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Intuition and Feminist Constitutionalism

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In any constitutional system, we must ask, as a foundational inquiry, when and why a government may distinguish between groups of constituents for purposes of allocating benefits or imposing penalties. For feminists and others with a stake in challenging inequalities, the rationales that a society deems acceptable for justifying these classifications are centrally important. Heightened scrutiny jurisprudence for sex-based and other distinctions may help capture some of the rationales that rest on stereotypes and outmoded biases. However, at the end of the day, whatever level of scrutiny is applied, the critical question at any level of review is whether, according to the decision maker, the government has adequately justified the distinction it has drawn.[1]

For most official classifications, the rationales for differentiating among people are obvious and unremarkable, and the laws at issue provoke no challenges. Age-based rules that require only some people (youth) to attend school are a classic example. Similar are rules that restrict the issuance of drivers' licenses to individuals without significantly impaired vision. In these instances, the government's line-drawing is linked to a demonstrable characteristic of the people who are burdened by the measure at issue.[2]

[1] Of course, the relationship between the rigor of review and quality of acceptable justifications can be an interactive one. Under the tiered approach to equal protection analysis applied by federal courts in the United States, for example, certain justifications that might be sufficient at the lowest level rational-basis review will be deemed inadequate when heightened scrutiny is applied. *See, e.g.*, *Cook v. Babbitt*, 819 F. Supp. 1, 21 n.19 (D.C. Cir. 1993) (finding that, where the "only rational basis for a gender-based exclusion policy would be . . . administrative convenience," it is an "open question" "whether this rational basis could survive heightened scrutiny") (citations omitted).

[2] We see this as well in the rationales proffered for other sorts of restrictions on rights. The government justifies restriction of rights of enemy combatants, for example, by pointing to national security concerns. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). Likewise, schools have argued that students' free speech rights must be restricted to prevent the undermining of educational institutions' objectives. *See Morse v. Frederick*, 551 U.S. 393 (2007).

In this vein, early gender and sexuality litigation was aimed at showing courts that discriminatory classifications rested on unfounded stereotypes about the competency of the group members in question rather than on a factually demonstrable defining characteristic of the burdened group.[3] So, for example, in the U.S. Supreme Court's earliest ruling to reject a sex-based classification, the Court invalidated a law favoring husbands over wives as estate administrators, finding that women had shown themselves to be as capable as men at the task.[4] Likewise, many courts that once treated mothers and heterosexual parents as more capable of supporting healthy child development than fathers, or gay or lesbian parents, now take the default position that sex and sexual orientation are neutral factors, absent evidence to the contrary.[5]

Although many so-called facts about social groups have later been shown to embody bias or stereotypes,[6] a regime that requires demonstrable facts before the state can discriminate creates the possibility, at least, for empirical contestation of the proffered characterization of group members.[7] So, for example, a decision resting

3 For example, early decisions upholding interracial marriage bans often resorted to pseudo-scientific conclusions that the children of interracial couples would be genetically inferior. *See, e.g., Jackson v. State*, 72 So.2d 114, 115 (Ala. Ct. App. 1954) (upholding Alabama's anti-miscegenation statute based on the "well authenticated fact that if the [issue] of a black man and a white woman, and a white man and a black woman, intermarry, they cannot possibly have any progeny"); *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955) (asserting that interracial marriage would produce a "mongrel breed of citizens"); *Perez v. Lippold*, 198 P.2d 17, 26 (Cal. 1948) (striking down California's ban on interracial marriages and criticizing the underlying beliefs "that such minorities are inferior in health, intelligence, and culture, and that this inferiority proves the need of the barriers of race prejudice"). *See also* Keith E. Sealing, *Blood Will Tell: Scientific Racism and the Legal Prohibitions Against Miscegenation*, 5 MICH. J. RACE & L. 559 (2000) (discussing the development of and justifications for anti-miscegenation laws in the United States).

4 *Reed v. Reed*, 404 U.S. 71, 77 (1971).

5 Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L. Q. 381, 422 (2006) ("Most courts now apply what is commonly called the *nexus* test: a parent's sexual orientation will be deemed relevant only if there is evidence that the parent's sexual orientation is having, or is likely to have, a negative impact on the child."); Laura T. Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1, 30–31 (2005) (observing that "the majority of states no longer take into account the sexual orientation of a parent in custody disputes" and characterizing the "nexus test" as "mak[ing] the sexual orientation of a parent irrelevant unless there is evidence that it will negatively impact the best interests of the child"). *See also S.E.G. v. R.A.G.*, 735 S.W.2d 164, 166 (Mo. App. 1987) (ruling that in order to deny parental rights, "[t]here must be a nexus between harm to the child and the parent's homosexuality"); *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (declining to consider the homosexuality of a parent where "there is no suggestion that [the parent's sexual orientation] has or is likely to affect the child adversely"); *M.P. v. S.P.*, 404 A.2d 1256, 1263 (N.J. Super. Ct. 1979) (declining to consider the homosexuality of a mother where "[n]othing suggests that her homosexual preference in itself presents any threat of harm to her daughters").

