1-1-1981

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The Rights of Meretricious Spouses To Wrongful Death Actions

The insistence on adherence to an older morality as the key to the courtroom was discarded shortly after the close of the Spanish Inquisition and is clearly not the law of this state.¹

Judge Poché

Meretricious spouses² traditionally have been denied the same legal rights and benefits as married couples. Yet, in recent years the California Legislature and judiciary have become increasingly concerned with the rights and privileges of the meretricious spouse. In the fields of housing,³ credit for housing,⁴ family relations,⁵ and contracts,⁶ legislative and judicial actions have tended to equalize the legal rights of meretricious couples with those of their married counterparts.⁷ In California, however, the wrongful death action has not been extended to the meretricious spouse for the death of his or her partner.

The rationale for the denial of the wrongful death action to the meretricious spouse is primarily based on a determination by the California Supreme Court that the California Legislature intended to preclude ju-

². The meretricious spouse traditionally has been defined as one who illicitly cohabits with another with knowledge that the relationship does not constitute a valid marriage. See Comment, Rights of the Putative and Meretricious Spouse in California, 50 CALIF. L. REV. 866, 873 (1962). Couples maintain meretricious relationships for a variety of reasons. A young couple may forego marriage until one of them is financially able to support adequately the other. An elderly couple may forego marriage because of a reduction or termination of retirement or death benefits without which they cannot afford to live. A couple may view the meretricious relationship as a trial period preceding marriage. Any of these reasons, or others, may induce a couple to enter into a meretricious living arrangement. See generally Comment, Illicit Cohabitation: The Impact of the Vallera and Keene Cases on the Rights of the Meretricious Spouse, 6 U.C.D. L. REV. 554, 554 (1973).
⁴. See CAL. GOV'T CODE §12955(e).
⁷. See generally Loss of Consortium, supra note 3, at 139-42.
dicial extension of the wrongful death remedy.\(^8\) A recent California Court of Appeal decision and two federal court decisions have cited this determination as the basis for denying the wrongful death remedy to a meretricious spouse under California law.\(^9\) The California Supreme Court, however, has not specifically decided the rights of a meretricious spouse under the wrongful death statute.\(^10\) Thus, the possibility of judicial extension of the wrongful death remedy to the meretricious spouse has not been foreclosed.\(^11\)

The federal court decisions applying California law have resulted in discrimination against and harsh treatment of the meretricious spouse.\(^12\) These courts have differentiated the meretricious spouse and married spouse by excluding the meretricious spouse from the class of persons entitled to bring an action for wrongful death.\(^13\) Since the only difference between the two types of spouses may be the lack of participation in a formal ceremony by the meretricious spouse, the state interests in requiring a marriage ceremony should be weighed against the harsh effects resulting from such a distinction.\(^14\)

The thesis of this comment is that the California courts should extend the wrongful death remedy to the meretricious spouse. This com-

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10. The California Supreme Court denied an appeal from a California Court of Appeal decision that held the meretricious spouse of a decedent is not an heir who may bring an action for wrongful death under the wrongful death statute. See Harrod v. Pacific Southwest Airlines, Inc., 118 Cal. App. 3d 155, 173 Cal. Rptr. 68 (1981) (A petition to have the cause heard in the supreme court after judgment in the district court of appeal was denied by the supreme court on July 29, 1981).

11. There is no jurisdiction in the United States that provides a wrongful death remedy for persons who merely cohabit. See generally Annot., 31 A.L.R.2d 1255 (1955). Even jurisdictions that recognize common law marriage do not provide a wrongful death remedy for merely living together with a member of the opposite sex. See id. at 1277-81. The Pennsylvania Supreme Court defined common law marriage by stating that

> marriage is in law a civil contract, and does not require any form of solemnization before officers of a church or state, but it must be evidenced by words in the present tense, uttered with a view and for the purpose of establishing the relation of husband and wife. . . .

Commonwealth v. Stump, 53 Pa. 132, 136 (1866). Other states require cohabitation, consummation, reputation as husband and wife, and assumption of marital duties. See generally 55 C.J.S. Marriage §22(b), at 850-55 (1948). California allows only the putative spouse to enjoy the equitable results achieved in common law marriage jurisdictions.

For purposes of the wrongful death statute, a putative spouse is 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. See Kunakoff v. Woods, 166 Cal. App. 2d 59, 63, 332 P.2d 773, 775 (1958); CAL. CIV. PROC. CODE §377(b)(2). See generally 32 CAL. JUR., Family Law §27, at 53-54 (3d ed. 1977).


ment will analyze both the origins and histories of the common law rule denying a right of recovery for wrongful death and the California wrongful death statute. The analyses will establish that there was never any logical basis for the common law rule precluding an action for wrongful death and that the determination by the California Supreme Court that the California Legislature intended to occupy the field of wrongful death recovery is erroneous. This comment will then examine the inequitable results that are caused by a denial of the wrongful death remedy to the meretricious spouse. This examination will show that the harsh consequences outweigh the policy justifications supporting the denial of the wrongful death remedy to the meretricious spouse. This examination will be followed by a discussion of two methods the California courts can use to extend the wrongful death action to the meretricious spouse. Finally, the comment will conclude that the California courts have the power and the duty to include the meretricious spouse in the class of persons entitled to maintain an action for wrongful death.

