

CFLQ

Research

Legal assumptions, cohabitants' talk and the rocky road to reform

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[B]Introduction

Whilst we know from Shakespeare that the course of true love never did run smooth,¹ the path to resolving disputes on relationship breakdown was always going to be bumpier. Yet it is cohabitation law reform in England and Wales, particularly in dealing with the financial consequences of couple separation, which is proving to be the rockiest ride of all. To date, both the Law Commission report recommending reform² and Lord Lester's Cohabitation Bill 2009³ have fallen on deaf legislative ears.⁴ This is despite what is now a wealth of research advocating the need for reform and evidence of strong public support for it, particularly where there are children.⁵ Neither is there anything in the first Queen's Speech of the new coalition government that indicates that this is likely to change in a hurry, notwithstanding a promised review of Family Law. Whilst the reinstatement of greater tax relief for married couples reveals a clear preference by the new government for retaining the status quo

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¹ W. Shakespeare, *A Midsummer Night's Dream*, Act 1, scene 1, in *The Complete Works of William Shakespeare*, Oldham Press Ltd, undated, p 168.

² Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (TSO, 2007).

³ <http://www.publications.parliament.uk/pa/ld200809/ldbills/008/09008.1-5.html#j02>.

⁴ Ministerial statement to Parliament by Bridget Prentice MP, Parliamentary Under-Secretary of State for Justice, (*Hansard* HC Deb, vol 472, col 22WS (6 March 2008) indicated that no legislative action would be taken in response to the Law Commission report. The Cohabitation Bill, a Private Member's Bill introduced by Lord Lester, had its second reading on 13 March 2009. It was debated inconclusively in Committee Stage on 30 April 2009, after which it was not listed again.

⁵ See A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart Publishing, 2005); A. Barlow, C. Burgoyne, E. Clery and J. Smithson, 'Cohabitation and the Law: Myths, Money and the Media' in A. Park, J. Curtice, K. Thompson, M. Phillips and E. Clery (eds), *British Social Attitudes – The 24th Report* (Sage, 2008), at pp 29–51; R. Tennant, J. Taylor and J. Lewis, *Separating from Cohabitation: Making Arrangements for Finances and Parenting* (DCA, 2006) available at http://www.dca.gov.uk/research/2006/07_2006.pdf; G. Douglas, J. Pearce and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (2007), available at <http://www.law.cf.ac.uk/researchpapers/papers/1.pdf>;

C. Vogler, M. Brockmann and R. Wiggins, 'Intimate Relationships and Changing Patterns of Money Management at the Beginning of the 21st Century' (2008) 37 *British Journal of Sociology* 455; C. Burgoyne and S. Sonnenberg, 'Financial Practices in Cohabiting Heterosexual Couples: A Perspective from Economic Psychology' in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets, An Inter-Disciplinary Study* (Hart Publishing, 2009), at pp 89–108.

of legal privilege within family policy, we have also been told that they believe that ‘strong and stable families of all kinds are the bedrock of a strong and stable society’.⁶ Thus the direction family policy is now to take may not be clear. However, one discernible tension within family law regulation that it will undoubtedly face is that between providing couples, whether married or not, with more autonomy to negotiate and agree on the legal consequences of their relationship – a contractual model; and the role family law has traditionally played in the protection of the economically weaker or more financially ‘vulnerable’⁷ family members – perhaps better expressed as the prevention of exploitation.

Whatever belief the new government may have in using law as an important way of both sending out symbolic messages and influencing behaviour,⁸ we would caution that a purely pro-marriage government policy is unlikely to be able to reverse the family restructuring trends away from marriage into other couple relationships. Research shows that these trends are not unique to Britain and are evident throughout the Western world, irrespective, largely, of the family law regime in place.⁹ If pro-marriage regulation were the way to prevent large-scale cohabitation, then Ireland with restrictive divorce laws and no legal acknowledgment to date of cohabitation relationships would not, over one decade, have experienced the four-fold increase in unmarried heterosexual cohabitation that its census statistics reveal.¹⁰ Conversely, states which have given increased rights to cohabiting couples have not seen any greater increase in family structuring away from marriage and into unmarried cohabitation than that which existed prior to this.¹¹

Thus if cohabitation is not going to go away and indeed is likely to continue to increase,¹² it is very probable that at some point in the future, policy makers will

⁶ ‘The Coalition: our programme for government – Families and Children’, 20 May 2010 available at <http://programmeforgovernment.hmg.gov.uk/families-and-children>.

⁷ Martha Fineman has recently suggested a move away from the concept of dependency to a concept of vulnerability as a more effective means of moving towards a truer substantive egalitarianism within a more responsive state. See M.A. Fineman ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ [2009] *Yale Journal of Law and Feminism* 1–24.

⁸ A striking example of this belief in the family law context is Baroness Young’s assertion in the Parliamentary debates surrounding the Family Law Bill 1996 proposing divorce reform that, ‘law influences behaviour and it sends out a very clear message. There would be no point in legislating at all if law did not influence behaviour.’ (Hansard, *Lords Debates*, vol 569, col 1638 (29 February 1996). Both the previous Labour Government’s *Supporting Families* document (Home Office, (TSO, 1998)) and the Conservative-led Social Justice Policy Group’s policy paper *Breakthrough Britain*, (Centre for Social Justice, 2007) have a pro-marriage discourse.

⁹ K. Kiernan, ‘Unmarried Cohabitation and Parenthood in Britain and Europe’ [2004] *Journal of Law and Policy* 33–55, C. Grant Bowman, *Unmarried Couples, Law, and Public Policy*, (Oxford University Press, 2010).

¹⁰ There were more than 120,000 cohabiting couples in Ireland in 2006 according to the census, up from 31,000 in 1996, meaning 12% of all couples in Ireland are cohabiting outside marriage. The Civil Partnership Bill 2010 due to be signed in June 2010 will extend rights to cohabiting couples but its implementation is likely to be deferred. The Bill legislates for homosexual unions but also gives rights to different-sex unmarried couples who have lived together for 3 years, or 2 if they have a child together. See *Times Online*, 11 April 2010, available at <http://www.timesonline.co.uk/tol/news/world/ireland/article7094399.ece>.

¹¹ K. Kiernan, A. Barlow and R. Merlo, ‘Cohabitation Law Reform and its Impact on Marriage’ [2006] *Fam Law* 1074; B. Atkin ‘The Challenge of Unmarried Cohabitation – the New Zealand Response’ [2003] *Family Law Quarterly* 303.

¹² The Law Commission Report (*Cohabitation: The Financial Consequences of Relationship Breakdown*, Law Com No 307 (TSO, 2007)) predicted on the basis of data from the Government Actuary’s Department, that over one in four couples will be cohabiting by 2031 (see para 1.10).

return to the question of whether a family law which is centred on formal marriage (and now formal same-sex civil partnerships) is fit for purpose, when social norms and trends in England and Wales are accepting and reflecting a far more diverse range of family relationships.

It is suggested here that, at that moment, it will be important when deciding on appropriate modes of regulation to clarify what role we are expecting family law to play in interventions in family life. We must also consider what we know about the emotional and psychological expectations of those experiencing couple relationships such as marriage and cohabitation in the twenty-first century. Relationship choice is now legitimately regarded as a personal matter, with a right to respect for private and family life guaranteed.¹³ So the factors perceived as appropriate in relation to the law's role in aiding or impeding solutions in couple regulation reinforce the credibility and effectiveness of law in this field.

In order to assist such a reflective approach, this article will draw on two studies of cohabiting couples' attitudes and behaviours in England and Wales and assess the suitability of the quite different proposals for reform of cohabitation law put forward by the Law Commission in 2007 and the Cohabitation Bill 2009 in the light of what we know of cohabitants' practices. It will also consider whether there is a role for law to intervene in informal couple relationships to protect the most vulnerable family members or whether the limit of the role of the law is simply to give greater recognition to autonomy and private ordering. We will also consider whether there are stumbling blocks to private ordering which emerge from understandings of couple behaviour, which often contrast with the legal understandings and expectations of 'legally rational behaviour'. By considering how well the recent proposals for reform would fit with what we know about family practices, the article will go on to question whether autonomy, as a concept used to express empowerment within relationships, is appropriate or attainable or whether its role needs to be reconsidered in the light of expected social, family and behavioural norms.