6 Many arguably "demonstrable" facts themselves embody bias or stereotypes, and the American case law is full of instances in which courts have relied on "facts" about a social group to sustain what was later understood to be an invidious distinction. *See* Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955 (2006); Suzanne B. Goldberg, *On Making Anti-Essentialist and Social Constructionist Arguments in Court*, 81 OR. L. REV. 629 (2002) (hereinafter *Anti-Essentialist Arguments in Court*).

7 Of course, facts, as well as norms, are inevitably theory-soaked and socially constructed; by distinguishing between the two, I do not mean to suggest that they are easily separable. *See, e.g.*, Katherine M.

on the "fact" that fathers or gay people have less ability to parent well than mothers or heterosexuals is subject to data-based contestation. Again, this is not to suggest that courts will be persuaded by data that runs counter to their impressions. Indeed, empirical research also shows that people often hold to their views about social groups even in the face of contrary data.[8] However, for purposes here, the point is that a regime that insists on demonstrable facts before the state can discriminate offers those burdened at least some opportunity to contest the basis for the burdens imposed on them.

In this sense, intangible rationales present a special challenge for anyone concerned with eradicating traditional or long-standing barriers to equality, and these kinds of rationales – in particular, intuition, morality, and "common sense" – are this chapter's focus. When a decision maker relies on any of these to sustain government regulation, factual contestation is beside the point, as the rationale is avowedly nonempirical. For example, when the U.S. Supreme Court held in 1986 that an electorate's "presumed moral disapproval" was sufficient, standing alone, to sustain a state law that criminalized the private sexual intimacy of consenting adults,[9] the move was, in essence, a conversation-ender, at least for purposes of litigation. So long as something as noncontestable as moral disapproval could suffice as a basis for limiting equal treatment, advocates could offer little to overcome the rationale.[10]

For feminists, the judicial embrace of "intuition" and other intangible rationales ought to give particular pause, as such terms can – and often do – function as

Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender* 144 U. Pa. L. Rev. 1, 98–99 (1995) (making this point with respect to treatment of sex as fact and gender as norm); Goldberg, *Anti-Essentialist Arguments in Court*, *supra* note 6, at 650–53 (discussing occasional recognition by courts of socially constructed nature of facts).

[8] *See, e.g.*, Dan M. Kahan, *Commentary: The Theory of Value Dilemma: A Critique of the Economic Analysis of Criminal Law*, 1 Ohio St. J. Crim. L. 643, 649 (2004) (citing studies showing that individuals who are confronted with empirical assertions that counter their views tend to reinforce their prior views by turning to those whom they trust and whom share their values rather than shifting their views in light of the new evidence) (citations omitted).

[9] *Bowers v. Hardwick*, 478 U.S. 186 (1986). Writing in concurrence, Justice Burger emphasized the claim that "[c]ondemnation of [sexual relations between same-sex couples] is firmly rooted in Judeo–Christian moral and ethical standards" to support the conclusion that the Constitution afforded no right to private, consensual sexual intimacy between same-sex partners. *Id.* at 196 (Burger, C. J., concurring).

[10] In fact, gay and lesbian rights advocates in many cases after *Bowers v. Hardwick* sought to reframe the morals justification as a factual claim. They made showings, in their own briefs and through amicus briefs from religious and other organizations, that moral views about homosexuality were, in fact, diverse and not nearly as monolithic as the Supreme Court had suggested. The Supreme Court ultimately agreed when it invalidated sodomy laws in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Court also ruled the *Bowers* Court's references to historical condemnation of homosexuality to be erroneous, finding that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter. . . . Thus, the historical grounds relied upon in Bowers are more complex than the majority opinion and the concurring opinion by Chief Justice Burger there indicated. They are not without doubt and, at the very least, are overstated." *Lawrence*, *id.* at 559.

stand-ins for stereotypes and biases. This is particularly the case when it comes to regulation of gender and sexuality, I argue. After all, these are topics about which few people, lawyers and nonlawyers alike, lack strong opinions and intuitions – yet those strong views typically derive more from personal experience and upbringing than from social science analysis or rigorous evaluation of relevant empirical data. We can see this, for example, in the vigorous claims by commentators who would limit access to abortion because of negative mental health consequences for pregnant women[11] or restrict gay people from parenting because of purported harms to child development or the social fabric more generally[12] even when there is little or no data to support those positions. We see this, as well, where courts acknowledge that they lack data to support a gender- or sexuality-based regulation yet nonetheless sustain the regulation because it is consistent with their intuition or common sense.