Repudiation of the Common Law Rule Denying a Cause of Action for Wrongful Death

The denial of a cause of action in wrongful death for a meretricious spouse is primarily based on the old common law rule prohibiting such a remedy for any person. California courts, however, can judicially extend the existing statutory remedy by holding that: (1) subsequent developments have completely reversed the common law rule; and (2) the California wrongful death statute was not intended by the legislature to serve as the sole means of recovery. Initially, this comment will examine the origin and history of the common law rule denying a

15. Although it is beyond the scope of this comment, a third argument has been advanced for the judicial extension of the wrongful death remedy to the meretricious spouse: the Wrongful Death Act's exclusion of meretricious spouses is a denial of equal protection of the laws. The California Court of Appeal concluded that:

The Legislature may decide who is entitled to sue for wrongful death, and its determination must be upheld if it is rationally related to the legitimate state purpose of placing reasonable limits on the right to recover for wrongful death. [citations omitted]. The exclusion of a decedent's meretricious spouse from the class of persons entitled to sue for wrongful death is a reasonable limitation by the Legislature on a right it has created. The Legislature could reasonably conclude a relationship which the parties have chosen not to formalize by marriage lacks the necessary permanence to allow the survivor to recover damages for wrongful death-damages which look to the future and are intended to compensate for future loss. In addition, an action based on a meretricious relationship presents greater problems of proof and dangers of fraudulent claims than an action by a spouse or putative spouse. Finally, the exclusion of meretricious spouses is reasonably related to the state's legitimate interest in promoting marriage. [citations omitted].

cause of action for wrongful death to demonstrate that no logical justifications exist for perpetuating the common law rule.

A. Historical Reasons for the Common Law Rule

In the 1808 case of Baker v. Bolton, Lord Ellenborough stated that "[i]n a civil Court, the death of a human being could not be complained of as an injury. . . ." The ruling by Lord Ellenborough, issued without citing authority, originated the common law rule denying a right of recovery for the tortious death of a human being.

Three arguments were used to perpetuate the common law rule. First, a civil suit for wrongful death was considered precluded by the common law doctrine of merger. Second, the courts believed that a pecuniary value could not be placed on human life. Third, personal actions were believed to die with the decedent. These three arguments, however, are presently inadequate to persuade a court to deny a civil action for tortious death.

In early English law, a homicide was regarded more as a criminal offense against the state than as a civil offense. Since "negligence," in its modern sense, did not exist at that time, almost every accidental killing was a criminal homicide. The punishment for criminal homicide included the forfeiture of the defendant's property to the Crown. To permit subsequent civil actions for judgments that could never be satisfied would have been an empty action. The justifications for the merger rule in England, however, never existed in the United States. Forfeiture of property was never made a form of felony punishment in

17. Id.
18. See id.
25. See Speiser, supra note 19, §1:2, at 6 & nn.5 & 6.
this country. The assets of a defendant always have been available to satisfy a civil judgment for damages in the United States, and it is not infrequent for one act to give rise to both criminal and civil liability.

In their efforts to rationalize the denial of a civil action for tortious death, the American courts explained that the idea of compensating for the loss of human life in money was "revolting." In addition, the courts stated that "[t]he impossibility of calculating the pecuniary value of a life is a sufficient reason for denying recovery in wrongful death actions." These arguments lose much of their force when it is realized that they were advanced after Lord Campbell's Act created a right of action for wrongful death in England. Thus, courts were already assessing damages for these injuries. Furthermore, calculation of the loss sustained by the dependents or the estate of the deceased under present wrongful death statutes is no more difficult than calculation of damages for many non-fatal personal injuries. Compensating for loss of human life in dollars, therefore, is no longer a revolting nor an impossible task.

The courts also have suggested that the prohibition of a civil action for tortious death derived support from the maxim actio personalis moritur cum persona; that is, that personal actions are extinguished with the death of a decedent. The principle is now universally recognized as pertaining only to the personal claims of the decedent and has no bearing on whether a person, other than the decedent, should be permitted to recover for pecuniary loss suffered as a result of the tortious death of the decedent. Thus, the explanations by the courts do not support a denial of a common law remedy for wrongful death. The common law rule has been called "barbarous" by some commentators and criticized severely by most. Although many courts have voiced their disapproval

28. See id. at 384.
29. See Hyatt v. Adams, 16 Mich. 180 (1867); SPEISER, supra note 19, §1:4, at 12 & n.29.
31. Lord Campbell's Act, 1846, 9 & 10 Vict. c. 93.
32. See SPEISER, supra note 19, §1:4, at 12.
33. 398 U.S. at 385; see Hollyday v. The David Reeves, 12 F. Cas. 386, 388 (Case No. 6,625) (D.C. Md. 1879); Green v. Hudson River R.R. Co., 28 Barb. 9, 17-18 (N.Y. 1858).
35. See notes 23-35 and accompanying text supra.
38. Dean Prosser concluded that the common law rule made it "more profitable to kill the
of the rule, they have nevertheless continued to apply it. In fact, it was not until 1970 that the United States Supreme Court disputed the historical justifications for the denial of the existence of a common law cause of action for wrongful death.

