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In Defence of the 'Gold-Digger'

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Abstract

This article examines the gold-digging trope in family law. It explores the etymology of the term and how it has been employed in cultural and legal contexts, such as media, parliamentary debates and case law. It is argued that the gold-digger construct has shifted, in that it was once applied only to women who formed relationships with men for financial gain, but is now used against *all* women in the context of modern equality claims in family law, regardless of their intentions. Today, the gold-digger is any woman who seeks a fair share of family assets on divorce, and the concept informs ideas not only of claims to financial relief on divorce, but also the enforceability of prenuptial agreements.

Key words

Family law; marriage; gender; prenuptial agreements; financial provision on divorce

Resumen

Este artículo analiza la figura de la cazafortunas en el derecho de familia. Estudia la etimología del término y cómo se ha empleado en contextos culturales y legales, como medios de comunicación, debates parlamentarios y jurisprudencia. Defiende que el concepto de cazafortunas ha cambiado, ya que en una época sólo se aplicaba a las mujeres que establecían relaciones con hombres para obtener ganancias financieras, y ahora se usa contra *todas* las mujeres en el contexto de las reivindicaciones modernas de igualdad en el derecho de familia, sin tener en cuenta sus intenciones. Hoy en día, cualquier mujer que en caso de divorcio busque una división justa de los bienes de la familia se considera una cazafortunas, y el concepto denuncia ideas relacionadas no sólo con la asistencia financiera en caso de divorcio, sino también con la ejecutabilidad de los acuerdos prematrimoniales.

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Palabras clave

Derecho de familia; matrimonio; género; acuerdos prematrimoniales; provisión financiera en caso de divorcio

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1. Introduction

It is an unfortunate fact that the language of gold-digging features in conversations surrounding law reform. Most recently, in the UK Baroness Deech has reintroduced the Divorce (Financial Provision) Bill 2016-17,¹ the impetus of which is to fortify the system of financial provision on divorce against exploitation by the 'gold-digger'.²

The gold-digger, according to Baroness Deech, is a woman who has 'deprived irrationally [a man] of everything he had worked for', and it is '[t]he wife ... least likely ever to have put her hand in cold water during the marriage ... [but] most likely to walk off with millions' (HL Deb (2014) 754, col. 1491). And so as Lord Davies put it, '[p]eople have been deeply offended by some of the gold-digging – that is the word one must use – that has had a lot of publicity recently' (HL Deb (2014) 754, cols. 1496-1497). In his view, the Divorce (Financial Provision) Bill would 'make the law more obviously fair and just' (HL Deb (2014) 754, col. 1496), by limiting the awards that women, or to be precise, gold-digging women, receive on relationship breakdown. The perspectives of Baroness Deech and Lord Davies portray a woman who doesn't *necessarily* marry for money, but undeservedly receives a large sum on divorce in spite of having made no direct financial contribution to the marriage. However, to better understand the phrase gold-digger, it is crucial to further interrogate the context in which this label is applied, to look past the media's obsession with career divorcees, and to consider whether the vitriol directed at gold-diggers is justifiable or misinformed.

To this end, this paper will examine the gold-digger accusation and the gendered nature of the concept, particularly in the context of marriage. Section two begins by outlining the meaning of the term, from the historical origin of 'gold-digger'³ in the early 20th century to its modern day use. Through this assessment, the image of a predatory woman is implied by the phrase gold-digger, which obscures the causes of economic dependency in the marital relationship, and does not account for the value of non-financial contributions to the welfare of the family. As a result, when gold-digging claims are taken at face value, it becomes easier to justify a reduction in the level of award to the non-moneyed spouse on divorce, whilst failing to recognise the adverse impact this would have on women (because the term is generally not applied to men).

The consequences of this are considered in the third section of this paper, with a particular focus on the impact of prenups when presented as an antidote to gold-digging. It is argued that when used to protect the moneyed spouse from gold-digging, prenuptial agreements in reality protect inequality, and further entrench the discriminatory value attributed to direct financial contributions at the expense of recognising care. Put simply, when prenups are used to prioritise protection of the moneyed spouse's property, these agreements serve to mask much deeper problems. First, the power inequalities between parties entering into prenups are entrenched, because the gold-digging accusation levied against the non-moneyed spouse means she is required to prove her reasons for marriage rather than negotiating mutually beneficial terms. Secondly, the structural inequalities between men and women are exacerbated, because the non-moneyed spouse, usually the wife, has relinquished her rights to a financial award on divorce that would reflect the value of any non-financial contributions she has made. On this analysis, an

¹ The Divorce (Financial Provision) Bill was first introduced in 2014 and was reintroduced in 2015 and 2016.

² If enacted, the Bill would prevent financial orders being made in respect of property acquired before the marriage, or through gift or inheritance (clause 2), limit the scope of periodical payments to a maximum of five years from the date of the decree of divorce, unless this would lead to serious financial hardship (clause 5), and make prenuptial and postnuptial agreements binding subject to procedural requirements (such as independent legal advice and material disclosure) at the time the agreement is entered into (clause 3).

³ In metaphorical terms that is, notwithstanding the original and literal meaning of an individual whose occupation was to dig for gold.

examination of the stigma attached to gold-digging helps us understand *why* prenups are gendered. Although this paper is focused on English law, reference is also made to the position of prenuptial agreements in New York in this section, to explicate some of the issues with binding prenups in another common law jurisdiction in practice.

Finally, the concept of the gold-digger is rethought, to determine whether a destigmatised version of the concept could be used to redress or at least challenge the gender inequity underpinning marriage and outcomes on divorce. To be clear, it is not being argued that women *should* prey on rich men or adopt a wholly mercenary attitude to marriage; the contention is, rather, that a woman's reasons for marriage should not be questioned any more than a man's, and these reasons certainly should not justify scepticism towards wives in receipt of the financial share to which they are entitled on divorce. Yet this is what the gold-digger accusation does. If the term gold-digging is disassociated from moral repugnance, the term can no longer be used as a weapon against women. Furthermore, women would not have to sign a prenup to prove they are marrying for the 'right' reasons. However, there are a number of flaws with the reconceptualised gold-digger model; most patently, that if women's financial position depends on marriage, women's participation in society on a par with that of men is not promoted (Fraser 1994, p. 610). Indeed, reinforcing women's dependency on men in this way would take women's position back to an era when financial dependence was expected, and gender equity in the public sphere was not possible. At the same time, the utility of this assessment is not completely undermined because it goes some way towards challenging the androcentric *effect* of prenuptial agreements (in that masculine perspectives are emphasised and men are consequently advantaged), and financial provision principles that limit the non-moneyed spouse's award.

To assess whether it is right to defend and rethink the concept of 'gold-digging', the general disdain expressed towards gold-diggers must be understood and challenged. This first requires examining the etymological and historical context of the concept.

2. Historical background

The Oxford English Dictionary defines the term gold-digger as 'a woman who forms relationships with men purely to obtain money or gifts from them'. This suggests material gain is the only motivation for a gold-digger, and interestingly, that men are not gold-diggers. Thus when investigating the context in which the term gold-digger is applied, it is important to question first why the notion of the gold-digger is gendered, and secondly why the term is considered to 'offend the public's sense of justice' (HL Deb (2014) 754, cols. 1496-1497). Following this, the last part of this section investigates the use of gold-digger in practice, particularly when opposing reform that would further women's rights.

2.1. 'She's a gold-digger, that one' (McNutt 1918, p. 60)

The reasons why 'gold-digger' has historically been applied to women and not men can be gleaned from a closer inspection of the instances in which the term has been used. Gold-digger emerged as slang in the United States in the early 20th century (Beach 1911), and was popularised by a 1919 Avery Hopwood play entitled *The Gold-Diggers*.⁴ In this play, the protagonist forbids his nephew from marrying a chorus girl he suspects only wants his money. To help persuade his nephew against marriage, the protagonist enlists the help of another chorus girl who is described as 'one of a band of pretty little salamanders known to Broadway as 'gold-diggers', because they "dig" for the gold of their gentlemen friends and spend it being good to their mothers and their pet dogs'. Interestingly, however, the chorus girls want

⁴ This was made into a silent film in 1929 entitled *Gold-diggers of Broadway*.

to marry rich men in *The Gold-Diggers* so that they will not suffer financial hardship, like a former star of Broadway who they discover has been driven into low paid work. From this perspective, gold-digging was carried out by women fighting for economic survival. During the roaring twenties in the States, at a time of increased prosperity for many men, women were confined to low paid and low status jobs (Goldin 1980). Furthermore, the vast majority of American women did not work outside the home (Tentler 1986). A rich husband provided the opportunity of a better life at a time when participation in the labour market was not on equal terms (Fredman 1998, p. 98). Whilst the popularisation of the term gold-digger does not provide evidence that many women *were* entering relationships with men for purely financial reasons, the economic and structural inequality between men and women *does* explain why the term was gendered, in that women were more likely to marry rich men for financial security than vice versa.

