as to promote resilience amongst its citizens.[27] It should be remembered that the internal and external accounts are referring to quite different types of vulnerability, which impacts their respective views of resilience. While the psychological studies of resilience focus on responses to trauma and hardship, Fineman is concerned with measures that can mitigate against the potentially harmful effects of the inherently vulnerable human condition. While she argues that all humans are inherently vulnerable due to their embodied and social nature, this is not experienced uniformly due to varying levels of resilience across populations. She has described resilience as comprising a range of "assets" upon which the individual can draw to reduce the impact of vulnerability, but never fully eliminate it.[28] These include financial and material resources, but also various social networks through which citizens can gain strength and support. Inherent biological vulnerability means that no person is immune to accident, illness, or the ageing process. However, a person with access to private health insurance, a generous pension, a safe and secure home, and a loving and supportive family network, is likely to have a very different experience of old age to a person who has to rely on a state pension, cannot afford basic amenities such as heating, and is socially isolated.

[26] Brad Evans and Julian Reid, *Resilient Life: The Art of Living Dangerously* (John Wiley & Sons 2014)
[27] Martha Albertson Fineman, 'Equality, Autonomy and the Vulnerable Subject in Law and Politics' in Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013), 19
[28] Ibid, 22-23

Even unforeseen and random events such as life-limiting illnesses, which seemingly do not discriminate between rich and poor, will be experienced differently depending on an individual's access to resources. The neoliberal retrained state currently denies the reality of human vulnerability, insisting instead that humans are rational, and self-sufficient and therefore able to overcome disadvantage without any intervention.

The crux of the external view of resilience is that the state, not the individual, has ultimate control over the distribution resources and is therefore wholly responsible for fostering resilience. In Fineman's view, fluctuations in resilience can never be attributed to personal weakness or failing, but rather to the way that state policies have resulted in unequal resource-distribution.[29] The state currently hides behind a mask of restraint in order to avoid taking responsibility for the consequences of ignoring the vulnerable human condition. Instead, individuals are blamed for showing evidence of inevitable dependency, and neoliberal invulnerability is presented as the norm.

As I stated above, I see relational vulnerability as comprising elements of both the internal and external accounts and positioned on the spectrum between the two. I fully agree with Fineman's argument that ultimate responsibility for resilience must lie with the state, firstly because the state is responsible for creating conditions of inequality and has a duty redress them, and secondly because only the state has the power to influence how resources are allocated across populations. Furthermore, as Fineman does, I see relational resilience as consisting predominantly of external resources. Even the most optimistic and hardy person will struggle without access to safe and secure housing, adequate funds, food, and healthcare. In the context of cohabitation, homemakers as a class are disadvantaged by

[29]Ibid

unequal structures and to point to differences between individuals in terms of how they adjust to hardship, is unhelpful.

In my view, the weakness in Fineman's treatment of resilience for the purpose of addressing relational vulnerability is its lack of a normative framework or set of goals that resilience should achieve. This is not only because Fineman does not extensively elaborate on the meaning of resilience, but also because she and I are discussing different types of vulnerability. Fineman is referring to a universal and shared corporeal vulnerability that remains constant but is experienced differently based on an individual's access to resources of resilience. Relational vulnerability is more nuanced. It is pathogenic, and it *is* avoidable, because it arises due to the state's reinforcement of various myths that place the homemaker in a disadvantaged position. Furthermore, its emotional and spatial dimensions mean that resilience requires more than a simple demand that financial resources should be allocated to the homemaker. Resilience must have underlying goals to ensure that the homemaker is empowered rather than further marginalised. Those goals are relational autonomy and substantive equality, as I explore further below.

The other difference between my approach and Fineman's relates to how the notion of state response is interpreted. Fineman is rightly very critical of the tendency to privatise vulnerability and dependency, confining it to the private family and preferring private ordering and wealth redistribution to collective solutions.[30] Indeed, the neoliberal emphasis on personal responsibility discussed above is wholly inadequate and is based on an unrealistic conception of personhood. However, I do not think that attention to the private, and specifically, the dynamic between the homemaker and her partner, should be completely

[30] Martha Albertson Fineman 'Injury in the Unresponsive State: Writing the Vulnerable Subject into Neo-Liberal Legal Culture' in A Bloom, DM Engel and M McCann (eds), *Injury and Injustice: The Cultural Politics of Harm and Redress* (Cambridge University Press 2018)

abandoned in a theory of resilience. The state is responsible not only for the homemaker's low social status, but also for the imbalance that comes to exist between her and her financially stronger partner as a result. The state, through reinforcement of its various myths, permits the homemaker's partner to profit from the homemaker's caregiving and domestic work. This must be addressed. Therefore, I see a commitment to relational resilience as operating on a combination of scales. The state must take an active role in restructuring its institutions in order to ensure that the homemaker occupies an equally valid role to those who perform paid work. This can take various forms, such as providing financial subsidies and reforming employment practices so that they do not disadvantage those who have caregiving obligations. At the same time, the state cannot ignore the injustices that are currently perpetrated on a much more local scale, in terms of how assets are distributed between intimate partners. Interrelational distribution can never by itself be sufficient to change the way the state treats homemakers. For one thing, it is unlikely that a couple will have sufficient assets in order to redress lifelong homemaker vulnerability. However, redistribution does form an important part of the overall strategy of resilience. The state must therefore ensure that the homemaker is provided with the resources she needs in order to mitigate against potential harms, but it must also prevent other citizens from increasing their own resilience at the homemaker's expense.

The Normative Foundations of Relational Resilience

I now turn to the normative aims of relational resilience. As explained above, the concept of resilience requires an underlying purpose in order to be measured in a meaningful way. As Zelizer has argued, even something as apparently neutral as money is heavily bound up with social meanings and status, depending on the source of the money.[31] For example, there is a symbolic difference between family law redistribution schemes that are based purely on

[31] Viviana A Rotman Zelizer, *The Social Meaning of Money* (Princeton University Press 1997)

need, and those that are based on entitlement or 'earning a share' through contributions.[32] The former has connotations of dependency and weakness, whereas the latter scheme seeks to put the parties on an equal footing. Resilience in the form of resources must therefore be delivered in such a manner that it empowers rather than stigmatises homemakers.

As I alluded to above, a degree of tension exists in the scholarship over the appropriateness of using seemingly individualistic concepts such as autonomy and equality. Fineman in particular is cautious about the fact that both autonomy and equality have been used in liberal conceptions of personhood to deny the existence of universal vulnerability.[33] As such, she believes it unhelpful to frame a theory in the same discourse as the one it aims to counter and reject. Part of Fineman's objection likely stems from the fact that resilience is under-theorised in her work. Any theory of resilience requires some ability to judge the extent to which resilience has been achieved. In the case of relational resilience, it must, at its core, aim to rebalance the homemaker's network of relationships so that they empower rather than marginalise her. This reflects Harding's argument that, because not all relationships or relational contexts are positive ones, normative commitments are vital in order to be able to evaluate the extent to which an individual's wellbeing is promoted by the web of connections in which she is situated.[34] It also echoes the previously mentioned distinction between relational and communitarian approaches.[35] Relational theories of personhood do not abandon focus on the individual. They merely recognise, unlike liberal theories, that personhood is inevitably socially embedded and relational.[36] Thus, reference to terminology

[32] Rebecca Bailey-Harris, 'Dividing the Assets on Family Breakdown: The Content of Fairness' (2001) 54 Current Legal Problems 533

[33] See Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1; Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory Law Journal 251; and discussion in Mackenzie (2014), (n 17), 34

[34] Rosie Harding, *Duties to Care: Dementia, Relationality and Law* (Cambridge University Press 2017), 18

[35] See Chapter 1, p 31

[36] See Robert Leckey, *Contextual Subjects: Family, State and Relational Theory* (University of Toronto Press 2008); Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford

such as autonomy and equality, which is used in liberal conceptions of the person, are not contrary to vulnerability theory, because both terms are capable of being reconceptualised into relational terms.

One final point bears mentioning. I view equality and autonomy as guides by which resilience can be measured. They do not by themselves constitute resilience. The liberal vision of personhood denies the existence of vulnerability *because* the subject is regarded as autonomous and having equal opportunities with other citizens of availing herself of the opportunities provided by the state. By contrast, relational resilience is ultimately about the provision of resources, with equality and autonomy being the means by which the efficacy of this can be assessed.

Equality

Equality can be interpreted in different ways. As I set out below, there is a difference between equality in a formal sense (i.e. equal treatment and non-discrimination) and equality in a substantive sense (i.e. equal outcomes). Ultimately, I argue, the state should, through distribution of assets, ensure an equality of *status*. This is a concept that goes even further than substantive equality. Unfortunately, the current legal framework is based on a very narrow form of equality, which works to the homemaker's disadvantage.

Formal Equality: Equal Treatment

In its narrow and liberal sense, the concept of equality means that all citizens must be treated as having equal worth, without discrimination.[37] Furthermore, the state is responsible for ensuring equal treatment and, in Dworkin's words, it must show "equal concern for all those

University Press 2011); and Catriona Mackenzie and Natalie Stoljar, *Relational Autonomy: Feminist Perspectives on Automony, Agency, and the Social Self* (Oxford University Press 2000)

[37] See Adeno Addis, 'Special Temporary Measures and the Norm of Equality' in *Netherlands Yearbook of International Law* (Springer 2015)

citizens over who it claims dominion and from who it claims allegiance."[38] The principle of equality before the law is a fundamental one in Western legal systems, and is regarded as necessary to ensure law's impartiality and integrity.[39] However, equal treatment is not always synonymous with same treatment. Even traditional liberal theories recognise that certain sectors of society may need special legal protections to reflect perceived weaknesses (e.g. children or those with cognitive impairment), or to combat and redress historical discrimination or ill treatment (e.g. women or people of colour).[40] Equality in its narrow sense, therefore, extends to a right against discrimination, with protections in place to ensure that disadvantaged groups are not treated *worse* than a hypothetical comparator.[41]

Formal equality and non-discrimination have been foundational principles in the development of family law in the past twenty years.[42] The House of Lords in *White v White* emphasised that "in seeking to achieve a fair outcome, there is no place for discrimination between husband and wife and their respective roles."[43] This was in response to the problems with the law at the time, which limited the homemaker to her "reasonable requirements"[44] and did not treat homemaker and breadwinner contributions as being equal. Although Lord Nicholls stressed that he was not seeking to introduce a presumption of equal shares, he stressed that when making an award, judges should measure it against a "yardstick of equality of division",[45] while recognising that this could be departed from if there were

[38] Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2002), 1
[39] See e.g. Hans Kelsen, *What is Justice?* (University of California Press 1971), 15
[40] See e.g. John Rawls, *A Theory of Justice* (Harvard University Press 1971) which acknowledges that distribution of resources should maximally benefit the least advantaged in society.
[41] E.g. the Equality Act 2010 relies on a hypothetical comparator who does not share the relevant protected characteristic. Section 13(1) states that "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others." It is therefore assumed that others do not share the protected characteristic.
[42] See Bailey-Harris (2001), (n 32)
[43] *White v White* [2001] 1 AC 596, 605
[44] See *Dart v Dart* [1996] 2 FLR 286
[45] *White v White*, (n 43), 606

good reasons. This yardstick was later enshrined as a principle of 'equal sharing' meaning that the starting point will be equal shares unless unequal shares can be justified.[46]

In the cohabitation context, *Stack v Dowden* was praised for introducing a more family-focused approach to the constructive trust, whereby the presumption is that the homemaker should be awarded an equal share despite potentially unequal monetary contributions.[47] While *Stack* does not go as far as *White* in terms of seeking to eliminate discrimination, it does take into account the fact that parties within a domestic relationship are unlikely to intend shares in the exact proportion of their financial contributions.[48] There is therefore a distinct flavour of non-discrimination in the judgments, echoing law's approach towards married couples.[49]

While appearing ostensibly neutral and 'fair', non-discrimination measures are problematic from a feminist perspective.[50] As Addis has argued, "when the state takes the seemingly neutral stance of non-discrimination at a given moment in time, it freezes in place the unequal arrangements that have led to the particular circumstance."[51] In the case of the homemaker, principles of equality and equal sharing seek to mask the fact that the state has a clear preference for economic contributions and that, although homemaking contributions may be proclaimed equal in the courtroom, they do not have equal status in wider society. As Fineman argues, "formal equality leaves undisturbed and may even serve to validate existing institutional arrangements that privilege some and disadvantage others."[52]

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[46] See *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24
[47] Simon Gardner, 'Family Property Today' (2008) 124 Law Quarterly Review 422
[48] *Stack v Dowden* [2007] UKHL 17, [69]
[49] See Simon Gardner and Katharine Davidson, 'The Supreme Court on Family Homes' (2012) 128 Law Quarterly Review 178
[50] See Diduck and O'Donovan (2006), (n 10), 2
[51] Addis (2015), (n 37), 322
[52] Martha Albertson Fineman, 'Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality' (2012) 92 Boston University Law Review 1713, 1717

Non-discrimination initiatives such as that in *White* also seek to reinforce economic self-sufficiency as the norm, with homemakers requiring special treatment because they deviate from this. It normalises the gender-contract, reinforcing the belief that marriage (and marriage-like cohabitation) is comprised of separate gendered roles.[53] Formal equality and non-discrimination declares that homemaking labour is of the same value as income earning, without considering the homemaker's reduced status within wider society, which will come to impact on her after the relationship has broken down. Although she may receive an equal share of the family assets, this is unlikely to be sufficient to compensate for her reduced earning power as a result of taking on the homemaker role.

Substantive Equality: Equality of Outcome

Due to the concerns over the narrow definition of equality, feminists have argued for equality in a more substantive sense, meaning that law should ensure that homemakers and breadwinners have equal opportunities upon relationship breakdown.[54] This stance recognises the point that Baroness Hale made in *Miller v Miller*, namely that awarding equal shares to breadwinner and homemaker will have a very different outcome for each.[55] As Diduck and Orton have argued, substantive equality involves "[recognising] that in order to alleviate disadvantages and achieve equality, *different* treatment will sometimes be needed."[56] Therefore, a departure from equality would be permitted in order to reflect that the homemaker would need more to attain a similar lifestyle to her partner post-separation.

[53] See Charlotte Bendall, 'A 'Divorce Blueprint'? The Use of Heteronormative Strategies in Addressing Economic Inequalities on Civil Partnership Dissolution' (2016) 31 Canadian Journal of Law and Society 267
[54] See Martha L Fineman, 'Implementing Equality: Ideology, Contradiction and Social Change-A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce' (1983) Wisconsin Law Review 789; and Alison Diduck and Helena Orton, 'Equality and Support for Spouses' (1994) 57 Modern Law Review 681
[55] *Miller v Miller; McFarlane v McFarlane*, (n 46), [136]. See also discussion of this statement in Chapter 1.
[56] Diduck and Orton (1994), (n 54), 688 (emphasis added)

Equality of outcome involves a more active state response to formal equality, in terms of not merely ensuring that the homemaker is treated the same, but that adjustments are made in order to elevate her to a substantively equal position.[57] The notion of substantive equality was recognised in *McFarlane v McFarlane*[58] through the compensation principle, which acknowledged that "women may still suffer a disproportionate financial loss upon the breakdown of a marriage because of their traditional role as home-maker and child-carer."[59] A commitment to substantive equality does not exist in the constructive trust framework. Even where the home is jointly owned, the cohabiting homemaker is confined to a maximum share of one half of the equity in the home, regardless of her wider disadvantaged position.

The Law Commission's 2007 report suggested imposing an "economic equality ceiling" which would ensure that "the court shall not place the applicant, for the foreseeable future, in a stronger economic position than the respondent."[60] This would operate as a maximum limit for any award, ensuring that the respondent was not unduly prejudiced by the court's award. The Law Commission's recommendation was undoubtedly more nuanced than the *Stack*-presumption, involving "a holistic, 'in the round'",[61] assessment of the parties' economic positions. This would involve taking account of the parties' income and earning capacity, the value and liquidity of particular assets, and the risks associated with particular activities or investments."[62] However, it was emphasised that "economic equality would not be a goal. It would simply set an upper limit",[63] meaning that the proposal stopped short of offering substantive equality for homemakers.

[57] See Addis (2015), (n 37), 324
[58] *Miller v Miller; McFarlane v McFarlane*, (n 46)
[59] Ibid, [47]
[60] Law Commission Cohabitation: The Financial Consequences of Relationship Breakdown ((Law Com No 307), 2007), para 4.39
[61] Ibid, para 4.73
[62] Ibid, para 4.73
[63] Ibid, para 4.74

I am unconvinced that even substantive equality initiatives go far enough to redress relational vulnerability. While they do endeavour to place homemakers in an empowered economic position, they do not fully tackle the wider lack of status of homemaking work and its unequal, gendered distribution. Substantive equality initiatives thus tackle the symptom rather than the cause of relational vulnerability. A significant part of relational vulnerability is that the myths normalise female caregiving and domestic work. As such, it is seen as a less attractive option for men, and men, in contrast to women, have the option of avoiding homemaking work because their existence is not configured around the mythical images of altruism and domesticity.[64] For instance, there is no suggestion that the court's ability to order compensation to homemakers on divorce has led to any substantial redistribution of homemaking work within marriage. I would therefore suggest that the concept of equality needs to be interpreted in a more radical way.

