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# Viewing domestic property disputes from a vulnerability perspective

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## Abstract

This article argues that the legal regime applicable to cohabitants on separation is based on liberal ideals of individual autonomy and self-sufficiency. This can be seen chiefly in the preference for financial contributions in order to establish a constructive trust. The preference for financial contributions marginalises and stigmatises those who make ‘caring contributions’ within an intimate relationship and are thus unable to conform to the ideal, economically independent legal subject. The article proposes that property disputes between former intimate partners should instead be analysed through the lens of vulnerability theory. It argues that so-called ‘relational vulnerability’ occurs where an individual undertakes caring or domestic labour within the context of an intimate relationship, and suffers economic hardship as a result. The state has a duty to respond to this vulnerability through distribution of property on separation. The article further suggests that vulnerability theory provides a preferable basis for analysing disputes to liberal theory, as it avoids the tendency to rely on concepts such as altruism and needs when explaining caring contributions and the law’s response to them.<sup>2</sup>

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<sup>1</sup> I presented an earlier version of this paper at the Critical Legal Conference, University of Kent in September 2016 and would like to thank the participants in the Vulnerability stream for their helpful comments. I would also like to thank my supervisors at the University of Birmingham, Professor Rosie Harding and Dr Tatiana Cutts.

<sup>2</sup> This article focuses on disputes in the ‘domestic context’ rather than those where the parties are in a commercial relationship with one another. Undoubtedly, different considerations would apply to commercial contexts, but these are beyond the scope of the article.

## Introduction

A major criticism of the law applicable to property disputes between former cohabiting partners is that it does not adequately recognise what can be termed ‘caring contributions’.<sup>3</sup> These contributions can include child rearing, domestic labour and unpaid work in a family business. English property law, with its roots in liberal theory, expresses a clear preference for easily quantifiable contributions, as famously seen in *Lloyds Bank v Rosset*,<sup>4</sup> where, to establish a constructive trust, Lord Bridge thought that it was “at least extremely doubtful”<sup>5</sup> whether anything less than direct monetary contributions to the purchase price would suffice in order to infer a common intention to share the beneficial interest in the property. Previous cases such as *Burns v Burns*<sup>6</sup> had already established the hard-nosed nature of property law and its potential harshness on the homemaker and carer. More recent cases have also demonstrated the precarious position of a claimant whose sole contribution has been in the form of caring either for the home or for dependants.<sup>7</sup> I do not propose to discuss the constructive trust case law at length in this article. As mentioned, there has been extensive scholarship on this issue. Instead, I intend to set out how a different theoretical perspective, namely vulnerability theory, can be used as a lens through which to view property disputes between former cohabitants. In this article, I argue that adopting a version of the theory that I term *relational vulnerability* can offer a perspective that is more inclusive of caring contributions than the current law.

### Broad and narrow versions of vulnerability theory

Vulnerability theory has developed as a critique of the dominant liberal ideology underlying legal and political policy. Liberal autonomy is often associated with the work of Kant and his

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<sup>3</sup> See for example Anne Barlow, ‘Configuration (s) of Unpaid Caregiving within Current Legal Discourse In and Around the Family’ (2007) 58 Northern Ireland Legal Quarterly 251, 260 and Rebecca Bailey-Harris, ‘Law and the Unmarried Couple—Oppression or Liberation?’ (1996) 8 Child & Fam. LQ 137, 139

<sup>4</sup> *Lloyds Bank v Rosset* [1991] 1 AC 107

<sup>5</sup> *Ibid*, 133 (Lord Bridge)

<sup>6</sup> *Burns v Burns* [1984] Ch 317

<sup>7</sup> See for example *James v Thomas* [2007] EWCA Civ 1212, *Curran v Collins* [2015] EWCA Civ 404, *Geary v Rankine* [2012] EWCA Civ 555 and *Smith v Bottomley* [2013] EWCA Civ 953

theory of internal moral law,<sup>8</sup> but also subsequent scholarship such as Rawls' theory of justice,<sup>9</sup> Raz's liberal perfectionism<sup>10</sup> and contemporary theories of individual freedom by Dworkin<sup>11</sup> and Frankfurt.<sup>12</sup> Liberal accounts view autonomy as political freedom and the ability of the individual to form rational judgments that are unconstrained by external factors. Within liberal theory, autonomy has come to be synonymous with individualism, as can be seen in the work of Mill, who defends the development of individuality as worthwhile in itself.<sup>13</sup> Autonomy under the liberal model is viewed as an internal concept in that the rational, autonomous individual is not restrained by his relationships with others. Relationships that do restrain the individual from exercising free will are viewed as harmful and contrary to autonomy.

Formosa argues that vulnerability theorists have tended to take either a 'broad' or a 'narrow' view of vulnerability.<sup>14</sup> Within the broad view, Martha Fineman's work has been particularly influential in exposing the manner in which liberal theories of autonomy tolerate and perpetuate significant social inequalities.<sup>15</sup> Fineman argues that legal theory needs to acknowledge the individual as inherently vulnerable, in that he or she is variously dependent on others for care and is susceptible to illness or injury, throughout life.<sup>16</sup> Fineman's view of vulnerability is that it is universal, constant and inevitable. It is not possible under Fineman's account for an individual to be 'invulnerable',<sup>17</sup> although the vulnerability of some is more visible than others at times. Instead, she argues that humans possess different degrees of 'resilience' to

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<sup>8</sup> See Mary J Gregor and Roger J Sullivan (eds), *Immanuel Kant: The metaphysics of morals*, vol 19 (Cambridge University Press Cambridge 1996)

<sup>9</sup> John Rawls *A Theory of Justice* (Harvard University Press, 1971)

<sup>10</sup> Joseph Raz *The morality of freedom* (Oxford University Press, 1986)

<sup>11</sup> Gerald Dworkin *The theory and practice of autonomy* (Cambridge University Press, 1988)

<sup>12</sup> Harry G Frankfurt *Freedom of the Will and the Concept of a Person* (Springer, 1988)

<sup>13</sup> John Stuart Mill *On liberty* (Longmans, Green, Reader, and Dyer, 1869)

<sup>14</sup> Paul Formosa 'The Role of Vulnerability in Kantian Ethics' in C Mackenzie, W Rogers and S Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2014) , 88

<sup>15</sup> See Martha Albertson Fineman *The autonomy myth: A theory of dependency* (The New Press, 2004), 31 and Martha Albertson Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory LJ* 251, 251

<sup>16</sup> *Ibid*

<sup>17</sup> Martha Albertson Fineman, 'Public Lecture: Vulnerability and Resilience: An Emerging Paradigm ' (University of Birmingham, 14/09/2015)

vulnerability.<sup>18</sup> Resilience can come in various forms, including access to resources or specific groups and networks. Resilience does not remove vulnerability, but rather renders it less visible. Fineman constructs her theory around the ‘vulnerable legal subject’ and his or her needs and the state’s duty to respond to vulnerability.<sup>19</sup> The broad version of vulnerability is compelling in that it avoids the problems of focusing on defined groups of vulnerable individuals, with the risk of inadvertently stigmatising these. However, Mackenzie et al have remarked that an excessively broad definition of inherent vulnerability fails to recognise that many forms of vulnerability *are* avoidable and arise as a result of unequal relationships or unequal social structures. In this article, I argue that relational vulnerability *is* avoidable and can be addressed by counteracting and responding to the effects of unequal relationships. Additionally, Hurst has argued that a broad definition of vulnerability is too loose to offer a practical solution.<sup>20</sup> By labelling all individuals vulnerable, vulnerability risks becoming an empty concept.<sup>21</sup> Certainly, it could be argued that all individuals are vulnerable following relationship breakdown. This does not by itself justify legal intervention and therefore relational vulnerability focuses on those who are more adversely impacted than others.