In Britain, the film adaptation of *The Gold-Diggers* (*Gold-diggers of 1933*) popularised the concept of the gold-digger, although it did not receive widespread critical acclaim, with one newspaper describing it as 'nauseous tosh' (*Saturday Review of Politics, Literature, Science and Art* 1933, p. 427). The topic of gold-digging was clearly popular, however, as the success of *Gold Diggers of 1933* led to the sequels *Gold Diggers of 1935* (1935), *Gold Diggers of 1937* (1936) and *Gold Diggers in Paris* (1938). Other evidence that the term had permeated British culture included a short story published by Dion Clayton Calthrop (1932) about a moneyed man exploited by a woman, whom he referred to as a gold-digger. Thus on both sides of the Atlantic, gold-digger was a gendered word, reflecting (most likely) the stark socio-economic inequality between men and women.

Indeed, women's unequal footing with men in the home and labour market meant a woman could simply not afford to marry a man who could not provide financial stability. Though single women had consistently participated in the labour market for a significant period (Auchmuty 1975, p. 109), and replaced much of the work force during World War I,⁵ the attitude that women were less productive in the public sphere and more suited to work in the home was pervasive (Fredman 1998, p. 109). This justified women being segregated into jobs viewed as women's work, such as domestic services, whilst positions in industry and government were reserved for men (Fredman 1998, p. 109). Women's lower pay was also justified by the stereotype that underpinned the family wage; a concept that supported higher pay for men, as it was men who were expected to financially support the family.

It was also assumed that single women had no duty to financially support anyone but themselves, and so it was thought their standard of living would be undeservedly higher if men and women were paid the same. These hypothesised relationship dynamics buttressed a view of women as 'the most dangerous enemies of the artisan's Standard of Life', (Webb 1891, p. 635 cited in Fredman 1998, p. 109) which arguably also contributed to the feminine characterisation of the gold-digger. Yet as Fredman (1998, p. 109) notes, these views clearly did not reflect the real needs of the parties involved, and merely reinforced women's subordination as homemakers, or unmarried spinsters in relatively low paid work (Auchmuty 1975). As a result, the parity with men in employment, wages and education denied to women (Auchmuty 2012) meant that even though they could earn and control property in their own right since the Married Women's Property Act 1882, there was little opportunity for financial independence in marriage or for equal participation in the labour force for single women. Furthermore, married women had little control over their husband's property and money, because separation of property, (although a huge achievement for women's rights in ending coverture) meant that it belonged to him and would be controlled according to his discretion. Whilst this

⁵ Fredman (1998, p. 109) calls this 'transient replacement' as women were forced out of the positions formerly occupied by men at the end of the war.

highlights some of the context out of which the term gold-digger emerged in the 1920s and 1930s, today the backdrop against which it is used is quite different.

More than forty years ago, Lady Summerskill observed that '[w]e have heard so much ... about a woman supporting her husband that I suppose that soon "gold-digger" will be applied to both sexes' (HL Deb (1969) 305, col. 862). One can understand why she made this prediction, as at this time, the sexual revolution, the Equal Pay Act 1970 and impending divorce reform indicated significant advances towards equality between men and women (see Auchmuty 2012). Today, however, 'gold-digger' remains a term almost exclusively applied to women.⁶ One reason for this could be that structural inequalities continue to prevent women from being substantively equal to men in private and public spheres (Fraser 1994, Stewart 2013). But dependency between partners is not as it was in the early 20th century, and so these inequalities do not entirely explain why gold-digging remains so heavily associated with women. A more convincing reason, perhaps, is that the definition of gold-digger has evolved into a caricature that is not associated with men. Although gold-digger is formally defined as a woman who forms relationships with men for financial gain, it is now more accurate to describe the *use* of the term gold-digger as a derogatory *accusation* used against a woman when she is perceived as reaping undeserved financial gain. Yet whilst there are undoubtedly mercenary individuals in the world who wish to exploit others, there is no evidence that this is an exclusively female pursuit. Indeed, the gold-digging accusation is levied against women regardless of whether their intentions are influenced by money.

2.2. *'You dolls make me sick, grabbing at every nickel you see' (Beach 1918, p. 220)*

It arguably is not difficult to understand why the idea of gold-digging is generally considered to be morally repugnant, because it is associated with greed, and gold-diggers are viewed as mercenary predators exploiting men. On the other hand, marrying for money has not always been considered improper, and in fact economic considerations have historically been central to the marriage contract (Shanley 1993). Interestingly, however, when the term 'gold-digger' was popularised in the 1920s and 30s in the United States and Britain, marriage was no longer the economic transaction it had been in the 19th century, and was based much more on companionship (Coontz 2006, p. 7). One possible explanation for this change was the legal reform enabling a married woman to control property in her own right (pursuant to the Married Women's Property Act 1882), combined with increased independence for women outside the marital relationship. The relative liberation brought by improved opportunities in education and in the work place, women's suffrage, the sexual liberation of the flapper era and increasing divorce all contributed to transforming attitudes towards marriage. In short, marrying only for money was no longer acceptable. The glamorous, aspirational and arguably empowering lifestyles of gold-diggers portrayed in the movies of the 1930s were not a reality for women at this time. Indeed, the rise of companionate marriage, in addition to women's enfranchisement and increased independence masked the grave inequalities persisting between men and women.

A revealing example of this in Britain was the illusion of equality evoked by separation of property between married men and women that, as noted above, failed to reveal the struggles faced by married women, particularly on relationship breakdown, who did not have any income or property of their own. As Smart (1984, pp. 47-48) put it:

Ironically the situation regarding matrimonial property was a consequence of matrimonial legislation which treated men and women *as if* they were equal. That is

⁶ There is little evidence of the accusation being levied against men, although the husband was explicitly accused by the wife's father of gold-digging in *Luckwell v Limata* [2014], [31].

to say that the law presumed women and men were equally *free* to work or stay at home, to own property individually or jointly, and to acquire assets ... whilst in practice it disadvantaged wives who were in a structurally different position to husbands.

In spite of this, the courts prevented women from retaining housekeeping money on divorce,⁷ and barred maintenance payments if the wife committed a 'matrimonial offence'. For instance, in *Naylor v. Naylor* [1961], the wife was disqualified from recovering maintenance for herself and her child because the court found she had deserted her husband. Even though she did not leave the marital home, she was guilty of desertion because she took off her wedding ring and 'performed no wifely duties' (*Naylor v. Naylor* [1961], p. 254). Therefore, a wife was on one hand punished for discontinuing domestic tasks (like in *Naylor*), but on the other hand she was not permitted to keep any money saved when undertaking such tasks. On this basis, the law not only reflected a formal (and misleading) equality between the spouses, but was also aimed at what Lady Summerskill referred to as 'the tiny minority of "gold-diggers" ... lead[ing] a parasitical existence' and as a result was 'based on prejudice, custom, and a failure to recognise that the woman in the home is making a contribution ... which should be recognised' (HL Deb (1969) 305, col. 862).

Since the Matrimonial Causes Act 1973 (MCA), the judiciary has discretion to recognise these contributions. Furthermore, conduct is only taken into account when it would be inequitable to disregard it (section 25(2)(g)), and so the behaviour of spouses is no longer part of the financial assessment on divorce unless the case is one of extreme violence or fraud. As discussed further below, these changes together indicate that the court is now more concerned with making a fair award on divorce that does not discriminate against the non-moneyed spouse than it is with counteracting a small number of individuals hoping to marry for money. Unfortunately, the resultant shift towards equal valuation of spousal contributions (*White v. White* [2000]) is opposed by those who believe this is a message to women that, as Baroness Deech has put it, 'getting married to a well-off man is an alternative career to one in the workforce' (Deech 2009, p. 1140). In her view, gold-digging is *encouraged* when the non-moneyed spouse receives a significant award on divorce as it is 'an irritant to many ex-husbands because they have to continue to provide ... regardless of the bad conduct which they believe was evidenced by the wife' (Deech 2009, p. 1142). Yet basing financial provision on the non-moneyed spouse's conduct on divorce would signal a return to penalising the 'undeserving' wife, an approach that the MCA sought to move away from.