[B]Background to the studies

Our data come from two linked interdisciplinary studies of cohabitants and former cohabitants, separately funded by the Nuffield Foundation and the Ministry of Justice (MoJ) (formerly the Department for Constitutional Affairs) and undertaken between 2006 and 2009.¹⁴ Aspects of both projects aimed to explore the inhibitors to different-sex cohabiting couples taking legal steps to 'put their affairs in order' and also to examine the effect of the government-funded Living Together Campaign¹⁵ and surrounding media coverage, which intensified around the period the Law Commission published their consultation paper¹⁶ in May 2006. Incorporating a socio-legal/psychological dimension, both projects were looking to build on earlier

¹³ See Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR) and the Human Rights Act 1998.

¹⁴ Both studies commenced in January 2006 and all interviews for the two qualitative studies took place in 2006 and 2007. The 'MoJ study' was for a period of 9 months, whereas 'the Nuffield study' was initially for 2 years, but was extended until July 2009. We would like to express our gratitude to both our funders for supporting these projects. Anonymised details of the cohabitant participants in the qualitative phase of each study are available on request.

¹⁵ See <http://www.advicenow.org.uk/living-together>.

¹⁶ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown, A Consultation Paper* CP No 179 (TSO, 2006).

research.¹⁷ This work had first revealed, a widespread ‘common law marriage myth’ whereby the majority of people in general, and of cohabitants in particular, falsely believe that over time, cohabiting couples acquire the same legal rights as married couples. A second important finding had been that, nationally, very few cohabitants (under 10%) sought legal advice or took legal action as a result of cohabitation unless and until the relationship broke down, a figure which did not significantly increase amongst ‘legally aware’ cohabitants, often despite good intentions to take action. Reasons for this included an optimistic assumption that they (unlike others) would not need such legal steps as well as the cost and complexity of the steps needed to follow legal advice.¹⁸ The Living Together Campaign (LTC), which was launched in 2004, was part of the government response to this research. Its website provides clear advice about the different legal positions of married and cohabiting couples in different contexts and guidance on what could and could not be done to gain legal protection similar to that automatically acquired by law through marriage. Downloadable documents were available for those cohabitants accessing the site to take legal steps such as make wills, draw up living together agreements or next of kin statements. The MoJ project therefore set out to assess the impact of the Campaign, by then in its third year, on those cohabitants accessing the LTC website who were ‘legally aware’ of how the law treated them. First an internet survey, accessed from the LTC website, of 102 respondents looked at features of respondents’ website experience; their attitudes to current cohabitation law, against the background of their socio-demographic status and their financial practices as a couple. This was followed by semi-structured interviews where issues could be explored in more depth in a qualitative study comprising a purposive sample of 30 (18 men and 12 women) selected from the internet survey respondents and some of their partners.

The Nuffield study, on the other hand, aimed first to capture a nationally representative picture of how, if at all, legal awareness and activity surrounding cohabitation more generally had changed, given the increased publicity and government-funded campaign on this issue. Public attitudes towards marriage, cohabitation and their legal and financial consequences were explored through a sample of 3,197 respondents in England and Wales as part of the British Social Attitudes (BSA) Survey 2006 to update the national picture gained from this survey in 2000 (‘the nationally representative study’). The follow-up qualitative study comprising 48 in-depth interviews with current and former cohabitants selected from the national sample (‘the Nuffield qualitative study’) then went on to explore financial practices, including processes of decision-making, understandings of commitment, awareness of and attitudes to current cohabitation law and possible law reform.¹⁹ Both

¹⁷ See A. Barlow, S. Duncan, G. James and A. Park, ‘Just a Piece of Paper? Marriage and Cohabitation in Britain’ in A. Park et al (eds), *British Social Attitudes: Public policy, social ties: The 18th Report* (Sage, 2001), at pp 29–57; and A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart Publishing, 2005); C. Burgoyne, ‘Money in Marriage: How Patterns of Allocation both Reflect and Conceal Power’ (1990) 30 *The Sociological Review* 634.

¹⁸ See further A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart Publishing, 2005).

¹⁹ The report of the MoJ study is published as A. Barlow, C. Burgoyne and J. Smithson (2007) *The Living Together Campaign: An Investigation of its Impact on Legally Aware Cohabitants* (Ministry of Justice) available at [http://www.justice.gov.uk/publications/docs/living-together-research-report\(1\).pdf](http://www.justice.gov.uk/publications/docs/living-together-research-report(1).pdf). The findings of the quantitative phase of the Nuffield study reporting on the module of questions in the BSA survey 2006 is published as A. Barlow, C. Burgoyne, E. Clery and J. Smithson, ‘Cohabitation and

projects were undertaken at a time when cohabitation law was under scrutiny by the Law Commission and when these issues were the subject of extensive media attention and public debate.²⁰

By the time these projects were undertaken, a good number of other demographic, economic and sociological studies of cohabitants had been and were being conducted in the light of clear social trends indicating family restructuring away from marriage.²¹ In particular, Smart and Stevens' study of cohabitation breakdown²² was the first to stress the diversity of heterosexual cohabitation relationships and identified a spectrum of commitment within cohabitation ranging from the contingently committed couples at one end to the mutually committed at the other. Their study primarily focused on the most fragile contingently committed who are easily distinguished from stable and committed married couples and can be contrasted with Jane Lewis's inter-generational study²³ which focused on mainly mutually committed couples whose behaviour mirrored that most commonly identified with marriage. Arthur, Lewis and Maclean's study *Settling Up* uncovered the gulf between settlements made between divorcing couples, as compared with those made on cohabitation separation and the indirect effects this has on the standard of living of children of those relationships.²⁴ Aspects of this work were confirmed by later studies by Douglas et al²⁵ and Tennant et al²⁶ which focused on separating cohabitants. These, together with the Nuffield and MoJ studies which focused on intact cohabiting couples, fed into the Law Commission's review of cohabitation law which resulted in its consultation paper in May 2006, and its subsequent report in July 2007, containing

the Law: Myths, Money and the Media' in A. Park, J. Curtice, K. Thompson, M. Phillips and E. Clery (eds), *British Social Attitudes – The 24th Report* (Sage, 2008), at pp 29–51).

²⁰ The most intense media publicity took place in May and early June 2006 just before the BSA survey and the MoJ follow-up study went into the field. The Living Together Campaign featured on BBC Breakfast television, Channel 4 lunchtime news, Radio 5 Live breakfast programme, 33 local radio stations and 5 national newspapers. Following the publication of the Law Commission's consultation paper *Cohabitation: The Financial Consequences of Relationship Breakdown, A Consultation Paper CP No 179* (TSO, 2006) on 31 May 2006, the Living Together Campaign's website was visited 50,000 times over a 4 day period.

²¹ J. Haskey, 'Cohabitation in Great Britain: Past Present and Future Trends' (2001) 103 *Population Trends* 4–25; and K. Kiernan, 'Unmarried Cohabitation and Parenthood in Britain and Europe' [2004] *Journal of Law and Policy* 33–55 are good examples of demographic studies. Vogler et al and Burgoyne had looked respectively quantitatively and qualitatively at money management within married and cohabiting families – see C. Vogler, M. Brockmann and R. Wiggins, 'Intimate Relationships and Changing Patterns of Money Management at the Beginning of the 21st Century' (2008) 37 *British Journal of Sociology* 455; C. Burgoyne, 'Money in Marriage: How Patterns of Allocation both Reflect and Conceal Power' (1990) 30 *The Sociological Review* 634; C. Burgoyne and S. Sonnenberg, 'Financial Practices in Cohabiting Heterosexual Couples: A Perspective from Economic Psychology' in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets, An Inter-Disciplinary Study* (Hart Publishing, 2009), at pp 89–108. See also C. Vogler, 'Managing Money in Intimate Relationships' in J. Miles and R. Probert, *Sharing Lives, Dividing Assets, An Inter-Disciplinary Study* (Hart Publishing, 2009), at pp 60–87; K. Ashby and C. Burgoyne, 'Separate financial entities? Beyond categories of money management' [2007] *Journal of Socio-Economics* 458.

