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JUSTIFYING THE DENIAL OF WRONGFUL DEATH ACTIONS TO COHABITANTS

The California wrongful death statute bars a cohabitant’s claim for his or her partner’s tortious death. Moreover, the California Supreme Court in Justus v. Atchison found that a common law wrongful death remedy is precluded because the state legislature has occupied the field. This Comment concedes the weakness in the Justus court’s analysis and investigates the wrongful death statute from its 1862 inception to the current version. The Comment concludes that the Justus court’s conclusion is correct and that policy considerations militate against recognizing the cohabitant’s wrongful death cause of action.

INTRODUCTION

In Marvin v. Marvin, the California Supreme Court refused to label cohabitation an illicit union, recognizing instead that “[t]he mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a [legal] standard based on alleged moral considerations that have . . . been so widely abandoned . . . .”1 Although the Marvin court did not equate the rights of cohabitant2 with those of spouses,3 many view the case, in conjunction with other legal developments,4 as a springboard to

2. In this Comment, a “cohabitant” is defined as a person steadily living with another under marriage-like conditions without the good faith belief that he is legally married. The term “meretricious spouse” which frequently appears in related literature is not used because “meretricious” connotes an illicit relationship. With the 1975 repeal of California Penal Code sections 269(a) and (b), criminal sanctions for cohabitation were removed; the lifestyle is not illicit except, to some, in a moral sense. CAL. PENAL CODE §§ 269(a)-(b) (West 1970) (repealed 1975).
3. In Marvin, the court refused to extend the Family Law Act to unmarried persons. The court expressly stated that the cohabitant should be treated as any other unmarried person. A decision to equate cohabitant with spouse was unacceptable because it would “resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895.” 18 Cal. 3d at 684 n.24, 557 P.2d at 122 n.24, 134 Cal. Rptr. at 831 n.24.
4. Numerous cases and statutes illustrate a trend towards legal equivalence between cohabitant and spouse. See Bulloch v. United States, 487 F. Supp. 1078

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general legal equivalence between cohabitant and spouse. Nevertheless, California continues to deny such legal equivalence in wrongful death actions; the spouse may bring a wrongful death suit upon her husband's tortious death, but the cohabitant is precluded upon her partner's.

The rationale for this distinction stems primarily from the California Supreme Court's analysis of the California wrongful death statute in *Justus v. Atchison*. The court in *Justus* denied a 

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(a) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but shall not include damages recoverable under Section 573 of the Probate Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

(b) For the purposes of subdivision (a), "heirs" mean only the following:

(1) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of Division 2 (commencing with Section 200) of the Probate Code,

(2) Whether or not qualified under paragraph (1), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, and parents. As used in this paragraph, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(3) Minors, whether or not qualified under paragraphs (1) or (2), if, at the time of the decedent's death, they resided for the previous 180 days in the decedent's household and were dependent upon the decedent for one-half or more of their support. Nothing in this subdivision shall be construed to change or modify the definition of "heirs" under any other provision of law.

wrongful death remedy to parents of a stillborn fetus, because it concluded that the state legislature intended to "occupy the field" of wrongful death and to preclude any common law expansion of the remedy. The statute did not provide a remedy to parents for a fetus' death; therefore, plaintiffs could not state a cause of action.

The statute similarly fails to provide a wrongful death remedy to a surviving cohabitant. Courts applying California law in Vogel v. Pan American World Airways, Aspinall v. McDonnell Douglas Corp., and Harrod v. Pacific Southwest Airlines recognize this statutory exclusion and rely heavily on Justus in their refusal to grant common law wrongful death rights to cohabitants.

Although the Justus court's conclusion is correct, its statutory analysis is superficial. The court, in its one-paragraph statutory examination, anchors its legislative preemption holding solely on the following: (1) the intent of the first wrongful death statute (passed in 1862) was to create a new cause of action; (2) the statute is phrased in terms of general application; and (3) the legislature has amended the statute several times. The Justus court failed to investigate seriously the amendments, bills, and express statements of legislative intent which form the wrongful death statutory scheme. Moreover, the court failed to specify any statutory elements which support the preemption conclusion. One writer, after attempting the task the Justus court found unneces-

9. Id. at 574, 565 P.2d at 128, 139 Cal. Rptr. at 103.
10. The statute provides a remedy for the death of "a person." The court held that a fetus was not "a person."
11. CAL. CIV. PROC. CODE § 377(b) (West Supp. 1982). See supra note 7 for the statute's text.
13. 625 F.2d 325 (9th Cir. 1980).
15. Vogel cites Justus twice in the same paragraph concluding "[t]he plain fact is that 'meretricious spouses' are not included in the statutory definition of 'heirs.'" 450 F. Supp. at 226. Aspinall similarly parrots Justus to confine the action: "the right of a survivor to recover under the wrongful death theory is purely statutory . . . ." 625 F.2d at 327.
16. 19 Cal. 3d at 574, 565 P.2d at 129, 139 Cal. Rptr. at 104.
17. The court made its legislative preemption conclusion after merely listing its three general findings. The Justus court apparently ignored the proposition that "courts may and should have recourse to available extrinsic aids in order to discover the meaning and purpose of legislation." Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 383, 106 P.2d 404, 405 (1940).
sary, concludes that the legislature did not intend to foreclose common law expansion of wrongful death and that the Justus court erred.\textsuperscript{18} If the Justus legislative intent conclusion fails, Vogel, Aspinall, and Harrod are threatened, with the result that the cohabitant may not be precluded from wrongful death actions. Such exclusion, however, is demanded by the statute and justified by policy considerations.

