

Adducing Social Science Evidence in Constitutional Cases

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Social science evidence is the “new normal” in Charter litigation in Canada. Yet, the road is not smooth for the use of social science evidence in courts. How to effectively use such evidence remains an under-studied area. This paper explores the dynamics, strategies, and best practices associated with adducing such evidence, using a qualitative, comparative perspective and examining cases from Canada, the United States, and South Africa. The paper argues that there are clear lessons emerging, in Canada and elsewhere, for how to effectively use social science evidence in constitutional cases. By analyzing scholarship and case studies in this area, the paper unpacks some of the dynamics and strategies at play for using social science evidence in courts. It puts forward five lessons, explaining that counsel who wish to harness social science evidence in Charter litigation should: (1) employ a group approach to constitutional litigation that brings together affected persons, community organizations, academics, and other experts; (2) present social science evidence early on in litigation and with the most reliable experts available; (3) ensure that social science evidence will withstand scrutiny under the applicable rules of evidence; (4) consider alternative strategies where social science evidence is weak, contested, or complex; and (5) prepare for a future where the importance of social science evidence in Charter cases increases.

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Introduction

The road is not smooth for the use of social science evidence in the courts.

– Justice John M Wisdom, United States Court of Appeals for the Fifth Circuit¹

Social science evidence is increasingly part of *Canadian Charter of Rights and Freedoms*² litigation in Canada. Armed with litigation records that include

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1. John Minor Wisdom, “Random Remarks on the Role of Social Sciences in the Judicial Decision-Making Process in School Desegregation Cases” (1975) 39:1 *Law & Contemp Probs* 134 at 139. Note that the author was a judge of the US Court of Appeals for the Fifth Circuit and was influential in the implementation of school desegregation in the southern US states following the Supreme Court of the United States’ decision in *Brown v Board of Education*.
 2. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

extensive social science evidence, historically disadvantaged litigants have forced seismic policy change in areas such as safe injection sites, sex work, and assisted dying. These “have-not” litigants—drug users, sex workers, and the terminally ill, amongst others, with limited litigation experience and even fewer economic resources—have effectively used social science evidence to win their cases.³

Much has been written on this phenomenon and the benefits, burdens, and challenges it poses for the judicial system in Canada.⁴ What has been less studied are the dynamics, strategies, and best practices associated with adducing such evidence. This paper addresses that under-studied area, using a qualitative, comparative perspective.

Importantly, the paper does not attempt to make the causal claim that social science evidence is necessary for, or correlated with, success in constitutional cases. The systematic, non-probabilistic selection of landmark case studies for this paper does not permit such claims or allow for generalization of what impact social science evidence will have in a prospective case. But that is also not the objective of this paper.

Instead, this paper asks: are there lessons that can be learned from landmark constitutional cases where significant social science evidentiary records were presented by one or both parties? The main claim of this paper is that there are clear best practices, emerging in Canada and elsewhere, for how to effectively

3. The notion of “have” and “have-not” litigants was developed by Marc Galanter in his seminal paper “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change” (1974) 9:1 *Law & Soc’y Rev* 95, discussed at 21ff, *below*.

4. See e.g. Jodi Lazare, “Judging the Social Sciences in *Carter v Canada (AG)*” (2016) 10:1 *McGill JL & Health S35*; Ranjan Agarwal & Faiz Lalani, “Noting the Obvious: A Reflection on the Supreme Court of Canada’s Application of Judicial Notice under Sections 7 and 15 of the *Charter*” (2016) 35:2 *NJCL* 131; Alan N Young, “Proving a Violation: Rhetoric, Research and Remedy” (2014) 67 *SCLR* (2d) 617; Yasmin Dawood, “Democracy and Deference: The Role of Social Science Evidence in Election Law Cases” (2014) 32:2 *NJCL* 173; Rebecca Sutton, “Dirty Puddles and Safety Valves: The Path from Fact to Remedy in *Canada (A.G.) v. PHS Community Services Society*” (2014) 33:1 *NJCL* 39; Jula Hughes & Vanessa MacDonnell, “Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations” (2013) 32:1 *NJCL* 23; John David Lee, C Tess Sheldon & Roberto Lattanzio, “Law and Ordered C.H.A.O.S.: Social Science Methodology, and the Charter Claims of Persons with Disabilities” (2013) 32:1 *NJCL* 61; Béatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 173–92; Emma Cunliffe & Gary Edmond, “Gaitkeeping in Canada: Mis-steps in Assessing the Reliability of Expert Testimony” (2013) 92:2 *Can Bar Rev* 327.

adduce social science evidence in constitutional cases. By qualitatively studying successful and unsuccessful cases, it is possible to unpack some of the dynamics and strategies at play and make recommendations for how to make the road smoother for using social science evidence in constitutional cases. This is timely given the shifting approach to social science evidence in Canada over the past two decades.

The Canadian experience with social science evidence mirrors, to some extent, that of other jurisdictions: judicial reference to facts derived from such evidence has transitioned from distrust or hostility⁵ to something that is “firmly established” to the point of being unremarkable.⁶ At the same time, courts are increasingly guarded against “junk science” and are demanding that expert evidence be rigorous and reliable, especially when it goes to an issue that is dispositive of a case.⁷

As courts have become more open to social science evidence, the inclusion of such evidence in constitutional cases has proliferated. In less than two decades, we have moved from a constitutional jurisprudence that could find serious psychological harm on the basis of a brief affidavit of the applicant,⁸ to a jurisprudence that frequently relies on, if not requires, massive social science records.⁹ Like other jurisdictions, such as Germany, that have included social

5. See J Alexander Tanford, “The Limits of a Scientific Jurisprudence: The Supreme Court and Psychology” (1990) 66:1 Ind LJ 137 at 145.

6. John Monahan & Laurens Walker, “Twenty-Five Years of *Social Science in Law*” (2011) 35 L & Human Beh 72 at 80 [Monahan & Walker, “Twenty-Five Years”]. But see Niels Petersen, “Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication” (2013) 11:2 Intl J Constitutional L 294 at 295 (finding that the use of social science evidence in law has not resonated globally, particularly in continental Europe).

7. *R v J-LJ*, 2000 SCC 51 at para 25; *White Burgess Langille Inman v Abbott and Haliburton Co*, 2015 SCC 23 at para 18 [WBLI].

8. See e.g. *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46, 177 DLR (4th) 124 (where the Supreme Court of Canada held, based only on the affidavit of the applicant, “that state removal of a child from parental custody . . . constitutes a serious interference with the psychological integrity of the parent” at para 61).

9. See *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 [Insite SCC] (where the evidentiary record was almost 4,000 pages in 20 volumes); *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 15 [Bedford] (where the evidentiary record was more than 25,000 pages in 88 volumes); *Carter v Canada (Attorney General)*, 2012 BCSC 886 at para 114, aff’d 2015 SCC 5 (where the evidentiary record included 36 binders of evidence entered through admission plus *viva voce* evidence from 18 witnesses).

science evidence as part of constitutional litigation for quite some time, the presence of social science evidence in constitutional litigation records and decision making is becoming the “new normal” in Canada.

The Supreme Court of Canada entrenched this new normal in two important ways in *Canada (Attorney General) v Bedford*.¹⁰ First, the Court held *stare decisis* does not necessarily apply where there has been a “change in the circumstances or *evidence that fundamentally shifts the parameters of the debate*”.¹¹ A change in the circumstances includes, for example, shifts in shared social values such as the meaning of marriage.¹² A change in the evidence includes, for example, reference to public policy experience and research that was not available at the time of the previous decision.¹³ Second, the Court held that the appropriate standard of review of such evidence was the deferential palpable and overriding error standard.¹⁴ Together, these holdings encouraged litigants to include social science evidence in their records with the hope of demonstrating a fundamental change in the debate, and to do so at trial level. Recent examples abound of litigants seizing on the Court’s guidance in *Bedford* and employing social science evidence in this manner.¹⁵

10. *Supra* note 9.

11. *Ibid* at para 42 [emphasis added].

12. See e.g. *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 21–25 (where the Court explained that the meaning of marriage is not constitutionally fixed and that its definition was capable of evolving to include same-sex couples).

13. See e.g. *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 103–07 [*Carter*] (where the Court found that reference to the public policy experience of jurisdictions that permitted assisted dying and research evaluating those regimes substantially diminished “slippery slope” concerns with assisted dying and changed the minimal impairment analysis at the *Oakes* test phase; this evidentiary record was not available before because those other jurisdictions were at earlier phases in their experience with assisted dying).

14. See *Bedford*, *supra* note 9 at para 56.

15. See e.g. *Carter*, *supra* note 13 (where litigants used social science evidence at trial to reverse an existing precedent and successfully challenge the constitutionality of the criminal prohibition on medical assistance in dying); *British Columbia Civil Liberties Association v Canada (Attorney General)*, 2018 BCSC 62 [*BCCLA*] (where the litigants used social science evidence at trial (the litigation is ongoing) to argue that sections of the *Corrections and Conditional Release Act* authorizing segregation in jails are unconstitutional).

By “social science evidence”, I mean expert evidence that attempts to explicate, using quantitative or qualitative methods, the impact of law on human behaviour or experience and, conversely, the impact of human behaviour or experience on legally relevant principles or rules.¹⁶ This is a functional definition that focuses more on what work the evidence is doing in a particular case and less on the disciplinary training of the researcher or the particular methods they used to produce the research. Social science evidence addresses the human or social dimension of law, not the biological, chemical and physical dimension of human existence.

Facts derived from social science evidence can be case specific or more general in nature—a distinction that Kenneth Davis characterized as *adjudicative* versus *legislative*.¹⁷ Other scholars have developed more nuanced categories,¹⁸ while still others have attempted to place social science evidence on a fact and law continuum based on how the evidence is used in judicial decision making.¹⁹

16. Admittedly, the distinction between the *social sciences* and the *natural sciences* is not airtight. For example, a physician researching the health outcomes of a safe injection clinic, using a randomized and controlled methodology, might look like they are employing the traditional scientific method associated with the *natural sciences*. At the same time, they are also describing a social experience for intravenous drug users and the information provided by the study may be legally relevant for evaluating the regulatory structure of such clinics.

17. See Kenneth Culp Davis, “An Approach to Problems of Evidence in the Administrative Process” (1942) 55:3 Harv L Rev 364 at 402–03 (describing *adjudicative facts* as the who, what, where, when and why questions concerning a party that a trier of fact would traditionally have to ascertain and *legislative facts* as broader factual findings made by courts in order to answer a question of law or policy).

18. See John Monahan & Laurens Walker, “Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law” (1986) 134:3 U Pa L Rev 477; Laurens Walker & John Monahan, “Social Frameworks: A New Use of Social Science in Law” (1987) 73:3 Va L Rev 559; Laurens Walker & John Monahan, “Social Facts: Scientific Methodology as Legal Precedent” (1988) 76:4 Cal L Rev 877; John Monahan & Laurens Walker, “Judicial Use of Social Science Research” (1991) 15:6 L & Human Beh 571; John Monahan & Laurens Walker, *Social Science in Law: Cases and Materials*, 7th ed (New York: Foundation Press, 2010); Gregory Mitchell, Laurens Walker & John Monahan, “Beyond Context: Social Facts As Case-Specific Evidence” (2011) 60 Emory LJ 1109 at 1117–18; David L Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (New York: Oxford University Press, 2008) at 167.

19. See Dana Erin Phillips, “Loosening the Law’s Bite: Law, Fact, and Expert Evidence in *R v JA* and *R v NS*” (2017) 21:3 Intl J Evidence & Proof 242 at 249; Danielle Pinard, “Au-delà de la distinction du fait et du droit en matière constitutionnelle: les postulats nécessaires” (2014) 48:1 RJTUM 1 at 2.

These attempts at categorization are not without significant problems, including definitional imprecision.²⁰

Whether because of these definitional concerns or not, in *R v Spence*, the Supreme Court of Canada collapsed a number of different categories of facts into a single *social facts* category.²¹ At issue in *Spence* was judicial notice and whether certain categories of facts could be accepted without proof and without being subjected to cross-examination. The Court held that the relevant question was not how a fact was categorized, but instead whether its admission and role in legal reasoning was dispositive of the case.²² The distinction between different categories of facts was further flattened in *Bedford*, where the Supreme Court of Canada explicitly stated there is only one standard of review for fact-finding regardless of whether the facts are *adjudicative*, *legislative*, or *social*.²³

20. One of the problems with these overlapping categories of facts is that they are both descriptive and functional at the same time, and occasionally tautological. Some of the categories are defined by their descriptive characteristics, such as a relation to the parties or the case. Other categories are defined by their functional role within the adjudication process, such as articulation of the historical meaning of terms or use in determining whether a specific constitutional test is met. This can lead to definitional confusion and the dissatisfying result that a fact can only be categorized *after* a judicial decision has been rendered.

21. 2005 SCC 71 at para 57. The Court noted:

“Social fact” evidence has been defined as social science research that is used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a particular case As with their better known “legislative fact” cousins, “social facts” are general. They are not specific to the circumstances of a particular case, but if properly linked to the adjudicative facts, they help to explain aspects of the evidence. Examples are the Court’s acceptance of the “battered wife syndrome” . . . or the effect of the “feminization of poverty” . . . and of the systemic or background factors that have contributed to the difficulties faced by aboriginal people in both the criminal justice system and throughout society at large.

Ibid.

22. See *ibid* at paras 63–65.

23. See *supra* note 9 at para 56. *Bedford* held “that a no-deference standard of appellate review for social and legislative facts should be rejected. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error” (*ibid*). The Court in *Bedford* overturned *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at paras 79–81, 127 DLR (4th) 1 (where the Court held deference was only owed to adjudicative fact-finding and *not* to legislative or social fact-finding).