The remainder of this chapter develops the claim that intangible rationales present cause for concern when constitutional adjudicators rely explicitly on them to sustain sexuality- and gender-based restrictions. I first outline the two ways in which these intuitions can operate to the detriment of careful analysis and offer several illustrations of judicial reliance on intangible rationales in gender- and sexuality-related cases. I then flag several specific concerns raised by judicial reliance on these rationales, including general problems associated with the reliability of intuitions and specific issues related to the way that intangible rationales skew constitutional analysis. At the same time, I acknowledge the inevitable, and arguably appropriate, role that intuition and other noncontestable modes of reasoning play in shaping governmental decisions about which restrictions to impose. Still, I argue that concerns about their skewing the constitutional analysis press in favor of limiting courts' reliance on them as compared to rationales based on demonstrable evidence. Specifically, I suggest that analytic frameworks that require courts to expose and defend the intuitions they rely on could potentially prompt reflection and cabin judicial inclinations to mask bias or hostility with neutral-sounding justifications.

[11] *See, e.g.*, David C. Reardon, Making Abortion Rare: A Healing Strategy for a Divided Nation (1996).

See also Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of the Woman-Protective Antiabortion Argument*, 57 Duke L. J. 1641 (2008) (analyzing the field of woman-protective arguments against abortion); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 Yale L. J. 1694 (2008) (identifying the woman-protective arguments in the *Casey* and *Carhart* decisions).

[12] *See, e.g.*, Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. Ill. L. Rev. 833, 833–34 (arguing that, contrary to the findings of some studies, there are "significant potential effects of gay childrearing on children, including increased development of homosexual orientation in children, emotional and cognitive disadvantages caused by the absence of opposite-sex parents, and economic security"); Lynn D. Wardle, *Considering the Impact on Children and Society of "Lesbigay" Parenting*, 23 Quinnipiac L. Rev. 541, 543 (2004) ("Logically, it is not unreasonable to expect that lesbigay parenting will not prove to be as beneficial for children or for society as parenting by a mother and father who are married to each other. But we do not know for sure.").

INTANGIBLE RATIONALES AS COVERS FOR CONSCIOUS BIAS AND UNCONSCIOUS STEREOTYPING

From a jurisprudential standpoint, the problem for constitutional analysis posed by judicial embrace of intangible rationales arises in two distinct but ultimately interrelated ways. First, in some instances, courts might invoke intuition deliberately to use its patina of legitimacy as cover for either contestable or impermissible outcome-oriented, ideologically motivated aims. A judge who believes mothers are better than fathers at instilling values in their children, for example, might not find an empirical fact to support that view when considering a challenge to a citizenship law's preference for mothers of foreign-born children over fathers. However, by deferring to the legislature's intuition or common sense regarding women's relatively greater ability to imbue citizenship values in their children, the same judge could escape the evidentiary deficit and avoid disclosure of his or her personal views while sustaining the law's classification.[13] Similarly, a judge who believes that abortion negatively affects society and should never occur, or that gay parents negatively affect their children's development, might also invoke presumptions about the lawmakers' intuitions when there are no credible facts to sustain those positions.[14]

Second, in other instances, a judge who has no particular ideological motivation might reiterate the received wisdom that mothers are more likely than fathers to bond with and transfer citizenship values to their children. Or he or she might simply assume that having an abortion is more detrimental to a woman's mental health than giving birth or that children do "better" with a mother and a father than with two mothers or two fathers. In these instances, as earlier, a judge's intuition or

[13] *See Nguyen v. INS*, 533 U.S. 53 (2001). In this case, at issue was the constitutionality of a U.S. immigration law provision that made it easier for U.S. citizen mothers than fathers to extend U.S. citizenship to their foreign-born children. The majority declared, *inter alia*, that the opportunity for mother–child bonding "inheres in the very event of birth." *Id.* at 65. Although the Court did not invoke the sorts of intangible rationales I am focused on here, the case remains an interesting one for the dissent's challenge to the way in which the majority imbued the "event of birth" with a significance that it then used to justify the sex-based classification at issue. Justice O'Connor wrote for the four dissenters:

> [T]he idea that a mother's presence at birth supplies adequate assurance of an opportunity to develop a relationship while a father's presence at birth does not would appear to rest only on an overbroad sex-based generalization. A mother may not have an opportunity for a relationship if the child is removed from his or her mother on account of alleged abuse or neglect, or if the child and mother are separated by tragedy, such as disaster or war, of the sort apparently present in this case. There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms. The "[p]hysical differences between men and women," therefore do not justify [the statute's] discrimination.

Id. at 86–87 (citation omitted).

[14] *See Gonzales v. Carhart*, 550 U.S. 124 (2007); *Lofton v. Sec'y of Dep't of Children & Family Servs.* (*Lofton I*), 358 F.3d 804 (11th Cir. 2004).

unsubstantiated assumptions can result in uncritical affirmation of flawed classifications, even if, as here, ideology is not driving the turn to intuition.

In both of these contexts, a framework that allows courts to embrace noncontestable rationales as justifications for government action has the potential to facilitate implementation of both deliberate and unconscious stereotypes and biases. In other words, when intangible, nondemonstrable rationales can suffice as justifications for restrictions on rights, decision makers have few incentives to back away from implementing their biases.[15] Likewise, the analytic framework does not prompt those without a particular outcome-orientation to expose and defend the intuitive bases for their decisions.

