

**New Labour's Communitarianism, Supporting Families and the  
'Rationality Mistake'.**

**Part II**

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**Abstract**

In Part I of this paper we argued that New Labour is keen to use legislation to promote what it sees as desirable family forms and to discourage other, less favoured family practices. The codification of this approach in the 1998 Green Paper *Supporting Families* – and in particular the 'New Deal for Lone Parents'- was compared with recent empirical research on how people make decisions about their moral economies. We concluded that the government's approach is subject to a 'rationality mistake' – people do not make decisions in the way the government assumes and hence legislation can be inefficient or even oppressive. Part II of the paper goes on to examine this contention further, this time focusing on chapter 4 of the Green Paper, indicatively entitled *Strengthening Marriage*. Using recent empirical research on mothers' views on marriage and cohabitation, we find further evidence of the 'rationality mistake' where the government has misunderstood the ways in which people make decisions about partnering, and hence misplaces the role of family law. It concludes that supportive and flexible legislative frameworks are needed which recognise the varying ways in which people take moral economic decisions.

**Keywords**

Cohabitants, Common Law marriage, Family law, Rationality, New Labour, Supporting Families

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### **Introduction**

In Part I of this paper (Barlow and Duncan, date) we argued that New Labour is keen to use legislation to promote what it sees as desirable family forms and to discourage other, less favoured family practices. This results at least in part, from the government's conservative and prescriptive version of communitarianism. The codification of this approach in the government consultation document *Supporting Families*<sup>1</sup> ('the Green Paper')– and in particular the 'New Deal for Lone Parents'– was compared with recent empirical research on how people make decisions about their moral economies. We concluded that the government's approach is subject to a 'rationality mistake' – people do not make decisions in the way the government assumes and hence legislation can be inefficient or even oppressive. In this second part of the paper we go on to examine this contention further, this time focusing on chapter 4 of the Green Paper, indicatively entitled *Strengthening Marriage*. In order to assess how far this assertion of marriage is likely to succeed, we compare the legislative proposals in this part of the Green Paper with recent empirical work on mothers' views on marriage and cohabitation and their reasons for choosing one or the other. Is there further evidence of the 'rationality mistake' where the government has misunderstood the ways in which people make decisions about partnering? Has the role of family law consequently been misconstrued? We conclude that supportive and flexible legislation is needed, more on the model of recent legislation

in other European countries which recognises the varying ways in which people take moral economic decisions.

### **Strengthening Marriage and Parenting under New Labour**

Chapter 4 of the Green Paper, itself entitled '*Strengthening Marriage*', maps out a basic response to family change. On one level, it claims that intervention aims to help the parenting relationship - whether married or not - to succeed. In any case, government competence is limited where 'families do not want to be lectured about their behaviour or what kind of relationship they are in' (para 4.2). Yet at another level, the Green Paper states that the government's preferred parenting structure is marriage. As the preamble makes clear:

'marriage does provide a strong foundation for stability for the care of children. It also sets out rights and responsibilities for all concerned. It remains the choice of the majority of people in Britain. For all these reasons, it makes sense for the Government to do what it can to strengthen marriage.' (para 4.8)

What is more, the vast bulk of the chapter is concerned with how marriage can be supported and encouraged. Other possible partnership and parenting forms are hardly mentioned and nothing at all is said about same-sex parenting. Yet in 1997 in Great Britain, 22 per cent of children were born to cohabiting parents, with another 15 per cent born to lone mothers (*Social Trends 29*, 1999: 50). Both figures are increasing and cohabitation is predicted to double by 2021 (*Population Trends*, Spring 1999: 13). Nonetheless only about half a dozen of the 49 paragraphs of the Green Paper could have much relevance to such parents, and only three consider cohabitants directly. The tenor of the advice in the Green Paper to all these parents seems to be 'get married'. Whilst there is government

awareness of the phenomenal scale of marriage breakdown in the United Kingdom (para 4.9), this is not, however, seen as undermining the essential benefits of the institution itself:

‘Divorce statistics take the headlines, but marriage still works for the majority. It provides millions of people with a strong and stable basis for bringing up children in a rapidly changing world.’ (para 4.6)

Although there is some acknowledgment that there are ‘strong and mutually supportive families and relationships outside marriage’ and that ‘many unmarried couples remain together ...and raise their children every bit as successfully as married parents.’ (para 4.7), this provides no reason, it seems, to strive to strengthen those relationships. All observations and proposals seem almost entirely premised upon the essential superiority of the married family form, which merely requires strengthening before it is able to flourish again.