B. The Moragne Decision—Rejection of the Common Law Rule

In Moragne v. States Marine Lines, the United States Supreme Court recognized a common law cause of action for wrongful death in general maritime law. Justice Harlan, in his majority opinion, reached the following conclusions concerning the historical basis for the common law rule: (1) the continued denial of a cause of action for wrongful death in the United States was based on a set of factors that had "long since been thrown into disregard even in England;" (2) American courts have failed to produce any satisfactory justification for the common law rule; and (3) "[t]he most likely reason the English rule was adopted in the United States without much question is simply that it had the blessing of age." Once the historical basis for the common law rule was nullified, the Court held that a civil action for wrongful death could exist in the absence of congressional intent to occupy the field of recovery.

The Moragne Court cited numerous federal and state statutes that permit recovery for wrongful death and asserted that the statutes evidenced "a wide rejection by the legislatures of whatever justifications may once have existed for a general refusal to allow such recovery." The Court found "no present public policy against allowing recovery for wrongful death." Furthermore, the Court declared that the legis-
lative establishment of policy carries significance and is given weight not only in matters of statutory construction but also in those of decisional law. The Court recognized that it is the duty of the judiciary to recognize the significance of major legislative innovations and to incorporate "the new legislative policies into the inherited body of common law principles—many of them deriving from earlier legislative exertions." Professor Landis, quoted in Moragne, noted that "much of what is ordinarily regarded as 'common law' finds its source in legislative enactment." Thus, the Court held that a judicially created remedy for wrongful death exists under general maritime law in the absence of legislative intent to occupy the field of recovery. The common law rule denying a cause of action for wrongful death was abrogated.

The Court, in determining whether the legislature has evidenced an intent to occupy the field of recovery, used the following test:

The legislature does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical. The conclusion is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations. . . . On the other hand, the legislature may, in order to promote other, conflicting interests, prescribe with particularity the compass of the legislative aim, erecting a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation.

In addition, the Court stressed that there must be an "affirmative" indication of legislative intent to occupy the field to preclude judicial initiative in wrongful death actions.

An application of this test led the Court to conclude that Congress has not evidenced an affirmative intent to preclude judicial development in the field of recovery for tortious death. The Moragne Court thoroughly analyzed the pattern of congressional enactments con-

50. See id. at 390-91.
51. See id. at 392.
53. See 398 U.S. at 393 (emphasis added).
54. 398 U.S. at 392 (emphasis added). Professor Landis stated that "[a] course of legislation dealing continuously with a series of instances can be made to unfold a principle of action as easily as the sporadic judgments of courts." Landis, supra note 52, at 222. See generally Landis, supra note 52, at 215-16, 220-22.
55. See 398 U.S. at 393.
56. See id. at 393, 402.
57. See generally id. at 393-403.
cerning wrongful death actions in maritime law and found that the federal legislation was intended to ensure the availability of a cause of action for wrongful death in territorial waters. For example, the Court held that the Death on the High Seas Act was specifically designed not to preempt the entire field. Thus, a common law remedy for tortious death was recognized by the United States Supreme Court.

The Supreme Judicial Court of Massachusetts, in Gaudette v. Webb, followed the Moragne analysis and held that the wrongful death remedy is of common law origin. The Gaudette court noted the lack of any discernible basis for the common law doctrine of Baker v. Bolton and the harsh results it frequently produced. After considering the Moragne decision and its reasoning, the Gaudette court concluded that in Massachusetts the right to recover for tortious death was derived from the common law.

C. The California Response to Moragne

In 1977, with Justus v. Atchison, the California Supreme Court denied the parents of an unborn fetus an action for wrongful death. The court based its refusal to extend the remedy on its determination that the California Legislature intended to occupy the field of recovery for wrongful death. The denial of the extension of the remedy to parents of an unborn fetus may have been justified on other grounds.

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58. See id. at 397.
60. See 398 U.S. at 398.
61. See id. at 393.
63. See id. at 71, 284 N.E.2d at 229.
64. See notes 16-19 and accompanying text supra.
65. See 362 Mass. at 69, 284 N.E.2d at 228.
67. See 362 Mass. at 71, 284 N.E.2d at 229.
69. See id. at 580, 565 P.2d at 132, 139 Cal. Rptr. at 107.
70. See id. at 575-79, 565 P.2d at 129-32, 139 Cal. Rptr. at 104-07.
71. Justice Tobriner, in his concurring opinion, suggests that the denial of a cause of action for the wrongful death of a fetus could have been based on the California Supreme Court's decision in Borer v. American Airlines, Inc., 19 Cal. 3d 441, 563 P.2d 858, 138 Cal. Rptr. 302 (1977). See 19 Cal. 3d at 586-87, 565 P.2d at 137, 139 Cal. Rptr. at 112. In Borer, the primary reason for the denial to a child of a cause of action for the loss of consortium of an injured parent was the court's recognition that "social policy must at some point intervene to delimit liability." 19 Cal. 3d at 446, 563 P.2d at 861, 138 Cal. Rptr. at 305. The court explained: Loss of consortium is an intangible, nonpecuniary loss; monetary compensation will not enable plaintiffs to regain the companionship and guidance of a mother; it will simply establish a fund so that upon reaching adulthood, when plaintiffs will be less in need of maternal guidance, they will be unusually wealthy men and women... In reality they have suffered a loss for which they can never be compensated; they have obtained, instead, a future benefit essentially unrelated to that loss.
We cannot ignore the social burden of providing damages for loss of parental consor-
but the rationale underlying the decision requires examination.