Equal Status: Revaluing the Homemaker's Role

Genuine equality would involve equal value rather than simply an equal financial position. I am conscious that this may seem an overly idealistic, and maybe unrealistic, goal, especially in the narrow context of this research. After all, it seems unlikely that legal measures introduced to assist cohabiting homemakers will by themselves effect the degree of social change needed to make a significant difference to the way in which couples organise homemaking work. However, family law reform, even in a narrow area, needs to be viewed in its social context and assessed as to the degree to which it helps to promote a wider goal. The family courts are indeed limited to dividing the assets resulting from a relationship, but the way in which they perform this task and the language they use is significant. For example, the shift in the language used in matrimonial finance cases, from

[64] See discussion in Paul Kershaw, 'Care Fair: Choice, Duty, and the Distribution of Care' (2006) 13 Social Politics 341, 342

needs and requirements to entitlement and compensation, has contributed towards challenging the way marriage is understood; as a partnership of equals rather than a relationship of dependency.[65] While this may not have had the practical effect of shifting the distribution of homemaking, it has certainly led to an improvement on the position of homemakers in the 1970s and 1980s. However, given that homemaking work remains unequally distributed, a more radical change is now needed.

The greatest challenge for reform is to undermine and eventually erode the influence of the dominant myths that underlie the legal system. Even if homemakers are afforded greater legal protections, this will be insufficient if the ideal continues to be paid work and economic self-sufficiency. As I have argued throughout the thesis, the veneration of paid work and devaluation of homemaking is illogical, because society is just as dependent on care and domestic work for its effective function as it is on economic work. It makes little sense to remunerate one but not the other. The current position is only tenable due to women's systematic subordination and exploitation, hidden behind the façade of domesticity and affection.[66] As long as the dominant myths remain, the homemaker will always be in a subordinate position and will fail to live up to the image of the ideal citizen. Even if the state proclaims that her work is important, this is undermined by a lack of expectation on *all* citizens to perform some degree of care and domestic work.

It is insufficient to simply proclaim that homemaking and income-earning is of equal value unless this is accompanied by measures that affirm this. This raises an important preliminary question of whether it is in fact *possible* for homemaking to be equal to paid work. Schultz

[65] Bailey-Harris (2001), (n 32)
[66] See discussion in Chapters 4 and 5

has powerfully argued that it is only paid, mentally stimulating work that brings genuine equality and empowerment to women. As she argues:

> Unless we pay attention to the institutional contexts through which housework is valued and individual choice realised, stubborn patterns of gender inequality will continue to reassert themselves- including the gender-based distribution that is at the root of women's disadvantage. Separatism will not suffice.[67]

Schultz thus argues that homemaking and income earning are fundamentally incapable of being equal because paid work brings a greater sense of personal fulfilment. Therefore, in her view, any policy that does not address gender distribution is insufficient. My issue with this is that Schultz's appears to be influenced by a middle-class view of paid work as a vocation. There are large sectors of the population working in unfulfilling and unenjoyable jobs, the main purpose of which is to provide the worker with an income, rather than intellectual stimulation. It is also somewhat dismissive to suggest that homemaking cannot be a fulfilling occupation in itself.[68] If one accepts that being a professional caregiver, e.g. a nurse, is a stimulating and fulfilling vocation, why can this not be the case for those who care for family members in the home?

Conversely, perhaps the focus of this debate is wrong. I suggest that the problem is not merely that homemakers are not being paid, but that a sector of the population is being permitted to almost entirely evade socially reproductive work in order to pursue self-interested goals. For instance, many men are able to become parents and enjoy the pleasures of family life while performing a very small amount of the hands-on work of raising children. They are permitted to 'care about' others without 'caring for' them.[69]

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[67] Vicki Schultz, 'Life's Work' (2000) Columbia Law Review 1881, 1883

[68] See Martha M Ertman, 'Love and Work: A Response to Vicki Schultz's 'Life's Work'' (2002) Columbia Law Review 848

[69] Clare Ungerson 'Why do Women Care?' in J Finch and D Groves (eds), *A Labour of Love: Women, Work and Caring* (Routledge 1983). See also discussion in Chapter 4, p 155

If a broader conception of personhood is embraced, whereby the individual is emotional, embodied, and relational, attention must be turned to what the state should expect of its citizens and what measures it should take to enforce those expectations. Kershaw has highlighted that, while the state demands all citizens to work (unless they are financially supported) and sanctions those who do not, it places no such expectation in terms of performing essential caring labour.[70] Because caregiving and homemaking needs to be carried out, it becomes delegated to oppressed members of society who are unable to exercise the freedom to 'not care'. This highlights that the parameters of the existing debate must be shifted in order to enable meaningful reform. As Etzioni has argued, "few people who advocated equal rights for women favoured a society in which sexual equality would mean a society in which all adults would act like men."[71]

Kershaw proposes that the state impose stricter measures to ensure that care becomes a citizenship duty rather than an option.[72] This would be a means of incorporating an element of the ethic of care into citizenship or, rather, ensure that justice incorporates a caring element.[73] In the same way that the state can sanction those who do not obtain paid work, there could be consequences for those who fail to take on a fair proportion of the homemaking burden.[74] One way in which law reform could play a role is to make it very financially disadvantageous for individuals to leave all the homemaking work to their partners. As Ertman has argued:

> Making male partners pay their sweeties for homemaking labour might be a catalyst for… change, as it would allocate the cost of that labour to the

[70] Kershaw (2006), (n 64)
[71] Amitai Etzioni, *Spirit of Community* (Simon and Schuster 1994), 63
[72] Kershaw (2006), (n 64)
[73] See discussion in Chapter 4, p 133
[74] Kershaw (2006), (n 64). See also Lyn Craig, 'Valuing by Doing: Policy Options to Promote Sharing the Care' (2008) 10 Journal of the Association for Research on Mothering 45, 51. I recognise that there would be inevitable practical problems involved in sanctioning citizens for a failure to care, and indeed it is questionable if it is indeed desirable to 'force' caregiving, but these issues lie beyond the scope of this thesis.

> primary wage earner rather than to the primary homemaker. Primary wage earners might be less enthusiastic about gendered specialisation of labour if they had to foot the bill for it.[75]

While this might appear to be a call for privatised financial obligations, I argue that it could also be construed as the state creating unattractive conditions for role specialisation. Currently, there is little incentive for the caring burden to be shared, as evidenced by men's failure to do so, despite women's increased participation in paid work. This is especially true in the case of cohabitation, where there are few financial consequences for breadwinners who benefit from their partner's work. At the same time, I am conscious that substantive equality is a larger project and law reform in the area of cohabitation would simply be a small part of this. However, that is not to say that it cannot and should not contribute towards the broader goal.

Autonomy

The second normative commitment of resilience is autonomy. Autonomy is a contentious concept, both within vulnerability theory, and within wider feminist scholarship. Indeed, it may seem contradictory that, after criticising the autonomy myth so heavily in Chapter 2, I am now proposing that the law should aim to foster homemaker autonomy through resilience initiatives. The response to that is that *relational* autonomy, which I argue should be the goal of resilience, is a very different concept to the individualistic, disembodied version that forms the basis of classical liberal theories and neoliberalism. It is necessary to elaborate on this further in order to justify not simply abandoning autonomy altogether.

Narrow and Broad Views of Autonomy

Autonomy is essentially self-determination; an individual's ability and competence to make uncoerced choices and decisions about her life. The most famous of the liberal accounts of

[75] Ertman (2002), (n 68), 858

Kant's moral theory views human autonomy as the ability to self-govern and to live according to one's own internal moral law.[76] Mackenzie has argued that autonomy has two components, namely "the *capacity* to lead a self-determining life", as well as "the *status* of being recognised as an autonomous agent by others".[77] Yet, the liberal interpretation of autonomy is highly problematic for feminist scholars. As was outlined in Chapter 2, liberal theories of autonomy regard the capacity element as internal and innate, in the sense that all persons are presumed to be born free and to possess powers of self-determination.[78] This is based on the flawed view of personhood that ignores the emotional, embodied, and relational nature of humanity. It overlooks the extent to which autonomy is not an innate condition, but is fostered and developed through socialisation and connections with others. Furthermore, liberal theories of autonomy do recognise the need for the individual to be seen as autonomous by others, but have translated this into a requirement for state restraint in order to not encroach on autonomy.[79] Recognising an individual as an autonomous being thus translates into non-intervention.

Fineman is deeply critical of the language of autonomy, arguing that it is a hollow notion that turns attention away from the state and its institutions, blaming the individual for her own hardship.[80] However, relational autonomy theorists, most notably Mackenzie, have criticised Fineman for relying only on the narrow, Kantian version of autonomy in her rejection of the concept.[81] Mackenzie and Stoljar argue that autonomy is not incompatible

[76] Immanuel Kant, *Kant: The Metaphysics of Morals* (first published 1797, Cambridge University Press 1996)
[77] Mackenzie (2014) (n 17), 41 (emphasis in original)
[78] Linda Barclay, 'Autonomy and the Social Self' in Catriona Mackenzie and Natalie Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Automony, Agency, and the Social Self* (Oxford University Press 2000), 54
[79] Natalie Stoljar, 'Relational Autonomy and Perfectionism' (2017) 4 Moral Philosophy and Politics 27, 33. See also discussion in Chapter 2.
[80] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004), 41
[81] Mackenzie (2014), (n 17), 34. See also Lotz (2016) (n 1)

with recognition 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."[82] Relational autonomy theorists reject the view of autonomy as an inborn condition, arguing that it is fostered through the individual's relationships with others, including the state.[83] As Nedelsky argues, "autonomy is made possible by constructive relationships- including intimate, cultural, institutional- all of which interact."[84] Under the relational account, the state plays a fundamental role both in recognising the individual as being autonomous and having the capacity to make choices, and in providing the material conditions necessary for autonomy.[85] Relational autonomy is thus a considerably more comprehensive and realistic concept than internal autonomy. Indeed, proclaiming that all individuals are inherently autonomous is meaningless if not all persons are provided with the capacity and means to live an autonomous life.

Rather than regarding all intimate relationships as a potential threat to individual autonomy, relational theorists argue that an individual can be autonomous, even if her choices and decisions are influenced by her interpersonal connections. At the same time, it acknowledges that there are certain relationships that are harmful to autonomy, such as those where there is substantial inequality between the partners.[86] As Nedelsky argues, the purpose of a relational approach is not to argue for the preservation of all relationships, but to distinguish between those that foster autonomy and those that do not.[87] Liberal theory is unable to make

[82] Catriona Mackenzie and Natalie Stoljar, 'Introduction: Autonomy Refigured' in Catriona Mackenzie and Natalie Stoljar (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford University Press 2000), 4
[83] Ibid
[84] Nedelsky (2011), (n 36), 118
[85] Jennifer Nedelsky, 'Property in Potential Life? A Relational Approach to Choosing Legal Categories' (1993) 6 The Canadian Journal of Law and Jurisprudence 343, 363; and Jonathan Herring, *Relational Autonomy and Family Law* (Springer 2014), 27
[86] See e.g. Catriona Mackenzie, Wendy Rogers and Julie Dodds (eds) *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014), 9
[87] Nedelsky (2011), (n 36), 123

this distinction, as the internalist account is merely concerned with whether the individual exercised free choice in entering the relationship. For example, Oshana argues that the internalist account would seem to permit states of being such as voluntary slavery and subservience, which are oppressive and contrary to autonomy, provided that the individual freely chooses them.[88]

The Role of Autonomy in Achieving Resilience

What then does a commitment to relational autonomy mean in terms of fostering resilience? As I argued above, autonomy is a means by which resilience (in the form of resources) can be measured rather than by itself constituting resilience. Its purpose is to ensure that the homemaker's relationships are empowering and constructive; a means of distinguishing between positive and negative relational settings.

If homemaker autonomy is to be fostered, a key aim of legal reform must be to promote self-reliance and to eliminate negative relationships of dependency. Self-reliance should not be confused with neoliberal expectations of economic self-sufficiency. The inherent relational nature of humanity means that complete self-sufficiency is an impossibility. We are all dependent on others in some way, including in an economic sense. Those who are employed are reliant on their employers, whereas self-employed individuals are dependent on staff, clients, and customers. However, the neoliberal restrained state ensures that the homemaker's dependency is a negative one. It deprives her of access to and control of resources, it disempowers her, and leaves her without the power to make the choices that enable her to live an autonomous life. Homemakers who are dependent on the state are also caught in an unhealthy relationship of dependency. They are depicted as having failed to attain the ideals of self-sufficient citizenship and are treated as a burden on the state. As well

[88] Marina AL Oshana, 'Personal Autonomy and Society' (1998) 29 Journal of Social Philosophy 81

as being subjected to social stigma, welfare benefit claimants are subjected to significant scrutiny and intrusion in order to prove their 'deserving' status. The aforementioned new Universal Credit rules that pay benefits to the 'household head' signify yet another layer of difficulty for those who are now at the mercy of their partners in order to have access to even a basic level of resources.[89] Negative relationships of dependency therefore impede autonomy and can leave homemakers trapped in unhappy or harmful relational contexts.[90]

In order to break the existing patterns of dependency, legal reform must prioritise the homemaker's access to, and control of, resources in her own name. In turn, this will enable her to make choices that benefit her and those in her network of relationships. This will not render her invulnerable or eliminate the responsibilities and obligations she has to others, but it will permit her to make meaningful choices as to how she organises her life. It is the normative commitment to autonomy that enables a distinction to be made between positive and negative forms of resource allocation. After all, Universal Credit is a form of state subsidy, albeit one that provides only a minimal level of support. However, it is not a subsidy that enhances the wellbeing of those it claims to support. Instead, it traps claimants in unhealthy cycles of dependency, both on the state and on their partners. It does not enhance autonomy and cannot therefore be said to provide resilience.

Illuminating the need for reform on both large and small scales, it must be questioned whether the homemaker can be truly autonomous until the current gendered patterns of homemaking labour are challenged. The myths of domesticity and caregiving, which both construct the work as a female endeavour linked to the gender-contract, restrict the choices that are available to women in heterosexual relationships. While not all homemakers or

[89] See discussion in Chapter 3, p 100

[90] See Alfred DeMaris and Steven Swinford, 'Female Victims of Spousal Violence: Factors Influencing Their Level of Fearfulness' (1996) Family Relations 98, highlighting the fact that financial dependency negatively influences the victim's ability to leave the relationship.

caregivers are women, the difference is that men are not *expected* to perform socially reproductive work to the same extent that women are. I am not by any means suggesting that men who do take on homemaker roles only do so as a matter of free choice. As argued, there are many factors that influence a person's decision to be a carer, including financial considerations, love and affection for family members, and an absence of adequate state-provided services.[91] However, for women, there is an additional coercive element in the form of the socially constructed myths that paint them as inherently nurturing and self-sacrificing. Women are told that 'having it all' is an unrealistic ambition and are required to choose between home-life and career in a way that men are not.[92] While some women are in heterosexual relationships where the male partner does take on the bulk of homemaking, leaving the female partner free to concentrate on her career, these tend to be seen as outside the norm.[93] Men thus have the advantage of not needing to negotiate their way to financial autonomy to the same extent that women do (e.g. by finding a partner who is prepared to take on homemaker duties). Instead, society presumes that women will choose to put family commitments ahead of career ambitions.

Thus, while the redistribution of resources and the availability of legal remedies for cohabiting homemakers will enhance the homemaker's autonomy, providing her with more choices, autonomy in its fullest sense requires a more equitable distribution of homemaking work. That is not to say that the decision to care should be an entirely free one. *Nobody* should be able to completely abandon responsibility for others, as the current framework permits. The measures discussed above regarding making care a necessary part of

[91] See Chapter 4
[92] See Natasha Campo, ''Having it All'or 'Had Enough'? Blaming Feminism in the Age and the Sydney Morning Herald, 1980–2004' (2005) 28 Journal of Australian Studies 63
[93] See Calvin Smith, "Men Don't Do This Sort of Thing': A Case Study of the Social Isolation of Househusbands' (1998) 1 Men and Masculinities 138; and Joyce Y Lee and Shawna J Lee, 'Caring is Masculine: Stay-at-Home Fathers and Masculine Identity' (2018) 19 Psychology of Men & Masculinity 47

responsible citizenship and financially penalising those who do not do their fair share will also be of relevance to the promotion of autonomy.

The Temporality of Relational Resilience

In this final section, I briefly explore the temporality of relational resilience. I return to temporality in more detail in Chapter 7 when evaluating the various schemes of resilience.

