

## **UNCONSCIOUS JUDICIAL BIAS IN LIGHT OF LGBT FAMILY LAW CASES - SHEDDING LIGHT ON THE PARADOX OF AN INDEPENDENT JUDICIARY**

### ***I. Introduction – The Problem...***

The severe impact of judicial bias towards LGBT individuals is probably most clearly illustrated in the context of family law and child custody disputes, especially issues involving child custody.<sup>1</sup> Family law in the LGBT context is distinct from most other areas of law, because family relationships interests are considered one of the most fundamental liberty interests protected under the Fourteenth Amendment<sup>2</sup>; at least in the light of traditional nuclear families.<sup>3</sup> They are so protected that the Supreme Court, generally leave family law decisions regarding children entirely up to a trial judge's discretion.<sup>4</sup> However, while family law decisions on a trial court level allow judges to better take into account all of the unique factors of a family, it also leaves LGBT families extremely vulnerable to any possible bias a judge may have regarding LGBT individuals, whether it be conscious or not.<sup>5</sup>

The 1991 custody case, *Nancy S. vs. Michele G.*, illustrates the severity of judicial decisions on non-traditional families, where Michele, the non-biological mother, was held to by the court to be a legal stranger to her children.<sup>6</sup> The judge who decided the case disregarded the fact that Michele the more "maternal" primary caretaker of her two children, Micah and Kate, and because she was unable to

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<sup>1</sup> Tobin A. Sparling, *Judicial Bias Claims of Homosexual Persons in the Wake of Lawrence v. Texas*, 46 S. Tex. L. Rev. 255, 284 (2004).

<sup>2</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); see also *Troxel v. Granville*, 530 U.S. 57, 84-92, (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

<sup>3</sup> See *Troxel*, 530 U.S. at 63-64 ("For example, the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.").

<sup>4</sup> See *id.* at 84-92 (Justice Stevens in his dissenting opinions recognizes the Court's concern that "best interest standard" applied in custody cases imposes hardly any limits on trial judges discretion).

<sup>5</sup> See *id.*

<sup>6</sup> Elaine Herscher, *Family Circle - For Nancy Springer, a 1991 court case over custody of her children was a victory. But the precedent-setting legal decision nearly destroyed her family six years later. Here is what happened after the lawyers went home*, The San Francisco Chronicle, Sunday, August 29, 1999 at SC-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/08/29/SC42SUN.DTL&ao=all#ixzz1uPrd5e4s>.

conceive children had finally persuaded her partner Nancy to have the children in the first place.<sup>7</sup> All that legally mattered to the judge was that since she was not biologically related to the children, and thus granting her visitation would be seen as imposing on the biological mother's constitutional right to parent her children.<sup>8</sup> In fact, the very same day the judge made his decision that Michele was a legal stranger to the children she had raised, Michele was coldly served with a restraining order and a contract for her to sign, stipulating that she had no legal parental rights in exchange for shared custody at her ex's discretion.<sup>9</sup>

Michele, frightened and dumbfounded, stated, "I just couldn't do it. What would that be saying to them, that I didn't fight for them . . . that I was willing to sign a paper saying I wasn't their parent? They would have grown up thinking they were expendable. ..And besides, it was a lie. They were everything to me."<sup>10</sup> Michele went on to appeal the trial court's decision and lost both times.<sup>11</sup> *Nancy S. vs. Michele G.*, came to be one of the best-known child custody cases in California and it resulted in a landmark California Appellate Court decision that was used to refuse parenting rights to potentially hundreds of same-sex couples who were not the biological parents of children they raised.<sup>12</sup>

Sadly it took two separate and tragic situations for Michele to finally get her children back.<sup>13</sup> The first event was when Kate, eight at the time, underwent a serious depression.<sup>14</sup> After a psychologist determined that Kate was suffering the kind of clinical depression that a child undergoes as the loss of a parent Nancy finally allowed Michele to have guardianship of Kate, but kept Micah with her.<sup>15</sup> Unfortunately, it was then when Nancy was killed in a fatal collision with a tanker truck that Michele had another chance seek legal custody of her son Micah before social services placed him into foster care.<sup>16</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Herscher, *supra* note 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Children are often traumatized when an attachment to a caregiver is severed by the legal system. *See infra* note 23 and accompanying text.

<sup>16</sup> Herscher, *supra* note 6.

However, at the time of the collision, Michele had no legal rights to her son, who was also seriously injured in the collision and airlifted to a nearby hospital.<sup>17</sup>

*Nancy S. vs. Michele G.*, exemplifies the sort of problems that arise in family law cases when a judge fails to recognize non-traditional families and to ultimately understand the true impact of his or her decisions.<sup>18</sup> Michele hoped that perhaps good could still come from the tragedies that she and her children had to suffer remarking, “[i]f this makes these judges think about what they're doing, if it generates a dialogue, if it gets lawyers trying to find ways of solving these things out of court, that's good. That's what's important.”<sup>19</sup> The problem with our court system is that judges are not forced to think about the consequences of their decisions.<sup>20</sup> Rather, they are encouraged to remain “independent” from “external influences” and to apply the law in a neutral and detached manner.<sup>21</sup> The paradox illustrated by this case is that by encouraging judges to view themselves as ‘independent’, they are then also encouraged to view themselves as ‘independent’ from understanding the external outcomes that result from their decisions; thus ultimately causing judges to become independent from providing justice itself.<sup>22</sup>

In *Nancy S. vs. Michele G.*, no party or child in the case was benefitted or served justice by the trial judge applying precedent law, rather it simply further complicated the lives of this dissolving family, thus deterring any real concept of justice for this family.<sup>23</sup> Kate, nineteen at

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<sup>17</sup> *Id.* Although Micah had told hospital authorities that he had another mother, they never made any phone call to her, it was hospital chaplain that played the part of searching for Nancy so that she could be notified about her son’s dire circumstances. *Id.*

<sup>18</sup> See e.g., *infra* note 23 and accompanying text.