²² C. Smart and P. Stevens, *Cohabitation Breakdown*, (Family Policy Studies Centre, 2000).

²³ J. Lewis, *The End of Marriage: Individualism and Intimate Relationships* (Edward Elgar, 2001).

²⁴ S. Arthur, J. Lewis and M. Maclean, *Settling Up* (NatCen, 2002).

²⁵ G. Douglas, J. Pearce and H. Woodward, *A Failure of Trust: Resolving Property Disputes on Cohabitation Breakdown* (2007), available at <http://www.law.cf.ac.uk/researchpapers/papers/1.pdf>.

²⁶ R. Tennant, J. Taylor and J. Lewis, *Separating from Cohabitation: Making Arrangements for Finances and Parenting* (DCA, 2006) available at http://www.dca.gov.uk/research/2006/07_2006.pdf.

law reform proposals.²⁷

[B] Legal rationality – conflicting messages?

In our analysis of the data from our two studies, we set out to consider the practices of cohabitants alongside attitudes to their legal position. In particular, we were keen to consider how ‘legally rational’ people were, or felt able to be, inside an ongoing relationship. In the cohabitation context, law assumes people are making an active choice to cohabit rather than marry and that they will act in a legally rational way to order their legal affairs within the confines of property and succession law, should they wish to. This places the onus for action on the couple who must make wills if, for example, they wish their partner to succeed to their estate if they die and/or make declarations of trusts in respect of the family home **to indicate precise ownership shares are agreed** in the event that the relationship breaks down.

For married or Civil Partner couples, on the other hand, the law takes the obverse approach. Legal rationality is certainly not required to make contingent arrangements, as assumptions are made in law that a spouse or civil partner should inherit at least part of the estate on death and that financial relief should be provided on divorce to the economically weaker spouse or civil partner. Could this be in part because it is recognised that these are difficult arrangements to make between intimate partners who are actively engaging in family life, often playing roles which will change over time? Indeed, even if they wish to, such couples cannot act in a tailor-made legally rational way by making an enforceable pre-marital agreement detailing how assets should be divided on divorce or dissolution. To do so has classically been thought to be contrary to public policy²⁸ and, as a consequence, it is not possible to oust the jurisdiction of court on these matters in advance of a separation.²⁹ Thus although it is accepted that marriage is an economic relationship, the nature of the bargain struck is for the state to decide at the point of marriage breakdown and not for the parties to agree in advance. Thus the courts are charged with redistributing assets according to statutory criteria which, as a matter of public policy, make the interests of any children of the family the first consideration.³⁰ The judicially interpreted overarching aim of divorce is now to achieve ‘fairness’ through an examination of these criteria. This has been construed as meaning that the needs of the parties and any children must be met first, followed by sharing (usually equally) the matrimonial assets where these exceed the needs and where there have not been any ‘stellar’ contributions which warrant unequal sharing. Then, if appropriate, compensation for relationship disadvantage can be awarded to the economically weaker spouse.³¹ Whilst we are experiencing some judicial activism which has allowed pre-marital agreements to be

²⁷ Law Commission, *Cohabitation: The Financial Consequences of Relationship Breakdown*, A Consultation Paper CP No 179 (TSO, 2006) and *Cohabitation: The Financial Consequences of Relationship Breakdown* Law Com No 307 (TSO, 2007).

²⁸ *Hyman v Hyman* [1929] AC 601.

²⁹ Divorce is governed by Part II of the Matrimonial Causes Act 1973 and Civil Partnership dissolution is governed by Sch 5 of the Civil Partnership Act 2004.

³⁰ Section 25 of the Matrimonial Causes Act 1973 sets out the factors the court must have regard to. These broadly include all the circumstances of the case plus the needs and resources of the parties; their ages and duration of the marriage; their respective contributions to the welfare of the family and conduct it would be inequitable to ignore.

³¹ This approach has been judicially developed through a number of recent cases. See in particular *White v White* [2001] 1 AC 596, [2000] 2 FLR 981; *Miller v Miller*; *McFarlane v McFarlane* [2006] UKHL 24, [2006] 1 FLR 1186; *Charman v Charman* [2007] EWCA Civ 503, [2007] 1 FLR 1246.

considered as ‘one of the circumstances of the case’³² alongside other statutory criteria, they are not enforceable and, in contrast to the situation in many other jurisdictions, are culturally not part of our courtship rituals.

This, in a sense, makes the law’s expectations of legal rationality by cohabitants, in default of which no safety net is provided to the economically weaker partner,³³ unrealistic and contrary to social and cultural expectations within our society. Certainly, as discussed below, we found evidence that such ‘legally rational’ behaviour was difficult to achieve partly because such behaviour feels counterintuitive and partly because couples found it hard to discuss what would be appropriate on death or relationship breakdown, making them unable to act or agree to act in a legally rational way.

For those cohabiting couples believing in the common law marriage myth – some 53% of the 2006 British Social Attitudes survey’s nationally representative sample,³⁴ the conflicting messages are at their most powerful. This then raises the question of whether legal rationality is a flawed concept in the sphere of intimate personal relationships. Some argue that it is,³⁵ others consider that legal change will have effect on behaviour in this field.³⁶ In addressing this further, it is helpful to explore the psychological dimension revealed in our studies.

[B] A psychological dimension to legally rational behaviour?

In both studies, the interview transcripts were analysed using a grounded theory approach.³⁷ Themes relating to the research questions were investigated, their occurrence and context noted, and emerging themes not originally anticipated were considered in a process of constant comparative analysis. The core themes (in terms of researchers’ and participants’ priorities) were identified and focussed on for this analysis. In considering the range of cohabitants in the studies, we could identify cohabitants along the Smart and Stevens’³⁸ spectrum of mutually committed to contingently committed, but this was not sufficient to explain the range of behaviours and attitudes that the study revealed. Particularly in the MoJ study, where perhaps unsurprisingly for a group drawn from an advice website the majority of cohabitants were mutually committed, a more refined categorisation was needed. In the analysis

³² Section 25(1) Matrimonial Causes Act 1973. Recent developments include cases where pre-marital agreements have heavily influenced the court’s decision on what ancillary relief should be provided on divorce: *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467; *Radmacher v Granatino* [2009] EWCA Civ 649, [2009] 2 FLR 1181; *MacLeod v MacLeod* [2008] UKPC 64, [2009] 1 FLR 641.

³³ Property law rather than family law will apply to disputes about assets on cohabitation breakdown and as Baroness Hale made clear in *Stack v Dowden* [2007] UKHL 17, [2007] 1 FLR 1858, at para [61], the court’s role is absolutely not about achieving fairness between the partners.

³⁴ A. Barlow, C. Burgoyne, E. Clery and J. Smithson, ‘Cohabitation and the Law: Myths, Money and the Media’ in A. Park, J. Curtice, K. Thompson, M. Phillips and E. Clery (eds), *British Social Attitudes – The 24th Report* (Sage, 2008), at pp 29–51.

³⁵ See A. Barlow, ‘Legal Rationality and Family Property: What has Love got to do with it?’ in J. Miles and R. Probert, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing, 2009).

³⁶ A. Dnes, ‘Rational decision-making and Intimate Cohabitation’ in J. Miles and R. Probert, *Sharing Lives, Dividing Assets: An Interdisciplinary Study* (Hart Publishing, 2009).

³⁷ B. Glaser and A. Strauss, *The Discovery of Grounded Theory* (De Gruyter, 1967); K. Charmaz, ‘Grounded Theory’ in P. Alesautti and J. Brannen (eds), *Sage Handbook of Social Research Methods*, (Sage, 2009).