To this end, a number of measures are put forward in chapter 4 of the Green Paper to strengthen marriage. These propose better preparation for marriage, including a clear statement of rights and responsibilities, pre-nuptial agreements about the distribution of money and property, an enhanced role for marriage registrars in providing premarital counselling, a longer period of notice to be given personally by both parties intending to marry, modernisation and personalisation of the civil marriage service, access to mediation and counselling to support marriages in difficulty, and better information meetings before divorce so as ‘to increase the chance of saving more marriages’ (para 4.12). Clearer rules on property division on marital breakdown are proposed to reduce conflict between married couples.

In contrast proposals affecting cohabiting families are limited to just two suggestions. First, the introduction of a non-religious and public child-naming ceremony which may also be used to stage the public signing of a parental responsibility sharing agreement where parents are unmarried (para 4.39). This is designed to encourage public assertion of both parents' commitment to a child, whether or not they are living together. Second, the Green Paper rather grudgingly suggests that 'it might therefore be worthwhile' to produce a guide for cohabitants setting out their legal rights in relation to income, property, tax, welfare benefits, and responsibility towards their children, to be made available in Citizens Advice Bureaux and libraries (para 4.15). These proposals would do nothing at all to address the complexity and inadequacies of the law relating to cohabitation. Nor do they even show awareness of the ongoing work of the Law Commission and their long-awaited consultation paper on 'homesharing' (see Harpum, 1995). Similarly, while enforceable prenuptial contracts for those intending to marry are proposed, the Green Paper is silent on the issue of whether legally enforceable cohabitation agreements should similarly be able to govern property disputes within cohabitation relationships. Counselling to save cohabitation relationships is not considered at all, in sharp contrast to the proposed efforts to be invested in marriage-saving. Yet, from the perspective of a child, surely it is the improvement of the parents' relationship -irrespective of their marital status - which is of critical importance. The Green Paper therefore fails to acknowledge yet alone address, the need for better family law-based regulation of cohabitation relationships.

It is little wonder then that Bea Campbell (1998) has dubbed the Green Paper 'The Government's Make'em Marry Crusade'. Only if cohabitants or lone parents marry will they be rewarded with the

legal protection and government support they and their children need. As the Green Paper rightly observes, marriage, (through the matrimonial laws which govern this state-endorsed relationship), 'sets out rights and responsibilities for all concerned' (para 4.8). As a consequence, it justifies the promotion of marriage and, effectively, the undermining of unmarried parenting. Yet, if the government so chose, it could endow cohabitation with similar 'rights and responsibilities' as those held by married partners. This would provide legal security and state support for both partners and children within unmarried relationships. It would also address the issue where, as we shall see below, many cohabitants - falsely - already believe they possess this.

Why has the government chosen their particular course of action, in strengthening marriage in opposition to other partnership forms? In Part I of the paper we discussed this in terms of the centrality of families - and parenting behaviour in particular - to New Labour's version of communitarianism in restoring the beneficial links between social morality, social cohesion and economic success (see Figure 1, Part I, Barlow and Duncan, date). In this Part to the paper, we focus on the family discourses that lie behind this appropriation of marriage as the ideal, preferred form.

