The open future: analysing the temporality of autonomy in family law

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This article takes a novel approach by applying a theoretical framework of temporality to the law governing financial obligations on divorce. Although under-explored, particularly in family law, time and temporality are powerful tools of legal governance that reinforce norms and expectations of behaviour. The article explores family law's increasing preoccupation with principles of individual autonomy, as demonstrated through the recognition of prenuptial agreements and the expectation of financial self-sufficiency post-divorce. It argues that law's expectations of autonomy are reflected through temporal mechanisms, promoting liberal ideals of linear progress and modernity. The prenup and the clean break are based on an imagined legal subject who can seamlessly move on from the divorce towards an 'open future' that is unconstrained by obligations from the marriage. However, as the article argues, family law's imagined linear temporality conflicts with the temporal experiences of caregivers. Although the certainty promised by the prenup and the clean break is lauded as a universal good, caregivers face considerable temporal barriers to self-righting post-divorce. Problematically, neoliberal rhetoric paints longer-term financial hardship as a personal failure rather than a societal problem, frequently depicting the caregiver as someone stuck in the past and preventing the former spouse from moving forwards.

Introduction

Family law has witnessed a growing commitment to principles of individual autonomy in recent years, especially in the context of the rules governing financial obligations between spouses on divorce. Commentators have observed a discernible move from paternalistic concerns for welfare towards embracing and promoting ideals of individualism, personal responsibility, and economic self-sufficiency.[1] This article analyses two key examples of this shift towards autonomy. The first is the changing status of antenuptial agreements (prenups), which allow spouses to pre-determine the extent of their financial obligations in the event of divorce, rather than being governed by the statutory redistributive scheme under the Matrimonial Causes Act 1973. The second is the clean break principle, which assumes that spouses should be capable of attaining economic self-sufficiency upon divorce, enabling financial obligations between them to be terminated.[2]

There already exists plentiful scholarship critiquing the presumption that legal subjects are necessarily rational, individualistic, and self-sufficient, and highlighting the implications for those who have made career sacrifices in order to undertake caregiving work during the

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1 See, for example, S Thompson, *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Hart, 2015); A Barlow, R Hunter, J Smithson and J Ewing, *Mapping Paths to Family Justice: Resolving Family Disputes in Neoliberal Times* (Palgrave Macmillan, 2017); A Diduck, 'What is Family Law For?' (2011) 64 *Current Legal Problems* 287.

2 Under the Matrimonial Causes Act 1973, s 25A(1).

marriage.[3] Caregiver disadvantage within heterosexual marriage remains a deeply gendered issue, with women still being more likely than their male spouses to undertake the majority of day-to-day care for children and other dependents, with an observable knock-on effect on their earning capacity.[4] Presumptions of rationality and autonomy inevitably tend to favour the financially stronger spouse (who is disproportionately likely to be male). This article does not seek to unduly repeat this relatively well-trodden ground within the family law literature, although it shares the caution about an autonomy-centred approach. Instead, the article adopts a novel theoretical perspective by considering how concepts of *time* and *temporality* are employed within family law to reinforce its increasing expectation of autonomy and economic self-sufficiency. Furthermore, it considers how the overarching temporality of autonomy that the law imposes impacts those who undertake a caregiver or homemaker role in marriage, whose own temporal experiences do not fit easily with the dominant narrative.

The article is divided into three parts. The first part sets out the theoretical framework, exploring how law's use of time, despite its apparent neutrality, is frequently loaded with meaning, signalling state approval or disapproval of certain behaviour, or of certain subjects. Law also imposes a dominant vision of time on its subjects, claiming that human experiences of time are shared and universal.[5] This section draws on Emily Grabham's argument that, 'temporal constructs, as techniques of governance, create particular types of embodied legal subject with particular histories, trajectories and futures'.[6] It argues that family law engages temporality to reinforce its expectation that legal subjects be autonomous and self-sufficient. The temporality of autonomy is undoubtedly *linear*, envisaging time as moving neatly and evenly through definable epochs of past, present, and future, symbolic of liberal notions of progress and modernity.[7]

The second part considers how the linear nature of autonomy is reflected within modern family law through a temporal analysis of the prenup and the clean break principle. It argues that both the prenup and the clean break reinforce an image of an autonomous legal subject who embraces a post-divorce 'open future'[8] – one that is characterised by opportunities for self-fulfilment and is free of burdens from the past. Furthermore, this legal subject is assumed to be in control of the future, with an expectation of prompt 'self-righting' or recovery upon the legal dissolution of the marriage. By contrast, post-divorce dependency comes to be regarded as a personal failure, with those who are not able to self-right in the expected time frame being viewed as 'stuck in the past' and operating as an impediment to their former spouse's ability to move forwards.

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3 See, for example, Thompson, above n 1; Barlow et al, above n 1; A 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); A Barlow 'Solidarity, Autonomy and Equality: Mixed Messages for the Family' [2015] CFLQ 223.

4 See, for example, H Fisher and H Low, 'Financial Implications of Relationship Breakdown: Does Marriage Matter?' (2015) 13 *Review of Economics of the Household* 735; D de Vaus, M Gray, L Qu and D Stanton, 'The Economic Consequences of Divorce in six OECD Countries' (2017) 52 *Australian Journal of Social Issues* 180; S Harkness, 'The Effect of Motherhood and Lone Motherhood on the Employment and Earnings of British Women: A Lifecycle Approach' (2016) 32 *European Sociological Review* 850.

5 See E Grabham and S Beynon-Jones, 'Introduction' in S Beynon-Jones and E Grabham (eds), *Law and Time* (Routledge, 2019), 9; C Greenhouse, 'The Long Sudden Death of Antonin Scalia' in S Beynon-Jones and E Grabham (eds), *Law and Time* (Routledge, 2019).

6 E Grabham, 'Governing Permanence: Trans Subjects, Time, and the Gender Recognition Act' (2010) 19 *Social & Legal Studies* 107, 108.

7 See E Grosz, *Space, Time and Perversion: The Politics of Bodies* (Allen & Unwin, 1995); L Finchett-Maddock, 'Nonlinearity, Autonomy and Resistant Law' in S Wheatley and T Webb (eds), *Complexity Theory & Law: Mapping an Emergent Jurisprudence* (Routledge, 2018).

8 The term 'open future' is drawn from philosophical writings. As Stephan Torre argues, 'whereas we think of the past as settled, fixed, and closed, we think of the future as unsettled, alterable, and open. What's done is done; the past is singular and closed off to us. The future, on the other hand, holds numerous possibilities; it is ours to shape' (S Torre, 'The Open Future' (2011) 6 *Philosophy Compass* 360).

The final part explores how family law's overarching temporalities are troubled and challenged by the temporal experiences of those who make caregiving contributions. It argues that law's neat and logical conception of linear time is at odds with the temporal realities of caregiving. Unlike the imagined autonomous legal subject, the caregiver's future is not 'open' and untroubled by her past. Concepts of self-righting and leaving the marriage in the past are often unrealistic because the economic impacts of caregiving, even for short periods, have potentially life-long consequences.[9] Furthermore, a significant part of caregiver disadvantage is future-related and quantitatively unknown at the point that law intervenes upon divorce. Yet, family law's overarching autonomy-based temporality, as expressed through the status of the prenup and the clean break, ensures that by the time that these future-related disadvantages manifest, they will cease to be attributable to the marriage (which is now firmly consigned to the past) and will instead represent a personal failure to become autonomous.

