WHEN DISCIPLINES COLLIDE: POLYGAMY AND THE SOCIAL SCIENCES ON TRIAL

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This article draws on the Supreme Court of British Columbia's Reference re: Section 293 of the Criminal Code of Canada [the Polygamy Reference] as a concrete example of the benefits and limitations of intense judicial reliance on social science evidence in the adjudication of constitutional rights and freedoms at the trial level. By examining the evidence tendered, I suggest that the current adversarial model of adjudication is ill-suited to combining the legal and the social scientific endeavours. The divergent values, methodologies and objectives of the legal and scientific enterprises severely limit the benefits that the former can yield, thus compromising the effectiveness and utility of the courts for social groups whose claims are heavily grounded in non-legal evidence. Further, I argue that the vast amounts of contradictory evidence typically tendered in rights challenges, as well as the complex and controversial nature of Charter questions and the inevitable need for judges to adjudicate values, risk resulting in undue deference to the legislator, hinder the delivery of justice and ultimately undermine the raison-d'être of Charter litigation.

Cet article concerne le renvoi porté devant la Cour suprême de la Colombie-Britannique au sujet de l'article 293 du Code criminel [Polygamy Reference – renvoi sur la polygamie], qui constitue un exemple concret des avantages et inconvénients de l'utilisation intensive des éléments de preuve relevant des sciences sociales dans la détermination des droits et libertés constitutionnels en première instance. En examinant les éléments de preuve présentés, j'affirme dans cet article que le modèle actuel de règlement des litiges, qui repose sur l'approche accusatoire, se prête mal à la combinaison des démarches juridiques et de celles qui relèvent des sciences sociales. Les valeurs, méthodologies et objectifs divergents des démarches juridiques et scientifiques restreignent les avantages inhérents aux méthodes juridiques, ce qui compromet l'efficacité et l'utilité des tribunaux pour les groupes sociaux dont les revendications reposent en grande partie sur des éléments de preuve de nature non juridique. Je soutiens également que la multitude d'éléments de preuve contradictoires habituellement présentés dans les litiges mettant en cause des droits, conjuguée à la nature complexe et controversée des questions concernant la Charte et à la nécessité inévitable pour les juges de soupeser des valeurs, risque de se traduire par une trop grande déférence

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envers le législateur, de nuire à l'administration de la justice et, en bout de ligne, de saper la raison d'être des litiges fondés sur la Charte.

I. INTRODUCTION

Law is not a standalone discipline. On its own, legal reasoning rarely produces appropriate solutions to the complex social questions it is used to decide. Rather, courts and judges must look beyond the law in order to properly determine the content of individual rights and freedoms, especially when evaluating the effects of the law on particular groups. When adjudicating social policy in the context of a constitutional challenge, the social context is gleaned from non-legal sources, often in the form of evidence from the social sciences, that is, the work of those who study human behaviour. This article examines a concrete example of judicial reliance on this type of non-legal, or empirical, evidence by a trial court and identifies some of the many difficulties accompanying the practice — difficulties that may impact the fair resolution of rights disputes and challenges by socially marginalized litigants, whose cases will often be grounded in the social sciences, thus limiting the effectiveness and utility of rights litigation. The goal of this article is two-fold: to illustrate the virtues of using social science evidence in constitutional adjudication at the trial level and to draw out some of the obstacles that impede the law's ability to maximize the valuable contributions that the social sciences have on offer. It thus contributes to the lively discussion on the appropriate use of the social sciences in the courtroom and the vital importance of considering social context in accessing justice.

This article approaches these issues by examining a Canadian trial decision that typified the social sciences approach to judicial decision-making. In the *Polygamy Reference*, the British Columbia Supreme Court considered “several hundred” legal and social science materials in an advisory opinion upholding the criminal prohibition of polygamous marriage in Canada.¹ The decision is thus a striking example of the formation of an evidentiary record based on social facts. Moreover, in coming to his decision, Chief Justice Bauman struggled with characteristic difficulties encountered by trial judges evaluating the evidence of social scientists.

Determining the substantive content of *Charter* rights requires a factually-grounded analysis of the harms targeted by an impugned provision as well as its effects. Current constitutional adjudication presses judges to evaluate empirical evidence at the level of determining the content of rights and in the balancing of distinct rights required by section 1 of the *Charter*.² For decades, the Supreme Court of Canada has looked to social science evidence when assessing claims of unconstitutionality.³ This article, however, is premised on the belief that appellate decisions do not provide the ideal sample for exploring the judicial treatment of empirical evidence. Rather, the primary function of the reasons of reviewing courts is to offer guidance to trial judges, who confront the evidence head on and assess its ultimate

¹ *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para 32, [2011] BCJ no 2211 [*Polygamy Reference*].

² See Sujit Choudhry, “So What is the Real Legacy of Oakes? Two Decades of Proportionality Analysis under the Canadian Charter’s Section 1” (2006) 34:2 Sup Ct L Rev 501; Danielle Pinard, “Le droit et le fait dans l’application des standards et la clause limitative de la Charte canadienne des droits et libertés” (1989) 30:1 C de D 137.

³ See e.g. *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577 [*Irwin Toy*]; *RJR-MacDonald Inc v. Canada (Attorney General)*, [1995] 3 SCR 199, 127 DLR (4th) 1 [*RJR-MacDonald*].

value. The trial, then, aimed primarily at finding facts, is the best place to observe the interaction between the law and the social sciences. The evidentiary record created at trial informs not only the trial judge's decision, but also, with rare exceptions, the factual basis for appellate review. Evidence tendered, including that of social scientists, thus has its greatest impact at the first instance. In attempting to understand facts — the very things that social science evidence is meant to illuminate — the appellate court is the wrong place to look.⁴

The significance of first instance courts provides the basis for the object of the present study, as does the vast amount of social science evidence and literature relied on therein. The *Polygamy Reference* provides a recent and practical example of the usefulness of the social sciences to the law and assists in responding to some common criticisms of judicial reliance on non-legal evidence. Further, the decision also demonstrates some of the typical limitations of non-legal evidence in the courtroom and, in some cases, the resulting hindrances to the just resolution of constitutional disputes about social issues. For example, as I develop below, the *Polygamy Reference* illustrates the diverging concepts of truth, as understood by social scientists and by litigators, and the limits of scientific research prepared exclusively for litigation. It also provides a compelling example of the idea that our system of party-based adjudication is not the best way of resolving the polycentric issues which typically characterize *Charter* challenges.

The *Polygamy Reference* evaluated the constitutionality of the criminal prohibition of polygamous marriage in Canada.⁵ Chief Justice Bauman endeavoured to determine whether the impugned provision violates the *Charter* guarantees of religious freedom, freedom of expression and association, freedom from discrimination and the protection of life, liberty and security of the person.⁶ The volume of evidence was tremendous, consisting of more than 90 affidavits, 22 of which were presented by experts in a wide range of social science disciplines, as well as several hundred articles, books and DVDs.⁷ According to a 20-page appendix to the decision listing all of the materials submitted, the Chief Justice dealt with almost 300 non-legal documents. The discussion of the evidence, excluding its application to the relevant constitutional principles, spans 718 paragraphs of the total 1,367 paragraphs of the decision. Although he determined that criminalization violates the religious freedom of fundamentalist Mormons as well as the security of the person of members of the religious community aged under 18, Chief Justice Bauman concluded that, save for its effect on children, the prohibition, based primarily on its goal of preventing the proven harms of polygamous marriage, is constitutionally justified.