*Figure 1 around here*

Figure 1 presents a number of alternative discourses about different family forms, focussing on cohabiting and lone mothers. What we see when we look at 'the family' depends as much on the particular configuration of the discourse that guides our gaze, and shapes our reports, as it does on the concrete object and facts of our scrutiny. Not least, those discourses influencing government vision channel

policy development and its legal implementation. In this way family law can even be seen as the operationalisation of a particular discourse. In Britain the socio-political debates about parenting have become polarised between two major views. In one discourse, lone and cohabiting mothers are seen as a threat to society, both morally and financially; they are formative members of an underclass that has no interest in providing for themselves in legitimate ways. In the other discourse, lone and cohabiting mothers are seen as a social problem; they are not personally irresponsible and are trying to do the best they can for themselves and their children, but their position puts them into a disadvantaged position. The net result is to weaken both partnering and parenting. However, in addition to these 'social threat' and 'social problem' discourses there are two other main identifiable discourses on cohabiting and lone mothers. These are firstly a view of lone parenting and cohabitation as one of a number of diverse choices in a general social move towards 'lifestyle change' in family life. And secondly, a view of lone parenting and cohabitation as an 'escape from patriarchy', where women seek to live their lives without control by men. These four discourses can be characterised as in competition with each other in defining the meaning and causes of - and responses to - family change ( see Duncan and Edwards, 1999). However, while there are strong distinctions between the discourses, they are not completely separate but can overlap and combine in particular aspects of their construction, as depicted in Figure 1. Thus two very different discourses, those of 'social threat' and 'escaping patriarchy', are in some ways rather similar, appearing as opposite sides of the same coin.

In terms of Figure 1 the Green Paper appears to combine the 'social problem' and 'social threat' discourses. Partnering and parenting are a social problem in that state intervention is necessary to allow

families to perform these social and moral functions. But at the same time alternative family forms, like cohabitation and lone motherhood, are seen as a threat to the successful fulfilment of these functions. This view, they claim, is justified by the assertion made by Jack Straw, as Home Secretary and Minister responsible for the Green Paper, that 'research' shows that 'there is a higher level of commitment between married couples than between those who cohabit; and married couples are more likely to stay together' (Straw, 1998). Some clue to the identity of the research referred to is found in the Longitudinal Survey linking birth registration status with family status according to the 1991 Census. This tends to show that children under the age of 10 born within marriage are more likely to be living with their natural parents than those born outside marriage, even if the birth was registered jointly (*Social Trends 29*, 1999: 51). Yet this does not of course compare like with like. If the cohabitants had been married, their break-up rate might have been just the same. In other words, it may not be being married or cohabiting which makes the difference to relationship breakdown – a classic case of mixing correlation with cause. Nonetheless, it is concluded marriage should therefore be strengthened and these other alternative forms discouraged.

### **Legal Responses to Family Restructuring: Britain in Comparative Perspective**

We can briefly note here how proposals in the Green Paper are in some contrast to an increasing number of other developed countries. In Scandinavia, for instance, cohabitation and marriage have long held equality before the law, and same sex cohabitation, and more recently same sex marriage, have been drawn into the same orbit. Lone mothers are just another type of 'worker citizen' where all adults below pensionable age are treated as autonomous, and supported in taking up paid work (Duncan and Edwards, 1999,



Björnberg, 1992, 1997). This represents the implementation of the 'lifestyle change' discourse in terms of Figure 1, and its great advantage is that a large proportion of parents (up to 50 per cent) are not legally and politically marginalised. Other longstanding examples of partial reform in the direction of the 'lifestyle change' approach, recognising the changing social realities of family life, can be drawn from some Commonwealth jurisdictions. In the Canadian Province of Newfoundland, heterosexual cohabitants are permitted under the Matrimonial Property Act 1979 to opt into the matrimonial property legislation and once they do, are treated as if they were spouses. In New South Wales, Australia, the De Facto Relationships Act 1984 enables heterosexual cohabitants of at least 2 years to apply for maintenance and property adjustment on relationship breakdown. More recently, the Domestic Relationships Act 1994 in the Australian Capital Territory extends financial provision on relationship breakdown to all 'personal relationships (other than legal marriage) in which one provides personal or financial commitment and support of a domestic nature for the material benefit of the other' (s3(1)). Interestingly, in the European context, following the recent examples of the Netherlands, Belgium and two autonomous regions in Spain (Catalonia and Aragon), the Jospin government in France is currently attempting to more closely approximate the legal rights of cohabiting couples with those of married couples (see Barlow and Probert, 1999). This would represent a transition from the social threat / problem discourse to the lifestyle change discourse in terms of Figure 1, and as such has attracted considerable opposition from the right and religious organisations (Henley, 1998, and Fabre, 1998). This change is to be achieved in two ways. Firstly by adopting a definition of cohabitation which encompasses both heterosexual and same-sex cohabitation into the French Civil Code, cohabitants will be given a formal legal status combined with a 'safety-net' package of rights.