³⁸ C. Smart and P. Stevens, *Cohabitation Breakdown*, (Family Policy Studies Centre, 2000).

of the interviews, the links between finances, commitment and different “types” of cohabitation were considered alongside demographic differences in order to explore the legal needs of diverse groups of cohabitants. From this, four main categories of cohabitants emerged (with some overlap) which presented a psychological dimension to their behaviours, and we found these groupings also fitted the more diverse Nuffield follow-up study respondents drawn from the national sample. We therefore concluded from our further analysis that cohabitants in both qualitative projects fell into a typology comprising:

- Ideologues
- Romantics
- Pragmatists
- Uneven couples

The ‘Ideologues’ are in long term, committed relationships, but one or both partners will have an ideological objection to marriage. The ‘Romantics’, in contrast, do expect to get married eventually, and see cohabitation as a step towards marriage. Interviewees in this group typically saw marriage as a very serious commitment, not to be undertaken in haste, and preferably an institution entered following a ‘proper’ wedding for which they were actively saving. They also scorned the idea of getting married for legal or financial protection. A third group, termed ‘Pragmatists’, took a functional view and so were making decisions about whether to marry or cohabit on legal or financial grounds. In all three of these groups, both partners were mutually committed to the relationship. The fourth group we found comprised people in ‘Uneven Couples’ where one wants to marry, and one does not or where one is more committed to the relationship than the other, leaving one in a vulnerable position. Whilst these groups were not necessarily mutually exclusive, we did find that these standpoints both drove and explained behaviours.

It is suggested that viewing cohabitants through this lens could be helpful in considering how the law could and should respond to the phenomenon of increasing numbers of cohabiting couples. Rather than defining unmarried cohabiting couples negatively by what they are not (ie not married), and viewing them as a social problem, compared with those who are married, perhaps our analysis can help explain what positive things cohabiting couples see their style of family structure as offering them.

The relative size of these groups is important in legislative terms. In the MoJ study, of those who were aware of their legal rights having accessed the LTC website, Ideologues were the biggest group - comprising over a third of the participants. Uneven couples and Romantics were groups of equal sizes – each representing a quarter of the sample, with pragmatists being the smallest group. In the Nuffield qualitative study, on the other hand, Romantics, Uneven couples and Pragmatists were fairly equally represented, with ideologues being the smallest grouping – at around 10% of the qualitative sample.

Let us next consider which styles of couples can embrace a legally rational approach.

[C]Ideologues and legal planning

Both of our qualitative studies confirmed that Ideologues who were choosing not to marry for very clear reasons are capable of adopting a legally rational approach, other than in relation to marriage itself. Participants in this group had almost all made wills, made declarations of ownership in respect of the family home and drawn up next of

kin documents in each other's favour. The one legal step they were not generally prepared to take was that of getting married, however advantageous this might prove to be in terms of issues like pensions and inheritance tax. Many expressed their frustration that there was no mechanism other than marriage – often objected to for its patriarchal baggage – through which they could achieve parity with married couples. The symbolism and values associated with the language of marriage was a problem for some:

'The "marriage" word is what's value-laden with all the concepts that we dislike. That's what I object to. If they called it something like "civil contract and joint responsibilities", then fine.' (Peter, long term cohabitant, no children)

Whereas the term 'civil partnership' was much more positively viewed, as Hannah summed up –

'I think just the language of civil partnership is quite interesting. The "civil" clearly is making a statement about it being, you know, not religious; being secular. And "partnership" is clearly about ... For me it communicates something about equality, um in terms of two equal people making that ... Progressing to that point where they want to register their partnership. Whereas marriage comes with so many other things in terms of society's expectations or beliefs about it that, you know, it's very difficult to separate out the legal stuff and the religious stuff from the kind of, um ... The way our society operates around traditional male-female relationships.' (Hannah, long term cohabitant)

John and Linda were frustrated and affronted by their lack of legal rights and very worried about the fact that an inheritance tax bill would render their partner and their four children homeless, should either of them die. This was particularly so, given their commitment to each other, their children and their community –

'I feel I'm doing everything the government wants people to do. You know, we're making a home, we're bringing up children, we're involved in the community ... We are doing what the government wants people to do – you know, the more sort of family units in a way is what they want, and that's why they want people to get married. If they want solid family units, they need to give people options of doing it that work within their lives. I think, for lots of different reasons, marriage clearly is not something that works that well in people's lives any more.' (Linda, long term cohabitant, 4 children)

'I can't see that anyone – you know, the government or anybody – would want to put our children in a perilous state just because ... You know, that can't be the aim. I mean, their stated aim is they want to have a secure environment for children to grow up in, and that's not what they're doing. For people like me, who don't want to get married, they're not providing that and they ought to provide that.' (John, partner of Linda, long term cohabitant, 4 children)

Although they could have married, their ideological opposition to marriage was so strong and their conviction that their way of life was the best one for them and their children, that they were prepared to face financial disaster, rather than marry. They were not prepared to be pragmatic, but saw the issue of their legal vulnerability as one

the state had quite negligently failed to address.

Others were more troubled than angry, but shared the same sense of injustice that they were being financially punished for having chosen what they considered to be the best relationship for their situation –

‘I think really it’s the pension and the inheritance tax that I’m uncomfortable with, because that feels unfair. That feels like I’m being punished in some way, for not being married.’ (Harriet, long term cohabitant)

Thus a pro-marriage approach does not suit the ‘psychological partnership contract’ of couples in this group and they and their children remain legally vulnerable in terms of inheritance tax, succession rights and pensions, even if they take all the legal steps that are open to them. Yet the legal and psychological needs of this very committed and legally rational group would easily be met by the extension of a marriage-like civil partnership to different-sex couples along the lines of the Dutch model. The couples here were not looking for any lesser commitment than marriage – indeed a number considered themselves far more committed to each other than the average married couple – but the patriarchal and quasi-religious tenets embedded within even civil marriage was not something this group were prepared to sign up to, whatever the cost. To view this form of partnership as ‘marriage-lite’ would be to misunderstand the nature and motivations for this style of cohabitation relationship and exposes a weakness in family policy if it fails to provide legal safeguards for what seem to be the ‘strong and stable’ families it stated it wants to support.

[C]Legal planning – Pragmatic couples

Given that the Living Together Campaign is an appeal to the legally rational to either get married or take appropriate legal steps to achieve maximum legal protection before such disadvantage occurred, pragmatic couples must be its primary target. As we have seen, the Ideologues are willing to take all legal steps short of getting married. But it is with the Pragmatists, who like the Ideologues, were open to legally rational arguments, that the LTC could have best effect. If this can be done, at a moment before legal disadvantage occurs (rather than after as most often happens now), then Pragmatists, like Ideologues, will respond.

Natasha, a Pragmatist, represented a clear success story for the LTC website –

‘I was looking at alternatives to getting married. I was looking at the living together arrangements, which was mentioned on the BBC website. So I was having a look at that to see whether that compared favourably with marriage or not...It looked interesting but it wasn’t quite enough protection for both of us. For what we needed at that time. I’ve been in a relationship where I’ve cohabited before and at the end of that I was left with nothing and I wanted to have something which gave us equal rights and ... You know, for example, if I took a career break to have children then, um, I’d quite like to have that represented in the amount I got back.’ (Natasha, about to cohabit, and engaged since accessing the website)

Sarah, on the other hand, at 25 was a Romantic Pragmatist who planned eventually to marry, illustrated some of the psychological inhibitors to marrying for legally pragmatic reasons –

‘Well I certainly wouldn’t even consider getting married ... on the basis

of financial strengths and weaknesses. I don't know anybody that would.' (Sarah, first time cohabitant)

Interestingly though, she had felt able to persuade her partner to transfer their home in joint names, from his sole name once she had discovered her legal situation.

Joanne and her partner were also clear pragmatists who secured their pension rights just in time –

‘And at work we were both ... offered early retirement with a package that we couldn't really refuse. But ... it meant that if we'd both retired early and we weren't married, if either of us died afterwards we would lose out on the pension rights, so that's what actually made us decide to get married.’

With this group, clearly the biggest issue is to work out how best get the information over to people and translate it into action before it is too late. Whilst we found that the Campaign over its first few years was being effective at the margins, with couples in our study resolving to take action rather than actually taking it in virtually all cases, we concluded that there was still a big information gap to address. What is more, information must be conveyed at a key moment in the relationship where there is an optimum chance of converting their legal awareness into legal action. Just how many of the 53% of cohabitants nationally,³⁹ who still believe they are protected by the mythical shroud of common law marriage are in fact pragmatists we cannot say precisely from our qualitative studies. Our best estimate would be in the region of a quarter (and possibly fewer than this) as both members of the couple would need to be prepared to take the pragmatic action, on which they might not agree. Thus to maximise the Pragmatic couples, it is critical to dispel the common law marriage myth. However, this is no easy task, given how deeply rooted it still is. Whilst effective communication of the position as begun by the Living Together Campaign can be expanded, the timing of such interventions also seems to be crucial but again is not easy to achieve.