As I have argued, a key gap in the existing debate over cohabitation reform, and family law more generally, is a tendency to ignore the various temporal scales of homemaker disadvantage, confining its definition to a financial imbalance that arises upon relationship breakdown and which can be redressed within a relatively short period of time.[94] I have emphasised that relational vulnerability is a condition that arises during the course of an intimate relationship and fluctuates throughout an individual's lifetime.[95] Therefore, relational resilience must respond to the temporality of relational vulnerability. It is insufficient to confine it to a set of remedies that are available on relationship breakdown and which only enable vulnerability to be addressed in the short-term.

For that reason, the Law Commission's proposed scheme, which imposed an equality ceiling based on the parties' financial positions "for the foreseeable future"[96] is unlikely to go far enough to redress the full extent of the imbalance that occurs when one party takes on a homemaker role. Although it moved away from the retrospective search for intention in the constructive trust framework, the report nonetheless displayed a marked reluctance to extend the spatial scales of legal intervention. The Commission stated that "a clean break would be a substantive objective of our recommended scheme", arguing that anything else would be

[94] See Chapter 1 and Chapter 3
[95] See Chapter 3
[96] Law Commission (2007), (n 60), para 4.65

inappropriate "between parties who had not made a formal commitment to each other."[97] This reflects the perceived temporal difference between marriage and cohabitation. The promise of lifelong commitment in marriage marks it out as a stable institution (despite the ready availability of divorce and the fact that a substantial proportion of marriages break down), setting it apart from the more precarious cohabiting relationship. There is thus a significant reluctance to impose long-term consequences to a relationship where the long-term was perhaps not even contemplated. While I see merit in that argument, I do think it overlooks another more important temporal commitment; the one that occurs when a couple decides to have a child together. Unlike the marriage vows, which can be relatively easily disentangled, children (or any other form of caring commitment) genuinely do bring about an unavoidable, sometimes lifelong, commitment; not only in terms of financial support, but in terms of caregiving. The Law Commission did acknowledge this by recommending a limited form of periodical payments to meet childcare costs, but overall the scheme is aimed towards terminating financial obligations as soon as possible.[98]

The above point illustrates the need to view relational resilience in broader and more holistic terms. Family law remedies, like other private law remedies, are constructed in terms of individual obligations between citizens. This causes inherent problems when it is proposed that one person should bear responsibility for another person for a lifetime, especially following a relatively short relationship. Those affected will inevitably question why *they* should be made to carry the burden of another's disadvantage. This is why the parameters need to be redrawn. If the issue of resilience is framed in terms of state obligations towards citizens, the question instead turns to what the state needs to do to ensure that the individual is not disadvantaged. Part of this will involve ensuring that resources are shared equitably

[97] Ibid, para 4.98
[98] Ibid, para 4.104

and that some sections of the population are not able to draw direct advantage from others. However, redistribution needs to be viewed in a broader context; one in which the state takes responsibility for homemaker resilience on a lifelong basis, seeking to reduce structural inequalities during the relationship, upon its breakdown, and into old age. This is an ambitious aim, but a necessary one if real progress is to be made in terms of addressing homemaker vulnerability.

Conclusion

In this chapter, I sought to address what I perceived to be a weakness in existing vulnerability accounts; the under-theorisation of resilience. While there is frequent reference to resilience in the literature, scholars have tended not to provide detailed explanations of what it means for an individual to be resilient. In developing a framework of relational resilience, I drew on two opposing perspectives; the social psychological definition of resilience as an internal state, and Fineman's cursory treatment of resilience as a purely external set of assets and resources distributed by the state. Situating my own position on the spectrum between these two views, I argued that, while relational resilience predominantly refers to distribution of resources, it is only possible to measure the impact of this distribution by recognising that not all schemes of distribution have an equal impact on the individual in terms of addressing her economic, emotional, and spatial vulnerability. Therefore, this requires drawing on the internalist psychological account, acknowledging that the terms in which redistribution is framed (i.e. whether it is viewed as an entitlement or a 'handout') has a significant impact on the individual.

As this chapter has illustrated, relational resilience requires a normative basis; a set of goals against which proposed schemes can be measured. Attention to the relational aspects of personhood is not synonymous with a communitarian approach, whereby the collective is always prioritised over the individual. Instead, relational resilience must aim to promote

autonomy and equality. While feminists and vulnerability theorists have approached these inherently individualistic concepts with caution, both are capable of being reconfigured in relational terms, rejecting the way in which neoliberal discourse has used language of autonomy and equality to connote invulnerability.

A key issue emerging from this analysis was the importance of considering the broader context of any law reform. The advantage of the relational resilience approach is that it moves away from configuring the problem as one of individual interpersonal obligations. Redistribution of relational assets is *part* of resilience, reflecting the state's duty to ensure that some citizens do not benefit at the expense of others. However, the state's responsibility towards the vulnerable homemaker is broader than this, and relational resilience must aim to respond to relational vulnerability, which is a fluctuating, potentially lifelong condition. The cohabiting homemaker does not merely suffer from a lack of legal remedies, but from the fact that her work is undervalued on a much broader scale. It is questionable whether equality and autonomy are possible without a wider revaluing of homemaking work.

CHAPTER 7: EVALUATING RESILIENCE: THREE SCHEMES

Introduction

In this final substantive chapter, I evaluate three hypothetical state responses to relational vulnerability, considering the extent to which each of them addresses the economic, emotional, and spatial aspects of relational vulnerability, and the degree to which each of them can be said to make the homemaker resilient, in terms of enhancing equality and autonomy.

The three responses represent diverse and contrasting ways in which the state can address relational vulnerability. They are hypothetical, but each draws on elements of existing schemes in other jurisdictions. My aim is not to propose a definitive solution to relational vulnerability, but rather to critically evaluate the impact of a variety of responses on the homemaker and consider the workability of these within English law. The hope is that this analysis, which places the homemaker at its centre, will prompt a shift in how reform debates in this area are structured, moving towards viewing relational vulnerability as a state-created problem, demanding a response in order to be resolved.

The first potential response is state subsidy. By this I mean that the resources allocated to the homemaker in order to address vulnerability come directly from the state, rather than through redistribution between the parties on separation. In considering what form state subsidy should take, I draw on schemes developed in the Nordic countries: a recent Finnish universal basic income experiment, and three so-called 'cash for childcare' schemes in Norway, Sweden, and Finland. The second response is the more familiar system of judicial redistribution of assets upon relationship breakdown. Here, I examine the Family Law (Scotland) Act 2006, which to a large extent mirrors the Law Commission's 2007 proposal, and consider the extent to which redistribution can bring about homemaker resilience. The third response is a modified form of community of property, whereby cohabitants would be

prima-facie entitled to a defined share of the shared home, with the potential for a compensatory share to be allocated to homemakers.

Each of the three responses presuppose abandoning the current constructive trust and estoppel framework and passing legislation to address the needs of cohabiting couples. The current law is unsuitable for determining disputes between intimate partners due to its uncertainty, complexity, and lack of regard for homemaking contributions. Given the status of property rights in English law, coupled with the constitutional roles of Parliament and the judiciary, it seems inconceivable that the courts will substantially redraw the boundaries of the constructive trust and abandon the concept of common intention.[1] Therefore, a new legislative framework is likely to better serve the needs of unmarried couples than leaving the matter to the judiciary.

In the final part of the chapter, I consider what limits there should be to a vulnerability approach. Firstly, I address the question of whether couples should be permitted to contract out of any proposed resilience-scheme, expressing caution over the process of contracting out when the parties are not on an equal footing. I also briefly consider the role of 'non-relational vulnerabilities' such as illness, accident, or ageing (which are unavoidable results of inherent bodily vulnerability), and the extent to which these should be relevant to any proposed reform.

State Subsidy

The first hypothetical state response to relational vulnerability is a system of financial subsidy, whereby homemakers are paid a non-means tested 'citizen's income' for the work they undertake in the home. Such a system would therefore be a radical departure from existing family policy, as it would address the homemaker's vulnerability predominantly

[1] See discussion in Chapter 2

through direct state payments rather than through redistributing assets when family relationships break down. Basic income is also substantially different to the existing welfare benefits system. The latter is means-tested and intended as a safety-net and a last resort. By contrast, basic income would consist of state-paid compensation for performing socially reproductive labour that benefits the rest of society.

While the political climate in the UK over the past decades has led to the state taking an increasingly restrained position with regards financial support for its citizens, the Nordic countries have embraced the concept of citizenship income to a much greater extent and provide useful guidance. One example is the recent well-publicised basic income trial in Finland whereby unemployed citizens receive a monthly sum of 560 Euros, irrespective of other income, and with no obligation on the recipient to actively seek work.[2] Despite media reports suggesting that the scheme has been abandoned,[3] the Social Insurance Institution of Finland has confirmed that the experiment will run until the end of 2018 with analysis of results to be published thereafter.[4] The Nordic countries also provide 'cash for care' initiatives for parents of young children who choose not to make use of state-subsidised childcare provision.[5] State-run cash for care schemes in Norway, Sweden and Finland enable direct payments, typically representing around 10% of an average income, which can be retained by the family or used to purchase private care services.[6]

[2] Ben Chapman 'Finnish Citizens Given Universal Basic Income Report Lower Stress Levels and Greater Incentive to Work' (The Independent, 21 July 2017)
[3] Jamie Crisp Finland Ends Universal Basic Income Experiment' (*The Telegraph*, 24 April 2018)
[4] Kela *Contrary to Reports the Basic Income Experiment Will Continue Unitl the end of* 2018 (25 April 2018) http://www.kela.fi/web/en/news-archive/-/asset_publisher/lN08GY2nIrZo/content/contrary-to-reports-the-basic-income-experiment-in-finland-will-continue-until-the-end-of-2018 (accessed 10 May 2018)
[5] For further analysis, see Anne Lise Ellingsæter *Cash for Childcare. Experiences from Finland, Norway and Sweden* (International Policy Analysis, Friedrich Ebert Stiftung 2012)
[6] The Finnish scheme, *Kotohoidontuki,* was introduced in 1985 and is available in respect of children aged 1-3 (www.kela.fi (accessed 23 August 2018)). The Norwegian scheme, *Kontantstøtte*, was introduced in 1998 and is available for children aged 1-2 (www.nav.no (accessed 23 August 2018)). The Swedish scheme, *Vårdnadsbidrag* was introduced in 2008 and is available for children aged 1-2 (www.forsakringskassan.se (accessed 23 August 2018)).

The idea that the state should provide its citizens with a basic level of income is not a novel one. Across the political spectrum, there have been numerous arguments in favour of a universal basic income over the years. It has been posited as a way to reduce social problems of poverty and unemployment, fostering a stronger sense of citizenship, and justly redistributing resources among citizens.[7] While theories of universal basic income have tended to be gender-neutral,[8] feminists have argued that basic income schemes have particular potential for improving the social position of women and rewarding them for unpaid work.[9] Pateman has argued that state reward for women's work can also help to lift its status, thus potentially challenging its gendered distribution.[10]

Modified versions of basic income which specifically reward socially reproductive work (rather than being payable to the whole population), such as cash for care initiatives have also had feminist support. The aforementioned Wages for Housework initiative argued for state compensation for work in in the household.[11] Additionally, as Fineman has remarked, subsidy schemes can be justified on the basis that the state owes homemakers a collective social debt.[12] She argues that performing homemaking work is a form of subsidy to the state and should therefore be directly repaid rather than the state resorting to schemes whereby financial dependency is hidden within the private family.[13]

[7] See Philippe Van Parijs, 'Basic Income: A Simple and Powerful Idea for the Twenty-First Century' (2004) 32 Politics & Society 7; and Anthony B Atkinson, 'The Case for a Participation Income' (1996) 67 The Political Quarterly 67
[8] Ingrid Robeyns, 'Will a Basic Income do Justice to Women?' (2001) 23 Analyse & Kritik 88, 89
[9] See Ailsa McKay and Jo Vanevery, 'Gender, Family, and Income Maintenance: A Feminist Case for Citizens Basic Income' (2000) 7 International Studies in Gender, State & Society 266; and Carole Pateman, 'Democratizing Citizenship: Some Advantages of a Basic Income' (2004) 32 Politics & Society 89
[10] See Pateman (2004), ibid
[11] See discussion in Chapter 1. See also Silvia Federici, *Wages Against Housework* (Falling Wall Press 1975)
[12] Martha Albertson Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press 2004), 47
[13] Ibid, 49

In this hypothetical scenario, I am envisaging an income that is paid to homemakers rather than to the population as a whole. The Nordic cash for care initiatives are limited to caring for young children, but a similar scheme could conceivably be extended to provide payments to those who look after older children or adult dependents. In a similar manner to Universal Credit being paid to the household head, basic income could be paid to the partner (or single parent) with primary responsibility for caregiving and homemaking.

Basic Income: Addressing Relational Vulnerability

In many ways, a basic income scheme where homemakers are paid directly by the state is a compelling solution to economic vulnerability. It would enable economic imbalances to be addressed during the course of the relationship, thereby addressing the homemaker's hidden economic disadvantage, or 'cashlessness', during the relationship.[14] Today's homemaker is increasingly likely to be engaged in some form of paid work alongside her responsibilities in the home, albeit often on a part-time basis. A system of non-means tested payments that supplement wages would offer increased flexibility in terms of allowing homemakers to work fewer hours without the corresponding financial sacrifice.[15]

By having access to her own funds, the homemaker would be less reliant on her partner, addressing some of the negative patterns of dependency that prevent the homemaker from exercising financial autonomy. Basic income schemes can also address future-related economic vulnerability by providing payments towards the homemaker's pension fund. An example of this is the Norwegian cash for care regime, *Kontantstøtte*, which enables parents who do not make use of state-provided childcare to earn pension-points in order to mitigate against future disadvantages due to being out of the workforce.[16] A basic income regime that

[14] See discussion in Chapter 3
[15] See Lyn Craig, 'Valuing by Doing: Policy Options to Promote Sharing the Care' (2008) 10 Journal of the Association for Research on Mothering 45, 48
[16] See https://www.nav.no/no/Person/Pensjon/Omsorgsopptjening (accessed 23 August 2018)

provides deferred benefits in the form of pension credit would go a significant way to alleviating homemakers' pension-poverty, an issue which cannot be fully resolved through asset-redistribution upon separation, even for married couples.[17]

As well as addressing economic vulnerability, basic income can also alleviate the emotional and psychological aspects of relational vulnerability. The reduction in dependency between the homemaker and her partner can provide the former with a sense of satisfaction that she is making a contribution to the family finances, reflecting Pahl's findings that even making a small financial contribution to the household brings psychological benefits.[18] For homemakers reliant on the state following relationship breakdown, basic income avoids some of the many negative and stigmatising aspects of the current welfare system, rewarding the homemaker for her work rather than labelling her as a burden or a failure. Proponents of basic income have also pointed to its potential to strengthen familial connections and relationships by reducing time spent at work.[19] For the working homemaker, basic income could reduce the stress of the 'second-shift' and increase the amount of leisure time available to homemakers.

Basic Income and Resilience

As detailed above, basic income responds to several areas of relational vulnerability, particularly on an economic level. The question is whether it has the potential to make the homemaker resilient, i.e. whether it enables her to live an autonomous life and equalises her status in relation to income earners.

[17] See Debora Price 'Pension Accumulation and Gendered Household Structures: What are the Implications of Changes in Family Formation for Future Financial Inequality?' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009)
[18] Jan Pahl *Money and Marriage* (Macmillan 1989). See discussion in Chapter 3.
[19] Nick Srnicek and Alex Williams *Inventing the Future: Postcapitalism and a World Without Work* (Verso Books 2015)

Basic income is a radical response to relational vulnerability; one that moves the solution beyond the existing parameters of private family law. As such, it represents a paradigm of Fineman's imagined responsive state, which restructures its institutions so that they respond to, rather than ignore, vulnerability. Basic income rejects the language of privatised financial obligations between individuals, accepting instead that it is the state that bears ultimate responsibility for addressing the inevitable dependencies that arise as a result of relational personhood. By centralising the state as the guarantor of resilience, basic income challenges the restrained state myth by exposing and responding to dependencies and vulnerabilities rather than stigmatising and concealing them within the folds of the private family. By openly rewarding the homemaker for her work, some of the perceived barriers between the public and private that dominate neoliberal political thought will be eroded. Basic income manages to ascribe an economic value to homemaking work; an issue that property law has struggled immensely with. As Robeyns argues, "a basic income will in an indirect way contribute to a financial revaluation of unpaid work which might also help to increase the respect people show for this type of work."[20] If rates for the work are set by the state, this also eliminates the need to look to the open market for the current rates paid to carers and domestic workers, which in themselves, reflect the low social status of homemaking work.[21]

Basic income does not merely potentially alter the negative dynamics of dependency between the homemaker and her partner, but also impacts on the homemaker's wider relationship with the state. Basic income is a *citizen's* income that expressly rewards the homemaker's work, recognising its public and socially reproductive nature.[22] It acknowledges the subsidy that homemakers give to the state when performing essential but

[20] Robeyns (2001), (n 8), 92
[21] See Jonathan Herring, *Caring and the Law* (Hart 2013), 103
[22] See Bruce Ackerman and Anne Alstott, *The Stakeholder Society* (Yale University Press 1999)

unpaid work, and rewards them for it.[23] There is also scope for basic income schemes to reconceptualise what it means to be a responsible citizen. Neoliberal citizenship is configured around individual responsibility and financial self-sufficiency and the state places no value on the supportive work that enables some citizens to become self-sufficient. By recognising caregiving and homemaking as fundamental parts of citizenship, there is some potential for the work to gain wider social status and importance.[24]

State income programmes offer new possibilities in terms of trying to achieve equality of *status* rather than equality of *outcome* (the latter of which usually fails to fully address the full extent of the homemaker's vulnerability). They have autonomy-enhancing potential. Above, I have discussed the benefits to the homemaker of having increased access to, and control of, her own resources. However, the provision of resources *during* the relationship, rather than simply upon its end, also has an additional dimension from an autonomy viewpoint, in terms of the decision whether to remain in the relationship. As Pateman argues, basic income schemes "allow individuals more easily to refuse to enter or to leave relationships that violate individual self-government or that involve unsafe, unhealthy, or demeaning conditions."[25] Here, state income has a significant advantage over redistribution, because the latter does not address the problems of economically dependent homemakers remaining within harmful or unhappy relational contexts due to a lack of opportunity to be self-sufficient.