This Comment will supply Justus and its progeny with the firm rationale that the cases lack.\textsuperscript{19} An examination of the California wrongful death statutory scheme will reveal legislative intent to preclude the remedy's judicial expansion. Policy justifications for the cohabitant's exclusion will also be presented. First, a brief historical survey will place in context the statute and the common law approach to wrongful death litigation.

**WRONGFUL DEATH AND THE COMMON LAW\textsuperscript{20}**

In Baker v. Bolton, an 1808 nisi prius decision, Lord Ellenborough declared that "[i]n a Civil court, the death of a human being could not be complained of as an injury . . . ."\textsuperscript{21} This principle, stated without supporting authority or any rationale, apparently derives from the early English law felony-merger doctrine.\textsuperscript{22} This doctrine denied civil recovery for an act constituting both a felony and a tort; the offense against the Crown preempted the tort, resulting in the felon's property being forfeited to the Crown. Because all intentional or negligent homicide was felonious, a civil suit for wrongful death was deemed superfluous and was not permitted.

Baker's significance to California law is twofold. First, although the felony-merger doctrine was never applied in this state,\textsuperscript{23}

\begin{enumerate}
\item 1 Camp. 493, 170 Eng. Rep. 1033 (1808).
\end{enumerate}
Baker became authority for the dogmatically-applied rule that no action for wrongful death exists, unless and only to the extent provided by statute.\textsuperscript{24} Second, Baker's harsh result, which often left surviving family members destitute, inspired California's first wrongful death statute.\textsuperscript{25}

\textbf{A Common Law Remedy}

Before the 1970 United States Supreme Court decision in Moragne \textit{v. States Marine Lines},\textsuperscript{26} which created a common law wrongful death action, only Hawaii\textsuperscript{27} consistently rejected Baker. Other states clung steadfastly to the proposition that a wrongful death suit can only be maintained within the parameters of the applicable statute.

The Moragne Court held that a widow whose longshoreman husband's death occurred on navigable Florida waters could bring a wrongful death action notwithstanding the fact that neither the Florida statute\textsuperscript{28} nor the various federal statutes granted such a

\begin{itemize}
\item \textsuperscript{24} Kramer \textit{v. Market St. R.R. Co.}, 25 Cal. 434 (1864).
\item \textsuperscript{25} The preamble to Lord Campbell's Act, the 1846 English wrongful death statute, declares: "'[I]t is often times right and expedient that the Wrongdoer in such Case should be answerable in Damages . . . ." 1846, 9 & 10 Vict., ch. 93. The remedy is expedient by providing a means to the end of financial stability for the decedent's family. Lord Campbell's Act is considered the progenitor of American wrongful death statutes. 1 S. Speiser, \textit{supra} note 20, at 29. Because § 1 of California's first wrongful death statute is almost verbatim of Lord Campbell's Act, a reasonable inference exists that the purpose of the California legislature was identical to that of the English Parliament. Section I of Lord Campbell's Act states:
\begin{quote}
Whenever the Death of a Person shall be caused by wrongful Act, Neglect, or Default, and the Act, Neglect, or Default is such as would (if Death had not ensued) have entitled the Party injured to maintain an action and recover Damages in respect thereof, then and in every such Case the Person who would have been liable if Death had not ensued shall be liable to an action for Damages . . . .
\end{quote}
\begin{itemize}
\item 2 S. Speiser, \textit{supra} note 20, at 643 (text of Lord Campbell's Act).
\item Section I of California's 1862 statute reads:
\begin{quote}
Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages . . . .
\end{quote}
\begin{itemize}
\item 28. The Florida statute did not encompass unseaworthiness as a basis of liability.
\end{itemize}
\end{itemize}
The Court finally rejected Baker, noting that the felony-merger doctrine had never existed in the United States and that "[t]he most likely reason that the English rule was adopted . . . is simply that it had the blessing of age." Having destroyed Baker for lack of compelling rationale, the Court held that a common law wrongful death action existed absent legislative intent to occupy the field of recovery. After Moragne, therefore, a statutory and a more expansive common law wrongful death action may coexist, provided that the legislative remedy is not viewed as exclusive.