There is arguably another reason why substantial awards to the non-moneyed spouse on divorce are resented. Whilst these cases are often negatively associated with gold-digging, this association is not simply based on a fear of financial predators like those described in *The Gold-Diggers*; it is fuelled by the idea that property rights deserve protection on divorce. As a result, judicial and legislative efforts to advance the protection of women on relationship breakdown have been hindered by a reluctance to allow claims that significantly interfere with property ownership. The risk of such interference could explain why the fear of gold-diggers is so disproportionate and acute. Then again, perhaps the accusation of gold-digging is merely a smokescreen that enables propertied spouses to more easily justify protection of their assets against competing interests. This would explain why gold-digging is so often used as a weapon against women when there is no evidence of avarice.

⁷ See *Blackwell v Blackwell* [1943]. Subsequently, the Married Women's Property Act 1964 enabled women to save their housekeeping allowance and keep a one half share of it.

2.3. *The power of the gold-digger stereotype*

If the term gold-digger *is* used as a strategy to safeguard property rights, then it is conceivably applied when there has been no gold-digging behaviour. This is problematic given that the term is a popular stereotype in modern culture, and is still based on the original metaphor of a woman exploiting a man for financial gain. But, the gold-digging stereotype is used in circumstances where there has been no gold-digging, or where the risk of gold-digging is not a central issue. A consequence of this misuse is that financial awards made in favour of the non-moneyed spouse in line with judicial and statutory authority are unjustifiably associated with this stereotype, particularly in the media (see, for example Cochrane 2008). This is clear on examination of the debates surrounding divorce and financial provision on relationship breakdown, which demonstrate how the concept of gold-digging has been used systematically to support or oppose legal reform affecting women.

2.3.1. Financial provision on divorce

The gold-digger accusation has been most consistently employed in the context of financial provision on divorce. When the non-moneyed spouse is given better protection under the law, this is usually countered by the contention that protection encourages exploitation. The debates surrounding the Matrimonial Causes Act 1973 (MCA) clearly demonstrate this tension. The legislation was enacted to provide the courts with discretionary powers to divide property and assets so that spouses, and in particular women who had no opportunity to accumulate property of their own as a result of their work in the home, could achieve a degree of financial independence on relationship breakdown without being limited to the options of maintenance (which was not always paid), remarriage, or financial hardship. Whilst the MCA benefitted both spouses by introducing no-fault grounds, and thus facilitating the burial of many loveless marriages, it was also a landmark for married women in the 1970s, as organisation of the family home was still very much premised on the binary of male breadwinner and female homemaker at this time (Smart 1984).

However, the Act has not been viewed universally as a necessary and positive step towards spousal equality. Since its enactment, it has been referred to in several House of Lords debates as a 'gold-digger's charter' (HL Deb (2002) 636, col. 77) because it enables the wife to acquire rights in property directly earned by the husband without having worked outside the marital home. Such opposition was undoubtedly influenced by the idea that individuals should work to support themselves on divorce, regardless of the cost to their earning power that mothering or homemaking has had. Closely linked to this is the importance placed on the ways in which spouses come to own property that results in spouses with a claim based on non-financial contribution to be treated as if, in Smart's (1984, p. 105) words, they 'did not come by their share in the property in a legitimate way in the first place'. This was evident in some of the outcomes for non-moneyed spouses in financial provision cases in the 1970s, 80s and 90s where financial and non-financial contributions were not valued equally. Indeed, the assertion of property rights on divorce meant that in cases where the parties' assets exceeded their needs, the non-moneyed spouse had no additional claim on assets directly earned by the income producing spouse if this would leave her with an award surpassing her reasonable requirements. The effect of this focus on direct financial contributions was that in cases with surplus assets, or even cases with medium level assets, the homemaking spouse was treated as a needy supplicant no matter what her contributions had been (see *Dart v. Dart* [1996]).

This focus on 'reasonable requirements' was swept away by the House of Lords decision *White v. White* [2000]. Before this case was decided several commentators had openly condemned the court's limitation of the non-moneyed spouse's award for being gendered and discriminatory because the non-financial work in the home was typically undertaken by the wife (Cooke 2001). In *White*, this was highlighted by Lord Nicholls, who said the redistribution of assets on divorce should not depend

on which spouse 'earned the money and built up the assets', because '[t]here should be no bias in favour of the money earner and against the home-maker and child-carer' (*White v. White* [2000], [24]). As a result, financial provision should be cross checked against the principle of equality to ensure fairness of outcome on divorce. In practice, this did not affect cases where the assets could barely stretch to meet the parties' needs (Hitchings 2010), but in cases involving large amounts of wealth, known as 'big money' cases, the lion's share of the assets was no longer reserved for the income producing spouse. The largest award to date for the lesser income producing spouse is £330 million (*Cooper-Hohn v. Hohn* [2014]) which although significant still only reflected a 36% share of the assets. The wife cared for four children under five years old whilst in employment, but the judge decided that the husband's greater economic contribution justified a departure from equality. Therefore, in spite of the wife's double shift of work (Fraser 1994), her contribution was not a 'special' one because in Roberts J's view, it did not require the 'innovative vision' and 'special skill and effort' that the husband's generation of 'truly vast wealth' did (*Cooper-Hohn v. Hohn* [2014], [282]). The way in which cases like this are reported in the media (see *Charman v. Charman* [2007]) suggests that equitable division of assets causes the moneyed husband to be deprived of *his* property, as headlines consistently focus on the award received by the non-moneyed wife. This goes against the attitude promoted by *White*; that both spouses directly and indirectly have a role in the generation of marital property, and so the property belongs to both of them. But aligning the general public's attitudes with those in *White* is very difficult in practice, particularly when the gold-digger stereotype is so powerful.

As noted above, Baroness Deech is one of the most vocal opponents of large awards for non-moneyed spouses in big money cases. One of the court's justifications for these awards is that family life is often a significant impediment on women's career progression outside the home. However, Baroness Deech asserts that the outcomes resulting from this view are problematic because they encourage women to be dependent and even gold-diggers (HL Deb (2014) 754, col. 1491). She argues very persuasively that disadvantages experienced by married women in the public sphere are not attributable to their husbands and that 'maintenance laws cushion and legitimise the attitudes of employers who discriminate against women, because they are aware of the "meal ticket for life" [or gold-digger] mentality' (Deech 2009, p. 1142).⁸ If Baroness Deech is correct, gold-diggers not only justify reform limiting women's award on divorce; gold-diggers also are to blame for discrimination against all women outside the family home. And so if laws that (in Baroness Deech's view) encourage and enable gold-diggers are reformed, women will be more equal and independent in society.

The weaknesses of this view are exposed on closer inspection of gold-digging, because as this paper argues, the women labelled gold-diggers are usually not women who have ensnared men for money. Furthermore, research has consistently proven that economic dependence within the family is based on gendered social values, and is not simply encouraged by the system of financial provision under the MCA, just as career sacrifices made by women are not, as Baroness Deech (2009, p. 1142) has said, simply a 'matter of choice'. Although there are more female principal breadwinners than ever before (Adkins and Dever 2014) this should not lead to assumptions as to the modern division of labour in the home, especially when the marriage has produced children. As Cynthia Lee Starnes (2006, p. 208) puts it:

⁸ A woman's presumed view of men as 'meal tickets' in this context is inextricably linked to the concept of gold-digging. As noted previously, gold-digging, by definition, involves any woman driven to enter relationships for financial gain (which presumably includes the pursuit of life long economic support) and is not limited to a woman's search for luxury. Therefore, when castigating the gold-digger, phrases like 'meal ticket' are typically employed too.

According to myth, in today's egalitarian, gender-neutral culture mothers and fathers co-parent, both working full-time in the paid economy and sharing equally in their leisure time the few family tasks that are really necessary ... [yet] Even when a married mother works outside her home she likely serves as the primary caretaker, undertaking a disproportionately large share of household chores.