Narrow versions of vulnerability theory argue that an individual is vulnerable only if he or she is more susceptible to harm than others. The focus is on vulnerability that arises as a result of societal and relational inequalities that have permitted the repression of certain individuals. In this sense, vulnerability is defined as a reduced ability to protect one’s own interests as a result of a particular social condition. Goodin’s work focuses on the extent to which relational aspects make certain individuals particularly susceptible to harm.<sup>22</sup> Goodin’s definition of vulnerability therefore moves beyond the biological and universal aspects of vulnerability in order to focus

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<sup>18</sup> Fineman, ‘The Vulnerable Subject and the Responsive State’, above at n 15, 270

<sup>19</sup> *Ibid.*, 267

<sup>20</sup> Samia A Hurst, ‘Vulnerability in research and health care; describing the elephant in the room?’ (2008) 22 *Bioethics* 191

<sup>21</sup> See also Formosa, above at n 14, and Doris Schroeder and Eugenijus Gefenas, ‘Vulnerability: Too vague and too broad?’ (2009) 18 *Cambridge Quarterly of Healthcare Ethics* 113

<sup>22</sup> Robert Goodin *Protecting the vulnerable: A Reanalysis of Our Social Responsibilities* (University of Chicago Press, 1985)

on specific sources of social inequality. Goodin focuses on those relationships where there is an inequality of vulnerability and where there is greater potential for exploitation. He argues that the essence of vulnerability is that it is socially created rather than a natural and unchangeable phenomenon. It is therefore capable of being challenged and eliminated, rather than being something that must be accommodated.

Mackenzie et al have acknowledged the tensions between the narrow and the broad view.<sup>23</sup> Their proposed taxonomy acknowledges instead the various sources of human vulnerability. They distinguish between inherent vulnerability, which occurs as a result of biological processes and situational vulnerability, in which external circumstances such as war or incarceration operate in order to render the subject temporarily vulnerable.<sup>24</sup> Additionally, they identify pathogenic vulnerability as a form of situational vulnerability arising as a result of adverse social conditions such as oppression, or in the context of oppressive interpersonal relationships. Pathogenic vulnerability can also occur as a result of measures intended to respond to vulnerability, but have the opposite effect, such as abuse of dependent individuals by their carers. Pathogenic vulnerability is described by the authors as “particularly ethically troubling”.<sup>25</sup> Mackenzie et al also distinguish between vulnerability that is “dispositional” and that which is “occurrent”.<sup>26</sup> Whereas dispositional vulnerability can describe the fact that certain sectors of the population are at higher risk of vulnerability than others, occurrent vulnerability refers to that which has or is taking place.

The narrow version is not without problems of course. The emphasis on avoidable vulnerability may mean that there is a lack acceptance that there are numerous vulnerabilities that cannot be

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<sup>23</sup> Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: new essays in ethics and feminist philosophy*, vol (Oxford University Press 2014)

<sup>24</sup> *Ibid*, 7-9

<sup>25</sup> *Ibid*, 9

<sup>26</sup> *Ibid*, 7

avoided. As Formosa points out, it is not desirable to seek to eliminate all vulnerability.<sup>27</sup> He argues that the narrow version risks pathologising vulnerability. Within the narrow version, it may also be implicitly assumed that those who are not vulnerable are ‘invulnerable’. For proponents of the broader view, that amounts to a fundamental misrepresentation of the human condition. Despite this, I argue that in the context of property disputes, a narrow theory offers a preferable basis for legal intervention.

### Relational vulnerability in domestic property disputes

Mackenzie et al argue that a theory of vulnerability should be able to identify the obligations involved in responding to the vulnerability and the agents of institutions that should respond.<sup>28</sup> Relational vulnerability theory outlines how and why the court should redistribute (or distribute) property between intimate partners following relationship breakdown. It is a narrow version of the theory. Although it is recognised that biological functions such as ageing or illness may render an individual particularly vulnerable, this does not necessarily explain why reallocation of property rights should be the response.

I define relational vulnerability as being *an individual's reduced capacity to deal with the economic effects of relationship breakdown, as a result of the manner in which the parties conducted their relationship*. The intimate relationship itself is viewed as the source of vulnerability. Using Mackenzie et al's taxonomy, it can be described as a form of situational vulnerability in that it is confined to those intimate relationships where the parties' conduct has caused one partner to become economically disadvantaged.

How does one measure such a reduction in capacity? Essentially, relational vulnerability is aimed at redressing an economic imbalance between the parties, recognising that the relationship may also have been a source of resilience for the stronger partner, at the weaker

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<sup>27</sup> Formosa, above at n14, 91

<sup>28</sup> Mackenzie, Rogers and Dodds, above at n 23, 13

party's expense. It cannot therefore be described as being merely a needs-based theory, as the relationship may have relieved the stronger party of obligations that would otherwise interfere with his or her ability to engage in economic activity. As a result, reduction in economic capacity can either be measured as against that of the stronger party, or by comparing the position that the vulnerable party would be in had it not been for the relationship.

Although there are various ways in which an intimate relationship can cause vulnerability and imbalance, I have broken this down into four main categories. These are traditional role allocation, economic sacrifice through caring, economic sacrifice through unpaid work and the loss of a chance. There is a certain degree of overlap between the categories and there will be cases where there are elements of several or all present.

Traditional role allocation refers to parties in an intimate relationship dividing domestic and economic activity between them in an unbalanced manner. One party becomes the 'breadwinner' and is essentially freed from domestic obligations in order to pursue economic activity. The other party is the 'homemaker' and performs the household labour that would otherwise be the parties' joint responsibility. During the course of the relationship, the homemaker is wholly or partly financially dependent on the breadwinner. On separation, he or she is significantly disadvantaged as a result of a prolonged absence from the marketplace.

Economic sacrifice in order to carry out caring obligations most commonly occurs in relation to childcare. Research by Crompton and Lyonette suggests that where a couple has children, the primary carer also tends to carry out a disproportionate share of the housework, so claimants in this category often overlap with the first category.<sup>29</sup> While less common, this type of vulnerability can also occur in the context of caring for a dependent adult. Again, the vulnerability or disadvantage occurs because performing caring tasks impacts upon the

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<sup>29</sup> Rosemary Crompton and Clare Lyonette, 'Who does the housework? The division of labour within the home' (2008) 24 British social attitudes 53



caregiver's ability to participate in economic activity. There may be a period of absence from the workplace or a reduction in working hours or responsibility. This type of vulnerability can also be explained in terms of conferring a benefit on the economically stronger party, whose caring obligations are reduced as a result of the claimant's actions. It is of course possible to argue that the work could be outsourced and that therefore, the benefit to the defendant is only a financial one. However, if a relational approach to caring is taken, such as that advocated by *Herring*, it can be said that there is a benefit to the defendant in that the care is performed by a family member.

Economic sacrifice through unpaid employment refers to the scenario where the parties work on a commercial venture that only seeks to benefit one of them. There are numerous examples of joint business ventures in the case law, including *James v Thomas*,<sup>30</sup> *Thomson v Hurst*,<sup>31</sup> *Hammond v Mitchell*<sup>32</sup> and *Curran v Collins*.<sup>33</sup> In this scenario, one party will have foregone the opportunity to undertake paid work, whereas the other party will have benefited financially from the other's labour and potentially saved the cost of hiring additional employees.