Limitations of Basic Income

Despite its positive features, I do not believe that basic income by itself goes to the heart of addressing the homemaker's relational vulnerability. My concerns largely relate to the

[23] Fineman (2004), (n 12), 50
[24] Craig (2008), (n 15)
[25] Pateman (2004), (n 9), 97

ability of basic income to bring about an equality of status. As discussed above, basic income certainly goes some way in terms of elevating the homemaker's citizenship status. However, it is doubtful whether it could ever truly equalise the position of homemakers and income earners to the extent that homemaking is seen as a viable pursuit for both sexes. As discussed, the altruistic carer and domesticity myths coerce women into accepting homemaking as part of their social and relational role.[26] If the status of homemaking is not raised to a sufficient level, there is a real danger that the existing gender division could become entrenched, or even worsened. The neoliberal state expects women to be financially self-sufficient in addition to working in the home. This dual role creates considerable pressure, including a depletion of leisure time. Nonetheless, women's financial autonomy has undeniably improved (albeit not to the extent of fully eliminating dependence on male partners) through their increased presence in the workplace.[27] If the state offers payments for staying in the home, this risks encouraging role-specialisation rather than promoting equality in the workplace.

The idea of basic income appears on first glance to belong to the political left, especially given its contrast to the minimalist neoliberal state. However, as Ellingsæter has remarked, the Nordic cash for care schemes were in fact all introduced by centre-right parties and have been subject to considerable criticism largely on the basis of their risk of promoting gender inequality.[28] While the Swedish, Finnish, and Norwegian initiatives are ostensibly gender-neutral, their uptake is incredibly gendered, with the vast majority of claimants being mothers.[29] Another concern is that many claimants come from low-income, low education, or immigrant backgrounds, while women in higher-paid jobs tend to continue working after

[26] As discussed in Chapters 4 and 5
[27] See e.g. Price (2009), (n 17), 257
[28] Ellingsæter (2012), (n 5), 8
[29] See Åsa Nelander, *Vårdnadsbidrag—En Tillbakagång i Svensk Familjepolitik* (Arbetarorelsens Tankesmedja 2007) (English trans: "Carer Benefit- A Backward Step for Swedish Family Politics")

having children.[30] Finnish research suggests that an increasing number of women are becoming homemakers, and that claiming carer payments does not really represent a genuine choice between caregiving and work.[31] Thus, the lessons from the research seem to be that basic income is unlikely by itself to lead to gender equality, even if it may temporarily enhance homemakers' position.

Furthermore, as I argued in Chapter 6, promotion of resilience does not merely consist of state provision of resources but should also seek to redress imbalances between the parties. It is the homemaker's work that enables the income earner to pursue career opportunities and make provision for future financial security, relatively unburdened by the obligations that are undertaken by the homemaker.[32] Because homemaking labour is not ascribed a financial value, the income earner's gain is normalised and is not questioned. Two of the most significant ways in which an individual can attain financial security and prosperity are through home ownership and pension contributions. The homemaker is effectively restricted from participating in both of these. Home ownership enables the owner, over time, to make a very significant financial windfall (provided that property values continue to increase). Regular state payments cannot match this windfall, even if they are paid over an individual's lifetime. The Nordic cash for care scheme pays a very modest amount and, even if a cash for care scheme could potentially comprise higher payments than the Nordic ones, it is very unlikely that basic income would pay even the equivalent of a modest private sector salary. Additionally, basic income does not deal with the issue of home ownership and the benefits it can bring. UK property prices increased by an average of 207% since 1997.[33] Despite the

[30] Ellingsæter (2012), (n 5)
[31] Anita Haataja and Anita Nyberg 'Diverging Paths? The Dual-Earner/Dual-Carer Model in Finland and Sweden in the 1990s' in AL Ellingsæter and A Leira (eds), *Politicising Parenthood in Scandinavia: Gender Relations in Welfare States* (Bristol Policy Press 2006)
[32] Hilary Charlesworth and Richard Ingleby, 'The Sexual Division of Labour and Family Property Law' (1988) 6 Law in Context 29, 34
[33] See UK House Prices Index calculator at http://landregistry.data.gov.uk/app/ukhpi (accessed 21 July 2018)

state income, those who undertake paid work will remain in a better position than homemakers and therefore income earning would continue to have a higher status. Income earners would be relatively unaffected by basic income (other than indirectly, in the form higher rates of taxation) and would therefore retain their privileged position.

If paid work continues to have a higher status due to its greater rewards, it is doubtful whether basic income will address problems of the gendered distribution of homemaking. Orloff has argued that instead of positing basic income as the solution to gender inequality, political strategies must instead focus on changing the structure of both paid work and homemaking in order to avoid women effectively being pushed into specialising in homemaking.[34] Equally, Craig has remarked that, while basic income may give citizens the option not to work, "it would not necessarily give women the freedom not to provide care."[35]

Finally, basic income addresses economic and emotional elements of vulnerability, but it does not deal with the home's pivotal importance to the homemaker. Basic income would provide a higher income than current welfare payments, but it would not directly address the issue of housing and the importance of ontological security and place-connection. A significant part of the homemaker's vulnerability is the fact that she is at risk of the loss of her home, a place that has special importance to her. This is coupled with the fact that, in the UK, there is a significant difference between the rights of homeowners and the rights of tenants, something that is not as prevalent in other countries where tenants enjoy greater security.[36] If the homemaker continues to be excluded from long-term and secure accommodation, she will remain vulnerable. It may be that a solution could be provided in

[34] Ann Orloff 'Comments on Ann Withorn's 'Is One Man's Ceiling Another Woman's Floor? Women and BIG'' (Conference Paper, University of Wisconsin-Madison, April 1990) (discussed in Robeyns, (2001), 89)
[35] Craig (2008), (n 15), 48
[36] See Hazel Easthope, 'Making a Rental Property Home' (2014) 29 Housing Studies 579

the form of long-term secure tenancies for homemakers as another form of basic income, but there is a serious problem of a lack of social housing stock in this country.

Financial Redistribution on Relationship Breakdown

The second hypothetical response is a statutory discretionary system of financial redistribution upon relationship breakdown. This would involve the homemaker making an application to the court for an order, unless the parties can settle the matter through other means. The aims of statutory redistribution vary from scheme to scheme. Under the Matrimonial Causes Act 1973, which applies to married couples, the overall objective is "fairness",[37] which has been further defined as consisting of three strands; needs, compensation, and sharing, with needs taking priority where the assets are limited.[38] Alternatively, the Family Law (Scotland) Act 2006 and the Law Commission's 2007 reform proposal, both of which I consider in more detail below, are based on redressing financial advantages and disadvantages that have arisen as part of the relationship. Another potential redistributory aim is "fair sharing" of marital assets, such as under the Family Law (Scotland) Act 1985, which applies to married couples.[39] There is insufficient space in this thesis to give full consideration to the merits of the various potential aims of redistribution. Instead, I am interested in the more general principles of redistribution as a system for addressing relational vulnerability. For illustrative purposes, I will draw predominantly on the Family Law (Scotland) Act 2006, as this closely mirrors the law reform proposals for this jurisdiction.

The Family Law (Scotland) Act 2006 implemented the recommendations of the Scottish Law Commission,[40] providing a redistributive scheme for cohabitants based on redressing

[37] *White v White* [2001] 1 AC 596
[38] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24
[39] Family Law (Scotland) Act 1985, s9
[40] See Scottish Law Commission *Report on Family Law* (Scot Law Com No 135, 1992)

any economic advantage or disadvantage that either party has experienced as a result of contributions made during the relationship.[41] The English Law Commission's 2007 report recommended the implementation of a similar scheme in England and Wales, based on the same principles of redressing economic advantage and disadvantage.[42] This has never been implemented. The government initially suggested monitoring the position in Scotland before announcing in 2011 that it did not intend to take the Law Commission's proposals forward.[43]

The term "cohabitant" is defined in the Family Law (Scotland) Act as "a man and a woman who are (or were) living together as if they were husband and wife"[44] or "two persons of the same sex who are (or were) living together as if they were civil partners".[45] In contrast to the Law Commission's proposals to have a minimum period of cohabitation of between two and five years, there is no such mandatory period in Scotland. Interestingly, research has indicated that the absence of a minimum period has not presented major problems as generally only relatively long-term cohabitants will be able to establish a case.[46] Claims must be brought within one year of separation,[47] a feature of the legislation that has been criticised as being unduly restrictive.[48] The English Law Commission did not recommend a similar limitation period.

On an application by either party, if the court is satisfied that, by virtue of the contributions made to the relationship, one party has suffered economic disadvantage or the other has

[41] Family Law (Scotland) Act 2006, s28(3)
[42] Law Commission Cohabitation: The Financial Consequences of Relationship Breakdown ((Law Com No 307), 2007)
[43] Jonathan Djanogly, Parliamentary Under-Secretary of State, Ministry of Justice, Written Ministerial Statement, 6 September 2011
[44] s 25(1)(a) Family Law (Scotland) Act 2006
[45] s 25(1)(b), ibid
[46] Jo Miles, Fran Wasoff and Enid Mordaunt, 'Reforming Family Law–The Case of Cohabitation: Things may not work out as you expect'' (2012) 34 Journal of Social Welfare and Family Law 167, 174
[47] Family Law (Scotland) Act 2006, s 28(8)
[48] Fae Garland, 'Gender Imbalances, Economic Vulnerability and Cohabitation: Evaluating the Gendered Impact of Section 28 of the Family Law (Scotland) Act 2006' (2015) 19 Edinburgh Law Review 311, 316

gained an economic advantage,[49] it can order one party to pay a capital sum to the other.[50] In addition, it can require one party to pay a sum to the other "in respect of any economic burden of caring, after the end of the cohabitation, for a child of whom the cohabitants are the parents."[51] The English recommendations were significantly wider and included property transfer orders, orders for sale, lump sum orders, and pension sharing orders.[52]

Redistribution: Addressing Relational Vulnerability

Redistribution would address economic vulnerability in terms of seeking to correct economic advantages and disadvantages upon relationship breakdown. It would represent a considerable improvement on the current legal position, by providing cohabitants with a specific set of legal remedies rather than having to rely on property law or children law to address financial hardship when the relationship breaks down. Whereas the Scottish regime is limited to lump sum payments, the broader range of orders under the Law Commission's proposals present a better option for homemakers as they include the ability to make pension sharing orders, thereby alleviating future financial hardships.

A considerable advantage of redistribution lies in its flexibility and ability to respond to individual circumstances. Even under structured regimes with a relatively limited amount of judicial discretion,[53] such as the Scottish law and the Law Commission's proposals, there is still scope for judges to tailor remedies to the specificities of the case. This acknowledges that concepts such as certainty and predictability that underpin other areas of law are less appropriate when dealing with the emotional complexity of human relationships.[54] There

[49] Family Law (Scotland) Act 2006, s 28(3)
[50] Ibid, s 28(2)(b)
[51] Ibid, s 28(2)(c)
[52] Law Commission (2007), (n 42), para 4.40
[53] E.g. in comparison to the much broader regime applicable to married couples under the Matrimonial Causes Act 1973
[54] See e.g. Anne Barlow 'Legal Rationality and Family Property: What has Love got to do with it?' in J Miles and R Probert (eds), *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart 2009)

will inevitably be less flexibility in a scheme that is based on redressing economic imbalance than in one that is predominantly needs-based. The Family Law (Scotland) Act 2006 does not consider the parties' needs in making an order. By contrast, the Law Commission recommended that in redressing economic imbalance between the parties, the court should have regard to, inter alia, "the financial needs and obligations of both parties".[55]

Academic analysis of the Scottish case law has revealed that courts initially interpreted the provisions of the Family Law (Scotland) Act in a very restrictive fashion, conducting a strict accounting exercise, even in the case of long-term relationships.[56] In particular, the Scottish courts struggled to find that homemaking contributions conferred an advantage on the other party, especially when taking into account the fact that a homemaker may have received 'free room and board' from her partner during the relationship.[57] Some clarification was provided by the Supreme Court in *Gow v Grant*[58] which clarified that the forensic accounting in previous cases was inappropriate in the cohabitation context and that the court should instead focus on comparing the parties' respective positions at the end of the relationship.[59] While this clarification is welcome and would no doubt apply if the Law Commission's proposals were enacted in England and Wales, the language of weighing financial advantages and disadvantages still has the potential to invite a restrictive judicial approach and this must be borne in mind if redistribution is based on correcting financial imbalance rather than meeting needs.

While redistribution does not have the same ability to directly impact on the homemaker's wellbeing as basic income, it can nonetheless alleviate emotional vulnerability upon

[55] Law Commission (2007) (n 42), para 8.15 (2)
[56] Garland (2015), (n 48), 318 and Miles, Wasoff and Mordaunt (2012), (n 46), 173
[57] Garland (2015), (n 48). See also *Jamieson v Rodhouse* [2009] FLR 34; and *Selkirk v Chisholm* [2011] Fam LR 56
[58] *Gow v Grant* [2012] UKSC 29
[59] Ibid [39]

relationship breakdown and in the future, by reducing some of the uncertainty that the homemaker may otherwise experience. However, redistribution is unlikely to have a significant impact on emotional vulnerability during the course of the relationship.

Turning to spatial aspects of vulnerability, this will depend on the form that redistribution takes. The Scottish regime is limited to payment of a lump sum, meaning that the homemaker is likely to lose her home when the relationship breaks down, although a lump sum, if sufficient, could enable her to purchase alternative accommodation which would offer long-term residential security. The Law Commission recommended that the court have the ability to make property transfer orders, meaning that there may be the opportunity for the homemaker to retain the home. However, this would of course be subject to the economic equality ceiling.[60]

Redistribution and Resilience

In comparison to basic income, redistribution involves significantly less state action. Instead of taking direct responsibility, the state reframes relational vulnerability as a predominantly private matter between the parties. If the homemaker has suffered financial hardship, it is for her to bring proceedings against her former partner. That is not to say that the state is absent in redistributive responses. The state is always present in the lives of its citizens, determining the limits of law and interpersonal obligations.[61] A state that provides a remedy for cohabitants is substantially more active than the current neoliberal state, which allows financial imbalance and exploitation to go unchecked under the guise that it is not law's concern how unmarried couples organise their lives.

[60] Law Commission (2007), (n 42), para 4.72

[61] Martha Albertson Fineman, 'Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality' (2012) 92 Boston University Law Review 1713, 1729

As I argued in Chapter 6, relational resilience is not confined to state provision of resources, but must also seek to prevent the injustice that occurs when the homemaker's partner is able to draw a direct advantage from the former's work with very few financial repercussions. Basic income has only an indirect impact on breadwinners, in terms of potentially higher rates of taxation. By contrast, redistribution corrects advantages and disadvantages that ensue from cohabitation and therefore seeks to do justice between the parties. In that sense, it implements Ertman's recommendation to "[make] male partners pay their sweeties for homemaking labour".[62] As I argue above, there is a concern that basic income, while improving the homemaker's position, is insufficient to raise her status to that of the economically self-sufficient citizen and that those with a choice would still choose to engage in paid work. Redistribution ensures that there is at least some penalty for avoiding socially reproductive labour. The extent of this penalty of course depends on the goals of a redistributive scheme. In the case of married couples, economically stronger spouses can face a hefty bill even after a relatively short marriage.[63] By contrast, the Scottish regime is limited to ascertainable financial advantages and disadvantages and, therefore, has less impact on breadwinners. However, there is no suggestion that a potential future financial settlement would prompt a more equal division of homemaking work in heterosexual relationships.[64]

Limitations of Redistribution

Despite a redistribution-based response constituting a considerable improvement on the current position, such an approach has significant drawbacks unless it is accompanied by

[62] Martha M Ertman, 'Love and Work: A Response to Vicki Schultz's 'Life's Work'' (2002) Columbia Law Review 848, 858, discussed in Chapter 6, p 224

[63] E.g. *Miller v Miller* (n 38) where the wife secured an award of £5 million after a three-year childless marriage.