Secondly, by introducing 'PACS' (*Pacte Civile de Solidarité*) - civil union or civil solidarity contracts – again available to all unmarried cohabitants whether heterosexual or same-sex, the French legislation will give couples who have entered into a *pacte* the freedom to make their own binding legal arrangements. At the same time it will also guarantee legal rights similar to marriage (and superior to the rights of 'non-pacsé' couples) for purposes including social security benefits, health insurance, inheritance and property division on relationship breakdown. Interestingly, a duty, similar to that required in marriage, to offer each other 'mutual and material assistance' is also imposed on these couples. The French state is thereby demanding some return on its investment in a legal status for cohabitants. It does not, however, view it as an exclusively selfish and uncommitted family form giving rise to individualistic behaviour - a commonly perceived, if unsubstantiated 'social threat' feature of cohabitation (Lewis, 1999:53-55). The proposed legislation, which receives its final reading on 12 October 1999, is thus clearly addressing the legal and policy implications of widespread cohabitation.

By way of contrast, the British government's Green Paper proposals focus almost entirely on strengthening marriage, and demonstrate a wilful blindness to the social significance and reality of family restructuring away from marriage, ignoring the consequent need for legal reform. This approach is fuelled by the belief that increased legal recognition of alternative family structures will accelerate the drift away from marriage. As Jane Lewis has observed:

"The fear is that family law has not done enough to defend marriage. Thus Baroness Young also argued for the retention of fault in the law of divorce during the debates on the Family Law Act 1996 because of her belief that 'law influences behaviour and sends out a very clear message'.

There is considerable debate among social scientists on whether law has a direct effect on behaviour. There is more agreement on the idea that it facilitates and additionally legitimates particular kinds of behaviour.” (Lewis, 1999, p3).

Despite, or perhaps in ignorance of this debate, the government appears to believe that changing financial and legal parameters, as in the Green Paper, will thereby alter the calculus for people’s decision making about partnering and parenting, and therefore in turn lead to the desired changes in behaviour. They seem to share the view of Baroness Young 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* HL. 29.2.96 c. 1638). More lone parents will take up paid work, more couples will marry, less will cohabit and fewer will divorce. The means of carrying through this discourse, of strengthening marriage and reducing the importance of other family forms - or at least the threat they pose – can be seen then in terms of rational economic man and his close cousin the ‘rational legal subject’. As Maclean and Eekelaar (1997, 7) have stated, ‘Law is a purposive activity and policy makers expect results’. The problem is that the basic assumption about how people do make decisions about their moral economies - about how partnerships should be formed, sustained and dissolved; how parenting should be carried out; how this might be combined with paid work; and who does what sort of paid and unpaid work - might be incorrect. The whole enterprise might then become irrelevant because of this ‘rationality mistake’.

### **Moral Rationality, Decision-Making and the Law**

Much of the empirical research on the effects of family law on social behaviour has been undertaken in the context of divorce and family breakdown. Lewis (1999 p33) in her useful review of this work points

out that whereas Robert Mnookin (1979) concludes that divorcing couples bargain 'in the shadow of the law', Jacob (1992) demonstrates that the influence of social networks was much more important than that of lawyers. Similarly, Baker and Emry's (1993) research among applicants for marriage licences and law students showed surprisingly large-scale ignorance of the law even among these groups.

