INTRODUCTION

Theodore Roethke, a twentieth-century American poet, understood that when perceivedly unacceptable parts of ourselves give us anxiety, we tend to project that feeling onto something else:

O what's the weather in a Beard?
It's windy there, and rather weird,
And when you think the sky has cleared
—Why, there is Dirty Dinky.

Suppose you walk out in a Storm,
With nothing on to keep you warm,
And then step barefoot on a Worm
—Of course, it's Dirty Dinky.

As I was crossing a hot hot Plain,
I saw a sight that caused me pain,
You asked me before, I'll tell you again:
—It looked like Dirty Dinky.

Last night you lay a-sleeping? No!
The room was thirty-five below;
The sheets and blankets turned to snow.
—He'd got in: Dirty Dinky.

You'd better watch the things you do.
You'd better watch the things you do.
You're part of him; he's part of you
—You may be Dirty Dinky.\(^1\)

Courts dealing with issues involving lesbians and gay men express homophobic anxiety through the creation of their own “Dirty Dinky.”

\(^1\) Theodore Roethke, *Dinky*, in *Dirty Dinky and Other Creatures* 2 (1973).

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As at least one psychologist has put it, homophobic attitudes give people a way of "avoid[ing] anxiety associated with unacceptable parts of themselves."2 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 comfortably antithetical to themselves.

Not unexpectedly, homophobic attitudes pervade judicial decisions denying rights to homosexuals.3 It is, however, somewhat confounding to detect degrading stereotypes about lesbians and gay men in decisions that purport to advance lesbian and gay rights. By way of example, a recent Virginia Court of Appeals decision, *Bottoms v. Bottoms*,4 was one that civil libertarians and commentators had hailed as a victory for homosexuals.5 That *Bottoms* case, however, was paradoxical. Although in *Bottoms*, the lesbian mother emerged triumphant with her child, the court of appeals nevertheless promoted certain damaging, outmoded notions about homosexuals.

While the judgments in certain cases can seduce us into formulating optimistic theories about potential change in the law, sometimes more subtle insinuations within judicial decisions become impediments to progress. This

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5. See, e.g., *And a Mother, Too*, AM. SURVEY, July 2, 1994, at 25 ("The decision is radical for Virginia, which (in law, at least) has an Old-South attitude to sex."); *A Victory for Gays and The Family*, ATLANTA J. & CONST., June 23, 1994, at A16 ("Some will say this ruling is a victory for gay rights. Certainly, it must be welcome news for lesbians and gay men who are good parents but fear that their sexual orientation alone might be enough to have their children taken away in any custody dispute."); Peter Baker, *Lesbians Win A Round in Conservative Heartland*, INT'L HERALD TRIB., June 23, 1994 (News) ("If a conservative state such as Virginia effectively endorses gay couples as appropriate, some critics said[] it sends a message that other courts across the country may find hard to resist."); *Lesbian Wins Back Her Son*, TORONTO STAR, June 22, 1994, at A15 (Paula Ettelbrick, the director of public policy for the National Center for Lesbian Rights, is quoted as saying: "We applaud the ability of the appeals court to reject the homophobic ruling of the trial court."); *Grandmother Appealing Decision Giving Lesbian Custody of Son*, N.Y. TIMES, June 26, 1994, §1, at 1 ("Gay rights advocates . . . had viewed the appellate opinion as a major victory that was likely to bolster the cases of homosexual parents nationwide."); Ben Macintyre, *Lesbian Mother Ruled Fit to Be Parent*, THE TIMES (London), June 23, 1994, at Overseas News ("The ruling was hailed by gay groups as a victory for homosexual parents. 'It sends a message nationally that sexual orientation has no relevance to the ability to parent a child,' the Washington-based National Gay and Lesbian Task Force said yesterday."); *Reuniting a Mother and Her Child*, CHICAGO TRIBUNE, June 24, 1994, at 18 ("The decision, which may be appealed to the state Supreme Court, makes Virginia one of only about 10 states to rule that homosexuality doesn't automatically make a parent unfit."); Sandra Sanchez, *Lesbian Mom Wins Custody of Va. Toddler*, USA TODAY, June 22, 1994, at 10A ("The ruling brought cheers from gay groups nationwide."); Greg Schneider, *Lesbian Regains Custody of Her Son*, VIRGINIAN PILOT AND LEDGER STAR (Norfolk), June 22, 1994, at A1 ("Virginia has now joined the consensus of other states," said Peter Swisher, a family law expert at the University of Richmond Law School."); *Tom Billman; Dean Mellberg; Sharon Bottoms*, U.S. NEWS & WORLD REPORT, July 4, 1994, at 18 ("The case is a symbolic victory for gay-rights groups and a setback for conservatives.")
Lesbian Mothers

article explores certain preconceptions that surface when homosexuals assert the right to custody of their own children.

This author has chosen as a focal point the judicial approach to homosexuality in parental or custodial matters not just because that context is manageably narrow, but also because it tends to breed homophobic stereotypes. One reason for this tendency is the requirement that courts base custody determinations on what is in the best interests of the child. Because the “best interests” test is malleable, affords courts broad discretion, and encompasses multiple factors, it invites judges’ personal moral standards, misconceptions and prejudices.

As other critics have pointed out, courts considering what is in the best interests of the child with a lesbian or gay parent have viewed the homosexual as a mentally ill person or as a child molester. Such courts have also branded the homosexual parent as one prone to convert the child to

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7. See Atkinson, supra note 6, at 3 (“[F]or judges, custody cases bring forth more of their emotion and personal background than almost any other type of case they deal with.”); Fitzgerald, supra note 6, at 56 (“The ‘best interest’ standard is peculiarly malleable to diverse political agendas precisely because it reflects no individual’s interest. Instead, the standard is a vessel which judges and legislatures may fill with their own competing definitions.”); David P. Russman, Alternative Families: In Whose Best Interests?, 27 SUFFOLK U. L. REV. 31, 35 (1993) (“Discrimination against homosexuals is prevalent in the family law context where judges and agencies are able to exercise broad discretion”); Sencer, supra note 6, at 193 (“The best interest standard is often undefined and lacks definition. This leaves the choice and application of factors in deciding best interests to the judiciary.”); Shernow, supra note 6, at 684 (discussing the critics of the “best interests” standards who believe that it means that the “custodial parent is . . . at the mercy of the trial judge’s moral values and prejudices.”); Shaista-Parveen Ali, Comment, Homosexual Parenting: Child Custody and Adoption, 22 U.C. DAVIS L. REV. 1009, 1012 (1989) (discussing how “best interests” standards, especially in cases involving homosexuals, “sometimes encompass the court’s personal morality standard.”); Comment, Developments in the Law—Sexual Orientation and the Law, 102 HARV. L. REV. 1629, 1630-31 (1989) (“[S]everal courts have used the best interest standards to deny custody to gay and lesbian parents.”); Felicia Meyers, Gay Custody and Adoption: An Unequal Application of the Law, 14 WHITTIER L. REV. 839, 841 (1993) (discussing how courts have allowed “judicial misconceptions and prejudice to enter into the [best interests] analysis.”).


9. See Meyers, supra note 7, at 843-45; Russman, supra note 7, at 37, 59; Ali, supra note 7, at 1018. See also H. CURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN & GAY COUPLES 129 (4th ed. 1986) (explaining that 97% of child molesters are heterosexual males).
homosexuality, to expose the child to societal ridicule, or actually to infect the child with AIDS.

Significantly, courts have used several approaches to determine the fitness of a homosexual parent. A minority have concluded that lesbians and gay men are unfit custodians as a matter of law. Other courts have applied what is typically denominated the “nexus” approach, which means that custody will be denied only where there is proof that the parent's sexual orientation has or will adversely affect the child. Other courts, rejecting the per se unfitness approach, have instead opted for a presumption that exposure to the homosexual parent harms or will harm the child. Such courts condition custody or visitation on certain restrictions or behavioral modifications of the homosexual parent.

10. See Joseph Evall, Sexual Orientation and Adoptive Matching, 25 Fam. L.Q. 347, 353 (1991) (Discussing how “statutory restrictions on the provision of foster or adoptive homes by gay men and lesbians may reflect a legislative belief that . . . the presence of a gay parent poses a ‘risk’ to the child’s development, e.g., the child will ‘become’ gay.”); Meyers, supra note 7, at 843-45; Donald H. Stone, The Moral Dilemma: Child Custody When One Parent Is Homosexual or Lesbian—An Empirical Study, 23 Suffolk U. L. Rev. 711, 724 (1989) (“The position that homosexual and lesbian parents will influence their children to develop same-sex orientations is prevalent in custody cases and is a view that society at large accepts.”); Ali, supra note 7, at 1016-17.

11. See Meyers, supra note 7, at 843-45; Ali, supra note 7, at 1020-21; Russman, supra note 7, at 37; Suseoff, supra note 8, at 877-79.


13. See Stephen B. Pershing, “Entreat Me Not to Leave Thee:” Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents, 3 WM. & MARY BILL RTS. J. 289, 290 n.5 (1994) (“A conclusive presumption or per se rule it is indeed, for if read literally, it allows for no exceptions, permits no kind or degree of evidence to overcome it, and most importantly, applies even in the face of countervailing presumptions and shifts in burdens of proof.”); Russman, supra note 7, at 44 (“In such cases, gay parents lose the custody dispute regardless of whether their homosexuality is shown to adversely affect the child.”). But see Dooley, supra note 12, at 407 (under per se approach, “parent’s homosexuality presents a rebuttable presumption that the parent is unfit.”); Meyers, supra note 7, at 840-41 (“The irrebuttable presumption of unfitness places the insurmountable obstacle on gay parents to prove they are fit.”).