Therefore, limiting financial provision to caregiving spouses is not a safe or productive strategy for addressing structural inequalities between men and women. But the 'meal ticket', gold-digger mentality does not appreciate this reality, and has instead justified a gradual departure from the non-discriminatory approach in *White v. White* (George 2013, p. 991). Indeed, in recent cases, the judiciary has become increasingly likely to depart from equality and place disproportionate emphasis on the financial contributions made to the marriage (see *Jones v. Jones* [2011], *Prest v. Petrodel* [2013]). This ultimately means that outcomes weigh more heavily in favour of the breadwinner on divorce, which in turn disadvantages women who have undertaken domestic and reproductive labour during the marriage. When the wife cannot point to financial contribution or show clearly that all of her husband's wealth was acquired during the marriage, her claim is significantly weakened and is more likely to be limited to her 'reasonable needs' (*Jones v. Jones* [2011]). This echoes the aforementioned 'reasonable requirements' approach that had been swept away by *White v. White* for being discriminatory against the non-moneyed spouse. Yet under today's reasonable needs assessment, a wife is not only required to justify why she married her husband in the past; she must also justify maintenance of her marital standard of living post-divorce, by producing a budget detailing what her needs are so an assessment can be made as to whether her claim is 'reasonable'.

2.3.2. Conduct

Fears of gold-digging in the context of marriage and divorce have not only been elevated by equitable division of property on relationship breakdown; the increasing irrelevance of spousal conduct on divorce has also raised concerns. Prior to the enactment of the MCA, divorce was only possible if one of the spouses was at fault, and the commission of a matrimonial offence would affect financial provision. Thus couples wanting to divorce either had to establish fault or find a fictional basis for attaching blame. The MCA dealt with this by introducing no-fault facts to prove irretrievable breakdown (two years separation with consent and five years separation without consent). However, fault based facts (behaviour, desertion and adultery) were retained, and so pursuant to the MCA the UK has a quasi-fault-no-fault system of divorce.

In 1996 the Family Law Bill (which later became the Family Law Act 1996, but was never fully implemented and is now repealed) sought to reform the MCA, introduce no fault divorce and permit divorce after one year of separation without both parties' consent. But this was opposed by those who believed the reasons for marital breakdown are important, gold-digging being a prime example of conduct that should not be overlooked. Divorce without the consent of both parties, and without any blame would make it easy for gold-diggers to marry, divorce and reap financial gain. As Lord Northbourne (HL Deb (1996) 570, col. 723) put it in the House of Lords:

If Spouse A is seeking to obtain a divorce, and Spouse B does not wish to have a divorce, and Spouse B has not committed any fault, under the law as it exists at the moment, Spouse A would have to wait five years. Under the Bill which we have before us, Spouse A will only have to wait one year. Therefore that means that this Bill give an enormous opportunity for gold-diggers and for injustice if an unscrupulous spouse enters into marriage with a view to gaining financial advantage.

This is a clear example of the power of the gold-digging stereotype, as it obscures the reasons for this particular reform. The importance of such reform was

highlighted recently in research carried out by Anne Barlow *et al.* (2014), who found that preservation of fault based facts to prove irretrievable breakdown in the MCA exacerbates hostility on relationship breakdown. As was put in their report *Mapping Paths to Family Justice* (Barlow *et al.* 2014, p. 32):

[T]here comes a jarring moment when the lawyer(s) or mediator(s) have to broach the issue of the grounds for divorce, and the fact that if the parties want to resolve financial issues and move forward now rather than waiting for two years, one of them will have to accuse the other and the other will have to accept the accusation of either adultery or unreasonable behaviour. We saw the capacity for this legal requirement to upset and antagonise parties and to disturb the equilibrium of the dispute resolution process. Government's promotion of non-adversarial approaches to family disputes needs to be underpinned by a non-adversarial – i.e. no fault – divorce regime.

In spite of the practical benefits of no-fault divorce, some practitioners have suggested that fault based facts are important to spouses who feel a sense of injustice on divorce (Bingham 2014). Petitioning for divorce on the basis of unreasonable behaviour or adultery is viewed by some as a public declaration that the other spouse is at fault, even if this has no bearing on the financial outcome. However, this aspect is not of central concern to those in fear of gold-diggers. Rather, no fault divorce would simplify the divorce process, and would conceivably make it easier for the 'career divorcees' frequently reported in the media. If, as this paper argues, these examples are not at all representative, then a cultural stereotype is impeding reform that would assist divorcing spouses in resolving their disputes.

2.3.3. Financial remedies for unmarried cohabitants

The gold-digger stereotype has been consistently used as a reason to oppose legislation that would provide the court with redistributive powers on the relationship breakdown of unmarried cohabitants. Currently, England and Wales has no legislative provision that provides cohabitants with relief in the event of relationship generated disadvantage, and so couples dividing assets in this situation must instead navigate complex trust law principles that depend on direct financial contribution. Research has consistently demonstrated that this leaves the non-moneyed partner in a financially vulnerable position on separation (Barlow *et al.* 2008), particularly in cases determining ownership of the family home after a long relationship involving children (Douglas *et al.* 2007), and often women who have undertaken reproductive and domestic tasks have little recourse unless their name is on the property deeds.

There is significant support to introduce reform similar to that carried out in Scotland. The Family Law (Scotland) Act 2006 provides that a former cohabitant can apply for compensation if she or he has suffered economic disadvantage, and his or her partner has experienced economic advantage, both *directly as a result of the cohabitation* (section 28(3)). In Scotland this Act provides the court with powers to carry out a balancing exercise between the parties' respective gains and losses at the end of the relationship, but does not provide any of the same wide ranging discretionary powers exercised by the courts in England and Wales when determining financial provision on divorce. The Law Commission advocated reform similar to the legislation introduced in Scotland in its report to Government in 2007 and these proposals have received public support from Lady Hale (*Gow v. Grant* [2012]) and Resolution (an organisation of family lawyers in England and Wales). In addition, two private members' bills have been debated in the House of Lords: Lord Lester's Cohabitation Bill in 2009 and Lord Marks' Cohabitation Rights Bill (first introduced in 2013 and after parliament was prorogued twice, reintroduced in June 2015). Both of these Bills have received steadfast opposition in the House of Lords from those who believe that financial remedies for unmarried cohabitants would simply enhance gold-diggers' success when exploiting wealthy men.

According to Baroness Deech, financial relief for unmarried cohabitants would lead to undeserved awards in many cases. In 2009 she argued that Lord Lester's Bill 'would be a windfall for lawyers but for no one else except the gold-digger' (HL Deb (2009) 708, col. 1422) and in 2014 she asked of Lord Marks' Bill (HL Deb (2014) 757, col. 2074): 'Why should the mistress of a rich man get, for example, £5 million after a couple of years of childless cohabitation?'

Baroness Deech's perpetuation of the gold-digger stereotype in this context is damaging. It drowns out the voices of women left homeless and financially destitute because there is no legal recourse available to them; simply as a result of their marital status. But even though these women and their partners often *function* no differently to a husband and wife, Baroness Deech and many others do not believe this justifies access to rights and remedies similar (but not equal) to those available to married couples (Glennon 2008). In short, this approach does not appreciate the realities of dependency in intimate family relationships, and the concept of gold-digging only obscures these dependencies further.

All of these examples demonstrate that there is a huge gulf between the *portrayal* of gold-diggers in theory and the *reality* of individuals' behaviour within intimate family relationships. Therefore, the gold-digging stereotype constitutes a widespread overreaction to large awards on divorce. The stereotype operates by labelling women with no mercenary intent as gold-diggers simply because they have received a share of marital assets that they did not directly earn. The problem with this is that it leads to misconceptions in the media when a big money case is decided. Specific examples of this include Mr Vince's public accusation of his former wife for gold-digging (BBC News 2015), even though the subsequent settlement provided her with a relatively small award⁹ in recognition of her child care contributions over many years (*Wyatt v. Vince* [2015]).

Since the House of Lords explicitly placed substantive fairness at the centre of its decision in *White v. White*, all women are being tarred with the 'gold-digger' brush. The problem with this gold-digging stereotype is that it hinders erosion of the sexual division of labour, and so in spite of the court's more egalitarian approach to financial provision on divorce, wives undertaking domestic tasks in addition to employment cannot match their husbands' unencumbered earning power throughout the marriage. Indeed, the dependencies and power imbalances within marriage are not discussed when focus is placed on the covetous spouse intent on exploiting her partner for financial gain. This is convenient for those in favour of binding prenuptial agreements, because as the next section explains, the impetus for these agreements is often to protect the moneyed spouse's assets on divorce, and to prevent gold-diggers' ability to profit from the marriage.