Law's relationship to time

Although, as Renisa Mawani has remarked, 'juridical concepts, legal discourses, and legal authority are underwritten by and draw their meanings from the production, specification, and arrangement of time',[10] it is only relatively recently that scholars have engaged in meaningful and sustained analysis of law's temporality. Temporal analysis refutes the notion that time is a natural, neutral, and extra-legal phenomenon, exploring instead how law employs time as a powerful tool of governance, enabling it to assert its own authority and logic, as well as reinforcing dominant norms and discourses through the production of categories and hierarchies among its subjects.[11] Temporal legal analysis has produced a critical body of work, much of which will be drawn upon in this article, offering novel insights into a range of areas of law, including examinations of legal time as a means of producing racial hierarchies,[12] critiques of concepts of 'flexibility' within labour law,[13] representations of modernity and 'progress' within medicine,[14] and the role of the state in righting past wrongs through historical abuse litigation.[15] This article seeks to add family law to this list.

Before analysing the specific ways that family law uses time as a tool for reinforcing expectations of autonomy, it is necessary to theorise law's relationship to time in more general terms. This article argues that law's time is not something that *just is*, but instead represents a powerful and ideologically loaded means of governance and reinforcement of dominant narratives and ideals. It has been suggested that one of the reasons that time remains under-explored within legal scholarship is because it is assumed to be a given, 'unfolding effortlessly and inconspicuously as the backdrop to social and political life'.[16] There is a sense that time is inevitable, 'a fact of life' and an entirely neutral and apolitical entity.[17] Sociological and socio-legal scholars of time and temporality generally do not dispute time's inevitable and

9 J Eekelaar and M Maclean, 'Marriage and the Moral Bases of Personal Relationships' (2004) 31 *Journal of Law and Society* 510; Fisher and Low, above n 4.

10 R Mawani, 'Law as Temporality: Colonial Politics and Indian Settlers' (2014) 4 *UC Irvine Law Review* 65, 71.

11 See, for example, M Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (Routledge, 2015); Grabham and Beynon-Jones, above n 5.

12 Mawani, above n 10; S Keenan, 'Smoke, Curtains and Mirrors: The Production of Race through Time and Title Registration' (2017) 28 *Law & Critique* 87.

13 E Grabham, 'Legal Form and Temporal Rationalities in UK Work–Life Balance Law' (2014) 29 *Australian Feminist Studies* 67.

14 E Cloatre, 'Traditional Medicines, Law and the (Dis)Ordering of Temporalities' in S Beynon-Jones and E Grabham (eds), *Law and Time* (Routledge, 2019).

15 S Ring, 'On Delay and Duration. Law's Temporal Orders in Historical Child Sexual Abuse Cases' in E Grabham and S Beynon-Jones (eds), *Law and Time* (Routledge, 2019).

16 Mawani, above n 10, 70.

17 B Adam, *Time and Social Theory* (Polity Press, 1990), 1.

irreversible passage (evidenced, for example, through the biological human life-cycle).[18] Rather, the purpose is to interrogate the social (and legal) *meanings* that are attributed to time, none of which can be said to be natural or inherent.[19] Law in particular is replete with temporal scales and references, most of which are accepted without questioning the meanings that they convey and the narratives that they reinforce. Furthermore, law has the power to 'create time' in that, through its authority, it imposes an overarching temporality upon its subjects. It presumes that all individuals experience time in a universal manner.

In the Western legal tradition, law's overarching temporality is linear and regards time as continually moving forward through clearly defined epochs of past, present, and future. As Lucy Finchett-Maddock argues, this linearity reflects 'liberal concern for progress in society though developments in technology, industry as a result of accumulation, colonialism and the primordial role of capital as "time as money" and the progenitor of organisation and order within society'.[20] Law's vision of time is as an entity that is logical, ordered, and irreversible. Yet law imagines *itself* to be *atemporal*, ungoverned by time, possessing the ability to transcend and defy the very boundaries that it creates for its subjects.[21] Law can return to correct past wrongs and transgressions, even where these have been forgotten by human memory and, through the medium of the courtroom trial, can re-enact them in the present-day to achieve justice.[22] It can also envision and predict the unknown future, securing and ordering it in the present through contracts and other future-based agreements and orders.[23] Furthermore, the common law tradition and its reliance on the past to decide cases in the present day leads to a curious position where law is simultaneously always, yet never, complete. As Carol Greenhouse has remarked, the system of precedent 'creates a *false* historicity in that it perpetually reclaims the past for the present . . . "The law" thus accumulates, but it never passes; at any instant, it represents a totality. It is by definition complete, yet its completeness does not preclude change'.[24]

Law also employs time as a sorting mechanism, an attempt to assert its own logic and to make sense of itself. As Grabham argues:

> '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'[25]

Thus, in many legal contexts, time is a gatekeeping-tool, with temporal scales and limits symbolising law's boundaries, separating the legal from the extra-legal and the important from the trivial.[26] These time-scales also serve to govern and regulate the behaviour of those who come before the law. For instance, limitation periods not only distinguish between valid claims and those whose relevance has been lost to time, but also reinforce an expectation of prompt action to enforce rights.

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18 See, for example, E Grosz, *The Nick of Time: Politics, Evolution, and the Untimely* (Duke University Press, 2004), 5.
19 See B Adam, 'Feminist Social Theory Needs Time. Reflections on the Relation Between Feminist Thought, Social Theory and Time as an Important Parameter in Social Analysis' (1989) 37 *The Sociological Review* 458; Adam, above n 17.
20 Finchett-Maddock, above n 7, 221.
21 See, for example, V Wohl, 'Time on Trial' (2003) 9 *Parallax* 98.
22 Ring, above n 15; M Enright, ' "No. I won't go back": National Time, Trauma, and the Legacies of Symphysiotomy in Ireland' in E Grabham and S Beynon-Jones (eds), *Law and Time* (Routlege, 2019).
23 See I Macneil, 'The Many Futures of Contracts' (1973) 47 *University of Southern California Law Review* 691.
24 C Greenhouse, 'Just in Time: Temporality and the Cultural Legitimation of Law' (1989) 98 *Yale Law Journal* 1631, 1640 (emphasis in original).
25 E Grabham, *Brewing Legal Times: Things, Form, and the Enactment of Law* (University of Toronto Press, 2016), 10.
26 See Mawani, above n 10, 71.

Temporal boundaries are explained as necessary for law's efficient function; preventing it from becoming too uncertain and unwieldly. The liberal legal tradition places considerable value on principles of certainty and predictability, which are presented as having universal benefit.[27] Yet, a closer analysis reveals that temporal boundaries are not as neutral as is claimed, for they can also create distinct power relations.[28] For instance, mandatory delays and waiting periods in order to access legal rights function as a form of control and exercise of power, frequently with punitive overtones. As Elizabeth Olson argues, 'waiting . . . modifies the place of the individual in society and her importance'.[29] As between individuals, the act of waiting 'produces hierarchies which segregate people and places into those which matter and those which do not'.[30] Legally enforced waiting can thus be a form of state coercion or even brutality. A contemporary example is the mandatory five-week waiting period to receive Universal Credit payments.[31] The Conservative government's disapproval of welfare state dependency is well-documented[32] and this arbitrary delay, that is not reflective of the actual time required to assess claims, has been accused of contributing to significant hardship on the part of applicants.[33]

