

August 1994

## "Entreat Me Not to Leave Thee": Bottoms v. Bottoms and the Custody Rights of Gay and Lesbian Parents

Stephen B. Pershing

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Family Law Commons](#)

---

### Repository Citation

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 (1994), <https://scholarship.law.wm.edu/wmborj/vol3/iss1/9>

Copyright c 1994 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

**“ENTREAT ME NOT TO LEAVE THEE”:<sup>\*</sup>**  
**BOTTOMS V. BOTTOMS AND THE CUSTODY RIGHTS OF GAY**  
**AND LESBIAN PARENTS**

Stephen B. Pershing<sup>\*\*</sup>

I. INTRODUCTION

When the history of gay and lesbian civil rights in the United States comes to be written, a chapter will surely be devoted to the case of Sharon Lynne Bottoms. In the summer of 1993, a remarkable year in the struggles of homosexual Americans against discrimination,<sup>1</sup> this young Virginia mother, who never wanted to be famous—least of all for her love of another woman—became a national and international celebrity almost literally overnight. Millions of people now know her name and her situation: she lost custody of her two-year-old child to her mother in court solely because she wanted a family that did not fit the norm.<sup>2</sup>

---

<sup>\*</sup> “[E]ntreat me not to leave thee, or to return from following after thee: for whither thou goest, I will go; and where thou lodgest, I will lodge: thy people shall be my people, and thy God, my God: Where thou diest, will I die, and there will I be buried . . . .” *Ruth* 1:16-17 (King James) (Ruth to Naomi).

<sup>\*\*</sup> Legal Director, American Civil Liberties Union of Virginia. A.B., Harvard University, 1979; J.D., University of Virginia, 1987. The author is one of Sharon Bottoms’ attorneys. For assistance with this Article and with the shaping of his understanding, the author wishes to thank Abby Abinanti, Sharon Bottoms, Linda Burton, Donald Butler, Sarita Brown, Susan Canby, Richard D’Alessio, Scott Drabenstadt, Marc Elovitz, Kimberly Filbert, Emily Finkelstein, Rochelle Klinger, Player Michelsen, Daniel Ortiz, Charlotte Patterson, Nancy Polikoff, Gary Spitko, Miriam Solomon, Peter Swisher, and April Wade.

<sup>1</sup> See, e.g., Andrew Kopkind, *The Gay Moment*, 256 *THE NATION* 577, 577 (May 3, 1993) (marking April 1993 gay rights march on Washington) (“Not for thirty years has a class of Americans endured the peculiar pain and exhilaration of having their civil rights and moral worth—their very humanness—debated at every level of public life.”).

<sup>2</sup> The dispute is between Sharon Bottoms and her natural mother, Kay Bottoms, over custody of Sharon’s natural son, Tyler Doustou, born July 5, 1991. Kay first petitioned for custody in the local juvenile court, and at a hearing on March 31, 1993, that court ruled:

Upon hearing the evidence ore tenus, custody of the above captioned child is hereby awarded to Kay Bottoms, with visitation rights granted to the Mother as follows: Reasonable, but not in the presence of her lesbian lover to which relationship the child is not to be exposed. The court finds *Doe v. Doe*, [284 S.E.2d 799 (Va. 1981),] cited by counsel[,], to be inapplicable, but relies on *Roe v. Roe*, [324 S.E.2d 691 (Va. 1985)].

Sharon Bottoms and her son are now the best known victims, though by no means the only ones, of the Virginia Supreme Court's 1985 pronouncement in *Roe v. Roe*<sup>3</sup> that lesbians and gay men are unfit, as a matter of law, to have custody of their own natural children. The *Bottoms* case, now on appeal to Virginia's intermediate appellate court,<sup>4</sup> tests the validity of the *Roe* presumption<sup>5</sup> in a factual, legal, and social science research context different from what faced the court in *Roe*,<sup>6</sup> but similar enough to *Roe* as a matter of principle to bring that decision under

---

*In re Doustou*, No. J-32,113-01 (Va. Juv. & Dom. Rel. Ct. Henrico Co. Mar. 31, 1993). Sharon appealed de novo to the Circuit Court, *Bottoms v. Bottoms*, No. CH93JA0517-00 (Va. Cir. Ct. Henrico Co. Sept. 7, 1993), and sought the assistance of the ACLU Foundation of Virginia, which agreed to sponsor the litigation. Trial in the circuit court proceeding took place before the Honorable Buford Parsons, Jr. on September 7, 1993, and the ruling against Sharon was issued from the bench at the close of trial. Joint Appendix at 197-99, *Bottoms v. Bottoms*, No. 1930-93 (Va. Ct. App. filed Sept. 28, 1993); Trial Transcript at 195-97, *Bottoms v. Bottoms* (No. CH93JA0517-00).

The court-appointed guardian ad litem for the child contended at trial that Sharon showed "immatur[ity]" by failing to sever her lesbian relationship in order to please a court that he thought would apply *Roe* against her claim for custody of her son. Joint Appendix at 40-41, 191; Trial Transcript at 38-39, 189.

<sup>3</sup> 324 S.E.2d 691 (Va. 1985). *Roe* was premised on the "unlawful" nature of the father's same-sex relationship, which the court called "immoral and illicit," and described as an

intolerable burden upon [the child] by reason of the social condemnation attached to [the father's relationship], which will inevitably afflict her relationships with her peers and with the community at large . . . . The impact of such behavior upon the child, and upon any of her peers who may visit the home, is inevitable.

*Id.* at 694.

The trial court in *Bottoms* ruled from the bench that *Roe* rendered Sharon an unfit custodian as a matter of law and required a transfer of custody from her to Kay, the third party. Joint Appendix at 197-99; Trial Transcript at 195-97.

<sup>4</sup> The Virginia Court of Appeals was created by statute in 1985, and was vested with jurisdiction to hear appeals of right in domestic relations cases, among others. See VA. CODE ANN. § 17-116.01 (Michie Supp. 1993).

Oral arguments in *Bottoms* were held before a panel of the Court of Appeals on February 16, 1994, under a grant of expedited appeal. A decision is still awaited as this Article goes to press.

<sup>5</sup> 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. See *infra* notes 85-87 and accompanying text; see *Roe*, 324 S.E.2d at 694 ("The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian *as a matter of law.*") (emphasis added).

<sup>6</sup> *Roe* was a custody dispute between two natural parents, one homosexual and the other heterosexual, *Roe*, 324 S.E.2d at 692, while *Bottoms* is a dispute between a homosexual natural parent and a heterosexual nonparent. See *infra* notes 113-20 and accompanying text.

fire—and in the process to raise the attention and the consciousness of Virginia and the nation.

This Article proceeds from the premise that Sharon Bottoms' choice of family life is legitimate and worthy of legal protection. The Article discusses the *Bottoms* case in the context of other relevant decisions from Virginia and around the United States. It examines the legal presumptions and the social values that underlie, and escalate, controversies of this type, and in the process touches on some of the social science and constitutional arguments against classifications that burden parenting or other private activities based on sexual orientation. The Article argues strenuously against the reasoning and result of *Roe*, and in favor of universal adoption of the rule of the more soundly decided cases—that a parent's sexual orientation alone should not determine his or her suitability as custodian of a child.<sup>7</sup>

## II. DEBUNKING THE MYTHS: FLAWS IN SOME COMMON RATIONALES FOR ANTI-GAY CUSTODY DETERMINATIONS

The care and custody of children is an indisputably central function of family units that include children. Predictably, child custody is politicized whenever family relations become politicized. As current events in this country make clear, nothing is more politically controversial at the moment than homosexuality and related matters of lifestyle and family. The country collectively is divided on whether there is or should be such a thing as gay and lesbian families, let alone gay and lesbian civil rights inside or outside those families.<sup>8</sup>

In child custody cases involving lesbians and gay men in American courts, the question of the validity of homosexual love and partnership, or its distinction from other forms of love or partnership, has typically been presented in terms that serve anti-gay attitudes uniquely well: the "fitness," expressed as a function of sexual orientation, of parents who are gay or lesbian.<sup>9</sup> That such a criterion should even be suggested in child custody disputes is itself undeniable evidence of the prevalence of

---

<sup>7</sup> See *infra* notes 58-67, 88 and accompanying text.

<sup>8</sup> See, e.g., Peter Bacque, *Sacred or Sacrilege? Same-sex Parents Struggle to Lead Ordinary Lives*, RICHMOND TIMES-DISPATCH, Dec. 3, 1993, at E1; Steven A. Holmes, *Gay Rights Advocates Brace for Ballot Fights*, N.Y. TIMES, Jan. 12, 1994, at A17 (discussing recent ballot initiatives to bar localities from enacting laws that protect homosexuals from discrimination); Gregory Vistica, *In service or out, few salute policy*, SAN DIEGO UNION-TRIB., July 20, 1993, at A1 (noting criticisms of President Clinton's policy on gays in the military by both proponents and opponents of gay rights).

<sup>9</sup> For a discussion of the distinction properly to be drawn between fitness and preferability of a custodian, see *infra* note 102 and accompanying text.

aversions to gay and lesbian persons and lifestyles, known in the aggregate as homophobia or heterosexism,<sup>10</sup> in our society today.

The use of such a criterion for “fitness” of gay or lesbian custodians is variously “justified” by citing one or more of several supposed ills that states assert an interest in combatting: (1) the supposed illegality of the parent’s conduct; (2) the “immorality” of the parent’s lifestyle, regardless of legal prohibitions or proof of unlawful conduct; and (3) the real or imagined effect on the child of exposure to the parent’s gay or lesbian relationship, or of community prejudice or opprobrium directed toward the parent. None of these rationales is self-sustaining, but each subsists on an underlying bias against homosexuality in and of itself. As the discussion below suggests, this “false bottom” problem carries serious constitutional implications.

### A. *The Illegality Rationale*

The supposed “illegality” of homosexual relations<sup>11</sup> refers most typically to statutes that criminalize sodomy, an act defined in Virginia and

---

<sup>10</sup> An excellent discussion of judicial homophobia and heterosexism in this precise context can be found in Professor Polikoff’s pathbreaking article on lesbian parenting issues. Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 547-49 (1990) (citing G. Dorsey Green, *Lesbian Mothers: Mental Health Considerations*, in GAY AND LESBIAN PARENTS 188 (Frederick W. Bozett ed., 1987)).

Homophobia is what it sounds like: homo, [a] prefix meaning homosexual[,] and phobia, meaning “an exaggerated, usually inexplicable and illogical fear of a particular object or class of objects” . . . . Heterosexism . . . refers to our collective assumption that all people are heterosexual, unless blatantly not so. It also pertains to our bias that people *should* be heterosexual.

Green, *supra*, at 188; see also Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187. Professor Law amplifies the discussion as follows:

The pervasive cultural presumption and prescription of heterosexual relationships—and the corresponding silencing and condemnation of homosexual erotic, familial and communitarian relations—can aptly be termed “heterosexism.” In popular culture, opposition to homosexuality is often characterized as “homophobia.” That term suggests a fear of homosexuals and an individual pathological hatred of them. . . . [H]eterosexism is a much broader phenomenon . . . . [It] shapes the lives, choices, beliefs and attitudes of millions of people who experience neither fear nor hatred of gay and lesbian people.

*Id.* at 195.

<sup>11</sup> A distinction should be made here, but sadly is not often made by courts, between personal relationships and sexual activity. While relationships between persons may consist of emotional, communicative, or physical bonds or connections of varying

elsewhere as oral or anal sexual penetration regardless of the gender of the partners.<sup>12</sup> Custody dispositions based on the “illegality” of same-sex relationships<sup>13</sup> appear to be concerned either with the lack of “legal recognition” of the relationship,<sup>14</sup> or else with certain sexual practices in which homosexuals, in particular, are assumed to engage, regardless of the extent to which heterosexuals also engage in them.<sup>15</sup> This basis for

---

degrees of intimacy, *cf.* *Roberts v. United States Jaycees*, 468 U.S. 609, 619-20 (1984) (intimate associational ties “involve deep attachments and commitments . . . shar[ing] not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life”), sexual activity by definition is found only in sexually intimate relationships. However, no personal relationship, regardless of the living arrangements that attend it and the sexual orientation of the parties, necessarily entails certain intimate sexual acts or should be presumed to do so. *See infra* note 24 and accompanying text.

<sup>12</sup> VA. CODE ANN. § 18.2-361 (Michie Supp. 1993) (describing “crimes against nature”). As of the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986), sodomy prohibitions were in force in 23 states and the District of Columbia. *See id.* at 198 n.1 (Powell, J., concurring) (collecting statutes).