Thus the way in which people make decisions about their moral economies in general, and their family structure in particular, is critical to the issue of whether marriage can be strengthened by continuing to focus legal privilege on this family form alone. What role if any does their knowledge of the law play in shaping these decisions? If no or false account is taken of the legal status conferred by marriage as opposed to cohabitation, then arguably the basis of government policy in this area is seriously flawed. Such a situation would be made worse if piecemeal changes in the law equating cohabitation with marriage in particular contexts are actually fuelling such false perceptions, with legislative policy disarming rather than forewarning cohabitants of their 'legal vulnerability'.

In order to assess these issues we draw on our second empirical study which focuses on beliefs about cohabitation compared to marriage. Thirty mothers<sup>2</sup> with pre-school children were interviewed (eleven married, eleven cohabiting and eight lone mothers) in the contrasting social and labour market areas of Great Yarmouth in Norfolk and Merthyr Tydfil in South Wales. The interviews explored reasons for cohabiting or marrying, and also aimed to discover respondents knowledge about relevant family law and how influential this was in terms of their partnering decisions. This study is therefore particularly pertinent to chapter 4 of the Green Paper.

Almost two-thirds of the interviewees saw marriage as an ideal family form, in that it symbolised stability and commitment. Interestingly, this included the majority of cohabitants as well as half the lone mothers. This ideal view parallels, therefore, the view of marriage taken in the Green Paper. However, and crucially, respondents took a different view of the moral reality of their own situations. Thus all the cohabitants had considered marriage, and all indicated that most people assumed they were married and that no stigma was attached to cohabiting. But they had rejected marriage largely because they thought it made no difference to the success of their relationships and/or they had previous bad experiences of marriage. (As we shall see, they inaccurately believed this rejection had no legal implications). Indeed, around half of these respondents actively saw marriage as in some way threatening to their relationship, because it would change their partner's behaviour for the worse. (Lone mothers saw marriage more as a source of unhappiness and disappointment). A smaller group of cohabitants did want to marry, but saw cohabitation as a trial marriage. While these mothers saw the cost of a 'proper marriage' as a disincentive, they did not doubt the validity of cohabitation as a partnering and parenting form. Marriage was again more of an ideal rather than some superior family form in practice. At the same time, few of the married mothers had actually got married because of its ideal characteristics, and around half had done so because of their wider social position in terms of religious beliefs or pressure from partners or parents. Indeed, many respondents saw the ideal of marriage as just that, an ideal not obtainable in practice. For many mothers therefore, and particularly the cohabiting and lone mothers, there were clear resonances of the 'lifestyle change' and 'escaping patriarchy' discourses about family forms where cohabitation is seen as equal to, or even superior to,

marriage. These views are not acknowledged in New Labour's 'social threat' - 'social problem' view of unmarried families (see Fig 1) as replicated in the Green Paper . In this context the lone mothers in the sample commonly hated the Child Support Agency (CSA), linked to the misconception that acceptance of 'CSA money' would mean that they would be forced to allow fathers contact with their children. This had led two of the lone mothers to refuse co-operation with the CSA, despite a 40% reduction in their benefit levels.

The practical advantages of marriage given by respondents, whether married or not, are particularly illuminating. These did not refer to the superiority of marriage for partnering and parenting as supposed in the Green Paper. Rather, they referred to marriage as a social symbol. This symbolism was to be achieved in two major ways - through a change of name and through a full-blown 'white wedding' in church.

The desire by cohabitants to have the same surname as their children and partner was cited as a major reason for marriage, and in fact this had been a major reason for marrying by those in the sample who had previously cohabited. It was the birth of children which commonly predicated this move. Conversely, most cohabiting mothers saw having a different surnames to their partner and children as the greatest disadvantage of not marrying. (Two had formally changed their surname to their partner's and another two families had all adopted double-barreled names). Female name-changing is of course not a legal requirement, but is rather a powerful tradition. Presumably, this is taken as a social signifier of a 'proper family'; one which follows accepted gender norms about roles and responsibilities. This is the very same reason why name changing is actually rejected

by some professional married women and by those with 'alternative' feminist views.