Thus, the set time frame in which rights can be accessed often has normative undertones. While legal requirements of waiting and delay can signal an absence of state concern and a perceived lack of importance, they can also symbolise moral judgement and disapproval of the right in question. For instance, the Republic of Ireland is notable for its religiously motivated hostility towards divorce, only reluctantly permitting it in 1996, many years after most other Western states and by a very narrow referendum vote.[34] Whilst the Irish Constitution was amended to allow couples to seek a divorce, the state continued to express its opposition by making divorce subject to a mandatory four-year period of separation.[35] Thus, despite legalisation, the long delay to access continues to signal state disapproval. Similarly, the temporal structure of the soon-to-be-reformed divorce law in England and Wales is also morally loaded. It is only if the petitioner can satisfy the court that the respondent is at fault, either through adultery or behaviour,[36] that the state considers the matter sufficiently urgent for the petition to be issued immediately. Conversely, where the divorce is not based on fault, lengthy periods of separation are required before the divorce can be granted.[37] The proposed move towards no-fault divorce (itself rooted in the notion that the state should not pass moral judgement on behaviour in intimate relationships) has already prompted debates over the 'right' period of delay before the

27 See L Fox-O'Mahony, 'Property Outsiders and the Hidden Politics of Doctrinalism' (2014) 62 *Current Legal Problems* 409; H Dagan, *Property: Values and Institutions* (Oxford University Press, 2011).

28 Grabham, above n 6, 113.

29 E Olson, 'Geography and Ethics I: Waiting and Urgency' (2015) 39 *Progress in Human Geography* 517, 501.

30 K Ramdas, 'Women in Waiting? Singlehood, Marriage, and Family in Singapore' (2012) 44 *Environment and Planning* 832, 834.

31 See: www.gov.uk/universal-credit/how-youre-paid (accessed 12 September 2019).

32 See, for example, K Garthwaite, 'Fear of the Brown Envelope: Exploring Welfare Reform with Long-Term Sickness Benefits Recipients' (2014) 48 *Social Policy & Administration* 782; K Garthwaite, ' "The Language of Shirkers and Scroungers?" Talking About Illness, Disability and Coalition Welfare Reform' (2011) 26 *Disability & Society* 369; D Cameron (Prime Minister of the United Kingdom), 'Speech on Welfare Reform' (Bluewater, Kent, 25 June 2012).

33 K Schmuecker, *Universal Credit: A Joseph Rowntree Foundation Briefing* (Joseph Rowntree Foundation, 2017).

34 For further detail, see L Crowley, 'Irish Divorce Law in a Social Policy Vacuum – From the Unspoken to the Unknown' (2011) 33 *Journal of Social Welfare and Family Law* 227.

35 Irish Constitution, article 41.3.2(i), which requires that 'at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years'. A further referendum in 2019 saw a majority vote in favour for the four-year waiting requirement to be removed from the Constitution (see: www.refcom.ie/current-referendums/regulation-of-divorce/ (accessed 4 September 2019).

36 Matrimonial Causes Act 1973, s 1(2)(a)–(b).

37 Ibid, s 1(2)(d)–(e).

decree can be granted.[38] However, what is considered an acceptable time frame is often decided on an arbitrary or instinctive basis (frequently justified by reference to concepts such as reasonableness), with relatively little sustained analysis of *why* we instinctively deem four years to be too long to wait, but simultaneously may feel that immediate availability is also inappropriate.

Temporal mechanisms can also reflect a paternalistic attempt by the state at coercing certain desired behaviour among its subjects, or to maintain the illusion that its subjects are already engaging in this behaviour. As Helen Reece argued in her powerful exposition of the 'post-liberalism' underlying the failed plans for divorce reform contained in the Family Law Act 1996, the reforms were based on a desire and presumption that the parties act 'responsibly' when divorcing.[39] 'Responsible' divorce, Reece suggested, was thought to necessitate a longer process, allowing for contemplation and reflection, as well as the construction of 'a new post-divorce identity' for both spouses.[40] Thus, the temporal tool of mandatory delay was employed in order to uphold the idealised vision of responsibility, despite the fact that this did not reflect the reality of many divorcing couples, including violent and abusive relationships.[41] A similar attempt to impose 'desirable' behaviour through a dominant temporality can be seen in Grabham's analysis of the waiting period contained in the Gender Recognition Act 2004. In order to obtain a Gender Recognition Certificate, the Act requires trans individuals to live in their acquired gender identity for a period of two years prior to the application, as well as declaring that they intend to live in their acquired gender until death.[42] As Grabham argues, this temporal stipulation 'requires trans citizens to perform (and produce) gender permanence in a way that non-trans citizens are not required to do' to reinforce dominant state policies that gender is necessarily stable.[43] Through temporality, the ideal vision of the subject can be maintained, whether that is the responsible divorcing couple or the stable and permanent future gender identity of the transitioning subject.

As this section has argued, time and temporality are powerful tools of legal governance. Although appearing neutral, law's time is frequently normatively loaded, communicating approval or disapproval, and setting expectations of behaviour among its subjects. The next section considers these issues in more detail, focusing on the way that family law uses temporal mechanisms to reinforce its expectations of autonomy and self-sufficiency on the part of its subjects.

The temporality of autonomy

Modern divorce: individualism and the 'open future'

Family law's temporality is increasingly constructed around an imagined autonomous liberal subject, a person who is future-oriented and progressive, demonstrating liberal values of progress and modernity. In reinforcing its expectations of autonomy, family law also displays a strong commitment to notions of modernity and a break from the past, with marriage being regarded to have cast off its oppressive history as a patriarchal institution. Historical marriage

38 The Divorce Dissolution and Separation Bill 2019–20, s 1(5), which will amend the current s 1 of the Matrimonial Causes Act 1973, currently contains a provision that, unless the divorce is applied for by both parties, the decree nisi cannot be granted before a period of 20 weeks following the issue of proceedings. For critique of this see D Hodson, 'No Fault Divorce: Serving the Interests of Respondents', 8 July 2019: www.familylaw.co.uk/news_and_comment/no-fault-divorce-serving-the-interests-of-respondents (accessed 13 February 2020).

38 H Reece, Divor*cing Responsibly* (Hart, 2003).

39 Ibid.

40 Ibid, 123.

41 Ibid, 127.

42 Gender Recognition Act 2004, s 2(1)(b).

43 Grabham, above n 6, 109.

is contrasted with 'modern marriage', which, by contrast, is imagined primarily as a partnership of equals, demonstrating a firm belief that both law and society have moved forward from the gendered inequalities of the past and are embracing a new and egalitarian future.[44] This liberal reconceptualisation of marriage has led to a corresponding shift in its temporality. Marriage is no longer the temporally certain, but simultaneously stifling and restrictive, 'union for life' that was described in *Hyde v Hyde and Woodmansee*.[45] To maintain a commitment to autonomy and individualism, it is thought that spouses must be granted the freedom 'to decide whether or not, and *for how long* to participate in the institution'.[46] As Carolyn Frantz and Hanoch Dagan argue, '[e]xit is a bedrock liberal value'[47] of relationships, suggesting that the liberal state has a duty to facilitate not only free exit from the institution of marriage through divorce, but also exit from its obligations, some of which continue after the marriage has been terminated. In this sense, a commitment to autonomy requires that exit from marriage be accompanied by an open future – one in which the individual can freely pursue new goals and directions without being held back by her past relationships.