<sup>13</sup> Massachusetts, Michigan, and South Carolina all have sodomy prohibitions, *see* MASS. GEN. LAWS ANN. ch. 272, § 34 (West 1990); MICH. COMP. LAWS § 750.158 (West 1991); S.C. CODE ANN. § 16-15-120 (Law Co-op. 1985), but do not use them to justify a transfer of custody away from a gay or lesbian parent, preferring instead a “nexus” test requiring a factual showing of harm to the child from the parent’s homosexual conduct. *See* *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215 (Mass. 1980); *Hall v. Hall*, 291 N.W.2d 143, 144 (Mich. Ct. App. 1980); *Stroman v. Williams*, 353 S.E.2d 704, 705 (S.C. 1987).

<sup>14</sup> *See, e.g., Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981) (finding that lack of legal recognition of same-sex partnership rendered homosexual parent unsuitable).

<sup>15</sup> *See Hardwick*, 478 U.S. at 188 n.2, 190 (upholding Georgia’s gender-neutral sodomy statute against federal due process challenge).

[T]he plaintiffs [in *Hardwick*] challenged the regulation of consensual sodomy . . . . It was the [Supreme] Court that understood the case as presenting an issue of regulation of homosexual conduct rather than of sodomy in general. The Court upheld the statute only insofar as it applied to consensual homosexual sodomy. The Court reserved the question whether the statute would be valid if applied to heterosexual sodomy.

Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1169 (1988) (footnotes omitted).

Four Justices dissenting in *Hardwick* criticized the majority for failing to address the constitutionality of the statute as a whole, i.e., as applied to heterosexual and homosexual acts alike. *Hardwick*, 478 U.S. at 200 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting).

Importantly, *Hardwick* did not decide whether classifications based on sexual orientation violated equal protection. *See infra* notes 72-76 and accompanying text. Recent social science research evidence clearly establishes that intimate sexual practices do not markedly differ depending on the gender or the sexual orientation of the partners. *See infra* note 21 and accompanying text.

decision is immediately problematic for due process and equal protection reasons, and may have first amendment infirmities as well.

First and most immediately, in the typical child custody case in which a gay or lesbian parent is a party, no criminal charge of sodomy or other illicit sexual conduct is asserted or proved. Judges who use the "illegality" rationale to disfavor a homosexual for child custody therefore *assume* a violation of such a law, and necessarily do so in the absence of indictment or conviction on the charge, or, in most cases, any direct evidence of sexual acts as part of the proofs. This ipso facto pretense seems infirm at the threshold to the extent that it incorporates, in a civil case, a judgment of criminal liability rendered without charge, without proof of the violation sufficient to meet an appropriate burden, and without criminal conviction and its attendant rights of direct and collateral review<sup>16</sup>

Second, although state statutes often criminalize certain sexual acts, and occasionally levy their sanctions based on the gender of the persons taking part,<sup>17</sup> they do not, of course, forbid persons of either gender from sharing living space, experiencing feelings of love, embracing one another or otherwise displaying affection in public or private places, or—most importantly—announcing, to intimate associates or to the world, a non-heterosexual orientation.<sup>18</sup> Any such proscriptions, where they exist, are sustained purely by cultural taboo. For the "illegality" of same-sex

---

<sup>16</sup> In the criminal context, the right to trial before conviction or punishment is fundamental. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."). See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (pretrial detention without prompt judicial determination of probable cause to believe detainee guilty violates Fourth Amendment). Even a civil proceeding to compel forfeiture of property allegedly used in crime or acquired with its proceeds, see, e.g., 21 U.S.C. § 881(a) (1988), requires the Government to prove, at least by a preponderance of credible evidence, probable cause to believe the subject property is forfeit. *United States v. \$228,536.00*, 895 F.2d 908 (2d Cir. 1990), *cert. denied*, 495 U.S. 958 (1991). While no court appears explicitly to have held that civil due process guarantees forbidding removal of a child from a parent's custody based on assumed parental guilt of a crime, several Virginia decisions have rejected custody challenges that were based on a parent's felony *convictions*, not just uncharged suppositions of felonious behavior. See *infra* notes 134-40 and accompanying text; *cf.*, e.g., *People v. Brown*, 212 N.W.2d 55, 59 (Mich. Ct. App. 1973) (rejecting state-instituted civil custody challenge against lesbian household under statute requiring change of custody on evidence of "criminality" in part because one mother was denied statutory right to appointed counsel).

<sup>17</sup> See, e.g., ARK. CODE ANN. § 5-14-122 (Michie 1993); KAN. STAT. ANN. § 21-3505 (1988); MONT. CODE ANN. § 45-5-505 (1993); TENN. CODE ANN. § 39-13-510 (1991).

<sup>18</sup> See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1370 (N.D. Cal. 1987) ("[*Bowers v.*] *Hardwick* does not hold, for example, that two gay people have no right to touch each other in a way that expresses their affection and love for each other."), *rev'd*, 895 F.2d 563 (9th Cir. 1990).

relationships, then, the threshold question is whether gay and lesbian partnerships necessarily entail, to a greater extent than heterosexual ones, intimate sexual acts that are against the law, and whether the acts themselves are really any different when performed in gay rather than straight relationships.<sup>19</sup> If, as common sense and social science research suggest, the answer to these questions is no,<sup>20</sup> then an “illegality” distinction between rival custodians based on sexual orientation manifestly lacks a factual basis.

Studies show that more than ninety percent of heterosexual couples, married and unmarried, engage in oral sex in their own boudoirs.<sup>21</sup> Thus, if a court deprives a lesbian or gay natural parent of custody of her or his child based on an assumed violation of a gender-neutral sodomy or other sexual conduct proscription, social science fact requires a similar finding of unsuitability as to any rival for custody, regardless of that person’s gender or sexual orientation, who does not first certify abstinence from the sexual activity in question. Needless to say, courts do not require heterosexual custody claimants to make such a showing. This obvious disparity, inexplicable except for anti-gay bias, is an important clue to the irrationality, and therefore the defectiveness under the equal protection clause, of disparate treatment of heterosexual and homosexual parents in custody disputes.<sup>22</sup>

---

<sup>19</sup> See, e.g., GA. CODE ANN. § 16-6-2 (1984) (at issue in *Hardwick*, 478 U.S. at 186); VA. CODE ANN. § 18.2-361 (Michie 1988 & Supp. 1990), invoked in *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (both gender-neutral).

<sup>20</sup> See *infra* notes 21, 24 and accompanying text.

<sup>21</sup> See, e.g., PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 236 (1983) (finding that 90% of heterosexual couples in the United States have engaged in fellatio and 93% in cunnilingus, and that same-sex couples engaged in oral sex only slightly more frequently than opposite-sex couples).

<sup>22</sup> Distinctions or classifications that are irrational, have no basis in fact, or are rooted only in bias and prejudice against certain persons or classes of persons, fail even the deferential “rational basis” test that federal equal protection doctrine uses to examine state-created classifications that are not based on race, gender, national origin, and the like. One important modern statement of the doctrine that bias-based classifications are irrational is *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (invalidating as irrational a local classification excluding homes for the mentally retarded from certain neighborhoods). *Cleburne* is sometimes cited as an example of “rational basis with bite,” Gayle Lynn Pettinga, Note, *Rational Basis With Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 779 n.9 (1986), or “rational basis with teeth,” David O. Stewart, *A growing equal protection clause?*, A.B.A. J., Oct. 1985, at 108, 112 (quoting Professor Victor Rosenblum of Northwestern University Law School).

Several arguments may also be made for heightened scrutiny of anti-gay parenting presumptions under equal protection. See *infra* notes 72-76 and accompanying text.



It would be a mistake to assume that all, and only, gay and lesbian persons engage in prohibited forms of sexual intimacy.<sup>23</sup> By the same token, not all loving relationships, again regardless of sexual orientation, necessarily entail sexual conduct that is against the law.<sup>24</sup> Furthermore, as a practical matter, the enforcement of statutes that prohibit particular private consensual sexual activity is well-known to be virtually impossible.<sup>25</sup> The Virginia sodomy statute, for example, apparently has not been enforced against consenting adults since long before *Roe v. Roe* was decided.<sup>26</sup> Not surprisingly, there are no reported domestic relations decisions in which a *heterosexual* parent has been denied custody or any other parental right based on a sodomy or similar statute. No presumption exists, in the law of Virginia or any other state, that heterosexuals are unfit custodians of children based on the *likelihood* that they will violate such a statute. Indeed, illegal sexual conduct of any kind is simply not cited as support for a finding of unfitness of a heterosexual parent seeking child custody. Courts seem disinclined to consider, for instance, proven or unproven allegations of fornication<sup>27</sup> or lewd and lascivious cohabita-

---

<sup>23</sup> See *supra* note 21 and accompanying text; *infra* note 24 and accompanying text.

<sup>24</sup> See, e.g., BLUMSTEIN & SCHWARTZ, *supra* note 21, at 236, 549 n.12, 578 n.45 (finding that 23% of lesbians rarely or never engage in oral sex and that mutual masturbation is the most common practice among gay male couples); ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITY* 109 (1978) (finding manual stimulation to be the sexual technique most commonly employed in female-female lovemaking). As a general matter, it should be obvious that persons who profess a homosexual orientation do not necessarily act on that preference by engaging in intimate sexual relationships or activities *at all*, any more than do persons claiming a heterosexual orientation.

<sup>25</sup> *Hardwick*, 478 U.S. at 196-97 (Powell, J., concurring) (citing non-enforcement of the statute as reason that the arguably disproportionate length of sentences for sodomy violations under the Eighth Amendment was not before the Court).

If sodomy laws did not exist or were not enforced against same-sex relationships any more than opposite-sex ones, gay relationships would still be subject, like other relationships, to the prohibitions on cohabitation or fornication—but these proscriptions are unenforced and unenforceable even if they remain on the books. See *Doe v. Duling*, 603 F. Supp. 960 (E.D. Va. 1985) (holding Virginia cohabitation statute unconstitutional), *rev'd*, 782 F.2d 1202 (4th Cir. 1986) (plaintiffs lacked standing to sue because statute was not being enforced).

<sup>26</sup> VA. CODE ANN. § 18.2-361 (Michie Supp. 1993) (no such cases reported); *cf. Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1981) (relying on parent's assumed violation of "crimes against nature" statute to deny custody because statute "is prosecuted with considerable frequency and vigor, as evidenced by the decided cases annotated under [that section] in the Code"). A review of the annotations to § 18.2-361 discloses no convictions upheld against consenting adults since at least 1923, although several reported cases involved prosecutions for forcible sodomy or sodomy committed against children.

<sup>27</sup> See, e.g., VA. CODE ANN. § 18.2-344 (Michie 1988) (making sexual intercourse between two persons who are not married to each other a Class 4 misdemeanor).

tion.<sup>28</sup> Even in Virginia, recent child custody decisions have overlooked or discounted the significance of violations of sexual conduct proscriptions by heterosexuals.<sup>29</sup>

From these facts the conclusion is inescapable that the true "illegality" criterion for anti-gay custody decisions, even in states with gender-neutral sexual conduct prohibitions, is not conduct, but simply the announced homosexual orientation—the *status*—of one party. This distinction, based solely on a status which is not itself illegal, and employed in a manner at least quasi-punitive in its impact on the unsuccessful suitor for custody, poses the well-known due process problem of *Robinson v. California*.<sup>30</sup>

---

Fornication has been decriminalized in 37 states, and in several more states is still a crime only when performed in public, with a minor, or with one who is married to someone else. See Polikoff, *supra* note 10, at 552 n.522 (citing Law, *supra* note 10, at 189 n.10). In *Fort v. Fort*, 425 N.E.2d 754 (Mass. App. Ct. 1981), the court upheld an award of custody to a father despite evidence that he cohabited with another woman before and after the divorce was final, in what the court called a violation of state laws against fornication, cohabitation, and adultery. *Id.* at 756-59.

<sup>28</sup> See, e.g., VA. CODE ANN. § 18.2-345 (Michie 1988) (making it a Class 3 misdemeanor for unmarried persons to cohabit "lewdly and lasciviously," or for married and unmarried persons alike to commit "open and gross lewdness and lasciviousness"). In at least one Virginia child custody case, *Moore v. Moore*, 183 S.E.2d 172 (Va. 1971), a parent-parent dispute where both parents were concededly fit, the court declined to transfer custody away from a mother who had left her husband and had begun cohabiting with another man, a cleric. *Id.* at 174-75.

If logic had ruled the trial court in *Bottoms*, the illegality rationale for depriving Sharon of custody should first have compelled a finding that the admitted cohabitation of Sharon's mother Kay with her boyfriend for almost two decades rendered *her* an unfit custodian.