<sup>19</sup> *Id.*

<sup>20</sup> See *infra* Part II.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> See *infra* Part VII.

<sup>23</sup> See Linda D. Elrod, *A Child's Perspective of Defining A Parent: The Case for Intended Parenthood*, 25 *BYU J. Pub. L.* 245, 250-51 (2011) (“Continuity of the parent-child relationship is essential to the child's overall well-being. When an attachment relationship is severed by one parent dropping out of a child's life, the child suffers emotional and psychological harm. Disrupting attachments can turn a securely attached child into an insecure one. Harm can occur to any child if one parent suddenly refuses to allow the other to maintain contact with a child. When a legally

the time, illustrates that even from the child's view, "[b]eing a judge is a very important thing in this society. You have to be able to do what's right, rather than what's easier."<sup>24</sup> Indeed, it is easier to focus on a standardized 'one size fits all' procedural concept of justice, especially where a judge may feel uncomfortable dealing with personal lifestyles different from his own.<sup>25</sup> A 'right' decision/outcome in *Nancy S. vs. Michele G.*, would have required that the trial judge use a much harder application concept – human empathy – to look beyond his or her own understanding of life and to try and understand another person's fears, needs and aspirations.<sup>26</sup> But exercising empathy is a hard task indeed, calling upon judges, "to make sense of the confusion of what we call human life--to reduce it to order but at the same time to give it possibility, scope, even dignity."<sup>27</sup>

## ***II. The Judicial Ethics Paradox with Impartiality***

The Model Code of Judicial Conduct (hereinafter "the Code") expounds in the first sentence of the preamble that "[a]n independent, fair and impartial judiciary is indispensable to our system of justice."<sup>28</sup> The Code contends that judicial integrity is strongly affixed to the concept of judges being independent from "external influences".<sup>29</sup> Specifically Rule 2.4 provides that judges, in making their judicial decision, should not be swayed by external

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recognized parent is denied contact, there are legal remedies. But if the nonbiological partner lacks legal standing, the harm to the child can be irreparable because there may be no remedy to allow the child to maintain the relationship.<sup>34</sup> A Texas judge noted: "The destruction of the parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved. . . .").

<sup>24</sup> Herscher, *supra* note 6.

<sup>25</sup> See Jack B. Weinstein, *The Role of Judges in A Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 Cardozo L. Rev. 1, 28 (2008).

<sup>26</sup> *Id.* Judge Jack Weinstein on the Federal bench in New York propounds, "for just administration of the law--that of the spirit, of humanity, of sympathy for the people before us--is the most difficult to satisfy. Because it is invisible and almost never explicitly acknowledged in the law schools or the courts, it is hard to know when we have adequately dealt with it." *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Model Code of Judicial Conduct preamble (2007).

<sup>29</sup> See *infra* note 30.

influences such as family, social, or political influences.<sup>30</sup> The rationale being that public confidence in judicial integrity might be eroded if judicial decisions are subjected to “inappropriate outside influences.”<sup>31</sup> Although the Code is intended more as set of guidelines<sup>32</sup>, the Supreme Court has articulated a strong deference for adhering to these guidelines, recognizing that “[t]hese codes of conduct serve to maintain the integrity of the judiciary and the rule of law.”<sup>33</sup> Furthermore, the Court also strongly accredits the Code’s principles as doctrinal to judicial integrity, which the Court values as, “a state interest of the highest order.”<sup>34</sup> Thus, both the Code and the Supreme Court accord that the principles of judicial impartiality and independence as a central crux upon which due process and ultimately justice itself is founded upon.<sup>35</sup>

However, while the judiciary facially cedes great deference to the importance of judicial integrity and of a unbiased decision-maker<sup>36</sup>, the judicial system provides little remedy to those actually subjected to judicial bias.<sup>37</sup> Conversely, the courts seems to be primarily focused on “public confidence” in judicial fairness and integrity and the “appearance of impropriety”, rather than *actual* impropriety.<sup>38</sup> In accordance with this “appearance” focus the Supreme Court denotes that the vast majority of states have adopted an objective reasonable person standard for when judges fail to “avoid impropriety and the appearance of impropriety.”<sup>39</sup> This test focuses

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<sup>30</sup> Model Code of Judicial Conduct § 2.4.

<sup>31</sup> Model Code of Judicial Conduct § 2.4, Comment 1.

<sup>32</sup> See Sparling, *supra* note 1. In 1972, the House of Delegates of the American Bar Association adopted the Model code of Judicial Conduct with the intent of establishing ethical conduct standards for Judges. *Id.*

<sup>33</sup> *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 889 (2009).

<sup>34</sup> *Id.*

<sup>35</sup> See *supra* notes 28-34 and accompanying text.

<sup>36</sup> See *supra* notes 28-35 and accompanying text.

<sup>37</sup> See *infra* notes 41-44 and accompanying text.

<sup>38</sup> See *Caperton*, 556 U.S. at 888-889.

<sup>39</sup> *Id.* at 888. Note that the Court does not distinguish that there is a difference between the two; instead the Court seems to assumed that deterring the appearance of impropriety will deter impropriety in general. See Anne Richardson Oakes & Haydn Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 Santa Clara L. Rev. 573, 620 (2011).

only on mitigating the “appearance of impropriety” by assessing whether the judicial conduct in question “would create in reasonable minds *a perception* that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”<sup>40</sup>

The objective reasonable person standard in the context of judicial bias is notably a very difficult standard for someone to prove as it requires a litigant to provide a record of a judge showing explicit aversion or hostility that is highly visible.<sup>41</sup> The result is that this standard has the affect of superficially providing a remedy for judicial bias when in reality there really is not much of one.<sup>42</sup> Justice Scalia recognizes that the Court’s reliance on the flawed theoretical presumption, namely that people value procedures independently from outcomes, only thwarts the ends of justice that the Court is supposed to be protecting.<sup>43</sup> He rightfully argues in his dissenting opinion that “[w]hat above all else is eroding public confidence in the Nation's judicial system is the perception that litigation is just a game, that the party with the most resourceful lawyer can play it to win, that our seemingly interminable legal proceedings are wonderfully self-perpetuating but incapable of delivering real-world justice.”<sup>44</sup>

### ***III. The Judicial Superego - Eradicating the Aims of Judicial Ethics***

Initially it seems intuitively logical that for a just decision, a judge simply needs to apply the law and constitutional requirements separate from all inappropriate external factors. If for some reason a judge feels he or she cannot make an unbiased decision, then he or she should step down from making a judicial decision.<sup>45</sup> However, a closer examination of the human mind

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<sup>40</sup> *Caperton*, 556 U.S. at 888-889.

