Minnesota Journal of Law & Inequality

Volume 21 | Issue 1 Article 2

June 2003

Homophobia: In the Closet and in the Coffin

Amy D. Ronner

Follow this and additional works at: https://lawandinequality.org/

Recommended Citation
Amy D. Ronner, *Homophobia: In the Closet and in the Coffin*, 21(1) LAW & INEQ. 65 (2003).
Available at: https://scholarship.law.umn.edu/lawineq/vol21/iss1/2

Minnesota Journal of Law & Inequality is published by the University of Minnesota Libraries Publishing.

HOMOPHOBIA: IN THE CLOSET AND IN THE COFFIN

Amy D. Ronner*

INTRODUCTION

One of Lord Alfred Douglas' poems, "Two Loves," that was quoted at Oscar Wilde's trial for homosexual offenses, ends:

> ... "Sweet youth,
> Tell me why, said and sighing, thou dost rove
> These pleasant realms? I pray thee speak me sooth
> What is thy name?" He said, "My name is Love."
> Then straight the first did turn himself to me
> And cried, "He lieth, for his name is Shame,
> But I am Love, and I was wont to be
> Alone in this fair garden, till he came
> Unasked by night; I am true Love, I fill
> The hearts of boy and girl with mutual flame."
> Then sighing, said the other, "Have thy will,
> I am the Love that dare not speak its name."[1]

In the Twentieth Century, "the Love that dare not speak its name" became synonymous with gay love.[2] In fact, that line and

---

* Visiting Professor of Law, University of Miami School of Law. J.D., 1985, University of Miami; Ph.D., 1980, University of Michigan; M.A., 1975, University of Michigan; B.A., 1975, Beloit College. I dedicate this article to the University of Miami Law School Dean, Dennis O. Lynch, who has helped me and so many others self-actualize. I would like to extend special appreciation to Terry J. Barnett of the law firm Rumbaugh, Rideout & Barnett in Tacoma, Washington. Mr. Barnett did a superb job representing Frank Vasquez in the *Vasquez v. Hawthorne* case, which is discussed in this article, and he also generously gave me his time and the benefit of his perspective. I am also grateful to my research assistants, Dennis O'Connor and Denise Christie.

1. Lord Alfred Douglas, *Two Loves*, *in* THE CHAMELEON (December 1894), *available at* http://www.law.umkc.edu/faculty/projects/ftrials/wilde/poemsofdouglas.htm.

2. In 1894, John Francis Bloxam, a homosexual Oxford graduate, asked Lord Alfred Douglas to contribute some poems for the new periodical, THE CHAMELEON.

the intimacy between Douglas and Wilde share an important theme — secrecy. Wilde described Douglas, also known as "Bosie," as someone who "understands me and my art, and loves both," and said, "I hope never to be separated from him."[3] Despite their bond, however, Douglas abandoned Wilde during his trial, absconding to France to avoid being called as a witness.[4] For him, secrecy trumped love.

In Wilde's era, secrecy was the recipe for gay survival. At that time, being open and honest about one's homosexuality could mean not mere ostracism, but also, as Wilde himself learned, incarceration.[5] While today most gay couples view secrecy as an option, not as a mandate, lamentably, there are still drawbacks to going public with one's sexual orientation.[6]

It is this author's broad thesis that judicial homophobia[7] encourages invisibility for gay and lesbian couples and that this is psychologically, politically, and culturally damaging. In fact, judicial decisions can and do perpetuate discrimination against lesbians and gays and promote cruel stereotypes.[8] While most

---

See The Knitting Circle, Lord Alfred Bruce Douglas *at* http://www.sbu.ac.uk/stafflag/alfreddouglas.html. Douglas's two poems were quoted at Oscar Wilde's 1895 trial for homosexual offenses. *Id.* The last line of *Two Loves* may have its roots in the 1876 parliament in which Robert Peel employed the expression, "*inter Christianos non nomindum*," or the crime that dare not be named by Christians. *Id.*

3. *Id.*

4. *See id.* Apparently, Lord Alfred Douglas believed that had he testified at Wilde's trial, he could have saved his dear friend. *See id.*

5. *See id.* Oscar Wilde spent some time in prison, after which he and Lord Douglas continued their friendship. *Id.*

6. *See infra* notes 26-35 and the accompanying text (discussing process of emerging from the closet). *See also infra* notes 26-62 (discussing some of the drawbacks of "coming out" in the context of wills).

7. Homophobia has been defined as "an irrationally negative attitude toward [homosexual people]." Richard C. Friedman & Jennifer I. Downey, *Homosexuality*, 333 NEW ENG. J. MED. 923, 924 (1994). *See also* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 195-96 (1999) ("The more extreme manifestations of homophobia include verbal abuse, harassment, and physical violence. Although negative attitudes toward gay people can be connected to religious beliefs, their connection is fluid and complex."); Gregory M. Herek, *The Social Pyschology of Homophobia: Toward A Practical Theory*, 14 N.Y.U. REV. L. & SOC. CHANGE 923, 929 (1986) (stating that homophobic attitudes give people a way of "avoid[ing] anxiety associated with unacceptable parts of themselves"); Amy D. Ronner, Bottoms v. Bottoms: *The Lesbian Mother and the Judicial Perpetuation of Damaging Stereotypes*, 7 YALE J.L. FEMINISM 341, 342 (1995) [hereinafter Bottoms] ("When courts face cases involving the rights of lesbians and gay men, they too frequently experience anxiety and react by portraying the homosexual as a symbol of something they believe is comfortingly antithetical to themselves.").

8. *See generally* Amy D. Ronner, *Amathia and Denial of "In the Home" in* Bowers v. Hardwick *and* Shahar v. Bowers: *Objectives Correlatives and* The Bacchae *as*

areas of the law harbor bias against same-sex couples, one especially inhospitable niche is trusts and estates.[9]

This article explores how homophobic trusts and estates decisions can psychologically damage same-sex couples and harm society at large. Part I explores the ligature between the closet and the coffin. It initially discusses how emergence from the closet can benefit individuals, facilitate gay and lesbian political activity, and help combat homosexual bias.[10] Then, bringing in some key concepts of estate planning, Part I describes how same-sex couples can present special challenges for lawyers.[11] Specifically, a couple's openness with respect to their sexual orientation can encourage a will contest and result in the invalidation of the will. However, a life in the closet can do the same thing – engender litigation between the decedent's family members and the homosexual beneficiary.[12]

Part II shifts from wills to intestacy. One of the main goals behind probate codes is bestowing upon testators the freedom to dispose of their property in any manner they wish.[13] Intestacy law applies this principle to situations where there is no will by aiming to accomplish by statute a default plan based on the presumed donative intent of the typical testator.[14] All such statutes have protections for a surviving spouse.[15] With respect to these, the approach tends to be cut and dry, depending on the answer to one question alone: is the couple legally married? If the answer is no, spousal protections usually do not apply.

Because there are increasing numbers of people living together outside of the constriction of marriage, courts have begun to depart from the traditional approach. Such courts have

---

Tools for Analyzing Privacy and Intimacy, 44 U. KAN. L. REV. 263 (1996) (discussing judicial homophobia) [hereinafter *Amathia*]; Bottoms, *supra* note 8 (discussing how courts create a mythic image of the homosexual, which is an amalgam of all of the preconceptions that underlie the usual justification that courts give for denying rights to a lesbian or gay male); Amy D. Ronner, *Scouting for Intolerance: The* Dale *Court's Resurrection of the Medieval Leper*, 11 LAW & SEXUALITY 53 (2002) [hereinafter *Scouting*] (exploring how courts have treated homosexuals as "unclean" lepers who can infect youth and endanger the community).

9. *See infra* notes 26-62 and accompanying text (discussing will contests in the context of same-sex couples and the effect of secrecy on such estate plans).

10. *See infra* notes 26-35 and accompanying text.

11. *See infra* notes 36-62 and accompanying text.

12. *See infra* notes 36-62 and accompanying text.

13. *See infra* notes 64-65 and accompanying text.

14. *See infra* notes 62-66 and accompanying text.

15. *See infra* notes 67-72 and accompanying text (discussing the intestate share of surviving spouses and the elective share in some states).

developed concepts, like that of the meretricious relationship doctrine, that entail the examination of the characteristics of the individual relationship.[16] Such an approach, designed to accommodate change, gives the law greater flexibility and fairness.

It is here that the discussion hones in on the decision, *Vasquez v. Hawthorne*,[17] from the state of Washington, in which a homosexual life-partner filed a claim against his lover's intestate estate, seeking a share of the community property.[18] The *Vasquez* decision, in which the appellate court determined that a same-sex relationship cannot be marital-like as a matter of law,[19] serves as an example of typical judicial homophobia.[20] The court derogated significant policies underlying intestacy law, trampled upon precedent, dehumanized homosexuals by divesting them of the power to choose, and effectually created a disincentive for such individuals to emerge from the closet.[21] Although the state supreme court reversed,[22] even that decision did not go far enough.[23] In fact, the supreme court majority and concurring decisions harbor anti-gay sentiment and promote the same damaging anti-gay stereotypes that surfaced in the decision below.

The last part of this article sums up the harmful effects of decisions like *Vasquez*, and describes the real wound that homophobia inflicts. Ultimately returning to Bosie's poem, "Two Loves,"[24] and its renowned coda, this article endorses laws that invite gay and lesbian couples to be open about their bonds and bring about a world where "Love *will* dare speak its name."[25]

I. THE CLOSET AND THE COFFIN

As one scholar has put it, "the 'closet' has become the prevailing metaphor to symbolize the invisibility of gay, lesbian,

16. *See infra* notes 76-156 and accompanying text (discussing the evolution of the meretricious relationship doctrine in Washington, a progressive community property state).

17. 994 P.2d 240 (Wash. Ct. App. 2000), *reversed and vacated by* 33 P.3d 735 (Wash. 2000). *See infra* notes 157-202 and accompanying text (discussing *Vasquez*).

18. *See Vasquez*, 994 P.2d at 241.

19. *See id.*

20. *See infra* notes 26-35.

21. *See infra* notes 200-320 (analyzing the decision's homophobia).

22. *Vasquez*, 33 P.3d at 735.

23. *See infra* notes 203-335 and accompanying text (analyzing the state supreme court's homophobia).

24. Lord Alfred Douglas, *supra* note 1.

25. *See infra* notes 350-351 and accompanying text.

bisexual and transgendered individuals."[26] Because segments of society stigmatize same-sex unions, emergence from the closet is courageous and significant. Such disavowing of invisibility brings real psychological benefits. Because being in the closet can be an internalization of societal homophobia or an acceptance of one's sexual identity as something shameful, coming out can exorcize the negativity and elevate self-esteem.[27] Also, because there is something dark and tragic about a life lived in secrecy, one in which individuals cannot be honest about who they are, coming out can breed self-actualization and happiness.[28]

Coming out of the closet can be both cathartic and self-affirming. It is a means of divesting oneself of societal scorn and figuratively marching into the world chanting, "I am proud of who I am."[29] But beyond that, coming out is not just a choice to make public one's true identity, but it can be – for the homosexual – the very rite of passage of becoming gay or lesbian.[30] In short, the

---

26. Darren Lenard Hutchinson, *Accommodating Outness:* Hurley, *Free Speech, and Gay and Lesbian Equality*, 1 U. PA. J. CONST. L. 85, 120-21 (1998) ("Due to societal homphobia and heterosexism, which act in tandem with patriarchy, white supremacy, and class stratification, gay and lesbian experience is often shrouded in secrecy."). *See also* Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1545 (1995) ("[S]odomy statutes reinforce self-doubt, solitude, and anxiety about remaining closet-bound lest one be branded a criminal. It appears that gay men and lesbian women are forced to peer out from this the closet because the law has backed them into it."); *Scouting, supra* note 8, at 65 ("Given the numerous common denominators between the treatment of homosexuals and lepers, it is not surprising that gays and lesbians, like those infected with the dreaded disease, sometimes respond by hiding.").

27. *See* Hutchinson, *supra* note 26, at 120-21. Hutchinson states that "[a] plethora of psychological data has documented the debilitating impact that 'internalized homophobia – or the acceptance of societal homophobia by gay and lesbian people – has upon an individual's self-esteem, personal development, and emotional adjustment." *Id.* at 121.

28. *See id.* at 120-23.

29. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995), the Supreme Court found that forcing the operators of the St. Patrick's Day parade to include the Gay, Lesbian and Bisexual Group of Boston would violate free speech. *See id.* With respect to outness, *Hurley* was a damaging case. Souter, to his credit, recognized that marching in the parade was a form of "coming out," a way for individuals to "celebrate [their] identity as openly gay, lesbian and bisexual ... [and] to show that there are such individuals in the community." *Id.* at 570. *See* Hutchinson, *supra* note 26, at 116 (arguing that by allowing the parade organizers to prevent GLIB from such open celebration, the *Hurley* court "relegated 'outness' back into its metaphorical closet"); *Scouting, supra* note 8, at 22-24, 53-54 (analyzing *Hurley* as both "homophobic and questionable"). *See also* Bryan H. Wildenthal, *To Say 'I Do':* Shahar v. Bowers, *Same-Sex Marriage, and Public Employee Free Speech Rights*, 15 GA. ST. U. L. REV. 381, 453 (1998) (footnotes omitted) ("Justice Souter's opinion validated, as lying at the core of First Amendment protection, speech that – even though sometimes 'not wholly articulate' – proclaims the innermost identity of the speaker.").

30. *See* Hutchinson, *supra* note 26, at 123 ("Because coming out serves as a

process of coming out *is* identity.[31]

There is more to coming out of the closet than individual psychological well being. As several scholars have noted, for homosexuals, "the coming out process has tremendous cultural and political significance."[32] Coming out is politically advantageous because it lets homosexuals unite to achieve equality.[33] But there is more to it than just the facilitation of gay and lesbian collective political activity. The concealment of same-sex orientation from public awareness retards progress for lesbians and gay individuals.[34] People who are familiar and interact with homosexuals are less inclined to harbor homophobic beliefs.[35] Consequently, openness with respect to sexual orientation can alter attitudes.

There is a definite ligature between the closet and the coffin. For homosexuals engaged in estate planning, their willingness to be open about their sexual orientation can not only affect the way they set up the disposition of their property at death, but also can determine the post-mortem aftermath.[36] To

---

crucial instrument in the development of gay, lesbian, bisexual, and transgendered identities, 'outness' has become an inseparable part of gay identity.").

31. *See id.* at 123.