<sup>29</sup> *Ford v. Ford*, 419 S.E.2d 415 (Va. Ct. App. 1992); *Sutherland v. Sutherland*, 414 S.E.2d 617 (Va. Ct. App. 1992). In both cases, parents argued that their former spouses had committed adultery in violation of Virginia Code § 18.2-365, and were therefore presumptively unfit custodians. See *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977) (affirming grant of custody to father where mother lived in adulterous relationship). Both *Ford* and *Sutherland* squarely rejected arguments, claimed to derive from *Brown*, that a parent's private illicit sexual conduct required a finding of unfitness. *Ford*, 419 S.E.2d at 417 ("Brown did not establish a per se rule prohibiting awarding custody to a parent involved in an adulterous relationship . . .") (emphasis added); *Sutherland*, 414 S.E.2d at 618 ("[Brown] did not establish a per se rule . . .").

Cohabitation prohibitions, like those against adultery, are no longer independently enforced. See *supra* notes 23-24 and accompanying text.

<sup>30</sup> 370 U.S. 660 (1962) (invalidating a statute criminalizing the status of addiction to narcotics). For a brief but provocative discussion of the *Robinson* problem in this context, see *Bowers v. Hardwick*, 478 U.S. 186, 203 n.2 (1986) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting). See also Ruth Marcus & Helen Dewar, *Pact on*

Finally, if a presumption against the gay or lesbian parent punishes his or her status, as opposed to conduct, it also appears to be based purely on protected expression, i.e., the announcement of homosexual as opposed to heterosexual orientation, or the sharing of that information with other persons, and therefore appears to violate the First Amendment.<sup>31</sup> While a state can criminalize certain sexual conduct without violating private expressive rights, it cannot constitutionally require persons to profess that the prohibited conduct is immoral, or to refrain from speaking sympathetically about it. An anti-gay custody presumption that is based purely on the announced gay or lesbian status of one party, even where that party does no intimate or unlawful act in or out of the child's presence, punishes openly gay persons but not those who remain in the closet,<sup>32</sup> and thus accomplishes indirectly the censorship of private speech that the state cannot impose directly. In particular, it would seem improbable for the state to deny child custody to a parent who did no more than "come out" privately to his or her child. Surely the state cannot permissibly seek to dictate the beliefs of its citizens by requiring that parents teach their children a certain view of human sexuality as a condition of entrustment with their care.<sup>33</sup>

---

*Gay Ban Remains Elusive*, WASH. POST, Jan. 29, 1993, at A1, A11 (quoting President Clinton as saying, "People should be disqualified from serving in the military based on something they do, not based on who they are . . . .")

<sup>31</sup> Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1675, 1716-19 (1993); Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617, 632-33 (1989) [hereinafter *Custody Denials*].

<sup>32</sup> Courts also make this implied distinction when saying children are not harmed by a "discreet" gay or lesbian relationship carried on by a parent. See *infra* notes 48-49 and accompanying text.

<sup>33</sup> See *infra* note 81 and accompanying text.

A ready analogy is to court decisions in Virginia and elsewhere that have refused to require that a custodial parent indoctrinate a child into a particular religious belief or tradition. See, e.g., *Lundeen v. Struminger*, 165 S.E.2d 285, 287 (Va. 1969) (declining, on establishment of religion grounds, to enforce prior agreement of divorcing parents that child would be raised in particular faith); *Carrico v. Blevins*, 402 S.E.2d 235, 237 (Va. Ct. App. 1991) (reversing, under state constitution's establishment clause, visitation order requiring mother to take child to church or partly relinquish visitation to allow father to do so); see also *Stanton v. Stanton*, 100 S.E.2d 289, 293 (Ga. 1957) ("[P]arents cannot by [prenuptial] contract relating to the religious training of their children restrict the discretion of the court in awarding custody, and the court may disregard entirely any such contract."); *Hackett v. Hackett*, 150 N.E.2d 431, 434 (Ohio Ct. App. 1958) (separation agreement promising that child be reared in a particular faith cannot be enforced by judicial decree); cf. *Jones v. Commonwealth*, 38 S.E.2d 444, 448-49 (Va. 1946) (state religious freedom guarantee was violated by probation order requiring children to attend church).

## B. *The Immorality Rationale*

Judicial reliance on a belief that homosexual relationships are “immoral” indicates, depending on one’s viewpoint, either a devotion to absolute moral principles or an ulterior subjective distaste for homosexuality in and of itself. The most troubling aspect of the use of “morality” rationales standing alone is not that they appear in custody decisions in the first instance, but that judges who rely on them find them so attractive without meaningful independent support, particularly in the way of factual showings of harm to the child.<sup>34</sup>

The “morality” of the various western sex taboos in general, and the role of religion and other cultural forces as determinants of social norms about those taboos, are of course beyond the scope of this Article. Suffice it to say that the “morality” arguments found in American court decisions on homosexual parenting seem derived chiefly from religious traditions which are said to accept only those sexual relations that are

---

<sup>34</sup> The language of a concurring opinion in *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992), is illustrative, even if almost hysterical in tone:

For years, [lesbian mother] has followed a life of perversion . . . [She] has harmed these children forever. . . . Until such time that she can establish, after years of therapy and demonstrated conduct, that she is no longer a lesbian living a life of abomination (*see* Leviticus 18:22), she should be totally estopped from contaminating these children. . . . [A]n act against nature is an act against God. . . . There appears to be a transitory phenomenon [sic] on the American scene that homosexuality is okay. Not so. The Bible decries it. Even the pagan “Egyptian Book of the Dead” bespoke [sic] against it.

*Id.* at 896-97 (Henderson, J., concurring and dissenting in part) (footnotes omitted).

A number of decisions use other rationales for denying child custody as a mask for imposing a “moral” view against homosexual relationships. *See* *Thigpen v. Carpenter*, 730 S.W.2d 510, 513 (Ark. Ct. App. 1987) (sleeping in same bedroom with same-sex partner while children were at home held as failure to shield children from sexual activity and presumed harmful to children in light of Arkansas precedent containing similar presumptions with regard to other illicit sexual conduct); *D.H. v. J.H.*, 418 N.E.2d 286, 296 (Ind. Ct. App. 1981) (after lengthy discussion of mother’s lesbianism as “relevant and admissible” despite efforts to keep it out of evidence at trial, court affirmed award of custody to father based on evidence of wife’s “lack of proper housekeeping standards,” husband’s “fix[ing] meals for the children because wife was out running around,” and husband’s “assist[ing] children with lessons”); *Chicoine*, 479 N.W.2d at 893-94 (blurring distinction between mother’s alleged mental illness and her lesbianism; displaying preoccupation with specifics of lesbian sexual positions; equating “caressing, kissing and saying ‘I love you’” with more intimate behavior; and relying on “expert” testimony that displays of non-intimate affection, regardless of the gender of the partners, would encourage unspecified “sexual behavior” in the child).

reproductive.<sup>35</sup> However, even in the face of these decisions, American religious organizations themselves have adopted new positions that demonstrate the increasing enlightenment of contemporary religious views on the issue.<sup>36</sup> A notable example is the coalition amicus brief urging invalidation

---

<sup>35</sup> See Polikoff, *supra* note 10, at 549-50. This is generally the position of the “morality” cases even though it has never been the only view espoused within the Western religious traditions in which most of our judges are reared. See, e.g., JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY 61-206 (discussing toleration of commonplace same-sex sexual behavior until the Middle Ages and citing ambiguities in biblical references to homosexuality).

<sup>36</sup> This evolutionary process appears to have begun at least as early as the 1970s. See, e.g., Unitarian Universalist Association, General Assembly Resolution on Discrimination against Homosexuals and Bisexuals (1970) (“Recognizing that . . . [a] growing number of authorities . . . now see homosexuality as an inevitable sociological phenomenon and not as a mental illness[,] . . . [the Assembly] [u]rges all peoples immediately to bring an end to all discrimination against homosexuals . . . .”); Office for Church in Society, United Church of Christ, Policy on Human Sexuality and Ordination (1973) (“recommend[ing] homosexuality, per se, not be a bar to ordination, but that Associations consider a candidate’s total view of human sexuality and its moral expression”), Pronouncement on Civil Liberties Without Discrimination Related to Affectional or Sexual Preference (1975) (“declar[ing] support for federal, state and local legislation to guarantee civil liberties for all persons, regardless of their affectional or sexual preferences; call[ing] for church-wide action to secure such legislation”), Policy on Virginia Privacy Laws (1991) (“reaffirm[ing] the right to privacy for all private, consensual, non-commercial sexual activity between adults; call[ing] upon the Virginia legislature to repeal the Virginia sodomy law and other legislation directed against persons specifically because of their sexual orientation”); National Council of Churches of Christ, Resolution on Civil Rights Without Discrimination as to Affectional or Sexual Preference (1975) (“reiterat[ing] the Christian conviction that all persons are entitled to full civil rights and equal protection and to the pastoral concern of the Church[;] . . . urg[ing] its member churches . . . to work to ensure the enactment of legislation . . . that would guarantee the civil rights of all persons without regard to their affectional or sexual preference”); Protestant Episcopal Church of the U.S.A., 65th General Convention, Resolution on Human Sexuality (1976) (“Homosexual persons are children of God who have a full and equal claim with all other persons upon the love, acceptance and pastoral concern and care of the Church . . . .”); American Jewish Congress, Convention Resolution on Opposing Discrimination Against Homosexuals (1980) (opposing “all discrimination against homosexuals—in employment, housing, military service, and other areas”); American Jewish Committee Board of Governors, Statement Opposing Discrimination Based Upon Sexual Orientation (1986) (declaring opposition to “discrimination based upon sexual orientation in employment, housing, education and public accommodations”); Convention of the Rabbinical Assembly, Resolution on Gay and Lesbian Jews (1990) (“[We] [s]upport full civil equality for gays and lesbians in our national life . . . .”); Federation of Reconstructionist Congregations and Havurot, Homosexuality Commission Report, A Reconstructionist Approach to Homosexuality at 36 (1992) (“Many who reject Jewish law in other areas assert the binding nature of the biblical condemnation of homosexuality. We bemoan justifying injustice by citing biblical law . . . Sexual orientation, like gender and other qualities that once served as rationales

of the Georgia sodomy statute at issue in *Bowers v. Hardwick*.<sup>37</sup> The coalition stated its case this way:

To the extent there is any consensus concerning alternative forms of sexual expression, heterosexual or homosexual, it is that private sexual conduct is a matter fundamentally committed to individual moral choice. Because we do not understand the full mystery of human sexuality, and because we are unwilling to condemn that which we do not understand, we believe as a matter of ethics that characterizing consensual sodomy as immoral is unwise.<sup>38</sup>

Unfortunately however, the Supreme Court's decision in *Hardwick* leads the charge in the opposite direction. The concurrence of Chief Justice Burger in particular draws from supposed religious conventions in an attempt to locate an absolute moral basis for the taboo against homosexual-

---

for discrimination, is a personality characteristic of all human beings. Homosexuality is no different from heterosexuality in this respect. All people inherently deserve dignity, integrity and equality . . . . We affirm the 1984 admission policy of the Reconstructionist Rabbinical College, that 'age, sex, marital status, sexual orientation and race will not be determining factors in the consideration of the Admissions Committee.'"); United Methodist Church, General Conference Book of Resolutions (1992) ("Certain basic human rights and civil liberties are due all persons. We are committed to support those rights and liberties for homosexual persons . . . ."); American Baptist Church, U.S.A., Resolution Calling for Dialogue on Issues of Human Sexuality (1993) ("The time has come for our churches . . . and the General Board . . . to consider prayerfully the mind of Christ regarding human sexuality."); Evangelical Lutheran Church in America, Church Council Resolution (1993) ("reaffirm[ing] that the historical position of the [Church] is . . . support for legislation [and] policies to protect the civil rights of all persons, regardless of their sexual orientation"); Union of American Hebrew Congregations, General Assembly Resolution on Recognition for Lesbian and Gay Partnerships (1993) ("[T]he Union . . . resolves [to] call upon our . . . governments to adopt legislation that will . . . ensure that lesbians and gay men are not a[d]judged unfit to raise children because of their sexual orientation[,] and afford partners in committed lesbian and gay relationships the means of legally acknowledging such relationships . . . .").

<sup>37</sup> 478 U.S. 186 (1986).

<sup>38</sup> Brief of Amici Curiae Presbyterian Church (U.S.A.), Philadelphia Yearly Meeting of Friends, American Friends Service Committee, Unitarian Universalist Association, Office for Church in Society, United Church of Christ, and Right Rev. Paul Moore, Jr., at 4, *Bowers v. Hardwick*, 478 U.S. 186 (1986) (No. 85-140), quoted in Polikoff, *supra* note 10, at 550.

ity,<sup>39</sup> and in the process betrays a surprising indifference to the provinciality of the supposed universals invoked.