However, collapsing the categories of facts and focusing on whether they are dispositive of an issue in the case does not necessarily make the use of social science evidence in constitutional litigation a simple task. The challenge with social science evidence is not how to apply a single palpable and overriding error standard of review to different types of facts. The challenge is that certain types of facts are far more complex than others, require specialized knowledge to assess for relevance and reliability, and can play drastically different substantive roles in cases that range from insignificant to dispositive.

In order to effectively use social science evidence to address particular issues and win cases, litigants must marshal social science evidentiary records, adduce such evidence before decision makers, and have the evidence admitted as relevant and reliable for an issue in the case. This is not easy. The road can indeed be bumpy to effectively using social science evidence in constitutional cases.

Part I begins by suggesting that the increased importance of social science evidence in *Charter* litigation has antecedents in American constitutional law. That experience opened the door to judicial reliance on social science evidence to resolve key constitutional issues in dispute, but it also raised questions about what to do with evidence that is subsequently cast in doubt. Part I also provides a quantitative analysis of judicial reference to social science evidence in *Charter* cases as well as qualitative commentary on the growing importance of this evidence in both early and more recent cases.

The dynamics, strategies, and best practices associated with effectively using social science evidence are examined in Part II. This includes consideration of how to create social science evidentiary records, who to use as an expert and when to present their evidence in court, legal tests for admissibility, and challenges with encouraging judicial reliance on such evidence.

Case studies of landmark constitutional cases from three jurisdictions (South Africa, Canada, and the United States) are employed in Part III to analyze these dynamics, strategies, and best practices. Many of the same factors play out in all of these cases, but each case also provides a central teaching more poignantly than the others. The South African case study shows that “epistemic communities” are key to both developing social science records and controlling how those records are interpreted by courts. The Canadian case study shows that well-respected experts, presenting reliable social science evidence, can be the linchpin on the dispositive legal issue, strengthen provided remedies, and influence post-decision implementation. Finally, the American case study shows the limits of social science evidence and the need for alternative litigation

strategies where causal claims are weak and competing constitutional rights claims are strong.

I. Opening the Door to Social Science Evidence

A. *Brown v Board of Education as a Catalyst for Change and Concern*

Like many aspects of Canadian constitutional law, the emerging significance of social science evidence has antecedents in American constitutional law. In the US, the story begins early in the twentieth century, but was catalyzed by the Supreme Court of the United States' decision in *Brown v Board of Education*,²⁴ and its now famous "footnote 11". In *Brown*, the plaintiffs challenged state laws that either permitted or required racial segregation in the public education system. The plaintiffs argued that such laws were a violation of the equal protection clause of the United States Constitution's Fourteenth Amendment.²⁵ The plaintiffs sought an order permitting them to attend public schools on a non-segregated basis.

The Court considered its previous decision permitting segregated public facilities,²⁶ but held that the "separate but equal" doctrine could no longer be used to justify segregation.²⁷ The Court based its decision on the belief

24. 347 US 483 (1954) [*Brown*].

25. See US Const amend XIV, § 1. The US Constitution reads:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ibid.

26. See *Plessy v Ferguson*, 163 US 537 at 543–52 (1896) (holding 8–1 that legally mandated, segregated public facilities—in this case separate railway carriages enforced by fine or imprisonment—were permissible so long as they were equal in all aspects other than race, and stating: "[i]f one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane" at 552).

27. *Brown*, *supra* note 24 at 495.

that legally sanctioned, segregated public schools create a sense of inferiority within minority children, which saps their motivation to learn, and negatively affects their educational outcomes and opportunities.²⁸ The Court then stated: “Whatever may have been the extent of psychological knowledge at the time of [the Court’s previous decision permitting segregation], [the negative effects] finding is amply supported by modern authority.”²⁹ Footnote 11 was the authority offered in support of this statement.

Footnote 11 contained seven pieces of social science evidence: a conference proceeding paper on the effect of prejudice and discrimination on personality development,³⁰ an edited volume of papers from the same conference,³¹ two peer-reviewed psychological journal articles on the psychological effects of segregation,³² one chapter in an edited volume on discrimination,³³ and two more general books on the African-American experience in the US.³⁴

It is not an overstatement to say that footnote 11 is “the most controversial footnote in American constitutional law”.³⁵ The response to footnote 11 was

28. See *ibid* at 493–95.

29. *Ibid* at 494.

30. See Kenneth B Clark, “Effect of Prejudice and Discrimination on Personality Development” (Paper delivered at the Midcentury White House Conference on Children and Youth, 1950) [unpublished] (describing the outcome of psychological “doll studies” where children were given a White doll with blonde hair and a brown doll with black hair and then asked questions about the dolls and their preferences for the different dolls, and arguing that children’s preferences for the White dolls was indicative of racism and internalized feelings of inferiority).

31. See Helen Leland Witmer & Ruth Kotinsky, eds, *Personality in the Making: The Fact-Finding Report of the Midcentury White House Conference on Children and Youth* (New York: Harper & Brothers, 1952).

32. See Max Deutscher & Isidor Chein, “The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion” (1948) 26 *J Psychology* 259; Isidor Chein, “What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?” (1949) 3:2 *Intl J Opinion & Attitude Research* 229.

33. See Theodore Brameld, “Education Costs” in RM MacIver, ed, *Discrimination and National Welfare* (Port Washington, NY: Kennikat Press, 1949) 37.

34. See E Franklin Frazier, *The Negro in the United States*, revised ed (New York: Macmillan, 1957); Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Brothers, 1944).

35. Paul L Rosen, “History and State of the Art of Applied Social Research in the Courts” in Michael J Saks & Charles H Baron, eds, *The Use/Nonuse/Misuse of Applied Social Research in the Courts* (Cambridge, MA: Abt Books, 1980) 9 at 9.

immediate and ferocious.³⁶ The unsuccessful southern states attempted to resist *Brown* through a series of policy efforts that were designed to inhibit desegregation, but these efforts were rebuffed by the Court in subsequent cases.³⁷ Others challenged both the quality of the social science relied upon³⁸ and its prominence in the decision.³⁹ Still others questioned whether the importance and influence of footnote 11 has been overstated.⁴⁰ These debates continue today.⁴¹ However, more recent research suggests social science has had a diminished impact on modern racial desegregation cases,⁴² a finding that is supported by one of the case studies discussed in Part III of this paper.

Regardless of the actual influence of footnote 11 on the judicial reasoning in *Brown*, the inclusion and reference to social science evidence sent an important signal in a case that had obvious significance for the American civil rights movement. It showed a positive example of a public interest group that had “deliberately used this type of research to pursue legal transformation” even though internally some members of the organization’s litigation team

36. See Sanjay Mody, “*Brown* Footnote Eleven in Historical Context: Social Science and the Supreme Court’s Quest for Legitimacy” (2002) 54:4 *Stan L Rev* 793 at 803–14; Lucas A Powe Jr, *The Warren Court and American Politics* (Cambridge, MA: Belknap Press, 2000) at 34–38 (summarizing and describing the response to footnote 11).

37. See *McNeese v Board of Education*, 373 US 668 (1963); *Green v County School Board of New Kent County*, 391 US 430 (1968); *United States v Montgomery County Board of Education*, 395 US 225 (1969); *Swann v Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Keyes v School District No 1*, 413 US 189 (1973).

38. See Joseph P Viteritti, “A Truly Living Constitution: Why Educational Opportunity Trumps Strict Separation on the Voucher Question” (2000) 57:1 *Ann Surv Am L* 89 at 94.

39. See Jack M Balkin, “Rewriting *Brown*: A Guide to the Opinions” in Jack M Balkin, ed, *What Brown v. Board of Education Should Have Said: The Nation’s Top Legal Experts Rewrite America’s Landmark Civil Rights Decision* (New York: NYU Press, 2002) 44; Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73:1 *Harv L Rev* 1.

40. See e.g. Dennis J Hutchinson, “Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948-1958” (1979) 68:1 *Geo LJ* 1.

41. See e.g. Robin Bernstein, *Racial Innocence: Performing American Childhood from Slavery to Civil Rights* (New York: New York University Press, 2011) at 235–42 (arguing that one explanation for Kenneth B Clark’s finding, *supra* note 30, that children preferred White dolls when given a choice, is that, at the time of these experiments, Black dolls were associated with violent play, and the children, therefore, may have been making a choice to avoid violent play rather than a positive selection based on race).

42. See Sheneka M Williams & Kathryn A McDermott, “Social Science Research and School Diversity Policy” (2014) 28:2 *Education Policy* 325 at 343.

thought the “research was irrelevant to the constitutional question presented by segregation”.⁴³

The inclusion of, and reference to, social science evidence also represented a further success in the legal realist attack on formalism. That attack may not have been enduring (in the US) but it definitely exposed the tension between how law and social science approach what types of conclusions can be drawn from evidence.⁴⁴ As Susan Haack explains:

The culture of the law is adversarial, and its goal is case-specific, final answers. The culture of the sciences, by contrast, is investigative, speculative, generalizing, and thoroughly fallibilist: most scientific conjectures are sooner or later discarded, even the best-warranted claims are subject to revision if new evidence demands it, and progress is ragged and uneven. . . . It’s no wonder that the legal system often asks more of science than science can give, and often gets less from science than science could give; nor that strong scientific evidence sometimes falls on deaf legal ears, while flimsy scientific ideas sometimes become legally entrenched.⁴⁵

These different ways of approaching evidence and conclusions are undergirded by different goals, which can render “social science as essentially meaningless” within the eyes of the law.⁴⁶

Yet despite these differences, the Supreme Court of the United States was willing, in *Brown* at least, to incorporate social science into its own legal reasoning. The fact the Court did so while overturning existing precedent is also noteworthy as it demonstrated a willingness to revise or discard “final answers” using contextual evidence of the moment that had been provided by social science.

43. Rachel F Moran, “What Counts as Knowledge? A Reflection on Race, Social Science, and the Law” (2010) 44:3/4 Law & Soc’y Rev 515 at 516–17.

44. See *ibid* at 537.

45. Moran, *supra* note 43 at 530, citing Susan Haack, “Trials & Tribulations: Science in the Courts” (2003) 132:4 Dædalus 54 at 57.

46. Jeffrey J Rachlinski, “Evidence-Based Law” (2011) 96:4 Cornell L Rev 901 at 922.

The Court's reasoning signalled a willingness to consider evidence-based arguments developed by other disciplines, including the social sciences, that addressed a central issue in the case. In effect, it invited the possibility for a whole variety of novel evidence-based arguments to be used in the future. Whether the promise of this moment has come to fruition in the US is beyond the scope of this paper. What matters is that a court with traditionally high levels of global influence⁴⁷ was opening the door to a new way of adjudicating constitutional rights claims. This showed other like-minded jurisdictions that a different way was possible.

At the same time, *Brown* also raises a number of troubling concerns about the reliance on social science evidence in constitutional decision making. The majority of the social science evidence in *Brown* was adduced through “Brandeis Briefs”—compilations of unsworn expert testimony that are introduced to a court via a party or *amicus curiae*. As a result, this evidence was not subjected to cross-examination at trial. With the advent of further research, the methodology and conclusions of the doll studies at the core of the social science record have been seriously questioned.⁴⁸ Others critiqued the underinclusive nature of the social science record and its focus on psychological harm to the exclusion of a broader understanding of the social and economic dimensions of segregation.⁴⁹

What *Brown* ultimately teaches is mixed in terms of the dynamics, strategies, and best practices of effectively using social science evidence in constitutional litigation. *Brown* opened the door to social science evidence becoming a successful component of constitutional advocacy in landmark cases. But it also struck a cautionary note on the importance of reliability and comprehensiveness of the record.

While *Brown* may have opened the door to using social science evidence in constitutional litigation, more recent American case law shows that doctrinally and epistemologically, the American judiciary has ongoing reticence towards such evidence. In the landmark case of *McCleskey v Kemp*, for example, the Supreme

47. But see David S Law & Mila Versteeg, “The Declining Influence of the United States Constitution” (2012) 87:3 NYUL Rev 762 (suggesting that the traditional global influence of the Supreme Court of the United States is diminishing).

48. See Bernstein, *supra* note 41; Martha Minow, *In Brown's Wake: Legacies of America's Educational Landmark* (New York: Oxford University Press, 2010).

49. See Lani Guinier, “From Racial Liberalism to Racial Literacy: *Brown v. Board of Education* and the Interest-Divergence Dilemma” (2004) 91:1 J American History 92 at 95–96.

Court of the United States had to decide whether the death penalty violated the equal protection clause or constituted cruel and unusual punishment on account of the fact that it was disproportionately applied against Black people.⁵⁰ The defendant, supported by the National Association for the Advancement of Colored People, led statistical evidence establishing that the death penalty was disproportionately imposed in the State of Georgia on Black killers of White victims versus White killers of Black victims. In a 5–4 decision, a majority of the Court held the statistical evidence did not establish a constitutional violation because the underlying death penalty was not promulgated or maintained for a discriminatory purpose.⁵¹ Moreover, the majority reasoned:

At most, the [social science evidence adduced in this case] indicates a discrepancy that appears to correlate with race. . . . In light of the safeguards designed to minimize racial bias in the process, the fundamental value of jury trial in our criminal justice system, and the benefits that discretion provides to criminal defendants, we hold that the [social science evidence adduced in this case] does not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process.⁵²

The majority's reasons highlight the problem of causation versus correlation (discussed in Part II below) that is endemic to much social science research. But the reasoning also demonstrates a more fundamental doctrinal problem: if equality analysis in a given jurisdiction does not include, or is hostile to, the concept of substantive equality, social science evidence of the disparate impact of an otherwise facially neutral law will not be determinative of case outcomes. As in *McCleskey*, the social science evidence may establish disparate impact, but doctrinally something more is required, such as motive or intent to discriminate, which the evidence did not establish.