THE INTANGIBLE RATIONALES AT WORK

Before turning to the particular ways in which these rationales skew the analysis, a few examples are in order to illustrate the work these intangible rationales perform in adjudication of rights claims. Consider, first, the U.S. Supreme Court's recent decision to sustain the federal "Partial-Birth Abortion Ban Act of 2003."[16] The measure imposes criminal penalties on physicians who carry out specified procedures while performing a second- or third-trimester abortion. Setting the stage for its determination that the government's interest in protecting women sufficed to justify the restriction, the Court first asserted, without citation, that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child."[17] After observing that "[w]hether to have an abortion requires a difficult and painful moral decision," the Court then concluded – based on its own sense of things – that women need special protection from the state to make this decision. Specifically, the Court wrote that "[*w*]*hile we find no reliable data to measure the phenomenon*, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." In other words, the Court

[15] It is well settled that governments – including judges as well as legislatures – may not impose or sustain burdens because of hostility toward the targeted group. *See Romer v. Evans*, 517 U.S. 620, 635 (1996) ("Even laws enacted for broad and ambitious purposes often can be explained by reference to legitimate public policies which justify the incidental disadvantages they impose on certain persons."); *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973) ("[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."). Yet persuading a reviewing court that another judge relied deliberately on intuition to mask an impermissible purpose is an exceedingly difficult task for a variety of reasons, including both institutional commitments to collegiality within the judiciary and the difficulty of proving something (hostile motivation) that cannot be seen. For more on the latter point, see generally Suzanne B. Goldberg, *Discrimination by Comparison*, 120 Yale L. J. 728 (2011). I have found no reported majority opinion from an appellate court suggesting that hostility, rather than a more benign error, led a court to accept a rationale that was ultimately rejected on appeal.

[16] *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

[17] *Id.* at 159. Reva Siegel has written extensively about the judicial and public discourse regarding this "woman-protective" argument. *See* Siegel, *supra* note 11.

acknowledged that it lacked empirical support yet forged on to hold that "[t]he State has an interest in ensuring so grave a choice is well informed."[18]

We also see this judicial willingness to opt for intuition rather than data in the context of marriage cases where courts have considered whether states can restrict marriage to different-sex couples as a means of favoring heterosexual parents over gay and lesbian parents. In New York, for example, the State's highest court relied explicitly on intuition regarding childrearing to sustain the state's exclusion of same-sex couples from marriage.[19] More specifically, the court found that "[t]he Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father."[20] However, the basis for deeming the belief rational was not research. Instead, the court wrote,"[i]ntuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of what both a man and a woman are like."[21] With intuition as the foundation for its conclusion, the court then reiterated that actual evidence to the contrary of those intuitions and experiences was not relevant:

> Plaintiffs seem to assume that they have demonstrated the irrationality of the view that opposite-sex marriages offer advantages to children by showing there is no scientific evidence to support it. Even assuming no such evidence exists, this reasoning is flawed. In the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home.[22]

Given that "conclusive" scientific evidence is rarely available on any point, any rationale that is consistent with the court's intuitions could potentially be deemed constitutionally adequate.[23]

Other state judges addressing the marriage question similarly have gauged the reasonableness of a legislature's continued exclusion of same-sex couples from marriage not by social science evidence but instead by whether the impulses underlying the exclusions could be justified by intuition. A plurality of the Washington Supreme Court, for example, sustained the state's ban on same-sex couples' marrying in part

[18] *Gonzalez*, 550 U.S. 124 at 159 (emphasis added).
[19] *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006).
[20] *Id*.
[21] *Id*.
[22] *Id*. at 8.
[23] Arguably if the standard of review were less lenient than the one applied by the court in this case, more might have been required to survive constitutional review. The court characterized its inquiry as aimed to determine whether "this long-accepted restriction [on access to marriage] is a wholly irrational one, based solely on ignorance and prejudice against homosexuals." *Id*. at 8. It then observed that, until recently, marriage between same-sex couples was virtually unimaginable. With this framing, it should be no surprise that the court's intuition (or the court's view of the legislature's intuition) was consistent with that tradition; indeed, the court wrote, in what was arguably a projection of its own concerns about its views, that it "should not lightly conclude that everyone who held this belief was irrational, ignorant or bigoted." *Id*.

based on its (unsubstantiated) view that "children *tend to thrive*" in a "traditional" nuclear family.[24] Likewise, one of the justices of the Massachusetts Supreme Judicial Court, dissenting from that court's recognition of marriage rights, found that the state legislature could have rationally concluded that "married opposite-sex parents" are "the optimal social structure in which to bear children." Same-sex couples, he wrote, "present[] an alternative structure for child rearing that has not yet proved itself."[25] Yet the opinion gives little sense that "proof" of any sort could actually overcome the view, permissible according to this justice, that gay and lesbian parents are simply suboptimal.