3. Prenuptial agreements: the gold-digging antidote

In *Feminism and the Power of Law*, Carol Smart (1989, p. 138) argued that when women resort to law to improve their situation, this can trigger a backlash whereby the law is counter-used to re-establish traditional rights. On this basis, the substantive equality achieved through recognition of non-financial contributions to the family is countered by the assertion of property rights in various ways, and the use of prenuptial agreements is an example of this. A prenuptial agreement is capable of decisive weight on divorce in England and Wales, provided the court does not decide it is unfair (*Radmacher v. Granatino* [2010]). However, there is still no *guarantee* that a prenuptial agreement can safeguard a moneyed spouse's assets, and so there have been numerous calls for reform that would remove the court's power to set agreements aside for being unfair. The Law Commission (2014) recommended reform making prenups binding pursuant to the Nuptial Agreements

⁹ Mr Vince's wealth is estimated to be approximately £107 million. The parties settled on an award to the wife of £300,000 to buy a house and a contribution to her costs (*Wyatt v Vince* [2016] EWHC 1368).

Bill, provided the effect of the agreement on divorce would not leave either party in need. To date, the proposed Nuptial Agreements Bill has not been introduced in Parliament, but the Divorce (Financial Provision) Bill was introduced in the same month the Law Commission published its report. The Divorce (Financial Provision) Bill differs to the Law Commission's Nuptial Agreements Bill because it contains no provision enabling a prenup to be challenged if a spouse's needs are not met. In short, the message of the Divorce Bill is that prenuptial agreements should be binding with very few exceptions. Two principal justifications for this are examined in this section.

The first reason advocated by those in favour of reform is that if a prenup is easily set aside, then the autonomy expressed by the parties in the terms of the agreement is not respected. Like contracts in business, the law should hold parties to their promises. At face value, this argument is persuasive because it implies that refusal to give weight to a prenup is tantamount to the judge telling the parties that he or she knows better. In the context of financial provision on divorce, a paternalistic approach that prioritises the court's idea of fairness over what the parties would consider to be a fair result is criticised by members of the judiciary for suppressing couples' autonomy. Indeed, the now dominant perception in prenuptial agreement cases states that giving more weight to such agreements is important to enable individual couples to work out what is best for them (*Radmacher v. Granatino* [2010], [51]). It should be noted that the judiciary's emphasis on autonomy is a recent development, and was brought to the fore in the Supreme Court case *Radmacher v. Granatino* in 2010. Before this case, prenups were one of the many circumstances considered by the court when making financial provision, which was considered by some commentators as 'paternalistic and protective of the payee' (Murray 2012). But the principle of autonomy is responsible for a significantly different judicial approach, whereby prenups are now not only prominent, but *decisive* in financial outcomes on divorce. However, prenups are not binding, because the MCA provides that financial provision is decided by the court, and so a prenup cannot replace this power unless legislation says so. To be clear, this means that the current situation is that a prenup needs the court to give it effect before it has any power, but if the Divorce (Financial Provision) Bill is introduced, prenups' power would be derived from statute. Changing the status of prenups in this way would provide couples with virtually unfettered power to control their property and finances in the event of divorce.

A second justification proffered by advocates of binding prenups is that the system of financial provision in England and Wales is flawed and couples should be able to contract out of it. As noted in the previous section, the system is criticised for involving great uncertainty and expense because it is not clear what a particular judge would consider as fair in any given big money case. But even if the court's approach was more transparent, Baroness Deech has said that financial provision is still deeply unsatisfactory. In her view, equitable division based on equal recognition of financial and non-financial contributions creates an environment in which gold-diggers can thrive, because if spouses receive a large financial award in spite of making little or no direct financial contribution, the message is "[f]ind that footballer and sit back" (HL Deb (2014) 757, col. 641). She also asserts that the court's approach is degrading to women, because it embodies the concept that women's dependency on men is inevitable rather than incentivising women's participation in the public sphere:

It is inconsistent if at one and the same time family law assumes that a woman can and should stay at home and care for their children and be compensated for that on divorce, and for society to call for women to take 50% of top jobs (Deech 2009, p. 1141).

Furthermore, the woman who stays at home, is unemployed and married to a rich man fits the typical description of a gold-digger in modern society. But it is up to her to avoid this characterisation by signing a prenup. This belies the discourse of

autonomy surrounding prenups, because by signing an agreement she is disproving her gold-digging motives, and this simultaneously inhibits her autonomy if she is less powerful economically and otherwise. Yet even a prenup might not be sufficient proof, as unless it is binding, according to Baroness Deech (2009, p. 1144), the 'gold-digger' can still receive a large award on divorce by having the agreement set aside, although one could assume that the presence of a prenup would make the 'gold-digger' much less confident in her result. Nevertheless, the *potential* of an unenforceable prenup enabling the gold-digger to succeed made Baroness Deech ensure the Divorce (Financial Provision) Bill would allow very few agreements to be set aside.

Both of these justifications for binding prenups are connected to the concept of the gold-digger. These justifications are also deeply flawed, because as discussed below, they are focused on the autonomy of the moneyed spouse, are based on assumptions about the context in which individuals enter into prenups and on assumptions as to the reasons for dependency within the marital relationship. In order to challenge these assumptions and uncover the reality of prenuptial agreements in practice, the next section draws on an empirical study of prenuptial agreements in New York, where prenups are binding. By examining the shortcomings of binding prenups in New York, support is given to the view that reform in England and Wales pursuant to the Divorce (Financial Provision) Bill would be problematic. To highlight this, the impact of assumptions made about binding prenups in the debates surrounding the Divorce (Financial Provision) Bill is examined. It is hoped that this analysis will reveal why the negative stereotype of the gold-digger has the potential to cause significant damage to the non-moneyed spouse on divorce.

3.1. An empirical study of prenuptial agreements in New York

In 2010 I interviewed twenty attorneys in New York City on their views and experiences of prenuptial agreements. The interviewees were all experts on prenups and had been drafting them for clients for decades. In New York, prenups have been legislatively binding since the 1980s, and so the study provided an interesting insight into a jurisdiction where prenups are routinely enforced. The results of this research were disseminated in my book *Prenuptial Agreements and the Presumption of Free Choice: Issues of Power in Theory and Practice* (Thompson 2015) but it is useful in this paper to also consider some of the findings that are relevant to the debates surrounding gold-diggers and the Divorce (Financial Provision) Bill.

In New York, the default system of financial provision on divorce is based on judicial discretion and equitable distribution, and operates similarly to the system of financial provision in England and Wales. However, a prenup will only be set aside in New York if it is procedurally flawed (for example, disclosure or legal advice was not adequate when the agreement was drafted) or if the court decides it is unconscionable at the time of enforcement. Every interviewee said it is extremely difficult for an agreement to be set aside on these grounds (Thompson 2015, p. 84). And so the status of agreements in New York is comparable to the status prenups would have in England and Wales if the Divorce (Financial Provision) Bill (or reform of a similar nature) is introduced.

The assertion that prenups reflect the autonomy of the parties, and should therefore be respected by the courts, is undermined when the meaning of autonomy is probed. A striking finding of the New York study was autonomy is a flawed concept because power inequalities are a feature of *every* prenup. In most cases this is because there is disparity of wealth or income between the parties, which leads to an uneven playing field, as one attorney in the study explained:

Oftentimes, there is a moneyed party, or a more moneyed party coming into the marriage and it's the more affluent party that is going to look for the agreement

and preserve what he or she has coming into it and then dictating also what may happen in the event that the marriage doesn't work out (Thompson 2015, p. 81).

As a result, a prenup is often not the most accurate reflection of *both* parties' intentions because, as an interviewee in the study put it:

[U]sually it is one party I think presses for it. I haven't seen too many people at least in my practice who both say, "I think it's a mutual best interest to execute a prenuptial contract" (Thompson 2015, p. 80).

Accordingly, focusing on a couples' autonomy as enshrined in their prenup is likely to lead to disproportionate emphasis on the wishes of only one party. This becomes particularly problematic if these wishes are influenced by a fear of gold-digging. Whilst there are a multitude of reasons why individuals decide to enter prenups, the study in New York found that often the non-moneyed spouse signs a prenup to prove she is not marrying for money, or the moneyed spouse insists on a prenup to be reassured he is not marrying a gold-digger. There were several anecdotes from attorneys where their clients or client's partners viewed the agreement almost as a litmus test for gold-digging, but one story in particular stood out:

She did not want the prenup. He insisted and at the last minute he capitulated and said it was alright. It was almost like it was a test. And because she said she would do it, [he knew] 'ok you're not marrying me for my money (Thompson 2015, p. 196).