<sup>41</sup> *Id* at 891. In his dissent, Justice Roberts explicitly points out that the Court was only able to identify *two* situations which require disqualification of a judge: when a judge is presiding over certain types of criminal proceedings or when the judge has some financial stake in his own decision. *Id.*

<sup>42</sup> *Id* at 889.

<sup>43</sup> *See id* at 903; *see also* Oakes & Davies *supra* note 39 at 577.

<sup>44</sup> *Caperton*, 556 U.S. at 903.

<sup>45</sup> 28 U.S.C.A. § 455(a); *see also* Oakes & Davies *supra* note 39 at 585.

reveals that this logical fallacy contains the erroneous presumption that judges have the ability to easily recognize and control the elimination of prejudice and bias within themselves.<sup>46</sup> The truth is that all human decisions, judicial or not, stem from subjective personal experiences.<sup>47</sup> This is not an easy concept to grasp. Philosopher John Mill, surmises this theoretical paradox posed by unconscious bias in his *Autobiography* declaring that:

[E]very inveterate belief and every intense feeling, of which the origin is not remembered, is enabled to dispense with the obligation of justifying itself by reason, and is erected into its own all-sufficient voucher and justification. *There never was such an instrument devised for consecrating all deep-seated prejudices.*<sup>48</sup>

Thus the enigma of an impartial and independent judiciary is that judges are then not even aware of their own prejudices; cloaked by what they feel is intuitively ‘right’ judges adamantly impose upon others the values, beliefs, and feelings that they themselves have grown up with.<sup>49</sup>

The Supreme Court’s landmark decision in *Brown v. the Board of Education*, exposed the concept of judicial bias in the context of racial discrimination.<sup>50</sup> Originally in *Plessy v. Ferguson*, the Court held that the Separate but Equal Doctrine was constitutional because theoretically it ensured equality.<sup>51</sup> However, it was not until the Supreme Court was forced to evaluate the findings of Dr. Kenneth Clark’s doll study that the Court began to understand how the separation of black children from white children was necessarily socially and psychologically harmful to black school children.<sup>52</sup> In Dr. Clark’s study white and black dolls were used in response to a series of questions that were meant to reveal the racial preferences of the children

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<sup>46</sup> See *infra* notes 48-65 and accompanying text.

<sup>47</sup> See *infra* notes 48-65 and accompanying text.

<sup>48</sup> John Stuart Mill, *The Collected Works of John Stuart Mill*. Gen. Ed. John M. Robson. 33 vols. Toronto: University of Toronto Press (1963-91) available at <http://www.iep.utm.edu/milljs/>.

<sup>49</sup> See *id.*

<sup>50</sup> See 347 U.S. 483 (1955).

<sup>51</sup> *Id.* at 490-91.

<sup>52</sup> See William J. Rich, *Betrayal of the Children with Dolls: The Broken Promise of Constitutional Protection for Victims of Race Discrimination*, 90 Cornell L. Rev. 419, 420 (2005).

studied.<sup>53</sup> Dr. Clark’s surprising discovery was that at a majority of different ages, the black children expressed a strong preference for white dolls.<sup>54</sup> The powerful imagery of the black children rejecting the black dolls and viewing them as “bad” and the belief that white dolls were “good” struck deep in the hearts of the Supreme Court Justices, thus encouraged to more deeply evaluate the effects of the deep-rooted and unconscious racism.<sup>55</sup> The Court was able to correlate that by rejecting the black dolls, black children were in a way, rejecting themselves.<sup>56</sup> In the end, it was through understanding “the effect” of racial segregation itself on public education, rather than “tangible factors”, that no doubt caused the Supreme Court to change its stance on the “Separate but Equal Doctrine”; and to thereby mitigate racial prejudice throughout the country.<sup>57</sup> Ironically, it was not until the Court empathetically viewed racism through the eyes of young black school children that the Court was finally able to recognize its own deep-seeded bias.<sup>58</sup>

*Brown v. the Board of Education* illustrates how ineffective the Court’s objective standard is because it only aims at deterring explicitly shown judicial bias rather than on encouraging empathy.<sup>59</sup> The Courts prior decisions in cases like *Plessy v. Ferguson* were probably not made out of explicit animosity toward black school children, but rather due to the powerful subconscious social misconceptions.<sup>60</sup> Stanford Law Professor Charles R. Lawrence III provides two explanations for the unconscious discriminatory beliefs and ideas utilizing social

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<sup>53</sup> *Id.*

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Brown*, 347 U.S. at 492-493. In this highly controversial issue the court asked and answered: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”*Id.*

<sup>58</sup> See *supra* notes 52-58 and accompanying texts.

<sup>59</sup> See *supra* notes 52-58 and accompanying texts.