The *Hardwick* morality analysis is really less an analysis than a pastiche of ancient and continuing taboos and phobias that are said to add up to “tradition,” an influence whose power is essentially admitted to derive from its own sheer longevity.<sup>40</sup> In this respect, there are undeniable parallels between *Hardwick* and any number of famous benign and not-so-benign judicial affirmations of now discredited private biases as to race and gender, from *Muller v. Oregon*<sup>41</sup> to *Naim v. Naim*<sup>42</sup> and *Plessy v. Ferguson*.<sup>43</sup>

Alternatively, the supposed “moral” justification for some courts’ aversion to same-sex love and partnership may be seen simply as recourse to a social norm, i.e., as a reflection and enforcement of popular preference, regardless of the fairness or unfairness of that preference.<sup>44</sup> The

<sup>39</sup> “Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards. . . . Blackstone described ‘the infamous crime against nature’ as an offense of ‘deeper malignity’ than rape . . . .” *Hardwick*, 478 U.S. at 196-97 (Burger, C.J., concurring).

<sup>40</sup> See *id.* at 198 n.2 (Powell, J., concurring) (“I cannot say that conduct condemned for hundreds of years has now become a fundamental right.”). Justice Blackmun, however, vigorously asserted the opposite view:

Like Justice Holmes, I believe that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”

*Id.* at 199 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (quoting Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897)).

<sup>41</sup> 208 U.S. 412, 421 (1908) (upholding state statute “protecting” women from excessive working hours, notwithstanding the supposed constitutional freedom of workers to contract, because of women’s “physical structure [and] performance of maternal functions”).

<sup>42</sup> 90 S.E.2d 849 (Va. 1956) (upholding Virginia’s ban on interracial marriages).

<sup>43</sup> 163 U.S. 537 (1896) (upholding racial segregation of public schools under a “separate but equal” doctrine); see also Polikoff, *supra* note 10, at 555-56 (“The supposed ‘natural’ order of society has been invoked in the past to support public policies now recognizably based on sexist or racist ideology . . . : ‘The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.’”) (quoting *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring)).

<sup>44</sup> See Polikoff, *supra* note 10, at 553 (“Although homosexuality continues to violate social norms, often social norms are themselves immoral. Until recently, the social norms of the American South included racially segregated bathrooms, restaurants, parks, and other public places. The widespread existence of such practices and their codification into law did not make them moral.”) (footnote omitted).

mere labeling of such a norm as “moral” does not make it so, even in the utterance of a court. As Ronald Dworkin has suggested,

Even if it is true that most [people] think homosexuality an abominable vice and cannot tolerate its presence, it remains possible that this common opinion is a compound of prejudice (resting on the assumption that homosexuals are morally inferior creatures . . . ), rationalization (based on assumptions of fact so unsupported that they challenge the community’s own standards of rationality), and personal aversion (representing no conviction but merely blind hate . . . ). It remains possible that the ordinary [person] could produce no reason for his view, but would simply parrot his neighbor who in turn parrots him . . . . If so, the principles of democracy we follow do not call for an enforcement of the consensus, for the belief that prejudices, personal aversions and rationalizations do not justify restricting another’s freedom *itself* occupies a . . . fundamental position in our popular morality.<sup>45</sup>

Indeed, if the subject is normative or prescriptive morality, we cannot ignore that “[t]he depth of the hatred and irrationality of the condemnation evoked by the sexual practices of parents . . . is in sharp contrast to the legislative and judicial condonation of abusive physical behavior towards spouses and children by their rejecting or ignoring it as a factor in custody and visitation decisions.”<sup>46</sup> Such an observation is certainly accurate with regard to Virginia custody cases, in which we see some quite extreme results.<sup>47</sup> These contrasts reveal either an inconsistency between what courts preach and what they practice, or a deeper consistency explained simply by a greater judicial aversion to homosexual love and same-sex partnerships than to homicide and domestic violence. Either way, the pattern hardly appears to deserve the name “moral.”

### C. *The Harms-to-the-Child Rationale*

A third basis for anti-gay custody decisions, i.e., fear of various harms to the child, may appear in several guises. Sometimes the “harms” are imagined, by courts both sympathetic and unsympathetic, to flow from the

---

<sup>45</sup> RONALD DWORBIN, *TAKING RIGHTS SERIOUSLY* 254 (1977) (emphasis added).

<sup>46</sup> Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, 461 (1988), cited in Polikoff, *supra* note 10, at 551 n.512.

<sup>47</sup> See *infra* notes 131-49 and accompanying text.



gay or lesbian parent's display of affection to his or her partner in the child's presence, even if the display is well short of sexual intimacy.<sup>48</sup> Even a parent's failure to keep his or her sexual orientation completely from the child is sometimes made the basis for a finding of present or potential adverse impact.<sup>49</sup> These notions, by themselves, derive from the same source as an inference of unsuitability or unfitness based on "immorality," i.e., an ulterior subjective distaste for homosexual relationships, and should be exposed and rejected on that ground alone. However, courts also need to take account of newly available social

---

<sup>48</sup> See, e.g., *Charpentier v. Charpentier*, 536 A.2d 948, 950 (Conn. 1988) (referring in dicta to trial court's concern "not with [mother's lesbian] sexual orientation per se but with its effect upon the children, who had observed in the home [unspecified] inappropriate displays of physical affection between their mother and [her partner]"); *Pennington v. Pennington*, 596 N.E.2d 305, 306 (Ind. Ct. App. 1992) (practice of "shield[ing] a child of tender age . . . from the sexual practices of the visiting parent, whether . . . homosexual . . . or heterosexual" is "sound [and] designed to foster the child's emotional well-being" and requires keeping an unmarried visiting parent's partner out of the child's presence); *In re Marriage of Walsh*, 451 N.W.2d 492, 493 (Iowa 1990) (implicitly banning public displays of affection, and perhaps forbidding father from sharing information about his homosexuality with children, by resting ruling on father's assurances that he would not expose children in any way to "lifestyle"); *M.P. v. S.P.*, 404 A.2d 1256, 1259 (N.J. 1979) (citing approvingly testimony of mother that she "refrains from any demonstration of affection toward other women when [her children] are present"); *Chicoine v. Chicoine*, 479 N.W.2d 891 (S.D. 1992) (discussed *supra* note 34).

The trial record in *Bottoms* contained uncontroverted testimony that no lesbian sexual intimacy was ever carried on in the child's presence, but that the mother and her lover declared their love for each other, kissed, hugged, and occasionally patted each other on the bottom in the child's presence. Joint Appendix at 50, *Bottoms v. Bottoms*, No. 1930-93 (Va. Ct. App. filed Sept. 28, 1993); Trial Transcript at 48, *Bottoms v. Bottoms* (No. CH93JA0517-00). The trial judge was convinced that these displays harmed the child. Joint Appendix at 197-98; Trial Transcript at 195-96. He stated:

She readily admits her behavior in open affection shown to April Wade in front of the child. Examples given were kissing, patting, all of this in the presence of the child . . . I will tell you that it is the opinion of this 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.

*Id.*; see *supra* note 32 and accompanying text.

<sup>49</sup> See, e.g., *Hodson v. Moore*, 464 N.W.2d 699, 701-02 (Iowa App. 1990) (no per se bar to custody for parent involved in *discreet* homosexual relationship). Here too the courts sometimes use back-door reasoning, as for instance in *Collins v. Collins*, No. 87-238-II, 1988 WL 30173 (Tenn. Ct. App. Mar. 30, 1988), in which the court decided against the lesbian mother chiefly because she had evidently told the child not to be ashamed of her lesbian lifestyle, but on the other hand not to discuss it with her schoolmates. *Id.* at \*1. In essence, the mother's own caution about others' opprobrium, whether or not those sentiments in fact existed in the community, was turned against her despite her own and the child's otherwise healthy attitudes.

science research that concretely refutes every one of the common myths about supposed "harms" to children of lesbian and gay households.<sup>50</sup>

As commentators have pointed out,<sup>51</sup> even a court not afflicted with homophobic preoccupations may wonder whether a child stands to be harmed from bias and prejudice against the gay or lesbian parent, and from the arguable potential of such bias to injure the child even if the injury is unfair. This concern, too, can be shown to be rooted not in fact but in preconceived notions of the matter. It flies in the face both of the social science research record<sup>52</sup> and of the Supreme Court's reasoning on the same point in another custody case, *Palmore v. Sidoti*.<sup>53</sup> The Court in *Palmore* put the matter bluntly:

[The issue is] whether . . . private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside

---

<sup>50</sup> The harms alleged to flow to children of lesbian or gay households from the social condemnation directed toward their parents, which *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985), held to be "inevitable," have in fact proven to be non-existent. Research on the growing number of children of lesbian or gay parents (much of it based on research published after 1985 and therefore unavailable to the *Roe* court) fails to support the assumptions *Roe* made about the inevitability and the harmfulness of community disapproval or social pressure. In particular, all of the social science data available indicate that the fear of harassment is far in excess of its actual incidence. See, e.g., Mary E. Hotvedt & Jane Barclay Mandel, *Children of Lesbian Mothers*, in *HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES* 275, 282 (William Paul et al. eds., 1982); Sharon L. Huggins, *A Comparative Study of Self-Esteem of Adolescent Children of Divorced Lesbian Mothers and Divorced Heterosexual Mothers*, in *HOMOSEXUALITY AND THE FAMILY* 123, 132 (Frederick W. Bozett ed., 1989); Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 *J. CHILD PSYCHOL. & PSYCHIATRY* 551, 565-67 (1983).

The social science research available to date is reviewed in Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 *CHILD DEV.* 1025 (1992), and Gregory M. Herek, *Myths about Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *LAW & SEXUALITY* 133, 156 (1991), and is comprehensively summarized in the brief prepared by Carolyn F. Corwin, E. Gary Spitko, and Christopher A. Crain of Covington & Burling in Washington, D.C., for the American Psychological Association, the American Academy of Child and Adolescent Psychiatry, the National Association of Social Workers, and its Virginia chapter as amici curiae in the *Bottoms* appeal to the Virginia Court of Appeals.

<sup>51</sup> See Polikoff, *supra* note 10, at 567-72.

<sup>52</sup> See *supra* note 50; *infra* notes 106-12 and accompanying text.

<sup>53</sup> 466 U.S. 429 (1984).

the reach of the law, but the law cannot, directly or indirectly, give them effect.<sup>54</sup>

*Palmore* invoked the strict scrutiny applicable to racial classifications under equal protection to forbid the use of fear of community racial bias as a criterion for denying custody of a child to an interracial couple.<sup>55</sup> *Palmore* is not strictly controlling here, where racial classifications are not involved.<sup>56</sup> Nevertheless, the decision and its reasoning should carry great moral weight with any jurist of conscience who wishes to avoid condoning or appeasing private anti-gay biases in custody decisions. To slight or ignore the command of *Palmore* in a gay-parenting case is effectively to permit the homophobia of a party, or of society, to infect the decision. This in turn perpetuates such bias and legitimates it for future cases and for the culture generally.<sup>57</sup>

On this ground, sometimes citing *Palmore* expressly, a number of decisions have held that the potential for social condemnation due to the parent's sexual orientation, like the potential for similar condemnation based on the parent's race or any other factor, is not a principled basis for denying custody. "Simply put," declared one opinion, "it is impermissible to rely on any real or imagined social stigma attaching to the Mother's status as a lesbian."<sup>58</sup> Said another: "This court cannot take into

<sup>54</sup> *Id.* at 433.

<sup>55</sup> *See id.* at 432-33.

<sup>56</sup> *Palmore* is not, as is sometimes thought, rendered inapplicable in the present context by *Bowers v. Hardwick*, 478 U.S. 186 (1986). *See infra* notes 68-81 and accompanying text.

<sup>57</sup> *Cf. City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985) (quoting *Palmore*, 466 U.S. at 433, for the proposition that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect"). The majority opinion in *Cleburne* is generally accepted to have ruled the appeasement of individual prejudice to be an illegitimate criterion for state classifications even under the rational basis test. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-3, at 1444 (2d ed. 1988).

In the present context, a principled application of this doctrine, sometimes called "rational basis with bite," Pettinga, *supra* note 22, at 779 n.9, or "rational basis with teeth," Stewart, *supra* note 22, at 112, ought to mean that even without heightened scrutiny for anti-gay legislative or judicial classifications, the overwhelming social science record on the relative sanguinity of outcomes among children of heterosexual and homosexual households should, sooner or later, expose as irrational—and therefore constitutionally invalid—a judicial presumption that lesbian or gay parents are, by virtue of their orientation, less appropriate as child custodians than their heterosexual counterparts. *See supra* note 50 and accompanying text; *infra* text accompanying notes 71-72; *infra* notes 106-12 and accompanying text.