Part II of this article draws on the *Polygamy Reference* to illustrate some of the virtues of judicial reliance on social science evidence in adjudicating controversial social questions and attempts to respond to some of the common criticisms of the practice. Part III then highlights some of the ways in which the law and the social sciences make poor companions in the courtroom. Based on an in-depth review of the *Polygamy Reference*'s use of non-legal evidence, I suggest that the divergent values and

⁴ Jerome Frank, "A Plea for Lawyer-Schools" (1947) 56:8 Yale LJ 1303 at 1311. See also *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 (on the fundamental role of the trial judge in evaluating evidence of social and legislative facts).

⁵ *Criminal Code*, RSC 1985, c C-46, s 293.

⁶ *Canadian Charter of Rights and Freedoms*, ss 2(a), 2(b), 2(d), 15, 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*].

⁷ *Polygamy Reference*, *supra* note 1 at paras 28, 29, 32.

objectives of the law and the social sciences limit the benefits that the latter can yield in the delineation of constitutional freedoms. In Part IV, I argue that the vast amount of conflicting and contradictory evidence tendered in the case illustrates how the current model of adversarial proceedings is ill-equipped to deal with the multifaceted nature of *Charter* litigation and the volume of issues that rights litigation generally raises. Finally, I attempt to show that the value judgments inherent in adjudicating social policy risk resulting in undue deference to the legislature.

The *Polygamy Reference* has already attracted scholarly commentary, with interests ranging from the decision's cultural implications,⁸ to the racialization of marital forms⁹ and the regulation of polygamy from a feminist constitutional approach.¹⁰ Other commentators have examined the appropriateness of a trial-level reference as opposed to the typical appellate reference,¹¹ in which a provincial legislature asks the province's court of appeal for its opinion on a legal matter, usually proposed or contentious legislation.¹² While the latter issue is relevant to the present discussion — the fact that the case was a reference justified Chief Justice Bauman's "liberal approach to admissibility"¹³ — the focus of this paper is on the general difficulties inherent in using social science evidence when adjudicating legal questions of sensitive social policy, with the *Polygamy Reference* as a fitting example.

This paper therefore has implications beyond the constitutional reference, or challenge. In family law, for example, social science evidence is often useful in determining questions of custody and support.¹⁴ In indigenous matters, parties often rely on the evidence of historians in forming the historical and geographical bases for their claims.¹⁵ Likewise, the fate of linguistic rights litigation will often depend on the historical record, as established by social scientists.¹⁶ The pursuit of justice often rests on the ability of legal actors to deal with complex facts and non-legal evidence. Thus, my reading of the *Polygamy Reference* and my conclusion that the law has a long way to go before it can make proper use of the social sciences is applicable beyond the context of the particular case.

II. SOCIAL SCIENCES AND LAW: CONTRIBUTIONS AND CRITICISMS

Socio-legal theorists maintain that one of the contributions of the social sciences and sociology in particular to the study of criminal law is a unique ability to situate phenomena in their social, cultural

⁸ See e.g. Carissima Mathen, "Reflecting Culture: Polygamy and the Charter" (2012) 57 Sup Ct L Rev (2d) 357.

⁹ See e.g. Joanna Sweet, "Equality, Democracy, Monogamy: Discourses of Canadian Nation Building in the 2010-2011 British Columbia Polygamy Reference" (2013) 28:1 CJLS 1.

¹⁰ See e.g. Beverley Baines, "Polygamy and Feminist Constitutionalism" in Beverley Baines, Daphne Barak-Erez & Tsvi Kahana, eds, *Feminist Constitutionalism: Global Perspectives* (Cambridge: Cambridge University Press, 2012) 452.

¹¹ See e.g. Michael Da Silva, "Trial Level References: In Defence of a New Presumption" (2012) 2:2 UWO Journal of Legal Studies 4.

¹² "The Lieutenant Governor in Council may refer any matter to the Court of Appeal or to the Supreme Court for hearing and consideration, and the Court of Appeal or the Supreme Court must then hear and consider it." *Constitutional Question Act*, RSBC 1996, c 68, s 1. Accord *Supreme Court Act*, RSC 1985, c S-26, s 53.

¹³ *Polygamy Reference*, *supra* note 1 at para 46.

¹⁴ See e.g. *Willick v Willick*, [1994] 3 SCR 670, 119 DLR (4th) 405.

¹⁵ See e.g. Arthur J Ray, "Ethnohistorical geography and aboriginal rights litigation in Canada: Memoir of an expert witness" (2012) 55:4 The Canadian Geographer 397.

¹⁶ See e.g. Mark C Power, François Larocque & Darius Bossé, "Constitutional Litigation, the Adversarial System and some of its Adverse Effects" (2012) 17:2 Rev Const Stud 1.

and historical context.¹⁷ In the *Polygamy Reference*, evidence was presented by historians, sociologists, anthropologists, evolutionary psychologists, economists, family demographers and religious scholars in an effort to establish the historical context of the practice of polygamy both globally and in Canada.¹⁸ Justifying his generous approach to admissibility, Chief Justice Bauman remarked on the potential impact of *Charter* cases and the consequent judicial expectation of and insistence on “the careful preparation of and presentation of a factual basis.”¹⁹ Accordingly, “[t]he relevant facts put forward [covered] a wide spectrum dealing with scientific, social, economic and political aspects.”²⁰ Thus, the case evinces the arguments of proponents of the social sciences approach to law, who maintain that constitutional reasoning which does not examine the social reality of the law lacks both comprehensiveness and transparency.²¹

In addition to context, the social sciences are useful in terms of their methods and methodology. Social scientists carry out significant amounts of empirical research with sociologists in particular gathering vast amounts of data aimed at discovering “what is actually going on in the world.”²² This empirical research was invaluable to Chief Justice Bauman’s analysis, without which, any substantial inquiry into the observable effects of the impugned provision would have been illusory. Some of that evidence consisted of statistical analysis and raw data regarding, for example, the incidence of teen births in fundamentalist Mormon communities.²³ Moreover, sociologists have a proclivity for studying socially marginalized groups, or sub-cultures, which other disciplines tend to avoid.²⁴ This aspect of the social sciences proved essential to the analysis; while the record was vast by the standards of court proceedings, the fact that it embodied “the bulk of contemporary academic research into polygamy”²⁵ indicates the limited scholarly attention polygamy has attracted. The constitutional analysis would have been severely lacking were it not for the sociological penchant for examining subjects outside of the mainstream.