<sup>60</sup> See *infra* notes 61-72.



science concepts.<sup>61</sup> The first is derived from Freudian theory which states that “the human mind defends itself against the discomfort of guilt by denying or refusing to recognize those ideas, wishes, and beliefs that conflict with what the individual has learned is good or right.”<sup>62</sup> For example, in the context of homophobia, homosexual prejudice has long been an integral part of our culture, especially a prevalent fear that homosexuality might rub off on children.<sup>63</sup> However, in the last decade or so society has begun to embrace that homophobia is immoral.<sup>64</sup> When someone like a judge experiences a conflict between prejudicial attitudes towards gays while also understanding the social ethics condemns those attitudes, the mind then excludes the judges prejudicial attitudes from conscious thought-process, because that is more comfortable.<sup>65</sup>

The second theory derives from cognitive psychology which demonstrates that culture, including the media, parents, peers, and authority figures transmit certain beliefs and preferences starting at birth.<sup>66</sup> Thus these beliefs are so deeply intertwined within a person’s culture and upbringing that these beliefs and preferences are not experienced as explicit lessons.<sup>67</sup> Rather they are deeply ingrained within a person and seem to be an intuitive part of how a person rationally organizes his or her perception of the world and of how the world should work.<sup>68</sup>

Another dilemma that seems to hold courts back from recognizing unconscious bias is that they appear to equate admitting the fact that judges are not impartial to admitting that no

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<sup>61</sup> Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 Stan. L. Rev. 317, 322-23 (1987).

<sup>62</sup> *Id.*

<sup>63</sup> *See infra* notes 73-83.

<sup>64</sup> *See infra* notes 84-103 and accompanying texts.

<sup>65</sup> *Lawrence*, *supra* note 61. This example stems from the original example that he provides in the context of racism.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

trial is or ever will be fair and thus completely eliminating judicial impartiality.<sup>69</sup> Judge Jerome Frank for the U.S. Court of Appeals for the Second Circuit demonstrates this fear stating:

If, however, ‘bias’ and ‘partiality’ be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions; and the process of education, formal and informal, creates attitudes in all men which affect them in judging situations, attitudes which precede reasoning in particular instances and which, therefore, by definition, are pre-judices.<sup>70</sup>

This then would explain why the Court focuses almost entirely on deterring the ‘appearance’ of impartiality rather than trying to deal with this inherent conflict posed by judicial unconscious prejudice entrenched in the heart of our legal system.<sup>71</sup> However, by avoiding this perplexing and overwhelming dilemma, justice is evaded for minorities like LGBT individuals, whose most fundamental autonomy and liberty rights regarding their families are substantial denied and demeaned by judges all across the country.<sup>72</sup>

#### ***IV. Judicial Integrity in the Context of LGBT Rights***

There is a long history of judicial prejudice towards LGBT individuals especially in the context of children and families.<sup>73</sup> Legislation like the Defense of Marriage Act (“DOMA”) even encourages states and federal government to deny same-sex couples legitimate and legal recognition.<sup>74</sup> Then in *Troxel v. Gransville*, not only does the Supreme Court refuse to recognize non-traditional families, but views them as almost a threat to the traditional nuclear family.<sup>75</sup> By

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<sup>69</sup> See *infra* notes 70-72; see also *Caperton* 556 U.S. 868.

<sup>70</sup> *In re J.P. Linahan, Inc.*, 138 F.2d 650, 651 (2d Cir. 1943).

<sup>71</sup> See Oakes & Davies *supra* note 39 at 579-585.

<sup>72</sup> See *infra* Part IV.

<sup>73</sup> See *supra* notes 74-103 and accompanying texts.

<sup>74</sup> Kris Franklin, *The "Authoritative Moment": Exploring the Boundaries of Interpretation in the Recognition of Queer Families*, 32 Wm. Mitchell L. Rev. 655, 663 (2006).

<sup>75</sup> See *Troxel* 530 U.S. at 63-65 (“The demographic changes of the past century make it difficult to speak of an average American family. The composition of families varies greatly from household to household. ... The nationwide enactment of nonparental visitation statutes is assuredly due, in some part, to the States' recognition of

failing to define non-traditional families and extend familial rights to LGBT individuals, the Supreme Court grants both a wide sea of interpretive opportunities to trial court judges in determining rights for these individuals.<sup>76</sup>

However, these interpretive opportunities provided to trial court judges are dangerous where our society has a long history of social and historical prejudice and bias towards the homosexual lifestyle, especially in light of public fear surrounding what effect homosexuality might have on children.<sup>77</sup> As a New York Court stated back in 1986, “some state courts, mostly in the southern and central portions of the United States, approach cases where homosexual parents seek custody ... from a position of overt homophobia.”<sup>78</sup> The Court was referring to a 1985 Virginia case where a father had openly admitted he was living in an active homosexual relationship.<sup>79</sup> The Supreme Court of Virginia imposed that: “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.”<sup>80</sup>

Again in 2002 Chief Justice Moore for the Alabama Supreme Court concluded denying a biological mother custody over her children even at the expense of leaving the children with their abusive father.<sup>81</sup> Chief Justice illustrates his outward disgust for homosexuals, articulating:

“Homosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an act so heinous that it defies one's ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child. To declare that homosexuality is harmful is not to make

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these changing realities of the American family. ...the State's recognition of an independent third-party interest in a child can place a substantial burden on the traditional parent-child relationship.”).

<sup>76</sup> Franklin, *supra* note 74 at 665-713.

<sup>77</sup> *Id* at 664-673.

<sup>78</sup> *M.A.B. v. R.B.*, 510 N.Y.S.2d 960, 965 (Sup. Ct. 1986).

<sup>79</sup> *Id.*

<sup>80</sup> See *Roe v. Roe*, 324 S.E.2d 691, 694 (1985).

<sup>81</sup> *Ex parte H.H.*, 830 So. 2d 21, 37 (Ala. 2002).

new law but to reaffirm the old; to say that it is not harmful is to experiment with people's lives, particularly the lives of children.”<sup>82</sup>

Sadly neither of these cases have yet been overturned.<sup>83</sup>

The Court has slowly been responding to alleviating prejudicial bias towards LGBT individuals.<sup>84</sup> There have been two main judicial actions that have extended the concepts of judicial integrity to LGBT individuals.<sup>85</sup> In 1999, sexual orientation was at last added to the list of biases prohibited by the Code.<sup>86</sup> Rule 2.3 under Canon 2 specifically states that:

A judge shall not, in the performance of judicial duties, *by words or conduct manifest bias or prejudice*, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, *sexual orientation*, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.<sup>87</sup>

From an ideal perspective, the fact that sexual orientation has now been added to the Code, would guarantee that judicial protection regarding the rights of persons with less traditional sexual orientations would be given high reverence in order to maintain judicial integrity for these individuals.<sup>88</sup> It would, hopefully, further mean that judges would dismiss their own personal bias or prejudice towards a person's sexual orientation as factors in performing their judicial duties.<sup>89</sup> However, these ideals are undermined by the examples provided in the commentary which only explicit examples of manifested judicial bias listed including: epithets, slurs,

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<sup>82</sup> *Id.*

<sup>83</sup> *See Roe v. Roe*, 324 S.E.2d at 691; *see also Ex parte H.H.*, 830 So. 2d at 21.