This same view was strongly articulated by a federal appeals court that sustained Florida's ban on adoption of children by gay and lesbian adults.[26] In its opinion, the court embraced two of the state's intuition-driven justifications. First, the court accepted that Florida could restrict adoption to heterosexuals because "the marital family structure is more stable than other household arrangements."[27] And second, the court accepted the state's claim "that children benefit from the presence of both a father and mother in the home."[28] Yet the court relied on no evidence to support these fact-like claims. Nor could it have: there are no credible studies to support the proposition that married mothers and fathers have more stable relationships than partnered mothers and mothers or fathers and fathers; instead, the studies showing the relative stability of marital relationships when children are in the home encompass only heterosexual couples.[29] Likewise, there are no peer-review studies indicating that children raised by heterosexual couples are better off on child development measures than children raised by same-sex couples; to the contrary, the overwhelming consensus of experts in the field is that sexual orientation is irrelevant

[24] *Andersen v. King County*, 138 P.3d 963, 983 (Wash. 2006) (plurality opinion) (emphasis added).

[25] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 999–1000 (Mass. 2003) (Cordy, J., dissenting). In a related fashion, a Kansas appellate court found that the state's legislature "could have reasonably determined that" an age-of-consent statute that imposed greater punishment on same-sex than different-sex couples could help "prevent the gradual deterioration of the sexual morality approved by a majority of Kansas." In hypothesizing in this way, there was surely no evidence that could overcome (or support) the court's reasonableness determination observation. *See State v. Limon*, 83 P.3d 229, 236 (Kan. Ct. App. 2004), *rev'd*, 122 P.3d 22 (Kan. 2005).

[26] *Lofton I*, 358 F.3d 804 (11th Cir. 2004). In a recent challenge, a Florida appeals court sustained a trial court ruling striking down the ban. *See Fla. Dept. of Children and Families v. Adoption of X.X.G. and N.R.G.*, 35 Fla. L. Weekly D2107 (Fla. Dist. Ct. App. 2010) (opinion not yet released for permanent publication).

[27] *Lofton I*, 358 F.3d at 819.

[28] *Id.*

[29] *See, e.g.*, Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 Am. Psychol. 607 (2006), draft *available at* http://psychology.ucdavis.edu/rainbow/html/AP_06_pre.PDF; *see also* Brief of the Am. Psychol. Ass'n et al. as Amici Curiae in Support of Plaintiffs-Appellees, Conaway v. Deane, 903 A.2d 416 (Md. 2006) (No. 44) (mem.), *available at* www.aclu.org/lgbt/relationships/27253lgl20061019.html; L. A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married Couples?*, 66 J. Marriage & Fam. 880 (2004).

to parenting ability and to healthy outcomes for children.[30] The court had little difficulty sidestepping this consensus, however, declaring that it is not "irrational for the legislature to proceed with deliberate caution before placing adoptive children in an alternative, but unproven, family structure that has not yet been conclusively demonstrated to be equivalent to the marital family structure that has established a proven track record spanning centuries."[31] In other words, no matter how much evidence the law's challengers might muster, the legislature could reasonably find, according to the court, that it would never be conclusive enough, unless perhaps several more centuries pass.

Even more interesting for purposes here is the court's reasoning behind its embrace of the state's mother-father preference as a sufficient basis for imposing a categorical exclusion on gay adults (and no others in the state) from adopting. After finding no evidence bearing on the question, the court stated simply, "We find this premise to be one of those 'unprovable assumptions' that nevertheless can provide a legitimate basis for legislative action."[32] Its source for this confidence in the state's unprovable assumption? None other than the long track record of married heterosexuals raising children together,[33] suggesting, again, that longevity itself functioned as a justification for the continued exclusion.

> Although social theorists from Plato to Simone de Beauvoir have proposed alternative child-rearing arrangements, none has proven as enduring as the marital family structure, nor has the accumulated wisdom of several millennia of human experience discovered a superior model. *See, e.g.*, Plato, *The Republic*, Bk. V, 459d–461e; Simone de Beauvoir, *The Second Sex* (H. M. Parshley trans., Vintage Books 1989) (1949).[34]

While citing Plato and de Beauvoir as creators of failed models, the court apparently found its own conclusion about the state's reasonableness in preferring heterosexuals

[30] *See* E. C. Perrin, Sexual Orientation in Child and Adolescent Health 110–30 (2002) (reviewing studies and finding no material disparities in mental health and social adjustment between children of gay and nongay parents); Melanie A. Gold et al., *Children of Gay or Lesbian Parents*, 15 Pediatrics in Rev. 354, 357 (1994) ("There are no data to suggest that children who have gay or lesbian parents are different in any aspects of psychological, social, and sexual development from children in heterosexual families."); *see also* Brief for Am. Psychol. Ass'n et al. as Amici Curiae Supporting Plaintiffs-Respondents at 36, *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (No. 86), 2006 WL 1930166; Brief for Child Rights Orgs. as Amicus Curiae Supporting Respondents at 11, *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (No. 75934–1), 2006 Wash. LEXIS 598.