The *Polygamy Reference* illustrates another way in which differences between the sociological perspective and those of other disciplines are useful to courts. Where many disciplines, such as economics and psychology, are more individualistic, sociology begins with the premise that individuals are socially-determined, thus making it the ideal framework from which to examine the global effects or effectiveness of a law.²⁶ The sociological inquiry into how individuals interact with their environment enabled Chief Justice Bauman to inquire not only into the situations of individual men and women, but to conduct a more global evaluation of the vulnerabilities of members of polygamous communities, as the focus of the *Polygamy Reference* was not limited to the effects of polygamy on individuals. Nor was

¹⁷ Calvin Morrill *et al*, “Seeing Crime and Punishment Through a Sociological Lens: Contributions, Practices, and the Future” (2005) U Chicago Legal F 289 at 295.

¹⁸ *Polygamy Reference*, *supra* note 1 at paras 146-233, 234-336, 337-467.

¹⁹ *Ibid* at para 51, citing *Mackay v Manitoba*, [1989] 2 SCR 357 at 361-362, 61 DLR (4th) 385.

²⁰ *Ibid*.

²¹ Tracey L Meares & Bernard E Harcourt, “Forward: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure” (2000) 90:3 J Crim L & Criminology 733 at 739.

²² Morrill *et al*, *supra* note 17 at 302.

²³ *Polygamy Reference*, *supra* note 1 at paras 710-725.

²⁴ Morrill *et al*, *supra* note 17 at 303.

²⁵ *Polygamy Reference*, *supra* note 1 at para 27.

²⁶ Morrill *et al*, *supra* note 17 at 315.

the analysis limited to its effects (and those of the prohibition) on fundamentalist Mormons as a group, or on portions of the group, such as teenaged girls or young men. Rather, a significant portion of the reasons dealt with the potential effects of legal polygamy on Canadian society at large.²⁷ This evidence-based analysis suggests that constitutional decision-making about social realities will necessarily be more compelling where it relies on established social facts arrived at through scientific research.²⁸

Naturally, the social sciences approach to the law is not without its detractors. Critics claim that judicial reliance on empirical research is a mask behind which judges can assert political ideologies and agendas.²⁹ Instead of informing judicial decisions, reliance on the social sciences serves a legitimizing function for deciding cases in a particular way and the use of social science evidence is regarded as a justification for judicial statements of personal beliefs and preferences.³⁰ While proponents of the socio-legal approach admit that courts have a tendency to employ rhetorical statements to confer a sense of authority on their decisions, they maintain that actual reliance on social science data — where decision-makers properly examine the empirical evidence — in fact makes for more transparent decision-making. It forces judges to be honest regarding the inescapable value judgments that they must make, thus rendering them more accountable.³¹ Instead of employing normative constitutional theory, which purports to guide and reform social action, decision-makers should look at the empirical evidence and base their legal decisions on what they see;³² social realities should guide the decision-making process and not the reverse. Where traditional constitutional theory attempts to offer a “data-free method of deciding cases,” what is needed is a constitutional law which actually employs the relevant social facts.³³

Chief Justice Bauman’s exhaustive analysis demonstrates this understanding of the evidentiary needs of litigating social issues. In order to reach an appropriate result, it was necessary to undertake an in-depth examination of the actual effects of polygamous marriage, both on individuals and the collective. A traditional argument by analogy or distinction would simply not have been an adequate means of reaching a suitable result. Presumably, like most lawyers and judges, Chief Justice Bauman did not have extensive or advanced training in the social sciences. Thus, in relying on the social science data, he acknowledged his shortcomings and the practical impossibility of arriving at a sensible result by employing constitutional reasoning alone. As he acknowledged, “[d]etermining the actual salutary and deleterious effects of an infringement of a *Charter* right ... calls for more than a hypothetical or

²⁷ See e.g. *Polygamy Reference*, *supra* note 1 at paras 13, 14.

²⁸ Peter W Sperlich, “Social Science Evidence and the Courts: Reading Beyond the Adversary Process” (1980) 63:4 *Judicature* 280 at 289. See also Christian Atias, *Épistémologie juridique*, 1st ed (Paris: Dalloz, 2002) (on the utility of non-legal disciplines in determining legal rules at 106).

²⁹ Meares & Harcourt, *supra* note 21 at 739, citing Dean M Hashimoto, “Science as Mythology in Constitutional Law” (1997) 76:1 *Or L Rev* 111.

³⁰ Richard Lempert, “‘Between Cup and Lip’: Social Science Influences on Law and Policy” (1988) 10:2, 3 *Law & Pol’y* 167 at 188-190. See also Niels Petersen, “Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication” (2013) 11:2 *International Journal of Constitutional Law* 294 at 295.

³¹ Meares & Harcourt, *supra* note 21 at 739.

³² Richard A Posner, “Against Constitutional Theory” (1998) 73:1 *NYL Rev* 1 at 3.

³³ *Ibid* at 18.

theoretical analysis.”³⁴ Thus, the *Polygamy Reference* exemplifies the weight which non-legal data can and often should carry in constitutional decision-making.

III. SOCIAL SCIENCE AND LAW: A DISCIPLINARY CLASH

The *Polygamy Reference* also exposes some of the many problems inherent in judicial reliance on expert testimony about human behaviour. This Part draws on the trial judge’s reasons to advance the argument that a strong theoretical disconnect between the two disciplines limits the law’s ability to obtain the answers it seeks in determining the scope of constitutional freedoms. In particular, the current adversarial model for interpreting constitutional rights fails to bridge this disciplinary divide.

A. Truth versus Persuasion

The *Polygamy Reference* illustrates that the challenges judges face when adjudicating social questions under the *Charter* are often due, in large part, to the conflicting or inconclusive nature of social science evidence and the “empirical uncertainty” surrounding the infringement of individual rights.³⁵ The evidence tendered in the case suggests that this demonstrated uncertainty stems in part from the fact that lawyers and social scientists have entirely different objectives, and consequently, employ wholly differing conceptions of truth. Truth in science is simply not the same as the truth sought by legal actors. It follows that expert testimony, the typical vehicle by which the law employs the social sciences, is the ideal place to “observe the clash of legal and scientific conventions”³⁶ When two creatures — here, the legal and the social scientific endeavours — do not speak the same language, their ability to communicate effectively will necessarily be limited.

The traditional idea that judges seek to uncover the truth is a romantic one that lies at the heart of the adversarial system. Through testimony and cross-examination, it is said, the weaknesses in a party’s arguments will come to light and the truth will ultimately shine through.³⁷ Social scientists draw an analogy with market theory, and have described an “Invisible Hand [that] guides the process toward the maximum production of truth.”³⁸ This idealization of the adversarial process is, of course, purely myth. Critics write that rather than reveal it, the adversarial system, by means of its “rules and devices,” does more to defeat the development of the truth, as jurists who claim to be seeking the truth are actually involved in a game of self-deception.³⁹ This dishonesty stems from the nature of the advocate’s role, wherein the representation of the client’s interests prevails over the revelation of the truth at any cost. Truth in the adversarial system, then, rather than the goal of litigation, becomes a “convenience, a byproduct, or an accidental approximation.”⁴⁰ Referring to the advocate, Justice Frankel wrote that “[h]is is not the search for truth as such.”⁴¹ Rather, in many cases, “truth and victory are mutually

³⁴ *Polygamy Reference*, *supra* note 1 at para 50.