32. *See id.* at 89.

33. *See id.* at 120-21. Hutchinson explains:

> [T]he closet harms gay communities because it hinders the ability of gays and lesbians to engage in collective political action to achieve equality. Furthermore ... homophobia and gay and lesbian invisibility also divide communities of color and feminist communities, erecting barriers to social and political action in these social groups as well.

Id. at 121. *See also* William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 614 (1994) ("asserting that speaking out in the form of 'gaylegal narratives' has the effect of "emphasiz[ing] that we are here, there, and everywhere..."); Wildenthal, *supra* note 29, at 454 ("It is through 'coming out' – a quintessential speech act – that gay people identify themselves" and "[f]or gay people, speech has been, if anything, an even more important device for social change than it has been for other minority groups who have taken advantage of American liberty to press America toward greater justice.").

34. *See* Eskridge, *supra* note 33, at 614 ("Psychological studies suggest that people who actually know an openly lesbian or gay person are less likely to be homophobic or to accept homophobic stereotypes."). *See also* Rachel A. Van Cleave, *Advancing Tolerance and Equality Using State Constitutions: Are the Boy Scouts Prepared?*, 29 STETSON L. REV. 237, 241 (1999) ("The law's approval or allowance of [discriminatory] exclusion may lead individuals in the groups to conclude that they are justified in excluding those people they perceive as different and perhaps even justified in their hatred of people who are different."). Van Cleave also acknowledges the theory that legally requiring organizations to include people can create a "backlash" which makes individuals "more angry and full of hate," actually stalling "any initial advances in equality." *Id.* at 240-41.

35. *See* Eskridge, *supra* note 33, at 614.

36. *See generally* Emily Berendt & Laura Lynn Michaels, *Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning*, 24 J. MARSHALL

put it bluntly, a secret life can impede probate of a will. But, as discussed below, outness can be detrimental as well.

Lawyers engaged in estate planning for same-sex couples know that a will can present special problems, one of them being a possible contest.[37] While there is always a potential for such litigation, it is relatively rare in the traditional family context where the will designates a spouse or family member as a beneficiary.[38] In such a situation, the interest in family harmony

---

L. REV. 509, 513 (1991) (stating that an attorney representing a gay client in an estate planning matter must attempt to ascertain whether the family knows about the client's life style); Merrianne E. Dean, *Estate Planning for Non-Traditional Families*, 309 PLI/Est 1087, 1095 (2001) (discussing how homosexual couples "may put off seeking estate planning assistance because they are reluctant or afraid to disclose the nature of their relationship to a stranger"); Stanley M. Johanson & Kathleen Ford Bay, *Estate Planning for the Client with AIDS*, 1989 TEXAS BAR J. 217, 217 (discussing how a gay client "may present the attorney with lifetime and estate planning issues that are not ordinarily encountered, especially if the client's family has not accepted his lifestyle or does not know that he is gay").

37. *See* Berendt & Michaels, *supra* note 36, at 513 (discussing how homosexual testator's are especially vulnerable to having their wills challenged); Johanson & Bay, *supra* note 36, at 217 (discussing how gay testator's can engender bitter will contests); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225 (1981) (exploring whether homosexual testators run "greater risks" of having their wills deemed invalid on the ground of undue influence than do heterosexuals); Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 88 (1998) (discussing how "families of a deceased gay or lesbian relative often seek to intervene and upset wills leaving property to long term partners of the decedents"). *See also* Joseph W. deFuria, Jr., *The Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 1989 NOTRE DAME L. REV. 200, 201 (discussing how "the freedom of testation has always been tempered by notions of fairness, justice, and especially morality" and how the undue influence doctrine "often functions ... as a barometer of society's mores"); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275 (1999) (discussing how cultural minorities should take measures to protect their estate plans from "majoritarian cultural norms"); *infra* notes 51-52 (discussing *In re Kaufmann's Will*, 257 N.Y.S.2d 941 (1965), in which the court invalidated a will designating same-sex lover as beneficiary on the ground of undue influence).

38. *See* Berendt & Michaels, *supra* note 36, at 513 (stating that the problem is that a gay client "may intend to leave all or the majority of assets to a 'family' member who is neither blood-related nor who maintains a legally recognized relationship, to the exclusion of traditional family members"); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 200 MICH. L. REV. 447, 458 (1996) (discussing how gay men and lesbians with partners making wills leaving property to their lovers face "unfortunate" consequences from "estranged" family members); Dean, *supra* note 36, at 1094 ("When undertaking an estate planning engagement [for homosexuals], it is important to clearly understand the various familial relationships of your new client, recognizing that very often 'chosen' family ties are of greater importance than biological ties."); Johanson & Bay, *supra* note 36, at 218 (analyzing how typically the attorney does not have to be too concerned about a will contest where the will favors traditional family members); Sherman, *supra* note 37, at 227

prompts survivors to acquiesce in the decedent's desires.[39] Where there is a disgruntled contestant, courts tend to be disinclined to upset a disposition to those perceived to be the natural objects of the decedent's bounty.[40] As such, if the named beneficiaries are spouses, children or other family members, courts typically refrain from entangling themselves in the decedent's motives or morals.[41]

When homosexuals leave property to their partners, however, the rules change and there is often litigation.[42] The couple's lifestyle and the decedent's openness about his or her sexual orientation can have an impact on family members' resolve to wage war.[43] In this context, will contests can arise in situations in which a family is unaware of the decedent's gay or lesbian lifestyle.[44] In fact, such contests are not usually about money; rather, the family's resentment about being lied to or kept in the dark about the decedent's life style often sparks the conflict.[45] The litigation becomes a way to punish the only visible target, the lover, who, in the minds of the contestants, had seduced the decedent into what they see as a lie or a life of secrecy.[46] Where

---

(discussing how dispositions that prefer "strangers in blood to natural objects of the testator's bounty" are regarded as "unnatural" and vulnerable to being invalidated); Spitko, *supra* note 37, at 282 ("[T]he 'abohorrent' testator who disinherits her legal spouse or close blood relations in favor of, for example, a non-mainstream religion, a radical political organization, or a same-sex romantic partner is especially at risk of having her estate plan discarded.").

39. *See* Spitko, *supra* note 38, at 282.

40. *See id.*

41. *See id.*

42. *See supra* notes 36-38 and accompanying text.

43. Berendt & Michaels, *supra* note 36, at 513. The authors describe the problems attorney face when doing estate planning for a gay client with AIDS:

> [C]lients in a gay family may face concerns of hostility between their biological family and their partner, or of personal rejection and lack of support. This may be particularly true where the client has not previously revealed his or her sexual orientation. The biological family must suddenly accept two facts – their close relative is gay and has a terminal illness. The combination of grief, anger, fear, guilt, and misunderstanding can result in a biological family that is unpredictable at best....

Id. *See also* Johanson & Bay, *supra* note 36, at 217 (writing that such a "will contest has been seen as a means of vindicating the family's values over homosexual practices that they could neither understand nor accept").

44. *See generally supra* notes 37-39 and accompanying text.

45. *See generally supra* notes 37-39 and accompanying text; Johanson & Bay, *supra* note 36, at 217 (discussing the "sharp increase in the number of contests filed by family members, challenging the validity of wills in favor of the testators' companion or friends" and that "[i]n many of these cases, it was reported the money involved has been secondary, and the will contest has been seen as a means of vindicating the family's values over homosexual practices that they could neither understand nor accept").

46. *See supra* notes 37-39 and accompanying text.

the contestants are homophobic and actually condemn the gay or lesbian lifestyle, the vendetta can be much more acrid.[47]

The closet, however, is not an all-or-nothing place and this can exacerbate conflict.[48] Human beings are multi-faceted and can function in several worlds. Homosexuals can thus choose to be open and even militant about their sexual orientation in some arenas, but not in others.[49] For example, certain gay lawyers might strive to advocate equality for homosexuals and might even become leaders in gay rights organizations and yet, in the workplace (perhaps the more stodgy law firm) might elect not to make an issue of their sexuality.[50]

Some homosexuals come out in their own social circles, surrounding themselves with a supportive community, but keep this world discrete from parents and other family members.[51] Such individuals, dealing with sad reality, having come to accept the fact that they will never be able to modify family members' irrational animosity toward their lifestyle, simply capitulate by extricating themselves either completely or partially from the disapproval.[52] When such a compartmentalized individual dies and leaves property to a lover, family members again tend to blame the beneficiary, who, in their view, connived to alienate them from the decedent.[53] For them, the will contest becomes a device for righting the wrong, for ousting the villainous converter, and for reassembling the broken family.

As scholars have pointed out, where same-sex couples are involved, the will contest becomes a means of "vindicating the family's values over homosexual practices that [family members]

---

47. *See supra* note 43.

48. *See Scouting, supra* note 8, at 105-106.

49. *See id.*

50. *See id.*

51. One of the famous examples of this is in *In re Kaufmann's Will*, 20 A.D.2d 464 (1964), *aff'd*, 205 N.E.2d 864 (1965), in which the court found the testator's will to have been the product of undue influence by the beneficiary, the decedent's same-sex partner. In that case, the two men lived together and appeared in social circles as a couple while they kept themselves essentially apart from the decedent's family. *Id. See also infra* note 52; Sherman, *supra* note 37, at 239-48 (discussing the *Kaufmann* case as an example of how the homosexual testator is especially vulnerable to a will contest and needs to take special estate planning measures to circumvent the problem).

52. What is sad about the situation in *In re Kaufmann* is that the testator felt safe to share his identity with his family only after his death through a letter that he signed contemporaneously with one of his wills leaving property to his same-sex lover. *See* Sherman, *supra* note 37, at 671.

53. *See generally supra* note 38.

could neither understand nor accept."[54] This is the real problem: the battle is lodged against homosexuality itself and because the target is an abstraction, the rancor can be great and prolonged.[55] Such tensions can, and often are, augmented when the decedent was afflicted with AIDS.[56] Here family members sometimes vilify the beneficiary for still another thing – namely, the transmission of disease and death.[57]

What is apodictic about will contest stories is that they never have happy endings. That is, regardless of who wins or loses, the common denominators are expensive litigation and at least, a modicum of emotional turmoil in which the testator's chosen beneficiary and his or her allies are pitted against the decedent's family members.[58] Such a battle not only engenders ill will and animosity, but in the context of a same-sex couple also fuels anti-homosexual sentiments.[59] As the litigation proceeds and bitterness builds, family members ascribe the stress and disruption of their lives to homosexuality itself.[60] For them, the same-sex relationship equates with poison.[61] If and when they prevail, the victory somehow seems disappointedly devoid of real vindication because the contestants' real goal, the very annihilation of a lifestyle or the vanquishment of a sexual orientation is simply not possible.

A "successful" will contest breeds its own insidious defeat: that is, upsetting an estate plan constitutes a deprivation of an individual's fundamental right to designate the successors to his or her own property at death.[62] But more broadly, such contests can devastate society by promoting unhealthy bias and cruel stereotypes.

---

54. Johanson & Bay, *supra* note 36, at 217.

55. Kirk Johnson, *AIDS Victims' Wills Under Attack*, N.Y. TIMES, Feb. 19, 1987, at B1.

56. *See id.* ("[C]ontests can be particularly bitter, especially if the family views the testator's companion as the cause both of their child's (or brother's) lifestyle and of his death.").

57. *See id.*

58. *See id.*

59. *See* Johanson & Bay, *supra* note 36, at 217.

60. *See* Johnson, *supra* note 55.

61. *See id.*

62. Johanson & Bay, *supra* note 36, at 217. *See also* deFuria, *supra* note 37, at 200 ("Even though the ability to dispose of one's property by will is not a federally protected right, the privilege of testation is commonly considered a 'right' fundamental to our form of government.").

II. THE CLOSET AND MERETRICIOUS RELATIONSHIPS

When there is no valid will, the probate code steps in to essentially write the will by dictating which family members receive what portions of a decedent's estate.[63] What intestacy provisions aim to accomplish is a "disposition of property under administration as the owner, acting rationally, would have disposed of it if living."[64] One of the main policies behind the probate laws is testamentary freedom.[65] The law generally aims to bestow upon testators the freedom to dispose of their property

---

63. *See generally* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS AND ESTATES 71-157 (2000) (treating intestacy as an "Estate Plan by Default"); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000) ("Intestacy statutes create, in effect, a statutory will – a will in which the government, rather than the individual, determines the dispositive terms."); Marissa Holob, *Respecting Commitment: A Proposal to Prevent Legal Barriers From Obstructing the Effectuation of Intestate Goals*, 2000 CORNELL L. REV. 1492, 1498-99 (discussing the general policies of probate codes and how they fill the void in the absence of a valid will); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 1994 MO. L. REV. 21, 28 (discussing how intestacy laws serve as default rules and explaining that historically this has not always been true).

64. ALISON REPPY & LESLIE J. TOMPKINS, HISTORICAL AND STATUTORY BACKGROUND OF THE LAW OF WILLS: DESCENT AND DISTRIBUTION, PROBATE AND ADMINISTRATION 160 (1928). *See also* DUKEMINIER & JOHANSON, *supra* note 63, at 74 ("The primary policy [behind an intestacy statute] ... is to carry out the probable intent of the average intestate decedent."); Holob, *supra* note 63, at 1499 (arguing that the Uniform Probate Code has the same objective). *But see* Gary, *supra* note 63, at 1-2 (pointing out that "[a]n analysis of intestacy law must begin with the recognition that an intestacy statute cannot work equally well for every potential decedent."). Gary explains:

> Indeed, developing an intestacy statute that will meet the needs or wishes of all persons is both unnecessary and impossible. There are too many variations on what decedents want, too many family situations to consider and too many special circumstances surrounding individual decedents. An intestacy statute can serve as a default rule, but a person whose wishes do not fit the default rule must execute a will.

Id.