The Atchison court accepted the test for determining legislative intent used in Moragne. Accordingly, two alternatives could characterize the creating and amending of the wrongful death statute enacted and amended by the California Legislature: the legislature intended to enunciate a general policy, allowing the courts to determine specific applications or the legislature intended to regulate the entire field of recovery for wrongful death, allowing the courts no room for modification. A very brief analysis of the legislative history of the wrongful death statute led the court to conclude that the legislature intended to “occupy the field of recovery” for wrongful death. In support of its position, the court stated:

Whether or not the belief [that the common law denied a cause of action for wrongful death] was well founded, it was so widely held that we must presume the legislature acted upon it. Accordingly, their intent in adopting the 1862 statute, and its successor section 377, was manifestly to create an entirely new cause of action where none was thought to exist before.

In addition, the court briefly noted that the California statute was available to remedy a broad spectrum of tortious conduct, in contrast with the limited scope of the federal wrongful death acts analyzed in Moragne. Furthermore, the court emphasized that the legislature had amended the wrongful death statute numerous times, regulating the remedy in increasing detail. The court went on to state that “[i]n
these circumstances we are persuaded that the legislature intends to occupy the field of recovery for wrongful death."\(^8\) The court concluded, for these reasons, that "the remedy remains a creature of statute in California,"\(^8\) and therefore the cause of action for wrongful death "exists only so far and in favor of such person as the legislative power may declare."\(^8\) Thus, the California Supreme Court, though unable to attack the soundness of the reasoning in \textit{Moragne},\(^8\) refused to extend a common law remedy to parents for the wrongful death of their stillborn fetus.

\section*{Statutory Construction of California's Wrongful Death Action}

The \textit{Moragne} court held that a common law cause of action for wrongful death exists in the absence of an affirmative legislative intent to occupy the field of recovery.\(^8\) The \textit{Atchison} court adopted the \textit{Moragne} test\(^8\) but determined that the legislature had given an affirmative indication of its intent to occupy the field.\(^8\) This determination was used by the courts in their refusal to extend the wrongful death action to the meretricious spouse.\(^8\) If the determination of legislative intent in \textit{Atchison} is found to be erroneous, the California Supreme Court could grant meretricious spouses the right to recover in wrongful death actions. Consequently, it is necessary to examine the \textit{Atchison} decision and the legislative developments in the field of wrongful death recovery in California.

\subsection*{A. Legislative History of the California Wrongful Death Statute}

Although the result in \textit{Atchison} could have been justified on other grounds,\(^8\) the court based the denial of a common law remedy for wrongful death on its analysis of legislative intent.\(^8\) A closer analysis of the history and policy of the California statute reveals that the \textit{Atchison} court's interpretation of legislative intent is erroneous. An exami-

\begin{itemize}
  \item 80. \textit{Id.} at 575, 565 P.2d at 129, 139 Cal. Rptr. at 104.
  \item 81. \textit{Id.}
  \item 82. \textit{Id.} (quoting \textit{Pritchard v. Whitney Estate Co.}, 164 Cal. 564, 568, 129 P. 989, 992 (1913)).
  \item 83. \textit{See id.} at 573, 565 P.2d at 128, 139 Cal. Rptr. at 103.
  \item 84. \textit{See notes} 42-55 and accompanying text \textit{supra}.
  \item 85. \textit{See note} 72 \textit{supra}.
  \item 86. \textit{See notes} 72-82 and accompanying text \textit{supra}.
  \item 88. \textit{See note} 71 \textit{supra}. The wrongful death of a fetus is a wholly intangible injury and monetary recovery can provide no real compensation. Consequently, a new cause of action for the wrongful death of a fetus should not be recognized. \textit{See 19 Cal. 3d} at 586, 565 P.2d at 156, 139 Cal. Rptr. at 111 (Tobriner, J., concurring).
  \item 89. \textit{See notes} 72-82 and accompanying text \textit{supra}.
\end{itemize}
nation of the legislative history of the wrongful death statute indicates that the California Legislature has gradually expanded the right of recovery under the statute to meet new situations and conditions.

Prior to 1968, the California wrongful death statute limited the right to bring an action for tortious death to the heirs of a decedent. In 1968, the California Legislature expanded the class of persons entitled to bring an action for wrongful death to include dependent parents of the deceased. The legislative action was a belated cure for results similar to those reached in Evans v. Shanklin. In Evans, the court denied the dependent mother of a decedent the right to a wrongful death remedy, although the decedent had been under a statutory duty to provide for her. The amendment enabled dependent parents, who survive the tortious death of their child, to obtain those benefits likely to accompany the parent-child relationship. The 1968 amendment is evidence of the recognition by the California Legislature of the close financial and emotional bonds between parent and child.