[64] E.g. homemaking work in marriages remains heavily gendered despite the generous discretion available on divorce.

other state initiatives. On its own, it is unlikely that redistribution can make the homemaker resilient.[65]

Redistribution places responsibility for obtaining a remedy on the homemaker. This is a particular worry if her former partner is intent on avoiding payment, leaving the homemaker to pursue enforcement through the courts, often unsuccessfully. This highlights the wider issue, that many privatised remedies provided by the neoliberal state are illusory if citizens do not have the means to access justice. Pursuing a non-paying former partner, particularly in the wake of legal aid cuts, requires financial, educational, and emotional resources that the homemaker may not have. Remedies that have potential enforcement problems do not go far enough to address vulnerability. For example, the failings of the mechanism for enforcement of child support payments in England and Wales have been described as a "national scandal".[66] The result of expecting parents to enter into private agreements for maintenance is that many single mothers have been left in poverty as a result of being unable to claim payments from the non-resident parent and denied assistance by an unsympathetic state.[67]

The under-reported aftermath of the landmark Canadian case, *Pettkus v Becker*[68] provides a tragic illustration of the struggle involved in enforcing court orders, and the gap that often exists between the black letter of law and the way it is experienced by its subjects. *Pettkus* was hailed as a breakthrough for homemakers, a victory for women, recognising as it did the plaintiff Rosa Becker's 50% interest in her partner's business as a result of her domestic

[65] My comments in this section also apply to the redistributive regime that governs married couples, although consideration of married homemakers lies beyond the scope of this thesis.
[66] Alison Diduck and Katherine O'Donovan, 'Feminism and Families: Plus Ça Change?' in Alison Diduck and Katherine O'Donovan (eds) *Feminist Perspectives on Family Law* (Routledge 2006), 12
[67] See research by the Nuffield Foundation, which indicated that private arrangements for the payment of child maintenance were difficult to sustain over time. Caroline Bryson, *Kids Aren't Free: The Child Maintenance Arrangements of Single Parents on Benefit in 2012* (Nuffield Foundation 2013)
[68] *Pettkus v Becker* [1980] 2 SCR 834

contributions throughout a long relationship. However, her partner refused to honour the court's judgment and, eventually, the half-share of the business was swallowed up by legal fees. Six years after the Supreme Court case, Rosa Becker committed suicide as "in protest against an unfair legal system which had deprived her of justice and left her penniless."[69] Remedies provided by the state will only be adequate when there is genuine access to justice and equality of arms between parties.

This issue is particularly pertinent in England and Wales, where the state is increasingly cutting back on legal aid and pushing parties towards private dispute resolution.[70] Even where the applicant is in scope for legal aid, increasingly fewer solicitors and barristers are undertaking publicly funded work, with so-called 'legal advice deserts' arising in some areas where there are simply no solicitors to take on a case. Homemakers' economic vulnerability means that they are less likely than their partners to have access to funds to pay legal fees and, collectively, women are more likely than men to be adversely affected by funding cuts.[71] Mediation and negotiation can be problematic, particularly given issues of unequal bargaining power.[72] Self-representation, while an option, can be intimidating and complex for someone unfamiliar with the legal system.[73]

Ultimately, redistribution does not go sufficiently far to make the homemaker autonomous and equal. Claims tend to be framed in language that suggests that the economically stronger party is *giving up* or relinquishing assets to meet the homemaker's needs. As Thompson

[69] Peter Bowal, 'A Famous Case Revisited' (2009) 33 Law Now 1, 2
[70] See Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017)
[71] Felicity Kaganas, 'Justifying the LASPO Act: Authenticity, Necessity, Suitability, Responsibility and Autonomy' (2017) 39 Journal of Social Welfare and Family Law 168
[72] See e.g. Susan Tilley, 'Recognising Gender Differences in All Issues Mediation' (2007) 37 Family Law 352; and Julie Doughty, 'Identity Crisis in the Family Courts? Different approaches in England and Wales and Australia' (2009) 31 Journal of Social Welfare & Family Law 231
[73] Liz Trinder et al, *Litigants in Person in Private Family Law Cases* (Ministry of Justice 2014)

argues, the "gold digger trope" is prevalent in family law (both in political discourse and in case law) and is used to describe any woman seeking to assert a claim to family assets.[74] Evidence of this negative perception of claimants was also witnessed in Barlow and Smithson's research on cohabitants. Here, some participants in the study explained that they did not discuss financial matters (including rights in the home) with their partner for fear of being labelled a gold-digger.[75] This is also an image that is prevalent in the media, with newspaper headlines frequently labelling maintenance orders a "meal-ticket for life" [76] and describing England and Wales as the "divorce-capital of the world".[77]

Finally, redistribution fails to challenge the current public/private divide that masks the public value of the homemaker's work. It confines the value of homemaking work to the private family context and reinforces private dependencies.[78] In contrast to the basic income scheme, redistribution arises only upon separation and therefore overlooks relational vulnerability that arises during the course of the relationship. Inevitably, redistribution regimes draw significantly on the marriage model,[79] thereby risking perpetuating existing gender inequalities.[80]

[74] Sharon Thompson, 'In Defence of the 'Gold-Digger'' (2016) 6 Onati Socio-Legal Studies 1225
[75] Anne Barlow and Janet Smithson, 'Legal Assumptions, Cohabitants' Talk and the Rocky Road to Reform' (2010) 22 Child and Family Law Quarterly 328, 341
[76] See e.g. Polly Morgan *Meal Tickets for Life?* (The Transparency Project, 24 May 2017) http://www.transparencyproject.org.uk/meal-tickets-for-life/ (accessed 10 May 2018)
[77]See Charlie Barker 'How England Became the Divorce Capital of the World' (*The Telegraph*, 22 July 2011). See also Emma Hitchings and Joanna Miles *Financial Remedies on Divorce: The Need for Evidence-Based Reform* (Nuffield Foundation, 2018), whose research strongly refutes the 'meal-ticket for life' trope. They found that, in a study of 400 financial remedy cases, only 16% included an order for spousal maintenance, meaning that the clear majority involved a clean break.
[78] For further discussion, see Susan B Boyd, '(Re)Placing the State: Family, Law and Oppression' (1994) 9 Canadian Journal of Law & Society 39
[79] Robert Leckey, 'Judging in Marriage's Shadow' (2018) Feminist Legal Studies 1
[80] For a strong critique of the assumption that a marriage-like model is the solution for cohabitants, see Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196

Deferred Community of Property

The final hypothetical response to relational vulnerability is a deferred and modified version community of property. Community of property is an ownership regime whereby, upon marriage or cohabitation, a couple's assets become jointly owned, even if they were previously held in sole names.[81] It exists in various guises in a number of jurisdictions, including South Africa,[82] France, and the Netherlands.[83] Usually there are options for a couple to contract out of community. Importantly, in its fullest sense, community of property extends to sharing liabilities as well as assets.[84] Community of property does not exist in England and Wales. Marriage or cohabitation by itself has no impact on property ownership, even if property is acquired during the relationship. Conversely, creditors cannot pursue a debtor's spouse or partner for a sole debt unless she has agreed to guarantee the loan.

Community of property can be both immediate and deferred. An immediate scheme, such as that in South Africa, allows an individual to deal with her spouse's or partner's assets as if they were her own from the date of the marriage.[85] Deferred community of property on the other hand refers to schemes that only take effect when the parties divorce or separate. Under deferred schemes, the fact of marriage or partnership will not have an immediate impact on property ownership, and an individual will not be able to deal with her spouse or

[81] Elizabeth Cooke, Anne Barlow and Thérèse Callus, *Community of Property-A Regime for England and Wales?* (Nuffield Foundation 2006)
[82] Under the Matrimonial Property Act 88 of 1984 (unless the couple contracts out of the regime)
[83] For full details of the European community of property schemes, see Cooke, Barlow and Callus (2006), (n 81); and Elizabeth Cooke, 'Community of Property, Joint Ownership and the Family Home' in M J Dixon and G L L H Griffiths (eds) *Contemporary Perspectives on Property, Equity and Trusts Law* (Oxford University Press 2007). It should be noted that the Dutch Civil Code was amended on 1 January 2018 to change the default regime from universal community of property (whereby all property, irrespective of being pre-acquired formed part of the community of assets) to a limited community of property regime that applies only to post-marital acquisitions and liabilities.
[84] Cooke, Barlow and Callus (2006), (n 81), 1
[85] Under the Matrimonial Property Act No. 88 of 1984, s 15, a number of restrictions operate, meaning for example that one spouse cannot unilaterally dispose of or alienate community property without the consent of the other.

partner's solely owned assets as though they were her own. However, upon divorce or separation, each party will be entitled to a specified share.

I am not suggesting that England and Wales should adopt community of property in its full sense. Instead, the hypothetical regime I consider here is a modified and deferred version; one that would be limited to the family home, would exclude pre-acquired assets (other than the home), and would provide a default position of equal shares in both joint and sole ownership cases after an appropriate qualifying period. Where a claimant could demonstrate vulnerability as a result of undertaking a homemaker role, there would be discretion to award a compensatory share or outright transfer of the home to the homemaker, as long as this did not result in significant hardship for the defendant. This is based on two schemes. The first is the Swedish 2003 *Sambolagen* (Cohabitees Act) which provides for equal shares in the home and household goods upon relationship breakdown. Pre-acquired property in sole names is excluded from the Swedish regime.[86] Under *Sambolagen*, cohabitants can seek equalisation of assets, either through property transfer or payment of a lump sum.[87] It also echoes the statutory regime proposed by Barlow and Lind in 1999,[88] which, as well as suggesting a default position of equal shares (after a minimum period of 2 years cohabitation) regardless of how legal title to the home is owned, argued for the court to have discretion to award an enhanced share (up to 75%) to those who could demonstrate economic vulnerability as a result of their homemaker role.

Deferred community of property would ideally be accompanied by additional protections for the homemaker in the form of express rights of occupation of the home for all cohabitants (irrespective of the length of the relationship), together with the ability to defer sale if

[86] Sambolagen, para 4
[87] Sambolagen, para 17
[88] Anne Barlow and Craig Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (1999) 19 Legal Studies 468

immediate sale would leave the homemaker in hardship. In some cases, for example where both parties are late middle-aged or older, this may involve the homemaker remaining in the home for the rest of her life if the economically stronger partner is able to rehouse without significant problem.[89]

There are some key differences between a deferred community scheme and the discretionary redistribution discussed in the previous section. Deferred community of property explicitly recognises and protects the homemaker's relationship to her home both during and after the relationship in a way that distribution does not do. Additionally, under deferred community, the homemaker's interest in the home would arise as of right, whereas under the redistributive scheme, the choice of order made (or indeed whether any order be made at all) would be at the court's discretion.

Deferred Community: Addressing Relational Vulnerability

There is considerable merit in a remedy that places ownership of the family home at its centre, as it directly addresses the homemaker's spatial vulnerability. A large part of the cohabiting homemaker's vulnerability arises due to her precarious relationship to her home. This is particularly true where she is not a legal owner and cannot point to financial contributions that would entitle her to an interest. Additionally, cohabitation by itself does not bring about a legal right to occupy the home, which can cause significant hardship to the non-owning homemaker if the relationship breaks down and she is asked to leave. Community of property would go some way towards recognising the concept of ontological security, whereby the individual's relationship to her home grounds her sense of identity and belonging in the world. Even though community of property may not leave the homemaker

[89] This would be similar to the 'Martin-order' which exists for married couples whereby sale is postponed until some future 'trigger' event. The order takes its name from the case *Martin v Martin* [1978] Fam 12

better off in net asset terms, there is a symbolic significance to a regime that recognises the importance of the home as a centre of security and belonging.

It is also conceivable that community of property would have psychological benefits in terms of equalising the parties' positions and enabling the homemaker to exercise a greater degree of financial and practical control over the home. As discussed in Chapter 3, sociological research on ontological security suggests that it is ownership, rather than the act of living in a place, that engenders particularly strong feelings of belonging and security.[90] In particular, the temporal nature of home ownership as a long-term endeavour may alleviate some of the homemaker's concerns over an uncertain and precarious future if her relationship breaks down.[91] As Cory J explained in the Canadian case *Rawluk v Rawluk*, "[o]wnership encompasses far more than a mere share in the value of property. It includes additional legal rights, elements of control and increased legal responsibilities. In addition, it may well provide psychological benefits derived from pride of ownership."[92]

On an economic level, there are significant benefits to a remedy that is based around home ownership. Unlike other assets, land tends to appreciate in value over time, and can provide significant financial security for the future in a way that state subsidy struggles to do. The discretion to order an enhanced share in response to relational vulnerability can enable the homemaker to retain the home when the relationship breaks down (although this would need to be subject to a requirement that this does not cause undue hardship to the defendant).

[90] Peter Saunders, 'Beyond Housing Classes: The Sociological Significance of Private Property Rights in Means of Consumption' (1984) 8 International Journal of Urban and Regional Research 202. See also discussion in Chapter 3.
[91] See Deborah Loxton, 'What future?: The Long Term Implications of Sole Motherhood for Economic Wellbeing' (2005) Just Policy: A Journal of Australian Social Policy 39; and discussion in Chapter 3
[92] *Rawluk v. Rawluk* [1990] 1 SCR 70 (Cory J)

Deferred Community and Resilience

From a resilience viewpoint, deferred community of property has greater potential than redistribution for achieving equality. Such a regime would involve a reconceptualisation of property rights. It must be remembered that private property itself is not inherent or pre-social, even if the classical liberal theories maintain that property is apolitical.[93] All regimes of property are ultimately created, reinforced, and given meaning by the state.[94] They represent examples of state distribution of resources among its citizens, and signal the values that the state seeks to promote. In English law, and within other neoliberal societies, private property is distributed unequally, with preference given to those who can conform to the autonomous ideal of personhood. Law permits propertied persons to exclude non-propertied persons, thereby creating a social hierarchy with owners at the top.[95]

Deferred community of property would represent a change in the values that the state wishes to foster through a regime of property law. The ability to acquire property rights as a result of homemaking work would be a radical departure from the current system that is based on individual self-sufficiency and wealth-maximisation. Furthermore, it would extend the class of persons who are able to acquire ownership rights. Home ownership is a clear state endorsement of citizenship status.[96] It is a badge of honour, a symbol of being responsible and self-sufficient. The homemaker currently lacks full status as a citizen, particularly if she is economically dependent on her partner or the state. She is stigmatised for not taking the opportunities that are presented as being freely available, including the opportunity to acquire home ownership. Deferred community could therefore be viewed as a means for the

[93] See discussion in Chapter 2, p 67
[94] See Margaret Davies, Property: Meanings, Histories, Theories (Routledge 2007), 42
[95] See Sarah Keenan, 'Subversive Property: Reshaping Malleable Spaces of Belonging' (2010) 19 Social & Legal Studies 423
[96] Helen Carr, 'Housing the Vulnerable Subject: The English Context' in Martha Albertson Fineman and Anna Grear (eds) *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013)

homemaker to acquire homeowner status and greater security upon relationship breakdown. Although the deferred nature of the scheme means that it only takes effect when the relationship has broken down, rules against disposal of the home without consent during the relationship would provide greater protection for homemakers who live in homes owned by their partner.[97]

Proponents of community of property point to its potential to combat women's historical disadvantage within marriage and intimate relationships.[98] The true test of equality is of course whether a proposed regime will have any impact on the gendered split of homemaking work. Deferred community is more radical than redistribution in terms of giving homemakers a share in the home *as of right* rather than based on need or disadvantage. I do not necessarily believe that it will act as an impetus for men to perform their fair share of homemaking work. However, as part of a much broader societal commitment to equalise the roles of income earner and homemaker, it may have some potential, as the homemaker is symbolically elevated to the status of equal partner, rather than a wronged victim (as she is under the redistribution scheme).

Finally, deferred community has the advantage of offering a degree of certainty of outcome.[99] Although judicial discretion provides the advantage of flexibility and individualised justice, the neoliberal social context in which law operates means that uncertainty is a distinct disadvantage to those who cannot afford access to the court system.[100] Certainty should not be mistaken for rigidity, as deferred community of property

[97] E.g. as under the Swedish *Sambolagen*, where disposal of the home by a sole owner is prohibited. See *Sambolagen* paras 23-25
[98] Lucy-Ann Buckley, 'Matrimonial Property and Irish Law: A Case for Community' (2002) 53 Northern Ireland Legal Quarterly 39, 40
[99] Cooke, Barlow and Callus (2006), (n 81), 35 and Buckley (2002), (n 98), 76
[100] See Barlow et al (2017), (n 70)

schemes can, and do, include court discretion.[101] Additionally, if a regime is to include the possibility of an enhanced share for homemakers, this would require judicial discretion. However, deferred community offers clearer parameters than the Scottish redistributive scheme, which suffered as a result of the inherent uncertainty surrounding the court's tasks. As homemaker contributions are notoriously difficult to value in financial terms, the clarity that can be provided by deferred community is to be welcomed.