65. *See e.g.*, deFuria, *supra* note 36, at 200 (discussing how "the freedom of testamentary disposition is one of the basic tenets of our social structure"). DeFuria explains that "restrictions on the freedom of testation are usually considered anathema both to private property rights and to the rights of the individual" and that "[i]n view of this sentiment, the intent of the testator has naturally played a dominant role in giving effect to his last wishes." *Id. See also* Gary, *supra* note 63, at 8 ("While freedom of testation is not unlimited, it continues to be substantial."); Holob, *supra* note 63, at 1499 (discussing how the law favors freedom of testation as economically and socially beneficial); Johanson & Bay, *supra* note 36, at 217 (describing "[t]he right of a person to designate who will succeed to ownership of his or her property at death" as "fundamental to our property system"); John H. Langbein, *Substantial Compliance With the Wills Act*, 1975 HARV. L. REV. 489, 491 (1975) ("The first principle of the law of wills is freedom of testation."); Spitko, *supra* note 37, at 276 ("Our society is committed in principle to the ideal of testamentary freedom.").

in any manner they wish.[66] Intestacy exports this principle to situations in which there is no will, aiming to express, through a default plan, society's commitment to what is presumed to be the donative intent of typical decedent.[67] Statutes typically contain generous provisions for surviving spouses.[68]

Even the sacrosanct goal of fulfilling the decedent's donative intent, however, has its limitations. Most probate codes in separate property states have what is called an elective share or forced share that ensures that a minimum percentage of the estate goes to the decedent's spouse.[69] In fact, this applies even when

---

66. *See generally supra* note 64.

67. *See generally* DUKEMINIER & JOHANSON, *supra* note 63, at 74 (discussing how the primary policy behind the intestacy statutes "requires that we decide what persons who die intestate would most likely want"); Gary, *supra* note 63, at 8-9 ("The ability to rely on an intestacy statute for distribution of property may be related to the idea of freedom of testation."); Holob, *supra* note 63, at 1500 (explaining that because of the importance of "fulfilling the decedent's donative intent, ... it is natural to extend this principle to the disposition of property when no will exists, further reflecting society's commitment to donative freedom.").

68. Dukeminier and Johanson state:

> In the last 20 years, a number of empirical studies have been made of popular preferences as to intestate succession. Although these studies do not always agree, they unanimously support the conclusion that the spouse's share given by most intestacy statutes is too small. They show that most persons want everything to go to the surviving spouse when there are no children from a prior marriage, thus excluding parents and brothers and sisters. This preference is particularly strong among persons with moderate estates, who believe the surviving spouse will need the entire estate for support.

DUKEMINIER & JOHANSON, *supra* note 63, at 74. *See also* Chambers, *supra* note 38, at 455-56 (describing the state laws designating the spouse as the recipient of part or all of a married person's property when he or she dies without a will); Gary, *supra* note 63, at 20 (discussing the research focusing on how property should be distributed under the intestacy laws, she points out that "[e]mpirical data showed that persons preferred to give the surviving spouse all or most of the estate, with variations depending upon whether the decedent left children who were not biological or adopted children of the surviving spouse"); Holob, *supra* note 63, at 1498 ("[M]ost probate codes ensure that spouses receive a guaranteed minimum percentage of the decedent's estate, regardless of any testamentary instruments to the contrary."); Waggoner, *supra* note 63, at 34 (discussing spousal rights in intestacy). Waggoner points out that:

> [i]ncluded within the assumption that decedents have "just" motives are that decedents mean to be generous to their surviving spouses, mean to strike a fair balance between their surviving spouses and children (that is, to be fair to all), but, above all, in striking that fair balance, mean at the very least to provide economic security for their surviving spouses.

Id.

69. *See* DUKEMINIER & JOHANSON, *supra* note 63, at 480-81 (discussing the elective share and its rationale). Dukeminier and Johanson point out that "[a]ll but one [Georgia] of the separate property states give the surviving spouse ... a share in the decedent's property." *Id.* According to Dukeminier and Johanson, "[t]he proclaimed underlying policy (at least in most states) is that the surviving spouse contributed to the decedent's acquisition of wealth and deserves to have a portion of

there is a testamentary instrument to the contrary.[70] There is, however, no equivalent statutory accommodation for same-sex partners.[71] The normative statutory approach is a formalistic one, depending on one question alone – is that survivor a spouse?[72] When the answer is "no," the code treats the lover or life-partner as a complete stranger.[73]

Because increasing numbers of people living together outside of the contours of marriage seek entitlements that have been exclusively reserved for spouses, courts have, albeit slowly, begun to depart from the traditional rigid approach.[74] Rather,

---

it." *Id.* *See also* Holob, *supra* note 63, at 1501 ("Decedents cannot fully disinherit their surviving spouse."); Waggoner, *supra* note 63, at 47 ("All but one of the separate-property states curtail the decedent's testamentary freedom in order to protect the surviving spouse against disinheritance.").

70. *See generally* DUKEMINIER & JOHANSON, *supra* note 63, at 480 (discussing how the elective share or forced share statutes give the surviving spouse a choice to "take under the decedent's will" or "renounce the will and take a fractional share of the decedent's estate"); Waggoner, *supra* note 63, at 47 (explaining that "[n]o matter what the decedent's intent, the separate-property states recognize that the surviving spouse has a claim to some portion of the decedent's estate"). In most states, such statutes have replaced the dower and curtesy provisions. *See id.*

71. Chambers, *supra* note 38, at 457 (pointing out that "only a very few states provide that an unmarried partner shall receive any portion of the estate of a person who dies without a will and, to date, no state provides anything for a same-sex partner"). *See also* Holob, *supra* note 63, at 1501 (discussing how spousal protections fail to recognize a "surviving domestic partner as a surviving spouse for property distribution purposes"). *See generally* Gary, *supra* note 63, at 35-36 (discussing domestic partner ordinances that permit same-sex couples and unmarried opposite sex couples to register and create a legal relationship that lets them be treated as family for some purposes). Gary also addresses "the reciprocal beneficiary relationship," which in Hawaii gives such an individual the same share a surviving spouse would receive under intestate succession. *See id.* at 36.

72. Waggoner, *supra* note 63, at 61-62 ("Spousal status is what grants the person a right to an intestate share and the right to elect a forced share if dissatisfied with the decedent's estate plan.").

73. *See, e.g.*, *In re* Estate of Cooper, 592 N.Y.S.2d 797 (1993) (concluding that the survivor of a homosexual relationship is not entitled to a right of election against the decedent's will); Waggoner, *supra* note 63, at 63 ("Regarding unmarried couples, the law grants the survivor no right against being disinherited, thus treating the surviving partner as having contributed nothing to the decedent's wealth."). *See also* DUKEMINIER & JOHANSON, *supra* note 63, at 499 (discussing how unmarried surviving partners have none of the benefits of unmarried partners).

74. DUKEMINIER & JOHANSON, *supra* note 63, at 499-500 (discussing how in some states, unmarried partners may have rights against the estate of the decedent under contract law or have unjust enrichment claims enforceable through the imposition of a constructive trust and claims for quantum meruit). *See also* Gary, *supra* note 63, at 31 (discussing how "in some areas of the law legislatures and courts are attempting to create legal rules that do make sense for today's diverse families"); Holob, *supra* note 63, at 1502 (arguing that "intestacy laws should be revised to protect domestic partners' justifiable expectations"); Vetri, *supra* note 37, at 91 ("In light of the reality of our family lives today, and the slow but evolving changes occurring in some states, it is increasingly inappropriate for state and

some courts have embraced the meretricious relationship doctrine that entails the examination of the characteristics of individual relationships.[75]

A. The Meretricious Relationship Doctrine

Washington, where *Vasquez* was decided, is a community property state.[76] Community property, as statutorily defined, is that which is "acquired during marriage by labor, industry or other valuable consideration."[77] While each spouse may own property separately, the presumption is that the property accumulated during marriage is community.[78] Each spouse shares equally the managerial power over community property and has testamentary power over his or her half of that property.[79] Upon divorce, courts change community property into separate property and arrive at a just and equitable distribution.[80]

The division of community property also becomes an issue at the death of one spouse.[81] In Washington, if one spouse dies intestate and has no surviving children, siblings, or parents, "the surviving spouse takes the entire separate estate of the

---

federal laws to remain immune to reform and accommodation about gay and lesbian families.").

75. *See infra* notes 76-156 and accompanying text (discussing the meretricious relationship doctrine).

76. DUKEMINIER & JOHANSON, *supra* note 63, at 472 (explaining that "[t]he fundamental principle of community property is that all earnings of the spouses and property acquired from earnings are community property" and that "[e]ach spouse is the owner of an undivided one-half interest in the community property"). It is "[t]he death of one spouse" that "dissolves the community" and "[t]he deceased spouse owns and has testamentary power only over his or her one-half community share." *Id.* As Dukeminier and Johanson explain, "Community property is based on the idea that husband and wife are a marital partnership, that they decide together how to use the time of each so as to maximize their income, and that they should share their earnings equally." *Id.* at 473. *See also* Harry M. Cross, *The Community Property Law in Washington (Revised 1985)*, 61 WASH. L. REV. 13, 17-18 (1986) (discussing the community property law of Washington).

77. Amanda J. Beane, *One Step Forward, Two Steps Back:* Vasquez v. Hawthorne *Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples*, 76 WASH L. REV. 475, 478 (2001). *See also* DUKEMINIER & JOHANSON, *supra* note 63, at 472-73 (discussing principles of community property); Cross, *supra* note 76, at 27-28 (explaining the basic presumptions of the Washington court's interpretation of what constitutes community property).

78. *See generally supra* note 77.

79. *See generally supra* notes 76-77.

80. *See* Beane, *supra* note 77, at 479 ("In marital dissolution, courts convert community property to separate property because the marital community ceases to exist, and then make a just and equitable distribution.").

81. *See id.* at 478-79. *See generally* DUKEMINIER & JOHANSON, *supra* note 63, at 472-73.

decedent."[82] This, of course, means that the surviving spouse retains his or her own one-half share of the community property.[83] If, however, the decedent has surviving siblings or parents, the spouse gets three-quarters of that separate estate.[84] When there are surviving children, the intestate share is reduced to one-half.[85]

In Washington, courts may extend community property rules to unmarried couples under the meretricious relationship doctrine.[86] Originally, however, when an unmarried couple acquired assets, there was a bright-line rule that property belonged to the one who held title.[87] That rule was conceived in *Creasman v. Boyle*,[88] a case which involved a meretricious relationship between a Black man, Harvey Creasman, and a White woman, Caroline Paul.[89]

Creasman and Paul had lived together for seven years until the woman's death.[90] During the cohabitation, one in which the couple held themselves out as husband and wife, Creasman worked in a naval shipyard and earned over $13,000 in total.[91]

---

82. WASH. REV. CODE § 11.04.015(1)(a) (2000); Beane, *supra* note 77, at 479.

83. *See supra* note 82.

84. § 11.04.015(1)(c). *See also* Beane, *supra* note 77, at 479.

85. § 11.04.015(1)(b). *See also* Beane, *supra* note 77, at 479.

86. *See* deFuria, *supra* note 37, at 201 n.8 ("Although 'meretricious' originally connoted purely illicit and tawdry sexual behavior ... the term, in legal parlance, refers to any unlawful sexual relationship."). DeFuria discusses the meretricious relationship doctrine, arguing that:

> [i]n light of the many changes which have taken place in how domestic relations law treats meretricious relationships, and especially nonmarital cohabitation, which is perhaps the archetypal meretricious relationship ..., it is no longer fitting to view a meretricious relationship as inherently relevant, as a matter of course, in determining whether undue influence has been exercised in the making of a testamentary gift to the surviving partner of the relationship.

Id. at 212. *See also* Ann Laquer Estin, *Ordinary Cohabitation*, 2001 NOTRE DAME L. REV. 1381, 1384 (2001) (considering the "social and legal norms of ordinary cohabitation that have evolved since [Marvin v. Marvin, 557 P.2d 106 (Ca. 1976)]"); Waggoner, *supra* note 63, at 69-71 (arguing that it is time to remove the meretricious-consideration argument as an obstacle to enforcement of express contracts governing unmarried partners). As Waggoner points out, the meretricious relationship involves sexual activity and because prostitution is illegal, some "post-*Marvin* decisions ... have held that contracts between unmarried cohabitors are flat unenforceable for that reason alone ...." *Id.* at 69. *See generally* Beane, *supra* note 77, at 479-83 (discussing the development of the meretricious relationship doctrine in Washington).

87. *See* Beane, *supra* note 77, at 479-82 (discussing Washington law before the adoption of the meretricious relationship doctrine).

88. 196 P.2d 835 (Wash. 1948).

89. *Id.* at 836.

90. *Id.* at 837.

91. *Id.*

Paul, however, handled all of the financial affairs.[92] Also, Paul had entered into a contract to purchase the shared residence and made the down payment by exchanging Creasman's car.[93] She took title to the home in her name alone, but made the payments with money that Creasman earned while they lived together.[94] When she died, Creasman sought title to the residence and the trial court awarded him one-half interest in it.[95] The trial court acknowledged that the man had been the sole financial provider, but took account of the fact that the woman had contributed by way of her "thrift" and "housekeeping."[96]

The state supreme court reversed, ordering the trial court to award the residence to the woman's estate.[97] In so doing, the court said that "property acquired by a man and a woman not married to each other, but living together as husband and wife, is not community property, and, in the absence of some trust relation, belongs to the one in whose name the legal title to the property stands."[98] The court also declined to impose a resulting trust in favor of Creasman, finding instead that "in the absence of any evidence [of intent] to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it."[99] This became known as the "*Creasman* presumption,"[100] one which the supreme court later discarded in *In re Marriage of Lindsey*.[101]

In *Lindsey*, the couple began with a meretricious

---

92. *Id.*

93. *Id.* at 836-37.

94. *Id.* at 837.

95. *See id.* at 836.

96. *Id.* at 838.

97. *See id.* at 842.

98. *Id.* at 838.

99. *Id.* at 841. Chief Justice Mallery dissented in *Creasman*, arguing that because all of the money was Creasman's, the case was a proper one to "invoke the doctrine of a resulting trust." *Id.* at 843. He stated that "[n]o citations are necessary for the rule that where one acquires title to property, either real or personal, with the money of another, it is presumed to be held in trust for the benefit of the other." *Id.* His stated reason for dissenting was that the majority opinion had a deleterious effect on the law of resulting trust and that "[i]t seem[ed] strange and unnatural to [him] to suppose that [Creasman] ever intended to make such a gift to ... Paul that her heirs would take any of the property in question to the exclusion of himself who at no time parted with either the possession or enjoyment of it." *Id.* at 843-44.

100. *See* Beane, *supra* note 77, at 480-82 (discussing the *Creasman* Presumption); Vasquez v. Hawthorne, 994 P.2d 240, 242 (Wash. Ct. App. 2000) (discussing the later-rejected *Creasman* presumption).