15. Dooley, supra note 12, at 396, 409 (Explaining that ‘middle ground approach’ “unlike the per se approach, frowns only on homosexual conduct and not on the mere status of being homosexual.”) See also Meyers, supra note 7, at 842.

16. See, e.g., S.E.G. v. R.A.G., 735 S.W.2d 164, 167 (Mo. Ct. App. 1987) (prohibiting mother’s female lover from contacting children); L. v. D., 630 S.W.2d 240, 245 (Mo. Ct. App. 1982) (affirming order that mother’s female lover not be in children’s presence during visitations); Newsome v. Newsome, 256 S.E.2d 849, 853 (N.C. Ct. App. 1979) (affirming requirement that child be kept out of the presence of her mother’s lover). See generally Ali, supra note 7, at 1022 (discussing compromise approach of “granting homosexuals ‘conditional’ custody or visitation.”); Dooley, supra note 12, at 409-11 (analyzing approach of courts that condition custody or visitation on certain restrictions); Meyers, supra note 7, at 842 (When courts condition custody or visitation on certain restrictions, that approach “does give the gay
Inherent in all such approaches is the “best interests” test. That is, built into the per se approach is the foregone conclusion that life with a lesbian mother or gay father is not in the “best interest” of the child. As such, the per se unfitness treatment of the homosexual automatically imbibes the assorted preconceptions about the supposedly dangerous proclivities of such a parent. The other approaches, moreover, which require courts to consider whether the homosexuality has an adverse effect upon the child or to decide what restrictions to impose upon the parent that will ameliorate the presumed adverse effect on the child, summon the same collection of preconceptions into the deliberative process.

It is this author’s thesis that courts create a mythic image of the homosexual. That mythic image constitutes an amalgam of all of the preconceptions that underlie the usual justifications that courts give for denying custody to a lesbian or gay parent. The image that materializes in judicial decisions is a composite of two separate stereotypes of homosexuals: the first, as an emblem of dangerous malum in se criminality, and the second, as someone with a life-style devoid of any marital or familial attributes. This article explores the merging of those two stereotypes in three cases in Virginia, a state renowned for its conservatism in the area of lesbian and gay rights.

In Part I of this article, I examine two cases, Doe v. Doe and Roe v. Roe. In Doe, the Supreme Court of Virginia found that a mother’s admitted lesbian relationship was insufficient to justify severance of her parental rights.
In *Roe*, that 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 are identical in the most crucial respect. That is, both the *Doe* and *Roe* courts portray the homosexual parents in essentially the same way—as dangerous criminals and as individuals engaged in a life-style bereft of any and all family qualities.

In Part II, I examine the more recent decisions in *Bottoms* by initially addressing the ostensible contrasts between the approaches in the trial court, the intermediate appellate court, and the Virginia Supreme Court. From there, I demonstrate how such seemingly disparate avenues through the same dispute actually converge. That is, although the intermediate appellate court appears to recognize the lesbian mother's right to custody of her own child, it, like the court below, nevertheless persists in equating homosexuality with a *malum in se* crime and depicting the homosexual home as antipodal to the family hearth. Beneath the surface, the intermediate appellate court's approach also resembles that of the Supreme Court of Virginia, which ultimately rejected the mother's custody claim. Specifically, I will show that the supreme court made explicit the very discrimination and prejudice that was implicit in the reasoning of the court below.

This article concludes where it began—with Theodore Roethke's incubus, "Dirty Dinky." In so doing, I suggest that the only real advancement in the area of lesbian and gay rights must come about not merely in the form of results in which homosexuals are deemed to be the prevailing parties, but must entail a conscious judicial effort to eradicate the underlying anxiety that activates homophobia. Thus, the real problem is that when courts portray a homosexual as a dangerous anti-familial criminal, they engender more anxiety, which, in turn, cyclically engenders more homophobia. As such, meaningful progress in the area of homosexual rights has to involve the dissolution of what has become an automatic judicial association between same-sex love and dangerous *malum in se* criminality. Also, the end of the vicious cycle of prejudice has to entail the formation of a new nexus, one between the homosexual household and the family home.

I. THE *MALUM IN SE* ANTI-FAMILIAL CRIMINAL IN *DOE V. DOE* AND *ROE V. ROE*

A. Doe v. Doe

In *Doe v. Doe*, when the married couple separated, the infant son stayed with his mother. As Jane Doe described it, although her ex-husband had a

Ph.D., he "led a rather aimless life for approximately two years after their separation, being generally unemployed and providing her with little child support." 26 Apparently the turning point in Mr. Doe's life was his acceptance of a job at Ferrum College in Virginia. At the time of the actual trial in *Doe*, John Doe was a tenured professor.

John had obtained a divorce from Jane, remarried, and then had a child with his second wife. His first child, however, continued to live with Jane in Ohio and periodically visited him and his new wife in Virginia. Eventually, John Doe and his wife, over Jane's objection, took the child to Virginia and shortly thereafter sought and obtained permanent custody. At that time, Jane still had her visitation rights.

Later, John's second wife, Ann, petitioned the court for adoption of the Doe child. At the hearing, Ann said that she wished to adopt the boy because of the distance between the two homes and the "difference in life styles between the two areas." 27 What Ann explained that she and her husband wished "to solidify their family unit by having Jack [the son] as a permanent member and expressed concern over the relationship between Jane and the woman with whom she live[d] in Ohio." 28

Jane testified openly about her relationship with the other woman and described them as "'married in the sense that we have a primary relationship and that we have committed ourselves to living our lives together and to supporting each other.'" 29 Jane believed that "the marriage was spiritual" and said that she and the other woman had gone through a marital ceremony with a Sufi priest as a way of "acknowledg[ing] the importance of the relationship," one which she admitted was at times sexual. 30 John and Ann stated that the child had not actually expressed any problems in accepting the relationship between his mother and "her friend." 31

The trial court ultimately permitted the adoption and severed all of Jane's parental rights. In so doing, it stated:

The open lesbian relationship now engaged in by Jane Doe, and which relationship she says will continue, would have a definite detrimental effect on Jack 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

26. *Id.* at 801.
27. *Id.*
28. *Id.*
29. *Id.* at 802.
30. *Id.* Jane had responded to questions "about the effect of her son growing up in two households, one where there is a husband and wife relationship and the other a homosexual relationship between two women." *Id.* Specifically, Jane said that she did not "see any conflict." *Id.* What the court found significant was her statement: "If at any point I did see a conflict I would do whatever I had to do, which would include severing a relationship with Moya or anyone else for Jack's sake." *Id.* See infra notes 83-88 and accompanying text.
31. *Id.* at 801.
emotional and mental harm to this child, and that his best interest will be promoted by the adoption.\textsuperscript{32}

On appeal, the Supreme Court of Virginia reversed and found that the trial court's finding was not supported by the evidence. The court pointed out that "[a]lthough there was testimony that [Jane Doe's] relationship with the woman with whom she lives is unorthodox, the testimony is also that Jane Doe is an exceptionally well-educated, stable, responsible and sensitive individual."\textsuperscript{33} In fact, the witnesses who described Jane were all quite complimentary.\textsuperscript{34}

In the court's view, the petitioners had not provided the trial court with a valid reason why the natural mother should be "permanently deprived of her child."\textsuperscript{35} As the court put it, if "it is solely her lesbian relationship which renders her unfit," then the petitioners had the burden of showing that the relationship made the continuance of the parent-child relationship "detrimental to the child's welfare."\textsuperscript{36} As the court concluded, the petitioner had simply not introduced such evidence.

Significantly, the court refused to "hold that a woman who is a lesbian and a man who is a homosexual are per se unfit to be parents" and that such automatic unfitness results in forfeiture of a child.\textsuperscript{37} The court stressed that "the most drastic and far-reaching action" a court can take is to issue a final order of adoption, which is "often as devastating as though the child had been delivered at birth to a stranger instead of into the arms of its natural mother or father."\textsuperscript{38}

The real test, according to the court, is "whether the consequences of harm to the child of allowing the parent-child relationship to continue are more severe than the consequences of its termination."\textsuperscript{39} The court concluded that the petitioners neither met the test nor showed that "Jane's lesbian relationship would have a detrimental effect on Jack and would result in serious emotional and mental harm to the child."\textsuperscript{40}

The court, however, carefully qualified its decision in the form of a proclamation that it was "not to be construed as approving, condoning, or sanctioning such unorthodox conduct, even in the slightest degree."\textsuperscript{41} The court, moreover, said that it was "not unmindful" of Jane Doe's representation

\textsuperscript{32. Id. at 804.}
\textsuperscript{33. Id.}
\textsuperscript{34. Id.}
\textsuperscript{35. Id. at 804-05.}
\textsuperscript{36. Id. at 805.}
\textsuperscript{37. Id. See supra note 13 and accompanying text.}
\textsuperscript{38. Id.}
\textsuperscript{39. Id.}
\textsuperscript{40. Id.}
\textsuperscript{41. Id. at 806.}
that "should it become necessary, for her son's sake, she would sever the relationship with the woman with whom she now lives." 42

B. Roe v. Roe

Roe v. Roe 43 was a custody battle between the natural parents, which again forced the court to consider the child's best interest. 44 In Roe, however, the Supreme Court of Virginia used that best interest standard to deny custody to the gay father.

Initially, Catherine and David Roe had separated and entered into a property settlement agreement, which granted full custody of their only child to the mother. Eventually, the father had to care for his daughter when Catherine underwent extensive surgery and medical treatment for cancer. When the father actually petitioned the court for a change of the child's custody to him, the mother opposed it. Although the mother acknowledged that her ex-husband had helped with the child's care, she stated that she was recovering, had actually returned to work, and could soon resume full-time child care. The parties nevertheless entered into a consent decree, which acknowledged that the mother was still physically incapable of caring for the child, awarded custody to the father, and reserved reasonable visitation rights to the mother. 45 As a result, the child stayed with her father, but frequently visited her mother.