This kind of 'test' is rather perverse when considering that prenups enable the wealthy spouse to protect their money from equitable division in the event of divorce. If anything, prenups bring the financial aspect of marriage to the fore. And by testing the love of the non-moneyed party in this way, the wealthy party implicitly does not trust them, or perhaps needs to convince third parties, such as affluent parents. Yet this is obscured by the gold-digging stereotype, which causes the intentions of the *non-moneyed*, (not the moneyed) party to be interrogated. Proponents of the Divorce (Financial Provision) Bill are unlikely to find this problematic, as in the House of Lords debates, prenups were discussed a means of keeping gold-diggers or 'alimony drones' at bay (HL Deb (2014) 754, col. 1491). But research suggests this attitude *is* harmful, because it does not place the non-moneyed parties' financial demands, needs and choices on a par with those of the moneyed spouse (Atwood 1993). After all, the moneyed spouse's intentions not to share in the fruits of the marriage are not scrutinised. And, in any case, either party's reasons for marrying should not be inspected, not least because people marry for various reasons, including financial gain and security. Focusing only on the motivations of the non-moneyed spouse not only leads to a false impression of the prevalence of gold-diggers, but also has a detrimental impact on financial outcomes on divorce.

3.2. *The impact of the gold-digging accusation*

The gold-digging stereotype is particularly detrimental in the context of prenups, as it leads to the use of these agreements as proof that the non-moneyed spouse is marrying for love, not money. When they think it is only a test of their affections, it distracts the parties from appreciating the consequences of a prenup, when the terms could be catastrophic for the non-moneyed spouse on divorce. In the extract discussed above, the attorney was relieved that the prenup signed by her client was only a 'test' because if it had bound the parties the wife would have been left in an economically precarious position:

I was sort of pleased for her [that the husband changed his mind about the prenup] because the terms of the agreement were egregious in my opinion. And by that I mean she was going to be put in the position of probably not working with children (Thompson 2015, p. 196).

Thus, when used to protect the moneyed spouse from gold-digging, prenups exacerbate issues of power between the parties by manipulating and undermining the non-moneyed spouse's ability to negotiate an award that could reflect her projected non-financial contribution.

The risk of entering into an agreement that favours the moneyed spouse is heightened by 'bounded rationality'. This term has emerged from research showing that parties are unrealistic about the prospect of divorce and consequently the likelihood of their prenup ever coming into effect (Baker and Emery 1993). Whilst independent and competent legal advice is a very important part of helping parties understand the consequences of a prenup (Fehlberg and Smyth 2005), evidence suggests this advice is not always listened to (Thompson 2011). In short, pressure to sign a prenup is more powerful when the non-moneyed party believes the agreement will never take effect, but this is *worsened* when she is intent on proving she is not the stereotypical gold-digger. Such power inequalities greatly undermine the contention that prenups reflect the intentions of both parties in the event of divorce, particularly when the agreement really only reflects the autonomy of the party intent on having a prenup to protect their property and avoid the default system of financial provision on divorce.

To be clear, the impact of the gold-digging accusation on the non-moneyed spouse is critical if it contributes to spouses signing away entitlement they would otherwise have on divorce. The court's recognition of non-financial contributions can be contracted out of by prenup and a spouse is more likely to agree to this if the aim is to avoid any gold-digging accusation. This is especially harmful for spouses that make prenups on the basis of their financial independence at the time of the wedding, but changes in circumstance during the marriage create dependency and leave spouses in a completely different position at the end of a lengthy relationship. As Regan (1999, pp. 189-90) has put it:

While it is plausible to say that members of an economic partnership may regard themselves as strangers in the market after the partnership ends, it is far less reasonable to characterize ex-spouses solely in this way. Ex-spouses are not simply individuals who revert to the status of detached individuals. They have shared an experience that has affected them deeply, so much that in a sense they are not the same persons they were when they entered the marriage.

Therefore, if not only the circumstances, but the parties themselves have changed, it is likely that the prenup will not reflect both parties' wishes on relationship breakdown. This demonstrates why it is so problematic to make prenups binding with very few exceptions.

Crucially, these issues affect women more than they affect men. That is, prenuptial agreements are androcentric in their effect because they prioritise the protection of property. This is problematic because the moneyed spouse in the prenup is usually the husband, and women are more likely to undertake domestic and child care tasks than men (Duncan *et al.* 2003, Starnes 2006). As a result, prenuptial agreements have a gendered dimension (*Radmacher v. Granatino* [2010], [137]), and this is exacerbated by the fact that gold-digging is a gendered term too (Brod 1994). Although women do instigate prenups, and it is increasingly common for the woman to be the breadwinner (Adkins and Dever 2014), attorneys in the New York study referred to the non-moneyed party in a prenup as the wife, 'because it almost always is' (Thompson 2015, p. 81). The study found that the source of the wealth is also gendered, in that when the moneyed spouse is the wife, this is generally because she has inherited wealth rather than earned a significant income (Thompson 2015, p. 82). In the reported prenup cases in England and Wales this trend is also clear, as the wealth belonging to moneyed wife in *Radmacher v. Granatino* [2010] and in *Luckwell v. Limata* [2014] was inherited, but in cases where the moneyed spouse was the husband, the wealth has been generated from success in the workplace (*Z v. Z (No 2)* [2011], *Kremen v. Agrest (Financial*

Remedy: Non-Disclosure: Postnuptial Agreement) [2012], *AH v. PH* [2013]). This shows that in spite of the rise of female breadwinner, those *earning* huge amounts of money surplus to needs are still men. Protecting these assets by prenup effectively protects the structural inequalities that lead to these gendered differences, and perpetuating the gold-digger stereotype will only entrench these inequalities further.

4. Defending the gold-digger: consequences and criticisms

Historically, the gold-digging stereotype has obscured structural divisions affecting women on relationship breakdown, and has justified the protection of property over recognition of care-based contribution. Therefore, the stereotypical image of the gold-digger is patently detrimental to the non-moneyed partner, and to women. Yet it is infinitely more difficult to change attitudes surrounding gold-digging than it is to propagate the stereotype surrounding the concept. There is no doubt that it is an insult to be called a gold-digger. However, in this section, a thought experiment is used to assume that gold-digging *does not* have negative connotations, so that the strengths and weaknesses of the concept can be assessed. The purpose of this is to address the question of whether defending gold-digging could be useful for women to whom this stereotype is applied, or if the term should instead be abandoned.

3.1. Can gold-digging be defended?

If gold-digging was accepted in society, a number of positive outcomes are conceivable. For instance, women's motivations for choosing a moneyed partner would not be questioned any more than men's, and so the sexist pursuit of policing women's intentions upon marriage would cease. One consequence of dispelling concern for gold-digging intentions is that prenups could be negotiated differently, so that the non-moneyed party would no longer have to prove she is not marrying solely for money. Furthermore, even though the gold-digging stereotype is often not directly responsible for power inequalities affecting prenups, it *does* often overshadow these inequalities when prenups are debated. Baroness Deech's Divorce (Financial Provision) Bill is a clear example of this, as it purports to defeat gold-diggers by making prenups binding, but its provisions (if introduced) would leave the court with little flexibility to recognise the fundamental problems with such agreements. However, when concern for gold-diggers is removed from this context, these problems can be brought into focus. As noted above, a major problem with prenups is their androcentric effect on divorce whereby masculine values take precedence and inevitably advantage men. That is, changed circumstances typically require caregiving sacrifices to be made by the wife, which are devalued on divorce if unaccounted for in the prenup. Therefore, the effect of prenups is androcentric because, as Fraser (1994, p. 600) has put it, they can be used to undervalue practices that are associated with women. Whilst destigmatising gold-digging does not directly address this issue, it indirectly challenges androcentrism by ending the use of prenups as a gold-digging antidote.

The effect that a positive view of gold-digging would have on the value attributed to domestic and caregiving tasks should not be underestimated. Women carrying out these tasks are not stereotypical gold-diggers, but as this article has contended, they are often labelled as such when recognition of their work interferes with the property interests of the money producing partner. This has arguably hindered substantive equality for spouses on divorce. A reconceptualisation of gold-digging would not just improve matters for the economically vulnerable in these individual settings; but could also change the wider context in which care and property interests are valued. In other words, if gold-digging is not stigmatised, it has no power to undermine the value of non-financial contributions to the family. Accordingly, interference with property rights is easier to justify.