It was also clear that the cohabiting mothers were not prepared to marry in a simple register office wedding. If they were to marry, it was on condition that they had a full-blown white church wedding. It was the wedding as a social display and not the institution or ideal of marriage as a partnership or parenting form which, it seemed, was endowed with significance in the context of their lives. This is dramatically underscored by the fact that eight of these mothers had actually refused their partner's offer of marriage in a Register Office! Those cohabitants in the 'trial marriage' group fully accepted that this might mean that they never married. These were the only unmarried respondents who indicated that financial incentives would have a decisive effect on their decision to marry - but only if this enabled them to obtain the highly desired 'white wedding' in church.

Marriage was often seen as an ideal state, but in terms of everyday moral adequacy few respondents saw marriage as a superior partnering or parenting form. It was the strength of the mothers' relationship with their partner that was decisive, and this was unaffected by whether marriage had taken place or not. Similarly, marriage was seen as largely irrelevant to the welfare of children. Respondents, unlike government spokespersons, did not easily confuse partnering and parenting forms (married, cohabiting etc) with those processes (love, support, communication etc) that lead to the success or failure of these relationships. In this sense, the respondents took rather more sophisticated moral judgments than the government. Rather, the significance of marriage for respondents was more that of a social symbol. The proposals in the Green Paper to modernise the civil marriage service seem unlikely to make inroads into those

seeking out the traditional rituals that a church wedding offers. Equally, few respondents saw marriage in financial terms or, if they did so, this was secondary to their socially derived beliefs about the signifying role of marriage. Here again, as with lone mothers' decisions about the compatibility of paid work with good mothering (see Part I, Barlow and Duncan, date), we can discern a gap between people's actual moral behaviour and that assumed in the Green Paper.

This essentially social signifying role of marriage was buttressed by the 'common law marriage myth'. Nearly all respondents firmly believed that the law treated cohabitants with children of the relationship in all respects as if they were married. This allowed marriage to be dismissed as 'only a piece of paper'. Although the law has not recognised common law marriage since the Clandestine Marriages Act of 1753, both married and unmarried cohabiting couples volunteered this as an acknowledged legal status. Yet this is far from being an accurate reflection of the legal position. Thus nearly all the cohabiting mothers believed, inaccurately, they would be entitled to a pension or other allowances on the strength of their partner's contributions. Only one was aware of the different tax treatment of cohabitants, and again only one was aware that cohabitant dependent partners cannot make claims for maintenance or other provision equivalent to that of a spouse under the divorce legislation. Nor was there any understanding that strict property law, rather than family law, applies to owner-occupying cohabitants on relationship breakdown. Two respondents' views vividly illustrate the firm belief in common law marriage rights:

"I think the law says that after you have lived with someone for so long, you become their common law wife or husband.....I've never looked into it but I just assumed that because we've been



together for so long that we would be the same as if we were married.” (Norfolk cohabitant mother in a relationship of over 20 years standing.)

And from the Welsh sample a similar understanding was expressed:

“People who live together are classed as married couples. Aren’t they called common law marriages? Yes, that’s right, once they are together in the same house, it doesn't make no difference.” (A Welsh married mother who had previously cohabited with her husband for 11 years).

Yet in reality, unmarried cohabitants who are not sole or joint legal owners may thereby have little claim on their family home even when separation occurs after many years (as in *Burns v Burns* [1984] Ch 317). On death, an application for financial provision may well have to be made to the court under the Inheritance (Provision for Family and Dependants) Act 1975 in the attempt to secure the home for the surviving partner. Nor, when a cohabiting partner dies, does the survivor have an automatic right to inherit any of the estate on intestacy, although again a claim may now be made under the amended 1975 Act for financial provision, itself less generous than that permitted to spouses (see ss 1(1)(ba) and 1A, Barlow, 1997: 90-99). Only one cohabitant in the sample was aware of this. None had taken steps to make their position more secure by making wills, entering into cohabitation agreements and all remained unaware of any need to do so. In addition there was an almost total ignorance of the current law relating to the acquisition of parental responsibility by unmarried fathers. All the cohabiting mothers, together with a lone mother who had jointly registered the birth with the father, also firmly believed that unmarried fathers gained the legal status of fatherhood

(parental responsibility) through jointly registering the birth. The majority of married mothers similarly believed this was the legal position of unmarried fathers. However, this again is a myth. Unmarried fathers can, currently, only acquire parental responsibility either by entering into a formal 'parental responsibility agreement' (in the prescribed form) with the mother, or by court order (s4 Children Act 1989). None of the cohabiting mothers had heard of this - not surprising perhaps when this information is deliberately withheld from parents on the birth of a child. Without exception, they had no idea that their partner's legal status was in any way inferior to that of a married father.