The Moragne Court established guidelines to determine whether a statute should be viewed as mandating an exclusive remedy. Factors demonstrating an intent to allow common law expansion include: (1) a course of legislation rather than one enactment; (2) a statute that deals with a series of situations; and (3) the existence of similar legislation in other jurisdictions. Factors showing legislative intent to occupy the field are: (1) a statute that seeks to promote conflicting interests; and (2) a legislative aim prescribed with particularity. One writer suggests that the Court also demands an affirmative indication of intent to occupy before judicial creativity is precluded; the Court, however, neither lists this requirement in its formulation nor defines what such an affirmative indication might be.
INTERPRETATION OF THE WRONGFUL DEATH STATUTE

An examination of the California statute's words and context reveals legislative intent to list an exclusive class of plaintiffs and to limit judicial creativity. Because the Justus court accepted the Moragne Court's analysis and guidelines, the Moragne criteria furnish a baseline against which the California statute will be measured. The investigation of the statute's words, context, and extrinsic material will disclose that, substantively and procedurally, the legislature has regulated wrongful death with particularity.

Language

The words in the wrongful death statute manifest an intent to list an exclusive class of plaintiffs and generally to limit common law activity. California Code of Civil Procedure section 377(a) allows the deceased's heirs or personal representatives to commence the action; subsection (b) declares that for the purposes of subdivision (a), "heirs' mean only the following . . . ." Because "only" denotes exclusivity, nothing more or different is to be added to the specified class of plaintiffs.

Subsections (b)(2) and (b)(3) provide for actions by a dependent putative spouse and a dependent minor. The statute does not simply name these classes; rather, the legislature has painstakingly defined these terms. These precise definitions show an

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36. See supra note 32.
37. See Frankfurter, Some Reflections on the Reading of Statutes, 47 COLUM. L. REV. 527, 535 (1947) ("[t]hough we may not end with the words in construing a disputed statute, one certainly begins there").
38. As previously discussed, a finding of particularity shows legislative intent to occupy the field. Moragne v. States Marine Lines, 398 U.S. at 392.
39. See supra note 7 for the statute's text (emphasis added).
40. See WEBSTER'S NEW INTERNATIONAL DICTIONARY 1703 (2d ed. 1960). Statutory language is generally accorded its plain meaning. Frankfurter, supra note 37, at 535-36; cf. Roschen v. Ward, 279 U.S. 337, 339 (1929) ("there is no canon against using common sense in construing laws as saying what they obviously mean") (Holmes, J.); see also CAL. CIV. PROC. CODE § 1861 (West 1955) (terms to be construed in their general acceptation).
41. See supra note 7 for the statutory definitions. Assembly bill No. 428 forms part of the present scheme. Introduced in January 1975, the bill did not define "putative spouse" until the third amended version in April. CAL. A.B. 428, 1975-76 Reg. Sess. (1975). In 1977, Senate bill No. 404 provided the cause of action for dependent minors. The first draft extended the right to any minor dependent for one-half of his support. On April 21, 1977, the bill was amended to impose the additional requirement that the minor must have resided in the decedent's house.
intent to limit judicial creativity. Although factual questions may arise regarding a putative spouse's good faith belief or a minor's degree of dependence, courts cannot squeeze a cohabitant into the putative spouse category by manipulating definitions. Moreover, these definitions, coupled with the use in subsection (a) of the word "only," satisfy the Moragne requirement that the legislature prescribe with particularity before a preemption finding is warranted.

Context

The wrongful death statute has been amended eight times since 1862. Although the earliest version states that the remedy is for the "exclusive benefit" of certain persons, this language was deleted in the 1873 amendment. Similar phraseology did not reappear until the 1975 insertion of "only." Because the legislature deliberately reintroduced the concept of an exclusive list of beneficiaries, subsection (b) must be recognized as an express indicator of intent to limit the remedy rather than as inadvertent draftsmanship.

The numerous amendments also illustrate a legislative trend toward regulating the remedy with increasing particularity. The 1862 statute established a cause of action whenever the death of "a person" was caused by wrongful act. In 1873, the action was held.

On August 22, 1977, the bill was amended to require that the minor must have resided in the decedent's household for 180 days prior to the wrongful death. Cal. S.B. 404, 1977-78 Reg. Sess. (1977).


43. Cf. Boston Sand & Gravel Co. v. United States, 278 U.S. 41, 48 (1928) ("[i]f Congress . . . use[s] a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute").

44. See supra note 25 for section 1 of the 1862 statute. Section 3 stated:

Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin, in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action, the jury may give such damages, pecuniary and exemplary, as they shall deem fair and just . . . .


45. Amendment of 1873, ch. 383, § 40, 1873-74 Code Am. 294 (current version at CAL. CIV. PROC. CODE § 377 (West Supp. 1982)).