The liberal vision of marriage and its increasingly complex temporality echoes the sociologist Anthony Giddens' idea of the 'pure relationship', whereby interpersonal connections are 'continued only in so far as it is thought by both parties to deliver enough satisfaction for each individual to stay within it'.[48] The pure relationship serves the modern autonomous individual, who is engaged in a continuous 'reflexive project of the self', characterised by a constant requirement to improve and reinvent oneself and to move on from unhelpful and unfulfilling situations.[49] As is explored below through analysing the temporal features of the prenup and the clean break, family law's commitment to autonomy requires that post-divorce obligations should not stand in the way of the individual's linear trajectory of self-development.

The prenuptial agreement

Prenups allow spouses to determine, prior to the marriage taking place, their respective financial obligations in the event of a future divorce. Their purpose is to allow parties to contract out of the statutory redistributive scheme under the Matrimonial Causes Act 1973 that would ordinarily apply upon divorce. Prenups often exclude certain identified property from the pot to be divided (usually where one or both parties has pre-acquired wealth), avoiding the risk that the court will divide non-matrimonial property. Commonly, prenups also exclude claims for spousal maintenance or limit maintenance to a predetermined period. Historically, prenups were treated with disapproval in English law, dismissed as an attempt to oust the court's jurisdiction[50] and accused of undermining the entire institution of marriage, which is intended to last for life.[51] Thus, they were once described as 'of very limited significance'.[52] However, during the late 1990s and early 2000s, the courts' position softened somewhat, with gradual acceptance that agreements made prior to the marriage and which were freely entered

44 See, for example, Lord Nicholls in *White v White* [2001] 1 AC 596, 605.
45 (1866) LR 1 P & D 130.
46 C Frantz and H Dagan, 'Properties of Marriage' (2004) 104 *Columbia Law Review* 86 (emphasis added).
47 Ibid.
48 A Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Polity Press, 1992), 58 (also discussed in Reece, above n 39, 86).
49 A Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (Stanford University Press, 1991). See also C Smart, 'Wishful Thinking and Harmful Tinkering? Sociological Reflections on Family Policy' (1997) 26 *Journal of Social Policy* 301.
50 *Hyman v Hyman* [1929] AC 601.
51 *N v N (Jurisdiction: Pre-nuptial Agreement)* [1999] 2 FLR 745, 752 (Wall LJ). For further discussion of the history of prenups, see Thompson, above n 1, 15.
52 *F v F (Ancillary Relief: Substantial Assets)* [1995] 2 FLR 45, 66 (Thorpe J).

into should be given consideration upon divorce, as part of the judge's exercise of discretion.[53] Despite this, the precise status of prenups remained shrouded in uncertainty until the landmark case of *Radmacher v Granatino*.[54] By a majority, the Supreme Court (Lady Hale being the only dissenting judge) held that the terms of a prenup that had been freely entered into by the parties should be implemented by the court 'unless in the circumstances prevailing it would not be fair to hold the parties to their agreement'.[55] The majority judgment furthermore confirmed that '[t]he reason why the court should give weight to a nuptial agreement is that there should be *respect for individual autonomy*'[56] and that '[t]his is particularly true where the parties' agreement addresses existing circumstances and not merely the contingencies of an uncertain future'.[57]

Demonstrating further support for the ability to pre-determine post-divorce obligations, in 2014, the Law Commission released its report entitled *Matrimonial Property, Needs and Arrangements,*[58] reflecting an extensive consultation of the judiciary, practitioners, academics, professionals, and the general public. In this, it was recommended that prenups should be put on a statutory footing and should be regarded as legally enforceable contracts, explaining that greater certainty in relation to their status 'will be particularly useful for couples who wish to plan ahead and have control over the financial consequences of separation and divorce'.[59] However, the Commission was opposed to fully removing the family court's jurisdiction to set aside agreements to prevent potentially unfair future results, arguing that a 'cast-iron approach', whereby the court would be unable to interfere with a validly constituted prenup, would be undesirable in light of family law's 'protective function'.[60] Instead, the Commission recommended that it should not be possible to use a prenup to exclude liability to meet the financial needs of one's spouse.[61]

While Parliament has to date not acted on the Law Commission's recommendations, Baroness Ruth Deech, cross-bench peer, academic, and staunch advocate of autonomy-based approaches to family law,[62] has made several attempts, through private members' Bills, to further enhance the legal status of prenups.[63] Her most recent bid, the Divorce and Financial Provision Bill 2017–2019, was introduced in the House of Lords in July 2017 (although it failed to complete its passage before the end of the parliamentary session in November 2019 and will progress no further). Unlike the Law Commission, Deech is strongly in favour of the 'cast-iron' approach, with the latest version of her Bill and those before that providing that a prenup should only be capable of being set aside in cases where there are concerns over the circumstances in which the agreement was signed. These include where one or both parties was not given the opportunity of receiving legal advice, or where there was insufficient financial disclosure prior to the signing of the agreement.[64] In all other cases, the prenup would be binding on the parties, regardless of

53 See *K v K (Ancillary Relief: Pre-Nuptial Agreement)* [2003] 1 FLR 120, where the prenup was considered as 'conduct which it would be inequitable to disregard under the Matrimonial Causes Act 1973, s 25(2)(g). In *A v T (Ancillary Relief: Cultural Factors)* [2004] EWHC 471 (Fam), [2004] 1 FLR 977 and *M v M (Prenuptial Agreement)* [2002] 1 FLR 654, the court considered the prenup as part of 'all the circumstances of the case' under the Matrimonial Causes Act 1973, s 25(1).

54 [2010] UKSC 42, [2011] 1 AC 534.

55 Ibid, [75].

56 Ibid, [78] (emphasis added).

57 Ibid.

58 Law Commission, *Matrimonial Property, Needs and Arrangements*, Law Com No 343 (TSO, 2014).

59 Ibid, para 7.3.

60 Ibid, para 5.78.

61 Ibid, para 5.84. The Commission declined to recommend that the specific level of need that must be met should be specified in the statute, suggesting instead that need should be defined according to its meaning under the current law (ibid).

62 See, for example, R Deech, 'What's a Woman Worth?' [2009] Fam Law 1140; R Deech, 'The Principles of Maintenance' [1977] Fam Law 229.

63 Her Divorce (Financial Provision) Bills were introduced in 2014, 2015 and 2017.

64 Divorce (Financial Provision) Bill 2017–19, s 3(1)(a)–(e).

any subsequent changes in their circumstances. Thus, while the Law Commission's proposal would allow the judge to evaluate the agreement based on the circumstances existing *at the time of divorce*, Deech is merely concerned with ensuring that it was validly entered into at the time that it was signed.

Fixing obligations in time: the temporality of prenups

The prenup can be analysed as a temporal tool that addresses issues arising out of liberalism's 'productive/destructive relation with uncertainty'.[65] On one hand, liberal theories view time as linear and constantly progressing towards an as-yet unknown future (but one that promises an improvement on the past). On the other hand, the very fact of the future's unknowability presents risks and potential threats to the imagined autonomous subject; risks that must be limited in the present as far as is possible. Describing this paradoxical relationship to the future present within liberal theory, Ben Anderson explains that '[u]ncertainty is both threat and promise: both that which must be secured against and that which must be enabled'.[66] Liberal conceptions of autonomy are based around an imagined subject who is in control of, rather than controlled by, her future.[67] As a result, various aspects of the future must become known as a means of protecting against risks and maintaining control.