About four years later, Catherine petitioned the court for a temporary restraining order, in which she alleged:

that it had just come to her attention that the father was living with a man who was his homosexual lover, that the two men occupied the same bed in a bedroom in the house in which the father lived with the child, that the child had reported seeing the two men 'hugging and kissing and sleeping in bed together,' and that other homosexuals visited the home and engaged in similar behavior in the child's presence. 46

Catherine also asserted that the child, who was then nine years old, "hated" the father's lover, was unhappy in her father's home and wished to return to her mother. 47 The mother sought not only to enjoin the father from exercising

42. Id. Chief Justice Carrico authored the dissenting opinion, emphasizing that the evidence supported the trial court's finding that "continuance of the relationship between Jack Doe and his mother 'would have a definite detrimental effect' on the boy." Id. at 807.
43. 324 S.E.2d 691 (Va. 1985).
44. See supra notes 6 & 7 and accompanying text.
45. 324 S.E.2d at 692.
46. Id.
47. Id.
his custody rights, but also to obtain for herself an award of permanent custody.

After a hearing, the trial court granted joint legal custody of the child to the father and mother.\(^{48}\) Under the order, the arrangement was that the child would live with her father during the school year and then with her mother in the summer. The trial court also gave each parent extensive visitation when the child was living with the other parent. The order, however, conditioned the father’s custody upon his “not sharing the same bed or bedroom with any male lover or friend while the child [was] present in the home.”\(^{49}\)

In addition, the trial court found that “each parent had been a fit, devoted, and competent custodian.”\(^{50}\) After interviewing the child, the court described her as a “very lovely, outgoing, bright and intelligent child . . . a very happy child [who] seemed to be well adjusted and outgoing.”\(^{51}\) The trial court specifically determined that there was no evidence that the father’s conduct adversely affected the child. The reason the trial court gave for requiring that the father not share the same bed or bedroom with his lover was as follows:

\[\text{[T]his relationship of sharing the same bed or bedroom with the child being in the home would be one of the greatest degrees of flaunting that one could imagine. It flies in the face of Brown v. Brown, and it flies in the face of society’s mores anyway.}\(^{52}\)

On appeal, the Supreme Court of Virginia expanded upon the trial court’s condemnation of the father’s conduct as defiant of societal morality. It emphasized that its decision in Brown to affirm the chancellor’s removal of sons from an adulterous mother “was not based on the mother’s adulterous relationship in the abstract, but rather on the fact that it was conducted in the children’s presence.”\(^{53}\) The Roe court then highlighted the fact that “[i]t was Mrs. Brown’s exposure of the children to an immoral and illicit relationship which rendered her an unfit and improper person to have their custody.”\(^{54}\) The Roe court, thus deeming Brown to be controlling, concluded that “[t]he

\[\begin{align*}
48. \text{Id.} \\
49. \text{Id.} \\
50. \text{Id.} \\
51. \text{Id.} \\
52. \text{Id. at 693 (citations omitted).} \\
53. \text{Id. In Brown v. Brown, 237 S.E.2d 89 (Va. 1977), the trial court had transferred custody of the children to their father because of a showing that while the mother had custody, she lived with her lover in an adulterous relationship. In unanimously affirming the trial court’s ruling, the court emphasized that “[a]n illicit relationship to which minor children are exposed cannot be condoned.” Brown, 237 S.E.2d 89, 91. See Katharine A. Salmon, Note, Child Custody Modification Based On a Parent’s Non-Marital Cohabitation: Protecting the Best Interests of the Child in Virginia, 27 U. RICH. L. REV. 915, 921 (1993) (“The supreme court probably stopped short of fashioning a per se rule by requiring that non-marital cohabitation be given ‘the most careful consideration in a custody proceeding.’ At the very least, however, Brown requires Virginia courts to presume that such relationships are harmful to children.”) (quoting Brown, 237 S.E.2d at 91). \\
54. \text{324 S.E.2d at 693.}
\end{align*}\]
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.”\footnote{Id. at 694.}

To embellish the immorality motif, the mother had argued that the damage to her child actually exceeded the damage to the children in \textit{Brown} and that there was even greater societal condemnation of homosexual conduct than of adultery, the grounds for denial of custody in \textit{Brown}.\footnote{Id.} The \textit{Roe} court, apparently acquiescing in such reasoning, stated:

\begin{quote}
[W]e have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but also impose an intolerable burden upon her by reason of the social condemnation attached to them, which will inevitably afflict her relationships with her peers and with the community at large. The father’s unfitness is manifested by his willingness to impose this burden upon her in exchange for his own gratification.\footnote{Id. (citations omitted).}
\end{quote}

The court thus concluded that the deleterious impact of the father’s conduct upon the child could not be allayed by doing what the trial court did—that is, effectually evicting the father from his lover’s bedroom.\footnote{Id.; cf supra notes 15-16 and accompanying text.} Rather, as the supreme court saw it, “[t]he child’s awareness of the nature of the father’s illicit relationship is fixed and cannot be dispelled.”\footnote{324 S.E.2d at 694.} Further, the \textit{Roe} court called the father’s reliance upon \textit{Doe v. Doe} “misplaced.”\footnote{Id. at 693.} As the \textit{Roe} court explained, \textit{Doe} was not a custody dispute, but a disputed adoption. The \textit{Roe} court then underscored what it believed was a crucial distinction between custody determinations, “which are \textit{ad hoc} and subject to change upon changing conditions,” and what \textit{Doe} involved—adoptions, which are “final and irrevocable.”\footnote{Id. at 694.} The \textit{Roe} court said that in \textit{Doe}, it had “declined to hold that every lesbian mother or homosexual father is \textit{per se} an unfit parent.”\footnote{Id. at 694. (emphasis removed).} The \textit{Roe} case, however, involved the “question of the impact of a homosexual relationship upon a child in the context of day-to-day custody.”\footnote{Id.} As such, the issue in \textit{Roe} was purportedly
the very terrain into which Doe did not tread. As the Roe court put it, in Doe it had "stopped far short of finding [the lesbian mother to be] a fit and proper custodian for her son, or even of approving his visitations in her home, while her existing living arrangements continued."64 Through its distinction of Doe, the Roe court implied that had Doe involved custody instead of adoption, the lesbian mother would have lost.

C. The Composite Image: The Malum In Se Anti-Familial Criminal

The Doe and Roe decisions are, in fact, compatriots. 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.

In Doe, the father had asserted that the mother's lesbian relationship was a crime, which, as he urged, meant that she had forfeited her parental rights.65 Although the Supreme Court of Virginia did not subscribe to the "forfeiture" theory, it still went ahead and abided by that perception of lesbianism as a form of dangerous criminality:

If we follow [the father's] . . . argument to its logical conclusion, we soon would be considering whether a convicted murderer, rapist, robber, burglar, habitual offender, or some other lawbreaker, whose conduct is unlawful and whose lifestyle is dangerous to himself, his family, and the public generally, should be declared unfit per se as a parent and his children made fair targets for adoption.66

Such a likening of homosexuality to criminality is also a central feature of the Roe analysis. The Roe court reiterated the mother's assertion that "the conduct inherent in the father's relationship is punishable as a class six felony"
and one "prosecuted with considerable frequency and vigor." The court seemed to think that the child's life with her gay father, tantamount to being exposed to unlawful or illicit acts, is like a fixed and continuous injection with a toxic substance.

In this respect, both Doe and Roe have a haunting analogue in Bowers v. Hardwick. The Bowers Court distinguished homosexual sodomy in the home from the viewing of obscenity in the home, which was recognized as a legitimate privacy interest in Stanley v. Georgia, which involved the viewing of obscenity in the home. There, the Bowers Court associated homosexual sodomy with the possession of stolen goods or drugs and to the ownership of potentially deadly firearms. Thus, the courts in Doe and Roe, as in Bowers, relegated homosexuality to the broad rubric of dangerous criminality.

The judicial portrait of homosexuality harks back to what was a rather unwieldy distinction between crimes malum prohibita and those mala in se. According to Blackstone, one guilty of a crime malum in se has offended "those rights then which God and nature have established." A crime malum prohibitum, however, "enjoin[s] only positive duties, and forbid[s] only such things as are not mala in se . . . without any intermixture of moral guilt."

Although concededly difficult to ascribe precise definitions to the two categories, the malum in se crime typically encompasses something inherently

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68. Id.
71. In Stanley, the Supreme Court stated:
   If the First Amendment means anything, it means that a State has no business telling a man,
   sitting alone in his own house, what books he may read or what films he may watch. Our whole
   constitutional heritage rebels at the thought of giving government the power to control men's
   minds.
   Id. at 565.
72. In Bowers v. Hardwick, 478 U.S. 186, 195 (1986), the Court rejected Hardwick's assertion that
   the result should be different where the homosexual conduct occurs in the home. The Bowers Court,
   conceding that "Stanley did protect conduct that would not have been protected outside the home,"
   denied that Stanley had any real ramifications outside of the contours of the First Amendment. Id.
   Justice Blackmun, with whom Justices Brennan, Marshall and Stevens joined, authored the primary
   dissenting opinion. The dissenters underscored the fact that the forbidden conduct occurred in Hardwick's
   home, "a place to which the Fourth Amendment attaches special significance," and criticized the Court's
   narrowing of Stanley and called it "entirely unconvincing." Id. at 206-7 (Blackmun, J., dissenting).
73. See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.6(b) (2d ed.
   1986)(describing difference between malum in se and malum prohibitum); As LaFave and Scott note, id.
   1.6(b), at 32 n.21, "[a] leading case defining these terms is State v. Horton, 51 S.E. 945[, 946] (1905):
   'An offense malum in se is properly defined as one which is naturally evil as adjudged by the sense of a
   civilized community, whereas an act malum prohibitum is wrong only because made so by statute.'"; see
   also David J. Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for
   Contemplated Crimes and Frauds, 64 N.C. L. REV. 443, 451-52 n.31 (1986) (reviewing history of
   distinction between malum in se and malum prohibitum).
74. EHRlich'S BLACKSTONE 16 (1959).
75. Id. at 19.
evil or conduct involving moral turpitude. Unlawful acts that imperil life or limb tend to fall into the *malum in se* class.