47. See supra note 25.
made much more precise: a claim exists only upon an adult's death; the defendant's employer may also be liable; and the act causing death need not be such as would have entitled the deceased to recover had death not ensued.\(^8\) In 1935 the legislature provided a cause of action upon the death of a minor who is survived by either a spouse or a child.\(^49\)

This extensive legislative fine-tuning continued. The 1949 amendment adds parents to the class of survivors who are eligible to bring an action for a minor's death.\(^50\) In 1968 the word "heirs" retained its Probate Code definition for wrongful death purposes; however, the 1968 version allows dependent parents who are not heirs to recover for an adult child's tortious death.\(^51\)

The 1975 amendment essentially placed the statute in its current form. The legislature declared that, in wrongful death actions, "heirs" include: (1) those entitled to take by intestacy under the Probate Code; (2) a dependent putative spouse; (3) any dependent children of the putative spouse; (4) dependent

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48. See supra note 45.
49. The 1935 statute stated:
   When the death of a person not being a minor, or when the death of a mi-
   nor person who leaves surviving him either a husband or wife or child or
   children, is caused by the wrongful act or neglect of another, his heirs or
   personal representatives may maintain an action for damages against the
   person causing the death, or if such person be employed by another per-
   son who is responsible for his conduct, then also against such other
   person.


50. The 1949 statute stated:
   When the death of a person not being a minor, or when the death of a mi-
   nor person who leaves surviving him either a husband or wife or child or
   children or father or mother, is caused by the wrongful act or neglect of
   another, his heirs or personal representatives may maintain an action for
   damages against the person causing the death, or in case of the death of
   such wrongdoer, against the personal representative of such wrongdoer,
   whether the wrongdoer dies before or after the death of the person
   injured.


51. The 1968 statute stated:
   When the death of a person not being a minor, or when the death of a mi-
   nor person who leaves surviving him either a husband or wife or child or
   children or father or mother, is caused by the wrongful act or neglect of
   another, his heirs, and his dependent parents, if any, who are not heirs, or
   personal representatives on their behalf may maintain an action for dam-
   ages against the person causing the death . . . .

stepchildren; and (5) dependent parents. Finally, the 1977 legislation included dependent minors in the definition of heirs.

These substantive changes have been paralleled by changes in the procedural aspects of wrongful death. The 1862 statute apportioned damages, which were determined by a jury, in accordance with intestate succession law. By 1949 the legislature expressly provided for the action's survival upon defendant's death. The 1961 amendment declared that the heirs' respective rights shall be determined by the court and included joinder and consolidation provisions.

Although such detail satisfies the Moragne Court's requirement of statutory particularity, an alternate interpretation is that the amendments illustrate responses to specific problems that came to the legislature's attention; under Moragne, therefore, common law activity could still be warranted. Proponents of this view emphasize the relationship between Evans v. Shanklin and the 1968 amendment as well as that between Steed v. Imperial Airlines and the revised 1975 statute. Such emphasis and interpretation, however, are misplaced.

The Evans court, interpreting the 1935 wrongful death statute, denied a cause of action to a deceased's dependent parent who was not an heir. Thirty-two years after the decision, the statute was amended to allow dependent parents a wrongful death claim. Conceding that the 1968 statute prevented recurrence of Evans' harsh result, legislation after a thirty-two year hiatus cannot real-

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53. See supra note 7.

54. See supra note 44.

55. See supra note 50.

56. The relevant portions of the 1961 amendment read:

The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.


57. See supra note 33 and accompanying text.


60. See Comment, supra note 18, at 135-37.
istically be termed responsive.\textsuperscript{61}

Similarly, in \textit{Steed}, an unadopted stepchild was denied a remedy for her stepfather's wrongful death. Stepchildren were not heirs under the 1968 statute. Although one year after the decision the amended statute included dependent stepchildren as heirs, this time proximity does not outweigh other factors showing that the 1975 amendment was not intended to be a response to \textit{Steed}.

One such factor is the precise issue raised in \textit{Steed}: whether an unadopted child led to believe that the deceased was her biological father\textsuperscript{62} may bring the wrongful death suit. The 1975 amendment encompassed far more than this narrow issue by expanding heirs to include \textit{all} dependent stepchildren, the putative spouse, and dependent children of the putative spouse. Although perhaps inspired by \textit{Steed}, the statute cannot be deemed responsive when classes not represented in the case are brought within the statute's provisions. Moreover, extrinsic sources of legislative intent, the state Assembly and Senate bills which formed the 1975 legislation, demonstrate that the 1975 statute was not intended as a response to the case.

\textit{Extrinsic Sources}

Assembly bill number 428 and Senate bill number 766, which combined to produce the 1975 wrongful death statute, show that the legislature specifically omitted reference to \textit{Steed} in its statement of intent. Assembly bill 428, introduced three months before the senate bill, states: "It is the further intent of the Legislature that the amendment to Section 377 of the Code of Civil Procedure . . . alter the rule of law enunciated in . . . Steed v. Imperial Air Lines . . . ."\textsuperscript{63} A Justus critic chastizes that court for ignoring this statement and maintains that "[t]his expression of legislative intent certainly qualifies as a reflection of 'nothing more than the dimensions of the particular problem that came to the attention of the legislature.'"\textsuperscript{64}

\textsuperscript{61} Analysis of a statute's chronology is a recognized interpretive device. \textit{Cf.} Garcia v. State, 247 Cal. App. 2d 814, 816, 56 Cal. Rptr. 80, 82 (1967) (chronology of two statutes to discern legislative intent).