³⁵ Choudhry, *supra* note 2 at 525.

³⁶ Joseph Sanders, “Science, Law, and the Expert Witness” (2009) 72:1 Law & Contemp Probs 63 at 63.

³⁷ Marvin E Frankel, “The Search for Truth: An Umpireal View” (1974) 123:5 U Pa L Rev 1031.

³⁸ J Morgan Kousser, “Are Expert Witnesses Whores? Reflections on Objectivity in Scholarship and Expert Witnessing” (1984) 6:1 The Public Historian 5 at 15.

³⁹ Frankel, *supra* note 37 at 1034, 1036.

⁴⁰ *Ibid* at 1037.

⁴¹ *Ibid*.

incompatible.”⁴² This type of sentiment is common among social science scholars who have experienced the trial process as expert witnesses.⁴³ Thus, the gap between the legal result and our traditional understanding of the truth is the product of a combination of factors, including the lawyer’s task of achieving victory for the client. Unlike the truth-seeking goals of scholarship and science, advocacy is concerned primarily with persuasion.⁴⁴ The courtroom is less about truth-seeking, and more a place where persuasion is central.⁴⁵ Evidence, including that of social scientists, is not meant to uncover scientific truths, but to persuade the judge of the correctness of one’s case.

On par with persuasion is the paramount role of procedure in the courtroom, even where it hinders the production of truth.⁴⁶ In legal proceedings, competing interests such as privacy, stability, speed and cost are equal, if not more important, goals than truth-seeking.⁴⁷ It is rare, in fact, that parties to court proceedings will want their witnesses to “give *the whole truth*.”⁴⁸ Instead, lawyers may employ evidentiary tools and strategies designed to distort or block its revelation. The primacy of persuasion and procedural norms is simply a part of the legal culture’s ethos. Truth, then, is but one of the priorities of the adversarial system, and not a high-ranking one. But the inferior status of truth in law is weakened even further when the legal system’s understanding of the truth is compared with that of the scientific endeavour.

B. A Conflict of Values

The differing conceptions of truth among lawyers and social scientists are visible at the levels of objectives, methodology and the overall values of the two systems. Deep tensions have been identified between the objectives and values of the scientific enterprise and the legal culture.⁴⁹ Among the sources of friction is the idea that the inquisitive goal of the sciences — the essence of scientific inquiry — is incompatible with the adversarial nature of adjudication. Whereas the aim of litigation is to resolve a particular dispute through a sound evidentiary basis, the goal of scientific inquiry is to discover answers and to produce knowledge.⁵⁰ Scientific inquiry begins with a question and seeks evidence by which to find the answer; advocacy begins with a position to be defended and gathers all of the evidence in its

⁴² *Ibid.*

⁴³ See e.g. Kousser, *supra* note 38; David Rosner, “Trials and Tribulations: What Happens When Historians Enter the Courtroom” (2009) 72:1 Law & Contemp Probs 137.

⁴⁴ Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge: Belknap Press of Harvard University Press, 1994) at vii.

⁴⁵ Herbert M Kritzer, “The Arts of Persuasion in Science and Law: Conflicting Norms in the Courtroom” (2009) 72:1 Law & Contemp Probs 41 at 43.

⁴⁶ See Richard O Lempert, “Built on Lies: Preliminary Reflections on Evidence Law as an Autopoietic System” (1998) 49:2 Hastings LJ 343 at 353.

⁴⁷ Mirjan Damaška, “Truth in Adjudication” (1998) 49:2 Hastings LJ 289 at 301.

⁴⁸ *Ibid* [emphasis in original].

⁴⁹ Susan Haack, “Irreconcilable Differences? The Troubled Marriage of Science and Law” (2009) 72:1 Law & Contemp Probs 1 at 2 [Haack, “Irreconcilable Differences?”]. Although Professor Haack’s writings deal primarily with the natural sciences and their role in private litigation, this research posits that her observations are readily applicable to the use of social science evidence in constitutional adjudication.

⁵⁰ Alexander Bird, “The Epistemology of Science—a Bird’s-Eye View” (2010) 175:1 Synthese 5.

favour.⁵¹ At best, then, legal inquiry, where it aims to seek out evidence in favour of an advocate's position — what one author describes as “advocacy research” — is more “a kind of pseudo-inquiry” than a quest for real answers.⁵²

Further, the scientific search for answers fosters a sense of honesty with oneself and with colleagues, which is often lacking among advocates making their case. This honesty about what the evidence uncovers is typically accompanied by a willingness to share that evidence with colleagues in the field and gives rise to the accepted scientific values of “disinterestedness” and “communism.”⁵³ Advocacy, by its nature, is far from disinterested. Legal concepts such as mandatory disclosure in criminal law and discovery in civil matters — the very idea that communication between parties is so rigidly regulated and often only the product of a statutory obligation — could hardly be compared to the sense of community with which some characterize the scientific endeavour. And although this idealized view of the scientific endeavour and its categorical distinction from the legal enterprise may, at times and in practice, be difficult to maintain, the fact remains that the sciences and the legal system have very different attitudes toward the gathering of evidence⁵⁴ — a difference that becomes quite apparent once the two undertakings enter the courtroom.

A reading of the *Polygamy Reference* brings out a further vital difference between science and law: the legal preoccupation with the prompt resolution of disputes. Where scientists seek the “resolution” of controversies, lawyers aim for the “termination” of legal disputes, which “occurs when nonepistemic factors, such as an authoritative ruling by some official agency, brings to end a controversy.”⁵⁵ By contrast, the resolution of scientific questions is open-ended and is only reached once the interested parties agree; the process can be a long one. Moreover, legal disputes on contentious social issues such as polygamy tend to raise unsettled social science questions and questions that simply do not lend themselves to clear answers. Whereas the law seeks finality, social facts about patterns of behaviour are rarely immutable or static.⁵⁶ Therefore, because the legal system values closure, it will often seek answers to unsettled scientific questions,⁵⁷ for the judiciary does not wish and cannot be expected to wait for scientific agreement before resolving a dispute. Of course, this attitude directly conflicts with the scientific tradition that closure only occurs once a consensus is formed, however long that may take.⁵⁸

While the legal system may content itself with reliance on evidence of unresolved theories, social scientists well-versed in the adjudicative process are less keen to reduce the fruits of their research to final answers that favour one party's case. Experienced political science experts have expressed

⁵¹ Haack, “Irreconcilable Differences?”, *supra* note 49 at 13.

⁵² Susan Haack, “What's Wrong with Litigation-Driven Science? An Essay in Legal Epistemology” (2008) 38:3 Seton Hall L Rev 1053 at 1071 [Haack, “Litigation-Driven Science”].

⁵³ Haack, “Irreconcilable Differences?”, *supra* note 49 at 9.

⁵⁴ Haack, “Litigation-Driven Science”, *supra* note 52.