Writing about *McCleskey*, and with the benefit of thirty years of hindsight, Reva Siegel argues that a close reading of the case and perceived deficiencies

50. 481 US 279 (1987).

51. See *ibid* at 298–99.

52. *Ibid* at 312–13.

with its record has opened the door to reliance on statistical evidence of bias by other American courts, especially in non-death penalty cases.⁵³ At the same time, there remains a judicial reticence to statistical evidence of discrimination. Because of this reticence, Siegel suggests that “it may not make best sense to imagine judges as the primary agents for implementing the insights of critical social science”.⁵⁴

Examples of modern reticence abound. In some cases, the very possibility of social science evidence making a valuable contribution to the search for truth and justice has been questioned. For example, in *Vieth v Jubelirer*, a plurality of the Supreme Court of the United States held that political gerrymandering cases were non-justiciable because there was no workable or manageable way for adjudicating such claims.⁵⁵ However, Kennedy J, in a concurring opinion, held that research methodologies may improve in the future such that there would be the necessary evidentiary record to properly adjudicate such claims.⁵⁶

These epistemological disputes continue at the Supreme Court of the United States. In oral arguments for *Gill v Whitford*, the most recent gerrymandering case to reach that court, Roberts CJ openly questioned whether the underlying evidence was “sociological gobbledygook” and expressed concern that lay members of the public would be unable to comprehend the basis upon which the Court reached its decision if it were to rely on this type of evidence.⁵⁷

53. See Reva B Siegel, “Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in *McCleskey v. Kemp*—and Some Pathways for Change” (2018) 112:6 Nw UL Rev 1269.

54. *Ibid* at 1289.

55. 541 US 267 (2004).

56. See *ibid*. Justice Kennedy held:

Technology is both a threat and a promise. On the one hand, if courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow. On the other hand, these new technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards.

Ibid at 312–13.

57. 585 US ____ (2018) (Oral argument).

In response, the President of the American Sociological Association wrote an open letter to the Chief Justice excoriating him for questioning the evidence-based contributions social science makes to the interpretation and application of law.⁵⁸

The precise role that social science evidence will play in the ultimate resolution of *Gill v Whitford* remains to be seen.⁵⁹ In its recent decision, the Supreme Court of the United States decided the case on the basis of standing, unanimously concluding that the plaintiffs only had a “personal stake” in their particular electoral districts and therefore could only challenge alleged gerrymandering in those districts as opposed to the statewide allegations they had been making.⁶⁰ The Court noted a deficiency in the social science evidentiary record, specifically that the studies adduced evaluated statewide interests of political parties and not the personal interests of particular citizens. However, a majority (7–2) of the Court decided to remand the case for reargument on the basis that some of the plaintiffs appeared to have a sufficiently personal interest in electoral districts where there was evidence of gerrymandering and that the law in this area is unsettled.⁶¹

What matters for the purposes of this paper is the open discussion of social science reliability and comprehensibility and the starkly expressed reservations of some justices to reliance on such evidence. Moreover, even where social science evidence is reliable, it may not necessarily overlap with the doctrinal requirements for establishing either standing or a particular breach.

These more recent cases show that *Brown* has not been a panacea for applicants in constitutional litigation in the US. On the contrary, doctrinal requirements and epistemological doubt continue to create bumpy roads for the use of social science evidence in courts in the US, even if the door is now open.

58. See letter from Dr Eduardo Bonilla-Silva to Chief Justice of the United States John G Roberts Jr, “Open Letter to Chief Justice Roberts” (9 October 2017), online: *American Sociological Association* <www.asanet.org/news-events/asa-news/asa-president-eduardo-bonilla-silva-responds-chief-justice-john-roberts>.

59. 585 US ____ (2018).

60. *Ibid* at 2.

61. See *Gill v Whitford*, *supra* note 59.

B. Social Science Evidence Comes to Canada

While *Brown* may have opened the door to reliance on social science evidence in other jurisdictions, it did not throw the door wide open in Canada. Canada has a long history of subjecting expert testimony to cross-examination. The practice of admitting unsworn evidence or Brandeis Briefs has never become a regular part of Canadian litigation in constitutional cases or otherwise. Courts can and do admit such evidence, but it is primarily adduced for uncontentious background information.⁶²

The teaching in *Brown* that has been followed in Canada is the notion that social science evidence can legitimately be introduced to address a core issue in a constitutional case. Indeed, in some of the first *Charter* trials, litigants adduced or attempted to adduce social science evidence that went to the core issues in the case. In *Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, for example, a case challenging the constitutionality of repeated interference by customs officers with the importation of gay and lesbian erotica material, the Court took no issue with the trial judge's approach to admitting an expansive social science evidentiary record, but decided the case on the narrow basis that there would be no constitutional violation if the prevailing statute were properly applied by administrative decision makers.⁶³ In *R v Malmo-Levine*, by contrast, a case challenging the constitutionality of the inclusion of marijuana as an illegal drug, a majority of the Court held that the trial judge had erred by failing to admit social science evidence, but only the dissenting judgments incorporated the social science evidence into the reasoning process in any meaningful way.⁶⁴ In other words, there was a plethora of social science evidence in both cases, but it did not carry the day.

Without performing a qualitative case-by-case analysis, and even if such an analysis is performed, it is difficult to empirically measure the impact of social science evidence on legal reasoning and outcomes.⁶⁵ More than thirty

62. See e.g. *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at paras 106–27 (discussing the Canadian approach to Brandeis Briefs and extrinsic evidence in the context of *Charter* cases).

63. 2000 SCC 69.

64. 2003 SCC 74.

65. See Kathleen E Hull, "The Role of Social Science Expertise in Same-Sex Marriage Litigation" (2017) 13 Annual Rev L & Soc Science 471 at 473.

years ago, some scholars argued that social science was becoming accepted in modern legal culture and that a professional infrastructure had emerged which would foster the increased and more sophisticated use of social science in future litigation.⁶⁶ Others say current use has grown to the point that it is “unremarkable”.⁶⁷ However, empirical impact studies, based on citation counts, are less definitive in their assessment.⁶⁸

Citation count studies themselves are not without limitations. They may under-represent the impact of social science if judges are reluctant to cite social science sources that they have actually relied upon.⁶⁹ Conversely, citation count studies may overrepresent the impact of social science if judges resort to citing social science sources as a form of post hoc rationalization.⁷⁰

The overrepresentation concern is a less likely explanation. There is no reason to suggest that the judiciary feels obligated to cite to social science research. Moreover, in constitutional cases, the applicable legal tests are often such that empirical social science support is not necessary to reach a particular conclusion, as the majority decisions in both *Little Sisters* and *Malmo-Levine* demonstrated.

Nonetheless, there has been a marked increase in reference to social science evidence in Canada. A search of the Westlaw database for “social science evidence” and related terms shows that approximately one in four constitutional cases in the most recent decade include a reference to social science evidence (Table 1). In the period 1970 to 2018, there was a fourfold increase in references in constitutional cases for all courts and a threefold increase in references in constitutional cases at the Supreme Court of Canada (Table 1). For *Charter* cases at the Supreme Court of Canada, the trend is even more striking: references to social science evidence have increased from ten per

66. See Murray Levine & Barbara Howe, “The Penetration of Social Science into Legal Culture” (1985) 7:2 Law & Pol’y 173 at 191.

67. Monahan & Walker, “Twenty-Five Years”, *supra* note 6 at 72.

68. See Ronald Roesch et al, “Social Science and the Courts: The Role of Amicus Curiae Briefs” (1991) 15:1 L & Human Beh 1 at 2–3.

69. See Charles R Tremper, “The High Road to the Bench: Presenting Research Findings in Appellate Briefs” in Gary B Melton, ed, *Reforming the Law: Impact of Child Development Research* (New York: Guilford Press, 1987) 199.

70. See Thomas L Hafemeister & Gary B Melton, “The Impact of Social Science Research on the Judiciary” in Melton, *supra* note 69, 27.

cent of cases in the first decade of the *Charter* to fifty-four per cent in the most recent decade (Table 1).

The quantitative data outlined in Table 1, however, are descriptive of a trend or phenomenon in Canadian constitutional litigation. Such trends are *not* necessarily indicative of a changing role or impact of social science evidence in these cases. In other words, one cannot draw the conclusion that increased reference equals increased influence.

There are significant methodological limitations to quantitative analysis based on these types of datasets. First, it is possible that the related search terms do not capture the prevailing nomenclature of earlier decades for what has been an unchanging approach. Second, references to “social science evidence” do not demonstrate what a court did or did not do with such evidence, whether it was accepted as relevant and probative to a key issue, or whether it was rejected as junk or completely irrelevant to the judicial task. This is why the paper employs systematic, non-probabilistic sampling of landmark cases to examine the role of social science evidence in a particular case.

Notwithstanding these limitations, it does appear there is an increasing frequency of judicial reference to “social science evidence” in *Charter* cases. In my view, it is more likely that courts are engaging with this evidence because of its perceived relevance and probative value to issues that are central to resolving the case. But this causal inference needs to be examined by further research using different methods than those employed in this paper. For the purposes of this paper, it is enough to note the descriptive increase in references to social science evidence and related terms.

Table 1: Number and percentage of constitutional and *Charter* cases, referencing “social science evidence” and related terms, by all courts and the Supreme Court of Canada, in the period 1970 to 2018 (Source: Westlaw)⁷¹

Period	Constitutional Cases: All Courts			Constitutional Cases: SCC			<i>Charter</i> Cases: SCC		
	Ref.	Total	%	Ref.	Total	%	Ref	Total	%
1970-1979	25	442	6%	3	44	7%	N/A	N/A	N/A
1980-1989	133	2116	6%	12	146	8%	8	82	10%
1990-1999	296	2396	12%	39	217	18%	40	183	22%
2000-2009	445	2436	18%	32	133	24%	27	69	39%
2010-2018	512	2081	25%	21	107	20%	14	26	54%

Even if the impact of social science evidence cannot easily be tested quantitatively, it is still possible to make qualitative assessments as to the impact of social science in particular cases or sets of cases.⁷² In terms of successful outcome and degree of engagement with social science evidence, qualitative assessments of recent landmark cases, such as *Canada (Attorney General) v PHS Community Services Society (Insite)*, *Bedford*, and *Carter v Canada (Attorney General)*,⁷³ all show a reliance on social science evidence that is consistent with

71. Westlaw was searched for “social science evidence” as well as “social facts”, “social framework evidence”, “extrinsic evidence”, “social authority” and “legislative facts” in both constitutional and *Charter* cases in the relevant periods. These searches were then repeated with only “constitutional” or “*Charter*” to identify the total number of cases. The searches are current to May 14, 2018.

72. See Hull, *supra* note 65; Joshua Dunn & Martin West, “Calculated Justice: Education Research and the Courts”, in Frederick M Hess, ed, *When Research Matters: How Scholarship Influences Education Policy* (Cambridge, MA: Harvard Education Press, 2008) 155; Michelle S Moses & Patricia Marin, “Informing the Debate on Race-Conscious Education Policy” (2006) 35:1 Educational Researcher 3 at 4–5; Kevin G Welner & Haggai Kupermintz, “Rethinking Expert Testimony in Education Rights Litigation” (2004) 26:2 Educational Evaluation & Policy Analysis 127.

73. *Insite* SCC, *supra* note 9; *Bedford*, *supra* note 9; *Carter*, *supra* note 13.

the increasing citation trends identified in this paper, and distinct from the Supreme Court of Canada's initial forays into social science evidence in *Little Sisters* and *Malmo-Levine*. With that said, it is not possible to generalize from these cases because they were identified through systematic, non-probabilistic sampling that sought to identify landmark cases where social science evidence was a significant part of the evidentiary record placed before the court. What can be examined are the necessary steps to effectively use this evidence in constitutional litigation, and to a lesser extent, the specific impact such evidence had in a particular case.

II. Effective Use of Social Science Evidence

In order to effectively use social science evidence, a party must adduce such evidence in court in a way that encourages judicial engagement and reliance on the evidence to decide an issue in that party's favour. This part of the paper analyzes the dynamics, strategies, and best practices at play in four stages of the process: (1) creating the record of social science evidence using epistemic communities; (2) considering who will present the evidence in court and at what stage of the litigation; (3) admitting the evidence in court; and (4) presenting the evidence in a way that overcomes limitations with social science evidence and encourages judicial engagement.

A. The Importance of Epistemic Communities for Developing the Record

Developing social science evidentiary records is a complicated task. Lawyers generally do not have advanced social science training or legal training related to social science evidence. Lawyers are also not normally connected to research communities. For social science researchers, there is often an inverse relationship between level of expertise and the availability of time to allocate to a litigation project—Canada Research Chairs have little extra time to commit outside their research programs. Social scientists may also not understand what is required for participation in the court process.⁷⁴

74. See e.g. Pascale Castonguay, "Quebec Ruling Reaffirms Research Data Confidentiality", *University Affairs* (7 June 2017), online: <www.universityaffairs.ca/news/news-article/quebec-ruling-reaffirms-research-data-confidentiality> (detailing the story of a doctoral researcher who offered to act as an expert witness in a court case related to a contentious development project

One way to overcome these challenges is to take a community approach to generating the record. Such an approach involves a community of people with various knowledge sets, sometimes from very different disciplines or jurisdictions, but a shared interest in the theme of the proposed litigation.

These types of epistemic communities can share the workload and provide strategic insight or assistance in creating the record. Legal academics, for example, can become quasi-directors of litigation research and act as an interface between social science researchers and litigation counsel.⁷⁵ Activists and advocacy organizations can open doors and create trust with marginalized populations. Researchers can convince other experts of why they should engage with a litigation project. These types of epistemic communities not only help to create the record, they then help with the subsequent litigation project.