The prenup enables this necessary knowledge of the future to be obtained. It is also notable that the prenup's change in status coincides with a rise in risk-based discourse surrounding marriage. As argued above, marriage's temporality is becoming increasingly complex and uncertain in an era where divorce is commonplace. Couples are required to state an intention of life-long commitment at the outset of the relationship, but this promise is made against a backdrop of knowledge that there is a very real possibility that the marriage will not last. The prenup is posited as a means of mediating this unpredictability- presenting an opportunity to reap the self-developmental and spiritual rewards of marriage, but without accepting the potential economic risks that the future may bring. It allows modern marriage to resemble the aforementioned 'pure relationship', removing the incentive to marry for money.[68] Sharon Thompson's work on the rise of discourses of 'gold-diggers' as a risk to men and their financial assets, both in the media and in policy and law-reform debates, provides an interesting illustration of liberalism's desire to reduce risk. Gold-diggers, as Thompson explains, are described in the discourse as women who cynically deprive men of their hard-earned financial assets upon divorce, without having made a sufficient contribution to the marriage.[69] The gold-digger is very much a future risk; something that may materialise, but which could not be known with certainty at the time of the marriage. Thus, the prenup, functioning as 'an antidote to gold-digging';[70] can be said to represent a form of 'anticipatory action'[71] that can be taken in the present day to prevent bad surprises in the future. Demonstrating law's timelessness and its powers to transcend temporal boundaries, the prenup allows the inherently unknown future to be imagined through the eyes of the present. As a result, obligations can be determined in advance and then legally 'fixed in time' until such moment that divorce occurs. This fixing renders obligations impervious to time's passage, setting out unchangeable obligations at the start of the relationship. Unless future events, including illness, accident, or loss of employment

65 B Anderson, 'Preemption, precaution, preparedness: Anticipatory action and future geographies' (2010) 34 *Progress in Human Geography* 777, 782.
66 Ibid, 782.
67 G Reith, 'Uncertain Times: The Notion of "Risk" and the Development of Modernity' (2004) 13 *Time & Society* 383.
68 S Thompson, 'In Defence of the "Gold-Digger" ' (2016) 6 *Onati Socio-Legal Studies* 1225, 1240.
69 Ibid, 1228.
70 Ibid.
71 Anderson, above n 65.

are contemplated and provided for by the prenup, they lose the significance they would otherwise have had, as the event of fixing takes on paramount importance.

There are inherent problems with taking anticipatory action and imagining the future in the way that the prenup demands. The prenup involves a complex relationship between present and future – perhaps more complex than in other forms of contractual relationships – in that the future that is being contemplated in the agreement is one that neither party wants to occur and one that they often do not believe *will* occur. On this basis, prenups are different in character to separation agreements that are made after the parties have already separated and divorce is expressly contemplated. Excessive optimism[72] about a perceived remote future risk can be detrimental to parties entering into prenups. Thompson has discussed the concept of 'bounded rationality',[73] whereby 'parties are unrealistic about the prospect of divorce and consequently the likelihood of their prenup ever coming into effect'.[74] As she argues, 'pressure to sign a prenup is more powerful when the non-moneyed spouse believes the agreement will never take effect'.[75]

The prenup is symbolic of the liberal narrative that temporal uncertainty is capable of control through planning and calculation of risk.[76] Yet, due to the future's inherent unpredictability, genuine knowledge of what is to come can never be a reality, and what was imagined at the time of the agreement may not fit with the circumstances that exist at the point of dispute.[77] As Lady Hale argued in *Radmacher*, 'a couple may think that their futures are all mapped out ahead of them when they get married but many things may happen to push them off course'.[78] The majority in the same case also acknowledged the inherent problems of envisaging the future, noting that 'where the ante-nuptial agreement attempts to address the contingencies, unknown and often unforeseen, of the couple's future relationship there is more scope for what happens to them over the years to make it unfair to hold them to their agreement'.[79] When addressing the problems posed by unpredictable circumstances, much will turn upon on how firmly frozen in time the obligations contained in the prenup are. Both the Supreme Court's approach in *Radmacher* and the Law Commission's proposals permit consideration of the past agreement through the lens of the present day, with agreements being capable of being set aside if they do not meet certain standards (determined by the standards of the present day). Therefore, these could be described as a loose form of fixing and, as a result, cannot enable the future to be fully known. However, Deech's proposals involve a much stronger version of fixing, whereby the only way that the agreement can be avoided is by reference to the circumstances existing at the time that it was made.

Prenups symbolise the above-mentioned new era of modern marriage and divorce, reinforcing that marriage is no longer a lifelong obligation. They are defended as a necessary move to propel family law into the twenty-first century, whereas concerns by their critics are framed as outdated, seen for instance in Deech's accusation that judicial attitudes remain rooted in a distant past, where gendered inequality was once a reality, but from which society has moved

72 For the argument that individuals tend to perceive their own relationship in more positive terms than the relationships of others, see P Van Lange and C Rusbult, 'My Relationship is Better than- and Not as Bad as-Yours is: The Perception of Superiority in Close Relationships' (1995) 21 *Personality and Social Psychology* Bulletin 32.

73 The term is taken from L Baker and R Emery, 'When Every Relationship is Above Average' (1993) 17 *Law & Human Behavior* 439.

74 Thompson, above n 68, 1241.

75 Ibid.

76 See Reith, above n 67.

77 K von Benda-Beckmann, 'Trust and the Temporalities of Law' (2014) 46 *The Journal of Legal Pluralism and Unofficial Law* 1, 12.

78 *Radmacher v Granatino*, above n 54 [175] (Lady Hale).

79 Ibid, [80].

on. She suggests that objections to her Bill amount to 'reinventing the wheel',[80] again conjuring up the contrast between a modern era of equality, requiring a different approach from a historical past marked by oppression.

The clean break

The clean break refers to the termination of financial obligations between the parties upon divorce, either immediately or deferred to a future date. The court's duty to consider whether a clean break would be appropriate was introduced by the Matrimonial and Family Proceedings Act 1984,[81] replacing the so-called 'minimal loss principle',[82] which aimed to place the parties in the position they would have been in had the marriage not broken down and each had fulfilled their obligations towards the other.[83] While earlier case law stressed that the duty to consider a clean break did not cement it into a presumption in favour of terminating obligations,[84] more recent decisions illustrate a clear preference for a clean break, meaning that it 'has now been elevated to the status of a principle'.[85] The court will order a clean break unless it can be clearly shown that one of the parties is unable to adjust without undue hardship.[86] The desirability for the clean break is rooted in liberal and neoliberal[87] ideas of individualistic autonomy, signalling a clear expectation that parties become self-sufficient as soon as possible after divorce.[88]

While initially the clean break was considered predominantly suited to so-called 'big-money' cases where available capital far exceeds the parties' needs, it has now become commonplace even in cases with modest assets.[89] The courts have also clarified that the future earning capacity of one spouse cannot be treated as a matrimonial asset to be divided.[90] Instead, any order for ongoing periodical payments must be justified by reference to the recipient party's needs, save in the most exceptional circumstances.[91] Research by Jo Miles and Emma Hitchings has revealed that the majority of financial remedy cases that come before the court result in a clean break, even where the spouses have minor children.[92] Most maintenance orders are made for a fixed term. Joint lives orders, where payments continue until either party's death, are exceedingly rare.[93] Yet, despite the rarity of spousal maintenance, political and media discourse continues to highlight England and Wales, and London in particular, as the 'divorce capital of the world', apparently possessing an uncommonly generous regime, coupled with uncommonly generous judges who allow undeserving former spouses (almost invariably wives) to claim a