⁵⁵ Sanders, *supra* note 36 at 70.

⁵⁶ See Donald L Horowitz, *The Courts and Social Policy* (Washington: The Brookings Institution, 1977) at 274.

⁵⁷ Haack, “Irreconcilable Differences?”, *supra* note 49 at 16. Accord Jonathan Yovel & Elizabeth Mertz, “The Role of Social Science in Legal Decision” in Austin Sarat, ed, *The Blackwell Companion to Law and Society* (Malden: Blackwell Publishing, 2004) 410.

⁵⁸ Sanders, *supra* note 36 at 73.

concerns over the use of their evidence in the courtroom, writing that the legal search for truth is not a consensus-building exercise.⁵⁹ For example, giving expert testimony is a very different experience from presenting one's research at a professional conference, where a colleague may provide constructive criticism or complimentary feedback, the latter of which is not expected from opposing experts in the courtroom.⁶⁰ Even where scientific colleagues may express disagreement with the work of others, disagreement tends to be centred on conclusions, or even research methods. Rarely is criticism aimed at undermining a colleague's credibility or professionalism, as is normally the case on the witness stand. Likewise, historians lament the speed and finality of the trial, in contrast with the common practice of scholars who may modify their perspective based on peer review and criticism from colleagues. The trial has been described as "a one-shot affair, [where] one goes from expression to publication without circulation, copy-editing, or galley proofs."⁶¹ Because what is said during testimony immediately becomes part of the evidentiary basis for the decision, the lengthy contemplation of one's insights — a routine part of scholarship — is necessarily reduced for an expert witness,⁶² at least where the subject of expert testimony has not been researched prior to the litigation, as discussed below. It is easy to imagine how this type of fast-tracking of the scientific process will not produce the same results that researchers might arrive at in their natural habitats.⁶³

Expert witnesses bemoan not only the adversarial method of presenting their evidence, but also the ways that it is employed by advocates. In presenting the evidence of social scientists, lawyers are perceived as valuing complexity and confusion over the clarity and precision which the witness's work is designed to bring.⁶⁴ For example, the ways in which lawyers use historical evidence change the historian's role. In questioning expert witnesses and historians in particular, lawyers tend to hone in on specific issues, framing questions narrowly, so as to elicit limited and focused responses. For one historian, this type of questioning "undermines the historian's autonomy and ability to cast a wide net, to contextualize or to place events in a deeper historical context."⁶⁵ Instead, historians may be called to testify as a tactic for obscuring and confusing the historical record.⁶⁶ Litigation thus prevents historians from actually doing history in the courtroom: "The essential attributes that we treasure most about historical inquiry have to be left outside the door. The scope of analysis is narrowed, the imagination is constrained, and the curiosity, curtailed."⁶⁷ Historical evidence, then, is often not used for enlightenment. Rather, historians describe a practice of creating historical doubt and ignorance about the

⁵⁹ See Richard L Engstrom & Michael P McDonald, "The Political Scientist as Expert Witness" (2011) 44:2 Political Science and Politics 285.

⁶⁰ *Ibid.*

⁶¹ Kousser, *supra* note 38 at 16.

⁶² *Ibid.*

⁶³ For a fuller discussion of the limits of public law adjudication and heavy reliance on unsettled historical evidence see Power, Larocque & Bossé, *supra* note 16.

⁶⁴ See Rosner, *supra* note 43.

⁶⁵ David J Rothman, "Serving Clio and Client: The Historian as Expert Witness" (2003) 77:1 Bulletin of the History of Medicine 25, cited in *ibid.*

⁶⁶ *Ibid.* at 151.

⁶⁷ *Ibid.*, citing Rothman, *supra* note 65.

past.⁶⁸ As my reading of the *Polygamy Reference* suggests, the distortion of social science research by the legal system is not limited to the use of historical evidence. Rather, it is one of the natural consequences of the divergent purposes and principles of different intellectual disciplines.⁶⁹

The judiciary is, of course, conscious of the demonstrated gaps between the law and the sciences and the limitations inherent in combining the two. In *R. v. Marshall*, Justice Binnie attempted to respond to academic criticism about the way trial judges use evidence of indigenous history to justify their decisions, acknowledging that “the law sees a finality of interpretation of historical events where finality, according to the professional historian, is not possible.”⁷⁰ Recognizing that the role of the courts is to find the historical facts required for the resolution of a dispute, Justice Binnie explained that the parties “cannot await the possibility of a stable academic consensus.”⁷¹ The decision does not, however, explain why the discrepancies between science and law continue to be the subject of complacency among legal actors. In light of the demonstrated disconnect between the legal and scientific endeavours, this article suggests that the courts need a better way to employ the evidence of social scientists, for the utility of the social sciences to the law can only be maximized once the gap between the two undertakings is narrowed.

C. The Conflict in Practice

The *Polygamy Reference* was emblematic of the clash between the scientific and legal endeavours. As mentioned, the evidence tendered represented the majority of contemporary academic research on the subject. Dozens of experts were called by all of the parties, which included not only the Attorneys General of Canada and British Columbia and the court-appointed *amicus curiae*, but also eleven interveners. It was inevitable that Chief Justice Bauman would face a lack of consensus. And it was improbable, at best, that the adversarial process would yield any sort of truth about the harms of polygamy. Moreover, a portion of the principal research presented was conducted for the sole purpose of testifying at trial. Dr. Joseph Henrich, for example, was the main witness called by the Attorney General of British Columbia. A psychology professor, Dr. Henrich was qualified, for the purposes of the case, “as an expert in psychology, particularly evolutionary psychology, in economics and in anthropology, as well as in the interdisciplinary field of culture, cognition and co-evolution.”⁷² Although he had never written about polygamy prior to studying the subject for the case, Chief Justice Bauman accepted his report, which was the product of a four-month review of the existing social science literature on polygamy.⁷³

⁶⁸ Rosner, *supra* note 43 at 157, citing Robert N Proctor, “‘Everyone Knew But No One Had Proof: Tobacco Industry Use of Medical History Expertise in US Courts’ tobacco industry use of medical history expertise in US courts, 1990-2002” (2006) 15 Tobacco Control (4:iv)117 at 118.

⁶⁹ See Damaška, *supra* note 47 (further discussing the ill-suitedness of the conceptual instruments of other intellectual genres to adjudicative fact-finding).

⁷⁰ *R v Marshall*, [1999] 3 SCR 456 at para 37, 177 DLR (4th) 513 [*Marshall*], cited in Arthur J Ray, “Ethnohistory and the Development of Native Law in Canada: Advancing Aboriginal Rights or Re-inscribing Colonialism?” in Frederica Wilson & Melanie Mallet, eds, *Métis-Crown Relations* (Toronto: Irwin Law, 2008) 1 at 3.

⁷¹ *Marshall*, *supra* note 70 at para 37.

⁷² *Polygamy Reference*, *supra* note 1 at para 495.

⁷³ *Ibid* at paras 537, 496.