101. 678 P.2d 328 (Wash. 1984).

relationship, but later married.[102] Although they had no children born of their marriage, they each had a child from a previous marriage that lived with them.[103] The parties separated and ultimately divorced.[104] At trial, the dispute revolved around the property that was acquired prior to and during the marriage.[105] There was contradictory evidence over the amount of labor that each party had expended to improve the property.[106]

Apparently, before the marriage, the couple had logged certain property, netted about $30,000, and then constructed a barn and shop on the farm.[107] When they were married, the husband had certain separate property while his spouse had no assets of her own.[108] The couple maintained a joint checking account and spent what they earned.[109]

The husband worked for the family business and his wife was the homemaker that cared for the children, horses and farm.[110] For about a year, however, the wife also worked for her husband's family business and was paid about $500 a month.[111] The husband had a gross income of over $45,000 one year and $28,000 another year.[112] There was one year, however, in which the business did poorly and the husband had to borrow $25,000 from his family members.[113] The couple acquired and bred horses, some of which they trained for the racing circuit.[114] When the parties started building a family home on the farm, they borrowed money from the husband's mother, family business, and a bank.[115] After a fire destroyed the barn and shop on the property, the insurance proceeds amounted to over $85,000.[116]

The trial court, applying the *Creasman* presumption, found that most of the assets before marriage were the husband's separate property and awarded him the realty.[117] The court

102. *See id.* at 329.
103. *Id.*
104. *See id.*
105. *See id.*
106. *See id.*
107. *Id.*
108. *See id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*

determined which were the community property assets and equitably divided them.[118] The trial court did not take into account any contribution the wife may have made to the construction of the barn and shop.[119] In addition to the realty, the husband received the stock in his family business, personal effects, horses and car insurance proceeds.[120]

On appeal, the Supreme Court of Washington critically examined the *Creasman* presumption and later cases, finding that "the rule often operates to the great advantage of the cunning and the shrewd, who wind up with possession of the property, or title to it in their names, at the end of a so-called meretricious relationship."[121] The court also acknowledged that other courts, avoiding the *Creasman* presumption by creating exceptions, had made the "law unpredictable and at times onerous."[122] As such, the *Lindsey* court decided that it was simply time to eradicate *Creasman*.[123]

In place of *Creasman*, the court in *Lindsey* required courts to "examine the [meretricious] relationship and the property accumulations and then make a just and equitable disposition of the property."[124] The courts, however, should not employ any "rigid set of requirements," but instead should examine each case on its own facts.[125] In reviewing the trial court's award, the supreme court found that the realty owned by the husband before marriage was properly characterized as separate and that the trial court also correctly distributed the other assets, including the horses.[126] The supreme court, however, was troubled over the insurance proceeds and the fact that the trial court did not award the wife any property interest in the barn and shop that had burned.[127] Consequently, the court remanded the matter to the trial court to consider the wife's interest in that structure.[128]

---

118. *See id.* (reporting that the wife received her personal effects, car insurance proceeds, four horses, a pickup, and some cash for community labor on the family residence).

119. *See id.*

120. *Id.* at 329-30.

121. *Id.* at 330 (quoting West v. Knowles, 311 P.2d 689 (Wash. 1957) (Finley, J., concurring specially)).

122. *Id.* at 331.

123. *See id.*

124. *Id.* (quoting Latham v. Hennessey, 87 Wash. 2d 550, 554 (1976)).

125. *See id.*

126. *See id.* at 332.

127. *Id.*

128. *See id.*

In *Connell v. Francisco*,[129] a case involving the division of property between an unmarried couple, the court developed the *Lindsey* approach and the meretricious relationship doctrine. In *Connell*, the woman was a dancer in a stage show when she met Francisco, the producer, who later invited her to move in with him in Las Vegas.[130] While the couple lived there for about three years, Connell continued her work as a dancer and helped Francisco with his business.[131]

After one of Francisco's companies purchased a bed and breakfast on a Washington island, the couple moved to the island and cohabitated there until the end of the relationship.[132] During that time, Connell worked at the inn, making breakfast, cleaning rooms, taking reservations, doing laundry, paying bills and assisting with general maintenance.[133] For almost two years, she received a salary for her labor.[134]

Further, the local community saw the couple as married and Connell even used Francisco's surname for business purposes.[135] Further, Francisco had given Connell an engagement ring and executed a will leaving her the corpus of his estate.[136] Connell did not make any financial contribution toward the purchase of any of the properties acquired during this time and title to them was in Francisco's name individually or in the name of one of his companies.[137]

At the end of the relationship, Connell sought "a just and equitable distribution of the property acquired during the relationship" and the trial court, finding that the "relationship was sufficiently long term and stable," granted her relief.[138] The court limited the property subject to distribution of that which "would have been community in character" had the parties been legally married and required Connell to prove this by a preponderance of the evidence.[139] The only property, however, that the court felt was "community in character ... was the increased value of

129. 898 P.2d 831 (Wash. 1995).
130. *See id.* at 832-33.
131. *Id.* at 833.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

Francisco's pension plan."[140] The court felt that Connell simply did not meet her burden with respect to any of the remaining assets.[141]

In reversing, the court of appeals determined that the meretricious relationship doctrine applied to "both property owned by each prior to the relationship and property that would have been community in character had the parties been married."[142] The court felt that the doctrine must be applied "to all property acquired during the relationship."[143]

In reviewing the matter, the Washington Supreme Court concluded that only "property acquired during the relationship" was subject to distribution.[144] The court defined a meretricious relationship as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist" and set forth the relevant factors that establish such a relationship.[145] The unexhaustive list of factors include: "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[146] The court implied that no one factor is determinative and stated that a relationship does not have to be "long term" to be deemed meretricious.[147] That is, a short-term relationship may suffice where other sufficient factors are present.[148]

Significantly, the *Connell* court pointed out that "[a] meretricious relationship is not the same as a marriage" and cited cases holding that certain benefits are available only to married couples.[149] Consequently, since marital property distribution laws do not directly apply to meretricious relationships, Washington courts may turn to these laws for guidance only.[150] The court explained that the differing treatment of property under each relationship is the result of a freedom of choice: "[t]he parties to such a [meretricious] relationship have chosen not to get married and therefore the property owned by each party prior to the

140. *Id.* at 833-34.
141. *Id.* at 834.
142. *Id.*
143. *Id.*
144. *Id.* at 837.
145. *Id.* at 834.
146. *Id.*
147. *See id.*
148. *See id.*
149. *Id.* at 835.
150. *See id.*

relationship should not be before the court for distribution at the end of the relationship."[151] The property acquired during the relationship, however, is subject to distribution to avoid unjust enrichment.[152] The court concluded that "[a]ny other interpretation equates cohabitation with marriage" and "ignores the conscious decision by many couples not to marry."[153]

As a result, the real property purchased during their meretricious relationship was presumed to be owned by both Connell and Francisco.[154] Francisco, however, could overcome such a presumption by presenting evidence to show that the real property was obtained with his separate funds.[155] If the trial court found that such realty is owned by Francisco alone, Connell could still "establish that any increase in value of Francisco's property occurred during their meretricious relationship and is attributable to 'community' funds or efforts" and she could be reimbursed for her contributions.[156]

B. The Decision in Vasquez v. Hawthorne

In *Vasquez v. Hawthorne*,[157] Washington courts considered the applicability of the *Lindsey* and *Connell* decisions to an alleged meretricious relationship between two men, Vasquez and Schwerzler, who had lived together for twenty-six years.[158]

---

151. *Id.* at 836.

152. *Id.*

153. *Id.*

154. *Id.* at 837.

155. *See id.*

156. *Id.* Justice Utter authored a dissenting opinion in *Connell* in which he accused the majority of "establish[ing] a new rule that will be uncertain in application and will likely interfere with the ability of the courts to 'make a just and equitable distribution of the property' as is required by *Lindsey*." *Id.* Essentially, he objected to the majority's "limit[ation of] the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married" because it makes the outcome hinge on how the court characterized each piece of property. *Id.* at 837-38.

157. 994 P.2d 240 (Wash. Ct. App. 2000), *reversed and vacated by* 33 P.3d 735 (Wash. 2001).

158. *Id.* at 241. The Washington Supreme Court found factual disputes between the parties. *Vasquez*, 33 P.3d at 737 (summarizing the contest between the affidavits). Therefore, the facts set forth in this Article are almost entirely from the perspective of Vasquez as presented in his Supplemental Brief to the Washington Supreme Court. Supplemental Brief of Appellant Frank Vasquez, Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001) (No. 69655-1) [hereinafter *Vasquez* Supplemental Brief]. This perspective is used because the appellate division implied that even if the relationship between the two men was found to be exactly as portrayed by Vasquez, the court still would not find the relationship to be meretricious. *Vasquez*, 994 P.2d at 241 ("A meretricious relationship cannot exist

When Schwerzler died, he was seventy-eight years old and Vasquez was sixty-one.[159] It was established in the trial court that Vaszquez and Schwerzler had a close personal relationship and held themselves out as a couple.[160] In fact, their circle of friends considered them a couple.[161] Schwerzler gave Vasquez a diamond ring for their seventh anniversary and gave him another one for their twenty-fifth anniversary.[162] Schwerzler had birthday parties for Vasquez and bestowed presents on him for other occasions.[163] He also baked his partner a cake nearly every week throughout their years together.[164] When he was in public, he often referred to Vasquez as "my partner," and said that "he did not know what he would do without him."[165] It was widely acknowledged that Vasquez was completely distraught when his partner of almost three decades died.[166]

There were other interdependencies between the couple that made the loss of his partner devastating for Vasquez, including the fact that Vasquez was illiterate and as a result Schwerzler managed their financial affairs.[167] During the relationship, the title of their acquired property was in Schwerzler's name alone.[168]

Throughout their relationship, the men made their living recycling boxes and bags and did this work from home by themselves.[169] It was a business without an overhead that generated a healthy income.[170] Schwerzler, however, had a gambling habit and he squandered much of their earnings in this way.[171] It was also established in the trial court that Schwerzler had announced to others that this income paid for their home and belongings.[172] Unfortunately, when Schwerzler died, the business

---

between members of the same sex.").

159. *Vasquez* Supplemental Brief, *supra* note 159, at 2-3.

160. *See id.* at 3.

161. *See id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *See id.* at 3-4.

167. *See id.* at 4.

168. *Id.*

169. *Id.*

170. *See id.* According to one of Schwerzler's longtime friends who helped in the business, there was a net annual income of $275,000 a year or more. *Id.* at 4 n.22.

171. *See id.* at 4.

172. *See id.* at 4-5.

died with him.[173] Hawthorne, the personal representative of the estate, assigned no value to it.[174]

Aside from the recycling business, the couple had also bought and sold apartment buildings and a house.[175] Vasquez was responsible for tenant relations, rent collection, maintenance, and most of the grounds upkeep.[176] Schwerzler never paid Vasquez for his work in their recycling business, nor for his services in connection with the rental properties.[177] Vasquez presumably did not expect payment "because he and Schwerzler were life partners."[178]

Over the years, friends had heard Vasquez tell Schwerzler that he feared "Schwerzler's relatives would put him out on the street" if Schwerzler were the first to die.[179] Schwerzler would allay Vasquez's concerns by telling him that he had made arrangements to provide for Vasquez.[180] Witnesses recalled seeing Schwerzler hug Vasquez as he consoled him.[181]

Schwerzler had several assets in his name when he died, including the house that he and Vasquez shared, a life insurance policy, two automobiles, and a checking account.[182] When no will could be found, "Vasquez filed a claim against the estate, asserting that he and Schwerzler had been homosexual life-partners and that he was entitled ... to a share of the community property."[183] His position rested on case law (presumably *Lindsey*, *Connell* and their progeny) that allowed individuals in a meretricious relationship to a share of the property.[184] Two of Schwerzler's four siblings decided to fight Vasquez.[185]

When the personal representative opposed the claim, Vasquez pursued it further in court.[186] The superior court awarded nearly all of the estate property to Vasquez on partial

173. *See id.* at 5.
174. *See id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *See id.* at 5-6.
179. *See id.*
180. *See id.* at 6.
181. *See id.*
182. Vasquez v. Hawthorne, 994 P.2d 240, 241 (Wash. Ct. App. 2000), *reversed and vacated by* 33 P.3d 735 (Wash. 2001).
183. *Id.*
184. *See id.*
185. For this information, I am indebted to Mr. Terry J. Barnett of Rumbaugh, Rideout & Barnett in Tacoma, Washington, the attorney for Frank Vasquez.
186. *Vasquez*, 994 P.2d at 241.

summary judgment.[187] All that was left for trial was Vasquez' claims of implied partnership and constructive trust.[188]

In a case of first impression, the personal representative appealed, contending that "as a matter of law, a same-sex relationship cannot be a meretricious relationship."[189] The appellate court traced the history of the meretricious relationship doctrine in Washington and ended in agreement with the personal representative.[190] After an ostensibly accurate analysis of *Connell* and its predecessors, the *Vasquez* court concluded "that a 'meretricious relationship' is one where the parties may legally marry."[191] The court understood this case law as assuming the proposition that such a relationship may only exist between a male and female.[192]

Turning to statutory marriage restrictions, the appellate court emphasized that "the parties must be of the opposite sex."[193] Further, the court stated that it found "no precedent for applying the marital concepts, either rights or protections, to same-sex relationships" and that "community property law clearly applies only to opposite-sex relationships."[194] The court noted that there are other avenues of legal recourse available to Vasquez, particularly in the form of constructive trust and implied partnership.[195]

The Washington Supreme Court vacated the appellate court's decision, reversed the trial court's partial summary judgment and remanded the case for trial.[196] The court's analysis focused primarily on the procedural posture of the case – namely that it was decided on summary judgment.[197] The court found that there was a genuine issue of material fact with respect to the type of relationship that existed between the two men and what property they had acquired in the course of that relationship.[198] Consequently, the supreme court held that the trial court erred by disposing of the case on summary judgment and that the court of

187. *See id.*
188. *See id.*
189. *Id.*
190. *Id.* at 241-43.
191. *Id.* at 242.
192. *See id.*
193. *Id.* at 243 (emphasis omitted).
194. *Id.*
195. *Id.*
196. Vasquez v. Hawthorne, 33 P.3d 735, 738 (Wash. 2001).
197. *See id.* at 737.
198. *See id.*

appeals erred by reaching the merits of the case.[199]

In its decision, the supreme court provided some guidance for the lower tribunal: the focus must be on the "equities involved between the parties" and such claims "are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties."[200] The court emphasized that in the prior meretricious relationship cases, the term "marital-like" is merely an analogy and that equating such cohabitation with marriage would create a de facto common law marriage — a move the court has repeatedly rejected.[201] Therefore, the court stated, "equitable claims must be analyzed under the specific facts presented in each case."[202]

C. Coming Out Without A Will

The appellate decision in *Vasquez* has four flaws, all of them rooted in judicial homophobia.[203] Although the Washington Supreme Court reversed, it did not eradicate the underlying discrimination against same-sex couples. In fact, the supreme court's majority and concurring decisions effectually fuel prejudice and fail to encourage gay and lesbian couples to emerge from the closet.