80 Baroness Deech, *Hansard*, HL Deb, vol 719, col 402 (11 May 2018).
81 Section 3, inserting Matrimonial Causes Act 1973, s 25B.
82 J Eekelaar, *Family Law and Social Policy* (Weidenfeld and Nicolson, 1984), 109.
83 Matrimonial Proceedings and Property Act, s 5(1) (subsequently consolidated as s 25(1) of the Matrimonial Causes Act, 1973).
84 See *Clutton v Clutton* [1991] 1 FLR 242; *SRJ v DWJ (Financial Provision)* [1999] 2 FLR 176.
85 R Bailey-Harris, 'The Paradoxes of Principle and Pragmatism: Ancillary Relief in England and Wales' (2005) 19 *International Journal of Law, Policy and the Family* 229, 237.
86 *Matthews v Matthews* [2013] EWCA Civ 1874, [2014] 2 FLR 1259; *SS v NS (Spousal Maintenance)* [2014] EWHC 4183 (Fam), [2015] 2 FLR 1124. For further discussion, see G Douglas, *Obligation and Commitment in Family Law* (Hart, 2018).
87 The term 'neoliberal' refers to the political ideology prevalent from the latter part of the 20th century, which emphasises personal responsibility, market liberalism, and individual economic self-sufficiency. For further discussion, see, for example, Barlow et al, above n 1. This can be compared with references in the article to 'liberal' theories and thought, referring to the classical writings on individualism and autonomy that continue to dominate much of legal philosophy.
88 See A Gilbert, *British Conservatism and the Legal Regulation of Intimate Relationships* (Hart, 2018).
89 J Miles and E Hitchings, 'Financial Remedy Outcomes on Divorce in England and Wales: Not a "Meal Ticket for Life" ' (2018) 31 *Australian Journal of Family Law* 43.
90 *Waggott v Waggott* [2018] EWCA Civ 727, [2019] Fam 479.
91 See *SS v NS*, above n 86, [26] (Mostyn J).
92 Miles and Hitchings, above n 89.
93 Ibid.

'meal-ticket for life' and thus avoid becoming independent upon divorce.[94] These are the 'gold-diggers' to whom Thompson refers.[95] According to this discourse, *any* long-term maintenance order, no matter how uncommon it is in practice, is regarded as being inherently unfair.

Baroness Deech's Bill, discussed above, aimed to drastically curtail the court's discretion to make periodical payments orders, reinforcing the importance of the clean break principle. Any spousal maintenance would be limited to a maximum period of five years, with an extension of the term possible only if 'the court is satisfied that there is no other means of making provision for a party to the marriage and that that party would otherwise be likely to suffer serious financial hardship as a result'.[96] As Thompson has noted, the notion of the undeserving wife who refuses to become independent featured extensively in the parliamentary debates of Deech's Bill, which aimed to 'fortify the system of financial provision on divorce against exploitation by the "gold-digger" '.[97]

The temporality of the clean break: self-righting and moving on

The clean break epitomises the liberal fixation on linear time, whereby the autonomous subject is positioned within a constantly forward-oriented trajectory. The divorce operates as a temporal 'rupture' effected by law, marking a clear dividing line between the marriage, which is now in the past, and the future, with its opportunities for progress and self-development. The clean break allows modern divorce to be presented as a form of reinvention and rebirth of the autonomous individual, one which offers the ability to create a better future, unburdened by the obligations of the past. As Shelley Day Sclater has argued:

> 'Coming through divorce is about overcoming our sense of failure to pursue new developmental pathways, it is about meeting challenges and finding new strengths to cope with adversity, it is about creating new hopes to carry us through the pain towards a better future.'[98]

Just as the prenup allows the uncertain future to be known and therefore less of a threat to autonomy, the clean break enables the future to be an open one, allowing for progress and reinvention, rather than being limited and constrained by the past.

The clean break principle has echoes of Giddens' 'project of the self', discussed above, whereby the individual is expected to be engaged in a constant process of improvement and reinvention, moving away from relationships and situations that no longer offer fulfilment. It imagines that the autonomous subject possesses resilience, which is defined in neoliberal thought as an innate ability to 'bounce back' from adversity and negative experience.[99] Liberal theories of autonomous personhood envisage that all persons possess an innate ability to self-right, and that excessively long dependency points to evidence of personal failure to avail oneself of opportunities.[100] Law outlines the temporal boundaries within which self-righting can acceptably take place, illustrating again the moral undertones to supposedly neutral references to time. There is now not only an expectation of eventual self-sufficiency after divorce, but also an expectation that this should be achieved *swiftly,* with the temporal margins for 'acceptable'

94 See S Thompson, 'A Millstone Around the Neck? Stereotypes About Wives and Myths About Divorce' (2019) 70 *Northern Ireland Legal Quarterly* 179.
95 Ibid; Thompson, above n 68.
96 Divorce and Financial Provision Bill 2017–19, s 5(1)(c).
97 Thompson, above n 68, 1226.
98 S Day Sclater, 'Narratives of Divorce' (1997) 19 *The Journal of Social Welfare & Family Law* 423, 436 (also cited and discussed in Reece, above n 39).
99 See J Joseph, 'Resilience as Embedded Neoliberalism: A Governmentality Approach' (2013) 1 *Resilience* 38.
100 M Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004).

post-divorce dependency rapidly shrinking. Distinctions are drawn, on the basis of timescales, between a 'deserving' payee, who may need initial assistance, but self-rights within the correct time frame, and the unscrupulous 'alimony-drone', who is seeking a 'meal-ticket for life' by refusing to move on.[101] While Deech defends her proposed five-year time-limit on the basis that it offers much-needed certainty that is in the interests of all concerned,[102] there is also an undeniably moral dimension to it. It draws a more explicit boundary than currently exists between what is deemed tolerable dependency and what tips the payee into the alimony-drone category.

In recognising and emphasising the human capacity for reinvention, it is also necessary within liberal rhetoric that marriage does not excessively restrict future progress. The autonomous individual is in the constant process of evolution and self-improvement and, therefore, commitment to autonomy means ensuring that the future remains an open one, avoiding too many obligations that could restrict autonomy. As Elizabeth Scott has argued:

> 'If the person binds himself to perform certain acts in the future, he may be binding a different person without that person's agreement . . . a commitment that seriously restricts one's own behaviour in later life is no more supportable than a commitment that would bind a different individual without that person's consent . . . the individual is not free to commit his later selves and is not responsible for behaviour of earlier selves'[103]

Thus, by safeguarding against the individual being tied up by future obligations, the open future as an opportunity for reinvention is preserved.

The discourses surrounding divorce juxtapose the perceived temporal trajectory of the monied and non-monied spouses. The ideal autonomous subject upon which the law is based is positioned as constantly moving forward. By contrast, the dependent spouse is depicted as a threat to progress and moving on. Rather than moving towards the future, she remains 'stuck in the past', clinging to a marital relationship that has ceased to exist. Rather than conforming to the norm of self-righting and reinvention, she refuses to do so and instead expects her 'meal-ticket for life'. Thompson has used the expression 'millstone around the neck' to describe the perception in the media of recipients of long-term spousal maintenance.[104] The millstone is an apt metaphor when considering the temporality of the clean break, symbolic of a burden from the past, a reminder of the failed marriage. It is seen as an impediment to the ability to move towards the future, constantly dragging the paying spouse back into the past.