As one mother indicated:

'I have never heard of parental responsibility agreements...I assumed you both got the same rights....It just seems to me really strange that you have to physically both go to register the birth and get your names put on the birth certificate, yet you're not asked if you want to enter this parental responsibility agreement.'" (Welsh previously married cohabiting mother)

All of them believed that, should they die, the father would automatically become the legal guardian of their children. In fact, for this to happen it would be necessary for the mother to either have appointed the father as testamentary guardian or to have entered into a parental responsibility agreement with him (ss 4 and 5 Children Act 1989).

This belief in the equivalence of 'common law marriage' is no doubt sustained by developments in the law giving some increased rights to cohabitants (but under which marriage is still clearly privileged), and the fact that the state has it both ways in assessing entitlement to means-tested welfare benefits - then cohabiting couples are treated exactly as if they were married in that their means are aggregated.

For, if people's everyday experiences with officialdom perpetuate the myth, formal marriage then becomes reinforced in their eyes as an unnecessary legal status – nothing more than a piece of paper. The decision whether or not to marry is reduced to one of pure personal, moral choice (Giddens, 1992), completing the circle in the move away from 'institutional' to 'companionate' marriage.

This then raises the question of whether such false perceptions can and should be reversed. Given the perhaps unwitting complicity of legislative policy in fanning such beliefs, might a better way forward not be to impose marriage-like rights and duties on cohabitants (Bailey-Harris, 1996)? The research findings indicate some general support for such an approach. Ninety per cent of all respondents thought that any unequal treatment of cohabitants in law was quite wrong. In this context, the Green Paper's cursory suggestion that more information should be made available to cohabitants about their inferior legal position is woefully inadequate. It is interesting that the only substantial change in the law around cohabitation is the proposal, summarised in the Green Paper (paras 4.7-4.8), to give most jointly registering fathers automatic parental responsibility. Rather than any move towards a 'lifestyle choice' view of cohabitation, however, on the model of France or Scandinavia, this reform appears more as a reflection of the 'social threat' discourse about the breakdown of traditional gendered families. The proposed change can help create such families *de jure* (see Smart, 1987). This may be buttressed by the linked 'social threat' view that children in unmarried families must perforce have weak male role models (see Part I, Barlow and Duncan, date).

The 'common law marriage myth' is both pervasive and deeply held. In a wider sense the ignorance of the law it displays is quite rational.

This is because couples generally see their partnership - and its strength or weakness - in terms of a relationship, not in terms of an institution. Indeed, as we saw earlier, for most the institution of marriage is valued simply as a social signifier of their relationship in their social network. Few mothers share the government's apparent view that the institutional form of partnership governs its success, or tends to make people into better parents. In this way chapter 4 of the Green Paper on 'Strengthening Marriage' perpetuates the 'rationality mistake' we identified in Part I of the paper for the New Deal for Lone Parents. People do not decide upon their moral economies according to the model of rational economic man and the rational legal subject

## **Conclusion**

The aim of New Labour's version of communitarianism is to remould family structures and practices in a way that will better promote social cohesion. Yet chapter 4 of the Green Paper *Supporting Families* reveals the limitation of New Labour's vision in this field. As the Conservative government before them, they have fallen prey to the political unease that has accompanied the drift away from marriage into alternative family forms and have identified strengthening the institution of marriage - at the expense of supporting family relationships more generally - as a main plank of their family and parenting policy. One of the key tools it will use to implement such a strategy is the law. Whilst promoting marriage through fiscal policy may have been abandoned in the last budget, the privileged legal status of marriage - the government's preferred parenting structure - will, in contrast to many of our European neighbours, very much remain. By continuing to view alternative family forms as part of the 'social threat' and 'social problem' discourses, any real quest for social cohesion has surely been abandoned.