The final category is perhaps the most controversial and describes the loss of a chance on the part of the vulnerable party as a result of the relationship. Again, there is significant overlap with the other categories in that it describes the loss of ability to be able to participate in the marketplace and to acquire property of one's own. However, it could also cover the loss of a chance to pursue other, potentially more personally or financially fulfilling relationships, including the opportunity to marry.<sup>34</sup> I describe this category as controversial due to the uncertainty of ascertaining the claimant's position but for the relationship. It involves

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<sup>30</sup> *James v Thomas*, above at n 7

<sup>31</sup> *Thompson v Hurst* [2012]EWCA 1752

<sup>32</sup> *Hammond v Mitchell* [1991]1 WLR 1127

<sup>33</sup> *Curran v Collins*, above at n7

<sup>34</sup> The lost opportunity of marriage was touched upon in *Smith v Bottomley*, above at n 7, [62] by Sales J, who mentioned the possibility of the claimant losing out on "more lucrative" offers as a result of her engagement to the defendant.

significant speculation and there may be a tendency for claimants to overstate their potential. It also potentially reduces relationships to their financial value and depicts them as being both expendable and easily replaceable.

I do not intend the above categorisation to be absolute. It is simply used in this article as a means of explaining how relational vulnerability can occur. The theory envisages that the state (through the courts or the legislature) responds to relational inequality by ordering property redistribution. The aim is redressing an imbalance that has been caused by the relationship and in that sense, the theory does not merely respond to financial need. Instead, it responds to the fact that one party has been placed in a vulnerable position as a result of features of the intimate relationship.

#### Responsibility for vulnerability- public or private?

Before examining the concept of relational vulnerability in greater detail, it is necessary to consider whether the response to vulnerability should be a collective or state response, or whether resilient individuals can be compelled to take responsibility for vulnerable individuals. Fineman argues that the state through its various institutions bears ultimate responsibility for vulnerability and that the manner in which it currently responds is inadequate.<sup>35</sup> She argues that responses to vulnerability tend to be in the form of equal-treatment initiatives that attempt to cast the problem as one between individuals. Equal treatment initiatives generally do not take into account the fact that the parties are in *unequal* positions as a result of unequal access to resources and opportunities.<sup>36</sup> These responses also tend to be individualistic rather than focused on state or collective responsibility. For example, anti-discrimination legislation in the US is focused around identifying a perpetrator, intimating that discrimination is a private rather

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<sup>35</sup> For example Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 Yale JL & Feminism 1, 6

<sup>36</sup> Ibid, 2

than a public matter that potentially affects us all.<sup>37</sup> Equality legislation also usually relies on a hypothetical comparator in order to identify discrimination.<sup>38</sup> This comparator is typically based on the liberal autonomous subject, reinforcing the idea that the vulnerable subject falls outside the norm.

In particular, Fineman is critical of the image of the restrained state that underlies legal and political ideology. She argues that liberal theory seeks to minimise or eliminate the role of the state in addressing vulnerability by placing the responsibility on the individual or the family.<sup>39</sup> She describes the state as having withdrawn from its role as “principal monitor or guarantor of an equal society”.<sup>40</sup> The solution for Fineman lies in a responsive state that takes responsibility for vulnerability through the creation of institutions that can support and subsidise caring work.<sup>41</sup> Recognition of the fact that vulnerability is beyond individual control means that scrutiny can then turn to the institutions of the state whose creation and responsibility is to respond to vulnerability.

Fineman argues that liberal theory has confined caring and dependency to the family.<sup>42</sup> Dependency is seen to be a private responsibility rather than a matter for the state. It is presented as a natural or a biological phenomenon, as is the family unit itself.<sup>43</sup> For Fineman, the family (in its idealised, marital, form) is in fact a societal construct that provides normative encouragement for the view that dependency is a private matter. In Fineman’s view, there is no inherent reason why the family should be responsible for dependency rather than another

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<sup>37</sup> Martha Albertson Fineman, ‘Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality’ (2012) 92 B U L Rev 1713, 13

<sup>38</sup> For example, under the Equality Act 2010, the comparator for the purposes of establishing discrimination is a person who does not share the protected characteristics set out in ss 4-12

<sup>39</sup> Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’, above at n 15, 11

<sup>40</sup> Ibid, 6

<sup>41</sup> Fineman, ‘The Vulnerable Subject and the Responsive State’, above at n 15, 256

<sup>42</sup> Fineman 2004, above at n 15, 58 and Martha Albertson Fineman ‘Equality, Autonomy and the Vulnerable Subject in Law and Politics’ in M Albertson Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Farnham: Ashgate, 2013), 18

<sup>43</sup> Fineman 2004, above at n 15, xiii

state institution.<sup>44</sup> The idea that another arm of the state could provide care in place of the family is contentious. For example, Herring argues that there is a strong relational element to care, and while the physical act of caring could potentially be outsourced, care also encompasses the bond between caregiver and cared-for.<sup>45</sup> He argues that family and friends are particularly suited to providing care due to the pre-existing relationship.<sup>46</sup> Similarly, Eichner has argued that care is best provided by the family, but that there needs to be state support in order to ensure that this can take place.<sup>47</sup>

In a sense, my view of relational vulnerability presents some contradictions to Fineman's theory, although I argue that the two are not fundamentally incompatible. By suggesting that the state responds to vulnerability through a regime of property redistribution between individuals, there is a potential accusation that the state is allowed to remain restrained, by allocating responsibility for vulnerability and dependency to the economically stronger partner. As a result, it does not directly compel the state to react to vulnerability by developing and strengthening its institutions and offering subsidies. It could be argued therefore that it allows dependency to remain a private issue, confined to the family unit. Moreover, relational vulnerability can be accused of failing to acknowledge the fact that the debt that is generated through caretaking is a collective one, meaning that the obligation to repay the caregiver should be societal rather than individual.

My response to these criticisms is firstly that they are based on a broad definition of vulnerability as something that is universal and inevitable. By adopting a more nuanced and narrower definition of vulnerability (as I do), it is possible to distinguish between those vulnerabilities that are inevitable and due to biological processes and those that are the product

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<sup>44</sup> Ibid, 61

<sup>45</sup> Jonathan Herring *Caring and the Law* (Bloomsbury Publishing, 2013), 4

<sup>46</sup> Ibid

<sup>47</sup> Maxine Eichner, 'Dependency and the Liberal Polity: On Martha Fineman's "The Autonomy Myth"' (2005) 93 California Law Review 1285

of specific societal conditions that encourage inequalities to remain. By only explaining the obligation as a collective rather than a private one, it does not address the vulnerability on a local level or provide a means of eradicating its source.

In addition, state responsibility can be viewed in various ways. As Fineman herself points out, there is no such thing as an *absent* state.<sup>48</sup> Even in apparently entirely private transactions such as contracts, the state determines which elements of the agreement are upheld. The difference is whether the state takes responsibility for guaranteeing equality for its subjects. Responsiveness therefore does not always need to be in the form of state subsidies. It can also occur through the process of acknowledging the ability of caring contributions to generate rights in property or by the making of policy decisions, emphasising the value of caring work. The current law clearly favours express agreements and monetary contributions. By permitting alternative forms of contribution as a basis for allocation of property rights, this would signal state recognition of the sacrifices made by caregivers.

Moreover, responsibility for vulnerability solely through state subsidies carries its own potential problems. Firstly, it brings the risk of excessive dependence on the welfare state rather than fostering self-sufficiency and responsibility. Secondly, as Sloan points out, the potential cost to the state of caring is huge.<sup>49</sup> Currently, unpaid informal carers carry out a large proportion of this, meaning that if the state were to take full responsibility, there would be an undue financial burden placed upon it. The sheer cost of the care bill would mean that the state would likely only be able to provide 'baseline' care at the minimum level. In addition, Herring argues that the state cannot provide the relational aspects of caring, only the performance of

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<sup>48</sup> See Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', above at n 15, 6

<sup>49</sup> Brian Sloan *Informal carers and private law* (Bloomsbury Publishing, 2012), 3

physical tasks. The emotional link between carer and caregiver is absent between the state and the individual.<sup>50</sup>

Therefore, my focus on the transfer of resources between individuals is not fundamentally incompatible with a broader vulnerability theory. Nor is it incompatible with the notion of a responsive state. If vulnerability is defined as occurring on a more local level, it is the responsibility of the state to recognise and address this. The state can be responsive in other ways than through direct provision of subsidies. I argue that the recognition of inequality and power imbalance in relationships is an example of a responsive state rather than an example of continued privatisation of dependency and vulnerability.