<sup>58</sup> *S.N.E. v. R.L.E.*, 699 P.2d 875, 879 (Alaska 1985) (citing *Palmore*, 446 U.S. at 433).

consideration the unpopularity of homosexuals in society when its duty is to facilitate and guard a fundamental parent-child relationship.”<sup>59</sup>

In one of the earliest decisions in this field, *M.P. v. S.P.*,<sup>60</sup> the court dealt specifically with the community disapproval problem by noting that the difficulty would still exist even if the children lived away from the homosexual parent, and that nothing in this regard could be gained by sequestering the children physically from that parent:

[T]he children’s exposure to embarrassment is not dependent upon the identity of the parent with whom they happen to reside. Their discomfiture, if any, comes about not because of living with [their mother], but because she is their mother, because she is a lesbian, and because the community will not accept her. [None of these] will be abated by a change of custody.<sup>61</sup>

The court went on to suggest that children raised by gay or lesbian parents may well not be in the least harmed by the living arrangement, or even by others’ disapproval of it.<sup>62</sup> To the contrary, said the court,

It is just as reasonable to expect that they will emerge better equipped to search out their own standards of right and wrong, better able to perceive that the majority is not always correct in its moral judgments, and better able to understand the importance of conforming their beliefs to the requirements of reason and tested knowledge, not the constraints of currently popular sentiment or prejudice.

Taking the children from [their lesbian mother] . . . will foster in them a sense of shame . . . . Instead of courage and the precept that people of integrity do not shrink from bigots, it counsels the easy option of shirking difficult problems and following the course of expedience. . . .

We conclude that the children’s best interests will be disserved by undermining in this way their growth [into] mature and principled adults.<sup>63</sup>

---

<sup>59</sup> *Conkel v. Conkel*, 509 N.E.2d 983, 987 (Ohio Ct. App. 1987).

<sup>60</sup> 404 A.2d 1256 (N.J. Super. Ct. App. Div. 1979).

<sup>61</sup> *Id.* at 1262.

<sup>62</sup> *Id.* at 1260, 1262.

<sup>63</sup> *Id.* at 1263.

And a notable Massachusetts decision, *Bezio v. Patenaude*,<sup>64</sup> crystallized the issue this way:

A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children "simply because their households fail to meet the ideals approved by the community . . . [or] simply because the parents embrace ideologies or pursue life-styles at odds with the average."<sup>65</sup>

*Bezio* and *M.P. v. S.P.* reflect the emerging consensus of courts around the nation<sup>66</sup> that a presumption of harm to a child of a gay or lesbian parent is unprincipled and improper. Additionally, current social science research evidence unequivocally demonstrates, to what should be the satisfaction of any remaining doubter, that as a factual matter the effects on children of private bias against their gay or lesbian parents are negligible.<sup>67</sup>

#### D. Equal Protection: The Arguments Take Shape

Our discussion has already suggested a number of constitutional problems with any court-imposed presumption—whether in parent-vs.-parent or third-party cases—that gay parents are "unfit" or less suitable as child custodians than their non-gay counterparts.<sup>68</sup> Beyond the due process and first amendment difficulties already discussed, a *Roe*-type rule presents equal protection problems that are assuredly not put to rest by the Supreme Court's ruling in *Bowers v. Hardwick*,<sup>69</sup> which did no more nor

---

<sup>64</sup> 410 N.E.2d 1207 (Mass. 1980).

<sup>65</sup> *Id.* at 1216 (citation omitted).

<sup>66</sup> Note that for a time, at least, that consensus included the Supreme Court of Virginia. See *infra* notes 89-90, 92 and accompanying text (*Bezio* quoted with approval in *Doe v. Doe*, 284 S.E.2d 799 (Va. 1981), but ignored in *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985)).

<sup>67</sup> See Frederick W. Bozett, *Gay Fathers: A Review of the Literature*, in *HOMOSEXUALITY AND THE FAMILY* 137, 143-44, 148 (Frederick W. Bozett ed., 1989); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 695-96 (June 1978) [hereinafter Green, *Sexual Identity*] (limited and transitory teasing reported by three of 21 children in study); Brian Miller, *Gay Fathers and their Children*, 28 FAM. COORDINATOR 544, 548 (1979).

<sup>68</sup> See *supra* notes 16, 22, 30-33, 53-55 and accompanying text.

<sup>69</sup> 478 U.S. 186 (1986).

less than refuse to extend the substantive due process right of privacy to homosexual sodomy.<sup>70</sup>

First, as just discussed, the current social science research record conclusively demonstrates the factual untenability of any assumption that children are harmed by the experience of growing up in the custody of lesbian or gay rather than heterosexual adults.<sup>71</sup> If such an assumption is factually insupportable, it lacks a rational basis and thus fails the most permissive test of state regulation under equal protection.<sup>72</sup>

Second, heightened scrutiny for a state's sexual orientation classifications is not, as is sometimes thought, necessarily foreclosed by the due process holding of *Hardwick*.<sup>73</sup> Anti-gay presumptions as to child custody have equal protection dimensions as well, and such arguments may well *not* have been precluded by that decision. After all, the *Hardwick* Court did not hold that classifications that burden homosexuals never violate equal protection; nor did it explicitly close the door to a future requirement of heightened scrutiny for one or more such classifications. Due process and equal protection doctrines have decidedly different roots and purposes, a fact that affords courts some room to interpret the two commands differently.<sup>74</sup>

State courts determining child custody should not be able to discriminate against homosexual parents merely because, so long as *Hardwick* remains the law, the due process clause is not recognized to

---

<sup>70</sup> *Id.* at 191.

<sup>71</sup> See *supra* notes 50, 67 and accompanying text; *infra* notes 106-12 and accompanying text.

<sup>72</sup> See *supra* note 22 and accompanying text.

<sup>73</sup> See, e.g., *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987). Upholding the FBI policy of considering homosexual conduct a significant or dispositive factor in employment decisions, the court stated:

It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause. . . . If the Court [in *Hardwick*] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.

*Id.* at 103, *quoted in* Sunstein, *supra* note 15, at 1161-62.

<sup>74</sup> See *Watkins v. United States Army*, 847 F.2d 1329, 1349 (9th Cir. 1988) (homosexuality is a suspect classification), *vacated and aff'd on other grounds*, 875 F.2d 699 (1989) (en banc), *cert. denied*, 498 U.S. 957 (1990); Sunstein, *supra* note 15, at 1161. The debate, however, is far from over, even among advocates of gay and lesbian civil rights. For a provocative discussion of the equal protection implications of the overlap between the class of those who consider themselves homosexual and the class of those who engage in homosexual sodomy, see Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 545-46 (1992). See also *infra* notes 79, 81 and accompanying text.

afford those persons a right to engage in consensual homosexual acts in private, and does not prohibit states from criminalizing that conduct. The argument has been made that, in child custody disputes at least, taking adverse account of the gender of a custodian's domestic partner where it is the same as the custodian's, but not where it is different, makes a gender-based classification that fails to withstand the "intermediate"<sup>75</sup> scrutiny that is accorded to gender classifications under equal protection.<sup>76</sup>

The debate over heightened scrutiny for certain classifications under equal protection harkens back to the famous phrase "discrete, insular minorities,"<sup>77</sup> i.e., societal subgroups whose members suffer disadvantages by virtue of immutable characteristics such as race or gender.<sup>78</sup> Although the matter is the subject of impassioned moral, social, and scientific debate in today's lesbian and gay community,<sup>79</sup> it must be noted that some

<sup>75</sup> Courts applying this level of scrutiny will review a classification for a "substantial" (i.e., less than "necessary" but more than merely "rational") relationship to an "important" (i.e., less than "compelling" but more than merely "legitimate") governmental interest. *See, e.g.*, *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>76</sup> *See Hardwick*, 478 U.S. at 186.

The [Georgia] legislature having decided that the sex of the participants is irrelevant to the legality of the acts, I do not see why the State can defend [its gender-neutral sodomy prohibition] on the ground that individuals singled out for prosecution are of the same sex as their partners. Thus, under the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class.

*Id.* at 203 n.2 (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting) (citing *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009 (1985) (Brennan, J., dissenting from denial of certiorari)); *see also* Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 155-56 (1988); *Custody Denials*, *supra* note 31, at 626-30; Harris M. Miller, II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 800-02 (1984); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1287 (1985).

<sup>77</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); *see also* *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 471-72 (1985) (Marshall, J., joined by Brennan and Blackmun, JJ., concurring in part and dissenting in part) (suggesting that either "heightened scrutiny or 'second-order' rational basis review" would be the "more searching judicial inquiry" referred to in the *Carolene Products* footnote, i.e., "a method of approaching certain classifications skeptically").

<sup>78</sup> *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 150 (1980); *TRIBE*, *supra* note 57, § 16-33, at 1616.

<sup>79</sup> *See* John D'Emilio, *Making and Unmaking Minorities: The Tensions between Gay Politics and History*, 14 N.Y.U. REV. L. & SOC. CHANGE 915, 921 (1986); *Custody Denials*, *supra* note 31, at 622-23 (arguing that the assumption that sexual orientation "is

emerging biological evidence suggests that sexual orientation in humans is at least partly innate.<sup>80</sup> Proof along these lines may someday be part of a successful “immutable characteristics” challenge to the reasoning and result of *Hardwick*, although such an argument may well be unnecessary to an equal protection analysis since immutability of the defining characteristic of a class may not be indispensable to protected status for that class.<sup>81</sup>

---

a ‘defining characteristic . . . essential to personhood’ depends on and emphasizes rigid sexual orientation categories that are ‘central to the oppression’ of those [defined] as different”) (footnotes omitted).

<sup>80</sup> Chandler Burr, *Homosexuality and Biology*, ATLANTIC, Mar. 1993, at 47, 52-58; Meredith F. Small, *The gay debate: is homosexuality a matter of choice or chance?*, AM. HEALTH, Mar. 1993, at 70, 70-71. This view, and a discussion of its equal protection implications, was advanced in *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated and aff’d on other grounds*, 875 F.2d 699 (1989) (en banc), *cert. denied*, 498 U.S. 957 (1990).

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. Scientific proof aside, it seems appropriate to ask whether heterosexuals feel capable of changing *their* sexual orientation. Would heterosexuals living in a city that passed an ordinance banning those who engaged in or desired to engage in sex with persons of the *opposite* sex find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?

*Id.* at 1347-48 (citations omitted).

<sup>81</sup> The immutability of class characteristics has been cited as a requirement for suspect or quasi-suspect status for classifications in such cases as *Lyng v. Castillo*, 477 U.S. 635, 638 (1986), and *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). Commentators have nevertheless suggested that uniform reliance on this criterion is inappropriate and potentially dangerous. See *Custody Denials*, *supra* note 31, at 624 (citing Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1073, 1074 n.52 (1980) (“features like immutability are neither sufficient nor necessary”; “even if race or gender became readily mutable by biomedical means, I would suppose that laws burdening those who choose to remain black or female would properly remain constitutionally suspect”)).

Another reason it might not be fair to apply an immutability theory to preclude suspect status for sexual orientation classifications is that persons of minority sexual orientation have significant social or cultural bonds to one another that derive affirmatively, not just as a matter of defensive necessity, from their defining common characteristic; to strip a classification of suspect status where it binds class members together in this way implicates both intimate and expressive association interests, see Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 682-86 (1980) (intimate association); David A. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 853 (1986) (same), that are arguably similar to those that ought to ensure continued protection for Professor Tribe’s right to “choose to remain” black or female.



### III. *DOE V. DOE*<sup>82</sup> AND *ROE V. ROE*.<sup>83</sup> THE LAY OF THE LAND IN VIRGINIA

The Virginia precedent encountered in the appeal of Sharon Bottoms' case has been particularly troubling, not only because of the irrefutable presumption language of *Roe*,<sup>84</sup> but because *Roe* itself represented something of a shift in direction for Virginia's highest court. In 1981, in *Doe*, the court had held that a natural parent's homosexual orientation should not dictate a surrender of her residual parental rights to her former husband's new wife by adoption.<sup>85</sup> The *Doe* court declined to decide whether the same lesbian parent would be adjudged suitable as a custodian,<sup>86</sup> but did hold that any possible adverse effects of a parent's homosexuality could not be assumed without specific proof:

If Jane Doe is an unfit parent, it is solely her lesbian relationship which renders her unfit, and this must be to such an extent as to make the continuance of the parent-child relationship heretofore existing between her and her son detrimental to the child's welfare. The petitioners introduced no evidence, scientific or otherwise, to establish this fact. Regardless of how offensive we may find [the mother's] life-style, its effect on her son's welfare is not a matter of which we can take judicial notice. We take judicial notice of generally known or easily ascertainable facts.<sup>87</sup>

The *Doe* court thus employed the so-called "nexus" rule common to the better-reasoned decisions around the country,<sup>88</sup> i.e., a rule requiring a

<sup>82</sup> 284 S.E.2d 799 (Va. 1981).