The empirical studies drawn on in the two parts of this paper demonstrate how the Green Paper proposals on the New Deal for Lone Parents, and on 'Strengthening Marriage', are undermined by what we have called 'the rationality mistake'. In implicitly assuming a universal model of 'rational economic man' and the 'rational legal subject', the Green Paper fundamentally misunderstands how people actually do make important decisions about their moral economies. As the research shows, people seem to take such decisions with reference to moral and socially negotiated views about what behaviour is accepted or expected as right and proper and this negotiation, and the views that result, varies in particular social contexts. Thus people make decisions in a different and arguably more sophisticated way, giving different results to those anticipated by the purposive policy makers using conventional economic and legal models.

As we have already noted, if people do not act according to the model of rational economic man and the rational legal subject, then legislation based on these assumptions might well be ineffectual. This is what seems to have happened with the pilot New Deal for Lone Parents, and the proposals to strengthen marriage seem to be taking a similar course. Given the high rates of cohabitation in Britain, and the widespread evaluation that this is equivalent to marriage in most practical and emotional terms, then basing a policy of supporting families almost entirely upon marriage as an institution seems to leave the government with its head rather deep in the sand.

As Carol Smart (1997 :303) has argued, at the level of political rhetoric, 'the family has been constructed as the one site where change should not occur and where change is seen as positively undesirable unless it is in a backward direction'. Yet, the Child

Support Act experience well shows how ineffectual it can be to attempt to reassert traditional family morality through imposed, not to say punitive, legislation (see Part I, Barlow and Duncan, date). In the same vein, Part II of the Family Law Act 1996 (which was to be implemented in the year 2000) was to revolutionise and extend the waiting time within the divorce process whilst purporting to better support the institution of marriage (see e.g. s1). This Act had been widely predicted to encounter both procedural difficulties and social resentment (see e.g. Cretney, 1996, Davis, 1995). Carol Smart and Bren Neale (1999:175) suggest that this is due to family law legislation in the 1990s being imposed 'from the top down' rather than enacted in response to social pressure - 'from the bottom up'. This is in contrast to the liberal family law reforms of the 1970s and 1980s which have achieved a high level of acceptance. Interestingly, the implementation of the remainder of the Family Law Act 1996 has now been postponed indefinitely. This decision follows 'disappointing' results from pilot testing of the new law, which showed how unpopular both pre-divorce information meetings and new-style mediated divorce over a long period of time were likely to be (see Lord Chancellor's Department, Press release No. 159/99). At least here, the 'rationality mistake' may have been recognised, albeit prompted by fears of unpopularity at the next general election (see Dyer, 1999).

New Labour's communitarianism, unlike its rhetoric, does not involve a 'from the bottom up' approach in its project for social cohesion. Rather it is prescriptive and uniform in tone and, ironically in view of the tenets of communitarianism, rides roughshod over what different social groups and communities believe is right and proper. The New Labour government believes that law facilitates and, additionally, legitimates particular kinds of behaviour and thus will use it,

coercively if need be, to achieve its 'moral reform crusade' (Coward, 1998). Yet this is to completely misunderstand the power of law in people's decision-making processes in the moral economic sphere. Thus the Green Paper proposals, rather than supporting families and promoting social cohesion, may simply perpetuate the 'rationality mistake' already seen in other recent family law legislation and risk excluding an increasingly large section of society. The alternative is to try to develop supportive and flexible legislative frameworks which do recognise the varying ways in which people take moral economic decisions. This is now the real challenge for the 'joined-up thinking' the government extols.

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<sup>1</sup> *Supporting Families: A Consultative Document*, The Stationary Office, 4 November 1998.

<sup>2</sup> It is acknowledged that in view of the smallness of the sample size, the research findings presented here are tentative. However, larger-scale research into the issues identified is planned by the authors.