Epistemic communities may also provide litigants with a strategic advantage that either compensates for or complements their level of expertise with the judicial process. In his seminal article on why certain litigants enjoy more success than others, Marc Galanter hypothesized that repeat players (the “haves”) enjoy more success than one-time players (the “have-nots”) because the former group have the organizational and economic capacity to employ litigation strategies that maximize their success over the long term.⁷⁶ Repeat players have better legal representation, can pick and choose when to litigate, and having chosen to litigate, can generally bring more resources to a given case. By contrast, one-time players take their case to court at the moment it emerges, lack the institutional knowledge that comes with repeated interactions with the court system, and generally do not enjoy the economies of scale that repeat players possess. Indeed, Galanter’s work has been repeatedly confirmed in subsequent empirical studies that show individuals generally fare poorly

without realizing that her interview data with the affected community might become disclosable in court).

75. See e.g. Jocelyn Downie, “Social Science and Humanities Evidence in *Charter* Litigation: Lessons from *Carter v Canada (Attorney General)*” (2018) 22:3 Intl J Evidence & Proof 305 (for the role that Jocelyn Downie of the Schulich School of Law played in *Carter*, *supra* note 13); Alison Latimer, Lisa Kerr & Laura Track, “The Segregation Case” (Remarks delivered at the Pierre Elliot Trudeau Foundation workshop on Social Science Evidence, Charter Litigation & Policy Change, 16 November 2016) [unpublished] (for the role that Lisa Kerr of the Queen’s University Faculty of Law played in *BCCLA*, *supra* note 15).

76. See Galanter, *supra* note 3.

when litigating against organizations and “party capability” is a key predictor of litigation outcomes.⁷⁷

Galanter’s work also correctly predicted that have-nots could remedy their litigation disadvantage “under particular (and limited) conditions” by affiliating themselves with more experienced legal counsel or advocacy organizations.⁷⁸ But the exact way that law would be reorganized to incorporate “the increasingly organizationally dominated legal environment” was unclear.⁷⁹

The increased use of social science evidence in constitutional litigation, in my view, is one way that this reorganization has been facilitated. By arming themselves with social science, marginalized litigants can increase their voice in a way that demands judicial responsiveness.⁸⁰

It might be tempting to hypothesize that well-resourced parties would be more likely to harness social science evidence and that this would actually advantage the haves vis-à-vis the have-nots. This might be true when, for example, a tobacco manufacturer is a party to litigation. But it is much less true when marginalized groups are litigating against the government. In jurisdictions like Canada, where the constitution only applies to government action, constitutional litigation necessarily involves the government (or institutions that are closely controlled by government).

While government may be the quintessential “repeat player”, this does not necessarily make them a have litigant. In theory, governments have unlimited economic resources, but in practice legal departments are significantly more constrained in what resources can be allocated to a particular case. For example, a regional office of the federal Department of Justice may share a handful of administrative assistants across many lawyers. The specialized human rights and constitutional law groups, all located in Ottawa, may not necessarily be engaged until litigation proceeds to the appellate level.

77. Charles R Epp, “The Two Motifs of “Why the ‘Haves’ Come Out Ahead” and Its Heirs” (1999) 33:4 Law & Soc’y Rev 1089 at 1091.

78. *Ibid* at 1090–93.

79. *Ibid* at 1097.

80. See Siri Gløppen, “Courts and Social Transformation: An Analytical Framework” in Roberto Gargarella, Pilar Domingo & Theunis Roux, eds, *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Hamphshire, UK: Ashgate, 2006) 35 at 36–37 (discussing a theoretical framework for when pro-poor litigation works and arguing that four factors explain success: voice, responsiveness, capability, and compliance).

One consequence of the shift in Canada to front-loading social science evidence at the trial level, as opposed to Brandeis Briefs before appellate courts, is that applicants commence litigation with the entirety of their record in place. Subject to statute of limitations concerns, applicants can spend significant time and energy forming their epistemic communities and using those communities to develop rich and detailed litigation records that are linked to a legal theory for a given case. By contrast, governments must respond to such records within the more truncated timelines of civil procedure rules. If governments have not amassed independent and impartial expert evidence as part of an evidence-based public policy development process, they will not have a social science repository with which to respond to an applicant's evidentiary record. Of course, as repeat players, they will be experts in using civil procedure rules to shape what adjudication on the *merits* ultimately looks like. Governments also have resources that can be allocated to developing an evidence base for a public policy or law under constitutional challenge. But faced with a have applicant, governments may struggle to respond with a competing evidence-based legal narrative in the timely fashion required by litigation.

Once litigation is commenced, epistemic communities can also play an important strategic role in framing the case to the general public. Each component of the epistemic community has its own social network and can extend the reach of communications about the case to those networks. By contrast, government is limited to more centralized and generalized communications strategies. To the extent that modern constitutional cases are litigated on social media, the epistemic communities that formed to create a social science evidence record can also provide a strategic communications advantage. While court cases are obviously not decided based on public pressure, judges are attuned to the public pulse on contentious issues and may be influenced by effective communications strategies. This type of public litigation may also influence government implementation decisions following a judgment, or in extreme cases, government strategy during litigation.⁸¹

81. See e.g. Jean Laroche, "Province Withdraws 'Unconquered Peoples' Defence in Mi'kmaq Court Case", *CBC News* (21 December 2016), online: <www.cbc.ca/news/canada/nova-scotia/unconquered-people-defence-court-case-alton-gas-appeal-environment-1.3906943> (explaining why the Province of Nova Scotia withdrew a legal defence, in the middle of a case involving Aboriginal rights, after there was a public outcry about the legitimacy of the Government's legal argument).

Employing epistemic communities to create litigation records, however, does not guarantee that those records will be accepted by courts. Litigation counsel must also concern themselves with who is presenting each piece of the social science record and when this evidence is presented.

B. Who Should Adduce Relevant Social Science Evidence, and When

Social science evidence is adduced by litigation counsel at trial via *viva voce* testimony, affidavit evidence or admission on consent, by *amici curiae* where permissible (usually at the appellate level), and by counsel directly in legal briefs. There are important dynamics, strategies, and best practices for each of these avenues.

Most social science evidence at the trial level will be presented by expert witnesses in the form of *viva voce* testimony or affidavits. Where a constitutional challenge proceeds by way of judicial review, expert testimony may need to be presented even earlier, before the administrative decision maker, since there are significant barriers to adducing additional evidence at subsequent stages.⁸² Expert testimony has the potential to significantly impact litigation, but it may also be viewed with suspicion if judges perceive experts to be descending from an impartial position to one of advocacy.⁸³ Ronald Roesch and colleagues argue that repeated “courtroom battles of the experts [in the US] have reduced the credibility of psychological research in the eyes of many judges as well as the public”.⁸⁴ The state of affairs in Canada is likely less jaundiced, but there remain long-standing concerns about the role expert witnesses play in litigation.⁸⁵

In *White Burgess Langille Inman v Abbott and Haliburton Co (WBLI)*, the Supreme Court of Canada fleshed out a two-step process for admitting expert evidence.⁸⁶ At the first stage, the trial judge must assess, as a threshold

82. See *Kawula v Institute of Chartered Accountants of Saskatchewan*, 2017 SKCA 70 at paras 52–53; *Patient X v College of Physicians & Surgeons*, 2015 NSCA 41 at paras 29–30; *Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 41–46; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19–20 (all addressing the applicable test for adducing new or fresh evidence in judicial review applications).

83. See Michael J Saks, “Expert Witnesses, Nonexpert Witnesses, and Nonwitness Experts” (1990) 14:4 L & Human Beh 291.

84. Roesch et al, *supra* note 68 at 4.

85. See *WBLI*, *supra* note 7 at paras 11–12.

86. *Ibid* at para 22.

matter, the relevance and necessity of the proposed evidence, absence of an exclusionary rule, and qualifications of the expert.⁸⁷ In cases where the opinion being proffered is “based on novel or contested science or science used for a novel purpose”, the trial judge must also make a reliability assessment.⁸⁸ At the second stage, the trial judge must balance the benefits of receiving the evidence against any risks, and exercise a discretionary gatekeeping function accordingly.⁸⁹ The expert’s independence, impartiality, and willingness to perform their duty to the court are assessed at both of these stages.⁹⁰ “The acid test is whether the expert’s opinion would not change regardless of which party retained him or her.”⁹¹

The Court’s concern for reliability of the expert, not just the evidence, follows a public inquiry in Ontario that found repeated instances of expert bias, by a chief pediatric forensic pathologist, that led to multiple wrongful convictions.⁹² The ensuing report made a number of important recommendations on the use of expert witnesses, which are relevant outside the criminal forensic context. A central theme throughout these recommendations is the need to shift, especially in forensic pathology, from a “trust me” approach, based on anecdotes and years of experience of the expert, to a “persuade me” approach, based on primary evidence and peer-reviewed literature.⁹³ This shift is also necessary, and can be seen, in how courts respond to experts from other disciplines. According to David Paciocco (now the Honourable Mister Justice Paciocco of the Court of Appeal for Ontario), in order to facilitate a “persuade me” approach, expert evidence must fulfill the following four factors:

- (1) the theory or technique used by the expert must be reliable, and so too must the use of that theory or technique by the expert;

87. See *ibid* at para 23.

88. *Ibid*.

89. See *ibid* at para 24.

90. See *ibid* at paras 52–54.

91. *Ibid* at para 32.

92. See *ibid* at para 12, citing *Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Ministry of the Attorney General, 2008) (Honourable Stephen T Goudge).

93. David Paciocco, “Taking a ‘Goudge’ Out of Bluster and Blarney: An ‘Evidence-Based Approach’ to Expert Testimony” (2009) 13:2 *Can Crim L Rev* 135 at 146.

- (2) the expert must not be biased (the expert must “keep an open mind to a broad menu of possibilities”);
- (3) the expert must be objective and complete in collecting evidence, must reject information that is not germane to the theory or technique being used, and must be transparent about all the information and influences they have been exposed to; and
- (4) the expert must clearly express not only the opinion, but also the complete reasoning process that led to it, and must be candid about the shortcomings of the theory or technique and the opinion reached, offering fair guidance on the level of confidence that can be placed in the opinion expressed.⁹⁴

Expert evidence that satisfies these four factors will be more likely to be viewed by judges as independent, impartial, and potentially of value to the litigation process, though by being forthright with the limitations of research, it may also mean that judges place less weight on the evidence itself.

The other main way that social science evidence can be presented to courts is by interveners or *amici curiae*, usually at the appellate level.⁹⁵ Some jurisdictions make little distinction between these two categories of participants whereas others draw important distinctions. In Canada, courts are generally reluctant to appoint *amici curiae*. For interveners, provincial civil procedure rules vary significantly across the country, with some courts taking a more restrictive approach than others.⁹⁶

The traditional common law distinction is that interveners are full parties to the litigation, with all the rights and obligations that party status entails, whereas *amici curiae* are merely friends of the court, invited or permitted to participate in some discrete aspect of the process.⁹⁷ But in practice there may be little distinction between the two categories when it comes to the issue of

94. *Ibid* at 146–47.

95. See e.g. Benjamin RD Alarie & Andrew J Green, “Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance” (2010) 48:3/4 *Osgoode Hall LJ* 381 at 398 (finding that nearly ninety per cent of Canadian *Charter* appeals involve interveners).

96. See e.g. *L&B Electric Ltd v Selig*, 2006 NSCA 130 at para 7.

97. For example, *amici curiae* may be invited to provide legal argument on a particular issue, taking the facts presented by the parties as a given.

presenting social science evidence to the court. Some courts do not readily permit interveners to adduce fresh evidence,⁹⁸ including social science evidence, while others permit *amici curiae* to do so in appropriate cases. These barriers significantly limit the contribution interveners, especially equality-seeking organizations, can make to highlighting the systemic aspects of individualized cases.⁹⁹

In foreign jurisdictions, some courts take a permissive approach whereas others take a more restrictive approach. For example, in South Africa, an *amicus curiae* was permitted to present social science evidence in the form of statistics on the economic needs of orphaned children in care even though this went against a textual reading of the civil procedure rules.¹⁰⁰ The Constitutional Court held that a textual and purposive interpretation of the rules permitted an *amicus curiae* to adduce such expert evidence. By permitting an *amicus curiae* to introduce expert evidence, the Court reasoned, it is more likely that the best available evidence will be presented since the marginalized nature of many litigants invariably means that they are less able to “produce the kind of compelling evidence that an expert, like the [applicant], may be able to provide”.¹⁰¹ In these circumstances, “the amicus speaks to aid voiceless and penniless people and assists the court in making an informed decision”.¹⁰²

In Australia, by way of contrast, there is a sharp distinction between interveners and *amici curiae*. Intervenors enjoy the privileges of being a party and can introduce evidence whereas *amici curiae* cannot make any contribution to the record except in rare circumstances.¹⁰³ Such rare circumstances include entering non-controversial evidence necessary to complete the record.¹⁰⁴

98. See e.g. *Tsilil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 102 at para 48.

99. See Dana Phillips, “*Ishaq v Canada*: ‘Social Science Facts’ in Feminist Interventions” (2018) 35 Windsor YB Access Just 99 at 124–25.

100. See *Children’s Institute v Presiding Officer of the Children’s Court, District of Krugersdorp*, [2012] ZACC 25.

101. *Ibid* at para 34.

102. *Ibid*.

103. See *United States Tobacco Co v Minister for Consumer Affairs*, [1988] FCA 241 at para 66, leave to appeal to the High Court refused (17 February 1989), citing *Corporate Affairs Commission v Bradley (Commonwealth Intervener)*, [1974] 1 NSWLR 391 at 396, 399.

104. See *Bropho v Tickner*, [1993] 40 FCA 25.

A lot of work has been done, particularly in the American context, on how interveners and *amici curiae* can best present evidence to the court. This work has focused on the benefits and best practices of brief writing. Roesch and colleagues argue that “[b]riefs may have an advantage over expert testimony because they are usually prepared by several individuals, they are reviewed by official groups or organizations, and their sources are documented.”¹⁰⁵ Because of the way briefs are prepared, there is an increased possibility for impartiality.