Challenges to linearity: the temporality of the caregiver

This final section considers how family law's overarching temporality of the autonomous future-oriented subject is challenged and troubled by a conflicting temporality of caregiving that refuses to fit and conform to the imagined linear trajectory of autonomy, thus giving rise to significant tensions. This echoes Mawani's argument that 'the presumed timelessness of law masks a heterogeneity of lived temporalities that law aspires to assimilate and obfuscate but which also actively challenge and refuse law's temporal claims'.[105] Although Mawani's comments are made in the context of racial categories in law and the experiences of non-white subjects, the underlying analogy can also be applied in relation to the position of caregivers within the new autonomy-based legal framework. Law assumes that its temporality is universal

101 Douglas, above n 86; Thompson, above n 94.
102 *Hansard*, HL Deb, vol 719, col 378 (11 May 2018) (Baroness Deech).
103 E Scott, 'Rational Decisionmaking About Marriage and Divorce' (1990) 76 Va L Rev 9, 60 (cited and discussed in Reece, above n 39, 87).
104 Thompson, above n 94.
105 Mawani, above n 10, 93.

and shared, in this case based on a presumption that all its subjects are equally capable of self-righting and moving on and will therefore benefit from the certainty and order offered by the prenup and the clean break. However, as explored in this section, those who perform caregiving in marriages have a different lived temporal experience – one that is masked by the dominant linear trajectory that is imagined and imposed by family law. The idea of being able to leave the past behind and move seamlessly towards an unburdened future is not possible for the caregiver, whose temporality is infinitely more complex than the linear norm. This demonstrates not only that the notion of a universal temporal experience is a fallacy, but also that family law's adherence to a temporality based on individual autonomy can have a serious detrimental impact on those who take on a caregiver role in the marriage.

Caregiving temporalities

As feminist scholars have noted, law's dominant, linear conception of time is inherently male in nature, failing to accommodate or consider the experiences of caregiving and social reproduction, activities historically (and currently) performed overwhelmingly by women.[106] This in turn echoes the extensive feminist critique that the autonomous liberal subject is invariably imagined as somebody who is free of caregiving burdens.[107] It also fits with the liberal tendency to see a conceptual divide between the public and private spheres, with caregiving and social reproduction consigned to the private realm. The public/private divide is also exhibited through temporality, with economic or 'work-time', reflecting future-orientation and linearity being the dominant conception of time around which society is oriented, whereas domestic time has to fit around work-time and lacks public visibility.[108] It has furthermore been suggested that the temporality of caregiving is qualitatively different to that of economic work. Rather than being purely linear and future-oriented, caregiving is cyclical in nature, characterised largely by rhythms and repetitions rather than working towards an identifiable goal.[109] However, its subordination to working time means that it is often not fully understood or visible within discourses around time and its setting in the private family makes its measurement inherently difficult.

Taking a caregiver role means that the overarching linear temporality that is assumed and imposed by an autonomy-focused family law is not a realistic one because the caregiver experiences a relationship to time that differs from that of the imagined autonomous legal subject. Unlike the autonomous subject, the caregiver cannot easily abandon the past and move towards an unburdened future. Performing caregiving during the marriage sets in motion a temporal trajectory whereby the caregiver is consistently confronted by her past decisions and choices, preventing her from fulfilling law's expectation to 'move on'. For the caregiver, the past matters because her economic future continues to be defined and influenced by her past work. Recovery from the financial effects of caregiving during marriage is not as simplistic as the liberal discourse would have us assume. However, family law's emphasis on autonomy and the perceived need to achieve legal finality and certainty within a short time frame means that the longer-term effects of divorce will always be unknown and a matter of conjecture, especially if the parties are relatively young. Yet, law both expects and imagines a swift financial recovery,

106 See C Leccardi, 'Rethinking Social Time: Feminist Perspectives' (1996) 5 *Time & Society* 169; J Kristeva, A Jardine and H Blake, 'Women's Time' (1981) 7 *Signs: Journal of Women in Culture and Society* 13; Adam, above n 17.

107 See Fineman, above n 100; O Smith, 'Litigating Discrimination on Grounds of Family Status' (2014) 22 *Feminist Legal Studies* 175; V Schultz, 'Life's Work' (2000) *Columbia Law Review* 1881.

108 See L McKie, S Gregory and S Bowlby, 'Shadow Times: The Temporal and Spatial Frameworks and Experiences of Caring and Working' (2002) 36 *Sociology* 897; E Gordon-Bouvier, 'Crossing the Boundaries of the Home: A Chronotopical Analysis of the Legal Status of Women's Domestic Work' (2019) *International Journal of Law in Context* 1.

109 See Kristeva, Jardine and Blake, above n 106; E Grosz, 'Feminist Futures?' (2002) 21 *Tulsa Studies in Women's Literature* 13.

depicting this as the norm. As a result, it ensures that a subsequent struggle to self-right can no longer legitimately be attributed to the divorce (and to broader structural problems of gender and valuation of caregiving labour), but instead represents a *personal* failure on the part of the individual, often attributed to not *wanting* to move on.

The discourse around autonomous divorce frequently invokes the image of the modern woman, who is frequently contrasted to her predecessor, the repressed housewife of the twentieth century. In defending her Bill, Deech relies heavily on the narrative of social progress, pointing to the higher number of mothers engaged in paid work compared to the 1970s, which she sees as evidence that women have now achieved the independence and financial autonomy that they previously lacked.[110] She accuses judges of ignoring this and remaining stuck in the past, relying on outdated stereotypes when deciding cases.[111] Yet, while women's increased presence in the workplace, and in terms of gaining educational qualifications is indisputable, Deech's proclamation that we now have equality oversimplifies the position, ignoring the complex temporality of women's careers and their intersection with caregiving responsibilities. The research shows that throughout Western societies, women's careers continue to be adversely affected by caregiving obligations, most significantly as a result of parenthood and childcare.[112] While women do participate in the workplace, this is on different terms to men and there is significant evidence of a 'motherhood penalty' being incurred with women failing to attain the same career trajectory as men once they have children.[113] Research on the economic impact of divorce also shows that women, significantly more so than men, struggle to recover from the economic impact of divorce, unless they remarry or form another long-term relationship.[114]

Some comments can be made about why these imbalances persist in an era of formal equality through examining the temporal dimension of the problem. Caregiving and paid work are categorised as inherently incompatible and the imagined 'ideal worker' that shapes employment law and policy continues to be characterised as a person who does not have caring obligations.[115] Additionally, social discourses still designate care as a female endeavour and women are measured against the notion of the 'ideal mother', who is, above all, expected to spend time with her child for their wellbeing and to sacrifice her own career in order to do so.[116] Men are not subject to these temporal demands to the extent that women are.[117] Demonstrating the dominance of economic work, caregiving is characterised by requiring 'time out' of the workplace, either through designated periods of leave, through a reduction in working hours, or by leaving the workplace altogether. Thus, it becomes framed as an interruption or series of interruptions to the expected working trajectory. It involves time that has been lost and which cannot be regained.[118] The future will be impacted and shaped by this lost time, even if the caregiver makes efforts post-divorce to attain financial independence.