<sup>84</sup> *See infra* notes 86-103.

<sup>85</sup> *See infra* notes 86-103.

<sup>86</sup> Sparling, *supra* note 1 at .

<sup>87</sup> Model Code of Judicial Conduct § 2.3.

<sup>88</sup> *See supra* notes 31-35.

<sup>89</sup> *See supra* notes 28-35.

demeaning nicknames, negative stereotyping, hostile acts, etc; which ultimately do not deal with the most detrimental type of prejudice: subconscious prejudice.<sup>90</sup>

The second large judiciary action was the Supreme Court's landmark decision in *Texas v. Lawrence*, regarding LGBT rights in the criminal context of judicial decisions.<sup>91</sup> *Lawrence* both overturned its prior decision in *Bowers v. Hardwick* and it also recognized that statutes criminalizing sexual intimacy by same-sex couples constitutionally violates the Due Process Clause of the Fourteenth Amendment.<sup>92</sup> The importance of *Lawrence* in the context of judicial bias cannot fully be grasped without comparing the Court's own analysis previously illustrated in *Bowers*.<sup>93</sup> The Court corrects many of its prejudicial assumptions made in *Bowers* and breaks down its analysis into four main segments.<sup>94</sup>

The Supreme Court commences its analysis by recognizing its 'misapprehensions' in *Bowers* by failing "to appreciate the extent of liberty at stake."<sup>95</sup> In hindsight, the Court concedes that in *Bowers* they had limited the idea of sodomy to simply the right to engage in certain sexual conduct.<sup>96</sup> However, *Lawrence* recognizes that consensual sexual acts, regardless of sexual orientation, are linked with fundamental rights to engage in sexual intimacy and further the right of individuals to chose their own personal relationships, which the Court recognizes as a liberty, that at the very least should not be punished by criminal conduct.<sup>97</sup> The Supreme Court also denotes that the government interest in preserving tradition and public morality are not

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<sup>90</sup> Model Code of Judicial Conduct § 2.3, Comment [2].

<sup>91</sup> *Texas*, 539 U.S. at 564.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 577-578.

<sup>95</sup> *Id.* at 558.

<sup>96</sup> *Lawrence*, 539 U.S. at 558.

<sup>97</sup> *Id.*

legitimate when compared to the heavy stigma imposed on the LGBT minority via criminal statutes.<sup>98</sup>

In contrast to *Bowers* which viewed sexual orientation as a social stigma that puts homosexuals in the light of an outcast, the Court in *Lawrence* is beginning to recognize that homosexuals might not be so different from heterosexuals after all.<sup>99</sup> By minimizing the differences between homosexual acts of sexual intimacy and heterosexual acts of sexual intimacy, the Court appears to be comprehending that homosexuals have personal feelings, desires, and needs that are not so different from their own and therefore their needs are equally deserving of protection from government interference.<sup>100</sup> Thus linguistically and conceptually, *Lawrence* begins connecting the concepts of human dignity and autonomy with the rights to both choose one's sexual orientation and to also act in accordance with that choice.<sup>101</sup> The Court explicitly reiterates the importance of personal autonomy and liberty to all of its citizens:

“[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education...[t]hese matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State. Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>102</sup>

Lastly, the Court concedes that Justice Steven's analysis in his dissent in *Bowers* should have controlled in *Bowers*.<sup>103</sup> Justice Stevens had explicitly criticized the Court's flawed

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<sup>98</sup> *Id* at 577-578.

<sup>99</sup> *Id* at 567.

<sup>100</sup> *Id.*

<sup>101</sup> *Lawrence*, 539 U.S. at 567.

<sup>102</sup> *Id* at 575.

<sup>103</sup> *Id* at 578.

reliance on tradition and public morality, especially in contrast to individual decisions concerning the intimacies of physical relationships which he quickly recognized as vital “liberty” rights protected by due process.<sup>104</sup> In saving face, the Court defends that their early position was strongly “shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family.”<sup>105</sup> However, the Court concedes that, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”<sup>106</sup> Indeed *Lawrence* was critical to LGBT rights because it shows that the Court is recognizing that by adhering to rationales related to ‘tradition’ and ‘morality’, the Court was using the law to impose majority standard on the LGBT minority, thereby both stigmatizing them, and depriving them of their personal autonomy to chose freely.<sup>107</sup>

#### ***V. The Court’s Shortcoming in its Analysis in Lawrence***

While *Lawrence* uses flowery abstract language to facially acclaim ideal civil autonomy and liberty rights that LGBT individuals should hypothetically enjoy, the Court takes no explicit steps to ensure that LGBT individuals *can* actually enjoy these freedoms.<sup>108</sup> Utilizing autonomy concepts derived from *Planned Parenthood of Southeastern Pa. v. Casey*, the Court discerns that “marriage, procreation, contraception, family relationships, child rearing, and education” are intimate personal decisions that are “at the heart of liberty.”<sup>109</sup> And thus concludes “[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>110</sup> However, the court extends no explicit guidelines or precedent for lower courts to follow and thus ensure that LGBT individuals are able to enjoyed these supposed ‘sacred’ rights.<sup>111</sup> Therefore the main downfall in *Lawrence* is that while the Court realizes that stigma is attached when homosexual conduct is

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 571.

<sup>106</sup> *Lawrence*, 539 U.S. at 571.

<sup>107</sup> *Id.* at 574-575.