Dr. Henrich's evidence is precisely the kind of practice that scholars in legal epistemology condemn. In her discussion of the complex relationship between the law and the sciences, Professor Haack writes of "litigation-driven science," or, "advocacy research."⁷⁴ As a product of the legal system and the sciences combined, litigation-driven science lacks many of the qualities of traditional science. Having been retained solely for the purpose of researching a specific and pointed question — the purported harms of polygamy — Dr. Henrich's research was necessarily limited. Based on their experiences as expert witnesses, social scientists have written that this type of party-commissioned research is not reflective of the scientific enterprise; the power to determine a scientific line of inquiry is the "critical distinction" between research conducted for litigation and traditional scholarly research.⁷⁵ In the courtroom, the expert's role is to answer only the questions he or she is asked. Expert knowledge, then, becomes moulded or contrived to suit the narrow issue before the court, demonstrating the argumentative nature of social science evidence once it enters the courtroom.⁷⁶

Research prepared solely for the purposes of litigation is thus necessarily suspect, especially when examined in light of the differences between the traditional scientific endeavour and the courtroom process. In evaluating the admissibility of Dr. Henrich's testimony, the judge acknowledged that his research was prepared solely for trial. Nevertheless, Chief Justice Bauman wrote that Dr. Henrich's involvement met the scientific norm of disinterestedness, stating that the witness's "research reflect[s], not a pre-disposition to a particular result, but the positing of an hypothesis which [he] has tested in a scientifically neutral manner."⁷⁷ Be that as it may, it is difficult to accept that the accelerated speed of the trial process enabled Dr. Henrich to apply the same "unquestioned academic rigor" which, as a Tier 1 Canada Research Chair, he surely applies outside of the courtroom.⁷⁸ His research on polygamy, conducted over a brief four-month period, likely circumvented the normal process of re-questioning and circulation, described above, leaving him little opportunity to modify his perspective. His evidence thus risks having suffered from the natural truncation, which can result from the use of science in the courtroom.⁷⁹

Chief Justice Bauman accepted Dr. Henrich's evidence that children in polygamous societies receive less parental investment, the underlying theory being that married men would remain on the marriage market and consequently invest their resources in acquiring more wives rather than in their own children.⁸⁰ That evidence was supported by 19th century census data from Mormon communities, as well as contemporary studies of African societies.⁸¹ Without disputing the correctness of these findings, it is worth asking whether further study, detached from the context of the litigation, carried out over a longer period and subject to the type of questioning that is typical of the scientific enterprise, might have yielded more up-to-date data on the question. That concern is all the more pressing when considered in light of Dr. Henrich's acknowledgment that further research is needed in order to "confirm the link

⁷⁴ Haack, "Litigation-Driven Science", *supra* note 52.

⁷⁵ Engstrom & McDonald, *supra* note 59 at 286.

⁷⁶ Christopher Nowlin, *Judging Obscenity: A Critical History of Expert Evidence* (Montreal: McGill-Queen's University Press, 2003) at 154.

⁷⁷ *Polygamy Reference*, *supra* note 1 at para 538.

⁷⁸ *Ibid* at paras 538, 495.

⁷⁹ See Kousser, *supra* note 38.

⁸⁰ *Polygamy Reference*, *supra* note 1 at paras 505, 518.

⁸¹ *Ibid* at paras 518-519.

between reduced parental investment and child mortality.”⁸² Such reliance on unconfirmed or disputed research findings is exactly what is referred to by the above-described distinction between closure in science and law. In consequence, the trial process risks creating “spurious, artificial scientific certainty.”⁸³

Of course it is impossible to know whether Dr. Henrich’s research qualifies as litigation-driven science in the weaker sense — where the need for the work in question simply arises out of litigation — or in the stronger sense — where “work is undertaken for the purpose of finding evidence favoring one side in litigation, and explaining away or otherwise playing down evidence favoring the other side.”⁸⁴ But litigation-driven research in the weaker sense may also be suspect, as experts may harbour an inappropriate desire to be helpful, which can affect their judgment.⁸⁵ It is worth recalling that Dr. Henrich was retained by the government to present evidence on the purported harms of polygamy.

As a counter to Dr. Henrich’s evidence, the *amicus* called on Dr. Todd Shackelford, “an expert in evolutionary psychology and in conflict between men and women in monogamous relationships.”⁸⁶ In response to Dr. Henrich’s correlations between polygamy and increased gender inequality, “as men seek more control over women when women become scarce,”⁸⁷ Dr. Shackelford presented evidence on the negative consequences of “any kind of mating or marriage relationship, including monogamous ones.”⁸⁸ That evidence highlighted the heightened rates of child neglect, abuse and filicide in situations “where women with children fathered by a previous partner remarry, which is an arrangement overwhelmingly associated with monogamy.”⁸⁹ Relying on that evidence, which the Chief Justice found of little assistance to his determination about the harms arising out of polygamous marriage, Dr. Henrich extracted a number of observations about violence among unrelated family members and violence driven in large part by male sexual jealousy. He concluded that “evolutionary theory and some empirical evidence are consistent with the view that intra-familial violence ... will be at least as bad, and probably worse, in polygamous families and societies....”⁹⁰ Faced with these propositions, Dr. Shackelford was unwilling to accept his colleague’s extrapolations, based on his concerns that “neither expert had any data regarding polygyny to support those extrapolations and that Dr. Henrich could not account for possible cultural and contextual differences in polygynous relationships.”⁹¹ Dr. Henrich’s extrapolations,

⁸² *Polygamy Reference*, *supra* note 1 at para 522.

⁸³ Susan Haack, “Of Truth, in Science and in Law” (2008) 73:2 Brook L Rev 985 at 1002.

⁸⁴ Haack, “Litigation-Driven Science”, *supra* note 52 at 1075. These stronger and weaker forms of litigation-driven science stand in opposition to a third category of expert evidence, that is, testimony based on research conducted prior to and independent of litigation.

⁸⁵ *Ibid* at 1079. See also David Paciocco, “Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts” (2009) 34:2 Queen’s LJ 565 (noble cause distortion).

⁸⁶ *Ibid* at 497.

⁸⁷ *Polygamy Reference*, *supra* note 1 at para 499.

⁸⁸ *Ibid* at para 541.

⁸⁹ *Ibid* at para 543.

⁹⁰ *Ibid* at para 551.