First, in declining to apply marital concepts to same-sex relationships, the *Vasquez* appellate court derogates significant policies underlying intestacy laws in the United States. The predominant intestacy goal is that of honoring the decedent's intent.[204] As mentioned above, intestacy law, built upon a commitment to donative freedom, applies to situations in which there is no will by presuming what the intended disposition would be.[205] While intestacy statutes are default estate plans, there are doctrines, like that of the meretricious relationship, that give such plans flexibility.[206] That is, where it can be shown that the

199. *See id.* at 736.

200. *Id.* at 737.

201. *Id.* at 737-38.

202. *Id.* at 738. There were concurring decisions in the case. *See infra* notes 314-329 and accompanying text (discussing Justice Sanders and Chief Justice Alexander's separate concurring opinions).

203. *See supra* notes 7-9 and accompanying text (discussing homophobia and the damaging gay and lesbian stereotypes).

204. *See supra* note 64 and accompanying text (discussing homophobia and the damaging gay and lesbian stereotypes).

205. *See supra* notes 66-72 and accompanying text.

206. *See supra* notes 76-156 and accompanying text (discussing meretricious relationship doctrine).

decedent's donative intent does not mesh with that of the statutory model, then the property could be distributed in a different and more equitable fashion.[207]

The *Vasquez* facts epitomize a situation in which donative intent falls outside of the statutory configuration.[208] The *Vasquez* facts showed that the donor Schwerzler intended for his long-time companion to succeed to his property.[209] It was undisputed that the men presented themselves as a couple and that Schwerzler made public displays of that bond, calling Vasquez his "partner" and proclaiming their interdependency.[210]

It was this interdependency that further warranted the designation of Vasquez as a beneficiary to Schwerzler's estate. Specifically, Vasquez's illiteracy made him dependent on Schwerzler to manage their mutual financial affairs.[211] Schwerzler's financial management, in turn, led to the title to their mutually acquired property to be held in his name alone.[212] The two also depended on each other to share in the labor and management of their recycling business and apartment buildings.[213] In this regard, their arrangement was no different than it would be if they were a married couple that also worked and shared a business together: there was no salary from one to the other, just a sharing of assets.[214] However, the evidence also demonstrated that Schwerzler intended to provide for Vasquez if Schwerzler was the first to die.[215]

In deeming Vasquez not entitled to share in the property as a meretricious partner,[216] the appellate court disparaged the predominant goal behind intestacy laws when it disregarded

---

207. *See supra* notes 76-156 and accompanying text (discussing meretricious relationship doctrine).

208. *See supra* notes 157-202 accompanying text (discussing *Vasquez* facts and holding).

209. *See Vasquez* Supplemental Brief, *supra* note 159, at 5-6. *See also supra* notes 179-181 and accompanying text.

210. *See Vasquez* Supplemental Brief, *supra* note 159, at 3.

211. *See id.* at 4.

212. *See id.*

213. *See id.* at 4-5.

214. *See id.* at 5 ("Schwerzler never paid Vasquez for Vasquez's work in the recycling business or with the rental properties. Vasquez did not expect payment, because he and Schwerzler were life partners."). *See also id.* at 4 ("This income paid for his and Vasquez's home, and everything else they had.").

215. *See id.* ("Schwerzler told [Vasquez] not to worry, that he had seen to it that Vasquez would never want for anything. Sometimes Schwerzler hugged Vasquez as he said this.").

216. *See supra* notes 189-195 and accompanying text.

donative intent.[217] The outcome in *Vasquez* is even more disturbing when one considers that the Washington courts had devised the meretricious relationship doctrine for the very purpose of accommodating those relationships in a community property state that do not precisely fit the intestate prototype.[218] In fact, the marital concept was designed for the very sort of situation that existed in *Vasquez*, one in which donative intent points one way and the statute another.[219]

There are, however, other goals of intestacy that the appellate court ignored or at least failed to extend to contemporary reality.[220] One of the intestacy objectives is to make sure that there is a fair distribution of property among family members and the law in Washington reflects that policy.[221] The Washington intestacy statute, like many others, comports with general property law, tipping its hat to the surviving spouse.[222] The surviving spouse takes the entire decedent's estate if there are no children, siblings, or parents and receives a diminished share where such surviving relations exist.[223]

The *Vasquez* appellate court essentially excised Vasquez from any spousal entitlements.[224] While Vasquez was not legally a spouse under Washington law,[225] the jurisdiction had adopted a meretricious (or marital-like) doctrine, which would have effectually placed Vasquez under the umbrella that ensures fair

---

217. *See supra* notes 64-68 and accompanying text.

218. *See supra* notes 76-87 and accompanying text (discussing evolution of meretricious relationship doctrine in the state of Washington). *See also* Beane, *supra* note 77, at 479 (discussing how the Washington Supreme Court developed the meretricious relationship doctrine by abandoning the unfavorable treatment of unmarried couples).

219. *See supra* notes 76-156 and accompanying text (discussing the purpose behind the meretricious relationship doctrine and how the doctrine avoids rewarding only the individual holding title to property).

220. *See supra* notes 63-85 and accompanying text (discussing intestacy, estate and community property laws).

221. *See supra* note 63 and accompanying text; Holob, *supra* note 63, at 1500 ("[P]robate codes seek to avoid creating dissatisfaction among family members in the disposition of an estate."); *supra* notes 68-85 and accompanying text (discussing laws protecting spouses and family members under the community property scheme in Washington).

222. *See supra* notes 68-72 and accompanying text (discussing accommodations for spouses in intestacy statutes and in the form of the elective share); *supra* notes 82-85 and accompanying text (discussing protections for surviving spouses under Washington law).

223. *See supra* notes 82-85 and accompanying text.

224. *See supra* notes 157-202 and accompanying text (discussing *Vasquez* facts and holding).

225. *See supra* note 193 and accompanying text.

distribution among "family" members.[226] The property at stake in *Vasquez* should fall under Washington's community property statute because it was acquired during a marital-like relationship by "labor, industry, and other valuable consideration."[227] Moreover, it was shown in the trial court that the lifestyle of these men resembled that of any typical "marriage."[228] And under Washington law, the appellate court could have treated Schwerzler and Vasquez as a meretricious couple and the spousal entitlement could have at least partially attached to Vasquez.[229] Had the couple been heterosexual, the intestacy law's goals and Washington's meretricious doctrine would have undoubtedly governed.[230]

Other policies behind the intestacy law are to protect financial dependents and enrich the nuclear family.[231] It is not remarkable that Washington promotes such goals by providing for surviving spouses and minor children.[232] These goals, however, necessarily coexist with another reality: intestacy laws are simply not static.[233] While it can be said that the intestacy laws have not exactly kept pace with contemporary society, such laws have modulated over time to meet changing norms.[234] In fact, the whole

---

226. *See supra* notes 76-156 and accompanying text (discussing the development of the meretricious relationship doctrine in Washington).

227. *See supra* note 76-85 and accompanying text (discussing Washington's community property law). *See supra* notes 170, 175-178 (describing how the men worked as business partners and Vasquez received no salary for his labor).

228. *See supra* notes 160-181 and accompanying text (describing marriage-like details of the relationship between Schwerzler and Vasquez).

229. *See supra* notes 145-148 (defining the meretricious relationship doctrine in Washington). *See supra* notes 76-156 and accompanying text (discussing the evolution of the meretricious relationship doctrine in the context of heterosexual couples).

230. *See supra* notes 76-156 and accompanying text.

231. *See* Holob, *supra* note 63, at 1501. Holob, however, points out that "[d]ifficulty arises ... in trying to define the term 'family'" and that "[h]istorically, society has valued the institution of the family – one consisting of a heterosexual, married couple and their biological children – for its legal, social, and religious significance." *Id. See supra* notes 63-85 and accompanying text (discussing goals of intestacy and estate laws).

232. *See supra* notes 82-85 and accompanying text (summarizing pertinent statutory provisions in Washington).

233. *See generally* Holob, *supra* note 63, at 1496-99 (describing the history and development of the intestacy laws); John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Commercial Code*, 55 ALB. L. REV. 871 (1992). *See also* DUKEMINIER & JOHANSON, *supra* note 63, at 72 (discussing the changes to the Uniform Probate Code which was originally promulgated in 1969).

234. *See* Holob, *supra* note 63, at 1495 ("Estate planning is an especially problematic area for nontraditional families."). Holob further states, "[a]s more and more couples choose alternative family arrangements, current intestate succession

history of intestacy is about change, about British ways meeting their demise when they arrived in the New World.[235]

While the modern law of wills dates back to Roman times, our closest ancestor is the English common law of inheritance with its male preference and separate treatment of land and personalty.[236] Historically, such testamentary law ministered to what we now consider archaisms, like dower and curtesy, and conformed to a feudalistic society, the cornerstone of which was primogeniture, a system in which land descended to the eldest son.[237] While United States law is rooted in this English model, our legislatures had to tweak some of the rules to fit our idiosyncrasies. While primogeniture is gone and dower and curtesy are practically defunct, the United States probate system recognizes not just the surviving spouse, but also nonmarital and adopted children.[238] The once rigid English demarcation between realty and personalty and the male preference have also vanished because of incompatibility with the United States adherence to testamentary freedom, our historic mistrust of dynastic aristocracies, and our professed allegiance to equality.[239]

---

laws adequately protect an increasingly smaller portion of society. Although significant changes have occurred in intestate succession laws, these changes do not satisfy all of the needs of domestic partners." *Id.*

235. *See id.* at 1496-98 (describing "historical variations between U.S. and British probate laws").

236. *See id.*

237. *See id.* *See also* DUKEMINIER & JOHANSON, *supra* note 63, at 478-79 (describing dower and curtesy). They explain that "[i]n feudal times, when land was the chief form of wealth and provided the power base of the head of the family, dower provided generous support to the widow of a propertied man." *Id.* at 478. Under the law of dower, the widow gets a life estate in "one-third of her husband's qualifying land" and basically, the "qualifying land" is "all land of which her deceased husband had been seised during marriage and which was inheritable by the issue of husband and wife." *Id.* Curtesy is similar to dower except that the husband does not acquire it unless children are born of the marriage. *Id.* at 479. Also, under the law of curtesy, the husband gets a "life estate in the entire parcel, not merely in one-third." *Id.* Dower and curtesy have been abolished in most states. *Id.*

238. *See generally* DUKEMINIER & JOHANSON, *supra* note 63, at 479 (describing the virtual abolition of dower and curtesy). As they explain, "[c]urtesy survives today in one or two states only as a label given to the support interest of the husband, which in fact has been made identical with the wife's common law dower." *See id.* According to Dukeminier and Johanson, dower exists in its common law form in only five states: Arkansas, District of Columbia, Kentucky, Michigan and Ohio. *See id.* at 102 (discussing inheritance rights of adopted children, which "var[ies] considerably from state to state") and 115-16 (discussing the evolution of the inheritance laws' treatment of nonmarital children, who were once considered "*filius nullius*, the child of no one, and could inherit from neither father nor mother").

239. *See* Holob, *supra* note 63, at 1497-98. She explains:

With the development of a market economy in colonial America, feudal

The *Vasquez* appellate court tramples on intestacy goals and essentially stops the clock. One of the perspicuous facts in the *Vasquez* case is Vasquez's financial dependence upon his partner, a situation which in some ways replicates that of the traditional wife. Although Vasquez put time and labor into the generation of "marital" property, he was illiterate and Schwerzler was the manager with title to the property.[240] The record reflected the fact that this couple acknowledged Vasquez's dependency. Vasquez himself expressed fear of being tossed out into the street upon his partner's death and Schwerzler made public promises to prevent such destitution.[241] Here there was financial dependence and a needy survivor. The appellate court, however, refused to acknowledge that the situation mirrored the one that intestacy aims to protect and simply did what Vasquez feared – put him out on the street. Not only did that contravene what was shown to be his partner's donative intent, but it also eviscerated the salutary estate goal of caring for financial dependents.

The infirmity, however, goes beyond just slighting the policies behind United States intestacy law. While the historical perspective on inheritance discloses a law that has changed considerably since the British progenitor, and surely since its more ancient Roman rudiment,[242] the *Vasquez* court puts the law in a kind of majoritarian deep freeze. The slogan, "promotion of the nuclear family," is seductive, but in truth meaningless when severed from the context of a society that is in constant flux.[243]

No one would deny that there was a time when society defined the immediate "family" as a married heterosexual couple

---

principles were not applicable. Because there was an abundance of unclaimed land throughout our nation's history, the United States did not attach as much importance to its ownership as the British did. In addition, the preference for male descendants over female descendants in intestacy law began to erode in America during colonial times, long before it did in England. This preference disappeared because it "was considered incompatible with that equality ... which it is the constitutional policy of this country to preserve and inculcate." With an abhorrence of "aristocracy [and] family dynasties," American probate codes developed by focusing on "individual freedom of disposition."

Id. (quoting LAWRENCE W. WAGGONER, ET AL., FAMILY PROPERTY LAW 33 (1997)).

240. *See Vasquez* Supplemental Brief, *supra* note 158, at 4-5.

241. *See id.* at 5-6.

242. *See* Holob, *supra* note 63, at 1496 ("Although documents resembling wills have been in existence for five thousand years, the modern American law of wills owes its origins to the Romans," who "defined inheritance as 'universal succession' and believed that the inheritor did not simply represent the deceased but 'continued his civil life, his legal existence.'").