In cases involving the parental rights of homosexuals, courts typically reason in two non-sequential steps: first, they automatically yoke the sexual preference with the act of sodomy and second, they infuse the same-sex love relationship with *malum in se* import. The culmination of such reasoning is an unquestioning convergence of a legal concept of crime with religious notions about transgressions against God. Thus, the homosexual, as judicially processed, ceases to be an individual and instead transmutes into a symbol—one of the *malum in se* criminal sinner. Consequently, when lesbians and gay men are parties in non-criminal cases involving their parental rights or child custody, many judges do not see them as parents—or even as people. What they see before them are criminals and not just average lawbreakers, but faceless forms charged and already convicted of inherently wicked crimes.

As part of an argument that a parent's sexual orientation should not be the sole basis for determining child custody, Stephen B. Pershing isolates the "supposed ills" that courts often assert an interest in combatting when they try to justify their use of sexual orientation as a criterion for determining parental fitness. Pershing posits that neither rationale, the "supposed 'illegality' of the parent's conduct" or the immorality of the parent's lifestyle, is "self-sustaining, but each subsists on an underlying bias against homosexuality in and of itself."

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76. See *LAFAVE & SCOTT*, supra note 73 §1.6(b), at 33, citing *In re Pearce*, 136 P.2d 969, 971 (Utah 1943); Richard A. Weinberg, Note, *The Right to a Jury Trial in Obscenity Prosecutions: A Sixth Amendment Analysis for a First Amendment Problem*, 50 FORDHAM L. REV. 1311, 1324-25 & n.105 (1982). LaFave and Scott point out that "[t]he trouble is that 'moral turpitude' is just as vague an expression as 'malum in se,' so it helps very little to define one term by reference to the other." *Id.* at n.25.

77. See *LAFAVE & SCOTT*, supra note 73, § 1.6(b) & n.26 ("In *Dixon v. State*, 104 Miss. 410, 61 So. 423 (1913), the court classified carrying a concealed weapon, public drunkenness and public shooting as *mala prohibita* because they were 'not per se vicious or dangerous.' ").

78. In *Bowers v. Hardwick*, the Court examined a law "against sodomy between consenting adults in general" and treats it as applying just to "homosexual sodomy." *Bowers*, 478 U.S. at 190. This too is a homophobic reaction, one which treats homosexuality and sodomy as synonyms. See the excellent analysis in Janet E. Halley, *Reasoning About Sodomy: Act and Identity In and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1726 (1993) (*Bowers* Court portrays "sodomy as transhistorically stable and identical to homosexual identity").

79. Cf. *LAFAVE & SCOTT*, supra note 73, §1.6(b) n.22 (distinction between *mala in se* and *mala prohibita* "may have originated even earlier in the area of ecclesiastical law: a priest who commits a wrong *malum in se* should be unfrocked; not so with a wrong only *mala prohibita*"; Fried, supra note 73, at 451 n. 31 (tracing history of *malum in se*). In *Bowers v. Hardwick*, the Court intimated that the sodomist is and has always been viewed as a sinner, and traced the proscriptions against homosexual sodomy to "ancient roots." 478 U.S. at 192. *But see J. BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 61-206 (1980); Anne B. Goldstein, Comment, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1086-87 (1988) (questioning prevalence of supposed "ancient" prohibitions upon which *Bowers* court relied); Halley, supra note 78, at 1751 n.91 (challenging claims made in historical survey relied on by *Bowers* Court).

80. Pershing, supra note 13, at 291-292.

81. *Id.* at 292.
Lesbian Mothers

Pershing is, of course, correct that illegality and immorality as distinct bases for denying a right to a homosexual derive from "aversions to gay and lesbian persons." But the judicial proclivity to fuse illegality and immorality into a composite basis for treating homosexuals differently solely because of their sexual preference is even more insidiously biased. That is, the malum in se assumption or the fusion of the unlawful with the sinful creates a homogenous identity for the homosexual. Such an identity does not just derive from, but actually sustains bias and spawns more prejudice.

The concept of homosexuality as a dangerous crime surfaces in another way in Doe. The Doe court specifically stated that "in determining [Jane's] fitness as a mother and the future welfare of her son, we are not unmindful of her testimony that should it become necessary, for her son's sake, she would sever the relationship with the woman with whom she now lives." In essence, the Doe court clarified that the lesbian mother is rewarded for what the court wants to see as her acknowledged willingness to change and for what it wishes to believe is her ability to change.

Significantly, this is the way that the Doe court implicitly paid homage to the lesbian mother for her reinforcement of the view of sexual preference as something that is not immutable or as something that she can control. The mother has thus, in the court's view, substantiated what is one of the bases for declining to treat homosexuals as a suspect class—namely, that the trait is neither immutable nor determined by causes outside of the individual's control.

82. *Id.*
84. In Watkins v. U.S. Army, 847 F.2d 1329 (9th Cir. 1988), a three judge panel concluded that homosexuals are suspect class. Judge Norris wrote:

"[W]e have no trouble concluding that sexual orientation is immutable for the purposes of equal protection doctrine. Although the causes of homosexuality are not fully understood, scientific research indicates that we have little control over our sexual orientation and that, once acquired, our sexual orientation is largely impervious to change. . . . [A]llowing the government to penalize the failure to change such a central aspect of individual and group identity would be abhorrent to the values animating the constitutional ideal of equal protection of the laws.

*Id.* at 1347-48. In an en banc hearing in Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989), the court deemed the Army estopped from preventing Watkins' reenlistment solely on the basis of his sexual preference and thus concluded that it was unnecessary to reach the constitutional questions that it had addressed in its earlier decision. *But cf.* Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (homosexuals not suspect or quasi-suspect class); Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (classifications based upon sexual orientation not subject to strict scrutiny).

85. One of the arguments that homosexuals meet the criteria for a suspect class is that they "share an immutable characteristic that bears no relation to their ability to participate in society." Russman, *supra* note 7, at 63. *See also* Beverly A. Uhl, *A New Issue in Foster Parenting—Gays,* 25 J. FAM. L. 577, 594 (1986-87) (homosexual trait is not in control of individual).
That is, Jane, portrayed as a sinner who can repent or as a criminal that can reform, does not lose the child because she has announced that she will and can relinquish what is purportedly just her life-style for her child.

In fact, courts that condition custody or visitation on the gay or lesbian parent refraining from certain conduct are also adhering to the belief that sexual orientation, like criminal conduct, is something that can be modified or reformed. The parents who comply (or indicate a willingness or ability to comply) with such restrictive orders are rewarded, not just for their particular modification or reform, but for their implicit bolstering of one of the prevalent arguments against the immutability factor. The Roe court, which ultimately treated the father as incapable of parting with his supposedly miscreant ways, implicitly endorsed the understanding of sexual orientation as an immutable trait, which thus can be worthy of suspect classification status. As such, the paradox is that within what appears to be the harsher unequal treatment of the homosexual parent resides a perspective actually more congenial to ultimate constitutional equal protection.

What exacerbates the image of the dangerous malum in se criminal is its coexistence with another separate judicial tendency, the refusal to attribute familial attributes to the homosexual household. In Doe, the heterosexual father depicted his own home as a "rural extended family" and juxtaposed it with that of his ex-wife, which was "different, unordered, unstructured, and bohemian." While the lesbian mother spoke of herself as "married" and said that she and her lover were quite committed to each other, the court, implicitly acquiescing in the father's perspective, refrained from denominating that bond as a "marriage" or as "marital" and instead clung to more sterile terms, like "relationship" and "association."

Further, the Doe court metonymically described the dispute before it as one between "two households, one where there is a husband and wife..."

86. Significantly, one of the basic themes that pervades the criminal justice system (except in certain death penalty cases) is a purported belief in the possibility of rehabilitation and the hope of restoring the convict to some respected and useful position in society. Courts, adhering to their view of the gay man or lesbian as a criminal, implicitly take comfort in the reassuring suggestion that homosexuality is likewise subject to rehabilitation.

87. For some homosexual parents, conditional or restrictive orders have serious economic ramifications. See Suseoff, supra note 8, at 868 ("For a single mother with children, whose former husband has shown his open hostility by challenging her custody rights rather than participating in a negotiated joint custody arrangement, the financial burden of maintaining a household separate from her lover's can be profound.").

88. In Roe, 324 S.E.2d at 693, the trial court had granted the father's custody on the condition that he not share the same bed or bedroom with any other male while the child was present. The Supreme Court of Virginia, however, was not persuaded that this restriction would prevent the father's alleged negative influence. Apparently, the Supreme Court of Virginia believed that the father simply could not control his conduct. Id. at 694.