Drawbacks of Deferred Community

There are of course negative aspects to a scheme based on deferred community of property.[102] As is the case for the other two regimes, I do not believe that it can fully address relational vulnerability by itself. Perhaps more so than the other two responses, deferred community is likely to be met with some opposition, particularly by those subscribing to Deech's view that cohabitation should be free from legal regulation.[103] There is likely to be a feeling that reform would be unfair to homeowners who subsequently cohabit and that they risk having their property arbitrarily removed by the state. The dominant myths surrounding autonomy, property, and the restrained state are deeply ingrained in legal and social policy and will be difficult to challenge. For libertarians, community of property (albeit in a modified form) could be viewed as unjustified state interference with ownership and is potentially in breach of the right to enjoyment of possessions under the European Convention on Human Rights. As I have argued throughout this thesis, I am relatively unpersuaded by objections of this nature, which are based solely on unfairness to the legal owner. The basis for objecting to homemakers gaining rights in the home rests on the belief

[101] Cooke, Barlow and Callus (2006), (n 81), 11

[102] I do not deal with the general objections to community of property in the full sense, as what is being proposed is a modified version of community of property. However, for a fuller overview, see Cooke (2007), (n 83)

[103] Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 International and Comparative Law Quarterly 480. See discussion in Chapters 1 and 2.

that, while economic contributions have value, homemaking contributions do not. This is a view that reinforces the gendered myths that women perform homemaking work as part of their relational role. Deech is concerned that extensive legal provision for homemakers places a significant risk on those forced by law to share their assets with a former partner.[104] However, this narrative overlooks the much greater risk that a person takes when she compromises her earning capacity to be a homemaker, resulting in an often-lifelong reduction in economic security. It is the homemaker, not the income earner, who is most likely to be adversely affected by marriage or cohabitation, but media headlines would have us assume that it is the opposite. In any event, concerns about injustice for property owners could conceivably be dealt with by a residual judicial discretion to adjust awards where they would otherwise result in manifest unfairness. However, giving an economically stronger party a substantially smaller share is not by itself unfair.[105]

The other drawback to deferred community is that it does nothing to redress relational vulnerability in cases where the couple does not own their home. For the younger population, home-ownership is being placed increasingly out of reach due to higher house-prices, increasing student debts, and stagnant wages. This is likely to have an impact on the future demographic of cohabiting couples, where there will be an absence of substantial assets available for sharing. Reported cases tend to focus on relatively wealthy couples and do not reflect the remainder of the population. Additionally, while there has been a boom in house prices over the past 20 years, this cannot realistically continue at the same rate, meaning that the home by itself is unlikely to be able to compensate the homemaker for her financial

[104] See Chapter 3, p 97
[105] See Jonathan Herring, 'Why Financial Orders on Divorce Should be Unfair' (2005) 19 International Journal of Law, Policy and the Family 218

sacrifice. Therefore, while there is a potential role for deferred community as part of a broader state response, it will not be sufficient on its own.

The Need for a Holistic Approach

All three hypothetical responses address relational vulnerability to some extent and all are an improvement on the current position. None will, by themselves, be able to fully eliminate the current structural inequalities that result from the state's privileging of economic self-sufficiency and rationality. However, some general observations can be made.

State subsidy is a compelling approach because it represents the most radical of the three responses and turning away from privatised solutions. Reform needs to take place on a wide scale if the homemaker's position is to be elevated in a genuine sense. Neither redistribution nor community of property address the relational vulnerability that takes place during the course of the relationship. By confining remedies to the point when the relationship breaks down, the homemaker cannot be said to be fairly remunerated for the socially reproductive work that she performs. The key is to avoid entrenching gender roles through turning homemaking into a paid profession. Ideally, homemaking should be evenly distributed across the population and as much a part of citizenship as economic activity. It is unlikely that state subsidy could achieve this by itself.

At the same time, the state cannot ignore the relational inequality that occurs when the homemaker's partner draws a direct benefit from being unburdened by homemaking work. Resilience must also correct imbalances occurring on an interpersonal level, enabling the homemaker to have equal access to family assets. I am more persuaded by a deferred community of property response than discretionary redistribution, due to the former's recognition of the psychological and security benefits of home ownership. A secure home offers considerable resilience, especially in terms of future-related hardships. The neoliberal

state currently restricts ownership to those who are economically self-sufficient, meaning that many homemakers are in precarious positions as regards their homes. Although it would not singlehandedly eliminate relational vulnerability, deferred community of property as part of a wider system of social reform, which also included some form of state subsidy, may be a way forward in terms of making the homemaker more equal.

The Limits of a Vulnerability Based Approach: Some Further Questions

The Role of Contract

If law reform is introduced, either in the form of redistribution or deferred community of property, this will also need to deal with the question of contracting out of any such regime. I am not so much concerned with whether contracting out *per se* should be permitted, but rather what the position should be in relationships where one party has taken on a homemaking role, either before or after the agreement was made. As scholars have noted, it is not cohabitation itself that leads to economic disadvantages but rather the assumption of caring and domestic responsibilities to the detriment of one's earning capacity.[106] Thus, there is a fundamental difference between relationships where cohabiting couples are on an equal financial footing and those where they are not. Contracting out is relatively unproblematic where the parties have equal bargaining power, and where both wish to avoid the impact of any legal regime. The position is very different where the relationship is not equal and where contracting out would result in the homemaker's partner benefiting at the expense of her work.

The majority of the Supreme Court in *Radmacher v Granatino* explained that "the reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy. … It would be paternalistic and patronising to override their

[106] See e.g. Patrick Parkinson, 'Quantifying the Homemaker Contribution in Family Property Law' (2003) 31 Federal Law Review 1

agreement simply on the basis that the court knows best."[107] Allowing contracting out and private ordering symbolises respect for the individual liberty that is so central to liberal theories of autonomy; namely that the individual should be free to choose what obligations they are bound by.[108]

In neoliberal society, there is an assumption that allowing contracting out and private ordering is always positive, a necessity for individual self-determination.[109] This is not confined to England and Wales: nearly all EU member states who had a matrimonial or de-facto property regime also permit opt-outs to some degree.[110] The Law Commission itself recommended that contracting out be permitted, noting also that "the arguments for private ordering for cohabitants are stronger than those for married couples and civil partners."[111] Given that *Radmacher* effectively allows contracting out for married couples,[112] it would be difficult to envisage that the law applicable to cohabitants would be stricter. The Law Commission's recommendation was that opting out would be subject to safeguards, including that the agreement be in writing,[113] but which did not extend to requirements for full disclosure or independent legal advice.[114] This would be subject to the court's ability to set an agreement aside in cases where it would produce "manifest unfairness".[115]

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[107] *Radmacher v Granatino* [2010] UKSC 42, [78] (Lord Phillips, Lord Hope, Lord Rodger, Lord Walker, Lord Brown, Lord Collins, and Lord Kerr). Lady Hale was the only dissenting judge.
[108] Richard Craswell, 'Remedies When Contracts Lack Consent: Autonomy and Institutional Competence' (1995) 33 Osgoode Hall Law Journal 209, 210
[109] See Gillian Douglas, 'Who Regulates Marriage? The Case of Religious Marriage and Divorce' in Russell Sandberg (ed), *Religion and Legal Pluralism* (Ashgate 2015), 61; and Barlow et al (2017), (n 70)
[110] Law Commission (2007), (n 42), para 5.18 (citing the Asser Institute Report for the European Commission on Matrimonial Property Regimes, http://ec.europa.eu/civiljustice/publications/docs/regimes/dutch_report_en)
[111] Ibid, para 5.19
[112] *Radmacher v Granatino* [2010], (n 107), [75] where the majority state that "The court should give effect to a nuptial agreement that is freely entered into by each party with a full appreciation of its implications unless in the circumstances prevailing it would not be fair to hold the parties to their agreement."
[113] Law Commission (2007), (n 42), para 5.30
[114] Ibid para 5.38
[115] Ibid para 5.51

From the homemaker's viewpoint, contracting out is a deeply problematic concept. Its basis is autonomy in the individualistic sense. The notion of contracting out serves those individuals who are able to conform to the ideals of autonomous citizenship, but it does not enhance the homemaker's relational autonomy. As Marguiles has argued, "almost inevitably [contracting out] is used by the economically stronger party in order to render himself financially invulnerable."[116] Safeguards, such as those proposed by the Law Commission and present in the *Radmacher* judgment,[117] are focused on ensuring that consent to contracting out is freely given. However, such safeguards are blind to the inherently unequal context in which agreements are made where one party is the homemaker. The homemaker is likely to have little to bargain with. Instead she is presented with a choice to take it or leave it. If she signs an agreement, she is signing away any right to be paid for the work she does and the sacrifice that she makes. She allows her partner to opt out of sharing, but she herself has no option as to whether her homemaking work is shared by the rest of the family. The creep of individual autonomy into the sphere of family law is troubling. It is always presented in positive terms, but it is not positive for those who are already disadvantaged by the legal and political system.

This discussion has so far focused on ways in which individuals can use contract to avoid obligations that would otherwise be imposed upon them. However, contract also offers potential to gain entitlements that the law does not provide. Cohabitation agreements, provided that they are freely entered into, with the benefit of legal advice, will usually be upheld by the courts upon separation.[118] These enable access to remedies that would not

[116] Sam Margulies, 'The Psychology of Prenuptial Agreements' (2003) 31 Journal of Psychiatry & Law 415, 415

[117] See paras [68]-[74]

[118] See *Sutton v Mischon de Reya* [2003] EWHC (Ch) 3166 and *Morgan v Hill* [2006] 3 FCR 620. The Law Commission also regarded cohabitation agreements favourably, recommending legislative clarification that they are not contrary to public policy (see Law Commission (2007), (n 42), para 5.8).

otherwise be available, and could conceivably allow homemakers to receive financial reward for the performance of care or domestic work throughout the relationship. Indeed, cohabitation agreements (along with general calls for greater legal awareness) have been posited as the way forward for cohabitants to prevent hardship or disputes on relationship breakdown, and are described by the Living Together campaign as "a brilliant way to protect you and your partner".[119] However, as a solution to homemaker vulnerability, this suggested reliance on contract is unsatisfactory. Whereas prenuptial agreements usually involve protecting the financially stronger party's wealth, cohabitation agreements that compensate the homemaker for her labour would involve the financially stronger party signing up for a liability that would otherwise not exist. While these contracts may indeed be welcomed by those cohabitants who have made an active choice not to marry for ideological reasons,[120] it is entirely unrealistic to expect homemakers in more uneven unions to persuade a financially stronger partner to relinquish the protection that the legal framework currently provides for unmarried breadwinners.

For the above reasons, I am highly cautious of permitting or promoting contracting out where the parties are in unequal positions. Until homemaking is given equal worth, contracting out cannot be a positive thing for those who undertake this work. Just as Lady Hale spoke of the "irreducible minimum"[121] in the case of marital obligations, there should be an equivalent minimum standard in cohabiting relationship. Otherwise the state, under the guise of promoting individual freedom, permits some citizens to exploit and take

[119] https://www.advicenow.org.uk/guides/how-make-living-together-agreement (accessed 23 December 2018). For critique of the promotion of cohabitation agreements, see Helen Reece 'Leaping Without Looking' in in Robert Leckey (ed), *After Legal Equality: Family, Sex, Kinship* (Routledge 2015)
[120] See Barlow and Smithson (2010), (n 75), who categorise these couples as 'ideologues', who choose to stay unmarried due to ideological objections to marriage. Evidence of this type of relationship can be seen in *R (on the application of Steinfeld and Keidan) v Secretary of State for the International Development)* [2018] UKSC 32, where the parties sought the right to enter into a heterosexual civil partnership due to their rejection of the patriarchal history of marriage as an institution.
[121] *Radmacher v Granatino*, (n 107), [132] (Lady Hale)

advantage of others. If the state is to permit contracting out, it must ensure that such agreements are robustly scrutinised, with the ability to set them aside completely where circumstances have changed since the agreement was made (e.g. if at the time of the agreement, the parties had no children and roughly equal income, but they have since then had children and one party has given up work to care for them).

Causal Links Between Vulnerability and Relationship

I pose one final question in this chapter, namely, how should cohabitation law deal with the issue of 'non-relational vulnerabilities'? Where vulnerability is relational, the state should respond both through subsidy and property transfer, preventing the homemaker's partner from profiting at her expense. But what of a situation where the economically weaker party (not necessarily a homemaker in this scenario) is more-than-ordinarily vulnerable due to non-relational factors, including illness, injury, or old age? Should the impact of inherent bodily vulnerability be treated the same as relational vulnerability?

The question of demanding a causal connection between vulnerability and relationship is a difficult one.[122] On one hand, causality is clearly not required where the parties are married to one another. When making an award, the court must take into account the ages of the parties,[123] as well as any mental or physical disability from which they may suffer.[124] Non-relationship-generated needs may mean that there is limited available capital for the other spouse.[125] On the other hand, there is an instinctive discomfort with the economically

[122] Carol J Rogerson, 'The Causal Connection Test in Spousal Support Law' (1989) 8 Canadian Journal of Family Law 95
[123] Matrimonial Causes Act 1973, s 25(2)(d)
[124] Ibid s 25(2)(e)
[125] See *C v C (Financial Provision: Personal Damages)* [1995] 2 FLR 171 where the husband's brain injury necessitated that all matrimonial assets be used for his future care, even though this meant that the wife did not receive financial provision.

stronger partner receiving less due to a vulnerability that cannot be directly attributed to the relationship.

My tentative answer is that compensatory shares (whether through redistribution or community of property) should generally be reserved for vulnerability that can be described as flowing from the parties' relationship. Where there are very clear non-relational vulnerabilities, such as a catastrophic accident, long-term illness, or disability, there should generally not be a compensatory share for the economically weaker party (over and above what she would ordinarily receive). My reasoning is that this would be unfair to the other party and would amount to privatisation of state obligations. It is the state's responsibility to respond to inherent vulnerability rather than placing the burden on individual citizens. It must be remembered that relational vulnerability is not inherent; it arises due to state-created unequal structures. Therefore, relational vulnerability may require adjustment between the partners to reflect benefits that one has gained at the other's expense by not having had to engage in homemaking labour. The same is not true for inherent vulnerability, where there is no real causal connection between the relationship and the disadvantage. In any event, family assets are unlikely to be sufficient to meet the considerable needs of a disabled adult and may place the other party in hardship.

The above relates to vulnerabilities that are clearly non-relational and are the result of out-of-the-ordinary events. Although the vulnerable human condition means that we are all constantly susceptible to unforeseen events that render us dependent on others, most of us are fortunate enough not to fall victim to a catastrophic accident or a disability. However, we are still inherently vulnerable to the natural stages of the life course, including ageing. These ordinary manifestations of vulnerability are much more difficult to distinguish from the relationship itself. For example, the stereotypical jilted late middle-aged woman who

features in many of the cases[126] is vulnerable as a result of taking on a homemaker role in the relationship but, arguably, her age also disadvantages her because, had she been younger, she would find it easier to return to work and to obtain a mortgage. However, it would be inappropriate to try to separate the relational from the non-relational in assessing her vulnerability. As I argued in Chapter 3, part of relational vulnerability is its temporality and the impact of the passage of time on the individual. Therefore, I do not believe that an enhanced share should be denied on the basis of ordinary aspects of the vulnerable human condition.

Conclusion

In this chapter, I sought to evaluate three different hypothetical state responses to vulnerability, using the framework for relational resilience developed in Chapter 6. My aim was not to find a definitive solution, but rather to examine how the different responses impacted on the homemaker's relational vulnerability. For each state response, I addressed a number of questions. How does the scheme respond to relational vulnerability? To what extent does it make the homemaker resilient? What are its limitations?

None of the hypothetical state responses would be sufficient as the *only* solution to relational vulnerability, but each has some potential as part of a broader state commitment towards revaluing the work of homemakers. Realistically, a combination of measures is likely to be required in order to challenge the existing myths and restructure the homemaker's relational network. This reflects Fineman's argument that reform needs to take place on a large scale; challenging the erroneous assumptions about personhood that define the neoliberal state.[127] The hypothetical autonomous liberal subject that dominates the legal framework needs to be

[126] See Chapter 1
[127] Fineman (2004), (n 12)

replaced by the relational, embodied, and above all, *vulnerable* legal subject.[128] I am conscious of the fact that I am researching a narrow area of law, and that it is unrealistic to expect that cohabitation law reform will have a much broader revolutionary social and political impact. Nonetheless, there are some general comments that can be made about state responses to relational vulnerability.

Firstly, there is a clear need for the state to respond to relational vulnerability. The current position allows state institutions to remain inactive while simultaneously reinforcing unrealistic and harmful myths that contribute to homemakers' societal and legal marginalisation. Any of the three responses would be an improvement on the current position, as each of them involves the state taking increased responsibility for addressing the imbalances that arise from consistently prioritising economic self-sufficiency and ignoring the relational and vulnerable reality of the human condition in the context of unmarried cohabitation. Secondly, resilience requires more than mere distribution of resources to homemakers. The way any response is framed, the rhetoric it employs, the way it positions the parties, are all fundamental to ensuring equality and autonomy. Thirdly, the state ideally needs to respond at both a central level (in ensuring that the homemaker is valued as a citizen and compensated for her work) and a local level (ensuring that the homemaker's partner cannot draw an unfair advantage from being relieved of the homemaking burden).