[C]Legal Planning – Romantic couples

Romantic couples are generally planning for marriage and this tends to divert them from legal action, even though the period of cohabitation can be greatly extended. Given 30% of children in England and Wales are now born to cohabitants,⁴⁰ it is not just the adult partners themselves who are affected and left vulnerable. Some Romantic couples are or can change into pragmatists over time but as a group, they commonly exhibit an optimism bias which produces a reluctance to take legal action for what at the outset is only planned to be a short period of time.

In terms of being willing to take legal steps to safeguard themselves if the relationship should break down or one of them die, most Romantics, unlike the Ideologues and Pragmatists, found it difficult to prepare for in advance for a worst case scenario, even though they knew it was a possibility. As Adam explained, ‘Until you're actually in a situation, you don't really start thinking ... you know.’ (Adam, cohabitant, divorced with children).

³⁹ A. Barlow, C. Burgoyne, E. Clery and J. Smithson, ‘Cohabitation and the Law: Myths, Money and the Media’ in A. Park, J. Curtice, K. Thompson, M. Phillips and E. Clery (eds), *British Social Attitudes – The 24th Report* (Sage, 2008), at pp 29–51.

⁴⁰ Birth Statistics 2008, *Statistical Bulletin* (ONS, 2009).

There were also other psychological barriers to having to think in negative terms about a relationship which is happy and ongoing, as Barbara discovered when she and her partner attempted the process –

‘It’s having to think about awkward things like who has the children when you split up. There’s no kind of benefits. It’s just all the negatives. It’s not like saying, “Wa-hey!” It’s more like going: “Yeah, so if you split up you have 50% of the money, and ...”’ (Barbara, new cohabitant)

In the same way that a study by Weinstein⁴¹ found that American college students expected a much rosier future for themselves than the average American, such as living longer, having longer-lasting marriages, more gifted children, fewer heart attacks, accidents and diseases than the average, most of our participants and in particular the Romantics, did not expect to die or separate or be unable to sort matters out amicably if their relationship broke down. Thus they saw no real need to go to the considerable trouble and possible expense of taking appropriate legal steps to safeguard the position of themselves, their partner and their children.

As Shaun, in his 20s, explains it is quite counterintuitive to be thinking about making a will –

‘It’s not something I’ve considered, because you don’t think you’re going to, you know, die the next day or something. Cos we’re too young to die sort of thing. But of course that’s not the case ...’

Noreen, a long term 30 something cohabitant with 2 children was confident that a living together agreement was not needed –

‘God forbid, if anything like that did happen I think we’re both mature enough to know that over the years we’ve both put enough in to just divide everything equally.’

Hannah encapsulates the dual aspect of the Romantic psychology which justifies her side-stepping the legally rational approach –

‘I know when we looked at the cohabitation contract we’d probably been together about 10 years. We just looked at it and just thought, “This isn’t right for us, actually.” It’s going to cause more grief to actually specify it all out. Whereas actually if we split up tomorrow, we will find a way of splitting our assets. We know we will.’ (Hannah, long term cohabitant)

In contrast to the optimism bias noticeable within the Romantic group, evidence of a pessimism bias often born out of experience towards marriage was, though, found in each of the other groups. This was sometimes ideological or for Pragmatist couples, often due to negative parental experiences, making marriage as an institution seem doomed to failure-

Kyla, a cohabitant in her 20s with no children explains –

‘I’m from a divorced family. He’s divorced and it does put a bit of a dampener on it you know.’

⁴¹ N. Weinstein, ‘Unrealistic optimism about future life events’ [1980] *Journal of Personality and Social Psychology* 806–820. This is not an exclusively American phenomenon, despite some variations in levels of optimism; see E.C. Chang, K. Asakawa, and L.J. Sanna, ‘Cultural variations in optimistic and pessimistic bias: do easterners really expect the worst and westerners really expect the best when predicting future life events?’ [2001] *Journal of Personality and Social Psychology* 476–491.

Kim, in her 20s and cohabiting for seven years feels –

‘[Marriage] is just about conforming really. A bit of paper, having the same surname and conforming.’

For Romantic couples and those who are negative about marrying, although committed to each other, a presumptive approach which provided a legal safety net for the vulnerable partner might be the most appropriate legal response, although a civil partnership model did also commend itself to some in these categories. Within the Romantic group in particular, couples do often have children whilst they are awaiting marriage and so are exposed to relationship-generated disadvantage, which will crystallise should the relationship break down before the wedding. Given that the average length of cohabitation for couples with children of the relationship has risen to over eight years,⁴² increasing numbers of couples are left only with the protection of legal arrangements they may or may not have made during the relationship to protect the vulnerable partner should things not work out as planned. Romantic couples are committed and value marriage so extraordinarily highly, that they agree that they should only get married when everything is exactly right. Yet the weaker economic partner and often any children living with them on separation pay a very high price should the relationship break down before the wedding bells have actually been rung, given the inferiority of the legal remedies available to them compared to those who did marry in greater haste.

[C]Legal Planning – Uneven couples

From the outset, Uneven couples do not share a common goal in the way that the Romantic, Ideologue or even Pragmatist couples do. This makes legal planning particularly problematic and often coincides with a severe power imbalance between partners. In terms of commitment to the relationship, it may well mean that one partner is totally committed, whereas the other is only committed as long as it suits them. Again, in terms of Smart and Stevens’ analysis,⁴³ these couples do not fit comfortably at either end of the continuum, yet neither is their situation reflected by a middle position. Psychologically, the contract between the two partners is skewed in favour of the financially more powerful one and we also found that some couples were able to separate out different levels of commitment, indicating that they were emotionally committed but that did not mean they should be financially committed. This is the style of cohabitation relationship where vulnerability is most exposed and where if the role of family law is to protect the vulnerable, then the current law is clearly failing.

One participant in the MoJ study talked about how his partner wanted to get married and he didn’t, as he wanted to retain control over his finances –

‘Essentially it’s kind of a way of retaining a bit of balance in the relationship. You know, if she walks away she’s going to be poverty stricken. I’ll always look after the kids – obviously ... But I wouldn’t feel particularly inclined to do anything for her.’ (Simon, cohabitant with 2 children)

⁴² A. Barlow, C. Burgoyne, E. Clery and J. Smithson, ‘Cohabitation and the Law: Myths, Money and the Media’ in A. Park, J. Curtice, K. Thompson, M. Phillips and E. Clery (eds), *British Social Attitudes – The 24th Report* (Sage, 2008), at pp 29–51.

⁴³ C. Smart and P. Stevens, *Cohabitation Breakdown*, (Family Policy Studies Centre, 2000).

This relationship would seem to be uneven in terms of the financial but not the emotional commitment. But does this make them a family in lesser need of legal protection, particularly as there are children of the relationship which will affect the carer's financial autonomy, should the relationship break down?

Given his emotional commitment, Simon's partner, who was not one of our participants, is quite likely to be completely ignorant as to his financial motivations for not marrying or taking other legal action. Yet he holds all the financial cards and is the partner with the financial power which in the cohabitation context will mean that he will not suffer any relationship generated disadvantage, should they separate.