#### The advantages of relational vulnerability theory as a tool in property disputes

I identify three major advantages of relational vulnerability over liberal theory. Firstly, I argue that if the law is to respond in a coherent manner, it must take into account the relational context of the dispute. Whereas liberal theory is generally resistant to regulation of intimacy, relational vulnerability allows for a response that directly addresses the structure of the relationship. Secondly, I argue that relational vulnerability offers the ability to view caring contributions as valuable in themselves and capable of generating property rights. Thirdly, relational vulnerability is able to maintain respect for individual autonomy, rather than risk becoming a solely needs-based theory.

#### A relational approach to property division

Traditionally, neither the constructive trust nor proprietary estoppel interrogated the nature of the parties' relationship in detail. In fact, the historical 'doctrine of family assets'<sup>51</sup> was

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<sup>50</sup> Herring 2013, above at n 45, 20

<sup>51</sup> The doctrine of family assets was developed in a line of cases from the early 1940's until the 1960's, prior to the Family Law Reform Act 1969 and the subsequent Matrimonial Causes Act 1973 which put judicial discretion to redistribute property on divorce on a statutory footing. See for example *Fribance v Fribance* [1957]1 All ER 357, *Rimmer v Rimmer* [1953]1 QB 63 and *Ulrich v Ulrich* [1968]1 All ER 67

criticised for implying that separate rules should apply where the parties' were married.<sup>52</sup> However, more recent developments of the constructive trust (as seen in *Stack v Dowden*)<sup>53</sup> and proprietary estoppel (as seen in *Thorner v Major*)<sup>54</sup> have paved the way for a greater emphasis on the context of the dispute, but the law remains plagued by inconsistencies as a result of attempting to fit relationality into the existing liberal framework. Of particular difficulty is the fact that the liberal model is resistant to intrusion into the family or 'private sphere'. Relational vulnerability rejects the privatisation of intimacy, arguing that it has historically permitted numerous inequalities to go unchallenged and allowed one party to profit at the expense of the other. It instead envisages an active and responsive state that is able to redress the imbalances that have occurred over the course of the relationship.

#### The limitations of liberal theory- privacy and autonomy

The concept of separate spheres, in which the family is presented as clearly distinct from public or political life underlies liberal theory.<sup>55</sup> The family traditionally inhabits the private sphere, into which the state should not intrude. There is extensive scholarship on these separate spheres, spanning numerous areas of law, the majority of which is beyond the scope of this article.<sup>56</sup> Instead, the reference to separate spheres is simply used in relation to the tendency of liberal theorists to draw a distinction between public and private life.<sup>57</sup>

Under the liberal model, the intimate relationship itself is an expression of autonomy, of the freedom to be governed by one's own law. Cohen argues that under the classic liberal model, the ability to pursue intimate relationships is viewed as central to the individual pursuit of

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<sup>52</sup> See *Gissing v Gissing* [1971]AC 886 and *Pettit v Pettit* [1970]AC 777

<sup>53</sup> *Stack v Dowden* [2007]UKHL 17

<sup>54</sup> *Thorner v Major* [2009]UKHL 18

<sup>55</sup> John Rawls, 'Political Liberalism' (1993) New York: Columbia UP, 137

<sup>56</sup> For further discussion of the literature, see Ruth Gavison, 'Feminism and the public/private distinction' (1992) *Stan L Rev* 1

<sup>57</sup> See Morton J Horwitz, 'The history of the public/private distinction' (1982) *University of Pennsylvania Law Review* 1423 for the historical development of the separate spheres doctrine.

happiness.<sup>58</sup> Karst has argued that it is the choice to form and maintain an intimate relation that permits full realisation of the human values that we cherish the most.<sup>59</sup> He refers to the importance of affording individuals the opportunity to care and be cared for and to form a commitment to other individuals.<sup>60</sup> In this sense, Karst argues that intimate relationships play a key role in shaping individual identity and can impact on how an individual defines himself.<sup>61</sup> Karst's theory is non-interventionist in that it views regulation and intrusion into intimate relationships as fundamentally negative. Karst is ultimately concerned with protecting individual freedom (through the restrained state), similar to the aims of Kantian theory.

A major critique of liberal theories of intimacy from a relational vulnerability perspective is the assumption that the parties are free in their relationships. For example, Karst points out that the benefits of intimate association are only realised where the parties have freedom of choice to enter the relationship.<sup>62</sup> Commitment between the parties is of a voluntary nature and based on affection rather than a legal duty. Similarly, Dagan argues that a fundamental principle of personal relationships of trust and reciprocity is the liberal commitment to free exit.<sup>63</sup> Rawls' theory provides that "particular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation."<sup>64</sup> The underlying assumption is that parties in an intimate relationship have freely chosen to enter that relationship and equally have free choice as to how long the relationship continues. Essentially, it is based on the fictional autonomous liberal subject, a self-sufficient and unburdened individual. Additionally, because the liberal subject is unburdened, liberal accounts can have a

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<sup>58</sup> Jean L Cohen *Regulating intimacy: A new legal paradigm* (Princeton university press, 2009)

<sup>59</sup> Kenneth L Karst, 'The freedom of intimate association' (1980) 89 *The Yale Law Journal* 624

<sup>60</sup> *Ibid*, 632

<sup>61</sup> *Ibid*, 636

<sup>62</sup> *Ibid*, 633

<sup>63</sup> Hanoeh Dagan *The Law and Ethics of Restitution* (Cambridge University Press, 2004), 196

<sup>64</sup> Rawls 1971, above at n 8, 186



tendency to excessively romanticise intimate relationships by assuming that, as they are freely chosen, they are based purely on affection and mutual benefit.

The right to privacy in liberal theory also extends to the choice of form of one's relationships. Supporters of the liberal position make much of the fact that unmarried partners have made the choice not to marry and that this choice should be afforded respect. Deech's argument against the legal recognition of cohabitation asks the question "[i]f cohabitants are dissatisfied with their legal position and believe that they suffer injustice, the question must be asked "Why don't they marry?"<sup>65</sup> Although Deech claims to be critical of the tendency to treat the family as a unit and prefers a more individualistic focus, her statement presumes that the decision not to marry is a joint one and that the relationship is one where both parties are able to assert their autonomy. Debates about the failure of couples to marry usually centre on the perceived lack of commitment between them. As Rowthorn claims, "if heterosexuals choose to cohabit instead of getting married this indicates something about the likely stability of their relationship."<sup>66</sup> What underlies Rowthorn's statement is again an assumption that both parties have freely chosen to conduct their relationship in a certain manner and that the possibility of marriage has been considered and discounted by them both. It also seeks to privatise the potential future vulnerability of cohabitants by presenting their choice as a failed opportunity to protect themselves.