90. Doe, 284 S.E.2d at 801.

91. Id. at 802.

92. Id. at 802-7.
relationship and the other a homosexual relationship between two women."93 The implication is that this controversy is not one between human beings but between households, and that such households are not simply options of equal valence, but antipodal. A choice to award custody to the lesbian mother would force the child to drop from the pinnacle, the traditional hearth of the "rural heterosexual family relationship," to the abyss—namely, "the life-style practiced by [the] mother."94 In the Doe court's perspective, the man and woman comprised a family, but the women were not merely not family, but did not even have or live a life-style. As such, the two women merely practiced a life-style. Thus, even though the Doe court said that it would not hold that every lesbian mother or homosexual father is per se an unfit parent, it adhered to an assumption that the mother's life-style was "unnatural" and "unorthodox," and factored that into its consideration of her fitness as a mother and of what is in the best interest of the child.95

The way the Roe court pitted the homosexual household against the family home as polar opposites was through a fixation on the bed and bedroom that the father shared with his male lover. The trial court's attempted eviction of the father from that bedroom ensued from an underlying revulsion at having marital insignia in what the court saw as an absolutely non-marital or even anti-marital arena. Also, the Roe court declined to treat the hugging and patting96 in the father's house as displays of love and affection, but instead adopted the mother's characterization of that conduct into something toxically aberrant and the child's exposure to it as unquestionably "deleterious."97 In the Roe opinion, the father's house, frequented by other homosexuals, appears not as a home, but as some orgiastic situs.98

II. THE MALUM IN SE ANTI-FAMILIAL CRIMINAL IN BOTTOMS

A. Bottoms in the Trial Court

When Sharon Bottoms separated from her husband, she was pregnant with their son. The divorce decree awarded custody of the child to Sharon and the

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93. Id. at 802.
94. Id. (emphasis added).
95. Id. at 806.
96. Roe, 324 S.E.2d at 693.
97. Id. at 694.
98. The predominant stereotype of a "gay life-style," is a life-style characterized by indulgence in promiscuous sexual activity. See, e.g., High Tech Gays v. Defense Industrial Security Clearance Office, 668 F. Supp. 1361, 1369 (N.D. Cal. 1987). As the court in High Tech Gays 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. See also discussion in Dooley, supra note 12, at 403-04.
child's father never became actively involved in his son's life. For about three years after the divorce, Ms. Bottoms dated another man, lived with her cousin and then lived with two lesbians. Eventually, Sharon began living with a female lover, April Wade.

During the time Sharon Bottoms had legal custody, she often relied on her mother, Kay Bottoms, to care for her child. In fact, according to Kay, she was the one who took care of the child the most. At a certain point, however, Sharon told her mother that her son would be spending less time at her mother's house because of the male companion living there. At that time, Sharon explained that while she was growing up, this same live-in companion had sexually abused her over eight hundred times. Although the grandmother initially expressed shock at these accusations, she later concluded that her daughter's charges were "not altogether unfounded."

The grandmother nevertheless sued for custody of her grandson. In compliance with her lawyer's advice, the grandmother had her live-in companion move out of the house during the pendency of the custody dispute. The main thrust of the custody petition was that Sharon's sexually active lesbian relationship made her an unfit parent.

Sharon Bottoms admitted that she was a lesbian and that she lived with her female lover. She also said that she and her lover had consensual sex in the privacy of their residence. Specifically, she explained that "they share[d] the same bed and engage[d] in oral sex once or twice a week." Also, when her child was very young, his crib was stationed in the bedroom. Sharon, however, testified that she and her lover had never engaged in any type of sexual activity in her son's presence, but that they had displayed affection for each other openly by hugging and kissing and by patting one another on the bottom.

At trial, the psychological evidence showed that Sharon Bottoms' relationship with her lover had "no visible or discernible effect" on her son. Also, evaluations described Sharon as "warm" and "responsive" with her child and the child as "entirely secure and at ease with his mother." Moreover, Kay Bottoms was unable to show that Sharon had failed to provide her son adequately with the basic necessities of life. Apparently, Sharon had twice spanked the child too hard, but this had not bruised or injured him. Also, Sharon had once punished her son by making him stand in the corner and had on occasion cursed in front of the child. The trial court was also aware that Sharon's lover was a recovering alcoholic.

Kay Bottoms testified that once her daughter had left the child with her for a week without telling her how she could be reached. There was no showing,

100. Id. at 279.
101. Id.
102. Id.
103. Id.
however, that Sharon had ever left her son unattended. The evidence also showed that Sharon Bottoms had recently obtained employment and was receiving Aid to Families with Dependent Children. Sharon's ex-husband, however, paid no child support whatsoever.

In finding that Sharon Bottoms was "an unfit parent as a matter of law," the trial court stated:

Sharon Bottoms has . . . admitted . . . that she is living in a homosexual relationship. . . . She is sharing . . . her bed with . . . her female lover. . . . Examples given were kissing, patting, all of this in the presence of the child. . . . There is no case directly on point concerning all these matters. In the case of *Roe v. Roe*, it's certainly of assistance to me in reaching a decision here today. I will tell you first that the mother's conduct is illegal. . . . I will tell you that it is the opinion of the court that her conduct is immoral. And it is the opinion of this court that the conduct of Sharon Bottoms renders her an unfit parent. However, I also must recognize and do recognize, that there is a presumption in the law in favor of the custody being with the natural parent. And I then ask myself are Sharon Bottoms' circumstances of unfitness . . . of such an extraordinary nature as to rebut this presumption. My answer to this is yes [under] *Roe v. Roe*. ¹⁰⁵

The trial court granted custody to Kay Bottoms and gave Sharon the right to visit the child two days a week. The court, moreover, prohibited such parental visits to occur either in the home that Sharon Bottoms shared with her lover or in the presence of the lover.

B. Bottoms in the Court of Appeals

The Virginia court of appeals was obliged to accord "great deference to the trial court's custody determination" and to presume that a "child's best interests will be served when in the custody of its [natural] parent." Because of the maxim on which the presumption was based—that "the relationship between a child and its parent is one of the most jealously protected rights in Anglo-Saxon jurisprudence,"—the only way the grandmother could prevail was to prove by clear and convincing evidence that

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¹⁰⁴. *Id.*
¹⁰⁵. *Id.* at 279-80 (omissions by the appellate court).
¹⁰⁶. *Bottoms*, 444 S.E.2d at 280 (quoting Judd v. Van Horn, 81 S.E.2d 432, 436 (Va. 1954)).
her daughter was “unfit or that special circumstances have an extraordinary reason for a transfer of custody.”107

Because the custody dispute was not one between the natural parents, but instead had a third party attempting to divest custody from a natural parent, Sharon enjoyed a presumption of parental fitness. In fact, the grandmother had to rebut that presumption before the court could even engage in the second tier of the analysis—whether the grandmother would herself be a fit or proper custodian. The court elaborated on this:

Unfortunately, and all too frequently, foster parents or third parties would be more willing and better able to provide a loving and nurturing environment for a child than would the child’s parents; however, custody of a child may not be taken from a parent on that basis. Even when the parental level of care may be marginally satisfactory, courts may not take custody of a child from his or her parents simply because a third party may be willing and able to provide better care for the child.108

The court, reviewing the most arguably damaging evidence against Sharon Bottoms, summed up that “on two occasions she [had] spanked her son ‘too hard,’ on occasion she [had] sworn [n] in his presence, she had him stand in a corner, and on occasion she had failed to change his diaper as soon as conditions required.109 The appellate court nevertheless concluded that there was no credible evidence to prove that Sharon was unfit or that her retaining custody would harm the child physically or psychologically.110

In addition, the court noted other aspects of Sharon’s life after her separation from her husband—namely, that she had had four different residences in different relationships in a three year period and had not maintained regular employment. The court acknowledged the fact that Sharon had left her son for a week with Kay, his grandmother, without telling Kay how she could be reached. The court concluded that, although an examination of such charges against Sharon showed that her parenting was not perfect, she was neither abusive nor indifferent to her child’s well-being.111

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107. Id. But see Richards, supra note 6, at 735 (discussing natural parent preference and suggesting “a new approach . . . that preserves the judicial economy of the natural parent preference, but only to the extent that it is consistent with the child’s best interest.”); Eric P. Salthe, Note, Would Abolishing the Natural Parent Preference in Custody Disputes Be in Everyone’s Best Interest?, 29 J. FAM. L. 539 (1991) (concluding that courts should rely on “best interests of child” standard rather than natural parent preference in custody disputes).

108. 444 S.E.2d at 280 (citing Wilkerson v. Wilkerson, 200 S.E.2d 581, 583 (Va. 1973)). In some states, the natural parent preference is codified. See Richards, supra note 6, at 737 n.7.

109. 444 S.E.2d at 281.

110. Id.

111. Id.
Further, the intermediate appellate court rejected the trial court’s finding of parental unfitness on the basis of Sharon’s lesbian relationship and on the basis of her engagement in the illegal act of sodomy. As the court viewed it, the relationship between a parent and resident of the household are “critical and significant” factors, which indeed bear on the issue of parental fitness and on what is in the best interest of the child. While the court, abided by the state supreme court’s view that a “lesbian ‘lifestyle’ is one factor ‘to [be] . . . considered in determining [a woman’s] fitness as a mother,’” it reiterated that a parent’s sexual preference does not “per se render a parent unfit to have custody of his or her child.”

A court may not simply surmise, speculate, or take notice that because a parent engages in private, sexual conduct, even that which is illegal or conduct that is perceived by some as immoral or antisocial and to which the child is not subjected and which does not affect the child, the parent is unfit or the child is being harmed.