\textsuperscript{62} Plaintiff was not simply a stepchild. The "stepfather" represented to plaintiff and to all the world that she was his biological daughter, encouraged her to use his surname, and led plaintiff to believe that he was in fact her father. 12 Cal. 3d at 118 n.2, 524 P.2d at 802 n.2, 115 Cal. Rptr. at 330 n.2.


\textsuperscript{64} Comment, \textit{supra} note 18, at 138.
The most likely reason the Justus court ignored this intent statement is that it was intentionally omitted when the law was finally enacted. Senate bill 766 contained its own version of the wrongful death statute. Until the bill’s third amendment in August 1975, the proposal restated the 1968 wrongful death statute, but substituted non-sexist language for existing sexist terms. The third amended senate bill contains two wrongful death statutes. Section 5 restates the 1968 law. Section 5.5 restates the assembly’s version (A.B. 428) but deletes the statement of legislative intent quoted above. The senate bill’s own statement of intent alloyed the confusion resulting from two wrongful death proposals: if both the assembly and senate bills were enacted, the wrongful death statute was to be that stated in section 5.5 of the senate bill. Both bills were chaptered and became effective in 1976. Section 5.5 of Senate bill 766 became law in accordance with the senate’s statement of intent. The assembly’s allusion to Steed was expressly deleted. This exclusion indicates an intention different from that expressed in Assembly bill 428. Therefore, the 1975 amendment is intended neither to be a response to Steed nor to the evidence that the legislature has only responded to particular problems that came to its attention in wrongful death litigation.

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65. CAL. S.B. 766 eventually was titled “Sexual Equality” and replaced “he” with “he or she,” and “his” with “his or hers” in various statutes. CAL. S.B. 766, 1975-76 Reg. Sess. (1975).

66. The Senate bill stated:
   It is the intent of the Legislature, if this bill and Assembly Bill No. 428 are both chaptered . . . both bills amend Section 377 of the Code of Civil Procedure, and this bill is chaptered after Assembly Bill No. 428, that the amendments to Section 377 proposed by both bills be given effect and incorporated . . . in the form set forth in Section 5.5 of this act. [If this occurs,] Section 5 of this act shall not become operative.

_id. § 10.


68. When the legislature omits a particular provision in a later enactment related to the same subject matter, the omission indicates a different intention. See Kaiser Steel Corp. v. Solano County, 90 Cal. App. 3d 662, 667, 153 Cal. Rptr. 546, 549 (1979). This conclusion is not affected by the rule that unpassed bills have little value as evidence of legislative intent, because both CAL. A.B. 428 and CAL. S.B. 766 were passed. See State Compensation Ins. Fund v. Workers’ Compensation Appeals Bd., 88 Cal. App. 3d 43, 63, 152 Cal. Rptr. 153, 166 (1979).

69. Neither Assemblyman Ingalls (author of CAL. A.B. 428) nor Senator Rains (CAL. S.B. 766) could furnish information other than the legislative digest accompanying their respective bills. Assembly bill 428, first introduced in January 1975, had action almost weekly through April 16, 1975. The bill then lay dormant until August 7, 1975. Note that this four-month lapse roughly coincides with Rains’ attempt to delete the legislative intent statement present in the assembly bill. Moreover, Rains’ own bill similarly bogged down between June and August after almost weekly action. What happened behind the scenes remains unknown; how-
Another extrinsic source of legislative intent, the Legislative Counsel Digest, supports a legislative preemption conclusion. Assembly bill 428's Digest articulates the conflicting interests present in wrongful death legislation, conflicts which the Moragne Court suggests manifest legislative preemption. Enlarging the class of persons entitled to sue promotes the state interest of having tortfeasors rather than society (through welfare payments) carry the burden of decedent's financial obligations. The legislature recognizes, however, that restrictions on the class of eligible plaintiffs are necessary to limit the tortfeasor's potential liability.

Beyond Moragne

Because the previous discussion is largely based on the Moragne Court's criteria, any invalidation of the Court's test may similarly weaken the legislative preemption conclusion. One criticism is that the test yields inconsistent conclusions. For example, the finding that the legislature has prescribed wrongful death with particularity derives from examining the statute's context (which is a course of specific legislation). In Moragne, however, the Court states that particularity demonstrates preemption ever, one theory is that the Senate was not pleased with expanding the cause of action to the putative spouse and others, especially with the Assembly's potentially dangerous legislative intent statement tacked onto the bill. The Senate's compromise was to impose an ultimatum on the Assembly: abandon the intent statement or revert to the 1968 law (section 5 of CAL. S.B. 766). The Assembly capitulated. Another theory is that the Senate's preemption of the Assembly's bill is simply a matter of drafting efficacy. Express preemption avoids practical problems when two bills dealing with the same subject matter are passed. Nevertheless, the Senate could have both preempted the Assembly and included the Steed intent statement. Therefore, even a pragmatic approach cannot adequately weaken the significance of the Senate's deletion.