Finally, I addressed two further questions relating to the limits of a vulnerability approach. The first was the question of being able to contract out of a proposed scheme. As I argued, the notion of contracting out is deeply problematic from a vulnerability perspective. It falsely assumes that the parties have equal bargaining power within the relationship. Contracting

[128] Martha Albertson Fineman, 'Feminism, Masculinities, and Multiple Identities' (2013) 13 Nevada Law Journal 101, 119-120

out must therefore be accompanied by safeguards that would enable unfair agreements to be set aside. The second question was whether any compensatory payments to financially weaker parties should include situations where the vulnerability was non-relational, such as disability or serious injury. This is a complex area, but generally, disability or injury should be dealt with through direct state provision of resources.

CHAPTER 8: REFLECTIONS AND CONCLUSIONS

Reflections on the Project

I started this thesis aiming to reconceptualise the current understanding of the ways in which intimate relationships can render individuals vulnerable and exposed to risk, especially where they do not have the legal protection of marriage. I wanted to excavate the concept of relationship-generated disadvantage, something that has to date been understood as a financial imbalance arising upon relationship breakdown, due to individual choices made by the parties during the course of their relationship. While the court can compensate married homemakers for relationship-generated disadvantage, unmarried couples are subject to the ordinary law of property and trusts where no such power exists.[1]

Cohabitation has been studied for decades, from various theoretical and political angles. There exists a wealth of existing literature spanning back to the 1970s, when it was first established that unmarried intimate partners are subject to the ordinary law of property and trusts.[2] Feminist scholars have levelled particular criticism at the legal framework's failure to recognise homemaking contributions, instead preferring the certainty of financial contributions.[3] Others have defended the lack of remedies, arguing that the state should not impose law upon those who have chosen not to marry.[4]

I did not wish to go over old ground by re-engaging with the debate over whether the current situation is unfair or justifiable. There is voluminous scholarship on this point. I started from the position that it *is* unfair to leave cohabiting homemakers without a remedy upon

[1] Matrimonial Causes Act 1973
[2] *Gissing v Gissing* [1971] AC 886
[3] E.g. Gillian Douglas, Julia Pearce and Hilary Woodward, 'Cohabitants, Property and the Law: A Study of Injustice' (2009) 72 MLR 24; and Anne Bottomley 'Women and Trust(s): Portraying the Family in the Gallery of Law' in JL Dewar and S Bright (eds), *Land Law, Themes and Perspectives* (Oxford: Oxford University Press 1998)
[4] E.g. Ruth L Deech, 'The Case Against Legal Recognition of Cohabitation' (1980) 29 International Comparative Law Quarterly 480

relationship breakdown. I sought to take the debate in a new direction by better understanding the nature of homemaker disadvantage and to locate the state's role in its production. First and foremost, I wanted to reconceptualise the debate with the homemaker at its centre. I felt that the political discourse around cohabitation reform, and family law generally, often blames homemakers for the position that they end up in, or paints them as 'gold-diggers' who seek to claim more than they deserve from former partners.[5] I was also struck by the extent to which the political debate around cohabitation was framed in the language of personal choices. For instance, Deech's opposition to law reform is based on the parties having made a choice not to marry and subject themselves to the redistributive regime on divorce. I saw this as part of the wider trend in family law towards embracing more individualistic concepts of autonomy and self-determination than was previously the case.[6] I wished to challenge the existing perception of homemakers and the assumption that an increasingly autonomy-focused approach to family policy is a positive one.

When beginning my research, I was particularly conscious of the arguments that society has 'moved on' and indeed that many of the previous concerns about homemakers may not be relevant today.[7] It is of course true that the world inhabited by Mrs Burns in the 1980s is quite different to that faced by the homemaker in 2018.[8] Furthermore, I was aware of arguments that, as it is now increasingly rare for the family home to be solely owned or for a cohabitant to not work, the concerns about being able to show a constructive trust over

[5] See Sharon Thompson, 'In Defence of the 'Gold-Digger'' (2016) 6 Onati Socio-Legal Studies 1225
[6] See Anne Barlow, Rosemary Hunter, Janet Smithson and Jan Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan 2017),
[7] See e.g. Rebecca Probert, 'Trusts and the Modern Woman-Establishing an Interest in the Family Home' (2001) 13 Child and Family Law Quarterly 275; Anne Bottomley, 'From Mrs. Burns To Mrs. Oxley: Do Co-habiting Women (Still) Need Marriage Law?' (2006) 14 Feminist Legal Studies 181; and Rosemary Auchmuty, 'The Limits of Marriage Protection: In Defence of Property Law' (2016) 6 Onati Socio-Legal Studies 1196
[8] See Chapter 1

solely owned property were largely redundant.[9] *Stack v Dowden* had already brought about a form of equality, meaning that even homemakers would be likely to obtain a 50% share of sale proceeds upon relationship breakdown.

At the same time, I was conscious that inequalities in how breadwinners and homemakers were treated persisted, and that the law remained wholly unsatisfactory. Some of was influenced by my previous experience as a solicitor specialising in family law, where I came across a number of clients who had moved into their partner's solely owned home and later started a family and found themselves in a precarious position when the relationship broke down. I also witnessed joint owners who worried about the extent to which the relatively small lump sum they would receive from sale of the home would eventually render them ineligible for housing benefit, as they were unable to purchase a new property. So many of these cases fall below the radar. The threat of costs orders for the losing party as well as high costs of litigation means that it is rare for these cases to come before a court.[10] Many are settled in negotiations or mediation without reaching public attention. Lack of access to justice is also a major concern. At the time that I left practice, the Legal Aid, Sentencing and Punishment of Offenders Act 2012 had just come into force, effectively decimating what was left of private family legal aid. It is now more difficult than ever for wronged parties to get access to justice, and the system is in a state of crisis. I therefore very much started from a position of believing that the current legal framework leads to significant injustice and that often the extent of that injustice is underestimated.

My thesis made the novel claim that homemaker disadvantage is a state-created problem. It cannot be attributed to individual life-choices, or a failure of homemakers to protect their position by getting married or entering into an agreement with their partner. Instead, it is

[9] Auchmuty (2016), (n 7)
[10] See the Civil Procedure Rules 1998, Part 44

caused by the way that the state consistently marginalises and devalues homemaking work, expecting its citizens to conform to an unrealistic, individualistic conception of personhood. Within the constructive trust and estoppel framework, this is evident through law's reliance on various myths which seek to establish homemaking as a sentimental and gendered activity that does not merit recognition in the form of property rights in the home. This leaves the cohabiting homemaker vulnerable both during the relationship and upon its breakdown.

I examined the constructive trust and estoppel framework through the lens of vulnerability theory. In recent years, vulnerability theory has gained significant popularity in critical legal scholarship. Although the concept of vulnerability has always been used to refer to marginalised groups, Martha Fineman's theory of *universal* vulnerability represented a change in direction in the scholarship.[11] Fineman's position is that we are all vulnerable by virtue of our embodied human nature. Therefore, she has moved the theory away from its traditional connotations with victimhood and weakness. For Fineman, vulnerability is not a condition that should be sought to be eliminated. The problem is that the neoliberal state stigmatises vulnerability, expecting its citizens to be economically self-sufficient. While dependency is an inevitable part of personhood, the neoliberal state views it as evidence of an individual failure to become autonomous. Fineman advocates rejecting the neoliberal emphasis on economic self-sufficiency and constructing a 'responsive state' that acknowledges inherent vulnerability and seeks to make its citizens more resilient.[12]

For me, the attraction of vulnerability theory was its core position that the state must take an active and supportive role towards its citizens. Fineman is very clear that the individual cannot be held responsible for her hardship and instead attention needs to be turned to how

[11] Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale Journal of Law & Feminism 1
[12] Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 Emory LJ 251

the state can address it. However, I felt that, in the context of cohabitation and homemaking, there were some limitations to the universal theory. Cohabiting homemakers, like the rest of the population, are inherently vulnerable, but they are also susceptible to harms that cannot be said to result from their embodied nature. A sole focus on universal vulnerability would downplay the unique hardships to which homemakers are susceptible. Rather, homemakers can be said to be "more-than-ordinarily-vulnerable".[13] They face additional hardship beyond inherent vulnerability due to the unsupportive state structures that govern their intimate relationships. This does not contradict or invalidate Fineman's theory. The reason why homemakers face additional vulnerability is that the state chooses to deny universal vulnerability, which brings with it inevitable relationships of dependency. Those who are engaged in the socially reproductive work of meeting dependency therefore become marginalised.

I developed a framework of relational vulnerability to explain the cohabiting homemaker's relationship-generated disadvantage. Relational vulnerability can be defined as *the broad susceptibility to harm that arises as a result of an individual existing within an uneven or unequal relational framework.* Relational vulnerability is a form of "pathogenic vulnerability";[14] it is not inevitable, rather it arises because the state expects all its citizens to be self-sufficient, even though this is an impossibility for many. The relational aspect does not merely relate to the dynamic between the homemaker and her partner. Relationships are situated within a broader network and include not just interpersonal and familial connections, but also broader relations between the individual and the state.[15] Theories that

[13] Derek Sellman, 'Towards an Understanding of Nursing as a Response to Human Vulnerability' (2005) 6 Nursing Philosophy 2, 2
[14] Catriona Mackenzie, Wendy Rogers and Susan Dodds *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2014), 9
[15] See Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press 2011)

deny this inherent relational nature of personhood (as classical legal and political theories do), are flawed and inadequate for the purpose of explaining concepts such as caregiving, love, and friendship. Law tends to be described as logical, rational, and unemotional, and it expects the same of its subjects. Those who cannot conform to the ideal are instead relegated to an imagined private sphere, into which law does not purport to intrude. By contrast, my relational vulnerability framework acknowledges that persons are inherently relational, emotional, and embodied, and that this needs to be acknowledged within the legal framework.

Summary of Findings

My thesis sought to answer three broad research questions. Firstly, in what way does the state create relational vulnerability? Secondly, what is the impact of relational vulnerability on the homemaker? Thirdly, how should the state respond to vulnerability?

Relational Vulnerability: Its Causes and its Effects

In Chapter 2, I argued that the state causes vulnerability by creating conditions of inequity, whereby the homemaker is marginalised and confined to the non-legal private sphere. This takes place through reliance on myths and discourses that are presented as irrefutable truths. I identified three main myths that operate within the cohabitation framework (the constructive trust and proprietary estoppel). Together, the myths reinforce the state's preference for the economically self-sufficient, rational, and individualistic subject. As a consequence, they marginalise and 'other' the homemaker and her contributions because she cannot fit into the dominant framework.

The first myth is that the legal subject is autonomous and rational. Emotionality does not fit into the framework, and indeed, the presence of emotion often leads to a remedy being denied. Individuals who can present their case in a dispassionate and neutral manner are

likely to be more successful. The second myth is the inviolability of property rights. Property rights are given significant force in English law, meaning that homemakers are viewed as a threat to the legal owner. The third myth is that the ideal state is restrained and should avoid paternalistic interference into the lives of its citizens. Together, these myths reinforce neoliberal society's preference for economic self-sufficiency. By contrast, homemakers are usually consigned to the private sphere, away from legal concern.

Chapter 3 examined the impact of marginalisation on the homemaker by outlining the various facets of relational vulnerability. Here, I expanded significantly on the traditional understanding of relationship-generated disadvantage as primarily financial and occurring only upon separation. I argued that relational vulnerability is a temporal concept which acknowledges that relational roles come to have a long-term impact on the homemaker. The homemaker is vulnerable to the effects of time because her future is increasingly precarious as a result of her actions and work during the present time. Additionally, vulnerability must be examined during different time periods: during the relationship, upon breakdown and in the future.

I identified three different ways in which harm can occur: economic, emotional, and spatial. Economic vulnerability refers to the disparity in financial resources between the homemaker and her partner. Legal scholars and the judiciary often refer to the concept of *interdependence*, which can mask the reality of *dependency*, and assumes that family resources are shared equitably. Although this is a relatively underexplored area, the research that does exist reveals that the homemaker often lacks control of financial resources, sometimes living in relative poverty in comparison to other family members. Policies of non-intervention and an absence of available remedies to challenge a lack of financial support during the relationship means that this goes unchallenged.

Economic vulnerability becomes more apparent when the relationship breaks down and the homemaker's dependence often shifts to the state. This is particularly so for the cohabiting homemaker who is unable to claim financial remedies against her former partner. The state and society treat reliance on subsidy as a sign of failure and the consequence of poor lifestyle choices. The economic consequences of undertaking a homemaker role cannot simply be analysed at the point of relationship breakdown. Over the course of a lifetime, they are enormous. In particular, the homemaker is less likely to have adequate pension provision to provide security in later life. Therefore, even an equal split of available resource does not come close to remedying the homemaker's financial disadvantage.

Emotional vulnerability describes the more nebulous aspects and non-financial aspects of the homemaker's marginalised role. The emotional element of marginalisation is downplayed in mainstream liberal legal theory. The homemaker can suffer emotional vulnerability as a result of her lack of bargaining power within the relationship, which is tied to her financially inferior role. Emotional vulnerability can also result from the homemaker's reduced status as a citizen and her inability to live up to the economic ideal. She is depicted as a failure if she becomes dependent on the state, and homemakers, especially if they are single parents, are expected to bear a disproportionate share of the blame for relationship breakdown. By contrast, financially stronger parties are able to walk away from obligation on the end of the relationship,[16] meaning that the entire burden of breakdown is placed on the homemaker.

Finally, spatial vulnerability refers to the homemaker's relationship to her home. Legal scholarship has traditionally overlooked the spatial and emotional connections that an

[16] Other than relatively limited financial obligations towards biological children under the Child Support Act 1991.

individual has to her home. In this chapter, I drew on sociological scholarship of ontological security, arguing that an individual's home plays a pivotal part in establishing a sense of identity, belonging, and safety. In the UK, home ownership arguably offers a much stronger sense of security than rental, which is often short-term, precarious, and does not allow the tenant to express her identity through making changes to the property. However, the homemaker's precarious financial position often excludes her from the security offered by ownership. This is particularly relevant in terms of considering the future-related elements of spatial vulnerability. I argued that homeownership provides a form of 'anchor' to the future, ensuring a sense of certainty and constancy against the potential harm brought by the passage of time.

Upon relationship breakdown, the homemaker is likely to experience the loss of her home harder than her partner. Her economic vulnerability means that she is less likely to be able to acquire a new home, meaning that she will have to resort to more temporary forms of housing. The enduring and almost everlasting nature of land means that the home provides a link to the future, mitigating against the uncertainty that the passing of time brings. Therefore, while the homemaker may have her short-term housing needs met, the absence of secure accommodation in old age will have a detrimental impact on how she experiences this period of her life.

Relational Vulnerability in Context: Care and Domestic Work

In Chapters 4 and 5, I applied the relational vulnerability framework to two specific contexts: care and domestic work. Care and domestic work are often treated as a homogenous category, whereas each of them has separate features that need to be considered. Caregiving, while undervalued, is often seen in moral or "spiritual" terms, whereas domestic work is seen as "menial". While there has been increased legal recognition of the rights of

caregivers, domestic work has become ever-more invisible as women's presence in the workplace has become more common.

Care and domestic work are consigned to the private realm, away from legal concern. However, as I argued, this private realm is also characterised by its own myths. In denying a remedy to homemakers, courts draw on myths in order to depict care and domestic work as private, gendered, and sentimental. The myth of the altruistic carer is based on the notion that women are biologically suited to caregiving in a way that men are not. The altruistic carer myth is also based on a 'gender-contract', whereby women are expected to perform caregiving labour as part of their heterosexual relational role.

My analysis of the case law revealed the influence of the altruistic carer myth where the claimant was female. Heterosexual women are required to show that their caregiving goes above and beyond what is expected of them under the myth. The case law shows an inability to reconcile the notion of female caregiving with property rights. Instead, caregiving is constructed as a labour of love. By contrast, cases involving male carers, which take place outside the heterosexual context, reveal greater willingness to accept that there were monetary motivations for the work. However, this often involves rewriting the terms of the caregiving relationship, sometimes casting the claimant in a professional role. Whereas women's caregiving is described in sentimental terms, denying its embodied and physical reality, cases involving male carers tend to be more realistic about the sometimes gruelling and exhausting aspects of caring for another person.

I also examined the way that the altruistic carer myth is reinforced through the spatial designation of care to the home. The home is the geographical representation of the private sphere and is depicted as the natural setting for care. State policies are based on the assumption that it is performed there. This confines the carer to the home and to the private

sphere, often limiting her ability to simultaneously participate in the public sphere. By contrast, public spaces are designed with an able-bodied, adult subject in mind and are often difficult for carers and their dependents to navigate, further reinforcing that care belongs in the home.