In confronting the issue of illegality, the court dealt with three cases in which third parties had sought to usurp parental custody and treated them as analogues. In Mason v. Moon, a grandmother also had sought to obtain custody of a child from the parent. The appellate court, however, had concluded that the grandparent did not present clear and convincing evidence to show that living in a residence with a stepfather, who had killed the child’s father in her presence, would harm the child. In Ferris v. Underwood, the problem was that the mother’s sister, who was a prostitute, frequented the home where the child lived. The Ferris court deemed the evidence to be insufficient to rebut the presumption in favor of the natural parent. Also, in Phillips v. Kiraly, the court found that the aunt and uncle had likewise failed to rebut the same parental presumption where the father, who was shown to be irresponsible, was accused of having taken pictures of nude women.
having issued bad checks, and being a “Peeping Tom.” Aligning Bottoms with Mason, Ferris and Phillips, the court proclaimed that “e[ven when a natural parent falls short of society’s accepted standards of behavior,” the State will not remove a child from a parent without proof of harm or evidence of neglect or abuse.

The appellate court also said that the trial court had misapplied the Supreme Court decision in Roe. Roe, as the court pointed out, did not mandate a per se approach to such custodial disputes. In fact, as the Bottoms court saw it, the Roe court had declined to hold that every homosexual parent is per se unfit. The Bottoms court, narrowing Roe, stated that what made the Roe father an “unfit and improper custodian as a matter of law” was his “continuous exposure of the child to his immoral and illicit relationship.” Finally, the Bottoms court distinguished Roe from the matter before it on the basis that Roe was a fight between two parents—not one between a parent and a third party. Thus, because that presumption of parental fitness did not shield the father in Roe, the Bottoms court deemed the Roe decision to be inapposite.

Although the Bottoms court saw a similarity between Sharon Bottoms' open display of affection toward her lover in the presence of the child and the father’s un concealed conduct in Roe, it viewed the Roe disclosure as somehow more egregious and as harmful to the child. Specifically, as the Bottoms court emphasized, in Roe the nine-year old daughter had “witnessed [her father and another man] ‘hugging and kissing and sleeping in bed together’” and had seen “other homosexuals . . . ‘engage in similar behavior’” at her father’s house parties and all of this had “visibly distressed” her. In the Bottoms case, however, there was neither a showing that the lovers engaged in “illegal sexual behavior” in front of the child nor evidence that the child had or would suffer because of the relationship.

C. Bottoms in the Supreme Court of Virginia

The Supreme Court of Virginia reversed. Although the supreme court acknowledged the strong presumption favoring a parent over a non-parent, it

121. Id. at 857.
122. Bottoms, 444 S.E.2d at 282.
123. Id. at 283 (citing Roe, 324 S.E.2d at 727).
124. Id. (quoting Roe, 324 S.E.2d at 692).
125. Id. at 283. In a footnote near the end of the decision, the Bottoms court disposed of two cases, in which grandparents had obtained custody apparently because factors, other than the sexual preference of the mother, established parental unfitness. In McGinnis v. McGinnis, 567 So. 2d 390 (Ala. Civ. App. 1990), the lesbian mother had herself expressly and voluntarily relinquished custody and had used illegal drugs in the home. In White v. Thompson, 569 So. 2d 1181 (Miss. 1990), the mother had used marijuana when the children were home, left them often without supervision and allegedly failed to clothe them properly during the colder months. The Bottoms court said that the case before it did not present the same kind of “relinquishment and dereliction of basic parental responsibility” upon which it believed that the Alabama and Mississippi courts had predicated their decisions. 444 S.E.2d at 284 n.3.
emphasized that "clear and convincing evidence" of parental unfitness can rebut that presumption. It further recited the admonitory bromide that "[a] reviewing court should never redetermine the facts on appeal." Then, suturing together both tenets, the supreme court stated:

The evidence plainly is sufficient, when applying the clear and convincing standard and when viewing the facts from the correct appellate perspective, to support the trial court's findings that the parental presumption has been rebutted, that the mother is an unfit custodian at this time, and that the child's best interests would be promoted by awarding custody to the grandmother.

While the supreme court cited its decision in Doe for the proposition that homosexuality does not render a parent per se unfit and said that the felonious "conduct inherent in lesbianism" is a consideration in determining custody, it focused almost exclusively (and indeed excessively) on factors other than those of sexual preference. Rather, the supreme court described Sharon Bottoms as "disappear[ing] for days without informing the child's custodian of her whereabouts," as "mov[ing] her residence from place to place," as "relying on others for support," and as "us[ing] welfare funds to 'do' her fingernails before buying food for the child." The court also dwelled on her promiscuity in her heterosexual past, which it grouped together under the title "illicit relationships with numerous men," and emphasized her acquisition of venereal disease from one such tryst. Further, the court collected various details about Sharon Bottoms' imperfections as a mother, which include the fact that she once forcefully struck the child and that she had been dilatory with respect to diaper changing.

The supreme court found that there was "proof . . . that the child ha[d] been harmed" because the child used "vile language," had temper tantrums and appeared "confused about efforts at discipline." After the seemingly studious effort to avoid mentioning issues related to sexual preference, the court, repeating language from Roe, pronounced that active lesbianism can—and likely will—create "social condemnation" and thus disturb the child's relationships with "peers and the community at large." The possibility

127. Id. at 104.
128. Id. at 105.
129. Id.
130. Id. at 108.
131. Id.
132. Id.
133. Id.
134. Id. (quoting Roe, 324 S.E.2d. at 694). There are, of course, decisions in which courts decline to treat social prejudices as grounds for the denial of custody. In Palmore v. Sidoti, 466 U.S. 429 (1984), the United States Supreme Court determined that potential societal condemnation resulting from an interracial marriage did not warrant the denial of child custody to the mother. In so doing, the Court refused
of social condemnation—and the decision of an independent guardian ad litem—cemented the court’s decision to deny custody to Sharon Bottoms.\textsuperscript{135}

The three dissenters, however, had several serious quarrels with the court’s decision. They objected to the majority’s failure to see that the trial court had refused to follow “established law” by its arriving at a “per se finding of unfitness based on the mother’s homosexual conduct.”\textsuperscript{136} Also, they indicted the majority for “presum[ing] that its own perception of societal opinion and the mother’s homosexual conduct are germane to the issue whether the mother is an unfit parent” because such adverse affects must be and were not actually shown.\textsuperscript{137} The dissenters, however, did not advocate a blanket affirmation. They instead urged a remand to the trier of fact for “application of the correct principles of law to all the evidence.”\textsuperscript{138}

D. The Malum in Se Anti-Familial Criminal

The intermediate appellate court decision in \textit{Bottoms} excited applause from gay activists, who praised it as a “major symbolic victory for gay rights organizations and [a] set back [for] conservative groups defending their views of the traditional family.”\textsuperscript{139} In fact, the Washington-based National Gay and Lesbian Task Force rejoiced in the ruling, which to them “sen[t] a message nationally that sexual orientation has no relevance to the ability to parent a child.”\textsuperscript{140} Similarly, Paula Bantner of the National Center for Lesbian Rights in San Francisco described the decision as a “strong message that just because a woman is a lesbian, it does not make her an unfit mother.”\textsuperscript{141}

Much of the celebration of the court of appeals’ decision in \textit{Bottoms} stems from an infatuation with merely the judgment, which reunited mother and son. The bleak truth, however, is that en route to that happy ending, the court of appeals, had, in effect, perpetuated the cruel stereotype of the homosexual as anti-familial and as a \textit{malum in se} criminal. The supreme court majority approach is really not so different from the decision it reversed. Specifically, the supreme court ultimately made explicit what was implicit in the reasoning of the court below.

\textsuperscript{135} \textit{Bottoms}, 457 S.E.2d at 106-07 (Keenan, J., dissenting).
\textsuperscript{136} \textit{Id.} at 109.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.}
\textsuperscript{139} \textit{Court Grants Lesbian Mother Custody of Her 2-Year Old Son}, L.A. TIMES, June 22, 1994, at 2A.
\textsuperscript{140} Maclntyre, \textit{supra} note 5.
\textsuperscript{141} \textit{Id.}
1. The Malum In Se Criminal

Stephen B. Pershing, who was one of Sharon Bottoms' attorneys, isolates the "flaws in some common rationales for anti-gay custody determinations." What Pershing points out is that courts use the "supposed 'illegality' of homosexual relations as ammunition against gay or lesbian couples." While the illegality basis, of course, ensues from state statutes which criminalized "sodomy," such statutes typically define "sodomy" as an act of oral or anal sexual penetration and do not specify the gender or sexual preference of the offenders. The judicial incantation of the word "illegality" as the rationale for denying custody to a homosexual parent is disturbing not just because it spawns an unjustified "disparate treatment of heterosexual and homosexual parents in custody disputes," but also because it transforms the act of sodomy into the shibboleth of same-sex love and simultaneously fuses same-sex love with a broad substantive subject in law—crime.

That triad of sodomy, homosexuality, and crime, also surfaces in Bowers v. Hardwick. Although the Bowers Court initially described the Georgia sodomy statute as a "law against sodomy between consenting adults in general," it sub silentio excised heterosexuals from the proscription by narrowing the issue before it to whether "the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy." Thus, the Bowers Court, through viewing "sodomy as transhistorically stable and identical to homosexual identity," cotermi nously gave the homosexual an identity as a sodomist criminal.

In the court of appeals decision in Bottoms, the coalescence of sodomy, homosexuality, and crime also manifests itself, but does so in three different ways. First, the image of the criminal sodomist is the only aspect of the trial court's findings that the appellate court condoned. In determining that Sharon Bottoms was an "unfit parent," the trial court did not even purport to articulate its views in a temperately judicial manner: rather, the judge's words became quite personal and staccato and even bordered on hysteria. His proclamation, "I will tell you first that the mother's conduct is illegal... I will tell you that it is the opinion of the court that her conduct is

142. Pershing, supra note 13, at 291.
143. Id. at 292.
144. See Pershing, supra note 13 (discussing how the use of illegality as a basis for removing a child from a homosexual parent presents equal protection problems). See also supra note 65.
145. Pershing, supra note 13, at 295.
147. Id. at 190 (emphasis added).
148. Halley, supra note 78, at 1726.
149. Bottoms, 444 S.E.2d at 279.
"immoral," is a personal outright denunciation of Sharon Bottoms as the epitome of the immoral malum in se lawbreaker.