Empirical research by Barlow and Smithson has suggested that this view of choice is far from accurate. The authors identified a number of reasons why some cohabitants do not get married. While some of these related to both parties having an ideological opposition to marriage, the research identified that a number of participants fell into the category of "uneven couples",<sup>67</sup>

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<sup>65</sup> Ruth L Deech, 'The case against legal recognition of cohabitation' (1980) 29 ICLQ 480, 482

<sup>66</sup> Robert Rowthorn 'Marriage as a Signal' in R Rowthorn and A Dnes (eds), *Law and Economics of Marriage and Divorce* (Cambridge: Cambridge University Press, 2002) , 145

<sup>67</sup> Anne Barlow and Janet Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22 Child & Fam. LQ 328, 335

where one partner did hope to marry but the other did not. Usually, it was the economically stronger partner who was resistant to marriage.<sup>68</sup> The weaker partner often displayed some hope that marriage would still take place in the future. Barlow and Smithson also found that these relationships frequently displayed other signs of inequality, such as an absence of sharing intention, characterised by the parties keeping separate bank accounts.<sup>69</sup>

It is erroneous to assume that all cohabiting relationships commence due to an internal desire on the part of the individual to care for another and to be cared for as suggested by Karst. The assumption of free entry and exit is also a fallacy. For example, a consequence of rising house prices against stagnant wages has led to an increase in diverse forms of cohabitation, including families of multiple generations living together.<sup>70</sup> There may also be a sense of moral obligation to take in an ailing or elderly family member in order to assist with caring.

Additionally, the assumption that there is free exit from cohabitation can create an image of the separating cohabitants as freely having made the decision to leave the relationship, something that has been criticised by Daly and Scheiwe.<sup>71</sup> The suggestion is that if one partner is not happy for example with the other's unwillingness to marry, he or she has the option to exit the relationship. For example, Scott argues that one partner could make it clear to the other that he has no intention of sharing assets, leaving his partner open to "make an informed choice whether to end the union or remain in a role that leaves her financially vulnerable."<sup>72</sup> This of course presupposes that exit is a realistic option and seeks to downplay the financial and emotional obstacles that may prevent this freedom. Liberal theory fails to recognise that the claimant operates within certain relational restraints that influence decision making. Just as

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<sup>68</sup> Ibid, 341

<sup>69</sup> Ibid, 347

<sup>70</sup> See Office for National Statistics, *What does the 2011 Census tell us about concealed families living in multi-family households in England and Wales?* (ONS, 2014)

<sup>71</sup> See Mary Daly and Kirsten Scheiwe, 'Individualisation and personal obligations—social policy, family policy, and law reform in Germany and the UK' (2010) 24 *International Journal of Law, Policy and the Family* 177, 179

<sup>72</sup> Elizabeth S Scott, 'Marriage, Cohabitation and Collective Responsibility for Dependency' (2004) University of Virginia Legal Working Paper Series 8, 41

with factors motivating entry to the relationship, economic, emotional and moral factors can determine an individual's decision to remain in a relationship that does not appear to offer the prospects initially hoped for. In addition, it does not account for the fact that exit from the relationship will be significantly easier for the economically stronger party and that this leaves the financially weaker party vulnerable to the potential termination of the relationship, something that may influence autonomy and bargaining power.

I suggest that the manner in which liberal theory depicts the intimate relationship, particularly its emphasis on the restrained state, has permitted and legitimised numerous inequalities to take place within the family unit. In the case of traditional role allocation, it has enabled the breadwinner to be relieved of responsibility and obligation at the homemaker's expense. It is this imbalance that relational vulnerability seeks to address, encouraging the state to respond directly and to correct it. The theory also avoids excessively romanticising intimate relationships, by instead depicting them as a potential source of vulnerability.

#### [The relationship as a source of vulnerability](#)

I should clarify that I do not suggest that relationships that cause vulnerability necessarily involve the abuse of one partner by the other. Nor do I imply that it needs to be proved that one party has acted in an unconscionable manner. Rather, the vulnerability has arisen due to the manner in which the parties have conducted themselves during the relationship. This is not necessarily merely a matter of individual decision making of the parties. Wider factors such as social norms and conventions as well as the availability of state support or subsidy will impact on the parties' decision to allocate tasks. Of course, relationships that *are* physically or emotionally abusive may be even more likely to cause a significant level of financial vulnerability, but it should not be assumed that imbalanced relationships are abusive.

This section focuses on the impact of this vulnerability, particularly in relation to those who become vulnerable as a result of providing care. Fineman argues that individuals who bear the responsibility of caring for inevitable dependants such as infants and the elderly, risk becoming “derivatively” dependent as a result.<sup>73</sup> The privatisation of care under the liberal model means that it is the responsibility of each family unit to ensure that the needs of dependents are met. The replacement cost of unpaid caring in the UK has been estimated at £87bn by Carers UK, a sum that would otherwise need to be paid by the state.<sup>74</sup> Unpaid labour, especially that involving caring for dependants, will often mean one partner becoming dependent on the other. Although he or she may return to work at a later date, this is often in a reduced capacity with wages being used for childcare.<sup>75</sup>

There is no enforceable legal obligation to financially maintain one’s unmarried partner, either during the relationship or after its end.<sup>76</sup> The vulnerability faced by those in unmarried partnerships who carry out caring work is therefore potentially increased. It is also usually only when the relationship breaks down that the vulnerability becomes evident.

Relational vulnerability theory acknowledges the element of economic sacrifice that is involved in caring work. In relation to divorcing spouses, it has been recognised that one spouse may be required to compensate the other for financial sacrifice made for the good of the marriage.<sup>77</sup> While the principle of compensation may not be relevant to all unmarried relationships, I argue that there needs to be recognition of the financial sacrifice made by the carer and that this cannot be painted in terms of individual choice, as it currently is.

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<sup>73</sup> Fineman 2004, above at n 15, 35

<sup>74</sup> See Carers UK, *Valuing Carers- Calculating the value of unpaid care* (2007)

<sup>75</sup> See for example Jane Waldfogel, ‘Understanding the “family gap” in pay for women with children’ (1998) *The Journal of Economic Perspectives* 137 Christopher J. Ruhm, ‘The Economic Consequences of Parental Leave Mandates: Lessons from Europe’ (1998) 113 *The Quarterly Journal of Economics* 285

<sup>76</sup> Although an unmarried relationship may lead to a reduced obligation on the part of the state (state benefit reductions etc) due to the expectation of financial contribution.

<sup>77</sup> See *Miller v Miller; McFarlane v McFarlane* [2006]UKHL 24 [13] (Lord Nicholls)

Vulnerability theory recognises that is not only the intimate relationship and the private nature of the family that serve to exacerbate vulnerability for those more susceptible to it; but that for the *recipients* of unpaid caring, the relationship serves to increase their resilience to vulnerability. In terms of assessing the value of unpaid labour, it is asked whether the claimant would have carried out the work in any event, regardless of an expectation of an interest in the property.<sup>78</sup> It is generally only when the answer to that question is ‘no’ that the court will find that there is detrimental reliance. There is little attention given to the potential value to the recipient and when there is, this tends to be in economic terms.<sup>79</sup> A purely economic analysis ignores the potential non-monetary benefits to the recipient of unpaid labour. Fineman’s concept of resilience on the other hand includes both economic resilience and emotional resilience.<sup>80</sup> She also acknowledges the wider benefit to society of unpaid caring in order to provide the conditions necessary for individuals to become independent and autonomous.<sup>81</sup>

Liberal theory also ignores the effect of unpaid labour on the power balance between the parties. As outlined above, caring or performing unpaid domestic or other work can involve one party making an economic sacrifice. Often, there is a commensurate benefit to the other party, who may be relieved of obligations as a result. I also argue that there is an impact on the power dynamic between the parties as a result of the economic imbalance that the relationship causes. In particular, the stronger party has more bargaining power in terms of how assets are owned and how resources are distributed. Using Fineman’s concept of derivative dependency the financially vulnerable party is to an extent at the mercy of the stronger party’s good will, as there is no legal right to insist on being maintained. It is therefore particularly inappropriate to use a model that presumes freedom of bargaining power.