<sup>108</sup> *See infra* notes 109-132.

<sup>109</sup> *Lawrence*, 539 U.S. at 574.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

criminalized; it fails to realize that declining to extend equal civil protections and civil rights to LGBT individuals also stimulates social stigma against this minority.<sup>112</sup>

It is only Justice O'Connor who analyzes LGBT rights under the Equal Protection Clause of the Fourteenth Amendment.<sup>113</sup> She begins her analysis by asserting that where legislation inhibits personal relationships, the Supreme Court has been most likely to apply a rational basis of review under Equal Protection.<sup>114</sup> She further describes that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."<sup>115</sup> She points out that *Lawrence* is different from *Bowers* because the question before the court in *Lawrence* is: "whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy. It is not."<sup>116</sup> Her strong focus on utilizing public moral disapproval insinuates that perhaps moral disapproval is still a persuasive factor deterring the Majority from getting into an Equal Protection analysis in regards to LGBT individuals.<sup>117</sup>

Accordingly, the Majority's failure to extend an Equal Protection appears to be two-fold.<sup>118</sup> While the Supreme Court concedes that there is a tenable argument for striking down the Texas sodomy laws under an Equal Protection analysis, the Court fails to see that it would be relevant.<sup>119</sup> The Court contemplates that the two concepts are so closely linked, that Due Process analysis alone adequately answers both points and is a better mode for examining the substantive validity of stigma

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<sup>112</sup> *Id* at 575.

<sup>113</sup> *Id* at 579.

<sup>114</sup> *Lawrence*, 539 U.S. at 579.

<sup>115</sup> *Id*.

<sup>116</sup> *Id* at 582.

<sup>117</sup> *Id*.

<sup>118</sup> *See infra* notes 119-125.

<sup>119</sup> *Lawrence*, 539 U.S. at 574-575.



against homosexual conduct imposed by the Court's decision in *Bowers*.<sup>120</sup> The Court's reasons that "some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."<sup>121</sup> Thus suggesting that the Court's avoids an Equal Protection analysis due to a disparate impact fear; that states might try to impose laws that would not be neutral in both effect and application.<sup>122</sup>

However, Justice O'Connor's dissenting opinion suggests other intentions for the Court's failure to extend Equal Protection analysis to homosexuals as a protected class.<sup>123</sup> She infers that the Court's primary worry for extending Equal Protection to LGBT individuals is based upon a concern that extending Equal Protection rights to LGBT individuals would create a slippery slope that would open the door for gay marriage.<sup>124</sup> This seems to be of serious concern to the Majority as Justice O'Connor tries to reassure the Majority by analogizing that both "national security" and preserving the "traditional institution of marriage" would be legitimate state interests that would survive rational basis review under Equal Protection analysis.<sup>125</sup> However, the Majority likely rejects this reassurance since it seems like ludicrous to parallel these two interests together as equally important state interests, especially to any trial judges dealing with daily marriage dissolutions.

While the Supreme Court is correct in assessing that equality of treatment and the right to Due Process are connected to the same liberty rationales underlying the Fourteenth Amendment,<sup>126</sup> the Court errs in stating that a Due Process analysis advances both interests.<sup>127</sup>

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<sup>120</sup> *Id.* The Majority declares: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests." *Id.* at 575.

<sup>121</sup> *Id.*

<sup>122</sup> *See id.* at 575. Justice O'Connor defending that it is not necessary for the Majority to decide whether criminalizing sodomy laws might be neutral both in effect and application suggests that this was perhaps a worry of the Majority. *Id.* at 585.

<sup>123</sup> *Id.* at 585.

<sup>124</sup> *Lawrence*, 539 U.S. at 585.

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

<sup>126</sup> *See supra* notes 123-125.

<sup>127</sup> *See infra* notes 128-131.

While both get at reviewing the substance of the law and of legal discrimination, the Due Process Clause and the Equal Protection Clause have distinctive functions and therefore differ in the remedies that they provide.<sup>128</sup> The Substantive Due Process Clause, acts as check to limit government power exercised against fundamental liberties protected by the Fourteenth Amendment.<sup>129</sup> Unlike the Due Process Clause, the Equal Protection Clause, can also extend privileges and rights granted under the law to all people equally situated.<sup>130</sup> Unfortunately by evading analysis of Equal Protection (like to avoid discussing the topic of gay marriage) and by only analyzing LGBT rights in the context of Due Process criminal law, the Court winds up circumventing the very underlying principals fostered by the Fourteenth Amendment.<sup>131</sup>

## ***VI. Going Back to the Underpinnings of the Fourteenth Amendment***

The purpose of both clauses is incorporate the self-evident principles that our country was founded upon.<sup>132</sup> Elaborated upon in our Country's Declaration of Independence which establishes that "*all men are created equal . . . with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness--That to secure these rights, Governments are instituted . . .*".<sup>133</sup> The Court in *Yick Wo v. Hopkins*, explains these same types of policy concerns regarding citizens' rights lies as behind the fourteenth amendment protections:

[U]ndoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty...but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal

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<sup>128</sup> See *infra* notes 129-130.

<sup>129</sup> See *Roe v. Wade*, 410 U.S. 113 (1973) holding modified by *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833(1992) ("Where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake."); see also *Casey*, 505 U.S. 833(1992) ("Substantive liberties protected by Fourteenth Amendment are not limited to those practices, defined at the most specific level, that were protected against government interference by other rules of law when Fourteenth Amendment was ratified.").

<sup>130</sup> O'Connor 579-580; see also *United States v. Virginia*, 518 U.S. 515 (1996) ("Remedial decree must closely fit constitutional violation; it must be shaped to place persons unconstitutionally denied opportunity or advantage in position they would have occupied in absence of discrimination.").

<sup>131</sup> See *infra* notes 134-140.

<sup>132</sup> See *infra* notes 133-135.