It is not merely that lost time cannot be regained, but also that time out has a social significance that can be difficult to challenge. There is a theoretical argument that there is a natural loss of

110 Baroness Deech, *Hansard*, HL Deb, vol 719, col 378 (11 May 2018).
111 Ibid.
112 See M Evertsson and K Boye, 'The Gendered Transition to Parenthood: Lasting Inequalities in the Home and in the Labor Market' (2015) *Emerging Trends in the Social and Behavioral Sciences* 1.
113 See L Prince Cooke, 'Gendered Parenthood Penalties and Premiums Across the Earnings Distribution in Australia, the United Kingdom, and the United States' (2014) 30 *European Sociological Review* 360.
114 Fisher and Low, above n 4.
115 J Maher, 'Accumulating care: Mothers beyond the conflicting temporalities of caring and work' (2009) 18 *Time & Society* 231; Smith, above n 107.
116 See T Miller, ' "Is this what Motherhood is all About?" Weaving Experiences and Discourse through Transition to First-Time Motherhood' (2007) 21 *Gender & Society* 337.
117 Ibid.
118 See Hale J (as she then was) in *SRJ v DWJ (Financial Provision)*, above n 84, 180, commenting that 'the marriage has deprived [the wife] of what otherwise she might have had'.

skill and value, or 'human capital' by being absent from the workplace, meaning that career breaks have an unavoidable negative impact on a worker's career trajectory.[119] However, as Marie Evertsson and Katarina Boye have argued, loss of human capital is not the sole explanation for the disadvantage experienced by caregivers.[120] They suggest that parenthood or caregiver status also sends a signal to employers about perceived levels of commitment of the worker, explaining why women persistently struggle to be promoted or gain access to careers requiring a significant amount of training or future investment.[121] Employers may fear that a worker with caregiving responsibilities will be unreliable, will be unwilling to commit time to the job, and will require time off, often at short notice. The caregiver is therefore judged against assumptions about her future behaviour, as well as the impact of her past caring labour. In that sense, the caregiver's future cannot be described as open in the way that it is imagined in the autonomy-based discourse, as it remains constantly defined by her past and the time that has been lost to caregiving.

Demonstrating the belief in a shared linear temporality, family law discourse states that the clean financial break offers a psychologically preferable outcome to continued financial obligations and should therefore be preferred unless it is completely unsuitable to the circumstances.[122] Yet, the reality of parenthood and caregiving means that the clean break is often illusory in practice. Financial and other relational interactions between the parties will often continue well into the future,[123] limiting the extent to which it can be said with any meaning that there is a clean break. That is not to say that psychological benefits do not exist. There are numerous practical objections to continued financial obligations in their current form, especially in light of increasing problems involved in the enforcement of orders in a neoliberal political landscape where access to justice is dependent on possessing private financial means.[124] This article should not be interpreted as necessarily arguing in favour of long-term maintenance orders. Rather, it seeks to challenge the assumptions of a shared temporality underlying family law's tendency to favour a clean break, arguing that it is a temporality that is constructed around a particularised vision of the legal subject, one that assumes self-sufficiency and an ability to move on, and is far from a universal experience.

This leads on to the final point, which relates to the illusion of certainty and predictability promised by family law's increasing turn towards autonomy. Certainty is consistently presented as an uncontested good. The autonomous subject requires the future to lie open, unspoiled by memories or burdens from the past, which is enabled through mechanisms such as the prenup or the clean break. These allow risks to be reduced and for the individual subject to focus on self-development. It is often assumed that both spouses have an equal interest in knowing the extent of their future obligations. However, certainty and predictability are inevitably judged from the vantage-point of the autonomous subject. Despite its claims to the contrary, law does not have power to see the future, which remains uncertain and containing the constant risk of events that seek to change or challenge the predicted life course.[125] By maintaining increasingly restrictive temporal boundaries as a means of respecting individual autonomy, family law simultaneously produces *un*certainties for those who are not able to emulate the autonomous

119 See J Mincer and H Ofek, 'Interrupted Work Careers: Depreciation and Restoration of Human Capital' (1982) *Journal of Human Resources* 3.

120 Evertsson and Boye, above n 112.

121 Ibid; M Evertsson, 'Parental Leave and Careers: Women's and Men's Wages after Parental Leave in Sweden' (2016) 29 *Advances in Life Course Research* 26.

122 See P Symes, 'Indissolubility and the Clean Break' (1985) 48 MLR 44.

123 For example, there can be no clean break in respect of child support obligations, meaning that one party may continue to be at least partly financially dependent on the other until the children reach adulthood.

124 See Barlow et al, above n 1.

125 See Reith, above n 67.

ideal. As has been explored, the perceived incompatibility between care and paid work places caregivers on a disadvantaged trajectory and they are unlikely to attain the economic power they would have had they not been caregivers. In the past, the more stable temporality of marriage would have offered a mitigation for this disadvantage, albeit a deeply problematic and gendered one. The new era of marriage as individualism and the attendant temporal uncertainty means that this aspect of future provision cannot be relied upon. Taking on a caregiver role, as it is currently treated in law and society, presents an enormous financial risk, yet the *real* risk in the discourse is consistently framed in terms of loss of material assets and threats from gold-diggers.

Conclusion

This article has sought to take the critique of family law's growing turn towards individualism and autonomy in a new direction by exposing and analysing its temporality. In doing so, it has analysed the way that law employs the apparently neutral and natural entity of time as a means of governance. Law utilises time as a tool to assert its own power and authority, demonstrating its own ability to transcend temporal periods, moving between the past, present and the future. Concepts such as waiting, and urgency are laden with normative meaning, signifying who matters and who does not. Above all, law assumes that its own dominant view of time is shared by its subjects.

The increasing expectation of individual autonomy within family law is characterised by a linear vision of time. The autonomous legal subject is imagined as constantly moving towards the future, which offers the opportunity for progress and reinvention. This future is an 'open' one, untroubled by obligations from the past and capable of being known, thus reducing the inherent risk to autonomy that is posed by uncertainty. Marriage is imagined in liberal terms, as an expression of self-determination and thus with a corresponding necessity of free exit once the relationship stops serving the parties' needs. The divorce provides an identifiable break with the past, leaving the future open for further unconstrained growth. Both the prenup and the clean break principle function as temporal tools, emphasising expectations of self-sufficiency and self-righting and viewing inability to conform as a personal failure, rather than a wider societal problem. Those who experience post-divorce dependency are depicted as being stuck in the past, a block on their former spouse's ability to move on.

The final part of the article addressed the incompatibility between autonomy-based temporality enforced by law and the temporality of the dependency that is generated by caregiving. Although, it is frequently proclaimed that the greater certainty offered by the prenup and clean break is of universal benefit, the expectation on the caregiver to self-right and become economically self-sufficient is often an unrealistic one. Unlike the imagined autonomous subject, she cannot merely leave the past behind, as her future continues to be defined by previous time out of economic work, as well as the perceived risk that her caregiving obligations will constitute a risk to an employer. The clear linear path to progress envisaged by the autonomy-centred temporality does not account for this. Self-righting is presented as a possibility for all, meaning that a failure to do so (or to do so outside of the acceptable temporal boundaries) is labelled as a personal refusal to move on, rather than as a symptom of a broader societal issue that needs to be addressed.

It has been said that family law scholars often eschew theoretical scholarship, especially in the analysis of financial obligations, in favour of a more practical and empirically informed

approach.[126] However, turning the attention to the law's normative underpinnings and considering some of the debates in more abstract terms, as this article has done, can be instrumental in prompting a shift in approach towards family policies. Temporality is an aspect of law and legal regulation that is easily overlooked, largely because time appears to be such an obvious fact of life that it does not merit any further interrogation. However, it is precisely its 'common sense' nature that allows it to be used as a tool of legal governance, with its implications often going unchallenged. In bringing family law into the existing literature that exposes and critiques law's temporal techniques, it is hoped that this will prompt further thoughts about how law and time interact.

126 See, for example, E Brake and L Ferguson, 'Introduction' in E Brake and L Ferguson (eds), *Philosophical Foundations of Children's and Family Law* (Oxford University Press, 2018).