⁹¹ *Ibid* at para 552. (Polygyny is explained, at para 135, as “the practice of a male having multiple female spouses,” as opposed to polyandry, where a female has multiples spouses. Much of the evidence tendered in the case dealt with the specific practice of polygyny.)

while “somewhat speculative and unproven,” where nevertheless accepted by the judge, who found them to be “supported to some extent by other evidence in this reference.”⁹²

It is uncontroversial to say that the law, as a general matter, does not seek the same kind of certainty as the sciences. Proof on a balance of probabilities is a much lower standard than scientific proof. But it is difficult to see how, when faced with two opposing experts, both of whom present credible and compelling evidence, the judge is well-equipped to choose between competing narratives about a subject that lies far beyond the expertise of the jurist. The judicial task of choosing between competing experts illustrates the above-mentioned idea that the role of the advocate, by means of recruiting an expert is, above all else, to persuade the court, sometimes based on reasoning outside of the expert’s disciplinary sphere. Chief Justice Bauman, for example, appears to place significant weight on Dr. Henrich’s prediction that the decriminalization of polygamy would result in a non-trivial increase in the practice, which would then lead to a number of identified harms. For his part, however, Dr. Shackelford reasoned that, while plausible, the spread of polygamy following decriminalization seemed “terribly, terribly unlikely.”⁹³

Whether the ultimate decision in the *Polygamy Reference* indeed rested on spurious and artificial science, or rather, whether the results were sound and confirmed by further research, will remain unknown to the legal community; the question has not been the subject of further proceedings. What is significant about the decision, however, is its utility as a fitting illustration of some of the disciplinary conflicts identified above between the law and the sciences. The decision illustrates that persuasion is paramount in law, even where the research relied on to persuade may lack the typical attributes of the scientific enterprise. Finally, given the clear disagreement between opposing experts, and as is often the case in scientific and social fact-based disputes, the *Polygamy Reference* created settled law in spite of obvious scientific disagreement and the continued existence of unresolved social questions.

IV. BLENDING THE LEGAL AND NON-LEGAL: PROBLEMS WITH ADJUDICATION

The breadth of issues tackled in the *Polygamy Reference* suggests that the current system of adjudication does little to foster the effective communication between the law and non-legal disciplines that is essential to the resolution of *Charter* disputes. The difficulty is due in large part to the fact that the party-based form of adversarial litigation cannot readily accommodate the judicial interpretation of the vast amounts of conflicting empirical data that normally accompany a rights-based constitutional challenge. The incongruity of social science evidence and adversarial adjudication is particularly visible when the issues in dispute are many, as is typical of *Charter* challenges. Moreover, the numerous issues and the complexity of conflicting social science data often lead judges to defer to legislative choices, thus threatening to undermine the very point in adjudicating *Charter* rights.

A. Adjudicating Polycentric Issues and Values

As was the case in the *Polygamy Reference*, *Charter* challenges rarely deal with isolated questions capable of neat resolution in favour of a particular side. In examining the social science evidence that often accompanies a claim of unconstitutionality, judges typically face varied and conflicting views and

⁹² *Ibid* at para 553.

⁹³ *Ibid* at para 556.

opinions on subjects which rarely admit of a correct answer. In the *Polygamy Reference*, Chief Justice Bauman examined a number of controversial questions all related to the constitutionality of the impugned provision. The conflicting nature of the evidence ultimately led the judge to defer to the government's choice. Without commenting on the substantive correctness of the decision, the case suggests that where the issues in dispute are numerous and marked by division among expert witnesses, the Anglo-American system is ill suited to resolving *Charter* challenges.

The *Polygamy Reference* was complex in the variety of issues it raised. Although only one statutory provision was in question, the issues canvassed ranged widely, and included the historical evolution of polygamy, polygamy as both a religious and secular practice, the effects of polygamy on young, unmarried men, harms to women and children, rates of teen births in fundamentalist Mormon communities and the potential effects of legal polygamy on Canadian society at large. All of these questions necessitated the input of an expert in a distinct social science discipline. With so many issues and perspectives in play, it is difficult to imagine how the adjudicative system and its "Invisible Hand" could guide the court to the "maximum production of truth,"⁹⁴ which would require, at minimum, that there is one truth to be discovered, and not a multiplicity of varying and still-developing views.

The *Polygamy Reference* is typical of *Charter* challenges in that infringements of more than one constitutional right were alleged. This "polycentricity" of *Charter* issues has led some jurists to express doubt about the suitability of adversarial adjudication to constitutional challenges dealing with sensitive social issues.⁹⁵ Among the reasons cited for the "poor fit" is the fact that *Charter* adjudication hides the need for the courts to make "value choices."⁹⁶ Whereas the adjudicative process and associated judicial reasoning usually employ inductive logic — the application of a general principle to the facts of the case — in *Charter* cases, judges must "select a major premise without there being a general principle to govern their choice."⁹⁷ Thus, as a minority of the Supreme Court has acknowledged,⁹⁸ value judgments necessarily come into play in the adjudication of rights and freedoms, undermining the idea that any sort of truth will be uncovered by the adversarial process.

B. Justiciability and Judicial Deference

The polycentric nature of *Charter* challenges and the inescapable value judgments they require of judges has led to questions about whether these types of cases should be better regarded as non-justiciable within the adversarial system of adjudication. The fact that "arguments do not decide constitutional cases, human beings do ..." has created some doubt as to their justiciability.⁹⁹ Others have likewise hinted toward the unsuitability of adjudication to *Charter* issues. In his discussion of the institutional capacity of courts to adjudicate poverty claims under the *Charter*, Professor Wiseman

⁹⁴ Kousser, *supra* note 38 at 15.

⁹⁵ See e.g. Donald M Brown, "Practice With the Charter" (1989) UBC L Rev 23:3 595.

⁹⁶ *Ibid* at 595.

⁹⁷ *Ibid*.

⁹⁸ See *R v Keegstra*, [1990] 3 SCR 697, 61 CCC (3d) 1, McLachlin J, dissenting ("[t]he task which judges are required to perform under s. 1 is essentially one of balancing ... The exercise is one of great difficulty, requiring the judge to make value judgments" at 845).

⁹⁹ Brown, *supra* note 95 at 596, citing Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (New York, Oxford University Press, 1982).

suggests that the capacity of courts is generally challenged by a lack of certainty, caused in part by the need to consider social science evidence, particularly when addressing arguments under section 1.¹⁰⁰ The judicial capacity to properly adjudicate these issues is limited by the “lack of definitiveness of social science evidence.”¹⁰¹ This deficiency is due to a lack of judicial experience and resources with which to develop definitive answers and to the fact that, “in any event, such development may be impossible.”¹⁰² With respect to the judicial lack of resources, a proper treatment of the issue is beyond the scope of this paper and much literature exists on the failings of legal education in this respect.¹⁰³ On the other hand, this article has already explored the near impossibility of developing the definitive answers which the legal system seeks, given the above-described distinctions between the needs and goals of the respective scientific and legal enterprises.

Related to these difficulties is the observation that the complexity of *Charter* interpretation requiring reliance on social science evidence often results in undue deference to the legislator on the part of the courts.¹⁰⁴ Given that a threat to a *Charter* right will generally preclude a court from characterizing an issue as non-justiciable,¹⁰⁵ the need to adjudicate social science might instead incite a court to adopt a more deferential approach to impugned legislation. In his review of Supreme Court jurisprudence requiring the balancing of rights, Wiseman observes that courts prefer to defer to the legislature than deem a claim non-justiciable.¹⁰⁶ Adjudicating a challenge and ultimately deferring to Parliament serves to acknowledge the constitutional interests at play and enables courts to evaluate whether an infringement meets “minimum (deferential) standards of justiciability.”¹⁰⁷ Thus, in the presence of “interpretive doubt and institutional capacity and legitimacy concerns,” particularly when balancing *Charter* rights, courts will often defer to legislative choice.¹⁰⁸

Increased deference in the face of inconclusive empirical evidence could have been at play in the *Polygamy Reference* and it is worth questioning whether the complexity of the social science evidence tendered indeed induced Chief Justice Bauman to adopt a more deferential stance toward the government’s choice. Surely, given the conflicting nature of the data tendered and the presence of 14 different parties to the dispute, the evidence would have created, at minimum, some uncertainty on the part of the court. And, citing a number of Supreme Court decisions where deference was urged in the

¹⁰⁰ David Wiseman, “The Charter and Poverty: Beyond Injusticiability” (2001) 51:4 UTLJ 425. See also Nowlin, *supra* note 76 on the judicial competence to receive expert evidence of social facts.