The impartial nature of briefs does not mean that they cannot engage in evaluation and interpretation of research. Evaluation and interpretation is necessary to convey to judges what conclusions can be drawn from the social science, and that a certain degree of controversy over those conclusions “is inevitable because there will invariably be some disagreement among social scientists about the conclusions to be drawn from a body of research”.¹⁰⁶ These controversies can be minimized by approaching “brief writing with an honest desire to share with the courts a faithful picture of the available [social science] knowledge, and to interpret the research only to the extent that doing so will clarify its meaning”.¹⁰⁷ Conclusions should be limited to situations where there is consensus within the scientific community¹⁰⁸ and disclosure should be made of alternative interpretations where appropriate.¹⁰⁹

Others argue that the American experience, in practice, shows that these best practices are not followed. First, the process of adducing social science evidence through briefs is relatively easy, which means that the court can be overwhelmed with multiple briefs that are submitted at the last minute.¹¹⁰ The evidence in these briefs is uncontested and tends to be prepared through an advocacy lens.¹¹¹ Even if a particular brief is prepared using more impartial best practices, it may simply get lost in a sea of other more advocacy-oriented briefs. Second, adducing social science evidence through briefs can

105. Roesch et al, *supra* note 68 at 4.

106. *Ibid* at 6.

107. Gary B Melton & Michael J Saks, “AP-LS’s Pro Bono Amicus Brief Project” (1990) 10 American Psychology L Society News 5.

108. See Roesch et al, *supra* note 68 at 6.

109. See David L Bazelon, “Veils, Values, and Social Responsibility” (1982) 37:2 American Psychologist 115.

110. See Allison Orr Larsen, “The Trouble with Amicus Facts” (2014) 100:8 Va L Rev 1757.

111. See *ibid*.

lead to self-directed judicial fact-finding, with judges turning to Google to evaluate and/or buttress social science evidence presented in briefs.¹¹²

The final way that social science evidence can be presented to courts is by counsel including reference to social science evidence immediately in their briefs. This can be a successful approach where a court is already amenable to such arguments, but it is not the advisable approach to take. The problem with counsel presenting social science evidence is that the court is provided with no basis to determine the validity of such evidence. Since counsel cannot give evidence on such validity, if the court questions the evidence, it cannot be explained and supported in the same way that is possible with an expert witness. Moreover, since such evidence cannot be subjected to cross-examination, this approach makes a party vulnerable to an objection from the opposing side.

Nonetheless, courts can be amenable to directly presented social science evidence. For example, in *AB v Bragg Communications Inc*, a Canadian case, a teenage victim of internet bullying sought a publication ban and order allowing her to proceed anonymously, as well as an order requiring the respondent internet service provider to disclose the identity of the internet protocol address responsible for the defamatory web page.¹¹³ The disclosure order was not contested, but two media outlets intervened to oppose the publication ban and anonymity order. Crucially, no evidence was presented at the trial level regarding any potential negative effects the minor would experience if such an order were not granted. The applications judge refused to grant the order and the minor appealed.

Prior to hearing the case on its merits, the Nova Scotia Court of Appeal refused to allow a child-rights organization intervener status on the basis that its submissions were not relevant to the appeal.¹¹⁴ The Court of Appeal then dismissed the appeal on its merits, finding that “the appellant’s failure to lead any evidence of harm or risk of harm to herself is fatal to both her request for a partial publication ban and that she be given permission to advance this litigation anonymously”.¹¹⁵ The minor appealed to the Supreme Court of Canada.

112. See Allison Orr Larsen, “Confronting Supreme Court Fact Finding” (2012) 98:6 Va L Rev 1255.

113. 2010 NSSC 215.

114. See *AB v Bragg Communications Inc*, 2010 NSCA 70.

115. *AB v Bragg Communications Inc*, 2011 NSCA 26 at para 94.

At the Supreme Court of Canada, thirteen groups were granted intervener status, including three child-rights organizations. The Court also appointed an *amicus curiae* to advance the arguments of the media outlets, since both media entities had chosen not to participate in the appeal. A variety of social science evidence was presented. This time, counsel for the minor appellant chose to present social science evidence too.¹¹⁶ The appellant's brief included reference to an unpublished article on children's experiences of bullying,¹¹⁷ two peer-reviewed articles on the relationship between cyberbullying, self-esteem, and suicide,¹¹⁸ a working paper from an internet institute on social networking and bullying,¹¹⁹ and a book chapter on cyberbullying in an edited collection addressing gendered violence in schools.¹²⁰

In a 7–0 decision, the Court partially overturned the lower court decisions, holding that an anonymity order should have been granted.¹²¹ The Court noted that various legislative enactments, case law, and the *Convention on the Rights of the Child*, all recognized the inherent vulnerability of children: “The law attributes the heightened vulnerability based on chronology, not temperament.”¹²²

The Court held that harm to the minor appellant could be inferred based on available social science evidence establishing that internet bullying was particularly harmful to minors, but surprisingly made no reference to any of the social science evidence cited by the appellant. The Court instead relied on two pieces of social science evidence to draw its inference: a report of a bullying task force in the appellant's province that was published after the Court of

116. See *AB v Bragg Communications Inc*, 2012 SCC 46 (Factum of the Appellant at para 5).

117. See Tanya Beran et al, “Children's Experiences of Cyberbullying: A Canadian National Study” (2015) 37:4 *Children & Schools* 207 (the paper has since been published).

118. See Sameer Hinduja & Justin W Patchin, “Bullying, Cyberbullying, and Suicide” (2010) 14:3 *Archives Suicide Research* 206; Justin W Patchin & Sameer Hinduja, “Cyberbullying and Self-Esteem” (2010) 80:12 *J School Health* 614.

119. See Anirban Sengupta & Anoshua Chaudhuri, “Are Social Networking Sites a Source of Online Harassment for Teens? Evidence from Survey Data” (2011) 33:2 *Children & Youth Services Rev* 284 (the paper has since been published).

120. See Shaheen Shariff & Rachel Gouin, “Cyber-hierarchies: A New Arsenal of Weapons for Gendered Violence in Schools” in Fiona E Leach & Claudia Mitchell, eds, *Combating Gender Violence in and Around Schools* (Stoke on Trent, UK: Trentham Books, 2006) 27.

121. See *AB v Bragg Communications Inc*, 2012 SCC 46.

122. *Ibid* at para 17.

Appeal decision,¹²³ and a non-peer reviewed science magazine.¹²⁴ The Court also cited a lower court decision that drew such an inference on the basis of a general newspaper article.¹²⁵

It would be fair to say that the social science evidence explicitly relied on by the Court was somewhat weak. A number of observations can be made from the Court's use of social science evidence. First, it is not always possible to tell from a written decision how social science evidence affected the Court. It is a strong possibility that the evidence cited by the appellant, but not referenced by the Court, did in fact have an influence. Second, this case suggests that a weak evidentiary record, produced at the last moment, may be sufficient to convince a court. However, it should be noted that the appellant in *AB v Bragg Communications Inc* was a child victim of sexualized internet bullying. The Court was thus understandably amenable to arguments that would protect her interests. Moreover, protecting her privacy interests had little political or economic ramifications even if it did infringe somewhat on the open court principle.

In a constitutional case where a party is seeking to strike down legislation or produce a broader policy impact, it is unlikely that a court will be amenable to this type of evidence presentation by counsel. For these reasons, the recommended approach for introducing social science evidence is through expert testimony at trial, and where absolutely necessary, by intervener or *amici curiae* briefs (where permitted). However, marshalling social science evidence and presenting it to a court does not mean that it will be accepted.

C. What is the Applicable Test for Assessing Reliability of Social Science Evidence

Once social science evidence is adduced, it must also be admitted by the trier of fact. Thus, care must also be taken to address the applicable evidentiary test for admission. The different admissibility tests are complex between and within jurisdictions. The Canadian test is outlined in *WBLI* (discussed above). Regardless of the specific test, there is a common concern, in many modern legal

123. See Nova Scotia Task Force on Bullying and Cyberbullying, *Respectful and Responsible Relationships: There's No App for That*, by A Wayne MacKay (Halifax: NSTFBC, 2012).

124. See "Cyberbullying: A Growing Problem", *Science Daily* (22 February 2010), online: <www.sciencedaily.com/releases/2010/02/100222104939.htm>.

125. See *R v R(W)*, 2010 ONCJ 526 at para 16.

systems, with excluding so-called junk science. How social science evidence should be tested, in order to ensure its reliability, is a much more unsettled issue. Here, the Canadian approach again has antecedents in American law.

For most of the twentieth century (and to the present day in some state jurisdictions such as New York and California), the American test for admissibility of expert evidence focused on whether there was “general acceptance” of the evidence within its field.¹²⁶ In *Daubert v Merrell Dow Pharmaceuticals*, the Supreme Court of the United States modified the prevailing test.¹²⁷ There, the Court held that trial judges should exercise a gatekeeping role to ensure that unreliable science was excluded from the litigation process. The Court identified a non-exhaustive list of five factors that could be applied flexibly to determine whether scientific evidence should be admitted: (1) whether a theory can be (or has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; and (5) whether the theory is generally accepted in the relevant scientific community.¹²⁸

In *Kumho Tire Co v Carmichael*, the Court extended the holding in *Daubert* to all non-scientific expert testimony.¹²⁹ What this means is that social science evidence, whether deemed scientific or non-scientific, must meet the *Daubert* test for admissibility in cases brought in the American federal court system and many state jurisdictions.

The Supreme Court of Canada has also held that trial judges should act as gatekeepers to exclude unreliable expert evidence,¹³⁰ but initial pronouncements on the test for admitting expert evidence did not result in the same focus on reliability as in *Daubert*.¹³¹ In *R v J-LJ*, however, the Court held that reliability was crucial in evaluating novel scientific evidence, and adopted the *Daubert* factors as a useful, non-exhaustive, flexible list for making reliability

126. *Frye v United States*, 293 F 1013 at 1014 (DC Cir 1923).

127. 509 US 579 (1993).

128. See *ibid* at 593–95.

129. 526 US 137 (1999).

130. See *R v J-LJ*, *supra* note 7.

131. See e.g. *R v Mohan*, [1994] 2 SCR 9, 114 DLR (4th) 419 (holding that the factors to consider when admitting expert evidence are: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert).

determinations.¹³² Subsequently, the Court has applied the *Daubert* factors to exclude novel scientific evidence.¹³³

Concern was raised, however, about the prospect of *Daubert* being taken too far and applied to expert evidence that was not scientific in nature, such as actuarial testimony or expert commentary on standards of care within a profession.¹³⁴ Paciocco (as he then was) argues that by being overly fixated on science, lower courts were prone to committing two types of error:

First, it caused some lower courts to hold that the *Daubert* test and the gatekeeping role is confined to scientific expertise. Experts who were not scientists would not be subjected to the reliability inquiry proscribed by *Daubert*. Second, it caused other courts to apply the criteria listed in *Daubert* in a wooden fashion, even to non-scientific forms of expertise. Each of these two kinds of error was caused by the failure to take context into account.¹³⁵

In response, the Court of Appeal for Ontario held that the *Daubert* factors should not be applied rigidly to certain types of social science evidence that are only being used to provide relevant contextual information.¹³⁶ However, that same Court later overturned a subsequent conviction, based on the social science in question, after it was discovered that the expert's testimony contained serious flaws and misstatements.¹³⁷ This shows the perils of using a reliability test that is too relaxed.

While there is now recognition (at least in Canada) that *Daubert* should be applied with some flexibility, it is unclear how and when such flexibility

132. *Supra* note 7 at para 33.

133. See e.g. *R v Trochym*, 2007 SCC 6 (finding that post-hypnosis testimony did not meet the test for admissibility).

134. See David M Paciocco, "Context, Culture and the Law of Expert Evidence" (2001) 24:1 *Adv Q* 42 at 57.

135. *Ibid.*

136. See *R v Abbey*, 2009 ONCA 624 at paras 104–17 (holding that the trial judge erred in rejecting expert testimony on the meaning of a teardrop tattoo, which the defendant had, within the urban street gang culture, a community to which the respondent admittedly belonged).

137. See *R v Abbey*, 2017 ONCA 640.

should be permitted and when it should not. Recent studies suggest that *Daubert* may be applied more flexibly for types of expert evidence of which courts are more familiar, even if the reliability of this evidence has been called into question.¹³⁸ Others suggest that *Daubert* did not have a significant impact on the admissibility of behavioural and social sciences, but may have led to an increase in the use of opposing experts to contest such evidence.¹³⁹

Julie Morgan and Diana Pullin suggest that “[t]he efficacy of social science evidence may depend on whether a judge casts a question as legislative or adjudicative.”¹⁴⁰ I disagree. The real issue is not how the question is characterized, but the degree to which the conclusion drawn from the social science evidence is dispositive of the case; the closer the evidence comes to resolving a key factual dispute or legal test, the more scrutiny courts will place on assessing the reliability of the evidence, and the more rigidly *Daubert* factors will be applied.¹⁴¹ Thus, social science evidence may be admitted, but if a party wants a court to attach significant weight to that evidence, on an issue that is dispositive of the case, then the evidence that is adduced must be capable of withstanding significant scrutiny.

D. Judicial Receptiveness to Social Science Evidence

There are a number of challenges to convincing judges to give weight to social science evidence. Two of those challenges are: the problem of establishing causation and the problem of judicial misunderstanding.

138. See Simon A Cole & Gary Edmond, “Science Without Precedent: The Impact of the National Research Council Report on the Admissibility and Use of Forensic Science Evidence in the United States” (2015) 4:2 *British J American Leg Studies* 585 (discussing the application of *Daubert* to forensic science following the 2009 report on forensic science by the United States National Research Council, *Strengthening Forensic Science in the United States*, which was quite critical of the methods and reliability of significant portions of forensic science).