While the intermediate appellate court rejected the decision below, what it did put its imprimatur on was the trial court’s portrayal of Sharon Bottoms as the malum in se criminal. In fact, the court stated that “in this instance, the open lesbian relationship and illegality of the mother’s sexual activity are the only significant factors that the court considered in finding Sharon Bottoms to be an unfit parent.” That is, the court of appeals exempted the illegality aspect from what would otherwise be its blanket disapproval of the analysis below.

Second, lesbianism congeals with criminality through the intermediate appellate court’s abrupt leap from the topic of sexual preference to crime:

"[T]he fact that a mother is a lesbian and has engaged in illegal sexual acts does not alone justify taking custody of a child from her and awarding the child to a non-parent, even though an award of custody may be only temporary. The fact that a parent has committed a crime does not render a parent unfit, unless such criminal conduct impacts upon or is harmful to the child, or unless other special circumstances exist aside from the parent’s conduct that would render continued custody with the parent deleterious to the child."

That transitionless jolt from lesbianism, which purportedly does not “per se render a parent unfit,” to the hypothetical of the criminal parent is really a way of collapsing together two disparate concepts.

Third, the court of appeals strengthened that union of sexual preference and crime through effectually aligning the Bottoms case with cases, like Ferris v. Underwood, Phillips v. Kiraly, Mason v. Moon and Walker v. Fagg, in which courts allowed children to remain with parents that had either themselves been charged with or convicted of crimes or allowed criminals into their homes. In Ferris, the “most troublesome evidence” was that the mother’s sister was a prostitute who sometimes visited the custodial home. Through its treatment of Ferris as an analogue, the Bottoms Court

150. Id. (emphasis added). Significantly, the trial judge in Bottoms had such an extreme aversion to lesbianism that he preferred the grandmother as the custodian of the child, even though that grandmother had had a live-in lover who had apparently sexually abused her own child.
151. See supra notes 73-79 and accompanying text.
152. Bottoms, 444 S.E.2d at 281 (emphasis added).
153. Id. at 281-82.
154. Id. at 281.
159. 348 S.E.2d at 20.
implicitly forged a bond between a child's exposure to prostitution and exposure to a same-sex couple.

In *Phillips*, after the father had placed his daughter in the temporary custody of his deceased wife's sister, the sister refused to return the child. As part of their case against the father, the custodians showed not only that he had issued bad checks, but also that he took pictures of nude women and had been "engaged in a so-called 'Peeping-Tom' episode." In the *Bottoms* court of appeals' reliance on *Phillips*, there is an implied link between the lesbian mother's life-style to one of dishonesty and voyeuristic aberration.

Through connecting the *Bottoms* matter to the situations in *Mason* and *Walker*, the court of appeals equated lesbianism with actual episodes of violence. In *Mason*, the child had witnessed the stepfather killing her own father. In *Walker*, the father had not only neglected his children and abused alcohol, but had actually been convicted of killing his wife.

As such, through use of *Ferris*, *Phillips*, *Mason*, and *Walker* as a precedential quartet, the *Bottoms* court of appeals injected the lesbian factor into a larger classification, one which subsumes prostitution, dishonesty, voyeurism and violence. The approach, which atavistically alludes to the *malum in se* classification, is again reminiscent of that language in *Bowers*, which equates homosexual sodomy in the home with the possession of stolen goods or drugs and to the ownership of potentially deadly firearms. Thus, although the *Bottoms* court of appeals returned little Tyler to his mother, it, in the spirit of *Bowers*, employed in its reasoning references to crime and violence and made such references into a language for the discussion of sexual preference.

The tripartite alloy composed of sodomy, homosexuality, and crime is equally pronounced in the portrait that the Supreme Court of Virginia paints of Sharon Bottoms. In its reasoning, the supreme court significantly avoided use of the word "sodomy" and instead forged an automatic equation between "conduct inherent in lesbianism" and "felony." That is, the court viewed lesbianism and crime to be virtually interchangeable. Further, the supreme court, in emphasizing the "social condemnation" that a child of an "active lesbian" supposedly suffers, stigmatized the mother as a convict that has extricated both herself and her child from "peers" and the "community at large."

In addition, the supreme court decision in Bottoms resembles the *Doe* decision in one crucial aspect: namely, the judicial predilection for lesbianism as something mutable. As we said, the *Doe* court clarified that the lesbian mother was being rewarded for her acknowledged willingness to change and

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160. 105 S.E.2d at 857.
161. See supra notes 73-79 and accompanying text.
162. 478 U.S. at 195. See also supra notes 71-72 and accompanying text.
163. *Bottoms*, 457 S.E.2d at 108.
164. *Id.* (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)).
for her professed ability to change.\textsuperscript{165} That is, the Doe court implicitly paid homage to the lesbian mother for her bolstering of their view of sexual preference as something that is not immutable or as something that she could control.\textsuperscript{166} Significantly, in the court's perspective, the rewarded Doe lesbian—like a criminal—could reform and be rehabilitated so that she could once again join her peers and community.\textsuperscript{167}

In contrast, the supreme court punished Sharon Bottoms for her supposedly demonstrated unwillingness to change and professed inability to change. The supreme court especially noted that there was "evidence that the mother separated herself from Wade after the juvenile court hearing . . . to 'help . . . with the custody fight,' but returned to live with her two weeks later."\textsuperscript{168} The court further suggested that Sharon Bottoms would not live apart from her lover even if it "would help her regain custody."\textsuperscript{169} What troubled the court was that Sharon Bottoms' conduct apparently substantiated the view of her sexual preference as something over which she had no control. That is, she had implicitly defied being characterized as a sinner who can repent or as a criminal who can reform.

Significantly, the supreme court recited what appears to be the guardian ad litem's ultimatum "that custody is something that's flexible and can change if the circumstances change."\textsuperscript{170} The guardian's quoted statement that "at this time under this actual situation," the child should live with the grandmother, constitutes a near beseeching of Sharon Bottoms not to merely relinquish her life of crime, but to prove that her sexual preference is a life of crime that can be relinquished.\textsuperscript{171} That is, her corroboration of their stereotype is what will bring her relief.

2. Anti-Family

The intermediate appellate court in Bottoms also fastidiously avoided acknowledging that Sharon Bottoms' household was a home with family attributes. This approach—one of pure denial—also mirrors an aspect of the Bowers decision.

In Bowers, the Supreme Court had disavowed any relationship between the "claimed constitutional right of homosexuals to engage in acts of sodomy"\textsuperscript{172} and the privacy rights protected by Griswold v. Connecticut.\textsuperscript{173} The Bowers Court also rejected what the Eleventh Circuit had urged, that "[f]or some, the

\begin{itemize}
\item 165. See supra notes 83-86 and accompanying text.
\item 166. See supra notes 83-86 and accompanying text.
\item 167. See supra notes 83-86 and accompanying text.
\item 168. Bottoms, 457 S.E.2d at 107.
\item 169. Id.
\item 170. Id.
\item 171. Id.
\item 172. 478 U.S. at 191.
\item 173. 381 U.S. 479 (1965).
\end{itemize}
sexual activity in question . . . serves the same purpose as the intimacy of marriage.’’174 In so doing, the Bowers Court extricated homosexual relationships from a whole genre of marital and familial institutions. Mr. Hardwick’s relationship with other men had no connection with any sacred institutions, like child rearing, marriage or procreation. As such, Mr. Hardwick’s “relationships” or “associations” were, by judicial fiat, figuratively ousted from the familial hearth.

Another recent decision, Shahar v. Bowers,175 is also similar in this respect. Even though Shahar married another woman and the Shahar court went so far as to recognize Shahar’s relationship with her lover as a “constitutionally-protected intimate association,”176 it studiously eschewed the word “marriage” and instead persisted in denouncing Shahar’s marriage as a “relationship,” an “association,” an “intimacy.”177

In the court of appeals’ decision in Bottoms, the most blatant nullification of anything conceivably marital or familial about Sharon Bottoms’ love for April Wade is the outright ouster of April Wade from the court’s analysis of the mother’s parenting. From that Bottoms court, we learn that Sharon twice “spanked her son ‘too hard,’” on occasion “swore in his presence” and neglected to promptly change his diaper.178 The court of appeals disclosed other details—how Sharon Bottoms punished her son by making him stand in a corner and how she left her son with the grandmother “for a week without informing the grandmother how she could be reached.”179 Although that court considered all sorts of intimate information in analyzing parental fitness and explicitly recognized that the relationship between a parent and a resident are “critical and significant” factors and although it is undisputed that April Wade is indeed that very “critical and significant” resident, the court shut the door on April Wade, thus keeping her out of the parental domicile.