In 1975, the wrongful death statute was amended to expand further the class of persons entitled to bring a wrongful death action. The 1975 amendment authorized the putative spouse who was dependent on the decedent, dependent children of the putative spouse, and dependent stepchildren of the decedent to bring an action for tortious death. The inclusion of the putative spouse of the decedent in the class of persons entitled to bring the action reflects the acceptance by the legislature of the holding in Kunakoff v. Woods. In Kunakoff, the court allowed a putative spouse, who qualified as an heir under the laws of intestate succession, to be considered an heir for purposes of the wrongful death statute.

The 1975 amendment also extended the wrongful death remedy to children of the putative spouse who were dependent on the decedent.

90. The heirs of a decedent are those entitled to succeed at death to the estate of the decedent in case of intestacy. See Dickey v. Walrond, 200 Cal. 335, 253 P. 706 (1927); In re Estate of Riccomi, 185 Cal. 458, 197 P. 97 (1921); Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547 (1899). See generally CAL. PROB. CODE §§200-258 (succession).
92. A dependent is an individual over one-half of whose support was received from the taxpayer. See I.R.C. §152(a); CAL. REV. & TAX. CODE §17056.
95. See 16 Cal. App. 2d at 362-63, 60 P.2d at 556; CAL. CIV. CODE §206 (duty of support).
and to dependent stepchildren of the decedent. There is no requirement that the children of the putative spouse be related in any way to the decedent or qualify as an heir under the California Probate Code. The inclusion of the dependent stepchildren of the decedent in the class was intended to alter the rule in Steed v. Imperial Airlines. The court, in Steed, held that the dependent stepchild of the deceased could not bring an action for wrongful death because she was not an heir under the statutory rules of intestate succession.

In 1977, the California Legislature amended the Code of Civil Procedure to include, within the class of persons who may maintain an action for wrongful death, minors who resided in the household of the decedent at the time of, and 180 days previous to, the death of the decedent and who were dependent upon the decedent for at least one-half of their support. The minors need not be related to the decedent to bring the wrongful death action. The intent of the legislature in enacting the 1977 amendment was apparently to protect economically and emotionally dependent minors, who do not qualify as heirs, from any injustice resulting from their inability to bring an action for the wrongful death of decedents from whom they previously had received support.

In summary, the California Legislature has amended the wrongful death statute three times since 1967, authorizing five new categories of persons to maintain an action for tortious death. The 1968 amendment was a legislative response to the court's refusal in Evans to extend the wrongful death action to dependent parents. The 1975 amendment was an express rejection of the refusal by the Steed court to extend the cause of action to dependent stepchildren and an acceptance of the decision by the court in Kunakoff to extend the remedy to putative spouses. In addition, by allowing recovery for children of a putative spouse who are dependent on the decedent, the 1975 amendment manifests the legislature's intent to discard a test based

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100. See Cal. Stats. 1975, c. 1241, §5.5, at 3189-90.
101. See id. See note 90 supra.
103. See 12 Cal. 3d at 122-23, 524 P.2d at 805-06, 115 Cal. Rptr. at 333-34.
107. See notes 90-106 and accompanying text supra.
108. See notes 92-95 and accompanying text supra.
109. See notes 102-103 and accompanying text supra.
110. See notes 98-99 and accompanying text supra.
111. See notes 100-101 and accompanying text supra.
solely on heirship to qualify for recovery under the statute. This intent is further evidenced by the extension of the remedy, pursuant to the 1977 amendment, to minors residing with the decedent who were dependent on the decedent for over one-half of their support.

Since dependent stepchildren, dependent children of putative spouses, and "dependent minors" may have no established legal relationship with the decedent, the legislature apparently has supplemented the "heirship" test with an "injury" test. In Steed, the court stated:

It seems without dispute that the class of those who suffer the greatest loss upon a wrongful death are the heirs of the deceased. Heirs are those who, as a class, stand in the closest relationship to a deceased. This is not to say that in all instances persons who are not in the class may not suffer equal or greater losses than some who are within the class, but the Legislature is not compelled to anticipate and provide for such persons.

In view of the rapid legislative response to Steed, it is apparent that the wrongful death action is intended to be used by those who are in a close relationship with the decedent and are injured by the decedent's death. The meretricious couple, by definition, is a family relationship. The close emotional and financial bonds that normally attend a family relationship are no less injured by virtue of the lack of participation by the couple in a formal marriage ceremony.

B. The Determination of Legislative Intent

In Atchison, the California Supreme Court acknowledged that the determination of legislative intent should be made by applying the Moragne test. In support of its determination that the legislature intended to occupy the field of recovery for wrongful death, the Atchison court stressed that the legislature had amended the statute numerous times, "regulating the remedy in ever greater detail." In addition, the court found that the California Legislature structured the wrongful death statute to be generally applicable to a variety of situations, in contrast with the limited scope of the wrongful death legislation reviewed in Moragne.