70. The Legislative Counsel Digest has frequently been used to discern legislative intent. See Rockwell v. Superior Court, 18 Cal. 3d 420, 443, 556 P.2d 1101, 1115, 134 Cal. Rptr. 650, 664 (1976). The Legislative Counsel assists in law drafting and publishes an analysis of every bill, the Legislative Counsel Digest. Because the Digest is analytical and apolitical, it is credible. Comment, The Use of Extrinsic Aids in Determining Legislative Intent in California: The Need for Standardized Criteria, 12 Pac. L.J. 189, 204-06 (1980).

71. 398 U.S. at 392.


74. See supra note 33 and accompanying text for the Moragne test.
and that a course of legislation allows for judicial creativity. The Court states that common law expansion is warranted when legislation similar to that under consideration exists in other jurisdictions. Because every state has a wrongful death statute, difficulties arise in determining this factor’s impact on other evidence which leads to a preemption conclusion. The Moragne problem is ameliorated, however, through an examination of other preemption cases which support the conclusion of legislative intent to control wrongful death. Although issues in these cases range from sterilization to contribution among joint tortfeasors, their shared theme—that common law practices cannot be considered when superseded by statutory provisions—allows analogies.

In Guardianship of Kemp, a California appellate court turned to Welfare and Institutions Code section 7254 to determine a probate court’s power to order sterilization of mental incompetents. The Kemp court concluded that the comprehensive statute requiring examination, notice, hearings, and judicial review precluded judicial alteration of sterilization requirements. A wrongful death remedy is not a drastic physical alteration as is sterilization; nevertheless, the Kemp holding is founded on a determination of legislative intent derived from a comprehensive statute. The wrongful death statute is similarly comprehensive, listing specific classes of plaintiffs; providing for the action’s survival; denying certain damages; allowing joinder and consolidation; and providing for judicial apportionment of awards.

In spite of the impression given by Justus and Kemp, California courts do not regularly find legislative preemption of common law power. In American Motorcycle Association v. Superior Court and Green v. Superior Court, the California Supreme Court determined that relevant statutory schemes did not preclude the court from fashioning common law remedies. In each case, the court identified factors that show no legislative intent to occupy a field. The absence of these elements in wrongful death adds support to a finding of legislative occupation.

In American Motorcycle, the court considered whether the contribution statute precluded judicial creation of comparative indemnity. The court’s analysis, as generalized, shows that no

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76. 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).
77. Id. at 763, 118 Cal. Rptr. at 67.
78. See supra note 7 for the statute’s text.
79. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).
preemption exists when the statute (1) preserves a common law right; (2) provides that such right is superior to that created by statute; and (3) mandates that the scheme be administered in accordance with common law principles.\textsuperscript{81} In contrast, the wrongful death statute does not preserve a common law right; in fact, the statute created a right not existing at common law.\textsuperscript{82} Moreover, the court's role in wrongful death litigation is to apportion the award among the heirs, not to administer the right according to common law principles.\textsuperscript{83}

In \textit{Green}, the court determined that landlord-tenant statutes, including one providing a "repair and deduct" tenant remedy, did not foreclose a common law implied warranty of habitability. The court emphasized that no legislative occupation exists when (1) historically, common law remedies have been granted independently of the statutes, and (2) statutory remedies are limited in relation to the harm sought to be alleviated.\textsuperscript{84} Courts in wrongful death cases, however, have not acted independently of the statute; rather, the courts consistently confine themselves to the legislative framework.\textsuperscript{85} Moreover, the wrongful death statute does not provide a limited remedy. The six broad classes of plaintiffs may recover any amount of damages deemed just.\textsuperscript{86}