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<sup>78</sup> See for example, *Grant v Edwards* [1986]Ch 638, 648 (Nourse LJ)

<sup>79</sup> For example, the discussion in *Thomson v Humphrey* [2009]EWHC (Ch) 3576 focused on the economic benefit of the claimant’s work in the defendant’s business.

<sup>80</sup> Fineman, ‘Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality’, above at n 37, 19

<sup>81</sup> Fineman 2004, above at n 15

An emphasis on autonomy, private ordering, and bargaining also means that it becomes possible for the economically stronger party to protect himself against the effects of the relationship by simply communicating an unwillingness to share to his partner. In both *Thomson v Humphries* and *Geary v Rankine*, the defendant's clear communication of an unwillingness to share meant that it would be unreasonable under the circumstances for the claimant to expect a share in the property. As Margulies has argued in the context of prenuptial agreements, expressing individualistic sentiments can render the stronger party almost invulnerable.<sup>82</sup> In this sense, an individualistic outlook acts to the advantage of the financially dominant partner.

#### Relational vulnerability as a preferable basis for redistribution of assets

Relational vulnerability enables redistribution of property on the basis of desert (or reward) in recognition of unpaid work and also as a means of compensating the vulnerable party for economic sacrifice. In contrast to liberal theory, it is able to acknowledge the inherent value of caring work, to the recipient, to society and to other individuals whose own obligations are reduced as a result of the caregiver's work. As Herring argues, the legal system is based on "an obsession with the production of economic value."<sup>83</sup> This fixation on economic value is evident throughout the law on constructive trusts, which prioritises financial contributions over non-financial ones. The liberal model is also based on an understanding that property rights are inviolable and symbolic of autonomy. The liberal understanding of property underlying the law of constructive trusts and estoppel has permitted vulnerabilities to arise and has helped to affirm the low status of caring work in society.<sup>84</sup>

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<sup>82</sup> Sam Margulies, 'The Psychology of Prenuptial Agreements' (2003) 31 *Journal of Psychiatry & Law* 415, 429

<sup>83</sup> Herring 2013, above at n 45, 1

<sup>84</sup> For further discussion about the status of caring, see Joan Williams *Unbending gender: Why family and work conflict and what to do about it* (Oxford University Press, USA, 1999), 152 and Herring 2013, Chapter 1

Relational vulnerability, in contrast to liberal theory, is based on recognition that caring for others is an essential part of humanity. As Herring argues, “caring is the rock on which society stands”.<sup>85</sup> Even a society that values economic independence and freedom above all else must concede that attaining autonomy depends on nurture and effective instilling of values during childhood and adolescence. Social problems are often attributed to a *lack* of care, such as childhood neglect or poverty. Despite this, caring remains confined to the private sphere and is expected to be carried out for little or no remuneration.

Caring is not seen as a concern for the English law of property. In fact, suggestions to incorporate a more generous approach to contributions in the constructive trust have been viewed as a threat to the doctrinal purity of property law.<sup>86</sup> The constructive trust case law reveals that distinctions between ‘relationship’ on the one hand and ‘property’ on the other are often made.<sup>87</sup> Those contributions that relate directly to the relationship are thought to be too remote to generate proprietary rights. Relational vulnerability challenges this distinction and argues that it permits inequalities within intimate relationships to remain. Particularly where the property in question is the family home, it becomes difficult to separate it from the relationship. The artificial distinction between property and relationship is simply another example of preference being given to economic activity over domestic or caring work. Because vulnerability theory attaches direct value to the act of caring and views it as invaluable both for society and for the recipient, it provides a basis for which caring work can be rewarded on the basis of desert. Concerns about redistribution in order to meet social goals can therefore be addressed on the basis that caring contributions can be viewed as equally valuable to monetary ones.

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<sup>85</sup> Herring 2013, above at n 45, 10

<sup>86</sup> See M Halliwell, ‘Equity as Injustice: The Cohabitant’s Case’ (1991) 20 *The Anglo-American Law Review* 500

<sup>87</sup> See *James v Thomas*, above at n 7 and *Lloyds Bank v Rosset*, above at n 4

Relational vulnerability theory challenges the tendency of liberal theory to use altruism as a justification for denying recovery. This is because a vulnerability-based regime would recognise caring contributions as valuable in themselves, rather than focus on whether they were performed with economic gain in mind.

While liberal accounts expect selfishness in the marketplace, in the unregulated private sphere, this behaviour is at odds with the idealistic model of the family. Horsburgh suggests that the law does not recognise or regulate altruism due to its potential threat to individualism and its incompatibility with the bargain-model of human behaviour.<sup>88</sup> Furthermore, Olsen argues that expectations of altruism pervade the family.<sup>89</sup> Often, these expectations are defined according to gendered standards, with wives and mothers in particular being depicted as carers. Similarly, Pohjonen has argued that love itself is presented as being unselfish and that performing caring acts towards one's partner is viewed as a natural part of the relationship and one that is beyond legal intervention.<sup>90</sup>

In the domestic property context, I argue that liberal theory conveys an expectation of altruism in the family by only rewarding or recognising those acts that are motivated by individual gain. Reward for caring work is precluded because caring is thought to be a natural part of an intimate relationship or family unit. In my account of relational vulnerability, I do not deny that caring *is* a natural part of a relationship and I certainly do not seek to suggest that carers are acting with financial motivation. However, where relational vulnerability differs from liberal theory is in its recognition that the expectation of altruism seeks to perpetuate inequality. Relational vulnerability envisages a state that actively values caring and provides the supportive

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<sup>88</sup>Beverly Horsburgh, 'Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs' (1991) 25 U. Mich. JL Reform 423, 424

<sup>89</sup> Frances E Olsen, 'The family and the market: A study of ideology and legal reform' (1983) Harvard Law Review 1497, 1501

<sup>90</sup> Soile Pohjonen, 'Partnership in Love and in Business' (2000) 8 Feminist Legal Stud. 47



environment in which it can be carried out. This environment is not provided by the liberal model of the restrained state.

In responding to non-financial contributions, the law tends to draw a distinction between those acts that are considered to be a natural part of an intimate relationship and those that are not. 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. For example, Sloan makes the distinction between those who care for family members or partners and ‘pure’ carers who have no relationship to the recipient other than as a carer.<sup>91</sup> Sloan has argued that the latter may find it easier to argue that their work should be compensated, as there is no moral obligation on them to perform services.<sup>92</sup> Often where the relationship is spousal (or tantamount to spousal), domestic contributions or other forms of caring work is seen as natural or inevitable and therefore incapable of giving rise to property rights.<sup>93</sup> However, where the parties are not in a conjugal relationship, 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. Because the concept of caring is seen as incompatible with financial motivations, the courts instead tend to recast the relationship as being commercial in nature in order to allow recovery.

In the estoppel case *Thorner v Major*, 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

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<sup>91</sup> Sloan 2012, above at n 49, 4

<sup>92</sup> Ibid

<sup>93</sup> See *Lloyds Bank v Rosset*, above at n 4 and *Thomson v Humphrey*, above at n 79

to the statutory intestacy rules.<sup>94</sup> 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. Despite the fact that the claimant had already been working unpaid for a number of years when Peter gave the assurance about inheritance, it was suggested that the claimant's work was conditional on his inheritance. This conflicted somewhat with the additional finding that the claimant would probably not have raised any objections had the farm needed to be sold in order to pay for Peter's nursing care.<sup>95</sup> In addition, the claimant also carried out work on his parents' farm for a nominal amount of 'pocket-money'.<sup>96</sup> These two factors could be taken to suggest that the claimant was not motivated by financial gain and rather carried out the work out of a sense of loyalty and affection for Peter and his parents. However, using a liberal theoretical model, 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 were downplayed in favour of commercial considerations.