113. See notes 104-106 and accompanying text supra.
116. See note 2 supra.
117. See notes 72-73 and accompanying text supra.
118. See note 79 and accompanying text supra.
119. See notes 77-79 and accompanying text supra.
The frequent legislative amendments which "regulate the remedy in ever greater detail" do not support the determination of legislative intent by the Atchison court. The test used in Moragne specified that when the scope of a statute reflects "nothing more than the dimensions of the particular problem that came to the attention of the legislature," the courts are invited to apply legislative policy to situations in which the injury is identical. The Moragne court further explained that this invitation "is reinforced where there exists not one enactment but a course of legislation dealing with a series of situations." In its analysis of the legislative history of the California Wrongful Death Act, the court ignored the statement of legislative intent in the 1975 amendment; the amendment clearly expressed that the extension of the remedy to dependent stepchildren was a direct response to the holding in Steed. This 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." Other legislative extensions of the remedy, such as the putative spouse, dependent children of the putative spouse, dependent parents, and dependent minor children, evidence a "course of legislation dealing with a series of situations." The Atchison court failed to recognize that these enactments evidence a general policy allowing recovery when the injury is similar to those already covered by the statute. Justice Burke, dissenting in Steed, stated:

In my view, the [1968] amendment illustrates a legislative policy to permit such actions by all persons who have incurred damages substantially identical to those incurred by decedent's heirs at law.

That statute cannot have the effect of excluding persons . . . who suffer an injury from decedent's death that is both emotionally and economically indistinguishable from that suffered by a natural child.

The dissent by Justice Burke takes on added significance in view of the rapid legislative response that is in accord with his opinion.

120. See note 54 and accompanying text supra.
121. See note 54 and accompanying text supra.
122. See note 54 and accompanying text supra.
124. See CAL. STATS. 1975, c. 334, §2, at 784.
126. See notes 88-116 and accompanying text supra.
127. See notes 90-95 and accompanying text supra.
129. See note 115 supra.
The Moragne test also included a provision requiring the existence of an affirmative indication of intent to preclude judicial extension of the remedy.\textsuperscript{130} Even if the California Supreme Court was unable to discern a specific legislative policy from its analysis of the legislative history of the Wrongful Death Act, it is difficult to perceive how the court satisfies the “affirmative indication” aspect of the Moragne test. There is no express indication in the statute that the legislature intends to occupy the field of recovery.\textsuperscript{131} In addition, the lack of an indication of implied intent to preclude judicial extension of the remedy makes it especially difficult to discern any compliance with the “affirmative indication of intent” requirement of the test. Moreover, even if implied intent could satisfy the affirmative intent requirement, the pattern of legislative enactments evidences an implied intent to allow the judiciary to grant the remedy to persons who incur damages similar to those actionable by persons currently entitled to maintain a wrongful death action.\textsuperscript{132} Justice Tobriner concurred in the result reached by the majority in Atchison but not in the majority’s reasoning.

I am unable to divine an affirmative legislative intent to preclude further judicial development. I find nothing in the statute or its history which anticipates and forbids the evolution of recovery for wrongful death into a universally recognized right of common law status. Judicial expansion and refinement of legal concepts characterizes the common law—any legislative intent to foreclose such traditional judicial activity should require positive expression.\textsuperscript{133}

The Atchison court also relied on the “phrasing” of the California statute as support for its determination of legislative intent.\textsuperscript{134} The court, however, cited those portions of the statute detailing the categories of torts the legislature deemed actionable, not the classes of persons entitled to maintain an action.\textsuperscript{135} The availability of a wrongful death action for the benefit of an increasing number of categories of plaintiffs to remedy a broad spectrum of torts is the result of the continued amending of the statute by the California Legislature. Thus, the rationale of the court, in using the “phrasing” of the statute as support for the determination of legislative intent to preclude judicial expansion of the remedy to a new category of persons, is flawed.

In sum, a detailed examination of the legislative history of the California Wrongful Death Act reveals that the conclusion by the court in

\textsuperscript{130} See note 55 and accompanying text supra.
\textsuperscript{131} See CAL. CIV. PROC. CODE §377.
\textsuperscript{132} See notes 120-129 and accompanying text supra.
\textsuperscript{134} See id. at 574, 565 P.2d at 129, 139 Cal. Rptr. at 104.
\textsuperscript{135} See 19 Cal. 3d at 572 n.8, 574, 565 P.2d at 127 n.8, 129, 139 Cal. Rptr. at 102 n.8, 104.
Atchison is not well founded. The application of the Moragne test gives no indication that the California Legislature intends to preclude judicial extension of the wrongful death remedy to a new category of persons.\textsuperscript{136}

The practical effect of finding that the legislature has not manifested an intent to occupy the field is the potential for inclusion of the meretricious spouse within the class of persons entitled to bring wrongful death action. Before suggesting the methods the courts can use to allow the meretricious spouse to bring an action for wrongful death, this comment will examine the inequitable results that have been caused by a refusal to extend the wrongful death action to the meretricious spouse.