As the current law stands, he has an absolute right to do that, despite the fact that his partner has given up a career to care for their children. Whilst Schedule 1 of the Children Act 1989 will provide some protection for her whilst the children are minors, she will not have any entitlement to a share of the family home in his sole name. If a couple do nothing at the outset of the relationship, perhaps because they see themselves as equal or perhaps because their lives start out as financially independent but that changes as their contributions to the relationship change, there is little that can be done if the other partner will not co-operate. Tricia captures how this makes clear where the power lies and risks affecting their psychological relationship -

'If anything happened now or Tom decided that he didn't want to carry on the relationship, where does that leave me? Again, with absolutely nothing. And I have to write a list of everything that I contribute to the house, which is furniture and décor and things. Currently I'm trying to get him to sign it, but he's looking at that as a threat, as if to say, "Well, why should I sign it?"' (Tricia, divorced, now cohabiting with another divorcee)

But even nearer the beginning of the relationship when couples throw their lot in together in terms of buying a home, issues such as wills which the LTC website strongly recommends can be difficult to raise or achieve for the more vulnerable partner –

'I mentioned once something about [making a will] and he said, "Oh, well. Do you want me to ...?" And I thought, "Well, it's a bit rude to say to someone, 'Excuse me, can you just make another will and leave me everything?!'" I mean, it does sound like gold-digging then. But it's from a practical point of view, you know.' (Sheila, divorced with adult children, new cohabitant, whose partner was a lawyer)

Gold-digging is not something cohabitants in our samples seemed to be aiming to achieve and in any event, as the law currently stands, any prospective gold-digger would be well-advised to seek a partner who will marry. However, within genuine relationships, the spectre of gold-digging may represent another psychological barrier to legal rationality, particularly in uneven relationships. In Sheila's case, her lack of power in the face of her partner's greater legal knowledge made her particularly vulnerable in a potentially uneven relationship in which she was wanting to make a significant emotional commitment and investment.

Looking at the situation of Uneven couples led us to conclude that there is a strong case for including a presumptive scheme of legal protection for this vulnerable group, in the absence of mutual agreement by the couple to opt out, particularly where there are children of the relationship. Both the Law Commission's proposals and the

Cohabitation Bill 2009 adopted such an approach and seemed to endorse family law's role in protecting vulnerability within intimate couple relationships beyond marriage.

[C]Regulation, motivation and commitment – legal implications

In addition to public attitudes which clearly support reform of cohabitation law, we would therefore argue that it is important to consider the 'psychological contract' which encompasses the style of motivation for and commitment within cohabitation relationships. Within our typology, we considered the variations in commitment as between groups. In law, marriage is considered the ultimate commitment because it is one that is declared publicly and so provable. This is the key distinction that is made between functionally similar married and cohabiting families which justifies a quite different treatment of the adjustment from intact to separated families. Yet it is the initial public commitment to the institution of marriage, rather than to the relationship that is rewarded within our redistribution of assets on divorce. This is regardless, in most cases, of any fault attributable to the parties' conduct during the marriage which might have led to the breakdown. Commitment in the cohabitation context is always private and can range from the contingently committed to the mutually committed.⁴⁴ However, our analysis shows that there was often a surprising ability to separate off the emotional or social commitment from a sense of legal and financial commitment which might be expected to accompany it, and this is almost encouraged by the operation of the current law, although few non-Ideological couples had made cohabitation agreements. Unless and until prenuptial agreements become enforceable, such a layered separation of commitment is difficult to achieve in the married context in this jurisdiction. However, increasing numbers of couples marrying are reportedly attempting to make prenuptial agreements, limiting financial commitment in the event of divorce, potentially throwing doubt on the superiority of commitment assumed to be found in marriage.⁴⁵ In the absence of any fault-based redistribution of assets on divorce, it is questionable whether a commitment which by definition has been broken at the point of divorce, is a truer entitlement to asset distribution than need in functionally similar relationships.⁴⁶

Our studies also found some evidence of a gendered psychology with regard to the moment of commitment. Overall, family identity or belonging seemed more important for women. Some had changed their name to that of their partner to achieve this as had been found in other studies – and their moment of commitment was often different to men's. Both men and women cited having a child as the moment of true commitment, but some gendered differences are still striking even in this context –

'Maria's said to me before that moving in was a bigger deal for her than getting married. Whereas for me it's kind of the other way round.' (Tom, 30, short term cohabitant now married)

Financial commitment can be seen to be the most powerful to some men –

'Marriage is irrelevant and it's obviously about the property. The buying the house ... I see as more of a commitment than marriage.' (Larry, 30's,

⁴⁴ Ibid.

⁴⁵ E. Hitchings, 'From Pre-nups to Post-nups: Dealing with Marital Property Agreements' [2009] Fam Law 1056.

⁴⁶ See A. Barlow, S. Duncan, G. James and A. Park, *Cohabitation, Marriage and the Law: Social Change and Legal Reform in 21st Century Britain* (Hart Publishing, 2005), chapter 6 for a further discussion.

Long term cohabitant with children)

We would argue that public commitment is not an appropriate exclusive trigger for legal regulation of couple relationships in an era where those who marry are an increasingly select group. If fairness is the aim in the married context, why logically should this be rejected for functionally similar cohabiting families who are exposed to the same relationship-generated vulnerabilities on death and relationship breakdown? Furthermore, if there is a differential gendered component to the psychological moment of commitment, this needs to be factored in to what is being rewarded or punished within family regulation.

[C]Gendered choices and rationality

As well as a gendered view on commitment, there are often gendered choices taken within cohabiting relationships which will in turn produce a gendered outcome in terms of relationship generated disadvantage. Risman pointed to ‘the logic of gendered choices’⁴⁷ whereby existing institutional and cultural arrangements make it practical for many couples who do not have a strong preference for following a traditional division of labour, to nonetheless adopt these traditional practices. Thus on the birth of a child, the father’s higher income, and/or the mother’s greater opportunity for paid leave, part-time work or family friendly employment may entrench them in a gendered breadwinner/homemaker relationship. This in the cohabitation context will always strongly favour the breadwinner, should the relationship breakdown. In legal terms, this exposes cohabitants, who have no right to a redistribution of assets on separation, to the economic disparity which these roles often promote.

This then brings us back to whether the law should play the role of protecting the vulnerable or of striving to give couples more autonomy to arrange their own financial matters on relationship breakdown. The views of cohabitants themselves suggest that they were largely in favour of legal reform which gave cohabiting couples similar rights to married couples on breakdown, particularly where there were children of the relationship.

We take the view that there is in cohabitation relationships a psychological contract between the partners which needs to be spelled out, rather than implicitly assumed by each partner, without necessarily any meeting of minds. This leads often to no recognition of the assumed quid pro quo which one partner may have relied on in choosing to play a role undertaken for the benefit of the family as a whole. Property law has struggled with the consequences, striving to find an invisible ‘common intention’ on which to found a constructive trust, and family law has provided no remedy to date in the cohabitation context. However, it is important to recognise that there is often a gendered dimension to the arrangements made through such ‘silent negotiations’ which is partly due to gendered structures within society and partly due to what might be termed ‘gender differentiated commitment’ as noted above. As Ruth, in her 30s and a cohabitant with three children, explained, there is a need to redress sacrifice through financial provision when relationships break down and this is commonly a gendered issue –

‘Because in a partnership people make compromises and quite often it’s the woman that makes compromises and that’s part of the deal. If it then

⁴⁷ B. Risman, *Gender Vertigo: American Families in Transition* (Yale University Press, 1998), at p 29).

turns sour ... they shouldn't be penalised because they've made sacrifices.'

Over the two qualitative studies, which included interviews with 78 current and former cohabitants, we observed few signs that an extension of legal rights would be viewed as oppressive, other than by some of the powerful partners (such as Simon above) in uneven relationships. These attitudes were also reflected in the general population captured in the BSA survey, who had an awareness of the need to avoid relationship generated disadvantage, regardless of whether the relationship was based on married or unmarried cohabitation.

In this first phase of the Nuffield study, nationally representative public attitudes were tested by putting forward 10 scenarios which explored how meritorious a partner's claim for financial provision was viewed where the law currently metes out different treatment to married and cohabiting couples on relationship breakdown or on death. We were looking to see how views changed according to variables such as – the presence or absence of children; whether the parties were married; the length of the relationship; financial and domestic contributions to the relationship and the circumstances leading to the claim for financial provision.

The table below (Table 1) summarises the findings of what was viewed by the national sample as appropriate on relationship breakdown and resulted in a changed hierarchy of relationships deemed deserving of legal protection.