243. *See supra* notes 231-235 and accompanying text.

plus biological offspring.[244] The definition, however, has expanded over the past decades to encompass all sorts of bonds.[245] The irony here is that the *Vasquez* appellate court's denial of the very evolving nature of the law occurred in a jurisdiction that, through common law and its abolition of the *Creasman* presumption, has done the opposite — namely, nourish the transforming concept of family.[246]

Washington is known for its progressive approach to meretricious relationships, but also for its formulation of property rights; this exemplifies a healthy symbiosis between the legislature and the judiciary.[247] Washington courts, in burying the *Creasman* presumption, have balanced deference to statutes that define and enumerate the benefits attendant to marriage with

---

244. *See generally* Beane, *supra* note 77, at 475-77 (discussing how law is adapted to the traditional family); Chambers, *supra* note 38, at 452-54 (discussing the legal consequences of marriage); Dean, *supra* note 36, at 1091-92 (discussing how law has not kept up with the non-traditional family); Gary, *supra* note 63, at 1-6 (discussing how intestacy statutes fit the traditional family); Holob, *supra* note 63, at 1493-96 (discussing how estate planning is easier for the traditional family); Spitko, *supra* note 37, at 280-82 (arguing that fact-finders discard estate plans in favor of intestacy scheme that fits the cultural norms); Vetri, *supra* note 37, at 3-4 (discussing the changing view of family and how the laws must adapt); Taya N. Williams, *Committed Partnership: The Legal Status of Committed Partnerships and Their Children*, 13 J. SUFFOLK ACAD. L. 221, 223 (1999) (discussing how family is defined for purpose of intestacy as "a married couple and children of that marriage").

245. *See* Beane, *supra* note 77, at 479 (discussing cohabiting unmarried couples and how Washington law has accommodated them); Chambers, *supra* note 38, at 449-52 (describing the lifestyle of gay and lesbian adults that live with a person of the same sex and regard that person as their life partner); Dean, *supra* note 36, at 1091 (describing "[n]on-traditional families" as including "gay and lesbian couples, unmarried cohabitants of opposite gender and people who have created informal parenting relationships with the children of their domestic partners, nieces and nephews, grandchildren or other children needing love and support"); Estin, *supra* note 86, at 1384 (describing cohabitants that have "no rights or obligations that arise by virtue of their shared life"); Gary, *supra* note 63, at 5-6 (describing the "functional definition" of family as including "family members those who function as family members, those for whom close, loving, caring and nurturing family relationships exist"); Holob, *supra* note 63, at 1501 (describing how "the configuration of family has undergone a dramatic change"); Vetri, *supra* note 37, at 21 (arguing that "[t]he traditional nuclear family – a legally married heterosexual couple living with their biological children – is no longer the dominant pattern of the American household" and that "[o]nly one half of the country's children live in such families today"); Williams, *supra* note 244, at 221 ("Single-parent, unmarried couples, same-sex and opposite-sex committed partnerships households (including children) have increased.").

246. *See supra* notes 76-156 and accompanying text (discussing the evolution of the meretricious relationship doctrine in Washington).

247. *See generally* Beane, *supra* note 77, at 474-79 (describing the progressive law in Washington and explaining how "[s]tatutory schemes and common law govern the disposition of community property and separate property in the event of dissolution or death").

basic equities and the aim to avoid unjust enrichment.[248] As such, Washington's meretricious relationship doctrine is essentially a testimonial to the virtue of hybrid judicial and legislative laws.

The appellate court in *Vasquez*, however, by turning its back on the syncretism that has worked, removes the judicial ingredient. The court essentially cracks open the statute book, grabs the language that marriage may exist only between a male and female, and proclaims, "end of story."[249] In so doing, the court denies its own existence by abrogating the judicial role. It is as if the court's resistance to homosexuality or fear of it is so potent that it leads the court to a form of self-annihilation.

In declining to apply marital concepts to same-sex relationships, the *Vasquez* appellate court disrespects precedent. As explained above, the *Lindsey* and *Connell* courts discarded the wooden *Creasman* approach, which made the law "unpredictable and at times onerous."[250] The *Lindsey* decision requires courts to make a just and equitable division after examining the relationship itself and the accumulations of property.[251] The *Lindsey* court purged the analysis of the "rigid set of requirements," and mandated that each case be examined on its own facts.[252] In contravention of *Lindsey*, the *Vasquez* court refused to see the facts before it and instead spawned a new rigidity – heterosexuality – as a requisite for the applicability of the meretricious doctrine. The court ordered a new threshold inquiry and said that when the couple fails that heterosexuality test, the examination can go no further.

The *Vasquez* court, admitting that *Connell* does not "precisely define when a meretricious relationship exists" and that it requires a "case-by-case" inquiry, stated that "[t]he critical focus is on property that would have been characterized as community property *had the parties been married.*"[253] The *Vasquez* court, however, did not deal with anything it recites – not the case before it, not the "critical focus," and not the *Connell* factors. None of

248. *See supra* notes 76-156 and accompanying text (discussing the evolution of the meretricious relationship doctrine in Washington).

249. *See* Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000) (One of the statutory limitations on marriage is that "the parties must be of the opposite sex ...").

250. *In re* Marriage of Lindsey, 678 P.2d 328, 331 (Wash. 1984). *See supra* notes 76-156 and accompanying text (discussing *Lindsey* and its overruling of *Creasman*).

251. *See Lindsey*, 678 P.2d at 331. *See supra* notes 76-156 and accompanying text.

252. *Lindsey*, 678 P.2d at 331. *See supra* notes 76-156 and accompanying text.

253. *Vasquez*, 994 P.2d at 242.

these things came into play.

As explained above, *Connell* enumerated certain factors that a court should consider in determining whether there was a stable marital-like relationship.[254] While the court clarified that no one factor is controlling and indicated that not all factors need apply,[255] the *Vasquez* record reflects that the relationship met every single prong. In fact, as the trial judge acknowledged, the showing of a meretricious relationship was so overwhelming that it warranted resolution on summary judgment.[256]

Specifically, Vasquez and Schwerzler had a committed relationship of long "duration," one that lasted about twenty-eight years, which, with the exception of about two years, entailed "continuous cohabitation."[257] Also, the "purpose of the relationship" and the "intent of the parties," as in any other marriage, had emotional and economic arteries.[258] Vasquez and Schwerzler appeared together as a couple and described themselves as "partners."[259] They also participated in holidays and significant events as a couple.[260]

The relationship involved the "pooling of resources" and shared income from "joint projects."[261] Together, they bought and sold apartments and together, they ran a profitable recycling business.[262] As in other committed relationships, they took the bitter with the sweet. Their bond endured despite Schwerzler's gambling problem and its resultant depletion of marital

254. Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995). *See supra* notes 129-156 and accompanying text (discussing *Connell* and its contribution to the development of the meretricious relationship doctrine).

255. *See Connell*, 898 P.2d at 834. *See supra* notes 129-156 and accompanying text (discussing *Connell* and its contribution to the development of the meretricious relationship doctrine).

256. *See* Vasquez v. Hawthorne, 33 P.3d 735, 737 (Wash. 2000) (discussing the trial court's determination to grant summary judgment).

257. *Connell*, 898 P.2d at 834 (stating that some of the factors establishing a meretricious relationship are "duration of the relationship" and "continuous cohabitation"). *See also Vasquez* Supplemental Brief, *supra* note 158, at 2-3 (describing the "duration of the relationship" and "continuous cohabitation").

258. *Connell*, 898 P.2d at 834 (stating that other factors establishing a meretricious relationship are "purpose of the relationship" and "intent of the parties"). *See also Vasquez* Supplemental Brief, *supra* note 158, at 2-6 (describing the relationship between Schwerzler and Vasquez).

259. *See Vasquez* Supplemental Brief, *supra* note 158, at 3.

260. *See id.* at 3-4.

261. *Connell*, 898 P.2d at 834 (stating that other factors establishing a meretricious relationship are "pooling of resources" and "services for joint projects").

262. *See Vasquez* Supplemental Brief, *supra* note 158, at 4-5.

resources.[263] Because the *Connell* prongs were so adequately satisfied and left no genuine issue of material fact, the trial court found as a matter of law that Vasquez was the beneficiary of a long term, stable, cohabiting relationship.[264]

While the appellate court eschewed the *Connell* inquiry, it deemed the doctrine inapplicable to a situation where the parties may not legally marry.[265] The court believed, based on *Connell* and its predecessors, that a meretricious relationship may exist only between a man and a woman.[266] While there are multiple faults in the reasoning, one of them is the effacement of stare decisis. What the court was essentially saying is that since the couples in *Connell* and other cases were heterosexual, the decisions can reach only fact patterns with heterosexuals. Ostensibly, the court's view is that there can never be any application of extant law to a case that has a new wrinkle that has not before presented itself. The nonsequitorial premise here is that the law cannot flex to accommodate change or to be blunt, that there is no hope of extending law to a case of first impression.

However, the court's interpretation of *Connell* is skewed for yet another reason. In *Connell*, the court felt that not all aspects of the law governing the distribution of marital property should apply to meretricious relationships.[267] The reason was freedom of choice. As the *Connell* court asserted, the parties chose not to get married and, therefore, the property that each one owned prior to the relationship should be unavailable for division.[268] Because of the conscious decision not to marry, only the property acquired during the relationship was to be divided.[269] *Connell* makes it clear that having the option to marry but not availing oneself of that option is what creates the limitation and bestows upon the meretricious relationship a status somewhat "inferior" to legal marriage.

The *Vasquez* court, however, inverted *Connell*. The court, examining the statutory limitations on who may marry, pointed

263. *See id.* at 4.

264. Vasquez v. Hawthorne, 33 P.3d 735, 736 (Wash. 2000) (describing summary judgment in trial court).

265. *See* Vasquez v. Hawthorne, 994 P.2d 240, 242 (Wash. Ct. App. 2000).

266. *See id.* at 242-43.

267. *See* Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995). *See supra* notes 129-156 and accompanying text (discussing *Connell* and its contribution to the development of the meretricious relationship doctrine).

268. *See Connell*, 898 P.2d at 836.

269. *See id.*

out that the parties must be of the opposite sex.[270] The court then somehow deduced from *Connell* that if the parties lack the option to marry, then the relationship cannot be meretricious.[271] For the *Vasquez* court, not availing oneself of marriage because marriage is not an option becomes not a mere limitation on property division, but an absolute bar to treatment of the relationship as meretricious.

An accurate reading of *Connell*, however, should lead to a different – and possibly opposite – approach. Specifically, not having the option to marry should, if anything, expand entitlement rather than diminish it. The fact that Vasquez and Schwerzler *could not* marry should tip the scales not against, but in favor of, a finding of meretriciousness. Basically, there was nothing that these committed lovers could do to legalize their bond or make it more "marital." In contrast, when heterosexual couples cohabitate and elect not to undergo the legal formalities of marriage, they are presumed to understand that they might be relinquishing certain entitlements upon divorce or property rights if one partner should die without making the other a beneficiary in a will or trust.[272] Under *Connell*, being heterosexual demotes the unmarried couple's rank to "marital-like."[273] According to the *Vasquez* appellate court, misreading *Connell*, being an unmarried homosexual couple reduces them to the status of virtual strangers.

One of the peculiarities of the *Vasquez* appellate decision is its extensive harping on the overruled *Creasman* presumption.[274] The *Vasquez* court briefed *Creasman*, giving the facts and procedural history, and quoted the key *Creasman* language that "in the absence of any evidence [or intent] to the contrary, it should be presumed as a matter of law that the parties intended to dispose of the property exactly as they did dispose of it."[275] While the *Vasquez* court, of course, acknowledges that *Lindsey* and *Connell* rejected *Creasman*, it ends up treating *Creasman* as if it were still good law.

The *Vasquez* court bolstered its conclusion that a meretricious relationship can only exist between a man and a

---

270. *See Vasquez*, 994 P.2d at 242-43.

271. *See id.*

272. *See Connell*, 898 P.2d at 836 (stating that it does not wish to "ignore ... the conscious decision by many couples not to marry").

273. *See id.* ("The parties to such a relationship have chosen not to get married and therefore the property owned by each party prior to the relationship should not be before the court for distribution at the end of the relationship.").

274. *See Vasquez*, 994 P.2d at 242-43.

275. *Id.* at 242 (quoting Creasman v. Boyle, 196 P.2d 835, 835 (Wash. 1948)).

woman with reliance on the overruled *Creasman* decision that made "repeated reference to 'a man and a woman.'"[276] In fact, the *Vasquez* court ultimately spawned a *Creasman* result, one that equates with the *Creasman* presumption that as a matter of law Schwerzler intended to dispose of the property exactly as he did dispose of it.[277] What is interesting here is that a concurring justice in the Washington Supreme Court praised the appellate court and said that the "scenario" in the *Vasquez* case

> would be ample reason to reconsider the benefits of the rule articulated in *Creasman* ... that property acquired by an individual, notwithstanding his or her living relationship short of marriage, in the absence of some trust relationship, 'belongs to the one in whose name the legal title to the property stands.'[278]

The homosexuality in the case motivates the appellate court and the concurring supreme court justice to the reactionary resurrection of a well-buried doctrine.

Creasman and *Vasquez* are kindred spirits in another way. Both have discrimination coursing through their veins. The "unpredictable and at times onerous"[279] application of the *Creasman* presumption was born in a case involving an interracial couple, which must have triggered at a minimum unconscious racial bias and discrimination on the part of that era's judiciary.[280] As such, it was not unlikely that the presumption derived from a disinclination on the part of the *Creasman* judges to treat a mixed-race couple as "marital" and deem them entitled to a sharing of property. In some sense, *Creasman* can be explained as an anti-miscegenation case.

Similarly, *Vasquez*, with its resuscitation of *Creasman*, springs from discrimination as well. It is based on anti-homosexual sentiment and adherence to the irrational notion that a same-sex relationship cannot be marital or familial.[281] Such a stereotype in *Vasquez* is not an anomaly, but rather duplicates the silly notion that surfaces in other judicial decisions involving gays and lesbians, especially those that deal with child visitation,

---

276. *See id.* at 242 n.2.

277. *See Creasman*, 196 P.2d at 841.

278. Vasquez v. Hawthorne, 33 P.3d 735, 741 (Wash. 2000) (quoting *Creasman*, 196 P.2d at 835).

279. *In re* Marriage of Lindsey, 678 P.2d 328, 331 (Wash. 1984).

280. *See supra* notes 88-101 and accompanying text (discussing the facts of *Creasman*).