<sup>83</sup> 324 S.E.2d 691 (Va. 1985).

<sup>84</sup> *Id.* at 694.

<sup>85</sup> *Doe*, 284 S.E.2d at 804-05.

<sup>86</sup> *See id.* at 806; *Roe*, 324 S.E.2d at 694 (noting that the court in *Doe* stopped short of finding the lesbian mother a fit and proper custodian).

<sup>87</sup> *Doe*, 284 S.E.2d at 805 (citation omitted).

<sup>88</sup> The following are other "nexus" decisions, i.e., holdings which have considered a parent's lesbian or gay sexual orientation to be problematic in a custody determination only where there is proof of an adverse effect on the child: *S.N.E. v. R.L.B.*, 699 P.2d 875, 878-79 (Alaska 1985); *Birdsall v. Birdsall*, 243 Cal. Rptr. 287, 288-90 (Cal. Ct. App. 1988); *Nadler v. Superior Court*, 63 Cal. Rptr. 352, 354 (Cal. Ct. App. 1967); *D.H. v. J.H.*, 418 N.E.2d 286, 293 (Ind. Ct. App. 1981); *Peyton v. Peyton*, 457 So. 2d 321, 323-25 (La. Ct. App. 1984); *Bezio v. Patenaude*, 410 N.E.2d 1207, 1215-16 (Mass. 1980); *M.P. v. S.P.*, 404 A.2d 1256, 1260-61 (N.J. Super. Ct. App. Div. 1979); *Guinan v. Guinan*, 477 N.Y.S.2d 830, 831-32 (N.Y. App. Div. 1984); *Conkel v. Conkel*, 509 N.E.2d 983, 986-87 (Ohio Ct. App. 1987); *Stroman v. Williams*, 353 S.E.2d 704, 705-06 (S.C. Ct. App. 1987); *In re Marriage of Cabalquinto*, 669 P.2d 886, 888 (Wash. 1983).

showing of adverse effects on the child as essential to a reallocation of parental rights. As to the need for evidence of harm, the court in *Doe* quoted liberally from the decision in *Bezio v. Patenaude*,<sup>89</sup> a custody case whose record contained expert evidence that a custodial parent's sexual orientation, standing alone, was "irrelevant" to parenting ability.<sup>90</sup>

With *Roe*, decided only four years later, the same court appeared to abandon the "nexus" approach as it launched a lethal attack, through the opening as to custody created in *Doe*, against day-to-day parenting by gays and lesbians. In terms as sweeping as they were unsupported, the *Roe* court insisted that a natural parent's homosexual relationship was an absolute bar to custody of the parent's own child:

The father's continuous exposure of the child to his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law. . . . We 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.<sup>91</sup>

The *Roe* opinion is particularly frustrating because it completely ignored the holding of *Doe* that a showing of harm to the child from the natural parent's homosexual lifestyle was required before the parent's rights could be abridged.<sup>92</sup> The court also ignored its prior reliance on

---

<sup>89</sup> 410 N.E.2d 1207 (Mass. 1980).

<sup>90</sup> *Doe*, 284 S.E.2d at 806 (quoting *Bezio*, 410 N.E.2d at 1215-16).

<sup>91</sup> *Roe*, 324 S.E.2d at 694 (citing *Jacobson v. Jacobson*, 314 N.W.2d 78 (N.D. 1981); *M.J.P. v. J.G.P.*, 640 P.2d 966 (Okla. 1982); *Kallas v. Kallas*, 614 P.2d 641 (Utah 1980)).

Neither the opinion in *Roe* nor those in *Jacobson*, *M.J.P.*, or *Kallas* relied on social science evidence concerning the harms to children that *Roe* pronounced as "inevitabl[e]." *Roe*, 324 S.E.2d at 694. The principal studies cited in the *Bottoms* litigation were published after all three of the decisions cited in *Roe* were rendered. See *infra* notes 107-12 and accompanying text.

<sup>92</sup> *Doe* was an adoption case in which the proper legal standard was the outright unfitness of a parent, as in a termination proceeding, rather than the relative suitability of the parents, as in custody determinations between two natural parents. See PETER N. SWISHER ET AL., *VIRGINIA FAMILY LAW: THEORY AND PRACTICE* § 15-7 (1991 & Supp. 1993). The court in *Roe*, however, if it meant to use the "unfitness" language of its own termination cases, should have tested for "nexus." In actuality *Roe* did not employ a test at all, but simply declared that harm to the child was "inevitabl[e]." *Roe*, 324 S.E.2d at 694. In any event, other courts that have applied the "nexus" rule have done so in

*Bezio*, and essentially created an irreconcilable schism with its reasoning in *Doe* without explicitly overruling that decision.

Besides illustrating extremely poor reasoning in service of an apparent bias against homosexuals, *Roe* is of interest because it used—indeed, brazenly conflated—all three of the rationales for anti-gay custody decisions discussed earlier in this Article. The *Roe* court referred to one of its prior decisions disfavoring an adulterous spouse as custodian,<sup>93</sup> and then declared that homosexual relationships, like adulterous ones, were “immoral and illicit,”<sup>94</sup> and that exposure of a child to such a relationship rendered the lesbian or gay parent an unfit custodian “as a matter of law.”<sup>95</sup>

The *Roe* court first presumed the illicitness of the natural father’s gay relationship, as though with a wave of the hand an indictment and conviction for sodomy or some other sexual conduct offense had been included in the record.<sup>96</sup> The court also pronounced the gay parent’s relationship “immoral,”<sup>97</sup> without even the dubious historical or cultural references used as support for a few decisions from other jurisdictions.<sup>98</sup> And the court presumed that the child whose custody was at issue would be harmed by exposure to the natural father’s gay relationship,<sup>99</sup> as though the proposition were self-evident and needed no support from the social science research record or from the facts of the case. These bits of “reasoning” taken together formed the basis for the conclusive, irrebuttable presumption of unfitness for which *Roe* has been taken to stand.<sup>100</sup>

Whether the anti-gay presumption of *Roe* is indeed irrebuttable, and to what situations it applies, are matters of interpretation made more difficult by the sheer nonsense of the central holding of the opinion. In the first instance, a finding of “unfitness” is normally made only in termination

---

custody and adoption or termination cases without distinction. See *supra* note 88 and accompanying text.

<sup>93</sup> *Roe*, 324 S.E.2d at 693 (citing *Brown v. Brown*, 237 S.E.2d 89, 91-92 (Va. 1977) (affirming grant of custody to father where mother lived in adulterous relationship)).

<sup>94</sup> *Roe*, 324 S.E.2d at 694.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see *supra* notes 22-23, 74 and accompanying text. It is no crime to “be” a homosexual. Cf. *Robinson v. California*, 370 U.S. 660, 667 (1962) (status of narcotic addiction cannot constitutionally be criminalized).

<sup>97</sup> *Roe*, 324 S.E.2d at 693-94.

<sup>98</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986).

<sup>99</sup> See *Roe*, 324 S.E.2d at 693.

<sup>100</sup> See Note, *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1631 n.13 (1989) (referring to *Roe* presumption as “apparently irrebuttable”).

of parental rights proceedings,<sup>101</sup> and is patently out of place in a custody dispute, where no such finding is necessary to the disposition.<sup>102</sup> In particular, where the rivals for custody are natural parents on an equal legal footing, as was the case in *Roe*, neither parent need be found “unfit” in order for the court to choose which of them is the preferable custodian.<sup>103</sup> This finding of relative suitability is quite different from a finding that one or the other parent is unfit to have anything to do with the child, as custodian or otherwise.

Because an “unfitness” finding was unnecessary to the result in *Roe*, the court’s pronouncement that the natural father’s homosexual relationship made him an “unfit” custodian, rather than merely a less preferable one,<sup>104</sup> was mere dicta. Moreover, the *Roe* decision did not deal with a third-party situation, or one in which a custody-seeker was evidently otherwise impaired or unsuitable for reasons other than sexual orientation.

However, a literal reading of the language of *Roe* would dictate that its per se rule be applied in every case in which a party seeking custody has a gay or lesbian relationship, no matter how well qualified he or she is, who his or her rival for custody is and in what relationship to the child he or she stands, or how preferable the rival is as a custodian by any other measure. A literal interpretation of *Roe* would permit no exceptions for, say, a non-gay rival for custody who had already been found unfit to have residual parental rights over another child. It would accord any party with standing to sue for custody, even the state,<sup>105</sup> an interest in the child that was instantly and automatically superior to that of the gay or lesbian parent.

If *Roe* applied across the board, no one would be a less appropriate custodian than the gay or lesbian parent—not the murderer, not the psychotic, not the child molester, not the cannibal. It defies credulity to

---

<sup>101</sup> See *Doe*, 284 S.E.2d at 806 (“proof of [mother’s] unorthodox life-style did not outweigh the clear and convincing evidence that she is a devoted mother and, in every other respect, a fit parent”).

<sup>102</sup> The use of the term “unfit” in cases enunciating the parental presumption in third-party custody cases is no accident; it is used precisely to make the presumption strong enough that it requires an award of custody to the natural parent unless that parent is found unfit in the same sense that grounds a decision to terminate his or her residual rights to the child. See, e.g., *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986). For further discussion, see *infra* notes 116, 131-50 and accompanying text.

<sup>103</sup> See *Elder v. Evans*, 427 6.E.2d 745, 747 (Va. Ct. App. 1993).

<sup>104</sup> *Roe*, 324 S.E.2d at 694.

<sup>105</sup> VA. CODE ANN. § 20-107.2 (Michie 1990 & Supp. 1993) (grandparents, stepparents, and other family members with a “legitimate interest” may intervene in custody proceedings); VA. CODE ANN. § 16.1-283(A) (Michie 1988 & Supp. 1993) (termination of residual parental rights by court must be by order “continuing or granting custody to a local board of public welfare or social services, to a licensed child-placing agency or the granting of custody or guardianship to a relative or other interested individual”).

suggest such a rule in a civilized society. Assuming the *Roe* court did not harbor a homophobia this barbaric, at the very least it failed to consider the ramifications of the per se rule it uttered into the law. A presumption of "unfitness" based on sexual orientation, as the *Roe* court should have realized, is totally unworkable in practice.

As we now know, the presumption is also unfounded in fact. A considerable body of social science research, some of it available when *Roe* was decided<sup>106</sup> but most of it published in the years since the decision, has by now decisively refuted any notion that children of lesbian or gay parents are adversely affected by anything in their parents' lifestyle. The research literature on outcomes in these children has measured everything from gender identification<sup>107</sup> to personal development<sup>108</sup> to peer

---

<sup>106</sup> See Brief for Amici Curiae American Civil Liberties Union of Northern Virginia, Center for Constitutional Rights, Lesbian Rights Project, and Women's Legal Defense Fund at 10-11, *Roe v. Roe*, 324 S.E.2d 691 (Va. 1985) (No. 832044) (citing NATIONAL INST. OF MENTAL HEALTH TASK FORCE ON HOMOSEXUALITY, FINAL REPORT AND BACKGROUND PAPER 15, 56 (1972) (homosexual orientation, by itself, is not a determinant of mental health, personal stability, or parenting ability)); Bernice Goodman, *The Lesbian Mother*, 43 AM. J. ORTHOPSYCHIATRY 283, 283-84 (1973); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 AM. J. ORTHOPSYCHIATRY 545, 545 (1981) (finding no correlation between the parent's sexual orientation and that of the child); Charles Silverstein, *Even Psychiatry Can Profit from Its Past Mistakes*, 2 J. HOMOSEXUALITY 153, 157 (1976) (discussing decision of American Psychiatric Association to remove homosexuality from its list of mental disorders given that "not one objective study, by any researcher, in any country, . . . substantiates the theory of homosexual pathology"); R.L. Rees, A Comparison of Children of Lesbian and Single Heterosexual Mothers on Three Measures of Socialization (1979) (unpublished Ph.D. dissertation, California School of Professional Psychology) (findings showed no significant difference among children based on mother's sexual preference).