[31] *Lofton I*, 358 F.3d at 826.

[32] *Id.* at 819–20.

[33] Of course, even this assertion sidesteps entirely the substantial data showing that for most of this history, the male spouse had little to do with childrearing other than providing financial support and setting household disciplinary rules. *Cf.* Susan Moller Okin, Justice, Gender, and the Family 149 (1989) ("It is no secret that in almost all families women do far more housework and child care than men do.").

[34] *Lofton I*, 358 F.3d at 820.

to gay people as parents to be sufficiently self-evident not to warrant any citation at all.

In short, while the question in all of these cases concerns whether the state has a sufficient justification for its restriction on individual rights, data related to the justification(s) becomes largely irrelevant. Instead, the filter through which the state's assertions are evaluated in the sexuality and gender areas, at least in some instances as illustrated by the examples just discussed, is whether the state's rationales are consistent with the court's intuition about what the legislature reasonably might have intuited itself. If they are, the court deems them constitutionally adequate.

If an unprovable assumption is all that a state needs to restrict rights related to gender and sexuality, and if the court's willingness to question the legislature's intuitions serves as the only check on misuses of these assumptions in service of intentional or implicit bias, we have reasons to be concerned. It is to these reasons that the next section turns.

INTUITION AND UNPROVABLE ASSUMPTIONS AS RIGHTS-LIMITING RATIONALES: THE CENTRAL CONCERNS

There are any number of reasons why feminists, in particular, might be concerned about courts allowing legislatures to act on their intuitions and unprovable assumptions when regulating gender and sexuality. Among the most obvious of these, as highlighted earlier, is the increased authority given to naturalized assumptions, stereotypes, and conscious biases that are rife in these areas. The more attenuated government action becomes from data-based or demonstrable justifications, the more likely it is that these biases and stereotypes will be elevated from the public debate to a position of heightened permanency and influence within the constitutional fabric. Simply put, the rationales that are accepted for government action – including intuitions about abortion's negative effect on women and the relative desirability of heterosexuals as parents – directly shape the meaning of a state's foundational equality guarantees. Allowing intuition and assumptions to function as rationales raises the risk that these guarantees will be diminished.

Yet beyond this concern, two additional points related to the judicial embrace of intangible rationales, and of intuitions in particular, are troubling as well. The first has to do with the fallibility of intuitions. The second concerns the skewing effect that intuitions, unprovable assumptions, and other similar intangible rationales have on constitutional adjudication.

With respect to the limitations of intuitions as a basis for evaluating the legitimacy of a state's rights-limiting rationale, Judge Richard Posner's observations are particularly helpful. As a general matter, Posner embraces the role of intuition in decision making, explaining that intuition "frequently encapsulates highly relevant experience" and "produces tacit knowledge that may be a more accurate and speedier alternative in particular circumstances to analytical reasoning, even

though, being tacit, it is inarticulate."[35] Yet he acknowledges that intuition, as an analytic filter, is limited by the experiences of the person doing the intuiting. "We must not . . . suppose intuition a sure guide to sound decision making," he adds. "An intuitive decision may ignore critical factors that lie outside the range of the person's experience that informs his intuition. . . . "[36] Others who have reviewed the empirical literature on the relative virtues of probabilistic reasoning and intuitive reasoning confirm that intuition is often unreliable because it derives mainly from the necessarily limited life experiences of the individual in question.[37]

In addition to their experience-based limitations, intuitions are also a weak filter for constitutional review of rationales for limiting rights because they are particularly susceptible to biases, often without the awareness of the decision maker himself or herself. As some scholars have observed, "Intuition is . . . the likely pathway by which undesirable influences, like the race, gender, or attractiveness of the parties, affect the legal system."[38]

Related to this point, we can see that a state's invocation of an unprovable assumption as the basis for its limiting the rights of particular constituents can produce a skewed constitutional analysis. In equality cases, for example, the central question is not whether the state's justification for limiting rights is legitimate in the abstract, but instead whether there is a sufficient reason for distinguishing between those who are granted the right or benefit in question and those who are not. So, for example, in the Florida adoption case, the question is not whether, as a general matter, married heterosexuals are good parents. Instead, it is whether the state has a legitimate reason for singling out gay adults and rendering them categorically ineligible to adopt while allowing all other adults residing in the state to have their adoption applications considered on a case-by-case basis. Thus, the fact-like claim embraced by the court – that children "benefit" from the presence of a mother and father in the home – is

[35] Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B. U. L. Rev. 1049, 1064 (2006) [hereinafter Poser, *Role of the Judge*] (footnotes and citations omitted); *see also* Richard Posner, How Judges Think (2008).

[36] Posner, *Role of the Judge*, *supra* note 35, at 1064.