281. *See* Bottoms, *supra* note 7, at 345 (discussing how courts create mythic images of the homosexual, one of them being an individual with a "life-style devoid of any marital or familial attributes").

custody and adoption.[282]

Courts expressing their heterosexism frequently refrain from attributing family attributes to a homosexual household.[283] By way of example, there are two notorious homophobic decisions in Virginia, *Doe v. Doe*,[284] in which the state supreme court found that a mother's lesbian relationship did not justify severance of her parental rights, and *Roe v. Roe*,[285] in which the same court concluded that a father's continuous exposure of his child to his homosexual relationship made him an improper custodian as a matter of law. Although the homosexual parent won in *Doe* and lost in *Roe*, the cases harbor the same discriminatory stereotype.[286] Both the *Doe* and *Roe* courts portray the homosexual parent as immersed in life-styles bereft of any marital or family qualities.[287]

---

282. *See id.*

283. *See id.*

284. 284 S.E.2d 799 (Va. 1981). In *Doe*, the married couple divorced and the ex-husband remarried. *See id.* at 801. The ex-husband and his new wife sought to adopt the child who was living with the ex-wife and her same-sex lover. *See id.* The trial court permitted the adoption and severed the lesbian mother's parental rights, stating,

> [T]he open lesbian relationship now engaged in by Jane Doe, and which relationship she says will continue, would have a definite detrimental effect on Jack [the child] if he is permitted to visit and live with his mother, especially during his formative years and that his being exposed to this relationship would result in serious emotional and mental harm to this child, and that his best interest will be promoted by the adoption.

Id. at 804. On appeal, the Supreme Court of Virginia reversed and determined that the trial court's finding was not supported by the evidence. *See id.* at 806. *See also* Bottoms, *supra* note 7, at 346-49, 352-57 (discussing this case and the court's portrayal of the lesbian mother as the "malum in se anti-familial criminal").

285. 324 S.E.2d 691 (Va. 1985). In *Roe*, there was a divorce and the trial court granted joint legal custody of the child to the mother and the gay father and specifically found that there was no evidence that the father's lifestyle adversely affected the child. *See id.* at 692-94. The trial court, however, required that the father not share the same bed or bedroom with his lover. *See id.* at 692. The Supreme Court of Virginia, however, reversed and concluded that "[t]he father's continuous exposure of the child to his immoral and illicit relationship render[ed] him an unfit and improper custodian as a matter of law." *Id.* at 694. *See also* Bottoms, *supra* note 7, at 349-57 (discussing this case and the court's portrayal of the gay father as the "malum in se anti-familial criminal").

286. *See Bottoms, supra* note 7, at 352-57 (discussing how both the *Doe* and *Roe* courts "foster the image of the homosexual parent not only as a dangerous criminal, but also as the personification of the anti-family").

287. In *Doe*, the heterosexual father portrayed his own home as a "rural extended family" and juxtaposed it with that of his lesbian ex-wife, which was "different, unordered, unstructured, and bohemian." 284 S.E.2d at 801. Further, the *Doe* court described the dispute before it as one between "two households, one where there is a husband and wife relationship and the other a homosexual relationship between two women." *Id.* at 802. As such, the court implies that the controversy is not one between human beings but between households, one superior and the other inferior. In *Roe*, the court similarly pitted the homosexual household against the family home as opposites and fixated on the bed and bedroom that his father

The *Vasquez* appellate decision falls squarely within this genre, insisting that the lifestyles of same-sex couples, putatively characterized by indulgence in sexual promiscuity, are nothing like their own.[288] In essence, the judicial process is repression and denial that stems from some possibly unconscious need on the part of members of the judiciary to ensure that the homosexual sphere has no conceivable affiliation with their own.[289]

At the core of homophobia is an unconscious ligature between the gay lifestyle and sodomy,[290] which was at issue in the notorious *Bowers v. Hardwick*[291] decision, upholding the constitutionality of the Georgia sodomy statute. While the Georgia statute itself was gender-neutral, proscribing both homosexual and heterosexual sodomy,[292] the *Bowers* Court read it

---

shared with his male lover. *See* 324 S.E.2d at 693. *See also* Bottoms, *supra* note 7, at 356-57 (further analyzing the image of anti-family).

288. *See* Bottoms, *supra* note 7, at 357 (the homosexual house is presented "not as a home, but as some orgiastic situs"). In *High Tech Gays v. Defense Industrial Security Clearance Office*, the court sought to dispel the myth that a gay lifestyle is one of indulgent sexual promiscuity. 668 F. Supp. 1361, 1369 (N.D. Cal. 1987). The court stated:

> Many people erroneously believe that the sexual experience of lesbians and gay men represents the gratification of purely prurient interests, not the expression of mutual affection and love. They fail to recognize that gay people seek and engage in stable, monogamous relationships. Instead, to many, the very existence of lesbians and gay men is inimical to the family.

Id.

289. *See Amathia, supra* note 8, at 293-94 (discussing the repression and denial in homophobic decisions). *See also* SIGMUND FREUD, *Repression* (1915) in GENERAL SELECTION FROM THE WORKS OF SIGMUND FREUD 3, 87 (John Rickman ed. Doubleday 1957) [hereinafter GENERAL SELECTION]. For Freud, "repression lies simply in the function of rejecting and keeping something out of consciousness." *Id.* at 89. It works with "negation," which is a "way of taking account of what is repressed." SIGMUND FREUD, *Negation* (1925) in GENERAL SELECTION 54-55.

290. *See generally* Harris M. Miller, II, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 802-803 (1984). Miller states:

> Sodomy statutes discriminate against gays so severely and disproportionately that these statutes are virtually forms of de jure discrimination. First, they deny gays *all* sexual contact, but, for heterosexuals, at worst only limit the forms of sex in which they may legally participate. Second, the obvious antigay orientation of the statutes stigmatizes homosexuals and perpetuates the "sexual deviant" stereotype of gays. Finally, police, governmental employers, the Immigration and Naturalization Service, university officials, and others defend policies that discriminate against gays on the basis of the criminal status sodomy statutes impose upon gays.

Id. See also Scouting, supra note 8, at 62-64 (discussing how sodomy statutes perpetuate discrimination against gays).

291. 478 U.S. 186 (1986).

292. The Georgia criminal statute provided:

> (a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or

as singling out only homosexual conduct.[293] What the *Bowers* Court did was engraft criminalized conduct onto what it perceived as a homogenous group – homosexuals.[294] In so doing, it personified sexual orientation as a menace to a wholesome society.

The *Vasquez* appellate court decision follows in the miserable *Bowers* tradition, by ousting only same-sex unions from the benefits of the meretricious relationship doctrine.[295] What is interesting, however, is that "meretricious" once had unsavory connotations and has evolved into a more generic term referring to something rather benevolent – that is, a "stable, marital-like relationship."[296] The *Vasquez* court, however, yoking the same-sex union to sodomy, brings back the archaic negativity that was once linked to meretriciousness.

In declining to affix marital concepts to same sex relationships, the *Vasquez* appellate court dehumanizes homosexuals by divesting them of the power to choose. This cruelty is related to, as discussed above, the *Vasquez* court's distortion of *Connell*. In *Connell*, the court found that freedom of choice was key and that couples choosing not to marry should enjoy only some benefits from the law governing the distribution of marital property.[297] Consequently, heterosexual partners can assert control over their own lives: they can choose the option of marriage and get the property rights in accordance with that station or they can choose a meretricious relationship and have the property rights befitting that alternative. In short, they have

---

anus of another ...

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one or more than 20 years ...

Id. at 188 n.1 (quoting GA. CODE ANN. §16-6-2 (1984)).

293. *See Amathia, supra* note 8, at 289; *Scouting, supra* note 8, at 62-63; Cynthia J. Frost, Shahar v. Bowers: *That Girl Just Didn't Have Good Sense*, 17 LAW & INEQ. 57, 62 (1999) ("Equating sodomy with homosexuality has the effect of exonerating heterosexuals.").

294. *See Scouting, supra* note 8, at 62-63.

295. *See* Vasquez v. Hawthorne, 33 P.3d 735, 737-38 (Wash. 2000).

296. *See* deFuria, *supra* note 37, at 200 n.8 ("'[M]eretricious' originally connoted purely illicit and tawdry sexual behavior ('characteristic of a prostitute')") (quoting WEBSTER'S DICTIONARY 1127 (2d ed. 1989) and BLACK'S LAW DICTIONARY 891 (5th ed. 1979)). DeFuria explains that "conduct once considered unacceptable has now become relatively commonplace, since few negative connotations apply to the practice anymore" and that "[a]s the incidence of nonmarital cohabitation increased, the law began to offer protection to cohabitants against various forms of discriminatory treatment based upon the meretricious relationship." *See* deFuria, *supra* note 37, at 209. *See also* Beane, *supra* note 77 (discussing the evolution of the doctrine as affording benefits and entitlements).

297. *See* Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995). *See supra* notes 267-273 and accompanying text.

a menu with more than one selection on it.

The problem with the reasoning in *Vasquez* is that the court strips homosexuals of the menu and choices. One choice that is already foreclosed is marriage, which is barred by Washington law.[298] The court, however, goes further by sealing up the only other alternative, that of being recognized as legitimately marital-like.

What the *Vasquez* court has done in its treatment of these individuals is mimic the kind of suffocation that psychologists have called the formula for "learned helplessness."[299] In his psychological study, Martin Seligman, describes the components of learned helplessness: "[f]irst, an environment in which some important outcome is beyond control; second, the response of giving up; and third, the accompanying cognition: the expectation that no voluntary action can control the outcome."[300] Seligman conducted experiments with animals subjected to pain that they could neither control nor avoid. Unlike the creatures in Seligman's comparison group that had a choice of escaping painful stimuli, the helpless subjects eventually stopped eating or became limp and apoplectic.[301]

Conditions that engender learned helplessness are analogous to the reasoning of the *Vasquez* court. Essentially, the *Vasquez* court has transmitted the message that there is nothing a homosexual can do to escape the confines of a heterosexist property system. More than that, the *Vasquez* decision admonishes gays and lesbians that attempting to shape something so basic to the American value system – home and family – is not in their control. The *Vasquez* decision, simulating the laboratory conditions designed to induce learned helplessness, endorses uncontrollability and hopelessness for homosexual couples by

298. *See* Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000) (discussing statute mandating that married parties be of the opposite sex).

299. MARTIN E.P. SELIGMAN, HELPLESS: ON DEPRESSION, DEVELOPMENT AND DEATH xvii (1992) (discussing "learned helplessness"). *See also* Amy D. Ronner, *Punishment Meted Out For Acquittals: An Antitherapeutic Jurisprudence Atrocity*, 41 ARIZ. L. REV. 459, 479 (1999) (discussing Seligman's studies in the context of the federal sentencing guidelines and therapeutic jurisprudence).

300. SELIGMAN, *supra* note 299, at xvii.

301. *See id.* at 42-43 (describing how uncontrollable shock produced more anxiety in rats and resulted in the "breakdown of a well-trained appetitive discrimination"). *See also id.* at 44 ("In summary, helplessness is a disaster for organisms capable of learning that they are helpless. Three types of disruption are caused by uncontrollability in the laboratory: the motivation to respond is sapped, the ability to perceive success is undermined and emotionality is heightened.").

urging them to just give up.[302]

The *Vasquez* appellate court's decision is detrimental in yet another way. It effectually inhibits or, at the very least, fails to encourage individuals to emerge from the closet. The *Connell* court gave factors that help establish the existence of a meretricious relationship.[303] The factors, such as "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties,"[304] are easier to prove when a relationship is out in the open. This is especially true in proceedings involving distribution of property upon death, in which the surviving partner, the one with the vested interest, must show a "stable, marital-like relationship."[305] For such an individual, being able to rely on the testimony of disinterested parties can be a real plus. Surely, it helps to have third parties that can relay their observations of the love, sharing and interdependencies between the decedent and the partner.[306] Consequently, being out of the closet can assure such witnesses and facilitate a showing of meretriciousness.

Here too the *Vasquez* appellate court has pushed things in the wrong direction. In deeming the marital doctrine unavailable as a matter of law to same-sex couples, the court implicitly transmits the message that coming out of the closet does not and cannot help. The court suggests that being open and honest about one's sexual orientation and holding oneself out as a "stable, marital-like relationship"[307] is unremunerative. As such, the court has missed an opportunity to create an incentive for same-sex couples to come out of the closet.

Such a missed opportunity is destructive because, as discussed above, coming out of the closet is salutary for multiple reasons.[308] It is psychologically beneficial as a means of purging oneself of societal homophobia.[309] Coming out can help individuals

---

302. *See* Vasquez v. Hawthorne, 33 P.3d 735, 741 (Wash. 2000).

303. *See* Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995); *supra* notes 129-156 (discussing *Connell* in the context of the evolution of the meretricious relationship doctrine).

304. *Connell*, 898 P.2d at 834.

305. *See id.*

306. *See, e.g., Vasquez* Supplemental Brief, *supra* note 158, at 2-7 (detailing the Statement of the Facts which relies on record cites to observations of friends and witnesses, people that interacted with the couple and was aware of their gay status).

307. *See Connell*, 898 P.2d at 834.

308. *See supra* notes 26-35 and accompanying text.

309. *See supra* notes 27-32 and accompanying text.

come to terms with their own sexual orientation, elevate their self esteem, and help them lead happier lives.[310] Also, as discussed above, coming out is politically advantageous because it enables homosexuals to bond together in the fight for equality.[311] Further, coming out can change bad attitudes.[312] People who are familiar and interact with minorities are more prone to relinquish stereotypes and to come to accept people as people. As such, coming out can yield an antidote to homophobia.[313] By failing to encourage outness, the *Vasquez* decision is not just psychologically detrimental, but also has the effect of perpetuating discrimination against homosexuals.

Although the state supreme court reversed and remanded, that decision does not go far enough. In fact, the majority and concurring decisions harbor anti-gay sentiment.[314] In his concurring decision, Justice Sanders rightly accused the majority of "avoid[ing] meaningful discussion of [the same-sex] issue" and described the opinion as "provid[ing] somewhat less satisfaction that can be obtained from kissing one's sister."[315] The majority did sidestep the issue of sexual orientation, instead dwelling mostly on the supposed impropriety of the procedural summary judgment mechanism. The Supreme Court, filling the paper with the rehashing of what it saw as the battle of the affidavits, faulted the trial court for resolving the case on the merits without "sufficient undisputed factual information."[316]

The majority, however, did not engage in a real critique of the heterosexist decision below. The court simply stated that the court of appeals erred by "reach[ing] the merits of the case" and as guidance on remand, admonished that equitable claims "are not dependent on the 'legality' of the relationship between the parties, nor are they limited by gender or sexual orientation of the parties."[317] The court did not mention bias or even attempt to reprove the appellate court for its unfair prejudice and spawning of different property rights for heterosexuals and for gays. The Supreme Court seems more agitated by the trial court's supposed abuse of summary judgment than by the appellate tribunal's cruel

310. *See supra* notes 27-32 and accompanying text.