Ironically, what makes April Wade’s absence so glaring is that it is April Wade’s very presence in the custodial home that is the grandmother’s main basis for trying to have her daughter divested of custody. The intermediate appellate court, however, did not appear to address how April Wade, as a “critical” and “significant” member of the Bottoms’ household, interacts with or responds to the Bottoms’ child. Such an exclusion of April Wade from an

175. 836 F. Supp. 859 (N.D. Ga. 1993) (holding that although a homosexual relationship is an intimate association protected by First Amendment, prospective employer’s withdrawal of employment after learning of plaintiff’s homosexuality did not violate First Amendment or equal protection clause).
176. Id. at 863.
177. Id. at 863-69. In Shahar, when Shahar, a recent law school graduate, indicated that she wished to marry another woman, the Attorney General withdrew his offer of employment. Consequently, Shahar sued Bowers, asserting that the withdrawal of the offer was unconstitutional because it violated her rights to freedom of association, freedom of religion, equal protection of the law, and substantive due process of law. See generally Amy D. Ronner, Amathia and Denial of “In the Home” in Bowers v. Hardwick and Shahar v. Bowers: Objective Correlatives and the Bacchae as Tools for Analyzing Privacy and Intimacy, KAN. L. REV. (forthcoming 1996).
178. 444 S.E.2d at 281.
179. Id.
analysis of the parenting amounts to a denial that April Wade and Sharon Bottoms do and can together comprise a parental home or a family. Really, in the court of appeals' perspective, Sharon Bottoms is the same as a single mother.

While the Supreme Court of Virginia did include April Wade in the analysis, it used her to make the lesbian household even more anti-familial. The house is portrayed not as a family unit, but more suggestively as a kind of *menage a trois* with "the mother, the child and Wade . . . living in a two-bedroom apartment with ‘Evelyn,’ another lesbian." The supreme court intimated that the child’s bed is the hub of the libidinous bedroom where “the mother and Wade slept, having sex in the same bed.”

Also, rather than viewing Bottoms and Wade as comprising a family unit, the supreme court treated them as a sham family where Wade had the audacity to “become ‘a parent figure’ to the child” and where the child called Wade "Da Da." While Wade comes across in the supreme court’s decision as an ersatz father, the court similarly faulted Sharon Bottoms for not being a real mother by “refus[ing] to subordinate her own desires and priorities to the child’s welfare” and specifically, for putting her own manicure before baby food. That is, Sharon Bottoms has defied the expected image of maternal self-sacrifice. Further, the supreme court sketched Wade as unstable and as prone to “violence when her views were not accepted.” The cumulative effect of the supreme court’s choice to emphasize such detail is not one of a warm sanctuary hearth, but of an orgiastic explosive context within which two women mock husband and wife and merely play house.

The lesbian domicile, as rendered by the supreme court, also takes on some of the attributes of a bedouin tent. The court described Sharon Bottoms as nomadic, as “disappear[ing] for days without informing the child’s custodian of her whereabouts,” as “mov[ing] her residence from place to place, and as keeping the “child’s suitcase packed” to “aid in her mobility” so that she could quickly deposit the child at her grandmother’s. The image is not one of a home, but of near homelessness. Although the grandmother’s home once housed a child molester, the supreme court nevertheless unhesitantly denominates it a “home” and ultimately pronounces it to be the “home.”

180. *Bottoms*, 457 S.E.2d at 106.
181. *Id.*
182. *Id.*
183. *Id.* at 108.
184. *Id.*
185. See supra note 98.
186. *Bottoms*, 457 S.E.2d at 108.
CONCLUSION

If courts are to play a role in eradicating discrimination based on sexual orientation, they cannot focus their efforts merely on the judgments in the particular cases before them. This Article examined three cases, Doe v. Doe,187 Roe v. Roe,188 and Bottoms v. Bottoms,189 in which courts had to decide the parental or custodial rights of homosexuals. Despite the fact that in one of the three cases the homosexual parent ultimately prevailed, all three decisions are equally homophobic. That is, all three perpetuate the same damaging stereotypes about lesbians and gay men.

In Doe, the Supreme Court of Virginia declined to permanently deprive a biological mother of her child solely because of that mother's lesbian relationship where there was no showing that that relationship was detrimental to the child. In Roe, however, the same court concluded that the gay father's "continuous exposure of the child to his immoral and illicit relationship" made him an unfit custodian.190 If one myopically scrutinizes just the results in Doe and Roe, one might in all likelihood see the former as a victory and the latter as a defeat. Both decisions, however, equally retard real change by effectually divesting individuals of their individuality and homogenizing them into symbols of malum in se criminality. This mythic identity of the homosexual derives from the courts' triadic fusion of sexual preference with the act of sodomy, and then with the disturbing abstraction of crime itself.

The Doe and Roe courts also meticulously refrained from attributing any family qualities to the homosexual household. Although in Doe the mother described her bond with her female lover as a marital commitment, the court recoiled from such a characterization and instead resorted to the use of more sterile labels, like "relationship" and "association."191 Similarly, in Roe the court made the father's house appear to be an orgiastic arena, a place unfit for parenting.192 That court also implicitly expressed revulsion at the bed that the father shared with his male lover. Thus, a common denominator in Doe and Roe is the judicial adherence to the view of the homosexual as not just a malum in se criminal, but as something inimical to family.

In Bottoms, the ostensible lesbian victory in the intermediate appellate court also harbored the icon of defeat. Although the Bottoms appeals court recited that a parent's sexual preference does not "per se render a parent unfit to have custody of his or her child,"193 it too wedded same-sex love with sodomy and then affixed that union onto the malum in se concept. The Bottoms court

188. 324 S.E.2d 691 (Va. 1985).
189. 457 S.E.2d 102.
190. 324 S.E.2d at 694.
191. 284 S.E.2d at 802-07.
192. See supra note 98 and accompanying text.
193. 444 S.E.2d at 281.
of appeals' erasure of April Wade, Sharon's lover, from the parenting picture, constituted its denial that the two women can comprise a marital or familial unit. That is, while the court acknowledged that the relationship between the parent and "resident" is a "critical and significant" factor in determining parental fitness,\textsuperscript{194} that court, nevertheless, backed that very "resident" out of the analysis. Again, the court of appeals decision in \textit{Bottoms}, the short-lived supposed lesbian victory, was, in essence, defeatingly discriminatory.

The bias and stereotypes that lurked beneath the court of appeals' decision in \textit{Bottoms} manifested itself in the supreme court's ultimate verdict of no custody for Sharon Bottoms. According to the supreme court, the lesbian mother is a diseased felon—the \textit{malum in se} criminal—who, having sinned, must lose her baby. The augmentation of her crime, however, is that she refused to nourish the judicial misconception of sexual preference as mutable and as in her control. She is portrayed as the stereotype who refuses to reinforce the stereotype. She is, at once, the court's mythical creation that simply will not cooperate with the myth.

In the supreme court's view, Sharon Bottom's life style is shifting and unstable and devoid of a real mother and father. The apartment is not really a home, but an orgiastic arena decked with packed suitcases. It is, as judicially processed, not merely non-family, but anti-family. Herek's examination of the different functions of homophobia\textsuperscript{195} can help us understand what process underlies such judicial reasoning in cases like \textit{Doe}, \textit{Roe}, and \textit{Bottoms}. According to Professor Herek, one function that homophobia serves is a "defensive" one, which "stems from fear of one's own latent homosexuality, or insecurity about one's sense of identity as a man or woman."\textsuperscript{196} Herek elaborates on defensiveness as a means of warding off anxiety:

It is sufficient to say that people can experience intense conflicts between who they think they \textit{should be} and who they think they \textit{are}. Sometimes these conflicts are based on having homosexual desires that one cannot accept. Sometimes the conflict involves feelings that one is not measuring up to one's gender role; that a man does not feel like he is a 'real man' or a woman that she is a 'real woman.' These conflicts cause anxiety, a very unpleasant feeling that people try to avoid. One strategy for avoiding anxiety is to deny that the unacceptable feeling or characteristic is part of oneself, and to project it outward onto some convenient person or object in the environment. The person can then hate or fear that external

\textsuperscript{194} \textit{Id.}
\textsuperscript{195} \textit{HEREK, supra note 2.}
\textsuperscript{196} \textit{Id. at} 931.
object (which symbolizes some part of the self) without hating
or fearing herself.\textsuperscript{197}

The "defensive process" might also be churning within judicial decisions. Courts, engaging in a "strategy" to deny that "unacceptable feeling[s] or characteristic[s]" are part of themselves, react by projecting them "outward onto some convenient person or object in the environment."\textsuperscript{198} Their surrogate is objectified as the image of the homosexual, judicially divested of his or her individuality and portrayed as an emblem of anti-family and \textit{malum in se} crime. While such a projection of fear onto a conjured target may serve to dispel anxiety or the "unpleasant feeling,"\textsuperscript{199} its ameliorating effect is both short lived and illusory. Such mythic images take on a life of their own, and cyclically spawn more of the unpleasant feeling, the homophobia, which, in turn needs a new outlet.

The end of prejudice has to mean an arrest of the defensive cycle itself. It is not enough for courts to issue decisions that appear to confer a victory on a lesbian or a gay male. Courts must do more than that and specifically refrain from creating the mythic anti-self, the stereotype, or what Theodore Roethke saw as the id-like "Dirty Dinky."\textsuperscript{200} As such, the cessation of the discriminatory cycle entails the isolation of the force that propels it and thus, requires true and even painful introspection. What it involves perhaps is a meaningful judicial heeding of Roethke's admonition, "\textit{You may be Dirty Dinky.}"\textsuperscript{201}

\begin{footnotes}
\footnote{197}{\textit{Id.} (emphasis original) Sigmund Freud described negation as a process by which "the subject-matter of a repressed image or thought can make its way into consciousness on condition that it is denied." \textit{Sigmund Freud, Negation in A General Selection from the Works of Sigmund Freud 55} (Doubleday 1957). As Freud explained:

[T]he original pleasure-ego tried to introject into itself everything that is good and to reject from itself everything that is bad. From its point of view, what is bad, what is alien to the other ego, and what is external are, to begin with identical. \textit{Id.}}}

\footnote{198}{\textit{Id.}}

\footnote{199}{\textit{Id.}}

\footnote{200}{\textit{Id.}}

\footnote{201}{\textit{Id.}}
\end{footnotes}