\begin{itemize}
\item \textsuperscript{81} Specifically, the court noted that the contribution statute preserved the common law right of indemnity, provided that such right was superior to that of contribution, and mandated that the scheme be administered in accordance with equitable principles. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d at 602, 578 P.2d at 914, 146 Cal. Rptr. at 197; \textit{see also} \textsc{Cal. Civ. Proc. Code} § 875 (West 1980) (contribution statute).
\item \textsuperscript{82} Moragne v. States Marine Lines, 398 U.S. at 381-86.
\item \textsuperscript{83} \textit{See supra} note 7 for the statute's text.
\item \textsuperscript{84} Specifically, the court noted a line of constructive eviction cases decided independently of the statutes. The \textit{Green} court also commented that the limited nature of the "repair and deduct" remedy suggested that the statute was not intended to be an exclusive remedy. Green v. Superior Court, 10 Cal. 3d at 630, 517 P.2d at 1177, 111 Cal. Rptr. at 713; \textit{see also} \textsc{Cal. Civ. Proc. Code} § 1942 (West Supp. 1982) (tenant permitted to spend up to one month's rent to make repairs).
\item \textsuperscript{85} \textit{See, e.g.}, Pritchard v. Whitney Estate Co., 164 Cal. 568, 129 P. 389 (1913); Steed v. Imperial Airlines, 12 Cal. 3d 115, 524 P.2d 801, 115 Cal. Rptr. 329 (1974).
\item \textsuperscript{86} A final argument supporting legislative intent to occupy wrongful death is based on legislative silence. In 1977, the statute was amended to include dependent minors as heirs. The legislature, with \textit{Steed} before it, failed to include any language indicating an intent to allow judicial creativity in wrongful death litigation. Cases support an implication that this legislative silence indicates an intention to leave the law as \textit{Steed} states: legislative occupation of the field. \textit{See, e.g.}, Bailey v. Superior Court, 19 Cal. 3d 970, 558 P.2d 394, 140 Cal. Rptr. 669 (1977). This determination of intent through legislative silence is not seriously presented, however, because California vacillates between \textit{Bailey} and the view that legislative si-
\end{itemize}
The argument presented above shows that the California legislature has occupied the field of wrongful death and precluded common law expansion to include cohabitants in the class of eligible plaintiffs. However, a technical argument detached from public policy is of limited value. Therefore, policy considerations are presented supporting denial of the remedy's expansion. Not only are the Marvin court's underlying assumptions erroneous, but practical considerations, social philosophy, and general tort principles militate against recognizing the cohabitant's wrongful death claim.

The Marvin Court's Erroneous Assumptions

The Marvin court makes two basic assumptions about cohabitation which lead to its legitimization of the lifestyle: the prevalence of cohabitation and the beneficial long-run effect on marriage of trial cohabitation periods. Empirical research refutes these underlying assumptions. Census data reveals that despite a twofold increase in cohabitation during the last decade, the number of cohabitants "represent a very small portion [2.7 percent] of all persons in 'couple' situations." Whereas some scholars predict that cohabitation will increase, others suggest that changed attitudes towards marriage are only a temporal response to the permissiveness of the 1960's and early 1970's. Whatever the future, 2.7 percent does not reflect a "prevalent" lifestyle which the judiciary should feel compelled to recognize.

Sociological research contradicts the Marvin court's assumption about the beneficial incidents of cohabitation. A 1977 study found that cohabitation was not a more effective mate selection device than traditional courtship patterns. Moreover, several potentially negative consequences of cohabitation have been identified. One recent project reports that 63 percent of cohabitation is not indicative of legislative intent. See, e.g., People v. Daniels, 71 Cal. 2d 1119, 1127 n.4, 459 P.2d 225, 229 n.4, 80 Cal. Rptr. 897, 901 n.4 (1969).

87. Marvin v. Marvin, 18 Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.
ing couples marry (usually not each other) or separate within two years. Furthermore, after learning that males generally enter cohabitation seeking only sexual gratification while females generally are motivated by marriage desires, one researcher concludes that females are at greater psychological risk in cohabitation relationships. This data, unexplored in Marvin, suggests that the state need not feel compelled to legitimize cohabitation by equating it with marriage in a wrongful death context.

Practical Problems

Practical problems arise if wrongful death actions are extended to cohabitants. Unless a cause of action is to be granted to participants in every living arrangement of any duration, courts must distinguish sufficiently long-lasting relationships from fleeting ones. Such distinctions are anything but precise. For example, recent English case law suggests that twenty-one years of cohabitation is sufficient permanence, but that five years is not. In a 1980 American case, a thirty-year relationship qualified a cohabitant's loss of consortium claim. The court recognized the difficulty and futility in attempting any definition of the requisite permanence, and ended the opinion relying on future attorneys to make the distinction and to avoid frivolous claims. Worse yet, marriage and cohabitation may exist simultaneously; one cohabitant may be married to a third person. Granting the wrongful death action would present courts with a conflict between cohabitant and the legal spouse. Under the statute, the court must weigh the relative claims of the heirs. If the tortfeasor's assets are limited, a choice between cohabitant and spouse must be made. "Both cannot be afforded any more than can polygamy."


94. Newcomb, supra note 89, at 599.

95. Twenty-one years was sufficient to consider the surviving cohabitant a member of the decedent's family in Dyson Holding v. Fox, 3 All E.R. 1030 (1975), cited in Freeman & Lyon, Towards a Justification of Rights of Cohabiters, 130 New L.J. 228, 228 (1990).