311. *See supra* notes 32-33 and accompanying text.

312. *See supra* notes 34-35 and accompanying text.

313. *See supra* notes 34-35 and accompanying text.

314. *See supra* notes 191-202 and accompanying text.

315. Vasquez v. Hawthorne, 33 P.3d 735, 739 (Wash. 2000) (Sanders, J., concurring).

316. *Id.* at 737.

317. *Id.* at 736-37.

discrimination.

Interestingly is that the supreme court makes a point of building a wall between meretricious relationship and marriage, emphasizing that the term "marital-like" is only an "analogy because defining these relationships as related to marriage would create a de facto common-law marriage."[318] It seems that underlying the court's insistence that meretricious relationships are not equivalent to marriage is not just a fear of legitimating same-sex couples, but also a fear that the decision will one day be construed that way. The message, although implicit, is that the court is not condoning homosexual unions and that the decision should not be treated as a step in the direction of legalizing them.

The majority decision is certainly not courageous; it fails to provide any real analysis of the failings in the decision below. Even if the supreme court believed that the facts did not warrant a summary judgment, it should have at least expounded on the holding that same-sex relationships can be "marital." The court simply ducks an opportunity to advance gay and lesbian rights or, at least, to encourage such individuals to live an open, honest life.

The concurring opinions are worse than that of the majority's. Justice Sanders agreed with the majority that summary judgment in the trial court was inappropriate; he divorced himself from the majority in several galling ways. Justice Sanders underscored the fact "that these individuals are of the same sex," which for him is a distinction with a difference, and with respect to the meretricious relationship claim "defer[red] to the unanimous and thoughtful opinion of the Court of Appeals."[319] Essentially, Justice Sanders took the view that a same-sex couple cannot be marital and incorporated into his own perspective the homophobic attributes of the appellate court's reasoning.

Justice Sanders, however, did not merely rubber-stamp the appellate decision, as he stated he was inclined to do, but rather added a toxic layer to it. He packaged his reasoning in the language of "intent," making it appear that his view had nothing to do with bias against homosexuals.[320] Sanders posited, like the court below, that the legal ability to wed is a requirement for a relationship to be meretricious and hung his hat on the decision in *In re Marriage of Pennington*,[321] which involved heterosexual

318. *Id.*

319. *Id.* at 739 (Sanders, J., concurring).

320. *See id.* at 740.

321. 14 P.3d 764 (2000). In *Pennington*, women filed complaints against their male partners, seeking equitable division of property based on the meretricious

couples. Sanders pointed out that certain parties in the *Pennington* case lacked the capacity to marry during the period of cohabitation because they were still married to their prior spouses.[322] *Pennington* thus bolstered Justice Sander's specious proposition that the equitable doctrine depends on the "*ability* of the couple to make a decision to marry" which he felt bears on *Connell*'s intent factor.[323]

Pennington and *Vasquez* are certainly not kindred spirits. Essentially, in a heterosexual relationship, where one party is not still married to a prior spouse, there is an ability to marry the new lover by choosing to undertake the requisite legal formalities. A heterosexual relationship in which one party *is* still married to a prior spouse is not that much different: the new couple still has the ability to marry as long as one of the partners chooses to first proceed with the requisite dissolution of the prior marriage. Stated otherwise, a heterosexual couple comprised of one already-married partner still *can* marry, but there is just an additional legal hurdle. This is nothing like a homosexual relationship in which the one and only hurdle is insurmountable as a matter of law. Consequently, the situations are not even comparable.

But the real problem is the controlling *Connell* analysis that treats the free choice not to marry as a limitation.[324] Such a limitation ensues from the fact that the parties to the relationship chose not to get married and thus, should have to abide by their choice by relinquishing some benefits attendant to legal marriage. In short, it is the conscious decision not to avail themselves of a viable option that diminishes entitlement.[325] What Justice Sanders failed to acknowledge is that the determinative conscious decision does not and can not exist in the *Vasquez* context. If this means anything, as explained above, it means that Vasquez's entitlement is greater – not lesser – than that of a couple that has the *ability* to marry.

Justice Sanders is not incorrect that the intent factor is a

---

relationship doctrine. *Id.* They won in the trial court, but when review was granted in the Washington Supreme Court, the court held that the evidence did not establish that either relationship was meretricious. *See id.* at 773.

322. *See Vasquez*, 33 P.3d at 740. Specifically, Pennington was married to someone else for the first five years of his relationship with the woman claiming that there was a meretricious relationship. *Pennington*, 14 P.3d at 771.

323. *Vasquez*, 33 P.3d at 740.

324. *See* Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995). *See* notes 129-156 and accompanying text (discussing *Connell*).

325. *See Connell*, 898 P.3d at 836 (stating that courts should not ignore "the conscious decision by many couples not to marry").

relevant one under *Connell*, but what he failed to discern is that the impediment in *Pennington* bears on the issue of intent while the impediment in *Vasquez* does not. A reasonable person could conceivably conclude that an individual that lives with a lover, but refuses to divorce a prior spouse does not intend to have a "stable, marital-like" relationship with the new partner.[326] A reasonable person, however, could not conceivably conclude that a man that lives with another man but does not legally marry that individual does not really intend to have a "stable, marital-like" relationship. With respect to the gay couple, Sanders' analysis is as absurd as saying the law should presume one can do the impossible. What belies his strained use of the inapplicable case is a denial that his alliance with the court of appeals derives not from reasoning, but from homophobia and a fear that same-sex couples will gain societal acceptance.

Another weakness in Justice Sanders' concurrence is his supposed policy justification. Essentially, he said that if his views were otherwise, he would be "defeating" the "legitimate expectations of cohabiting individuals."[327] He elaborated that "Mr. Schwerzler could well have relied upon his expectation that a meretricious relationship could not possibly exist under the facts of this case to prompt his decision to cohabit with Mr. Vasquez, with whom Schwerzler might not have desired to share his property absent volitional inter vivos transfer of title or testamentary bequest."[328] The problem here is that the same could be said of an individual in a heterosexual meretricious relationship. Such an individual could possibly believe that since the relationship does not fit the *Connell* factors, there is no meretricious relationship and thus, upon death, property would not pass to the live-in partner. It is also possible that Schwerzler believed what the *Connell* court *really* meant – that because he could not choose to marry Vasquez, then his property would indeed go to his marital-like partner.[329]

What is more perplexing is Justice Sanders' follow-up to the policy portion of his concurrence. He stated that "by the logic of the trial court, even if Schwerzler by will had specifically devised his property to close friends or relatives of his choice, that

326. *See Pennington*, 14 P.3d at 771. Pennington was married to another woman while with a new partner. *Id.* He refused to legally marry the new partner even after he divorced his wife, evidencing a lack of intent to have a long term relationship. *Id.*

327. *See Vasquez*, 33 P.3d at 741 (Sanders, J., concurring).

328. *Id.*

329. *See supra* notes 129-156 and accompanying text (discussing *Connell*).

intention would be defeated as surely as dying intestate by application of the meretricious relationship doctrine."[330] This confounds both theory and reality.

The *Vasquez* decision seems legitimately limited to the context of intestacy. That is, the posture of the case and the reasoning of the case suggest that what is being decided is confined to the situation in which a "stable, marital-like" relationship exists and one partner dies without a will. It is, of course, not inconceivable that if in *Vasquez* the marital doctrine is deemed to apply to a same-sex relationship, a future litigant might seek to extend such precedent to some will contest. But isn't that contingency inherent in all judicial decisions? Any decision might be deemed applicable to or distinguishable from a new set of facts. One can always, like Justice Sanders, object to reasoning on the basis of some case that has not yet reared its head.

Justice Sanders' hypothetical does not ring true for another reason. While more typically wills naming a same-sex partner as a beneficiary are vulnerable to contest and thus, invalidation because of bias, the opposite is rarely the case: be it right or wrong, the reality is that courts refrain from re-writing a will, especially one leaving property to someone deemed to be a natural object of the decedent's bounty.[331] In short, Sanders sees a problem where it does not in reality exist.

Ironically, Sanders aligned his view with the goal of testamentary freedom, implying that the allowance of same-sex meretricious relationships could "deny each of these partners the opportunity to dispose of his entitled assets as each saw fit, even upon demise."[332] The problem here is that the *Lindsey-Connell* inquiry is tailored to respect testamentary freedom through ascertaining the decedent's intent and ensuring that assets go their intended way.[333] Justice Sanders himself admitted that "intent" is an important part of the *Connell* inquiry. In fact, the equitable doctrine assists courts in finding the real – not just the statutorily presumed – intent of the partner with title.

In the concurring opinion, Chief Justice Alexander agreed with Justice Sanders that the meretricious relationship doctrine should not apply when one of the partners is deceased, but only

---

330. *Vasquez*, 33 P.3d at 741 (Sanders, J., concurring).

331. *See supra* notes 37-42 (discussing will contests when beneficiaries are same-sex partners or even "non-family" members).

332. *Vasquez*, 33 P.3d at 741 (Sanders, J., concurring).

333. *See supra* notes 76-156 (discussing the evolution of the mereticious relationship doctrine).

when a couple separates.[334] The Chief Justice would "leave to another day" the question of whether the doctrine applies to a stable same-sex couple in a long-term relationship that breaks up.[335] Consequently, what he advocates is complete avoidance of the homosexuality element entirely. While Justice Sanders wanted to return to the reign of *Creasman*, Chief Justice Alexander desired stasis or putting the law at a stand still. Either approach, however, encourages the closet and transmits the message that there is no benefit to being open about one's same-sex love.

CONCLUSION

As discussed in Part I, a homosexual's emergence from the closet is courageous and significant.[336] It also brings psychological benefits by elevating self esteem and helping individuals lead healthy and happy lives.[337] The coming out process is also politically empowering because it enables individuals to bond together in the fight for equality.[338] Not only that, being open about one's identity can improve our culture.[339] Specifically, individuals interacting with homosexuals are more prone to accept others, discarding stereotypes and negative predilections.[340] Decisions, like that in *Vasquez*, are psychologically, politically and culturally damaging because they transmit a message that the safest place to stay is in hiding and that there is nothing to be gained by being open about one's love.

When the *Vasquez* appellate decision issued, Daniel B. Kennedy, a reporter for the *ABA Journal*, asked family law professor David Meyer what "practical lesson" the case provides for gay and lesbian couples.[341] Responding, Professor Meyer advised, "[m]emorialize your intentions as clearly as possible in writing so you don't have to rely on equitable doctrines and default rules" and explained, "[a]s the [*Vasquez*] case shows, those sorts of equitable doctrines can be applied inequitably."[342]

---

334. *See Vasquez*, 33 P.3d at 738 (Alexander, C.J., concurring).

335. *See id.*

336. *See supra* notes 26-35 and accompanying text.

337. *See supra* notes 27-31 and accompanying text.

338. *See supra* notes 32-33 and accompanying text.

339. *See supra* notes 34-35 and accompanying text.

340. *See supra* notes 34-35 and accompanying text.

341. Daniel B. Kennedy, *Til Death Do Us Part: Same-Sex Survivor Seeks Assets of Partner Under Equitable Doctrine Governing Heterosexuals*, ABA J. 22 (Jan. 2001).

342. *Id.*

The problem here is that for same-sex couples, memorializing intentions in writing is not foolproof either. As pointed out in Part I, lawyers engaged in estate planning for same-sex couples know that a will naming a lover as a beneficiary is especially vulnerable to a contest. The couple's lifestyle and decedent's openness about his or her homosexuality can affect a family member's decision to wage war to invalidate the will.[343] Sometimes, it is the secrecy of the decedent that antagonizes family members and sparks the conflict. Other times, it is the decedent's candor that engenders animosity and prompts heterosexist family members to challenge the estate plan. As such, for lesbians and gays, dying with a will is surely not a sure thing. It does not ensure that a court will honor the decedent's donative intent or adhere to the policy favoring testamentary freedom.

As explained in Part II, dying without a will can also be pretty hopeless. While statutes provide for surviving spouses, they do not contain equivalent accommodations for unmarried partners.[344] That is, the survivor in a same-sex union can not claim an elective share or the spousal intestate share.[345] Such a survivor must rely on judicial constructs, equitable concepts, like meretricious relationship doctrine. [346] What decisions, like that in *Vasquez*, admonish is that judicial bias against homosexuals can make those svelte equitable loopholes unavailable.[347]

As suggested in Part II, it is the homophobia in *Vasquez* that prompts the appellate court to ignore significant policies behind the intestacy laws and trample upon precedent.[348] It is the homophobia in *Vasquez* that similarly infects the decisions in the supreme court that do little to dispel cruel stereotypes against gays and in fact, even perpetuates them.

Decisions like *Vasquez* are devastating. They dehumanize homosexuals by divesting them of the power to choose. Unmarried homosexual couples, unlike their heterosexual counterparts, lack

---

343. *See supra* notes 26-62 and accompanying text (discussing the affects of coming out on homosexuals and how some remain closeted due to the confines of legal doctines).

344. *See supra* notes 63-73 and accompanying text.

345. *See supra* notes 63-73 and accompanying text.

346. *See supra* notes 76-156 and accompanying text (discussing the meretricious relationship doctrine).

347. *See supra* notes 203-335 and accompanying text (analyzing the homophobia in the *Vasquez* appellate court decision and also in the Washington Supreme Court).

348. *See supra* notes 203-335 and accompanying text.

the ability to make choices that affect the distribution of their property. That is, they lack the option of selecting a lifestyle that can trigger entitlement to any of the benefits attendant to the marital relationship. They are, as pointed out in Part II, treated as "learned helpless," effectually divested of control over significant facets of their lives.[349] They are encouraged to stay hidden, to contain what Bosie called that kind of "love that dare not speak its name."[350]

Religious theorists, philosophers, psychologists, and artists all pay homage to love, the most powerful benevolence in the universe. By way of example, one of the great Romantic poets, Percy Bysshe Shelley, called love "the bond and the sanction which connects not only man with man, but with everything which exists."[351] What makes homophobic decisions so dreadful is that they impugn and silence love. We, as a society should want to have *all* species of love not merely speaking, but actually shouting its name. [352]

349. *See supra* notes 299-301 and accompanying text.

350. *See supra* notes 1-2 and accompanying text.

351. Percy Bysshe Shelley, *On Love*, in ENGLISH ROMANTIC POETS 1070 (David Perkins, ed. Harcourt, Brace & World, Inc. 1967).

352. *See supra* notes 1-2 and accompanying text.