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Proving a Violation: Rhetoric, Research and Remedy

Alan N. Young*

I. INTRODUCTION

Legal systems animated by the rule of law often achieve predictability but rarely reflect the diversity of the human condition. The universality of rights and the generality of legislation is the foundation of the rule of law, but painting with broad strokes often undercuts the ability of the law to address the nuances of life. At a conceptual level, rights can only be called rights if they operate at a level of universality; however, moral intuition suggests that there will be specific cases when a person's bad deeds or bad character leads us to believe that these people should not deserve the full protection of rights, and that their harmful acts should lead to a forfeiture of their rights. Clearly this moral intuition seeps into the law. It can be seen operating within the development of the exclusionary remedy under section 24(2) of the *Canadian Charter of Rights and Freedoms*¹ as the balancing of the court-developed factors for exclusion often leads to the predictable result that the more we fear or loathe the accused, the less likely a court will remedy a proven rights violation.

Another area in which there is clash between the concept of the universality of rights and the moral intuition that there may be people undeserving of rights protection arises from the 1985 *Big M*² principle that an accused person is entitled to challenge a law that violates the rights of third parties but applies in a constitutionally sound manner with respect to the accused. Just as there are very few criminals who are completely beyond redemption, there are few laws that are categorically

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¹ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

² *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 (S.C.C.).

bad. More often than not, a critical review of a piece of legislation will lead to the conclusion that the law is “substantially constitutional and peripherally problematic”.³ It is not unreasonable to wonder why an accused whose actions fit within the “substantially constitutional” part of a law should be entitled to challenge the law on behalf of others who hypothetically may fall within the “peripherally problematic” part of this law. The aspiration to achieve universality of rights seems to demand that some undeserving moral characters be windfall beneficiaries of the rights enterprise.

After 30 years of Charter litigation, it still remains uncertain as to when a court will invalidate an entire provision or regime, when it will read down and reinterpret, or when it will simply choose to sever the offending portion of the law. In addition, the courts continue to debate the viability of simply granting a personal remedy by way of constitutional exemption despite the many judicial pronouncements suggesting that this remedy is not “just and appropriate”.

In 2013 the Supreme Court of Canada in *Bedford* invalidated three interrelated provisions governing the sex trade and the decision was unanimous, unequivocal and unwavering in its rejection of blind deference to the idea that Parliament knows best.⁴ The decision is lucid and well reasoned;⁵ however, the decision did not address the question as to how a court should respond to a challenge of an impugned law that in some respects operates in a constitutionally proper manner and in other respects clearly violates the rights of some who are affected by the legislation.

The *Bedford* case did not directly raise this question of the proper judicial response to a “peripherally problematic” law as the Court found that the overly broad and grossly disproportionate operation of the three impugned sex trade laws rendered these provisions beyond judicial repair. This finding was supported by a voluminous record of expert,

³ *R. v. Sharpe*, [2001] S.C.J. No. 3, 2001 SCC 2, at para. 111, [2001] 1 S.C.R. 45 (S.C.C.) [hereinafter “*Sharpe*”].

⁴ *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, 366 D.L.R. (4th) 237 (S.C.C.) [hereinafter “*Bedford SCC*”]. The Court invalidated certain *Criminal Code* provisions: communication for the purpose of prostitution (s. 213(1)(c)), living on the avails of prostitution (s. 212(1)(j)) and keeping a bawdy house for purposes of prostitution (s. 210). See *Criminal Code*, R.S.C. 1985, c. C-46, ss. 213, 212, 210.

⁵ It should be disclosed that I was lead counsel on this case and it is therefore not surprising that I would be very pleased with the result. Accordingly, it could be said that I do not have the requisite objectivity to praise the decision, so in this paper I will not extol the virtues of the decision, but rather address one anomaly I see arising out of the decision.

experiential, international and statistical evidence. However, the Court paid scant attention to this legislative fact evidence, focusing instead on the experiential evidence of the three applicants. It appears that the legislative fact evidence may have been relegated to background context without constitutional significance because the Court was clear in pointing out that “gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate a constitutional norm”.⁶

This appears to be an unremarkable and trite comment as it is obvious that an applicant who can demonstrate that the law impacts upon his or her life, liberty or security in a constitutionally infirm manner is deserving of a protective remedy. However, it is not obvious and trite to conclude that this remedy must be the invalidation of a statutory provision that applies in a constitutionally sound manner to others. The *Bedford* case may have been grounded in a wide array of evidence demonstrating that the impugned laws violate the rights of many beyond the applicants; however, in the context of a *Big M* constitutional challenge launched as part of a defence to a criminal charge, the proposition advanced by the Court would mean that an accused has the power to invalidate a provision on the basis of “reasonable hypotheticals” which show that the law may impact the rights of persons other than the accused.