139. See Daniel W Shuman & Bruce D Sales, “The Impact of *Daubert* and its Progeny on the Admissibility of Behavioral and Social Science Evidence” (1999) 5:1 *Psychol Pub Pol’y & L* 3.

140. Julie Margetta Morgan & Diana Pullin, “Social Science and the Courts: Challenges and Strategies for Bridging Gaps Between Law and Research” (2010) 39:7 *Educational Researcher* 515 at 517.

141. See e.g. *R v Spence*, *supra* note 21 at paras 60–68 (explaining how courts will be reluctant to take judicial notice of any fact, regardless of its categorization, where it may be dispositive of the case).

The problem of causation deals with the difficulties of generating relevant social science evidence in the first place.¹⁴² Many social phenomena involved in constitutional litigation are polycentric and not amenable to simple causal relationships. This means that the best social science evidence available may not be able to answer questions in the definitive manner desired from courts.¹⁴³ Moreover, it would be a mistake to infer that causation is synonymous with relevance. The fact that quantitative causation cannot be established does not mean that a qualitative rights violation has not occurred.¹⁴⁴ It also does not mean that other forms of empirical research are irrelevant to the issues or values in a case. Yet, if causation is what courts focus on, parties face a difficult tactical decision of choosing whether to explain why only weak causation may be established or of taking an advocacy strategy that relies less on social science evidence.

The problem of judicial misunderstanding recognizes that social science evidence must be presented to judges in a manner that they understand. One of the potential issues with using social science evidence is that judges may not have “the technical skills necessary to fully comprehend complex [social] scientific evidence”¹⁴⁵ and they may lack the understanding of scientific

142. See e.g. Michael Heise, “Judicial Decision-Making, Social Science Evidence, and Equal Educational Opportunity: Uneasy Relations and Uncertain Futures” (2008) 31 *Seattle UL Rev* 863 at 887. Heise discusses some of the difficulties in establishing the educational benefits of diverse schools:

Many factors contribute to the conflicting social science evidence about the relation between student diversity and achievement. Efforts to identify and isolate the potential independent influence of specific variables (especially variables relating to student diversity) on educational outcomes, such as those involved in the *Grutter* and *Parents Involved* litigation, undertake one of the most complicated research questions available.

Ibid.

143. See A Young, *supra* note 4.

144. See Margaret L Satterthwaite & Justin C Simeone, “A Conceptual Roadmap for Social Science Methods in Human Rights Fact-Finding” in Philip Alston & Sarah Knuckey, eds, *The Transformation of Human Rights Fact-Finding* (Oxford: Oxford University Press, 2016) 321 at 327.

145. John W Wesley, “Scientific Evidence and the Question of Judicial Capacity” (1984) 25:4 *Wm & Mary L Rev* 675 at 685.

culture necessary to appreciate debates between different experts.¹⁴⁶ Morgan and Pullin suggest that “[t]here is little comprehensive research to show how judges fare in evaluating the quality of social science evidence.”¹⁴⁷ On the contrary, there is a growing body of research that seeks to analyze how well judges understand social science evidence. At least one American study, based on survey evidence, found that trial judges are ill-prepared to apply the leading test for assessing the reliability of social science evidence for the purposes of determining admissibility.¹⁴⁸ Another study found that scientific skepticism led judges to *not* admit valid evidence.¹⁴⁹ The same study found that judges made errors in admitting or spotting issues with flawed research, but that scientifically trained judges placed higher weight on valid studies.¹⁵⁰ In Australia, a qualitative study of family law practitioners found increased judicial reliance on social science evidence, but concern among practitioners that judges were not using such evidence properly in some cases.¹⁵¹

Judicial self-confidence in the ability to understand social science may have an impact on admissibility. For example, in assessments of forensic criminal evidence, judges are more likely than lay decision makers to respond that the evidence is complex and that they do not have a strong understanding of the material.¹⁵² Lay

146. See David S Caudill & Lewis H LaRue, “Why Judges Applying the *Daubert* Trilogy Need to Know about the Social, Institutional, and Rhetorical - and Not Just the Methodological - Aspects of Science” (2003) 45:1 Boston College L Rev 1.

147. Morgan & Pullin, *supra* note 140 at 516.

148. See e.g. Shirley A Dobbin et al, “Applying Daubert: How Well Do Judges Understand Science and Scientific Method?” (2002) 85:5 *Judicature* 244 (conducting a national survey of American trial judges to determine their understanding of the *Daubert* test, see *above* at 32, finding that judges have a poor grasp of the various components (especially falsifiability), and concluding that “[w]ithout appropriate scientific education judges may be ill-prepared to assess the validity and reliability of claims made about proffered scientific evidence” at 247).

149. See Margaret Bull Kovera & Bradley D McAuliff, “The Effects of Peer Review and Evidence Quality on Judge Evaluations of Psychological Science: Are Judges Effective Gatekeepers?” (2000) 85:4 *J Applied Psychology* 574.

150. See *ibid.*

151. See Zoe Rathus, “‘The Research Says ...’: Perceptions on the Use of Social Science Research in the Family Law System” (2018) 46:1 *FLR* 85.

152. See Dawn McQuiston-Surrett & Michael J Saks, “The Testimony of Forensic Identification Science: What Expert Witnesses Say and What Factfinders Hear” (2009) 33:5 *L & Human Beh* 436; Chris Guthrie, Jeffrey L Rachlinski & Andrew J Wistrich, “Inside the Judicial Mind” (2001) 86:4 *Cornell L Rev* 777. *Contra* Anthony Champagne,

decision makers, by contrast, show a concerning propensity to be influenced by a forensic expert's background and experience instead of by the sophistication of the forensic technology or the extent to which it was subjected to rigorous scientific testing.¹⁵³ Judges and lay decision makers are both more willing to accept qualitative conclusions about social science evidence rather than quantitative presentations of the same data.¹⁵⁴ The response of one social rights advocate is to try and simplify critiques of government action rather than employ complex statistical evidence.¹⁵⁵ Another response is to encourage courts to employ court-appointed experts to assist in explaining or translating expert evidence into simpler terms.¹⁵⁶

Regardless of how well judges understand social science evidence, judges may be less willing to accept valid social science evidence when it goes against pre-existing truths that have a long history of acceptance in the legal system.¹⁵⁷ This reluctance to challenge previously relied upon evidence is especially observable in criminal cases.¹⁵⁸ In effect, appellate courts may be applying a different standard of review for social science evidence in criminal versus civil trials.¹⁵⁹ The possibility of a less exacting standard in civil cases involving *Charter* rights claims may mean that it is easier to admit social science evidence, but if that evidence challenges pre-existing myths about marginalized people, then it is possible that the evidence will face greater scrutiny.

Daniel Shuman & Elizabeth Whitaker, "Expert Witnesses in the Courts: An Empirical Examination" (1992) 76:1 *Judicature* 5; Gary L Wells, "Naked Statistical Evidence of Liability: Is Subjective Probability Enough?" (1992) 62:5 *J Personality & Social Psychology* 739.

153. Jonathan J Koehler et al, "Science, Technology, or the Expert Witness: What Influences Jurors' Judgments About Forensic Science Testimony?" (2016) 22:4 *Psychol Pub Pol'y & L* 401.

154. See McQuiston-Surrett & Saks, *supra* note 152.

155. See Bruce Porter, "Canada: Substantive Equality Rights for the Poor" in Malcolm Langford et al, eds, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges and Strategies* (Geneva: Centre on Housing Rights & Evictions, 2003) 66 at 76.

156. See Hughes & MacDonnell, *supra* note 4.

157. See Erica Beecher-Monas, "Blinded by Science: How Judges Avoid the Science in Scientific Evidence" (1998) 71:1 *Temp L Rev* 55 (arguing that trial judges have evaded applying *Daubert* to analyze forensic evidence that has historically been admissible, but is questionable given current scientific knowledge).

158. See Peter J Neufeld, "The (Near) Irrelevance of *Daubert* to Criminal Justice and Some Suggestions for Reform" (2005) 95:S1 *American J Public Health* S107.

159. See National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, (Washington, DC: National Academies Press, 2009).

III. Social Science Evidence in Comparative Context

This part applies the insights from the preceding sections to an assessment of a landmark constitutional rights case in each of three jurisdictions (South Africa, Canada, and the US). In each case, social science evidence was heavily relied on by the litigants in their records and the courts in their decisions.

A. Assessing the Reasonableness of Economic and Social Rights Program Delivery: Treatment Action Campaign and Mazibuko

In *Minister of Health v Treatment Action Campaign (No 2)*, the applicants, a collective of civil society individuals and organizations, led by the Treatment Action Campaign, challenged the Government of South Africa's response to the HIV epidemic facing that country.¹⁶⁰ Specifically, the applicants challenged the Government's refusal to make the anti-retroviral drug nevirapine available in the public health sector and to expand its pilot program, to deal with mother-to-child transmission of HIV at birth¹⁶¹ (in which nevirapine was available), into a national program. The applicants argued that the Government's failures violated the right to health and children's rights provisions of the *Constitution of the Republic of South Africa*.¹⁶²

The Court was faced with two issues: (1) whether it was constitutionally reasonable for the pilot program to place restrictions on the provision of nevirapine in the public health sector; and (2) whether the government was obligated to expand its pilot program into a national program. Social science evidence played an important role in resolving these issues.

Social science evidence was adduced to address both of these issues. The applicants provided affidavits of affected women, primary care health practitioners, and medical professors.¹⁶³

160. [2002] ZACC 15 [*Treatment Action Campaign*].

161. Mother-to-child transmission of HIV can occur during childbirth and also from breastfeeding.

162. See *Treatment Action Campaign*, *supra* note 160; *Constitution of the Republic of South Africa, 1996*, No 108 of 1996, ss 27–28.

163. For a discussion of these issues, see Mark Heywood, "Preventing Mother-to-Child HIV Transmission in South Africa: Background, Strategies and Outcomes of the Treatment Action Campaign's Case Against the Minister of Health" (2003) 19:2 SAJHR 278; Amy Kapczynski &

The Government of South Africa responded with a litany of its own evidence, principally from doctors. In their reply briefs, the applicants responded by enlisting affidavits from the South African and the international authors of a number of the studies relied on by the Government.

On each issue, the Court resolved the evidentiary matters in dispute in favor of the applicants. Based on the social science evidence, the Court concluded that the Government's approach was unreasonable and a violation of the *Constitution of the Republic of South Africa* because the benefits of provision outweighed the negative effects.¹⁶⁴ The Court further held that it was also constitutionally unreasonable to wait "for a protracted period before taking a decision on the use of nevirapine beyond the research and training sites".¹⁶⁵ In considering the Government's failure to expand its pilot program, the Court concluded that it would not be too onerous for the Government to increase counselling and training capacity at the sites lacking adequate administration infrastructure, and so ordered.¹⁶⁶

A number of the dynamics, strategies, and best practices identified in Part II are observable in *Treatment Action Campaign*. First, an epistemic community, led by an advocacy organization, was central to the development of the record. This allowed the applicants to enlist the authors of studies relied on by the Government to counter the framing and conclusions that the Government attempted to ascribe to these studies. In effect, the applicants were able to establish that the evidentiary record was reliable, but capable of supporting only the conclusion the applicants were advancing. Second, the expert evidence was adduced at trial, permitting cross-examination and enhancing reliability. Third, the framing of the case at trial, using social science evidence, necessitated a response by the Government with its own record. The Court then relied on the Government's record to some extent as admissions of safety and efficacy of the drug at issue in the case.¹⁶⁷ In a case that turned on competing cost-benefit analyses, all of these factors came together to support the constitutional claim advanced by the applicants. As a result, the applicants were able to obtain an

Jonathan M Berger, "The Story of the TAC Case: The Potential and Limits of Socio-Economic Rights Litigation in South Africa" in Deena R Hurwitz, Margaret L Satterthwaite & Doug Ford, eds, *Human Rights Advocacy Stories* (New York: Foundation Press, 2009) 43.

164. See *Treatment Action Campaign*, *supra* note 160 at paras 80–81.

165. *Ibid* at para 81.

166. See *ibid* at para 135.

167. See *ibid* at paras 62–64.

order from the Court requiring the expansion of health services for vulnerable women and children.

By contrast, in *Mazibuko v City of Johannesburg*, the Government successfully used social science evidence, in part, to defend against a constitutional challenge to the implementation of prepaid water meters that limited the basic free allotment of water to six kilolitres per household per month.¹⁶⁸ At the core of the case in *Mazibuko* was a disagreement about what amount of water was sufficient to meet the constitutionally protected minimum core and progressive realization of that particular economic and social right.

In reviewing the expert social science evidence presented by the parties, the Constitutional Court determined that “what constitutes sufficient water depends on the manner in which water is supplied and the purposes for which it is used”.¹⁶⁹ Moreover, the Court held that the evidentiary record disclosed numerous definitions of what constituted “sufficient water” as well as a government that was taking progressive steps to provide more water over time.¹⁷⁰ The Court held it was ill-placed to choose one definition over another for institutional and democratic reasons and that assessing the reasonableness of progressive realization required a deferential standard.¹⁷¹

The Court distinguished *Mazibuko* from *Treatment Action Campaign* on the basis that in the latter case it was the Government that had accepted the sufficiency of nevirapine as a treatment and the Court’s decision merely extended who qualified for that treatment by removing unreasonable restrictions. By contrast, the Court in *Mazibuko* characterized the applicants’ request as one of setting or creating government policy, which went beyond the Court’s institutional role. Thus, the Court drew a distinction between no action to recognize a right, or unreasonable restrictions of a right, versus a policy choice that took steps to recognize a right for all but to a lesser degree than the applicants desired.¹⁷²

The Court then considered whether the policy of providing a per household amount versus a per person amount was constitutionally reasonable. The Court again referenced the evidentiary record provided by the government,

168. [2009] ZACC 28.