<sup>133</sup> Weinstein *supra* note 25 at 10-11.

and civil rights; that all persons should be equally entitled to pursue their happiness...that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs...”<sup>134</sup>

Hence both the founding fathers and the earlier Supreme Court expounded that it is the role of the government to protect every person’s inalienable rights to life, liberty, and the pursuit of happiness; all concepts that protect the autonomy of citizens.<sup>135</sup> It is then the role of the judiciary to ensure that the government do not impede on these fundamental rights by personal or arbitrary discretion.<sup>136</sup> Sadly the judicial system seems to have lost sight of its original purpose, especially in the context of both recognizing and protecting the LGBT individuals to define their own families.<sup>137</sup> Courts are hence unable to protect the autonomy rights of minorities, if they refuse to recognize their own unconscious bias towards these minorities and thereby unconsciously impose ‘traditional’ majority views regarding family.<sup>138</sup>

Had the Court recognized Equal Protection rights in the context of both civil and criminal rights for LGBT individuals, current law in the context of LGBT family rights would likely look much different.<sup>139</sup> For example, the Court’s rationale in *Palmore v. Sidoti* regarding protecting the interests of young children would then be extendable to custody cases like *Nancy S. Michelle G.*<sup>140</sup> In *Palmore* the Court articulates: “The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years...The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest

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<sup>134</sup> *Yick Wo v. Hopkins*, 118 U.S. 356, 367-68 (1886).

<sup>135</sup> *Id* (“Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power.”).

<sup>136</sup> *See supra* notes 133-134 and accompanying texts.

<sup>137</sup> *See infra* notes 138-158.

<sup>138</sup> *See infra* notes 140-158.

<sup>139</sup> *See infra* notes 140-158.

<sup>140</sup> *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984).

for purposes of the Equal Protection Clause.”<sup>141</sup> In accordance with its duty to protect the interest of minor children, the Court refused to tolerate deeply held judicial private racist biases in the context of taking away a child from his or her caregiver.<sup>142</sup> More recent social science has articulated how much anguish children suffer when they are taken away from their caretakers as family law professor Nancy D. Polikoff explains:

When parents create a nontraditional family, that family becomes the reality of the child's life...Confusion and torn affection may occur in complex families, but these families can also be enriching and can provide great emotional and financial support for children. Courts that try to protect a child from ‘confusion and torn affection’ may believe they are acting in the best interests of the child, but this is a subjective standard. When parents create a nontraditional family, that family becomes the reality of the child's life. The child may experience some stigma, but courts should delegitimize, not condone, disparaging community attitudes. The courts should protect children's interests within the context of nontraditional families, rather than attempt to eradicate such families by adhering to a fictitious, homogenous family model.<sup>143</sup>

Thus, in the context of LGBT families, where many state courts fail to recognize non-traditional families or “de facto” parents<sup>144</sup>, not only are the children traumatized because they feel abandoned, but non-biological parents are deprived of the family they worked so hard to create. How can these then ‘former-parents’ truly pursue happiness when courts tell them that they are not entitled to something so fundamental to them as their own children? Michele in *Nancy S. vs. Michele G.* adequately expresses the importance of her children, “[t]hey were everything to me.”<sup>145</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.* However, it should be noted that the two primary differences is the context of racial discrimination versus sexual orientation discrimination and that the mother was the biological mother. *See id.*

<sup>143</sup> 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, 473 & 482 (1990).

<sup>144</sup> Marissa Wiley, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children*, 38 Hofstra L. Rev. 330-340 (2009).

<sup>145</sup> Herscher, *supra* note 6.

The failure of some states to recognize de facto parents is only one of the many complications that LGBT parents have to face when wondering what rights they have to the children they have raised as their own.<sup>146</sup> The larger problem is that there is no clarity in the law regarding dissolving LGBT families and what rights they have after their dissolution.<sup>147</sup> Since the Supreme Court has left the rights of non-traditional families undefined; decisions regarding children are completely left to the discretion of trial judges; subsequently most law regarding LGBT family rights is either silent or in an unresolved state.<sup>148</sup> For example, in *Margaret M. v. Janice K.*, a 2009 Maryland Court decision where the Maryland Court of Appeals, overturned lower court decisions, that had previously recognized de facto parent rights, stating that Margaret could have better protected her rights to her children through second parent adoption.<sup>149</sup> However, there is no explicit law in Maryland that guarantees that second parent adoptions will be recognized by Maryland courts.<sup>150</sup> In *Boseman v. Jarrell*, a 2010 North Carolina decision, Boseman tried protecting her parental rights to her non-biological children through second parent adoption in 2005.<sup>151</sup> However the North Carolina Supreme Court overturned previous lower court decisions recognizing second parent adoptions and held all second parent adoptions to be void in the state of North Carolina.<sup>152</sup>

Where there is no predictable law in regards to LGBT individuals legal rights to their children the dilemma becomes what happens if one party and/or the children move to another state? Or what happens if the family is simply traveling through a random state and there is a serious accident? Will that state have to recognize the non-biological parent's right to make

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<sup>146</sup> Wiley, *supra* note 144 at 320-321.

<sup>147</sup> *Id* at 362.

<sup>148</sup> See *supra* note 4 and accompanying text.

<sup>149</sup> *Janice M. v. Margaret K.*, 948 A.2d 73, 75 (2008).

<sup>150</sup> *Id* at 88-89.

<sup>151</sup> *Boseman v. Jarrell*, 704 S.E.2d 494 (N.C. 2010).

<sup>152</sup> *Id.*

decisions regarding the children if his or her partner dies or is incapacitated? In *Adar v. Smith*, a 2011 case, the Fifth Circuit found that the Louisiana registrar has no duty to give full faith and credit to the adoption decree of another state.<sup>153</sup> By not recognizing the sanctity of non-traditional families the Supreme Court has caused LGBT individuals legal rights regarding their families to be completely arbitrary; despite the court's policy that "there should be no arbitrary deprivation of life or liberty".<sup>154</sup> Surely there must be some great compelling reason for the Court to deny equal protection rights to gays in the context of LGBT individual's autonomy rights?