In the context of the constitutional review of criminal laws for compliance with the principles of fundamental justice under section 7 of the Charter, this brief paper will address two related issues that need to be resolved in order to develop a coherent and consistent approach to laws that are “substantially constitutional and peripherally problematic”. First, the primary focus of this paper will be on the issue of the nature and quality of evidence needed to prove a constitutional violation. Litigants need clear direction on the simple question of how to prove that, in effect, a challenged law impairs life, liberty or security. Although the conventional wisdom suggests that constitutional challenges should be supported by a wide array of legislative fact evidence, the Court’s comment in *Bedford* now suggests that this evidence is unnecessary and of little relevance as an unconstitutional “effect on one person is sufficient to violate a constitutional norm”.

⁶ *Bedford SCC, supra*, note 4, at para. 122.

Second, this paper will provide a cursory analysis of the rationale and political viability of invalidating a legislative provision to remedy a proven violation of the rights on one person. The evidentiary and remedial issues are interrelated. If a constitutional challenge cannot succeed without the tendering of legislative fact evidence showing the impact of the law on third parties and societal interests then the remedial issue is less contentious; that is, invalidation will be predicated on proof that the unconstitutional effects of the law are prevalent and recurring. However, if legislative fact evidence is simply icing on the cake which need not be raised to achieve invalidation then a court must consider the issue of whether invalidation is the proper and justifiable remedy as it will only have for consideration evidence showing that the law uniquely affects the constitutional interests of the applicant before the court.

II. THE RISE AND FALL OF LEGISLATIVE FACT EVIDENCE

The Supreme Court's suggestion that invalidation may flow from the demonstration that one person's section 7 rights have been violated stands out as anomalous in light of the fact that many analysts and commentators have pointed out that successful invalidations in recent years have been predicated and driven by comprehensive and voluminous evidentiary records.⁷ Is the Court now suggesting that this exercise of compiling and presenting research and statistical data has been a monumental waste of time?

It is unclear whether the Court is signalling a change in perspective and approach in which the role of legislative fact evidence is diminished. As will be discussed, in the past the Court has invited litigants to be more inclusive and comprehensive in the development of legislative fact records; however, there are no certain rules and principles governing the

⁷ Michelle Bloodworth, "A Fact is a Fact is a Fact: *Stare Decisis* and the Distinction between Adjudicative and Social Facts in *Bedford* and *Carter*" (2014) 32 N.J.C.L. 193 [hereinafter "Bloodworth, 'A Fact is a Fact'"]; Michael Da Silva, "Trial Level References: In Defence of a New Presumption" (2002) 2 W.J. Legal Stud. 1 [hereinafter "Da Silva, 'Trial Level References'"]; 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 N.J.C.L. 61; Jula Hughes & Vanessa MacDonnell, "Social Science Evidence in Constitutional Rights Cases in Germany and Canada: Some Comparative Observations" (2013) 32 N.J.C.L. 23 [hereinafter "Hughes & MacDonnell, 'Social Science Evidence'"]; Maria Powell, "Moving Beyond the Prostitution Reference: *Bedford v. Canada*" (2013) 64 U.N.B.L.J. 187 [hereinafter "Powell, 'Beyond Prostitution Reference'"]; Don Stuart, "Striking Down Prostitution Laws and Revising Section 7 Standards to Focus on Arbitrariness" (2014) 7 C.R. (7th) 52.

manner of admission and the probative value of the evidence. All one can really say is that current practice of litigants, and the conventional wisdom of analysts, indicate that legislative fact evidence is an indispensable component in proving a violation of the rights to life, liberty and security enshrined in section 7.