169. *Ibid* at para 62.

170. *Ibid*.

171. See *ibid*.

172. See *ibid* at paras 64–68.

concluding: “Again the City presents cogent evidence that it is difficult to establish how many people are living on one stand at any given time; and that it is therefore unable to base the policy on a per person allocation. This evidence seems indisputable.”¹⁷³ Accordingly, the Court found the per household allocation to be constitutionally reasonable.

The applicants’ lack of success in *Mazibuko* provides a helpful case study with which to evaluate the comparative use of social science evidence and the dynamics, strategies, and best practices associated with that use. First, the initial organizing in *Mazibuko* was not supported by an epistemic community in the same way as it was in *Treatment Action Campaign*. The initial organizing was instead conducted by residents of a neighborhood affected by water privatization. Litigation efforts were later supported by the Anti-Privatization Forum, which is a socialist social movement.¹⁷⁴ This raises the possibility that the Constitutional Court viewed the litigation not merely as an impartial judicial review of public policy, centred around the regulation of a specific issue, but rather as a broader attempt to challenge the ideological or political choices of government—a use of courts that falls outside the legitimate boundaries of even the catalytic, governance-involved role that the Constitutional Court has taken on in post-apartheid South Africa.¹⁷⁵ Second (and related), the applicants in *Mazibuko* chose to frame their evidentiary record in terms of a minimum sufficient amount of water as determined by international standards. This meant that “comparative water consumption across race and class was not a major part of the case” and that substantive inequality was de-emphasized.¹⁷⁶ Third (and most important), the Constitutional Court in *Mazibuko* rejected the invitation to develop a minimum core right to water based on “international standards and domestic, context specific evidence” and instead preferred a

173. *Ibid* at para 84.

174. See Jackie Dugard, “Civic Action and Legal Mobilisation: The Phiri Water Meters Case” in Jeff Handmaker & Remko Berkhou, eds, *Mobilising Social Justice in South Africa: Perspectives from Researchers and Practitioners* (Pretoria: Pretoria University Law Press, 2010) 71 at 74.

175. See Katharine G Young, “A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review” (2010) 8:3 *Intl J Constitutional L* 385 (discussing the catalytic role of the Constitutional Court of South Africa in post-apartheid South Africa).

176. Patrick Bond, “The Right to the City and the Eco-Social Commoning of Water: Discursive and Political Lessons from South Africa” in Farhana Sultana & Alex Loftus, eds, *The Right to Water: Politics, Governance and Social Struggles* (New York: Earthscan, 2012) 190 at 193.

reasonableness analytical approach.¹⁷⁷ A doctrinal approach to constitutionally-protected economic and social rights that eschews a minimum core analysis in favour of a reasonableness analysis will necessarily place less weight on external standards derived from the evidence from other jurisdictions. This will especially be the case where the reasonableness analysis evokes resource allocation questions. As a result, social science evidence may play a stronger role where the constitutional case is framed in terms of under inclusion for specific persons in need versus under delivery for all members of a society based on a particular resource allocation choice.

B. Constraining Exercises of Discretion with Social Science Evidence: Insite

In *Insite*, a group of individuals and community organizations challenged the Government of Canada's refusal to permit the ongoing operation of a supervised drug injection site (*Insite*) in Vancouver's Downtown Eastside (DTES).¹⁷⁸ *Insite* was started in 2003 as a pilot project in response to epidemic levels of HIV and other communicable diseases associated with intravenous drug use, and to the numerous deaths resulting from drug overdoses.

Insite had the support of the Vancouver Police Department, the City of Vancouver, and the Province of British Columbia, but it required a federal exemption under the *Controlled Drugs and Substances Act (CDSA)*¹⁷⁹ in order to operate, which only the Government of Canada could grant. In 2008, the Minister of Health refused to grant the necessary exemption.¹⁸⁰ The applicants then challenged the constitutionality of the *CDSA*, though the case subsequently transformed into a judicial review of the Minister's decision.¹⁸¹ Social science evidence was crucial to the Supreme Court of Canada's conclusion that the Minister's decision was constitutionally suspect.

177. See Nathan John Cooper, "After *Mazibuko*: Exploring the Responses of Communities Excluded from South Africa's Water Experiment" (2017) 61:1 J Afr L 57 at 70.

178. See *Insite SCC*, *supra* note 9.

179. SC 1996, c 19.

180. It is notable that there was a change of government (from Liberal to Conservative) in 2006; therefore, the Minister of Health in 2008 was not from the party in power when *Insite* was first established.

181. The applicants also argued that the *CDSA* was unconstitutional on division of powers grounds. The Supreme Court of Canada rejected this argument, and since it does not raise the same social science evidentiary issues, this aspect of the case will not be discussed.

Like in *Treatment Action Campaign*, a significant portion of the social science evidence was presented at the trial level. Important parts of the evidentiary record were also presented to the Minister when the applicants requested a further exemption. The evidentiary record amassed by counsel consisted of twenty volumes—18½ of these volumes were social science evidence of one type or another.

The record included affidavits from drug users who used the Insite facility; these affidavits attested to the positive dignity and health aspects of Insite in their lives, and to the impact Insite made on their efforts to overcome their addictions.¹⁸² But the vast majority of the record included affidavits by professors of medicine, health, and epidemiology, reviewing peer-reviewed research on the efficacy of safe injection sites.¹⁸³ Most notably, some of these studies were of Insite itself. The record then detailed the history of Insite, including discussion of how Insite was an integral component of the policing model of the neighbourhood.¹⁸⁴

The trial judge made a number of findings, based on this record, that the Supreme Court of Canada found were “key” to reaching its decision.¹⁸⁵ The trial judge found that Insite was responding to pressing public health problems associated with IV drug use and that it had been an effective intervention.¹⁸⁶ The Supreme Court of Canada adopted these findings and also made extensive reference to other aspects of the record, particularly the affidavits of the Insite users themselves.¹⁸⁷ The Court also noted a particularly weak aspect of the record—the impact of Insite on crime in the DTES.¹⁸⁸

Part of the reason the record was weak on the issue of increases in crime linked to Insite is that the research finding no such increases was not published until after the record was completed. The applicants attempted to adduce a

182. See *Insite SCC*, *supra* note 9 (Affidavit of Dean Wilson).

183. See *ibid* (Affidavit of Dr. Thomas Kerr; Affidavit of Dr. Julio Montaner; Affidavit of Dr. Alex Wodak).

184. See *ibid* (Affidavit of Donald MacPherson).

185. *Insite SCC*, *supra* note 9 at paras 27, 93.

186. See *PHS Community Services Society v Attorney General of Canada*, 2008 BCSC 661 at paras 87–89.

187. See *Insite SCC*, *supra* note 9 at paras 22–23.

188. See *ibid* at para 28.

number of peer-reviewed studies as fresh evidence before the Supreme Court of Canada, but their motion was denied by Abella J.¹⁸⁹ The story, however, did not end there. The day before the hearing on the merits, *The Globe and Mail* ran an article noting “the many studies published on Insite . . . that conclude the clinic has not led to an increase in drug-related crime, is not a negative influence of those seeking to stop drug use and has resulted in a drop in public injections in back alleys and doorways.”¹⁹⁰ This article also discussed a recently published study in *The Lancet* that concluded Insite was effective.¹⁹¹

At the hearing, the federal Crown proceeded to argue that the trial judge erred in his findings because there was an evidentiary void as to “whether the program [was] ultimately effective or not”.¹⁹² This led Lebel J to put a “recent” and “widely covered” study showing that Insite worked directly to the Crown and to ask for a response.¹⁹³ By implication, this interaction also suggests the Court was aware of the other findings highlighted in *The Globe and Mail* article regarding crime statistics. While the Court does not refer to these studies in its written decision, this interaction at the hearing suggests that these studies may have played a role in the decision even though they were not technically in the record. This is troubling as it suggests civil procedure rules, especially in the context of judicial review, may prevent the admission of new or fresh evidence necessary to do justice between the parties. Instead, justice depends on a court’s willingness to act *ex mero motu* on either an implicit or explicit basis. But given the civil procedure rules that exist, this apparent reliance on fresh evidence not admitted also shows how public advocacy outside a courtroom can be essential

189. See *Canada (Attorney General) v PHS Community Services Society* (14 March 2011), Ottawa 33556 (SCC), online: <www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=33556> (decision on motion to adduce new evidence, Abella J).

190. Wendy Stueck, “The Arguments For and Against Vancouver’s Supervised Injection Site”, *The Globe and Mail* (11 May 2011) online: <www.theglobeandmail.com/news/british-columbia/the-arguments-for-and-against-vancouver-supervised-injection-site/article596153/>.

191. See *ibid.*

192. “Webcast of the Hearing on 2011-05-12: Canada (Attorney General) v PHS Community Services Society” (12 May 2011) at 00h:43m:13s–00h:44m:15s, online (video): *Supreme Court of Canada* <www.scc-csc.ca/case-dossier/info/webcastview-webdiffusionvue-eng.aspx?cas=33556&cid=2011/2011-05-12--33556&date=2011-05-12&fp=n&audio=n> (Oral argument, Appellant).

193. *Ibid.*

to the result inside a courtroom. In *Insite*, the public conversation surrounding an article effectively added evidence not in the record and influenced how the case proceeded inside the courtroom.

Based on the social science evidence in the record, the Court held that the Minister's unwillingness to grant the exemption was arbitrary and grossly disproportionate in effects, therefore making it unconstitutional.¹⁹⁴ The Court noted that criminal law prohibitions had not reduced drug use, supervised drug injection did reduce health risks, and the presence of supervised injection sites did not increase crime rates or other public nuisances.¹⁹⁵ Most importantly, the Court recognized the life-saving function of *Insite*, the number of overdoses that staff had intervened in, and the fact that no deaths had occurred at the facility.¹⁹⁶

The Court then took the unusual step of granting a *mandamus* order requiring the Minister to issue another exemption for *Insite*.¹⁹⁷ The Court explained that given the social science evidence presented, the only possible constitutionally valid decision for the Minister to make was to issue the exemption; therefore, nothing would be gained by sending the matter back for redetermination.¹⁹⁸ The Court also upheld the trial judge's award of special costs to the applicants.¹⁹⁹ This meant that the plaintiffs would be entitled to much of the costs of preparing the social science record.²⁰⁰

Like in *Treatment Action Campaign*, an epistemic community was central to the applicants' success, particularly for the way that public discussion of

194. See *Insite* SCC, *supra* note 9 at para 127.

195. See *ibid* at para 131 (explaining that the relevant factors included: "evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition" at para 153).

196. See *ibid* at paras 131, 133.

197. See *ibid* at para 150. See generally Kent Roach, "The Supreme Court's Remedial Decision in the *Insite* Decision" (2012) 6 JPPL 238 at 239 (arguing that the Court's chosen remedy may have been influenced by the sitting Government's refusal to take action following declaratory relief in another recent *Charter* case).

198. See *Insite* SCC, *supra* note 9 at para 150.

199. See *ibid* at paras 158–59.

200. See *PHS Community Services Society v Canada (Attorney General)*, 2008 BCSC 1453 at para 29.

rejected evidence influenced the hearing. That community was called into action when the Minister was only prepared to grant temporary exemptions for *Insite*.²⁰¹ Advocates correctly viewed this as a signal that a negative decision would be forthcoming and began the hard work of making the case for *Insite* in peer-reviewed publications.

What is more significant about *Insite*, however, are the strategic choices the applicants made for who would act as experts and the best practices those experts followed in order to enhance the reliability of the evidence presented. The core of the record in *Insite* was all presented by physicians, who enjoy high levels of respect by Canadians and courts.²⁰² These physicians were mainly providing evidence on peer-reviewed research, often using double-blind scientific methodologies. These affidavits also followed the best practices for brief writing discussed in Part II of this paper, but they did not have to substantially temper the applicability of their conclusions to the case since a large portion of the research being discussed was studying the efficacy of *Insite* itself. On the other side of the case was a respondent government that rested its argument on “what-ifs” of potential increases in crime, conjecture that was subsequently debunked by further peer-reviewed research. The government’s position then looked reflexive.

The disproportionate evidence presented to the Court—peer-reviewed studies of the precise public health intervention at issue against the conjecture of fictitious crime increases—translated into both the Court’s constitutional analysis and its provided remedy. Like the evidentiary imbalance, the Court viewed the Minister’s exercise of discretion as disproportionate, so much so, given the evidence, that only one possible decision was constitutionally valid. As a result, a small non-profit, advocating on behalf of drug users, was able to keep a supervised injection site open and lay the constitutional foundation for more such sites to open across the country; this has included unsanctioned

201. See Katrina Pacey, “The *Insite*/Bedford/Carter Trilogy” (Remarks delivered at the Pierre Elliot Trudeau Foundation Workshop on Social Science Evidence, Charter Litigation & Policy Change, 16 November 2016) [unpublished].

202. See *Insite* SCC, *supra* note 9 (Evidence, Volumes 1–20). See e.g. Insights West, News Release, “Nurses, Doctors and Scientists Are Canada’s Most Respected Professionals” (15 June 2017), online: *Insights West* <insightswest.com/news/nurses-doctors-and-scientists-are-canadas-most-respected-professionals> (showing that doctors continue to enjoy some of the most favourable positive opinions amongst Canadians).

“pop-up” sites that governments have been reluctant to shut down, perhaps because of the decision in *Insite*.