Judges failure to recognize their own unconscious bias in favoring of the institution of the heterosexual marriage and of the traditional nuclear family, has come at the expense of undermining two of the Court's highest priorities.<sup>155</sup> First the courts have failed to protect the interest of children of homosexual couples, by undoubtedly causing them personal trauma by not letting their second parent retain visitation rights, further the courts have also deprived them the additional emotional and financial support that goes hand in hand with having two caregivers.<sup>156</sup> Secondly, the Court ultimately undermines its own sacred duty to protect the rights and liberties of all individuals from government interference due to arbitrary and personal judicial bias.<sup>157</sup> Perhaps if judges were to consciously compare and weigh the ultimate costs caused by their lack of insight, the judiciary would likely see the need to rearrange its priorities.

## **VII. Resolution and Conclusion:**

The key for resolving the paradox of unconscious bias and still ensuring a fair trial is not as hard as the courts make it out to be. The problem is that the Court is looking in the wrong

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<sup>153</sup> *Adar v. Smith*, 639 F.3d 146, 176 (5th Cir. 2011) *cert. denied*, 132 S. Ct. 400 (U.S. 2011).

<sup>154</sup> *See supra* notes 102 & 153.

<sup>155</sup> *See infra* notes 156-157.

<sup>156</sup> *See supra* notes 140-145.

<sup>157</sup> *See supra* note 102.

place for the answer; the Court is obsessed with focusing on appearance and on providing objective fair process, rather than on striving for subjective fair and just outcomes.<sup>158</sup> The idea of subjectivity seems at first inherently incompatible with providing equal justice for all, however, the paradox is that *all law is subjective*.<sup>159</sup> As Supreme Court Justice Oliver Wendell Holmes Jr. eloquently explains in his book *The Common Law*, “[t]he life of the law has not been logic: it has been experience” and therefore “[y]ou can give any conclusion a logical form.”<sup>160</sup> Thus, the concept of a completely independent and impartial judiciary contains a logical fallacy because the human mind is inherently biased since judges are people that bring to the courtroom their own subjective experiences, upbringings and concepts of right and wrong.<sup>161</sup> Recognizing this logical fallacy does not dismantle judicial integrity, nor does it impair actual justice because justice itself is subjective.<sup>162</sup>

Judge Jack Weinstein on the Federal bench in New York illustrates how subjectivity is essential to making just judicial decisions stating, “[j]udges must have a window into life, into the hearts and minds of the people we serve, if we are to rule justly. Justices like Cardozo and Holmes recognized the need to candidly acknowledge the repressed biases and ignorance that often rule judicial decision making.”<sup>163</sup> Judge Weinstein further proposes that there are three elements of a just decision: “facts, law, and empathy” and he further articulates that “[o]ften, what people need most is a hearing, a forum, a sense that we understand their fears, needs and aspirations.”<sup>164</sup> Therefore judicial integrity is not furthered by a judge distancing himself from

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<sup>158</sup> See *supra* notes 36-44 and accompanying texts.

<sup>159</sup> See *infra* notes 160-173.

<sup>160</sup> Oliver Wendell Holmes, *The Common Law* at p.1 (1881).

<sup>161</sup> See *supra* Part III.

<sup>162</sup> See *infra* notes 163-173.

<sup>163</sup> Weinstein, *supra* note 25 at 152.

<sup>164</sup> *Id* at 28.

all external sources.<sup>165</sup> Conversely, it is furthered when judges bridge the gap between their own subjective experience and their understanding of other people's fears, needs, and aspirations and the subjective contexts in which they live their joys, pain, and worries that judges may ultimately be able to understand how their decisions truly impact the litigants they make rulings on behalf of.<sup>166</sup>

While this subjective rationale opposes the Supreme Court's objective "appearance of impropriety" standard, it seems to strangely correspond better with people's fundamental and inalienable rights in life, liberty and the pursuit of happiness as articulated by the Declaration of Independence and the liberty rationales underlying the Fourteenth Amendment.<sup>167</sup> All of these fundamental rights, "marriage, procreation, contraception, family relationships, child rearing, and education" which the Court view are at the "heart of liberty" and linked to justice are all autonomy rights which by definition means that they are *defined by one's own subjective conceptions and intentions*.<sup>168</sup>

Therefore in the context of family relationships, it is not the right of the government to define these fundamental autonomy rights such as 'family' through objective concepts like tradition, public morality, precedent, or objective procedural rules which actually only undermine the intentions of the Fourteenth Amendment and the maxims of our Constitution.<sup>169</sup> Rather, it is the job of the Court, in resolving conflicts in non-traditional families, to first look

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<sup>165</sup> See *id.*

<sup>166</sup> *Id.*

<sup>167</sup> See *supra* Parts II & VI.

<sup>168</sup> See *Lawrence*, 539 U.S. at 574.

<sup>169</sup> See *Yick Wo*, 118 U.S. at 370 ("But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws").



at the subjective intention of the parties in order to determine if the parties have defined themselves as a family, before resolving their grievances.<sup>170</sup>

While no set rules can ensure that judge will become more aware of how his decisions can affect litigants, the justice system can partner up with social science so that judges may become more aware of the consequential effects of their decisions. Social science can possibly be implemented into the judiciary system in many different ways, some examples could entail having judges attend educational classes, or hiring court house social science advisors, or by creating social science committees for reviewing court decisions. However, in the end, regardless of how, it is vital that judges work towards forcing themselves closer to understanding the plights of those that seek help from them, so that they may truly understand how to resolve litigants problems rather than exacerbating their problems out of ignorance. In conclusion, the judicial system needs to accept that a truly independent judiciary is not only impossible due to unconscious bias, but that failing to recognize unconscious bias is detrimental to judicial integrity itself. Furthermore, since judicial integrity is essential to justice, it is much too valuable to be put in the hands of the average person. Judges are given their positions because society holds them to higher standards and ideal than the average person. Thus, in turn, judges should live up to these higher expectations expected from them by the “sovereign people”, by delivering empathetic and just decisions to all people.

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<sup>170</sup> See *supra* notes 166-169 and accompanying text.