A more radical consequence of re-evaluating gold-digging (and the associated value attached to property and care) is that gold-diggers could redistribute wealth between income producing and non-moneyed partners. Such redistribution would take place on gender lines, because as noted above, the moneyed partner in a prenup is usually male, and women are economically disadvantaged as a result of wider structural inequalities. Gold-digging could challenge this economic inequality if relationships based on financial gain are encouraged. Indeed, one might ask why it is wrong to marry for money if this would elevate the economic position of women in society. After all, middle-aged wealthy men stereotypically 'trade in' their first wives for younger 'trophy' wives and this arguably is at least as morally questionable as gold-digging. Yet these men are derided far less; in fact, male self-interest is accepted and often assumed in society (England 2009, p. 37). If women were expected to be similarly self-interested, their choice to marry for money could arguably be viewed as rational instead of mercenary.

Furthermore, Deech maintains stereotypical gold-digging wives make no contribution because they marry and 'sit back' (HL Deb (2014) 757, col. 641) whilst husbands work hard to contribute financially, but this is not necessarily the case. Even if a gold-digger does not cook, clean or change nappies, this does not mean she makes no contribution. Moreover, it is difficult to accept that a husband derives no benefit from marrying a trophy wife. *Conran v. Conran* [1997] demonstrates that contribution to the marriage need not be in the form of traditional caregiving tasks, as in this case the wife's contributions included her skill, energy and creativity in hosting and participating in business dinners at the family home, which were important in enhancing her husband's reputation. Destigmatising the gold-digger could address gendered norms that otherwise vilify women for making what could be viewed as rational economic choices when marrying, and could also enable the services trophy wives provide to be recognised as contributions to the relationship.

However, destigmatising gold-digging so that it is no longer used as a weapon against women is very different from actively *promoting* gold-digging. Encouraging women to seek out rich men raises a host of difficult questions that require further examination below.

3.2. *Should the term 'gold-digging' be abandoned?*

An instinctive reaction to destigmatising the gold-digger is that it would incite many more women to marry wealthy men instead of earning their own money (Deech 2009). But there is arguably no concrete evidence women are at all more likely to exhibit this behaviour than men,¹⁰ whether gold-digging is a negative stereotype or not. However, within this thought experiment, it is important to assess whether stripping away the negative connotations of gold-digging is preferable to getting rid of the concept. One potential benefit of gold-digging is that it could be used to challenge economic inequalities between breadwinner and care provider. Yet on closer inspection, the problems with destigmatising gold-digging are numerous.

Whether society's view of gold-digging is positive or negative, the gendered nature of the term is damaging because the portrayal of women as gold-diggers assumes their economic dependency on men, and reinforces beliefs of their deviousness and use of 'feminine wiles' to trap men. Although economic dependency is often the reality for women, the concept of gold-digging does nothing to challenge this. Even if gold-digging could indirectly provide caregivers with more financial security, it would exacerbate women's marginalisation from employment, and impede women's participation in the public sphere (Fraser 1994, p. 609). By keeping gold-diggers

¹⁰ Although see M. Denike ("Evolutionary Thought and Anti-Immigrant Sentiment: Affective Politics and the Criminal Ban on Polygamy in Canada" personal communication, Oñati, 16 July 2015), who explains how theories of evolutionary psychology have been used as evidence that women are more susceptible to gold-digging.

out of public spaces and in the home, caregiving work is simply reinforced as women's work (Fredman 1998). The promotion of gold-digging would do nothing to highlight the fundamental value of care in the home, because the stereotypical gold-digger does not make a care based contribution, she devotes her time to spending her husband's money. In short, the hypothetically positive view of gold-digging could conceivably stop the chastisement of caregivers in receipt of substantial financial awards on divorce, but it would not recognise care because awards would be made regardless of contribution. Thus, the value attached to caregiving contributions would be unlikely to change within this thought experiment.

On the other hand, gold-digging, with all of its negative consequences, is an important concept because it highlights some of the problems with the way in which women's participation in society is viewed. Vehement opponents of gold-digging are in favour of an inflexible obligation on spouses to be financially independent. Women have to fit into patriarchal patterns of employment in order to succeed on a par with men, and yet research consistently shows that women also continue to carry out the majority of domestic tasks in the home (Duncan *et al.* 2003, Adkins and Dever 2014, Starnes 2006). The solution, therefore, must challenge the sexual division of labour inside the home and the structural inequalities outside it. Whilst gold-digging (even when reconfigured) does not successfully do either, examining the use of the concept in practice *does* leave the claims made by commentators such as Baroness Deech, and the legislative reform encouraged by these views open to challenge. Furthermore, if the inaccuracies and stereotypes associated with gold-digging are understood, more is revealed about how the protection of property has caused women to be discriminated against.

5. Conclusion

From music such as Kanye West's song *Gold-digger*, to films such as the Coen Brother's *Intolerable Cruelty*, to debates in the House of Lords, the message to wealthy men is clear: be wary of gold-digging women, and get a prenup. The depiction of gold-digging in these contexts resonates with Sandra Fredman's observation:

Stereotypical images of women have throughout the ages been used to justify detrimental treatment. Because women are classified as different in the relevant respects, it appears justifiable to subject them to detrimental treatment (Fredman 1998, p. 301).

Although Fredman was not writing specifically about gold-diggers, her words accurately capture the problem with the gold-digging stereotype, as it has consistently justified detrimental treatment of women. To be precise, in the family context it has justified the protection of the moneyed party's property to the detriment of the non-moneyed party. Most recently, the stereotype has driven support for reform by the Divorce (Financial Provision) Bill, which would limit provision to the non-moneyed spouse on relationship breakdown, and make prenuptial agreements binding with very few exceptions. Like many of the legal developments influenced by fears of gold-digging, this Bill would disproportionately harm women.

Unfortunately, the conversations surrounding this Bill do not appear to appreciate the effect of the gold-digger accusation. The term is often used against women simply because they are entitled to a share in property directly earned by their spouse, and regardless of whether their intent is suspect. Since the term emerged in the early twentieth century, 'gold-digger' has been used to deny women rights in property owned by men. Perhaps this is because it is easier to count the financial cost of divorce than it is to count the non-financial one. The income producing spouse can calculate the amount of earnings lost to the non-moneyed spouse, but the cost of care provided by the non-moneyed spouse cannot be quantified. Those

who employ the gold-digging stereotype do not consider these intangible costs, because non-financial contributions are not visible in the way that financial contributions are.

In conclusion, gold-digging is associated with greed, and with morally reprehensible behaviour. But the term is applied to women who clearly do not fit within this stereotype. From this perspective, the gold-digger is not mercenary, exploitative or manipulative; she is a woman entitled to property because she has shared and indirectly created it during her relationship. Understanding the gold-digger in this way does not defend the use of the stereotype, but it *does* defend the women to whom it is applied. And in doing so, it is hoped, the power of the gold-digging stereotype is lost.

References

- Adkins, L., and Dever, M., 2014. Housework, Wages and Money. *Australian Feminist Studies*, 29 (79), 50-66.
- Atwood, B., 1993. Ten Years Later: Lingering Concerns about the Uniform Premarital Agreement Act. *Journal of Legislation* [online], 19 (2), 127-154. Available from: <http://scholarship.law.nd.edu/jleg/vol19/iss2/2> [Accessed 28 November 2016].
- Auchmuty, R., 1975. Spinsters and Trade Unions in Victorian Britain. *Labour History*, 29, 109-122.
- Auchmuty, R., 2012. Law and the power of feminism: how marriage lost its power to oppress women. *Feminist Legal Studies* 20 (2), 71-87.
- Baker, L., and Emery, R., 1993. When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage. *Law and Human Behaviour*, 17 (4), 439-450.
- Barlow, A., et al., 2008. Cohabitation and the law: myths, money and the media. *British Social Attitudes* [online], 24, 29-52. Available from: https://in.sagepub.com/sites/default/files/upm-binaries/18380_Ch2_Barlow_et_al_FINAL.pdf [Accessed 28 November 2016].
- Barlow, A., et al., 2014. *Mapping Paths to Family Justice: Briefing Paper and Report on Key Findings* [online]. University of Exeter. Available from: https://socialsciences.exeter.ac.uk/media/universityofexeter/collegeofsocialsciencesandinternationalstudies/lawimages/familyregulationandsociety/pdfs/Mapping_Paths_to_Family_Justice_Briefing_Paper_23_06_14.pdf [Accessed 28 November 2016].
- BBC News (Gloucestershire, 12 March 2015), available from <http://www.bbc.co.uk/news/uk-england-gloucestershire-31849493> [Accessed 6th January 2016].
- Beach, R., 1911. *The Ne'er-Do-Well*. New York: Harper.
- Beach, R., 1918. *The Winds of Chance*. New York: Harper and Brothers.
- Bingham, J., 2014. Top family judge calls for no-fault divorce for all and putting cohabittees on a par with married couples. *Telegraph* [online], 29 April. Available from: <http://www.telegraph.co.uk/women/sex/divorce/10796954/Top-family-judge-calls-for-no-fault-divorce-for-all-and-putting-cohabittees-on-a-par-with-married-couples.html> [Accessed 19 December 2016].
- Brod, G., 1994. Premarital Agreements and Gender Justice. *Yale Journal of Law and Feminism* [online], 6 (2), 229-295. Available from: <http://digitalcommons.law.yale.edu/yjlf/vol6/iss2/2> [Accessed 28 November 2016].