96. Freeman & Lyon, supra note 95, at 228.


98. Deech, The Case Against Legal Recognition of Cohabitation, 29 Int'l &
The statement that granting a wrongful death cause of action to a cohabitant will lead to a loss of liberty probably sounds like an overstatement to many; however, such loss is probable. Already Marvin is used to extend legal equivalence between spouse and cohabitant. An innovative court might also rely on California Government Code section 12955 to further attach legal significance to cohabitation. Foreseeably, a decision equating cohabitation with marriage in wrongful death will itself become a springboard to further legal interference with cohabitation. The problem with this is that, as state intervention increases, an individual's freedom to engage in a relationship free from governmental control ceases. Liberty is lost when choice is destroyed; choice is destroyed when cohabitation becomes marriage-like because only one type of relationship remains where two types existed before. Denial of legal equivalence between cohabitant and spouse is necessary to end the post-Marvin trend and to preserve privacy. Liberty, of course, is seldom without cost; unfortunately, the occasionally harsh result accompanying denial of the cohabitant's claim is the price exacted.

Tort Principles—Damage Limitation

California tort law generally is concerned with loss compensation and distribution. These principles, standing alone, might require that a cohabitant be accorded a wrongful death recovery.


100. See supra note 5 and accompanying text.

101. See supra note 4.

102. Statutes may represent broad policy objectives to be integrated into the common law much like a set of prior judicial decisions. The cited statute may represent a policy of equating cohabitation with marriage in limited circumstances and may be used by a court to rationalize further expansion. See Landis, Statutes and the Sources of Law, in Harvard Legal Essays 213 (1934).


104. "Privacy" denotes an area of thought and action free from governmental interference. Deech, supra note 98, at 480.

However, a competing policy consideration, damage limitation, also finds expression in California case law and supports denial of wrongful death actions to the unmarried partner.  

In *Dillon v. Legg*, the California Supreme Court explained that the critical question in limiting a tortfeasor’s liability was the concept of foreseeability. The *Dillon* court concluded that a negligent driver who strikes a child may reasonably foresee that the mother will witness the incident and suffer emotional distress. In *Rodriguez v. Bethlehem Steel Corp.*, the court relied on *Dillon* to grant a spouse’s loss of consortium claim. The *Rodriguez* court used 1972 census data showing that up to 89.7 percent of American men were married to conclude that one “may reasonably expect that the injured person is married and that his or her spouse will be adversely affected . . . .” Of course, census data alone does not determine foreseeability; however, the chasm between *Rodriguez*’s 89.7 percent and the 2.7 percent cohabitant rate is substantial enough to suggest that a tortfeasor may not reasonably foresee an injured cohabitant.  

Another damage limitation approach has been termed the “family damages doctrine.” It reduces tort system cost by diminishing total family awards. This approach operated in *Borer v. American Airlines* to preclude a parent-child loss of consortium claim in spite of *Rodriguez*’s spousal consortium holding. The *Borer* court emphasized that social policy, not logic and sympathy, must limit liability: “We cannot ignore the social burden of providing damages . . . . Realistically the burden of payment . . . must be borne by the public . . . .” *Borer* limited total family damages because the injured member retained a cause of action. “[T]he family as an economic unit suffered a reduction, but not an elimination of damages.”

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112. *Id.* at 447, 563 P.2d at 362, 138 Cal. Rptr. at 306.

113. Levy & Ursin, *supra* note 106, at 524. Other cases expressing this damages approach are Steed v. Imperial Airlines, 12 Cal. 3d 115, 524 P.2d 801, 115 Cal. Rptr.
The justification found in Borer is similarly applicable to the cohabitant's wrongful death claim. One-fourth of all cohabitating couples have children living in the household.114 Because the wrongful death statute provides a remedy for any dependent minor, the "family" will enjoy some recovery in these cases; damages are merely diminished, not eliminated. This result also finds support in Steed, in which the court noted that its seemingly harsh denial of the stepchild's claim was mitigated by the mother's wrongful death recovery.115

The "family damages" approach is inapplicable to the remaining nonchild cohabitant cases; however, the policy suggested in Walters v. Sloan116 supports denial in these circumstances. In Walters, the court held that firefighters and police officers could not recover for negligently inflicted injuries suffered on the job. The court's focus on special disability benefits awarded to these injured workers implies that plaintiffs may be denied tort recovery when sufficient compensation from other sources is perceived.117 Insurance benefits and testamentary provisions supply a recovery that can be deemed sufficient in light of the other considerations militating against the cohabitant's claim. Those who see only injustice when a surviving cohabitant has neither of these benefits are reminded that all human activity involves costs. Having chosen the benefits of an unregulated relationship, the cohabitant must also shoulder its costs.

CONCLUSION

The California legislature has excluded cohabitants from wrongful death suits. Although the Moragne decision invites courts to expand wrongful death actions, an analysis of California's statute reveals that its legislature has occupied the field and that its judiciary is powerless to expand the cause of action. Technical justifications, unarticulated in Justus, support that court's holding whether the criteria be general rules of statutory interpretation, the Moragne guidelines, or analogies to other cases. Additionally, public policy is best served by California's

115. 12 Cal. 3d at 126, 524 P.2d at 808, 115 Cal. Rptr. at 336; see Levy & Ursin, supra note 106, at 525.
117. Levy & Ursin, supra note 106, at 530.
continued adherence to its exclusion of cohabitants from wrongful death actions.

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