In *Wayling v Jones*,<sup>97</sup> the claimant was in a long term same-sex relationship with the deceased. During the course of the relationship, the claimant 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 that 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.<sup>98</sup> However, he also said that if the deceased had never made the promise of a

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<sup>94</sup> Administration of Estates Act 1925

<sup>95</sup> *Thorner v Major*, above at n 54, [19] (Lord Scott)

<sup>96</sup> *Ibid* [23] (Lord Rodger)

<sup>97</sup> *Wayling v Jones* [1995]69 P & CR 170

<sup>98</sup> *Ibid*, 172

share, this would not have affected his decision to have a relationship with him<sup>99</sup>. Flynn and Lawson have remarked on the court's commercial analysis of the parties' relationship. They argue that the reason the claimant would have left the 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.<sup>100</sup> The economic analysis of the relationship cannot explain the apparent conflict in the claimant's motivations.

Similarly, in *Greasley v Cooke*,<sup>101</sup> the claimant had originally worked as a housekeeper for the deceased's family. She subsequently began a relationship with one of the family members and on his assurances, stayed on as a housekeeper, working without recompense after receiving an assurance that she would always have a home. Her work included caring for a disabled family member. In finding that the deceased's estate was estopped from denying her a right of occupation, the emphasis was again placed on the fact that the claimant had prejudiced herself financially by continuing to work for the family. It was also suggested that she may well have pursued other employment opportunities had she known that she would not be permitted to stay in the property.

From a vulnerability perspective, the reasoning in *Thorner*, *Wayling* and *Greasley* shows the need for the judiciary to recast the terms of the parties' relationship in order to make it compatible with the ideal of the autonomous subject. Essentially, the act of caring conflicts with individual autonomy because it is not always, or entirely, motivated by financial recompense. In *Thorner*, it was emphasised that the claimant had "other opportunities" that he was considering, although the details of these were not elaborated on.<sup>102</sup> Despite the fact that the claimant had already been helping his relative and was also working largely unpaid for his

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<sup>99</sup> *Ibid*, 173

<sup>100</sup> Leo Flynn and Anna Lawson, 'Gender, sexuality and the doctrine of detrimental reliance' (1995) 3 *Feminist Legal Stud.* 105,

<sup>101</sup> *Greasley v Cooke* [1980]1 WLR 1306

<sup>102</sup> *Thorner v Major*, [4] (Lord Hoffman)

parents, the House of Lords judgment suggests that he would consider the work alongside other employment opportunities and take the most lucrative one. The fact that the claimant might feel motivated by other factors in order to assist his relative irrespective of whether he was financially rewarded would not fit with the autonomous ideal.

According to Kennedy, altruistic acts will expose the caregiver to “a vulnerability to non-reciprocity.”<sup>103</sup> Care-giving involves taking a risk that the recipient will not fully appreciate the sacrifice made or will not reciprocate affection. The caregiver is sometimes criticised for failing to negotiate a return for her acts. For example, Sherwin argues that cohabitants ‘know the score’ when deciding to perform unpaid work.<sup>104</sup> She argues that making contributions involves an assumption of risk on the part of the contributor, who should not expect recompense at a later date. It is clear from Sherwin’s account that she believes that the risk is both understood and freely assumed by the parties.

Despite the emphasis on individualism in the marketplace, selfish behaviour within the family context is not encouraged as it might render other family members dependent on the state for support. Waldron has argued that the very idea of asserting individual rights within intimate relationships is viewed as unattractive.<sup>105</sup> The constructive trust case law shows distaste for any suggestion that parties are financially motivated within their relationship, particularly so where it is a marital or marriage-like partnership.<sup>106</sup> Communitarian principles are more likely to be compatible with marriage or marriage-like relationships.<sup>107</sup> Although the basis for the constructive trust is intention, it is cases where there is evidently no intention and the parties have been motivated solely by love that the court is often prepared to be more generous at the

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<sup>103</sup> Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’ (1976) 89 Harvard Law Review 1685, 1718

<sup>104</sup> Emily Sherwin, ‘Love, Money, and Justice: Restitution Between Cohabitants’ (2006) 77 U. Colo. L. Rev. 711

<sup>105</sup> Jeremy Waldron, ‘When justice replaces affection: The need for rights’ (1988) 11 Harv. JL & Pub. Pol’y 625

<sup>106</sup> See *Pettit v Pettit*, above at n 52, 810 (Lord Hodson)

<sup>107</sup> See the contrast between *Springette v Defoe* [1992]24 HLR 552 where the parties’ relationship was described as being akin to commercial and *Midland Bank v Cooke* [1995]27 HLR 733.

quantification stage, such as in *Midland Bank v Cooke*, where the claimant was awarded a 40% share, despite having contributed only 6.5% to the purchase price. In the bankruptcy case of *Rubin v Dweck*<sup>108</sup> on the other hand, the wife's insistence on a share of the matrimonial home in return for very substantial financial contributions was described as "mercenary".<sup>109</sup>

Relational vulnerability theory challenges the concepts of altruism and risk within cohabiting relationships. It suggests that liberal theory employs the rhetoric of altruism to ensure that obligations of caring are confined within the family and do not become the responsibility of the state. Because altruism and affection are reserved for the private family setting, liberal theory struggles to justify financial reward based on desert or compensation. Vulnerability theory confronts the supposed public/private divide and argues that the state through legal and political policy is able to address the issue of unpaid work within the family. Secondly, vulnerability theory rejects the bargaining model that is endorsed by liberal theory, as this presents a false notion of choice and freedom. Instead, there is recognition of the constraints under which individuals operate within the intimate relationship, meaning that recovery should not be denied on the basis that the claimant has taken a risk.

#### [Moving beyond welfare](#)

This section seeks to address the concern that by advocating a response to vulnerability, the theory is at risk of sacrificing certainty and principle in a bid to respond to the welfare of the parties. Welfare based theories potentially act as a threat to individual autonomy, both in the sense that they would permit redistribution of resources in order to meet the needs of particular individuals, and in the sense that they can be paternalistic towards those that they seek to protect. I argue that a vulnerability account is in fact compatible with commitment to respect for autonomy and is different to a theory based solely on welfare.

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<sup>108</sup> *Rubin (Trustee of Dweck) v Dweck and Another* [2012]BPIR 854

<sup>109</sup> *Ibid* [48] (Mr Registrar Jones)

The financial remedies regime under section 25 of the Matrimonial Causes Act 1973 is an example of a welfare based model of property redistribution. Although the guiding principles for distribution have been defined by the courts to be needs, sharing and compensation, it has been clarified that the needs of the parties will usually trump other considerations, and it is only when needs have been met that the court can consider issues such as compensation.<sup>110</sup> The case law makes a distinction between relationship-generated need and other needs, but the section 25 factors include reference to age and disability, neither of which are generated by the relationship. The prevalence given to needs under the legislation could be viewed as paternalistic, permitting interference with ownership rights and future income in order to meet the needs of vulnerable individuals.

Vulnerability theory contains elements of paternalism, in that it compels the state to be actively responsive to vulnerability. However, as Bailey-Harris has argued, a certain degree of paternalism is needed in order to recognise power imbalances within family relationships and to respond to inequality.<sup>111</sup> As argued above, the restrained state is not *absent*. Its failure to intervene to address imbalances within intimate relationships simply means that these are tolerated and normalised. Within liberal theory, paternalism is seen as the antithesis to autonomy and freedom. State power is regarded as oppressive and threatening.