\section*{Denial of the Wrongful Death Action to the Meretricious Spouse}

Three federal courts applying California law have denied the wrongful death remedy to common law and meretricious spouses.\textsuperscript{137} The inequity of the current status of the law in California can be illustrated best by reviewing these cases.

In the 1976 case of \textit{In re Paris Air Crash of March 3, 1974},\textsuperscript{138} the federal district court denied the wrongful death remedy to the common law wives of persons who were killed in an airplane crash.\textsuperscript{139} California law was applicable to all issues in the \textit{Paris Air Crash} cases.\textsuperscript{140} Thus, common law wives effectively were denied any remedy for the tortious death of their spouses.

In the 1978 case of \textit{Vogel v. Pan Am. World Air-Ways, Inc.},\textsuperscript{141} the court denied a meretricious spouse the wrongful death remedy.\textsuperscript{142} The plaintiff in \textit{Vogel} was at one time married to the decedent. Shortly after a formal dissolution of marriage and up until the date of death of the decedent, plaintiff and decedent were living together in a meretricious relationship.\textsuperscript{143} The court granted the motion of defendant air carrier for summary judgment.\textsuperscript{144}

\textit{Aspinall v. McDonnell Douglas Corp.},\textsuperscript{145} decided in 1980, is the most

\begin{footnotesize}
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\item \textsuperscript{136} See notes 120-135 and accompanying text supra.
\item \textsuperscript{138} 420 F. Supp. 880 (C.D. Cal. 1976).
\item \textsuperscript{139} \textit{See} id. at 881-82.
\item \textsuperscript{140} \textit{See} id. at 881.
\item \textsuperscript{141} 450 F. Supp. 224.
\item \textsuperscript{142} \textit{See} id. at 227.
\item \textsuperscript{143} \textit{See} id. at 225.
\item \textsuperscript{144} \textit{See} id. at 227.
\item \textsuperscript{145} 625 F.2d 325 (9th Cir. 1980).
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striking example of the inequity in the law of recovery for wrongful death in California. In *Aspinall*, the appellant brought an action to recover for the death of her meretricious spouse.146 At the time of his death, the decedent had no collateral heirs147 and his parents were deceased.148 The couple had lived together in England in the roles of husband and wife for over four years and the decedent left his entire estate to appellant by will.149 Except for a small pension, the decedent had constituted the sole support of appellant and her children during the meretricious relationship.150 The court held that neither the appellant, as a common law wife under the laws of England, nor her children151 had standing to maintain an action under the California Wrongful Death Act.152

In the 1981 case of *Harrod v. Pacific Southwest Airlines, Inc.*,153 the court denied a meretricious spouse the wrongful death remedy.154 The plaintiff in *Harrod* had been living with the decedent for over one and one-half years and was engaged to be married to her. Plaintiff and decedent pooled their earnings and had agreed to share equally the property acquired during their relationship. About a month before the decedent’s death, they bought a house, taking title in both names; both contributed to the down payment, and each agreed to contribute to the mortgage payments.155 The court affirmed the trial court order dismissing the action.156

In *Paris Air Crash*, common law spouses of persons tortiously killed were denied the wrongful death remedy.157 These plaintiffs were married pursuant to the law of the jurisdiction in which they were residents. The court, however, looked to the participation by the plaintiffs in a conventional marriage ceremony158 and not to the reality of their relationships to the decedents. The court failed to recognize that the surviving meretricious spouses suffered the same injury and had the same expectations as a legally married person who had lost his or her spouse through tortious death.

146. See id. at 326.
147. See note 90 supra.
148. See 625 F.2d at 326.
149. See id.
150. See id.
151. When the cause of action arose, Section 377 of the California Code of Civil Procedure had not been amended to include, within the class of persons entitled to maintain an action for wrongful death, “dependent minors.” See notes 104-106 and accompanying text supra.
152. See 625 F.2d at 327-28.
154. Id.
155. Id. at 157, 173 Cal. Rptr. at 69.
156. Id. at 158, 173 Cal. Rptr. at 70.
158. See id. at 881.

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The pattern of legislation in the field of wrongful death evidenced the intent of the California Legislature to allow a cause of action if there exists an injury to the financial "bonds" of a family relationship. Since the only distinction between a legally married couple and a meretricious couple may be the lack of participation in a formal ceremony by the latter, it is unreasonable for the courts to deny the meretricious spouse a cause of action for wrongful death. In addition, the degree of stability of the family bonds created by a legally married couple are not per se more stable than those created by a meretricious couple. The greater than one million divorces granted in the United States in 1975 alone supports the conclusion that the expectations of continuing benefits of a meretricious spouse are not per se less reasonable than those of a formally married spouse.

Professor Weyrauch has identified two major policy reasons for the reluctance of legislatures and courts to grant property rights to meretricious couples. First, official recognition of cohabitation without satisfying the formalities of marriage would legitimatize promiscuity. Second, official recognition of unmarried cohabitators as well as unrecorded common law marriages results in confusion of public records and possible clouding of land titles.