As has been noted, “social science evidence has become an important feature of litigation under the *Canadian Charter of Rights and Freedoms*”.⁸ It has also been asserted that “[t]he reality is that in many *Charter* cases ... [i]t is the legislative facts or social facts that are likely to prove dispositive ... The *Bedford* and *Carter* cases are two recent examples of situations where changing social science evidence had an important effect on the disposition of rights for the claimants.”⁹ With respect to *Bedford*, the application hearing judge’s treatment of the legislative fact record has been praised as being “an excellent example of how a judge can go beyond the invocation of intuition and common sense to reach a factual conclusion about contested empirical matters”.¹⁰

Recent practice in constitutional adjudication under section 7 suggests that the litigants believe a meritorious challenge must be accompanied by an extensive sampling of legislative fact evidence. As Da Silva has noted:

Recent constitutional jurisprudence has seen an increasing role for expert evidence and social science research in the determination of contentious cases. Trial level constitutional arguments in *Bedford v Canada* (concerning the constitutionality of criminal prohibitions against prostitution-related activities), *Canada (Attorney General) v PHS Community Services Society* (concerning constitutional exemptions from criminal drug trafficking offences for a safe injection site), and *Carter v Canada (Attorney General)* (concerning the constitutionality of criminal prohibitions on physician-assisted dying) relied heavily on expert submissions and social science data; in *Insite*, trial level weighing of this information provided a factual basis for the Supreme Court of Canada (SCC)’s ultimate determination. Contemporaneous with these cases was the first use of British Columbia’s trial level constitutional reference power: *Reference re: Section 293 of the Criminal Code of Canada*, also known as *The Polygamy Reference*.¹¹

⁸ Hughes & MacDonnell, “Social Science Evidence”, *id.*, at 1.

⁹ Bloodworth, “A Fact is a Fact”, *supra*, note 7, at 4-5.

¹⁰ Hamish Stewart, “*Bedford v Canada: Prostitution and Fundamental Justice*” (2011) 57 *Crim. L.Q.* 197, at 209.

¹¹ Da Silva, “Trial Level References”, *supra*, note, 7, at 1.

Da Silva refers to the extensive use of legislative fact evidence as a matter of “constitutional jurisprudence” but it appears to be more of a developing litigation strategy than a matter of jurisprudence. Admittedly, in the early Charter days, the Supreme Court of Canada did clearly express a preference for challenges to be accompanied by legislative facts of a contextual nature. The Court stated in 1989:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. ... Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.¹²

The Court may have been expressing a disdain for constitutional arguments that proceed solely on the basis of the rhetoric of “enthusiastic counsel”; however, one has to wonder whether the Court was inviting counsel to convert a court hearing into a commission of inquiry.

The recent flurry of section 7 challenges were not simply accompanied by a modest selection of contextual studies and research, but rather were cases in which dozens of expert and experiential witnesses testified and countless studies were tendered without the requirement of calling the authors of the studies as witnesses.¹³ For

¹² *MacKay v. Manitoba*, [1989] S.C.J. No. 88, at para. 9, [1989] 2 S.C.R. 357, at 361-62 (S.C.C.).

¹³ See, e.g., *Bedford v. Canada (Attorney General)*, [2010] O.J. No. 4057, 2010 ONSC 4264, 102 O.R. (3d) 321, at para. 84 (Ont. S.C.J.) [hereinafter “*Bedford ONSC*”] (88 volumes containing over 25,000 pages of evidence were presented to the Court, in addition over 60 lay and expert witnesses); *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, at paras. 26, 89-91, 121, 143-147, 200 (S.C.C.) (the Court, having been presented with numerous articles, reports, and studies, relied heavily on the 1977 Badgley Report and the 1987 Powell Report, and heard from such witnesses as therapeutic abortion physicians); *Canada (Attorney General) v. PHS Community Services Society*, [2011] S.C.J. No. 44, [2011] 3 S.C.R. 134, at paras. 60, 79-82 (S.C.C.) [hereinafter “*PHS*”] (the claimants and the government each tendered affidavits from medical practitioners assessing the efficacy of Insite); *Carter v. Canada (Attorney General)*, [2012] B.C.J. No. 1196, 2012 BCSC 886, 287 C.C.C. (3d) 1, at paras. 114, 160, 278-279, 287, 299, 262-263 (B.C.S.C.), revd [2013] B.C.J. No. 2227, 2013 BCCA 435 (B.C.C.A.) (the evidentiary record included some 36 binders, 116 affidavits, and 18 witnesses who were cross-examined on their affidavits, including 11 witnesses who were cross-examined in court); *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [1996] B.C.J. No. 71, 18 B.C.L.R. (3d) 241, at paras. 1, 110 (B.C.S.C.) [hereinafter “*Little Sisters BCSC*”] (the Court heard testimony from many expert or experiential witnesses, including artists, sociologists, psychologists, book distributors, librarians and police officers); *Victoria (City) v. Adams*, [2008] B.C.J. No. 1935, 2008 BCSC 1363, at paras. 38, 45 (B.C.S.C.), var’d [2009] B.C.J. No. 2451, 2009 BCCA 563 (B.C.C.A.) [hereinafter “*Adams*”] (the trial judge referred to two reports related to homelessness, the Report of the Gap Analysis Team and