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Table 1
 Beliefs regarding rights to financial provision on separation for married and unmarried couples

% agree partner should have right to financial provision on separation if ...	If couple not married	If couple married
... couple living together for 20 years, three children, woman reduced work to part-time and then gave up work to look after family and home, man supported family financially and owns home, woman has no income and poor job prospects.	89	–
... couple for 10 years, no children, one partner worked unpaid to build up other partner's business, partner who runs business also owns family home, other partner has no property or income of own.	87	93
... couple for 10 years, one partner has well-paid job requiring frequent moves, other partner has worked where possible but has not had a settled career.	69	81
... couple for 2 years, one has a much higher income than the other and owns the family home.	38	62
... couple living together for 2 years with young child and now separating. She will be child's main carer and he will pay child	74	–

support.		
<i>Base</i>	3,197	3,197
#TableEnd		

This confirms a different hierarchy of relationship status to that currently embodied in law. Whilst unsurprisingly, people placed married couples with children at the head, cohabiting couples with children are deemed more worthy of financial provision on breakdown than married childless couples. Although there was lower support for short cohabiting childless couples to be able to apply for financial provision on breakdown, over 60% of the public represented in a nationally representative sample were in favour, higher than might have been expected following a 2 year relationship.

[B] Implications for regulation?

Let us then consider how best to regulate cohabitation, given this public hierarchy of support captured in Table 1 and what we have learned from about the psychological dimension set out in the suggested typology of cohabiting couples. **[AQ –I hope this is now clearer]**. The Living Together Campaign was an appeal to the legally rational to either get married or take appropriate legal steps to achieve maximum legal protection before disadvantage occurred. As we have seen, the Ideologues are willing to take legally rational steps short of getting married, yet are deeply unhappy with many aspects of current law. For them an extension of civil partnership to different-sex couples would be a perfect solution. For the Pragmatists, who like the Ideologues, were open to legally rational arguments, the need is to ensure that they get the correct legal information so that they can make an informed choice about their relationship-style and legal actions. Whilst the Living Together Campaign has made some inroads, there is still a critical job to be done in informing cohabiting couples of their vulnerable legal status at the right moment in time to trigger appropriate legal action in far more cases.

Whilst aiming to allow couples the autonomy to make informed decisions about how to put their affairs in order is laudable and exactly what some couples want, this will not be a sufficient remedy for all, particularly where couples are uneven in the commitment and/or power they bring to their relationship. From their responses, it is clear that the participants within our typology have very different needs and issues about cohabitation. It was also evident that people can change their commitment or approach to the cohabiting relationship, or their views on marriage and commitment, over the course of a relationship, and particularly at times of life stage change. So Joseph, for example, who confirmed he was ‘ideologically opposed to marriage’, pragmatically married his cohabitant partner of 10 years following the birth of their daughter. Given the diversity both of cohabiting couples and of their legal needs, the law must adjust to changing social norms and ensure it is what Freeman terms ‘socially located’.⁴⁸ It must, in our view, adopt a pluralistic approach capable of balancing relationship autonomy with protection for the vulnerable. As has been seen, attempts to induce legal rationality may be part of the answer but are not the whole solution. Even for the legally rational, a wider range of options such as some form of Civil Partnership open to heterosexual couples as in the Netherlands, or a state-endorsed contract affording fewer rights than those afforded married and same-sex civil partners along the lines of the French Pacte Civile de Solidarité would encourage

⁴⁸ M. Freeman, ‘Towards a Critical Theory of Family Law’ [1985] *Current Legal Problems* 153.

support for stable families and provide a stepping-stone for those Romantic cohabitants planning to marry.

It is, though, uneven couples who are a large group of vulnerable cohabitants who pose real problems for this approach as joint and agreed action is not achievable. For them a presumptive approach, out of which other styles of cohabitants may agree to opt, is most clearly needed and should be pursued if family law is to fulfil its role of protecting vulnerable family members and not just those who are married.

[B] Mapping legal solutions onto psychological typology – some conclusions

Overall, the psychological examination of what is happening in these unmarried cohabiting relationships shows that reasons for cohabitation, as opposed to marriage, are diverse. Attempts to ensure a legally rational, pragmatic approach will be slow and haphazard and if they succeed, they will only reach just the tip of the iceberg. Even after the Living Together Campaign, only 12% of the nationally representative BSA survey of cohabitants had made wills; 19% had sought legal advice on cohabitation. Though effective, even a move to a compulsory declaration of beneficial interests in the home through changes to Land Registry procedures had only encompassed 15% of cohabitants in 2008, up from 8% in 2001.

We have seen that hidden psychological inhibitors to legally rational behaviour are quite powerful and often gendered. Furthermore, cohabitants as well as the general public, were largely in favour of legal reform, particularly where there were children of the relationship. We also found that whilst the idea of an extension of civil partnerships to heterosexual couples was enthusiastically received by most cohabitants, so was the idea of a presumptive legal framework for cohabitants. Proposals for cohabitation law reform to date have sought to view and define cohabitation negatively in terms of the fact that it is different and thus inferior to the gold standard that is marriage. Yet, given what we know about the psychological motivations of different styles of cohabitants, should we not now at least consider valuing cohabitation, rather than condemning it, for being the second most stable form of family relationship?⁴⁹

As shown in Table 1 above, the concept of relationship-generated disadvantage was a reason to provide financial provision. But our nationally representative study found that there was far less support for the law to distinguish between financial remedies for separating married and cohabiting couples where the relationship was long term, where there are children of the relationship or where there is evidence of 'joint enterprise' contributions, for example, to a partner's business by the other partner.

⁴⁹ Data from the millennium cohort study acknowledges that cohabiting couples, whilst more likely to break up than married couples, offer children far more stability over time than parents who were not cohabiting at the time of their child's birth. See K Kiernan, 'Partnership and Parenthood in the UK', unpublished paper presented at the Family and Parenting Institute's Parent Child 2006 Conference, London, November 2006; and K. Kiernan, 'Partnership and Parenthood' in J. Elliott and R. Vaitinglinham (eds), *Now we are 50: Key Findings from the National Child Development Study* (CLS, IOE, ESRC, 2008). A recent analysis of the ONS Longitudinal Study of couple behaviour between 1991 and 2001 confirmed that while four in five married couples remained with the same partner 10 years later, three in five cohabiting couples also did so (although some had married in the interim). Those cohabitants with children of the relationship had a higher chance of remaining together after 10 years than those without children. See B. Wilson and R. Stuchbury, [2010] *Population Trends* 37–63.

Having said that, views on these issues do change across the generations and it is difficult to know for certain if this is a periodic or generational effect. We did find that younger people without children tend to more readily endorse financial autonomy. Overall, however, most people were very child-centred in their thinking, which reflects the current law of financial provision on divorce and civil partnership dissolution. We also found that those who were older or who had more than one child tended to favour more equal recognition of financial and non-financial contributions. In the qualitative studies, there was also a correlation between the 'type' of cohabiting relationship people were in, and their money-management system within the relationship, but this correlation is not a straightforward one. Most 'Romantics' and the 'Pragmatists' had a system of joint accounts, usually with some single-owned accounts too ('partial pooling'), while all of the 'Uneven Couples' had separate accounts, even though three of these couples had been together for many years. The 'Ideologues' were broadly divided into two groups. Half had joint accounts, but half retained separate finances even after many years together, and even after children, which they saw as reflecting their ideological position. Many respondents made explicit distinctions between a romantic or emotional commitment to their partner, and financial commitment to a relationship in terms of joint accounts and shared savings plans. This, too, is partly a generational effect; younger married couples are also more likely to have separate finances and so caution is needed in drawing conclusions about these practices as a commitment-indicator for a relationship.⁵⁰

Given that we have had two different models for reform recently put forward by the Law Commission and then Lord Lester's Cohabitation Bill, it is interesting to see which of these presumptive models might be best suited to different cohabitant types.

The Law Commission's 2007 proposals are based on redressing economic advantage and disadvantage at the end of the cohabitation relationship, rejecting the idea that cohabitation law should be put on a par with marriage but permitting cohabitants to make contracts in which they opt out of the proposed scheme. It is suggested that this is a model particularly suited to two free-thinking autonomous adults who 'choose' their arrangement, such as the Ideologues. The proposals reflect shared risk of economic disadvantage to the point that one half of disadvantage is payable at the end of the relationship (providing the activity which resulted in disadvantage, such as giving up work for childcare, was jointly agreed), with any economic advantage gained being repaid in full. The Ideologues in our study were (or saw themselves as) autonomous, had actively taken legal steps, were very aware of their situation and were often equally matched in financial terms. They were happy to negotiate financially with each other and to separate their layers of commitment. For them, the Law Commission's proposals would be ideal as it reflected the ability to make their own arrangements, a view endorsed by Octavia, a long-term cohabitant who felt, 'You have to assume that people can make their own decisions'.