[37] *See, e.g.*, Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 Cornell L. Rev. 246, 271–72 (1990) (highlighting literature from fields outside law that "suggests the superiority of probabilistic methods" of reasoning). C. C. Guthrie and his coauthors identify similar challenges and perils associated with reliance on intuition in medicine. Citing a widely read medical writer's observation that "'[c]ogent medical judgments meld first impressions – gestalt – with deliberate analysis,'" they argue that the same balance between intuition and more rigorous forms of analysis should carry over to law. "Like cogent medical judgments, cogent legal judgments call for deliberation. Justice depends on it," they write. C. C. Guthrie, J. J. Rachlinski, & A. J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 43 (2007). Cass Sunstein has made similar observations with respect to judicial reliance on heuristics more generally, which he describes as "quite valuable" in general, but also as leading, in some cases, "'to severe and systematic errors.'" Cass R. Sunstein, *Hazardous Heuristics*, 70 U. Chi. L. Rev. 751 (2003) (citation omitted).

[38] Guthrie et al., *supra* note 37, at 31.

not responsive to the equal protection inquiry, given that children "benefit" from many things that are not treated as linchpins for special adoption rules.

Further, as we know, because the state lacked demonstrable evidence to support its categorical rejection of gay prospective adoptive parents, unprovable assumptions filled the gap as a justification for the sexual orientation-based line-drawing at issue. The constitutional problem with this move is that the unprovable assumption, as used in this case, restates the classification instead of explaining it. Reduced to its essence, the rationale is that heterosexual parents are preferable to gay or lesbian parents because we (the state) assume they are.

Although this reasoning appears to be circular – the state can differentiate because the state assumes that groups A (heterosexuals) and B (lesbians and gay men) are different in some relevant way – many courts, including those discussed earlier, treat the unprovable assumption as a justification. Specifically, they find that the assumption's intangible nature and its ultimate nonfalsifiability convert the description of the state's preference for heterosexuals into a stand-alone justification for the state's preference. In this way, the embrace of the intangible rationale enables the court to elide the baseline constitutional requirement that state-imposed inequalities be explained by something more than reference to the state's desire to differentiate. As the U.S. Supreme Court wrote when it invalided a state constitutional amendment that blocked the state and local government from protecting gay people against discrimination, "[b]y requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law."[39]

Indeed, in the Florida case, a dissenting judge reinforced this point by showing the ill fit between the state's assumptions and the classification it had drawn. As she explained, "[t]he adoption statute accords everyone other than homosexuals the benefit of an individualized consideration that is directed toward the best interests of the child." Pointing to the state's lack of a categorical bar for "[c]hild abusers, terrorists, drug dealers, rapists, and murderers," she highlighted how the unprovable assumption that had been offered could not overcome the "pure[] form of irrationality" reflected in the categorical ban on adoption by gays and lesbians.[40]

We see this skewed analysis in the marriage cases as well. The Massachusetts high court, for example, when invalidating the state's exclusion of same-sex couples from marriage, highlighted the flaw in the dissenters' claim that the state's ban was justified to ensure "optimal" homes for children headed by heterosexual parents. Instead of engaging with the dissenters' unprovable assumption that heterosexual parents could provide better homes than their gay counterparts, the majority showed that the very assertions regarding optimality were off point with respect to the equal

[39] *Romer v. Evans*, 517 U.S. 620, 633 (1996). The Court further stated that, "[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities." *Id.* (citations omitted).

[40] *Lofton v. Sec'y of Dep't of Children & Family Servs.* (*Lofton II*), 377 F.3d 1275, 1301 (11th Cir. 2004) (Barkett, J., dissenting from the denial of review en banc).

protection inquiry. The question in the case was not whether heterosexuals are desirable parents or whether children deserved good homes but, again, whether the state had a sufficient reason for excluding gay people from marriage. In that regard, the court noted that the state had "offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children."[41] Furthermore, the court found that the exclusion would harm children of same-sex parents by not allowing them to "enjoy[] the immeasurable advantages" that would flow from their parents being able to marry. As a result, the court concluded that "[r]estricting marriage to opposite-sex couples . . . cannot plausibly further" the state's interest in ensuring optimal homes for children.[42]

In short, intuitions and other intangible justifications present particular risks in constitutional adjudication in part because, as a general matter, they are often unreliable and potentially biased. In addition, to the extent courts defer to the legitimacy of the unprovable assumption or intuition, they often fail to ask, as the constitutional jurisprudence requires, whether that sense of things actually provides an explanation for the rights-limitation at issue. Instead, as we have seen, these rationales often merely restate or otherwise express the state's inclination to limit rights but gain traction by cloaking that inclination in the form of an assumption or intuition, which the reviewing court then erroneously treats as a substantial and independent explanation for the state's action.

THE INEVITABLE (AND DESIRABLE?) ROLE OF INTUITION AND OTHER INTANGIBLE JUSTIFICATIONS

Notwithstanding the potential for intuition and other intangible rationales to stand in for conscious and unconscious bias and stereotypes, I do not claim here that we should eradicate their role in decision making. Indeed, an effort to do so would fly in the face of all we know about the integral role of intuition in judicial reasoning as well as cognitive decision making.