example, in the recent polygamy reference, Bauman C.J.S.C. noted the importance of a full evidentiary record in Charter litigation and stated, “I have taken a liberal approach to admissibility in this proceeding, admitting all the evidence tendered.”¹⁴ Thus Bauman C.J.S.C.’s disposition regarding the constitutionality of section 293 of the *Criminal Code* rested “on the most comprehensive judicial record on the subject ever produced”.¹⁵ Chief Justice Bauman summarized the evidence as being comprised of over 90 affidavits and expert reports. Approximately 22 of the affiants and experts were examined who represented “a broad range of disciplines including anthropology, psychology, sociology, law, economics, family demography, history and theology”.¹⁶ Many lay witnesses also presented evidence of personal experiences within polygamous relationships.¹⁷

The conversion of constitutional challenges into a wide-ranging inquiry of social and political facts and values extends beyond the well-known controversies involving drug injection sites, polygamous relationships, assisted suicide and sex work. For example, in a recent section 7 and section 15 challenge to the B.C. Corrections Branch’s decision to cancel the Mother and Baby Program, which allowed inmates to remain with their babies after giving birth while they served their sentences, the Court heard and considered a wealth of contested evidence concerning child-rearing practices and the bond between mother and child. In finding the cancelled policy to be violative of rights, Ross J. summarized evidence from 10 expert witnesses,¹⁸ and seven experiential witnesses¹⁹ in addition to the two applicants. These witnesses included a nurse, a sociologist, a psychologist, a physician, a law professor, a professor of psychiatry, a clinical and forensic psychologist, a clinical social worker, a correctional supervisor and some of the mothers in the

The Mayor’s Task Force Report); *Chaoulli v. Quebec (Attorney General)*, [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791, at paras. 40, 42, 56, 62, 70-84, 114 (S.C.C.) [hereinafter “*Chaoulli*”] (the Court was presented with at least five studies regarding wait times in Canada as well as further reports on the status of health care in other Canadian provinces and other countries, in addition to the testimony of at least seven doctors).

¹⁴ *Reference re Section 293 of the Criminal Code of Canada*, [2011] B.C.J. No. 2211, 2011 BCSC 1588, 28 B.C.L.R. (5th) 96, at para. 46 (B.C.S.C.).

¹⁵ *Id.*, at para. 6.

¹⁶ *Id.*, at paras. 28-29.

¹⁷ *Id.*, at paras. 26-51, 59-62, 104-105.

¹⁸ *Inglis v. British Columbia (Minister of Public Safety)*, [2013] B.C.J. No. 2708, 2013 BCSC 2309, at paras. 255-322 (B.C.S.C.).

¹⁹ *Id.*, at paras. 84-134.

program. The Director of the Research, Planning & Offender Programming at Corrections provided a report regarding the “characteristics of the population of sentenced women in the province, criminogenic risk factors and factors relating to recidivism”.²⁰

Perhaps the most powerful indicator of the importance of legislative fact evidence comes from the recent sex work challenge. In 1990, the communications law and the bawdy house law were unsuccessfully challenged under section 7 in the absence of any legislative facts concerning the history, function and effect of these laws.²¹ In revisiting this challenge in 2013 the Supreme Court was now faced with dozens of witnesses, numerous government reports and studies and thousands of pages of documentary evidence. The current invalidation of laws previously upheld speaks volumes about the significance of contextual evidence. As Powell notes:

The harms that sex workers face are at the heart of the Bedford case, which is what separates it from the Prostitution Reference. Instead of considering sex work generally, the Bedford appeal gives the issue a human face and asks for the striking of laws that put sex workers at risk of violence. The issue of harms and the wealth of evidence supporting the fact that the impugned provisions of the Criminal Code aggravate the harms faced by sex workers were not put forward in the Prostitution Reference.

...

... The difference of opinion is understandable considering Himel J had the benefit of over 25,000 pages of evidence, in addition to witnesses ranging from sex workers, to police, to social workers, and academics. Apart from the recommendations of the Special Committee on Pornography and Prostitution which were released in 1985, much of the evidence relied upon in the Bedford case was not available at the time of the Prostitution Reference.²²

This asserted significance of the legislative fact evidence may be exaggerated. First, the Supreme Court did not rely or refer to this new evidence in any great detail. Second, the most salient difference between the 1990 and 2013 cases is the “living tree” evolution of constitutional

²⁰ *Id.*, at para. 277.