Lord Lester's Cohabitation Bill, in contrast, was needs-based, arguably simpler than the Law Commission's scheme and saw issues of economic advantage or disadvantage as just two factors to be taken into account alongside the welfare of any child and a non-exhaustive list of other factors (clause 9). It was much more aligned to the approach in the Matrimonial Causes Act 1973, although would have limited its

⁵⁰ C. Burgoyne and S. Sonnenberg, 'Financial Practices in Cohabiting Heterosexual Couples: A Perspective from Economic Psychology' in J. Miles and R. Probert (eds), *Sharing Lives, Dividing Assets, An Inter-Disciplinary Study* (Hart Publishing, 2009), at pp 89–108.

remit to providing for needs, rather than equal sharing of assets. This certainly fits with a wider range of our identified cohabitant types and in particular, better serves the needs of Uneven couples (who may not have made joint decisions which led to economic disadvantage). However, it was a welfarist rather than entitlement model that acknowledged the reality of dependency so often triggered by gendered choices on childcare and sacrifice found within heterosexual couple relationships.

In conclusion, we take the view that the psychological dimension of different styles of cohabiting relationship revealed in our studies underline that any legal reform should provide a range of legal options for cohabitants. These should include both (and primarily) a presumptive scheme giving cohabitants (and particularly cohabitants with children of the relationship) automatic rights and obligations akin to marriage from which couples can opt out, alongside an opt-in scheme giving flexibility as to the terms. In this way, 'Uneven couples' would gain protection otherwise impossible to achieve. In addition 'Romantic' couples planning to marry, and 'Ideologue' couples whose principles will not allow them to marry can negotiate their own arrangements, yet gain a recognised legal status other than marriage which publicly acknowledges their commitment to each other. 'Pragmatists' would also gain a wider spectrum of choice.

The analysis of the psychological dimension within relationships reinforces the view that any legal regulation of cohabitants must cater for the different motivations for cohabitation and acknowledge it carries for some a positive social value as a form of two-parent family. Failing to do so would accentuate the existing 'legal rationality mistake' identified by Barlow and Duncan⁵¹ and ignore the reality of gendered moral decision-making⁵² revealed by these studies within such relationships. The Law Commission's proposals were a bold and radical attempt to strike the balance between autonomy and protection and would certainly have improved the current law. But by ignoring need and only redressing one half of economic disadvantage where this could be proven, the balance was skewed too much towards autonomy and risked leaving vulnerable partners exposed. Unlike the Law Commission's scheme, which would have retained the tribal distinction between the married and unmarried, the Cohabitation Bill would have plugged a gap, providing a way to regularise cohabitation contracts and provoking debate on how to reform financial provision across all couple relationships in the future.

We would like to return in the last instance to Fineman's proffered concept of vulnerability, as a suggested counterpoint to the calls for autonomy-driven family law. We argue that this is particularly pertinent in the context of the legal and policy response to the changing nature of marriage and cohabitation. Feminist writers such as Deech,⁵³ see family policy based on autonomy as the driver for legal development towards equality for women within relationships, and away from the evils of dependency. By contrast, Fineman argues for a state response to vulnerability which will counter privilege and lead to a substantive equality which recognises, rather than ignores, the structural and often gendered inequalities inherent in institutions, including that of marriage and by analogy cohabitation too. Drawing on the US context, she explains:

⁵¹ A. Barlow and S. Duncan 'New Labour's Communitarianism, Supporting Families and the "Rationality Mistake"' [2000] *Journal of Social Welfare and Family Law* 129–143.

⁵² S. Duncan and R. Edwards, *Lone Mothers, Paid Workers, and Gendered Moral Rationalities*, (Palgrave Macmillan, 1999).

⁵³ R. Deech, 'What's a woman worth?' [2009] *Fam Law* 1140.

‘To richly theorize a concept of vulnerability is to develop a more complex subject around which to build social policy and law; this new complex subject can be used to redefine and expand current ideas about state responsibility towards individuals and institutions. In fact, I argue that the “vulnerable subject” must replace the autonomous and independent subject asserted in the liberal tradition. Far more representative of actual lived experience and the human condition, the vulnerable subject should be at the center of our political and theoretical endeavours. The vision of the state that would emerge in such an engagement would be both more responsive to and responsible for the vulnerable subject, a reimagining that is essential if we are to attain a more equal society than currently exists ...’⁵⁴

Within marriage, our potentially ‘responsive state’ in England and Wales has recognised the vulnerability inherent within the gendered dynamics of intimate couple relationships, and law and policy have addressed this. We are apparently keen to stamp out the gender discrimination inherent in attributing relative values to the qualitatively different contributions to marriage made respectively by breadwinner and homemaker. In the twenty-first century these are to be valued equally when deciding how assets should be redistributed on divorce, as was made very clear by Lord Nicholls in *White v White*:⁵⁵

‘If, in their different spheres, each contributed equally to the family then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money earner and against the homemaker and the child-carer.’

Despite evidence, to which the current studies have added, of equivalent vulnerability within the majority of functionally similar cohabitation relationships, the state has to date chosen not to address these very same inequalities. It is not currently, it seems, in responsive mode. We have seen that there have been moves by the courts towards giving greater liberal autonomy to married couples to agree divorce outcomes in advance through prenuptial agreements, a matter on which the Law Commission has also been asked to report. Others, however, have warned of the dangers of being lured by the superficial attractions of constructions of autonomy which may not take full account of the risks which the vulnerable subject is unable to avoid.

Herring, in particular, has argued that individual conceptions of autonomy have no place within family law as they are ‘inconsistent with the realities of family life; are dissonant with the way people understand their intimate lives; and work against the interests of women’.⁵⁶ Rather, he suggests, we need a vision of autonomy which recognises the interdependency and vulnerability of both children and adults within family relationships. Whilst enforceable prenuptial agreements and cohabitation contracts in short relationships without children enhance autonomy in a positive way, respecting a couple’s right to private and family life enshrined in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention), they can have negative consequences which do not

⁵⁴ M.A. Fineman ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ [2009] *Yale Journal of Law and Feminism* 1, at p 1-2.

⁵⁵ [2001] 1 AC 596, [2000] 2 FLR 981, at 989.

⁵⁶ J. Herring, ‘Relational Autonomy in Family Law’ in J. Wallbank, J. Herring and S. Choudhry (eds), *Gender, Rights and Family Law* (Routledge 2009), at p 275.

sit well with other family values. In particular, the fluid nature of family life poses problems for advocates of enforceable prenuptial agreements (and indeed cohabitation contracts) as they are likely to need frequent updating to reflect changed circumstances (eg following the birth of a child). Couples busy with the day to day challenges of family life may not get around to taking legal advice and formally review them, as has been shown to be the case for cohabitants. US psychological literature also indicates that prenuptial agreements are difficult to negotiate and may exacerbate existing power dynamics within relationships.⁵⁷ Whilst autonomy would be gained, the protection currently afforded the weaker economic spouse at the point of divorce would be lost. The state would in essence be making an already vulnerable subject potentially more vulnerable by allowing contracting out of financial obligations, regardless of their partner's needs or relationship-generated disadvantage suffered in the married as well as the cohabitation context. This is the very situation which under the current law the judicially developed 'fairness' principle seeks to prevent and which we suggest the new government, in the light of our discussion and mounting research evidence, should extend to apply to functionally similar families to which it has declared its support. To do so, would be to acknowledge the reality that the state, as well as children growing up in families, have significant interests in the relationship dynamics and agreements made between adult partners who are parents. It would also give us positive proof that we had managed to elect a truly responsive state in the field of family law and that we had finally reached the end of a very rocky road to reform.

⁵⁷ S. Margulies, 'The Psychology of Prenuptial Agreements' [2003] *Journal of Psychiatry and Law* 415.