Where the homemaker performs caring work, her ability to perform economic work is compromised, because caregiving demands a significant time-sacrifice. It also requires material resources in terms of feeding and clothing the dependent. The homemaker may therefore have fewer financial resources available for herself in seeking to meet the needs of the dependent. In terms of emotional vulnerability, the homemaker is likely to have less time to herself, especially if she is expected to combine caregiving with income earning. Her leisure time may be bound up with that of her dependents, meaning that she is not able to truly switch off. The homemaker's spatial vulnerability is particularly relevant in the context of care. Care is always dependent on a space in which it can be performed. The homemaker's legally precarious relationship to her home is therefore a source of concern if the relationship breaks down and she loses her home. Her status as a carer may impact on her ability to secure rental accommodation or qualify for a mortgage. With the decline in secure social housing tenancies, the homemaker and her dependents may be placed in temporally insecure, or otherwise unsuitable, accommodation that has a negative impact on their wellbeing. In the context of care, the need for a secure home is of particular importance.

When dealing with domestic work (i.e. work that takes place in the home and does not take the form of caregiving), courts are influenced by a myth of domesticity. As with the altruistic carer myth, the domesticity myth is also based on the gender-contract and a belief that women's natural place is in the private sphere of the home. It can be traced back to the Victorian moralisation of housework, whereby women were expected to be passive and

nurturing.[17] The myth of domesticity constructs domestic work as a natural part of the homemaker's relational role. Again, the case law appears to make a distinction between male and female claimants, with male claimants appearing to more easily argue that their work was financially motivated.

The case law also reveals a hierarchy of domestic work, affecting its visibility and perceived value. Construction work, or building, is associated with direct economic value, and within the constructive trust framework, the courts have accepted that such work can lead to an inference being drawn that the parties intended to share the beneficial interest. There is also a greater sense of legal familiarity with unpaid work that is carried out in the context of a business. The lowest value is afforded to 'ordinary' housework in the form of food preparation, cleaning, and washing. These are daily and essential tasks that are necessary in order for the individual to be able to function effectively in the outside world. It is no coincidence that these are the tasks that are traditionally performed by women.

As with the altruistic carer myth, the domesticity myth is also reinforced on a spatial level. While it is depicted as a private sanctuary, the home has a highly visible public function, signalling conformity with social norms. There is a performative aspect in domestic work, as it continuously reproduces the gendered domesticity myth. The architecture of the home also reinforces the relational roles of men and women. Work that is traditionally associated with men tends to be more spatially visible than women's work, which is literally as well as metaphorically concealed from the outside world.

[17] See Nancy Folbre, 'The Unproductive Housewife: Her Evolution in Nineteenth-Century Economic Thought' (1991) 16 Signs: Journal of Women in Culture and Society 463

Resilience

Chapters 6 and 7 dealt with the question of how the state should respond to relational vulnerability through fostering resilience. Resilience as a concept is somewhat under-explored in the vulnerability literature, with Fineman dealing with it in a brief and rather cursory manner. Therefore, I sought to bridge the existing gap by developing a comprehensive framework of relational resilience. As I explained, resilience is an antidote to vulnerability and can mitigate its impact, but resilience is not the same as *in*vulnerability. All intimate relationships bring about some degree of vulnerability through the act of opening oneself up to another person and relying on that person not to take advantage of this.[18] However, the relational vulnerability explored in this thesis *can* be reduced, if not eliminated. It is not a natural by-product of human relationality; it arises because of unequal state structures.

While vulnerability scholarship has tended to under-theorise resilience, it has been extensively explored in the social psychology literature. Here, resilience is seen primarily as an internal concept; a self-righting capacity in the face of trauma or hardship.[19] The variation in resilience between individuals explains why some people seem to deal with difficult life-events better than others. While some psychologists have claimed that resilience is an inborn disposition that the individual either possesses or does not, others have acknowledged the vital role played by environment, relationships, and access to support.[20]

In contrast to the psychological literature, Fineman sees resilience as an external set of resources that are controlled and distributed by the state. For Fineman, the difference in

[18] See Jo Bridgeman 'Relational Vulnerability, Care and Dependency' in J Wallbank and J Herring (eds), *Vulnerabilities, Care and Family Law* (Abingdon: Routledge 2014)
[19] See e.g. Emmy E Werner and Ruth S Smith *Overcoming the Odds: High Risk Children from Birth to Adulthood* (Cornell University Press 1992)
[20] See Michael Rutter, 'Psychosocial Resilience and Protective Mechanisms' (1987) 57 American Journal of Orthopsychiatry 316

individuals' experience of inherent vulnerability lies in the variation in their levels of resilience.[21] Those who have access to financial resources, healthcare, and strong social networks may be relatively untroubled by inherent vulnerability, whereas those who do not have access to these resources are more likely to suffer harm.

I argued that relational resilience incorporates elements of both the internal and external definitions. Relational resilience is primarily about the individual's access to a range of material and social resources in order to mitigate the impact of relational vulnerability. However, not all resources have equal impact and it is necessary for resilience to have underlying normative goals. In the case of relational vulnerability, resilience should aim to rebalance relationships so that they are equal and autonomy-enhancing. The purpose of the underlying normative goals of equality and autonomy are not to place responsibility for addressing vulnerability on the individual. The responsibility for resilience always rests with the state. Instead, the normative framework enables evaluation of whether a particular state-created relational context is a positive or a negative one. For example, welfare benefits constitute a form of resilience, but the way they are delivered does not enhance the recipient's autonomy or equality.

In Chapter 7, I applied the above normative framework of resilience to three hypothetical state responses to relational vulnerability. My aim was not to suggest a definitive solution, but to consider how different potential responses would address the economic, emotional, and spatial aspects of relational vulnerability. Currently, the state does not respond at all to the relational vulnerability of cohabitants, so each of the three schemes would be an improvement on the current position.

[21] Fineman (2010) (n 12)

The first response was state income for homemakers, either in the form of a basic income scheme, such as the one being trialled in Finland for unemployed persons, or in the form of 'cash for care' initiatives which are operated in several of the Nordic countries. Basic income is a radical proposal for addressing homemaker vulnerability, having echoes of the Wages for Housework initiative in the 1970s and 1980s, where feminist groups called on the state to remunerate their work in the home.[22] I argued that it is attractive because it involves an active state that explicitly recognises the value of homemaking work as essential labour for the production and reproduction of society. It would also address economic and emotional vulnerabilities that occur during the relationship, and has the potential to enhance homemaker autonomy, enabling a degree of choice as to whether to also engage in paid work. However, the downside to state income is that it is unlikely to pay at the same rate as economic work. The risk is that it will entrench the gendered split in homemaking work, because men are unlikely to be persuaded to abandon paid work for caregiving by the rates paid by the state. In the Nordic states, take-up of the cash for care schemes is highly gendered and there is also an over-representation of migrants and those in lower socio-economic groups.[23] By itself, state income seems unlikely to fully address relational vulnerability.

The second response was a statutory scheme of discretionary redistribution of assets upon relationship breakdown. This is a very familiar solution, existing in numerous common-law jurisdictions. Redistribution can have various aims. The regime under the Matrimonial Causes Act 1973 is based on achieving fairness, clarified to mean needs, compensation, and sharing, with needs taking priority in cases with modest assets.[24] By contrast, the Law

[22] See Silvia Federici *Wages Against Housework* (Falling Wall Press 1975)
[23] Anne Lise Ellingsæter *Cash for Childcare. Experiences from Finland, Norway and Sweden* (International Policy Analysis, Friedrich Ebert Stiftung 2012)
[24] *Miller v Miller; McFarlane v McFarlane* [2006] UKHL 24

Commission recommended a regime based on redressing economic advantages and disadvantages in a similar way to the Family Law (Scotland) Act 2006.

I argued that redistribution has the advantage of familiarity, as judges are already used to dividing the assets of married couples. It offers flexibility and can operate to prevent unfairness in specific cases in a way that more rigidly defined schemes cannot. The Law Commission recommended a range of order, including pension sharing, which can help to address concerns about future economic hardship. It also recommended property transfer orders, meaning that the homemaker may be able to retain the home where this is realistic and appropriate. However, I remained unconvinced by redistribution as the sole solution. Although it is a state response, it tends to rely on the restrained state myth by seeking to privatise obligations between the parties. In particular, I was concerned by practical questions of access to justice and enforcement of orders. Redistribution is also unlikely to significantly elevate the status of the homemaker role. It casts the homemaker in the role of dependent and opens her up to 'gold-digger' criticism.

The final response was modified community of property, whereby the homemaker would acquire a defined share in the home upon separation, with the potential for a compensatory share at the court's discretion. This would be accompanied by statutory rights of occupation for cohabitants (in the same form as matrimonial home rights)[25] and the ability to postpone sale of the former family home. The inspiration for this hypothetical regime was the Swedish *Sambolagen,* which applies to cohabiting couples and enables equalisation of the home and its contents, as well as a similar regime proposed by Barlow and Lind.[26] Deferred community of property would centre the state response around rights in the home. This is attractive in

[25] See Family Law Act 1996, s 30
[26] Anne Barlow and Craig Lind, 'A Matter of Trust: The Allocation of Rights in the Family Home' (1999) 19 Legal Studies 468

that it seeks to address spatial vulnerability, strengthening the homemaker's legal relationship to her home. This could have a positive impact on her psychological wellbeing and allow her more equal access to the benefits of homeownership. However, it is highly unlikely that even an enhanced share in the home would be sufficient to address all aspects of relational vulnerability. Furthermore, as home ownership becomes increasingly less affordable to the younger population, it would be a mistake to assume that all cohabiting couples are owner-occupiers. As with the other responses, it needs to be accompanied by other state measures in order to have an impact on relational vulnerability. As I concluded, only a holistic response that incorporates both state provision and asset-transfer between the parties is going to be satisfactory. Responses to cohabitation need to be seen as part of a much wider initiative to change the way that the state regards homemaking work. Homemaking should be as much a part of responsible citizenship as income-earning.

The final part of Chapter 7 was devoted to considering the potential limits of a vulnerability approach. Firstly, I considered the role of contracting out from a vulnerability perspective. While I accepted that some degree of contracting out should be permitted, these agreements should only be enforced where the parties are on a roughly equal financial footing. Where the relationship produces relational vulnerability, the economically stronger party should not be permitted to avoid obligations. Secondly, I considered whether non-relational vulnerabilities, such as a serious accident or disability impacting on earning capacity, should be subject to a compensatory share in the same way as relational vulnerability. I argued that, generally, it should not, because the state should make direct financial provision in these cases. However, this applies to clearly non-relational and out of the ordinary forms of bodily vulnerability and does not include cases where e.g. the homemaker's age increases her hardship.

Conclusions

There are a few general conclusions that I can draw from my research. The first is that the relational vulnerability framework that I developed in this thesis has enabled a reconceptualisation of the cohabitation debate, moving away from the tendency to view it as a private problem caused by couples failing to take adequate steps to protect their interests. As I have argued throughout my thesis, the problem is a much wider one than individual lifestyle choices. It goes to the heart of what is considered valuable in this society and what is not. Any future debate around reform needs to be set in its full social context. While this makes the task a significantly greater one than merely transposing a modified version of existing marriage law to cohabitants, this is a necessary task if a more profound social change is desired.

Applying the vulnerability lens has also enabled insights to be drawn about the homemaker and how relationship-generated disadvantage is understood in the context of cohabitation. Whereas relationship-generated disadvantage has largely been seen as an economic imbalance, the relational vulnerability framework has brought to the forefront the non-financial effects of homemaker marginalisation, which also need to be taken seriously in reform debates. My thesis has exposed the limitations of a legal system that predominantly views its subjects as disembodied and abstract. Rejecting the liberal autonomous account and viewing the subject as inherently relational, emotional, and embodied has enabled a significantly richer and more complex understanding of the way the state's laws and policies operate to marginalise a substantial sector of the population.

My research has sought to expose the way that legal myths are presented as normal and inherent, but in fact mask a particular political viewpoint. The state has a vested interest in keeping homemaking work unpaid, privatised, and gendered. Current estimates have

suggested that unpaid carers save the state and the NHS £132 billion per annum.[27] No such figures exist for domestic work, but it is likely to also be substantial. There is therefore an enormous incentive to encourage people to perform this work without expectation of recompense. Problematically, the state refuses to acknowledge the value of homemaking labour as an essential part of the production and reproduction of society. Caring sentiments are not part of the artificially constructed ideal citizen or ideal legal subject. Therefore, the state is actively exploiting homemakers, allowing their work to go unrecognised and unrewarded. Homemakers are told that they are *not* valuable members of society and that they do not deserve additional support. When they do seek to rely on the state, they are treated as a burden. This represents a huge injustice perpetrated against a large sector of the population, but the dominant discourses of individualism and autonomy are so strong that its full extent is not recognised.

The injustice against homemakers is endemic across society and in other relational contexts. In this thesis I focused on cohabitation because it represents a form of relationship where there is *particular* injustice and where the legal framework is especially orientated towards the economically self-sufficient citizen. However, many of the findings from this research will be applicable to other contexts, including married homemakers. The underlying problem is not merely that law fails to make provision for cohabitants, but that society is fundamentally unequal and discriminates between different forms of work. The lack of legal protection makes cohabiting relationships especially unequal, but this does not mean that marriage, which does recognise homemaker contributions under the redistributive scheme, is unproblematic either. Real change can only take place when homemaking becomes

[27] Carers UK *Unpaid Carers Save the UK £132 Billion a Year – The Cost of a Second NHS* (12 November, 2015) https://www.carersuk.org/news-and-campaigns/news/unpaid-carers-save-the-uk-132-billion-a-year-the-cost-of-a-second-nhs (accessed 18 January 2017)

substantively equal to income-earning. In the meantime, only radical initiatives are likely to have any substantial impact on achieving this.

Finally, my analysis of the normative foundations of resilience shows that the solution to relational vulnerability is far more complex than merely seeking to financially empower the homemaker. Not all resources have equal impact. The state must seek to enhance the homemaker's relational autonomy and ensure that she is given equal status to her partner. State responses to vulnerability should address not just the economic aspects of vulnerability, but also its emotional and spatial components. The importance of the security offered by the home is often overlooked in policy debates, which view the home as merely a financial asset. Homemakers often have a particularly strong connection to their homes and being forced to live in less secure accommodation post-separation can have a detrimental impact. These are all issues that need to be carefully considered in the reform debate. A holistic response is needed in order to improve the societal valuation of homemakers and their work.

Directions for Further Research

There are a number of ways in which this thesis can serve as a platform for further research into the role of homemakers and the concept of relationship-generated disadvantage or vulnerability.

One major limitation of this project was that this thesis did not involve conducting empirical research, but I hope that it will act as a basis for further work that includes empirical studies. Of particular interest would be a study of how the cohabiting homemaker experiences her home and whether the lived experiences of homemakers in relation to their homes are different to those of income earners. Research during the 1990s by Gurney suggested that there is a significant difference in the manner in which men and women perceived their

home.[28] It would be interesting to assess whether this remains true given the social changes that have taken place since the 1990s, particularly the fact that women are now likely to be employed outside of the home. It would also be interesting to analyse whether there is any difference in terms of the experiences of home between married and unmarried homemakers.

I hope that my research will be of general use in the area of family law, in terms of understanding how intimate relationships affect the individual and how this interacts with the relational, emotional, and embodied nature of personhood. In theory and in practice, relationships are often understood in a relatively narrow manner, often as interactions that are free from state and social intervention. My thesis has focused on the way in which law draws boundaries around itself, denying its influence in the so-called private sphere. My thesis could therefore form the basis of research in other areas where this takes place. I have particular interest in areas that, like cohabitation, represent an intersection between the public and private and the commercial and personal. One area where vulnerability analysis may be useful is in the context of undue influence in mortgage transaction, another area that engages some of the issues discussed here regarding the structure of relationships and the individual's embodied and emotional connection to her home.

Although my thesis has focused on the position of unmarried homemakers, it can also be used to prompt and inform further research around unpaid work within married relationships. There is frequently a perception that the solution for cohabitants is simply to get married.[29] However, the law of financial remedies on divorce is deeply problematic, some of which was explored in Chapter 7 regarding redistributive regimes. It may be therefore that the research in this thesis can form a basis for further discussion around

[28] See Craig Gurney *The Meaning of Home in the Decade of Owner Occupation: Towards an Experimental Research Agenda* (University of Bristol 1990); Craig M Gurney "… Half of me was Satisfied": Making Sense of Home Through Episodic Ethnographies (1997) 20 Women's Studies International Forum 373
[29] See Rosemary Auchmuty (2016), (n 7)

financial provision for married couples, prompting a move towards a more equal system of dealing with the financial consequences of relationship breakdown.

Finally, the urgency of the need for reform should not be underestimated. The state is perpetrating a significant injustice against cohabiting homemakers; one that needs to be rendered visible and redressed as a matter of priority. Neoliberalism and the concealment of vulnerability within the private family must be challenged. I hope that this work, together with the emerging emphasis on vulnerability as a guiding principle within legal scholarship, can play some part in paving the way for a new approach.

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