<sup>107</sup> Patterson, *supra* note 50, at 1030 (citing and discussing Julie S. Gottman, *Children of Gay and Lesbian Parents*, in HOMOSEXUALITY AND FAMILY RELATIONS 177, 189 (Frank W. Bozett & Marvin B. Sussman eds., 1990) (no significant differences in gender role preferences between adult daughters of lesbian mothers and those of divorced heterosexual mothers, remarried or not); Golombok et al., *supra* note 50, at 562 (children, regardless of parental sexual orientation, were happy with their gender and had no wish to be a member of the opposite sex); Green, *Sexual Identity*, *supra* note 67, at 692; Richard Green et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mothers and Their Children*, 15 ARCHIVES SEXUAL BEHAV. 167 (1986) [hereinafter Green et al., *Comparison*]; Kirkpatrick et al., *supra* note 106, at 545; Rees, *supra* note 106).

<sup>108</sup> Golombok et al., *supra* note 50, at 565 (no difference between children of lesbian and heterosexual mothers with regard to hyperactivity, unsociability, emotional difficulty, and conduct problems); Green et al., *Comparison*, *supra* note 107, at 174 (no differences in intelligence); Barbara M. McCandlish, *Against All Odds: Lesbian Mother Family Dynamics*, in GAY AND LESBIAN PARENTS, *supra* note 10, at 23, 30 (no difference between children of lesbian couples and children of heterosexual couples in independence,

relations<sup>109</sup> to self-esteem<sup>110</sup> to future sexual orientation,<sup>111</sup> and has uniformly found that children raised by gay or lesbian adults do not turn out any differently from their counterparts raised by heterosexual adults.<sup>112</sup>

There is simply no factual basis for a conclusion that a parent's gay or lesbian lifestyle harms a child. At a minimum, the court in *Roe* made its anti-gay pronouncement in an environment far shorter on social science fact, and far more vulnerable to subjective impressions, than would be true today. If *Roe* were subjected to reexamination in light of current understanding, and if that understanding were allowed to guide the later

---

ego functions, or object relations); Ailsa Steckel, *Psychosocial Development of Children of Lesbian Mothers*, in *GAY AND LESBIAN PARENTS*, *supra* note 10, at 75, 82-83 (similar findings).

<sup>109</sup> Golombok et al., *supra* note 50, at 564 (children reported mostly same-sex peer groups regardless of parents' sexual orientation; overall peer relations ratings were no different for two groups of children); Green, *Sexual Identity*, *supra* note 67, at 696 (gender distribution of friends of children of lesbian mothers was similar to that of children of heterosexual mothers); Green et al., *Comparison*, *supra* note 107, at 178 (self-ratings and parents' ratings of children's peer popularity did not differ depending on parental sexual orientation).

<sup>110</sup> Huggins, *supra* note 50, at 132-35 (no differences between children of heterosexual and lesbian mothers in any aspect of self-concept); D. Puryear, *A Comparison Between the Children of Lesbian Mothers and the Children of Heterosexual Mothers* (1983) (unpublished Ph.D. dissertation, California School of Professional Psychology); Rees, *supra* note 106 (no difference in development of children's moral judgment depending on parental sexual orientation).

<sup>111</sup> Golombok et al., *supra* note 50, at 564 (no difference in sexual orientation between children of homosexuals and those of heterosexuals); Gottman, *supra* note 107, at 189 (same); Green, *Sexual Identity*, *supra* note 67, at 693 (pre-adolescent and adolescent children of lesbians had exclusively heterosexual fantasies); Huggins, *supra* note 50, at 134 (no difference in sexual orientation between children of homosexuals and those of heterosexuals); Miller, *supra* note 67, at 546-47 (among 48 adult offspring of gay fathers, 4% were gay or lesbian which is comparable to the proportion of homosexuals in the general population); Rees, *supra* note 106 (adolescent children of lesbian mothers had uniformly heterosexual orientation).

<sup>112</sup> Patterson sums up the current research record as follows:

There is no evidence to suggest that psychosocial development among children of gay men or lesbians is compromised in any respect to that among offspring of heterosexual parents. Despite long-standing legal presumptions against gay and lesbian parents in many states, despite dire predictions about their children based on well-known theories of psychosocial development, and despite the accumulation of a substantial body of research investigating these issues, not a single study has found children of gay and lesbian parents to be disadvantaged in any significant respect relative to children of heterosexual parents. Indeed, the evidence to date suggests that home environments provided by gay and lesbian parents are as likely as those provided by heterosexual parents to support and enable children's psychological growth.

Patterson, *supra* note 50, at 1036.

court's reasoning, the presumption against gay and lesbian custodians would surely fall.

#### IV. *ROE V. ROE*<sup>113</sup> AND *BOTTOMS V. BOTTOMS*:<sup>114</sup> THE THIRD-PARTY PROBLEM

Had Sharon Bottoms' rival for custody been her child's natural father, the facts of her case would have been essentially identical to those of *Roe*. But the rival was Sharon's mother,<sup>115</sup> who, like any nonparent, was a legal stranger to the child. Virginia, like many other states, has a strong presumption favoring the natural parent over the third party in such disputes.<sup>116</sup> That presumption, as Virginia cases have repeatedly reaffirmed, can be overcome only by clear and convincing evidence of the unfitness<sup>117</sup> of the natural parent.<sup>118</sup> Because *Bottoms* was a conflict between a natural parent and a third party, *Roe* can be distinguished, and its vitality questioned, from a new perspective—that of opposition to any extension of the *Roe* pronouncement beyond parent-vs.-parent disputes into legal spheres governed by countervailing presumptions and burdens of proof. Nevertheless, the same arguments against *Roe* were made before the Court of Appeals<sup>119</sup> that would be advanced in a direct challenge to *Roe* in the Supreme Court of Virginia: that the presumption against gay custodians

<sup>113</sup> 324 S.E.2d 691 (Va. 1985).

<sup>114</sup> No. 1930-93 (Va. Ct. App. filed Sept. 28, 1993).

<sup>115</sup> See *supra* note 2.

<sup>116</sup> See *supra* note 102 and accompanying text; *infra* notes 123-29 and accompanying text.

<sup>117</sup> *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986). Unfitness in this context is the same as unfitness in proceedings to terminate parental rights, and the same parental presumption applies in both. See VA. CODE ANN. § 16.1-283(B) (Michie 1988); *Lowe v. Department of Pub. Welfare*, 343 S.E.2d 70, 72 (Va. 1986); *Walker v. Department of Pub. Welfare*, 290 S.E.2d 887, 890 (Va. 1982); SWISHER, *supra* note 92, § 15-7 & n.23. Unfitness need not be adjudicated in custody disputes between parents, where the court must typically decide the relative suitability of two apparently adequate custodians. A determination of unfitness is proper only on a showing of deficiencies much more severe than those needed to support a change of custody from one natural parent to another. See *supra* note 102; *infra* notes 123-29 and accompanying text.

<sup>118</sup> See *infra* notes 121-23 and accompanying text.

<sup>119</sup> Briefs of appellant and supporting amici curiae were filed November 15, 1993. There were three amici filings: a brief from the American Psychological Association et al., see *supra* note 50, which collected the social science evidence and concluded that there is none to support an inference that a parent's sexual orientation is harmful to a child and that there are convincing and oft-replicated empirical findings to the contrary; and briefs from the National Center for Lesbian Rights et al. and the American Academy of Matrimonial Lawyers, which made nationwide surveys of the caselaw, argued against the presumption of *Roe*, and recommended implementation of a "nexus" rule.

has no social science support for *any* purpose; that it is irrational, a pure reflection of bias and prejudice; and that it should be rejected, treated as a dead letter, or limited to its facts, and certainly not extended to new cases where it can do further damage.<sup>120</sup>

*Bottoms* illuminates with unique clarity the irreconcilable tension between a *Roe*-type custody presumption and the rest of Virginia domestic relations law. The Virginia Supreme Court, for better or worse, presumes that a “child’s best interests will be served when in the custody of its parent.”<sup>121</sup> The court has repeatedly spoken of the superior “place of a mother’s love, devotion, attention and supervision” in her child’s life, and the mother’s “natural right to have and enjoy the companionship and care of her own flesh and blood . . . .”<sup>122</sup> The same court has described the rights of parents as “founded upon natural justice and wisdom, and being essential to the peace, order, virtue and happiness of society.”<sup>123</sup> This rule leads to a presumption that parental custody is preferable, and “the presumption favoring a parent over a non-parent is a strong one.”<sup>124</sup>

The parental presumption is particularly strong when a third party seeks to deprive a parent of the custody of his or her child.<sup>125</sup> In order to

<sup>120</sup> Appellant’s Opening Brief at 12-21, *Bottoms* (No. 1930-93); Amici Curiae Brief of American Psychological Association et al. at 8-24, *Bottoms* (No. 1930-93); Amicus Curiae Brief of National Center for Lesbian Rights et al. at 25-32, *Bottoms* (No. 1930-93).

<sup>121</sup> *Judd v. Van Horn*, 81 S.E.2d 432, 436 (Va. 1954); *accord Doe v. Doe*, 284 S.E.2d 799, 800 (Va. 1981) (deciding parent-vs.-third-party adoption case based on analogy to parental presumption in custody cases; quoting *Cunningham v. Gray*, 273 S.E.2d 562, 564 (Va. 1981) (“[W]hile the welfare of the child is of paramount concern in adoption cases, nonetheless the rights of a natural parent vis-a-vis a non-parent will be maintained if at all consistent with the child’s best interests.”)) (other citations omitted).

<sup>122</sup> *Lawson v. Lawson*, 94 S.E.2d 215, 219 (Va. 1956) (denying uncle and aunt’s petition for transfer of custody from natural mother); *see also Judd*, 81 S.E.2d at 435 (right to custody of the son is ordinarily the father’s right “both by nature and by law”); *Williams v. Williams*, 66 S.E.2d 500, 502-03 (Va. 1951) (“The rights of the parents being founded on nature are respected unless they have been abandoned or relinquished.”); *Sutton v. Menges*, 44 S.E.2d 414, 417 (Va. 1947) (“To separate a child from its parents, the evidence of their unfitness must be cogent and convincing.”); *Merritt v. Swimely*, 82 Va. 433, 436 (1886) (“duties thrown upon [the father] by the law of nature as well as of society”). In *Ferris v. Underwood*, 348 S.E.2d 18 (Va. Ct. App. 1986), the court reversed as improper a transfer of custody of the child from her mother to her grandmother, stressing that “[o]ur holding . . . has the effect of re-establishing for [the child] the proper roles of her mother and her grandmother.” *Id.* at 20-21 (emphasis added).

<sup>123</sup> *Bailes v. Sours*, 340 S.E.2d 824, 827 (Va. 1986) (quoting *Walker v. Brooks*, 124 S.E.2d 195, 198 (1962)).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*



rebut this parental presumption, a third party must prove by clear and convincing evidence (1) that the natural parent is unfit, (2) that the natural parent has already been divested of custody, (3) that the natural parent has voluntarily relinquished custody, (4) that the natural parent has abandoned the child, or (5) that special circumstances present a truly extraordinary reason for taking the child away from the parent.<sup>126</sup>

To rebut the parental presumption by proving "special circumstances," the third party must prove by clear and convincing *evidence*—not merely by "surmise and conjecture"<sup>127</sup>—that the child will be seriously harmed if he or she remains in the parent's custody.<sup>128</sup> If the parental presumption is rebutted, then the court must make a further, separate determination as to whether the best interests of the child require a transfer of custody to the third party.<sup>129</sup>

No appellate court in the United States has yet held that a natural parent's same-sex relationship satisfies both these standards and requires transfer of custody to a third party. Indeed, courts in Virginia and across the nation have applied the parental presumption to insulate natural parents from third-party custody challenges in a variety of extreme situations.<sup>130</sup>

The point is starkly illustrated by a group of Virginia cases that can only be described as grotesque. In *Mason v. Moon*,<sup>131</sup> a child's grandparents sued to take custody from his mother and stepfather, claiming that the mother's household was unfit for the child for the simple reason that the stepfather had killed the child's natural father.<sup>132</sup> The Virginia intermediate appellate court reversed a lower court's award of custody to the grandparents, and specifically declined to hold that the child would be harmed by living with his father's killer: "There is no credible evidence in the record which would indicate that granting custody of the child to [the mother] would harm the child psychologically. . . . A parent and child will not be deprived of one another based on *surmise and conjecture*."<sup>133</sup>

---

<sup>126</sup> *Id.*

<sup>127</sup> *Mason v. Moon*, 385 S.E.2d 242, 246 (Va. Ct. App. 1989).

<sup>128</sup> *Id.* at 245.

<sup>129</sup> *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1973).