A denial of the wrongful death remedy to a meretricious spouse based on its possible contravention of morality is no longer supported by California case law. The California Supreme Court, in Marvin v. Marvin, concluded that "[t]he mores of society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many." The Marvin court recognized that earlier court holdings equated the meretricious relationship with prostitution and that such a holding today would "do violence to an accepted and wholly different practice." In support of this position, the Marvin court indicated its awareness that from 1960 to 1970 there had been an 800% increase in the number of meretricious living arrangements.

159. See notes 91-116 and accompanying text supra.
161. See Weyrauch, supra note 14, at 88-89, 96-100.
165. See id. at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.
166. See Cal. 3d at 683, 557 P.2d at 122, 134 Cal. Rptr. at 831.
Furthermore, statistics compiled after the *Marvin* case was decided show that between 1970 and 1978 there has been a greater than 250% increase in the number of persons sharing living quarters with members of the opposite sex. If the California Supreme Court could admit on the basis of the statistics it had before it that the mores of society have so changed in regard to cohabitation, then the newer statistics ought to compel it to disregard completely the "fear of legitimatizing promiscuity" as a valid justification for refusing to extend an action for tortious death to the meretricious spouse.

The confusion of public records resulting from cohabitation with a member of the opposite sex is a valid argument for denying property rights to both common law and meretricious spouses. In addition, the public health and welfare objectives in requiring a health certificate as a condition precedent to a marriage license may be frustrated if physical examination can be evaded by entering into an informal relationship. Arguments such as these must be weighed against the harsh results which can befall parties who are denied any remedy at all because their union has not been conventionally solemnized.

Although the state may espouse a public policy promoting formalized marital relations, the social trend, as evidenced by both legislative and judicial action, is to recognize that marriage is no longer a prerequisite to legal rights and privileges traditionally granted to married

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171. See generally Weyrauch, *supra* note 14, at 109. The *Harrod* court, in holding that the wrongful death statute does not deny a meretricious spouse equal protection of the laws, expressed several policy considerations that could justify a legislature in placing such a limitation on the right to recover for wrongful death. See note 15 *supra*. The *Harrod* court, of course, proceeded on the premise that the California Legislature had expressed its intention to preclude judicial extension of the wrongful death remedy. Harrod v. Pacific Southwest Airlines, Inc., 118 Cal. App. 3d 155, 156, 173 Cal. Rptr. 68, 69 (1981). The issue arises, however, whether these policy considerations could be used to defeat the meretricious spouse's right to recover under legal theories other than equal protection.

Problems of proof and dangers of fraudulent claims should not prove too challenging to a judicial system that has been assessing the credibility of witnesses for over 200 years. If the term "meretricious spouse" is defined adequately, see note 2 *supra*, the "proof and fraudulent claims" problems should be no more difficult than other fact findings made by the courts. Moreover, neither the California Legislature nor the California courts have used these policy considerations to distinguish married spouses from meretricious spouses in the fields of housing, credit for housing, family relations, and contracts. See notes 3-6 and accompanying text *supra*. For a discussion addressing the "permanence of a relationship as necessary to recover for future damages" and the "state interest in promoting marriage" see notes 164-170 and accompanying text *supra*.

172. See notes 3-7 and accompanying text *supra*.  

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persons. The state cannot ignore the increasingly large percentage of the population that has chosen to live without the nuptial sanctions of the state. The state does have some interest in regulating marital relationships, however the current status of California law inflicts too harsh a punishment on the meretricious spouse. The policy justifications for denying the meretricious spouse a cause of action for wrongful death are either no longer applicable or substantially outweighed by their inequitable effects. Thus, the greater state interest lies in providing relief to persons injured by wrongful acts.

EXTENSION OF THE WRONGFUL DEATH REMEDY TO THE MERETRICIOUS SPOUSE

Once the barriers prohibiting the extension of the wrongful death action to meretricious spouses are overcome, the courts could grant the remedy through either of two means. First, the courts could create a common law remedy for wrongful death independent of the statutory remedy. In Atchison, the California Supreme Court acknowledged its duty to modify common law doctrine to keep pace with new conditions. The meretricious relationship has been already recognized by the court as an accepted and rapidly growing practice.

Alternatively, the courts could exercise their duty to construe the provisions of the Wrongful Death Act liberally and “with a view to effect its objects and promote justice.” The legislative purpose in imposing such a duty on the courts is to render the wrongful death statute susceptible of easy adaptation to promote justice. Thus, the courts have the authority to extend the wrongful death remedy to the meretricious spouse and the duty to exercise that authority.

CONCLUSION

Meretricious spouses represent a growing segment of the population and are being treated harshly and inequitably by the California courts'
application of the Wrongful Death Act. The policy justifications for the denial of the remedy to the meretricious spouse are either substantially outweighed by the harsh results of maintaining such a policy or completely outmoded. The legal justification for denial of the remedy to the meretricious spouse is based on an erroneous determination of legislative intent by the California Supreme Court. Because of this error, the California courts have failed in their obligations to modify the common law and to liberally construe the wrongful death statute. The courts have the power and the duty to extend the wrongful death remedy to effect the objects of the statute and to promote justice. Judicial expansion of the wrongful death remedy to include the meretricious spouse within the class of persons entitled to bring the action is a logical and necessary response to changing mores of society.

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