¹⁰¹ *Ibid* at 436.

¹⁰² *Ibid*.

¹⁰³ See e.g. William D Moull, “Law and the Social Sciences in Canadian Legal Education: Some Perspectives on the Arthurs Report” (1984) 34:3 J Legal Educ 515, referring to Harry W Arthurs, “Paradoxes of Canadian Legal Education” (1977) 3:3 Dal LJ 639; Roderick A Macdonald, “Still ‘Law’ and Still ‘Learning’?” (2003) 18:1 CJLS 5; Veronica Henderson “Building on Strong Foundations: Rethinking Legal Education with a View to Improving Curricular Quality” (2011) 29:2 Dal LJ 491.

¹⁰⁴ See e.g. *Irwin Toy*, *supra* note 3; *RJR-MacDonald*, *supra* note 3, cited by Wiseman, *supra* note 100.

¹⁰⁵ See e.g. *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791.

¹⁰⁶ Wiseman, *supra* note 100.

¹⁰⁷ *Ibid* at 451.

¹⁰⁸ *Ibid* at 452. See also Petersen, *supra* note 30 (discussing the Supreme Court’s “high legislative margin of appreciation” when dealing with social science evidence of alleged *Charter* violations at 311).

face of “complex social issues,”¹⁰⁹ Chief Justice Bauman wrote that the government is entitled to a degree of deference.¹¹⁰

In the *Polygamy Reference*, the harms of polygamy may well have been demonstrated according to the appropriate standard of proof. Nevertheless, the decision should serve as a caution against undue deference in the face of complex or controversial empirical evidence. A rush to defer to the government’s choice in the presence of conflicting social science evidence would run contrary to Justice McLachlin’s (as she then was) statement that,

[t]o carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.¹¹¹

Courts, then, in order to avoid allegations of abdicating their constitutional duty in the presence of complex empirical facts, should confront the evidence head on. Where the social sciences demonstrate that legislation has unconstitutional effects, judges must not shy away from the appropriate conclusion, political and value-laden as it may be. For it is up to the courts to determine whether the social science is in fact inconclusive, or whether the government, in the context of a constitutional challenge to legislation, has simply not met its burden of proof.¹¹²

This reading of the *Polygamy Reference* should suggest that deference in the balancing of constitutional rights, “if taken too far or if applied without principle or coherence,”¹¹³ may undermine the constitutional recognition of *Charter* rights. There is a real risk that undue deference will turn judicial review into a “blunt instrument.”¹¹⁴ It follows that by inducing judges to defer to legislative choices, the current adversarial method of adjudicating disputes, with its basic requirement that judges pick a winning side, threatens to undermine the judicial role of safeguarding our constitutional rights and freedoms. This is not to say that the types of contentious social issues that require the judicial evaluation of complex empirical evidence have no place in the courtroom. *Charter* claims that challenge the institutional capacity of the courts should not be lightly deemed non-justiciable, given the serious consequences that would flow from such a decision.¹¹⁵ As the Supreme Court has stated on a number of occasions, when *Charter* rights are engaged, the courts have a duty to evaluate constitutionality, even where the evidence presents difficulties.¹¹⁶ Rather, *Charter* litigation should be used as a means for managing the challenges to the Court’s institutional capacity,¹¹⁷ with courts approaching complex claims

¹⁰⁹ *Polygamy Reference*, *supra* note 1 at para 1300, citing *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 53, [2009] 2 SCR 567. See also *Polygamy Reference*, *supra* note 1 at para 1221, citing *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571.

¹¹⁰ *Polygamy Reference*, *supra* note 1 at para 1342.

¹¹¹ *RJR-MacDonald*, *supra* note 3 at para 136, cited in Petersen, *supra* note 30 at 313.

¹¹² *Ibid.*

¹¹³ Wiseman, *supra* note 100 at 458.

¹¹⁴ Petersen, *supra* note 30 at 311.

¹¹⁵ Wiseman, *supra* note 100 at 454.

¹¹⁶ See e.g. *Operation Dismantle v The Queen*, [1985] 1 SCR 441.

¹¹⁷ Wiseman, *supra* note 100 at 454.

according to the discrete issues raised and employing the contextual analysis made possible by the detailed nature of the evidence.

V. CONCLUSION

The foregoing discussion suggests that the multidimensional and complex nature of the issues often raised in *Charter* adjudication are not well served by an adversarial system in which evidence is presented not to clarify a question, but in many cases, to confound the issues. This confusion, caused by the adversarial system's method of presenting large volumes of evidence aimed at persuading rather than enlightening, will often leave courts with little choice but to defer to legislative, or political, choices, the very things that courts are meant to keep in check. Of course, in order to effectively accomplish their role, judges must be properly trained to evaluate the social science data presented to them and the methodologies used to arrive at disputed empirical findings. Otherwise, courts and judges will continue to be ill equipped to confront controversial empirical data and rule according to the evidence, and deliberations about justice will necessarily be hindered.

The objective of this article is not to solve the problems it identifies. Rather, its purpose is to cast a critical eye, through an in-depth reading of a concrete example, on the disconnect between the law and the social sciences and to provide a practical demonstration of the drawbacks of using social science evidence under the current model of *Charter* adjudication. With these observations in mind, it is hoped that we are better able to appreciate the urgency of exploring potential avenues for reform, of which there are many currently in use across common law jurisdictions.¹¹⁸ There is further work to be done on how the legal system can properly train lawyers and judges to effectively draw on non-legal evidence, just as there is room to study potential procedural reforms to the party-based system of adjudication. A number of authors are exploring the use of less adversarial and more collaborative procedures for dealing with sensitive and multi-faceted social phenomena.¹¹⁹ By highlighting the obstacles, this study may help pave the way toward maximizing the cross-disciplinary sharing of information that will aid in the effective delivery of justice by enabling the law to take full advantage of the invaluable resources that the social sciences have to offer.

¹¹⁸ See e.g. Gary Edmond, "Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure" 72:1 Law & Contemp Probs 159 (on the "concurrent evidence" model in Australia); The Hon G L Davies AO, QC, "Court Appointed Experts" (2005) 5:1 Queensland University of Technology Law and Justice Journal 89 (on court-appointed experts).

¹¹⁹ See e.g. *ibid*; Paciocco, *supra* note 85.