<sup>130</sup> *See, e.g., In re James M.*, 135 Cal. Rptr. 222, 229 (Cal. Ct. App. 1976) (affirming award of custody to natural father who had been convicted of murdering his children's mother by stabbing her 22 times); *In re Lutgen*, 532 N.E.2d 976, 986 (Ill. Ct. App. 1988) (upholding grant of custody to natural father who had been convicted of choking the children's mother to death in their presence); *In re Welfare of P.L.C. & D.L.C.*, 384 N.W.2d 222, 226-27 (Minn. Ct. App. 1986) (granting custody to natural father notwithstanding evidence of his alcoholism and child and spouse abuse).

<sup>131</sup> 385 S.E.2d 242 (Va. Ct. App. 1989).

<sup>132</sup> *Id.* at 243.

<sup>133</sup> *Id.* at 246 (emphasis added).

In *Walker v. Fagg*,<sup>134</sup> grandparents attempted to rebut the presumption in favor of the natural father by claiming he was unfit because he had been unemployed and neglected his family, had abused alcohol, and had abused his wife and ultimately killed her.<sup>135</sup> The trial court granted temporary custody to the father pending appeal of his murder conviction, and the court of appeals affirmed.<sup>136</sup> The court said simply that the best interests of the children required that they remain temporarily with the father, and stressed that the best interests inquiry is independent of the parental presumption analysis, although it imposes on the third party a similarly heightened burden of proof: “[A] determination of unfitness [does not] require[ ] *ipso facto* a denial of parental custody . . . . ‘[T]he evidence must also be clear and convincing that the welfare and best interests of the child will be served by awarding custody to someone other than the parent.’”<sup>137</sup>

In *Brown v. Kittle*,<sup>138</sup> the court reversed a denial of custody to a father who had formerly drunk to excess, and was accused of fathering an illegitimate child—in addition to the child whose custody was in dispute—and of having sexual relations, allegedly forcible, with that child’s half-sister.<sup>139</sup> The court disapproved of the father’s behavior but refused to let that disapproval substitute for proof of an adverse effect on the child:

We do not condone Brown’s conduct either as a scofflaw or as a violator of generally accepted standards of morality. The evidence shows, however, that regardless of his transgressions and moral lapses Brown has been a devoted and dedicated father to Johnny and he and his remarkably understanding wife have made a good home for the child.<sup>140</sup>

In *Elder v. Evans*,<sup>141</sup> a mother had left her child in a nonparent’s care for four years of its life<sup>142</sup> and had failed during that time to provide for

---

<sup>134</sup> 400 S.E.2d 208 (Va. Ct. App. 1991).

<sup>135</sup> *Id.* at 210.

<sup>136</sup> *Id.* at 209.

<sup>137</sup> *Id.* at 211 (quoting *Wilkerson v. Wilkerson*, 200 S.E.2d 581, 583 (Va. 1973)).

<sup>138</sup> 303 S.E.2d 864 (Va. 1983).

<sup>139</sup> *Id.* at 866.

<sup>140</sup> *Id.* at 867; *see also* *Phillips v. Kiraly*, 105 S.E.2d 855, 859 (Va. 1958) (aunt and uncle’s petition for custody denied because parental presumption not overcome by general allegations that father was financially irresponsible, took pictures of nude women, and had been a “Peeping Tom”).

<sup>141</sup> 427 S.E.2d 745 (Va. Ct. App. 1993).

<sup>142</sup> *Id.* at 746.

the child.<sup>143</sup> The father had at first denied paternity and then failed to meet support obligations.<sup>144</sup> At trial, custody was awarded to the nonparent, who had bonded with the child,<sup>145</sup> but the award was reversed under the parental presumption.<sup>146</sup>

And in *Ferris v. Underwood*,<sup>147</sup> there was evidence that the mother's sister was a prostitute who sometimes visited the home, but the court found no evidence "that that situation in any way affected the child."<sup>148</sup> The court of appeals upheld the reversal of a juvenile court's award of custody to the grandmother, saying custody should be with the mother because there was insufficient evidence as to any adverse effect of the parent's behavior on the child.<sup>149</sup>

If a competent, stable, and loving lesbian mother is divested of custody of her natural two-year-old child in favor of a third party in a jurisdiction where parents have retained custody in cases as extreme as these, the conclusion is inescapable that homophobia, pure and simple, motivated the decision. It is wholly irrational to suggest that a court should decline to engage in "surmise and conjecture"<sup>150</sup> about the harmful effects on children of homicidal, sexually abusive, or otherwise violently dysfunctional homes, but that it may nevertheless indulge in such speculation, even in the face of overwhelming social science evidence to the contrary, in order to compel the removal of children from the loving homes of gay or lesbian parents.

Faced with this conflict between the per se pronouncement of *Roe* and the more general contours of domestic relations law, the trial court in *Bottoms* had a choice: to read *Roe* literally, i.e., to hold that in all custody disputes, regardless of the identity of the parties or their relationship to the child, a parent's same-sex relationship creates an irrebuttable presumption of unfitness, or to read it more loosely and hold that for one of several reasons the *Roe* rule did not govern.

The trial court could have said that *Roe* was limited to its facts; that *Roe* went beyond a decision as to which of two natural parents was preferable and declared one of them to be unfit, a "ruling" wholly

<sup>143</sup> *Id.* at 748.

<sup>144</sup> *Id.* at 746.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 749.

<sup>147</sup> 385 S.E.2d 18 (Va. Ct. App. 1986).

<sup>148</sup> *Id.* at 20.

<sup>149</sup> *Id.* at 20-21; see also *James v. James*, 334 S.E.2d 551, 553 (Va. 1985) (reversing order transferring custody to grandparents based on the divorced parents' "open hostility . . . toward each other" because the parental presumption was not rebutted by clear and convincing evidence of adverse effects).

<sup>150</sup> *Mason*, 385 S.E.2d at 246.

unnecessary to the result and therefore to be considered pure dicta; or that because *Roe* was decided within the parent-parent context, the court in that case did not need to decide, and did not even consider, the impact of an anti-gay parenting rule on a class of disputes governed by a strong countervailing presumption in favor of the natural parent. Finally, it could have taken account of the copious social science evidence of record, adduced principally through the expert testimony of Dr. Charlotte Patterson,<sup>151</sup> and decided—as it was urged to do—that the presumption of a gay custodian’s unsuitability could no longer be justified in light of post-*Roe* research findings on actual outcomes in children of gay and lesbian households.

Though the trial court phrased its ruling nominally to take account of countervailing presumptions and to treat *Roe* as overcoming them—or as substituting for whatever evidence might be needed to overcome them<sup>152</sup>—the decision appears to have ignored the evidence of no harm to the child,<sup>153</sup> and subverted the legal standard requiring such a showing before a third party may wrest custody from a parent. The lower court’s ruling cannot be construed to have followed parental presumption precedent unless one first agrees that evidence of a natural parent’s homosexual relationship invariably overcomes the presumption. That, as the present discussion suggests, would be begging the entire question.

The Virginia Court of Appeals, like the trial court, could readily take any of the alternative approaches just suggested without “overruling” *Roe*, as of course it lacks the formal power to do.<sup>154</sup> Each of these

<sup>151</sup> See Joint Appendix at 112-35, *Bottoms v. Bottoms*, No. 1930-93 (Va. Ct. App. filed Sept. 28, 1993); Trial Transcript at 110-33, *Bottoms v. Bottoms* (No. CH93JA0517-00).

<sup>152</sup> I . . . 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. In *Roe v. Roe*, gentlemen, page 728—it’s the only quote I am going to read to you—it says, “We have no hesitancy in saying that the conditions under which this child must live daily are not only unlawful but they also impose an intolerable burden upon her . . . .”

Joint Appendix at 198-99; Trial Transcript at 196-97 (trial court’s oral ruling).

<sup>153</sup> See Joint Appendix at 196-99; Trial Transcript at 194-97 (trial court’s oral ruling).

<sup>154</sup> One should not make too much of the formal incapacity of Virginia’s intermediate appellate court to pronounce *Roe* dead. *Roe* was decided before the Virginia Court of Appeals came into existence, and the intermediate court was charged by statute to hear appeals of right that had never before been available in cases such as this one. See VA. CODE ANN. § 17-116.05(3)(c) (Michie Supp. 1993). Neither the appeals court nor the Virginia Supreme Court has had to interpret or apply *Roe* until now, and neither court can ignore the post-*Roe* changes in the relevant social science record. See *supra* notes 107-12 and accompanying text. Furthermore, because the intermediate appellate forum may well be that of last resort, a decision there should not and need not shrink from a candid

approaches would result in a reversal and a permanent retransfer of custody to Sharon Bottoms, the natural mother. No remand for further factfinding, or even a determination as to visitation, would be necessary or proper, because the factual record below is quite complete as to the superiority of the natural mother's claim under the parental presumption, as well as the rivals' poor relationship and comparable ability to provide separately for the child.<sup>155</sup>

If the Court of Appeals, charged as it is with the rational development of Virginia domestic relations law through the appeals it must hear in such cases, issues a ruling favorable to Sharon, her mother could appeal to the Supreme Court of Virginia—but only for discretionary review.<sup>156</sup> That court could avoid confronting *Roe* by denying review, or it could take the case, and preferably treat it as a chance to replace the unfitness presumption of *Roe* with a “nexus” approach for *all* custody disputes, consistent with current social science research. Even an opinion which clarified that a parent's sexual orientation may only be considered as one factor in custody determinations, but is not dispositive absent clear and convincing evidence of harm to the child, would be a notable improvement over the muddled state of the law for which *Roe* is responsible.

There is, of course, the further possibility of an application by the losing party in *Bottoms* to the United States Supreme Court for *certiorari*. The calendar suggests that such a petition would likely be filed no earlier than 1995, with a decision, assuming grant of the writ, unlikely before the end of that year or the following year. The factual posture of the case might be different by then, depending on outcomes in the state courts and on the lives of the litigants. The child, Tyler Doustou, will be five years old in July 1996, and his interim custody will be significant to any adjudication of his best interests. Indeed, changing circumstances may

---

assessment of *Roe*'s continued vitality. *Cf.* *Ford v. Ford*, 419 S.E.2d 415 (Va. Ct. App. 1992); *Sutherland v. Sutherland*, 414 S.E.2d 617, 618 (Va. Ct. App. 1992) (relaxing the apparently *per se* rule of *Brown v. Brown*, 237 S.E.2d 89 (Va. 1977), against grant of custody to an adulterous parent); *Smith v. Kauffman*, 183 S.E.2d 190 (Va. 1971); *Surratt v. Thompson*, 183 S.E.2d 200, 201-02 (Va. 1971) (abrogating long-standing common-law interfamily and interspousal tort immunities in automobile accident cases because modern realities of liability insurance rendered the rule anachronistic).

<sup>155</sup> Joint Appendix at 78-79; Trial Transcript at 76-77 (Kay Bottoms claimed \$500 at most in cash savings, with no bank account); Joint Appendix at 156; Trial Transcript at 154 (direct examination of psychiatrist Rochelle Klinger, M.D.) (Sharon Bottoms and April Wade had “well-functioning relationship” and lived in pleasant “homey” apartment); Joint Appendix at 25-26, 44; Trial Transcript at 23-24, 42 (relationship between Kay and Sharon was satisfactory until Sharon confronted Kay with her boyfriend's long-running sexual abuse of Sharon).

<sup>156</sup> *See* VA. CODE ANN. §§ 8.01-670, -673(B), -675.1 (Michie 1988); VA. SUP. CT. R. 5:14, :20 (1993).

obviate or moot the litigation before the legal questions it raises are resolved. While under the circumstances it is of dubious value to forecast a Supreme Court phase for this case, the nation's highest tribunal is the logical forum for the assertion of the relevant constitutional claims. In any event, the next few years will witness a ripening of the constitutional arguments against presuming that gays or lesbians are unsuitable custodians of children.

#### V. CONCLUSION

A period of intense legal debate and factual inquiry has greatly changed the landscape for a *Roe*-type presumption in the few short years since that decision was rendered. Today, a court deciding the validity of such a presumption has a choice of convincing refutations based on social science fact or the domestic relations decisions of many states, or directly from constitutional law. Conversely, a court inclined to retain a rule against lesbian or gay parenting must recognize that it no longer imposes such a rule on any authority but its own predilections.

In Virginia, even if the intermediate appellate court renders a favorable decision in *Bottoms v. Bottoms*, it is premature to suggest that the day of *Roe v. Roe* is past. Yet the way has now been marked for future litigants, even in states where gay and lesbian parenting is disfavored strongly or per se, to contend successfully against such presumptions. It is only a matter of time before the barriers of prejudice and ill will in this critically important area of American law, like the barriers that have stood in the way of legal equality of the races and the sexes, begin to break down, permitting fuller freedom and dignity for the victims of the injustice. As Sharon Bottoms and her chosen family have reminded us, if the people lead, the leaders will follow.