Following *Insite*, have-not litigants replicated the use of social science evidence in two landmark cases, *Bedford* and *Carter*. A detailed review of each case is beyond the scope of this paper. In *Bedford*, the Supreme Court of Canada struck down various *Criminal Code* provisions related to sex work. In *Carter*, the Court struck down *Criminal Code* provisions related to assisted dying. Both cases were supported by extensive epistemic communities, including organizations that intervened at the various levels of court. Both cases involved voluminous social science evidentiary records, produced at the trial level, establishing that the harms caused by the respective prohibitions were grossly disproportionate or overbroad. In both cases, the government was unable to mount an evidence-based justification for the challenged laws.

Together, *Insite*, *Bedford*, and *Carter* represent a trilogy of cases demonstrating the importance of social science evidence in modern *Charter* litigation. In each case, social science evidence was at the core of the Court’s constitutional analysis and determinative of the outcome and remedy provided. The trilogy provides a blueprint for how to successfully use social science evidence in *Charter* litigation. Indeed, it is already being followed in current litigation. For example, in *British Columbia Civil Liberties Association v Canada (Attorney General)*, the British Columbia Supreme Court struck down various provisions in the *Corrections and Conditional Release Act* that permitted indeterminate and prolonged solitary confinement in federal jails.²⁰³ The 612-paragraph decision relied extensively on social science evidence as well as the decisions in *Bedford* and *Carter*. In response to the decision, one of the applicant’s lawyers remarked: “It is a stunning decision that is grounded in four decades of history, and the best social science and medical evidence on the impact on inmate’s health of solitary confinement, and alternatives to solitary confinement.”²⁰⁴ The decision is under appeal, but that appeal, per *Bedford*, will be shaped by the factual findings made by the trial judge on the basis of the social science record put before them.

203. See *BCCLA*, *supra* note 15; *Corrections and Conditional Release Act*, SC 1992, c 20.

204. Jason Proctor, “Indefinite Solitary Confinement in Canadian Prisons Ruled Unconstitutional by B.C. Court”, *CBC News* (17 January 2018), online: <www.cbc.ca/news/canada/british-columbia/charter-solitary-confinement-bc-ruling-1.4491526> (quoting BCCLA staff lawyer, Jay Aubrey).

C. Failing to Justify Policy with Social Science Evidence: Parents Involved in Community Schools

In *Parents Involved in Community Schools v Seattle School District No 1 (PICS)*, parents in Louisville, Kentucky and Seattle, Washington challenged their respective local public school board's policy of using racial classifications in student school assignment.²⁰⁵ The school boards argued that race-based school assignment was necessary in order to obtain racial diversity in public schools along with all the educational benefits that diversity provided. The policies were upheld in the lower courts and the parents appealed to the Supreme Court of the United States. Like in the two previous case studies, social science evidence played an important role in the Court's reasoning, but unlike the previous cases, social science was used to strike down a progressive policy seeking to advance racial diversity in public schools.

In the Seattle case, the school board simply provided a blanket statement claiming that racial diversity in public school had a positive impact on student socialization.²⁰⁶ In the Louisville case, by contrast, the school board presented expert witnesses and survey evidence, at the trial level, to support the argument that diversity benefited graduates in their post-graduate workplaces. The petitioners in Louisville responded with social science evidence, presented in *amici curiae* briefs, to support the argument that there were no conclusive benefits to the integration program.²⁰⁷ At the Supreme Court of the United States, the majority of social science evidence presented was in the sixty-four *amici curiae* briefs submitted to the Court.²⁰⁸

Despite what some commentators suggest, this social science played a central role in the Court's 5–4 decision striking down the school assignment policies as unconstitutional. In holding that the school board policies were not narrowly tailored and thus a violation of the equal protection clause, the majority engaged with the social science evidence in a variety of ways. The majority noted that there was conflicting evidence on whether racial diversity

205. 551 US 701 (2007) [*PICS*].

206. See *ibid* (Brief for Respondents, Seattle School District No 1 at 16).

207. See *ibid* (Petitioner's Reply Brief, Crystal D Meredith at 8).

208. See Robert L Linn et al, *Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases* (Washington, DC: National Academy of Education, 2007) at 5, online (pdf): National Academy of Education <nepc.colorado.edu/sites/default/files/Brief-NAE.pdf>.

was a compelling interest, no clear evidence-based rationale to justify the chosen diversity target, and nothing demonstrating “the actual impact of the plans”.²⁰⁹ In a concurring opinion, Thomas J also noted that there was a lack of consensus in the social science evidence presented, and held that reliance should only be made of social science evidence, in constitutional adjudication, where acceptance of the evidence approaches unanimity.

The dissent held that race-based school assignment programs could be a compelling interest not just to address prior segregation or to ensure diversity in tertiary education, but also to improve education opportunities or to ensure that secondary schools were reflective of “the ‘pluralistic society’ in which our children will live”.²¹⁰ The dissent contended that deference to the school boards was justified based on their “knowledge, expertise, and concerns in these particular matters” and argued that an evidentiary standard requiring unanimity amongst social scientists was too high.²¹¹

Following the decision in *PICS*, the National Academy of Education (NAE) reviewed six of the *amici curiae* briefs filed by the petitioners and twenty-seven of the briefs filed by the respondents, to assess the quality of the social science evidence presented and the accuracy of the conclusions that were proffered from this evidence. The report issued by the NAE queried the linkages between racial diversity in schools and academic achievement, intergroup relations, and “long-term effects”.²¹² It also sought to determine whether these outcomes required a certain threshold of diversity and whether they could be achieved through other race-neutral policies.²¹³ The report ultimately concludes that the evidence presented to the Court suggests that racial diversity in schools “does not guarantee such positive outcomes, but it provides the necessary conditions”.²¹⁴ The report also concludes that other race-neutral alternatives would not be “the most effective means of achieving racial diversity and its attendant positive outcomes”.²¹⁵

209. *Ibid* at 725, 729, 744.

210. *Ibid* at 840.

211. *Ibid* at 849.

212. Linn et al, *supra* note 208 at 1.

213. See *ibid*.

214. *Ibid* at 3.

215. *Ibid*.

Morgan and Pullin make a number of observations about the use of social science evidence in *PICS*. First, they argue “only the dissent seems to rely on such evidence as a basis for its legal conclusions”.²¹⁶ Second, they query whether the NAE report would have influenced the outcome of the decision if it were issued *ex ante*, but at the same time recognize that the report did not present the level of consensus called for. Other scholars accept that social science evidence was central to the Justices’ decision making, but question why a lack of consensus in the evidence was less determinative in previous education litigation than in *PICS*.²¹⁷

In my view, the majority opinion in *PICS* did in fact rely on the available social science evidence. The majority opinion considered the available social science evidence and concluded that the respondents’ programs lacked sufficient connection to an evidence-based rationale. When one looks at the ultimate conclusion of the NAE report, it is hard to see how the Court could have come to a different conclusion than it did without accepting a much lower level of evidentiary support for the states’ program. The NAE report finds that increased diversity is not guaranteed, but only likely, to have a positive impact, and that any possible positive impact is not direct and instead depends on other unidentified concurrent programs that may or may not be in place. While the report finds that the school assignment programs at issue were the most effective way of achieving diversity, the report does not consider the possibility that some less effective program might, at the same time, be less constitutionally problematic. Even if this report had been presented *ex ante*, it would likely not have changed the result.

Like both *Treatment Action Campaign* and *Insite*, the *PICS* case is another example of a government litigant struggling to control or frame how a social science evidentiary record is incorporated into judicial reasoning. What is most striking about *PICS*, however, is what it teaches about reliability assessments of social science evidence and the process that judges follow to attach weight to such evidence. Faced with competing research claims about the consequences of a challenged program and only weak causal claims about what such programs actually achieve, it is unsurprising that a majority of the court focused instead on differential treatment as a clear violation of equal protection. This poses a

216. Morgan & Pullin, *supra* note 140 at 521.

217. See Kovera & McAuliff, *supra* note 149.

dilemma for future efforts to implement diversity programs in American schools. It may be unlikely that the social science literature will ever converge on a consensus surrounding the benefits (or lack of benefits) resulting from diversity, because the highly charged nature of the debate has meant that contrasting studies have been generated for the past sixty years, and because the nature of the question being asked is less amenable to direct causal findings. This means that a less consequentialist litigation strategy is needed, one that focuses less on the outcomes that social science evidence can or cannot establish, and more on the non-instrumental value of having diversity in public schools.

Conclusion

With antecedents in American constitutional practice, social science evidence has increasingly become part of *Charter* litigation in Canada. More than half of all recent *Charter* cases litigated in the Supreme Court of Canada now include some reference to social science evidence. More importantly, qualitative analyses of recent cases show that Canadian courts are willing to both admit social science evidence *and* to rely on that evidence to resolve the dispositive constitutional issues at stake. Such reliance on social science evidence is now a new normal in Canadian constitutional jurisprudence. But how this evidence is best adduced remains an under-studied area.

The analysis in this paper of the dynamics, strategies, and best practices of adducing social science evidence shows that there are clear lessons emerging, from scholarship and case law, for how to most effectively use such evidence. If these lessons are followed, social science evidence can contribute to significant litigation results, including for marginalized or have-not litigants who might otherwise be expected to lose.

A. Lesson #1: Take a Group Approach to Constitutional Litigation that Brings Together Affected Persons, Community Organizations, Academics, and Other Experts

Forming epistemic communities is central to the development of social science evidentiary records, as well as to the dynamics associated with controlling how those records are received by courts. A community of experts, scholars, advocates, affected persons, and lawyers has synergistic effects. The task of creating the record is shared. It is also completed prior to trial, which can

disadvantage government respondents. The capacity to portray a convincing narrative from that record is enhanced. Such communities can also be used to counter a respondent government's evidence or to litigate the case in the court of public opinion. All of this has the potential to transform otherwise have-not litigants, who have minimal litigation expertise or economic resources, into parties that are capable of winning cases against government. In both *Treatment Action Campaign* and *Insite*, marginalized persons were able to use epistemic communities to create compelling social science evidentiary records and to present those records in a way that resolved the dispositive constitutional issue. *Insite* is also an example of how compelling evidentiary narratives can carry over into the implementation or expansion of the decision. Being in community with others, however, is insufficient in itself.

B. Lesson #2: Adduce Evidence at the Earliest Stage Possible with the Most Reliable Expert(s) Available

Evidence must be adduced by the type of experts who, and at a stage in the litigation where, the evidence will have the most success. The lessons here are clear. First, Canada is moving toward a “persuade me” approach where expert independence, impartiality, and willingness to perform their duty to the court are central considerations. Second, there is a strong continuing preference in Canada to having social science evidence adduced at the trial level where it can be subjected to cross-examination. It is still possible to adduce evidence through briefs at the appellate level or by counsel directly, but both of these approaches have significant limitations that may affect how courts assess reliability and probative value. Waiting to adduce evidence until the highest court, and doing so via briefs, as *PICS* demonstrated, can leave a party's evidence floundering in a sea of competing evidence. By contrast, *Insite* shows the strategic value of presenting evidence at trial using well-respected experts such as physicians, as this can produce key factual findings that influence all later stages of the case.

C. Lesson #3: Evaluate the Reliability of Evidence to Ensure It Will Withstand the Applicable Test for Admission and Be Given Weight

Social science evidence is only strategically valuable if courts admit and give weight to such evidence. In this area, Canadian courts also borrowed selectively from American jurisprudence. Social science evidence can and will

be tested for reliability using the factors outlined in *Daubert*, but the stringency with which these factors are applied will depend on the type of evidence and whether it is being proffered to resolve a dispositive issue. In cases where the best evidence cannot establish causality, courts may be deeply skeptical of what social science evidence adds, particularly in the face of a well-articulated constitutional violation. As *PICS* showed, a lack of consensus in the literature and weak causation can be fatal to a court case. This also occurred in *Mazibuko*, where different definitions of the sufficient water provision led the Court to prefer an analytical approach that was deferential to the legislature's balancing of progressive rights realization with ongoing fiscal realities. By contrast, in the *Insite*, *Bedford*, and *Carter* trilogy, the social science evidentiary record was so reliable and uncontested that it drove the substantive result.

D. Lesson #4: Adjust the Theory of a Case Where Social Science Evidence Is Weak, Contested, or Too Complex

Social science evidence may be helpful for some cases, but less helpful for others. Litigators must first ask whether the social science evidence is being adduced to answer a dispositive issue in a case. If this is the situation, more intensive scrutiny of the social science evidentiary record should be expected. Lawyers must have the ability to assess the validity of the research they are relying on and the skills to present this research to judges in a way that will be understandable. Neither of these abilities or skills are part of mainstream legal education in Canada at present. Where social science evidence is uncertain, likely to be contested, or too complex to be conveyed to judges in a way that will be received, alternative litigation strategies are needed. Appeals to non-instrumental values, deference to decision makers, or precautionary principles are all viable options that de-emphasize the need for evidence. But the reality is that the importance of social science evidence in *Charter* litigation is growing and may in the near future become part of what is considered competent constitutional litigation practice. This is why it so important for litigation counsel to be able to make evidentiary assessments and then determine whether to adjust the theory of a case accordingly to one where weaker evidence is playing a less dispositive role.

E. Lesson #5: Prepare for a Future Where Social Science Evidence Is an Expected Part of Constitutional Litigation

If social science evidence in *Charter* litigation continues to become the new normal, lawyers and litigants will be expected to master the effective use of social science evidence in the courtroom. Given the role played by social science evidence in the *Insite*, *Bedford*, and *Carter* trilogy, as well as more recent trial decisions, it is highly likely that the incorporation of such evidence will increase. However, effectively using such evidence, as this paper has shown, is not a simple task. There is an important role here, currently under realized, for law schools and professional development organizations to train future lawyers and current lawyers to become literate and effective consumers of social science research. With the development of such expertise, parties will better understand the dynamics, strategies, and best practices associated with adducing this type of evidence. If these complexities are understood and the lessons emerging from scholarship and jurisprudence followed, social science evidence has the potential to be a key to *Charter* litigation success.