- Calthrop, D., 1932. *All for the Love of a Lady*. London: Chapman and Hall.
- Cochrane, K., 2008. Why we love to hate Heather. *The Guardian* [online], 20 March, p. 4. Available from: <https://www.theguardian.com/uk/2008/mar/20/mccartneydivorce.pressandpublishing> [Accessed 28 November 2016].
- Cooke, E., 2001. *White v. White: A New Yardstick for the Marriage Partnership*. *Child and Family Law Quarterly*, 13 (1), 81-90.
- Coontz, S., 2006. The Origins of Modern Divorce. *Family Process*, 46 (1), 7-16.
- Deech, R., 2009. What's a Woman Worth? *Family Law*, 39 (12), 1140-1145.
- Douglas, G., Pearce, J., and Woodward, H., 2007. *A failure of trust: resolving property disputes on cohabitation breakdown*. Bristol: School of Law; Cardiff Law School.
- Duncan, S., Edwards, R., and Reynolds, T., 2003. Motherhood, paid work and partnering: values and theories. *Work, Employment and Society* 17 (2), 309-330.
- England, P., 2009. The Separative Self: Androcentric Bias in Neoclassical Assumptions. In: M. Ferber and J. Nelson, eds. *Beyond Economic Man: Feminist Theory and Economics*. University of Chicago Press, 37-51.
- Fehlberg, B., and Smyth, B., 2005. Binding Prenuptial Agreements in Australia: The First Year. In: L. Mulcahy and S. Wheeler, eds. *Feminist Perspectives on Contract Law*. London: Routledge, 130-140.
- Fraser, N., 1994. After the Family Wage: Gender Equity and the Welfare State. *Political Theory*, 22 (4), 591-618.
- Fredman, S., 1998. *Women and the Law*. London: Clarendon Press.
- George, R., 2013. Family Finances and the Corporate Veil: *Prest v. Petrodel*. *Family Law*, 43 (8), 991-995.
- Glennon, L., 2008. Obligations between adult partners: moving from form to function? *International Journal of Law, Policy and the Family*, 22 (1), 22-62.
- Goldin, C., 1980. The work and wages of single women, 1870 – 1920. *Journal of Economic History*, 40 (1), 81-88.
- Hitchings, E., 2010. The impact of recent ancillary relief jurisprudence in the 'everyday' ancillary relief case. *Child and Family Law Quarterly*, 22 (1), 93-114.
- Law Commission of England and Wales, 2014. *Matrimonial Property, Needs and Agreements (Law Com No. 343)* [online]. Available from: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286308/HC_1089_Web_only.pdf [Accessed 28 November 2016].
- McNutt, W.F., 1918. The Scent of the Roses. In: F. Munsey, ed. *Munsey's Magazine*, 63, 56-62.
- Murray, A., 2012. The Principle of Autonomy and Guidance for Appeals: *V v. V*. *Family Law*, 42 (4), 417-426.
- Oxford Dictionaries*, s.d. Gold-digger. *Oxford Dictionaries* [online]. Available from: <https://en.oxforddictionaries.com/definition/gold-digger> [Accessed 28 November 2016].
- Popik, B. 2009. Gold-Digger. *The Big Apple* [online]. Available from: http://www.barrypopik.com/index.php/new_york_city/entry/gold_digger [Accessed 28 November 2016].

- Regan, M., 1999. *Alone Together: Law and the Meanings of Marriage*. New York: Oxford University Press.
- Saturday Review of Politics, Literature, Science and Art, 1933. Gold-diggers of 1933. *Saturday Review of Politics, Literature, Science and Art*, 21 October, 156, 427.
- Shanley, M., 1993. *Feminism, Marriage and the Law in Victorian England*. Princeton University Press.
- Smart, C., 1984. *The Ties that Bind*. London: Routledge.
- Smart, C., 1989. *Feminism and the Power of Law*. London: Routledge.
- Starnes, C.L., 2006. Mothers, Myths, and the Law of Divorce: One More Feminist Cast for Partnership. *William and Mary Journal of Women and Law* [online], 13 (1), 203-233. Available from: <http://scholarship.law.wm.edu/wmjowl/vol13/iss1/5/> [Accessed 28 November 2016].
- Stewart, H., 2013. UK Women remain concentrated in lower-paid work, figures show. *The Guardian* [online], 25 September. Available from: <http://www.theguardian.com/money/2013/sep/25/uk-women-lower-paid-work-figures> [Accessed 28 November 2016].
- Tentler, L., 1986. *Wage-earning women: Industrial work and family life in the United States, 1900-1930*. New York: Oxford University Press.
- Thompson, S., 2011. Levelling the Prenuptial Playing Field: Is Independent Legal Advice the Answer? *International Family Law*, 4, 327-331.
- Thompson, S., 2015. *Prenuptial agreements and the presumption of free choice: issues of power in theory and practice*. London: Hart.
- Webb, S., 1891. The Alleged Differences in the Wages Paid to Men and Women for Similar Work. *Economic Journal*, 1 (4), 635-662.

Cases

- AH v. PH [2013] EWHC 3873 (Fam).
- Blackwell v. Blackwell [1943] 2 All ER 579.
- Charman v. Charman [2007] EWCA Civ 503.
- Conran v. Conran [1997] 2 FLR.
- Cooper-Hohn v. Hohn [2014] EWHC 4122 (Fam).
- Dart v. Dart [1996] 2 FLR 286.
- Gow v. Grant [2012] UKSC 29.
- Jones v. Jones [2011] EWCA Civ 41.
- Kremen v. Agrest (Financial Remedy: Non-Disclosure: Postnuptial Agreement) [2012] 2 FLR 414.
- Luckwell v. Limata [2014] EWHC 502.
- Naylor v. Naylor [1961] 2 W.L.R. 751.
- Prest v. Petrodel [2013] UKSC 34.
- Radmacher v. Granatino [2010] UKSC 42.
- White v. White [2000] UKHL 54.
- Wyatt v. Vince [2015] UKSC 14.
- Wyatt v. Vince [2016] EWHC 1368.

Z v. Z (No 2) [2011] EWHC 2878 (Fam).

Hansard

HL Deb (1969) 305.

HL Deb (1996) 570.

HL Deb (2002) 636.

HL Deb (2009) 708.

HL Deb (2014) 754.

HL Deb (2014) 754.

HL Deb (2014) 757.

HL Deb (2014) 757.

Statutes

Equal Pay Act 1970.

Family Law (Scotland) Act 2006.

Married Women's Property Act 1882.

Married Women's Property Act 1964.

Matrimonial Causes Act 1973.

Bills

Divorce (Financial Provision) Bill 2016-2017

Films

Belasco, D. (Producer), and Beaumont, H. (Director), 1923. *The Gold Diggers* [Motion Picture]. United States: The Vitaphone Corporation (Warner Bros.).

Lord, R., & Warner, J.L. (Producers), and Berkeley, B., & LeRoy, M. (Directors), 1933. *Gold Diggers of 1933* [Motion Picture]. United States: The Vitaphone Corporation (Warner Bros.).

Lord, R. (Producer), and Berkeley, B. (Director), 1935. *Gold Diggers of 1935* [Motion Picture]. United States: Warner Bros.

Bischoff, S., and Wallis, H.B. (Producers), Berkeley, B., and Enright, R. (Directors), 1938. *Gold Diggers in Paris* [Motion Picture]. United States: Warner Bros.

Ruth, R.D., (Director), 1929. *Gold Diggers of Broadway* [Motion picture]. United States: The Vitaphone Corporation (Warner Bros.).

Wallis, H.B., and Warner, J.L. (Producers), Bacon, L., and Berkeley, B. (Directors), 1936. *Gold Diggers of 1937* [Motion Picture]. United States: Warner Bros.

Play

Hopwood, A., 1919. *The Gold Diggers* [Play]. New York.