Vulnerability theory is not necessarily incompatible with autonomy, although there is some divergence on this issue in the literature. For Fineman, autonomy is a hollow concept that seeks to promote economic self-sufficiency above all else. Individuals who fall short of the autonomous ideal are stigmatised by society for failing to take the opportunities that are presented as being available to all citizens.<sup>112</sup> An autonomy-based approach can never, in her view, accommodate caring work because this is contrary to the image of the self-interested and

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<sup>110</sup> See *Miller v Miller; McFarlane v McFarlane*, above at n 77, [12] (Lord Nicholls)

<sup>111</sup> Bailey-Harris, above at n 3, 140

<sup>112</sup> Fineman 2004, above at n 15, 41

economically motivated autonomous legal subject. Mackenzie has criticised Fineman for relying on the narrow, Kantian version of autonomy in her theory.<sup>113</sup> She suggests instead that vulnerability theory can make use of the reconceptualised version of autonomy provided by relational theorists. Relational theorists argue that autonomy must be understood in the context that people are socially embedded and defined largely by their relationships with others. As Nedelsky argues, “autonomy is made possible by constructive relationships- including intimate, cultural, institutional- all of which interact.”<sup>114</sup> Mackenzie and Stoljar have further critiqued the fact that liberalism views the self as being defined separately to and prior to interrelationships.<sup>115</sup> In addition, liberal accounts of autonomy view goals as being self-chosen by the agent. Relational accounts acknowledge that while this is true in respect of some goals, other goals will be directly shaped by relational influences. The idea of an individual acting for the benefit of others rather than the self (what liberal theorists would term ‘altruism’) can be incorporated into a relational account of autonomy. Intimacy is therefore not necessarily something that contradicts or threatens autonomy.

Rather than regarding all intimate relationships as a potential threat to individual autonomy, relational theorists argue that there are certain relationships that are harmful to autonomy, such as those where there is substantial inequality between the partners. 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.<sup>116</sup> Liberal theory is unable to make 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

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<sup>113</sup> 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), 34

<sup>114</sup> Jennifer Nedelsky *Law's relations: A relational theory of self, autonomy, and law* (Oxford University Press, 2011), 118

<sup>115</sup> Catriona Mackenzie ‘Imagining oneself otherwise’ in C Mackenzie and N Stoljar (eds), *Relational autonomy: Feminist perspectives on autonomy, agency, and the social self* (New York: Oxford University Press, 2000)

<sup>116</sup> Nedelsky 2011, above at n 114, 123

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.<sup>117</sup> In order to explain why certain relationships are oppressive, it is necessary to consider conditions that are external to the individual.

Like Fineman, relational theorists are critical of the separate spheres ideology. Nedelsky has criticised the liberal concept of the minimal state and the notion of unconstrained freedom of choice. She argues that these are based on an illusory view of individual autonomy as creating a bounded sphere into which the state cannot enter.<sup>118</sup> Collectivity is seen as being incompatible with and in conflict with autonomy and we are told that there is an inevitable trade-off between the two. Nedelsky argues for a reconceptualization of autonomy, to be based on the caring relationship.<sup>119</sup> Although sharing Fineman's commitment to reconceptualising the family to be based on the caring relationship, Nedelsky's account does not seek to dismiss autonomy.

Mackenzie warns that that the risk of rejecting autonomy in favour of the more nebulous concept of equality is that responses to vulnerability may be overly paternalistic, painting the vulnerable subject as somebody who is a victim of an unequal society.<sup>120</sup> She argues that this adds to the sense of loss of agency that often accompanies vulnerability. Mackenzie suggests that a relational account of autonomy offers a better way forward in terms of empowering the vulnerable subject and providing him or her with resilience.<sup>121</sup>

I do not suggest that autonomy as a concept should be abandoned entirely in domestic property disputes. Instead, it needs to be understood in a manner that incorporates relational elements and that acknowledges that within intimate relationships, individual choice takes place within the constraints of the relationship. It is also necessary to distinguish between a regime where

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<sup>117</sup> Marina AL Oshana, 'Personal autonomy and society' (1998) 29 *Journal of Social Philosophy* 81

<sup>118</sup> Nedelsky 2011, above at n 114, 128

<sup>119</sup> *Ibid*, 118

<sup>120</sup> Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability', above at n 113, 48

<sup>121</sup> *Ibid*, 55



vulnerability itself grounds an obligation and one where vulnerability serves as an indicator of an obligation. Within the proposed theory of vulnerability, the obligation on the legal owner to transfer property to the beneficiary is based on relationship-generated inequality. I have made the argument that vulnerabilities that are not generated by the relationship should not be the focus of property redistribution. In instances where the vulnerability is an inherent one (such as disability), I would envisage a more direct state response, in the form of financial subsidies. Although I argue that property redistribution *is* a form of state intervention, this is in response to inequalities created in a relationship, rather than general need. The vulnerability serves as an indicator of the relational imbalance. There is a danger that a general obligation towards intimate partners would simply reinforce the idea of private responsibility for dependency. I am also concerned that a theory that merely responds to vulnerability (or welfare), rather than inequality, would risk depicting the vulnerable subject as a disempowered victim. That said, I do acknowledge that certain inherent vulnerabilities such as illness and age may serve to exacerbate relationship-generated ones. The two cannot therefore be entirely separated, although relational vulnerability focuses on economic sacrifice.

## Conclusion

English property and trusts law can be said to conform to a theoretical model of liberal individualism, whereby the role of the state is restrained. The fundamental problem with this model is that, for a variety of reasons, it is not suitable in the domestic context. I have argued here that vulnerability theory offers a preferable perspective. Vulnerability, defined as a reduced capacity to deal with the effects of relationship breakdown, can be caused in various ways. I have adopted a narrow version of the theory because in the context of property disputes, a broad version of vulnerability would fail to distinguish between those cases where vulnerability is inherent and those where it is caused by the relationship itself. In addition, I have argued that it is not merely the vulnerability itself that creates the obligation to transfer

property, but rather that the vulnerability serves as an indicator of a relational imbalance. It is this imbalance that grounds the obligation on the other party to transfer property. In common with other vulnerability theorists, I argue that the state needs to take an active role in responding to inequality within intimate relationships. Therefore, the traditional division between the public and the private domain needs to be challenged. In the area of property disputes, state intervention would either take the form of legislation or a more active judiciary that is prepared to make policy-based statements that unpaid caring work is of value both to the recipient and to society as a whole.

The unmarried relationship should be viewed as a vulnerable institution in itself. Protection and benefits for unmarried couples do not exist in the manner that they do for their married counterparts. The unmarried relationship also tends to be viewed as unstable in comparison to marriage. However, dependency and caring within the unmarried family is privatised, as it is in the married family. The unmarried family is expected to be economically self-sufficient in order to avoid becoming a burden on the state. This is enforced through measures such as child support legislation and social security legislation, which reduces benefits when the recipient cohabits. While there is recognition in matrimonial law of the economic impact of caring, there is no equivalent right to seek financial support on the breakdown of the unmarried family. Relationship imbalance is therefore likely to be particularly prevalent in the unmarried family with few economic consequences for the economically stronger partner on exiting the relationship.

Relational vulnerability theory addresses some of the problematic aspects of the liberal model. In recognising not only the value of caregiving, but the fundamental economic impact it has, the theory is able to justify awarding the caregiver rights on the basis of desert, rather than making use of paternalistic concepts such as welfare and needs. As a result, this version of vulnerability theory is not incompatible with individual autonomy. However, in common with

proponents of relational autonomy theory, it recognises that individuals are both characterised and constrained by their interpersonal relationships. A vulnerability-based perspective would enable this to be recognised, rather than relying on judges to distort the nature of the parties' relationship in order to make it fit with the traditional model. It would also recognise the fictitious nature of free choice within intimate relationships. The liberal model is unlikely to ever be able to bridge the gap between 'family law' and 'property law' and vulnerability theory offers the opportunity for a new perspective.