

ABSTRACT: *Cohabitants: What the Census Does and Doesn't Tell Us*  
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Our legal concepts struggle to keep up with the reality of family life. When they fail to do so, thus failing to address the problems experienced by today's families, this failure leaves many persons whom the law should protect in exceedingly vulnerable positions. Cohabitants, in particular, are often in such a position because they are treated in a punitive fashion by the law of most U.S. states, in contrast to the approaches in other countries, such as Canada, New Zealand, and even the U.K. Statistics about cohabitation in the United States show that it has been increasing at a steep rate for decades, and that large numbers of cohabiting persons fall into groups that are vulnerable in our society for other reasons as well – for example, low income and minority groups. I have previously proposed that cohabitants who have lived together for two years or have a mutual child should be treated as though they were married.

I am interested here in what the census does and doesn't tell us about how people live. Two groups of persons who live in ways the census does not reveal come to mind: (1) single mothers who aren't really single and (2) non-residential but conjugal partners. The first group has attracted some attention from American family law scholars, who point out that the statistics about single mothers are misleading because a large proportion of these mothers in fact live with the child's father although they are not married. My concern with respect to this group (in addition to remedies I have suggested for cohabitants) is primarily with the welfare of their children – their right to a continuing relationship and support from their cohabiting stepparent if the cohabiting couple separates or one partner dies, as well as to a variety of forms of posthumous support, such as inheritance in the absence of a will, social security survivors benefits, workers compensation benefits, and tort suits for wrongful death and loss of consortium. A variety of legal reforms are necessary to protect the children of cohabiting couples in these circumstances.

The second group, non-residential conjugal partners, is relatively unstudied in the United States, although it has attracted a good deal of attention in the U.K., where it is widespread enough to have been given a name — “LAT,” living apart together. How should the law treat these couples? Discussion of this question sheds a critical light on the remedies I have suggested for cohabitants and perhaps illuminates what the limits of those remedies should be.

After a brief discussion of the current legal treatment of heterosexual cohabitants in the United States and my proposals for reform, this presentation will focus on the legal treatment of the two groups concealed by census statistics. How should family law address their status? And what are the implications for equality?