As one group of authors has observed, "[e]liminating all intuition from judicial decision making is both impossible and undesirable because it is an essential part of how the human brain functions."[43] And another: "In general, there is no plausible form of adjudicative absolutism that can consistently escape the need for intuitionism at some crucial point."[44]

[41] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 963 (Mass. 2003). The court found, as well, that excluding same-sex couples from marriage would not "make children of opposite-sex marriages more secure." *Id.* at 634.

[42] *Id.* at 962.

[43] Guthrie et al., *supra* note 37, at 5.

[44] R. G. Wright, *The Role of Intuition in Judicial Decisionmaking*, 42 HOUS. L. REV. 1381, 1406 (2006); *see also id.* at 1384 (arguing that "intuition is invariably central – whether overtly so or not – to the process of arriving at a judicial outcome by any standard recognized means").

Indeed, one might argue that even if it were possible to substantially or entirely restrict the effect of judicial intuition on decision making, the cost would outweigh whatever gains might be had.[45] Particularly in areas where intuitions run so strong, to preclude their influence on decision making could itself skew the analysis. If we were to insist that all justifications be empirically demonstrable, courts might move, detrimentally, to disregard the limitations of extant empirical research. In the gender and sexuality law area, these might include not only questions related to parenting as are addressed in the adoption and marriage cases, but also other important issues related to gender identity and human sexuality, as in the abortion regulation and parenting contexts more generally.

Moreover, as noted earlier, empirically based rationales are no panacea for purposes of eliminating the conscious and subconscious biases that are of concern here. As is well known, methodological choices shape the results that empirical research produces and data can be manipulated to serve ideological ends. Most importantly, perhaps, the presence of data does not necessarily lead to greater deliberation or analysis where an adjudicator's inclinations run contrary to the empirically based research results.[46]

NEXT STEPS – DISCIPLINED INTUITION?

We have, thus, a serious tension. There are real risks in the areas of gender and sexuality posed by states proffering intangible rationales for limiting rights and by courts endorsing as constitutionally sufficient whatever state-proffered rationales fit with their own intuitions about right and wrong. At the same time, states' turns to these rationales and courts' filtering of them through their own intuitions are, as just discussed, both inevitable and in some ways desirable.

My brief proposal here is that two aspects of the judiciary's interaction with intangible rationales deserve particular attention because of their potential to support flawed constitutional analysis. The first is the inadequate reasoning in many of the decisions that rely on unprovable assumptions, intuitions, and other intangible rationales to sustain burdens on individual rights. Second is the *de minimis* way in which courts tend to engage with significant, credible data that run contrary to their conclusions.

Returning to the first, my suggestion is that more be done to show the way in which intangible rationales can evade serious review. The idea is that heightened

[45] Similar questions arise in debates regarding judicial candor. *See generally* Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (maintaining that judges who are misguided may reach better decisions than judges who clearly understand their decision making so that an insistence on candor would be ill-advised); Gail Heriot, *Way Beyond Candor*, 89 MICH. L. REV. 1945 (1991) (critiquing Altman's claims).

[46] *See generally* Suzanne B. Goldberg, *Constitutional Tipping Points*, *supra* note 6 (showing the ways in which judicial responses to changed views of social groups lag behind changed understandings of facts related to those groups); Kahan, *supra* note 8.

exposure of the circularity or self-serving nature of rights-limiting justifications such as unprovable assumptions and intuitions may increase the motivation for legitimacy-sensitive legislatures and courts to find demonstrable, accessible reasons for their actions. One might operationalize this aim by showing, at greater length and with greater context specificity than is possible here, that courts often use intangible rationales not to safeguard constitutional rights but instead to mask outcome-oriented aims. More moderately, efforts could avoid impugning judicial motives but still put a stark focus on the risks for the integrity of constitutional analysis posed by judicial acceptance of those rationales, as set out earlier.

On the second point, which concerns courts' frequent failure to engage seriously with data that conflict with their intuitions, doctrinal change would surely be difficult to achieve. Although it might be desirable for courts to offer extended explanations when they accept legislative actions that run contrary to strong demonstrable evidence, that demand would trigger concerns about the judiciary's overreaching into the legislature's role. Legislatures are, after all, sometimes better suited to sift through and weigh competing strands of evidence by virtue of their institutional resources and capacity. Moreover, even a doctrinal shift that demands greater exposition of judicial reasoning would not be likely to limit the work of outcome-oriented judges.

Yet doctrinal change may well be worth pushing despite these limitations. Without some meaningful constraint on the power of intangible rationales to justify rights restrictions, our constitutional framework retains the potential for unthinking or deliberate enforcement of long-entrenched yet unsupported biases about sexuality and gender and, indeed, many more issues. Even a limited shift – in decision-making norms, if not doctrine – has the potential to move much of the judicial conversation about these issues onto more accessible terrain. That shift, in turn, would not only enhance constitutional review as a general matter but also open new possibilities, consistent with the aims of feminism, for challenging the opportunity-limiting effects of gender- and sexuality-related stereotypes and biases.