²¹ *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code*, [1990] S.C.J. No. 52, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 (S.C.C.) [hereinafter “*Prostitution Reference*” cited to S.C.R.].

²² Powell, “Beyond Prostitution Reference”, *supra*, note 7, at 189, 194 (citations omitted).

doctrine and not the emergence of new facts.²³ In 1990 the Court recognized the “anomalous” and “bizarre” interplay of the sex trade laws²⁴ and there was some evidence available to demonstrate that these laws overshot the mark and led to an increased risk of harm.²⁵ The evidence in 1990 was still emerging and may not have been as compelling as in the post-*Pickton* era; however, the real obstacle in 1990 was the undeveloped nature of the Charter. The irrationality of the law could be recognized but without the development and expansion of the principles of fundamental justice to include considerations of arbitrariness (1990),²⁶ overbreadth (1993)²⁷ and gross disproportionality (2003),²⁸ the Court did not have the tools needed to condemn the law’s irrationality in a constitutionally recognizable form.

Nonetheless, even with the rich development of constitutional doctrine, it would be a strategic mistake to simply rely upon counsel’s rhetoric to fit the vices of an impugned law into a recognized doctrine. In 2009 the British Columbia Court of Appeal found that a city by-law

²³ Although Powell emphasized the importance of facts, she did recognize that the principles of fundamental justice “have also evolved considerably in the intervening years” (*id.*, at 189).

²⁴ *Prostitution Reference*, *supra*, note 21, at 1162.

²⁵ In debating the enactment of the communication law there was a recurring theme in the debates to the effect that the new law would endanger sex workers. An outline and overview of the relevant portions of these debates can be found in Appendix A of the *Bedford* Factum for the Supreme Court of Canada. See *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.) (Factum of the Respondents) [hereinafter “*Bedford SCC FOR*”], online: <<http://bedfordsafehaveninitiative.com/supreme-court-of-canada/>>. For specific examples, see, *e.g.*, *Bedford SCC FOR* at 73 (citing from *Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services Canada, 1985), vol. 2, JAR, vol. 71, Tab 154B, at 21051-21053); *Bedford SCC FOR* at 74 (citing from House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49*, Issue No. 4 (October 24, 1985), JAR, vol. 72, Tab 155E, at 21495); *Bedford SCC FOR* at 75 (citing from House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-49*, Issue No. 7 (October 31, 1985), JAR, vol. 73, Tab 155H, at 21646). In fact, as Justice Wilson notes in the *Prostitution Reference*, the Crown argued:

([R]ather surprisingly ... in light of the impact of s. 193 of the Criminal Code on attempts to engage in prostitution from private premises) that one of the purposes of s. 195.1 is to diffuse the activities associated with prostitution and ensure that prostitutes, like retailers and consumers, conduct their activities on private premises and in a way which will avoid the creation of a nuisance to others. (*Prostitution Reference*, *supra*, note 21, at 1213)

Thus it can be seen that lawmakers were aware of the risk of harm increasing but mistakenly concluded that moving inside was an available legal option to mitigate the risks of working on the streets.

²⁶ *Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.J. No. 94, [1993] 3 S.C.R. 519, 107 D.L.R. (4th) 342 (S.C.C.).

²⁷ *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, 85 C.C.C. (3d) 15 (S.C.C.) [hereinafter “*Heywood*”].

²⁸ *R. v. Malmo-Levine*; *R. v. Caine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.) [hereinafter “*Caine*”]; *R. v. Clay*, [2003] S.C.J. No. 80, [2003] 3 S.C.R. 735 (S.C.C.) [hereinafter “*Clay*”].

prohibiting the erection of temporary nighttime shelters violates the section 7 rights of homeless people in an overly broad manner.²⁹ The holding that this by-law was overbroad was predicated on a factual finding that there were insufficient shelter beds for the number of homeless people in the city and expert evidence relating to the “demographic realities”³⁰ of homelessness. The success of this challenge cannot be solely attributed to the establishment and affirmation of the overbreadth and gross disproportionality doctrines, but rather it was fuelled by the compelling nature of legislative fact evidence. Without the factual anchor the constitutional doctrine had little teeth as Professor Koshan points out:

Adams is thus a victory under section 7, but like *PHS*, a limited one. This is illustrated by a subsequent case, *Johnston v Victoria*, where the Court of Appeal declined to find a breach of section 7 where a homeless person was prevented from erecting a shelter in a park during the daytime. The Court declared that there was insufficient evidence of a shortage of adequate daytime shelter for homeless persons in Victoria, and consequently, was not prepared to find a breach of the claimant’s life, liberty or security of the person.³¹

III. PROVING A VIOLATION

1. Process

Under existing procedural avenues there appears to be three ways in which one can initiate a challenge to legislative provisions. Of course, if one is actually charged with an offence under the impugned provision one can challenge the law in the course of presenting a defence to the charge. If no charges are pending, a challenge can still be initiated by interested parties in an application for declaratory relief in the Superior Court. Finally, in rare cases the federal or provincial government can refer the question of constitutional validity to a trial or appellate court.³²

Regardless of the procedural forum chosen to initiate the challenge, all three avenues indirectly invite the applicant to extend the evidentiary

²⁹ *Adams, supra*, note 13.

³⁰ Jennifer Koshan, “Redressing the Harms of Government (In) Action: A Section 7 Versus Section 15 *Charter* Showdown” (2013) 22 Const. Forum Const. 31, at 37.

³¹ *Id.*, at 38 (citations omitted).

³² Da Silva, “Trial Level References”, *supra*, note 7.

record to include evidence of impact on third parties. In the context of a criminal trial, the *Big M* principle allows the accused to demonstrate unconstitutionality on the basis of impact on third parties not before the court. Even if the accused is able to tender evidence relating to the impact of the law on his or her interests, it would still be strategically wise to expand the record to include third party impact evidence especially if the facts of the case, and/or the character of the accused, may discourage a judge from granting Charter relief. In *Bedford*, the Court does suggest that upon proof of a personal violation then invalidation should follow; however, this suggestion was made in the context of a case containing a vast record of third party impact evidence, and it would be unsafe to assume that invalidation will always follow proof of a personal violation.

With respect to declaratory relief, the criteria for establishing standing compel an applicant to extend the application to embrace third party impact evidence. In order to be granted public interest standing three factors need be considered: (1) whether a serious justiciable issue has been raised; (2) whether the plaintiff had a real stake or a genuine interest in the outcome; and (3) whether, having regard to a number of factors, the proposed application was a reasonable and effective way to bring the issue before the courts.³³ Accordingly, the applicant need not demonstrate that his or her rights have been violated, but, rather, must show that he or she has a genuine interest in the rights claim. Having an interest in an issue gets the applicant through the front door, but it is unlikely the court will be moved to grant a remedy in the absence of some showing that other people are adversely impacted by the law. In fact, the requirement that the applicant must show that there are no other effective mechanisms to expose the rights claim to judicial review presupposes that others are affected but are without the resources, a forum or representation of counsel, making it unlikely that they can champion the rights claim. In the sex trade cases, a relevant consideration with respect to public interest standing was the fact that other individuals who are charged under the impugned provisions are unable to raise a constitutional claim as it is common practice for the Crown to withdraw minor criminal charges to insulate the offence from constitutional challenge.³⁴

³³ *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] S.C.J. No. 45, [2012] 2 S.C.R. 534, at 531 (S.C.C.).

³⁴ *Id.*, at 561-62.

In recent years, challenges brought by way of reference or declaratory relief have been routinely supported by experiential and anecdotal evidence from third parties who describe how the law personally affects their interests. In the *Bedford* case, the legislative fact evidence partly comprised anecdotal evidence, called by both the applicants and Crown, from sex workers as to their experiences in the sex trade. In the recent polygamy reference case, extensive evidence of personal experiences within polygamous relationships was introduced, and in the *Little Sisters* case (constitutional challenge to the acts of customs officials) the Court considered evidence from non-party booksellers as to acts of customs officials with respect to their import shipments.³⁵

It appears that the approach to public interest standing has been recently expanded and liberalized;³⁶ however, it must be recognized that, although a superior court of record has inherent jurisdiction to consider any constitutional claim, there is a stated preference for leaving constitutional issues with a trial court.³⁷ Courts are loath to provide advisory opinions and prefer to litigate Charter issues in the context of a robust presentation of the adjudicative facts of a case before the courts.³⁸ As the Ontario Court of Appeal has noted: “These cases dictate that issues, including those with a constitutional dimension, which arise in the context of a criminal prosecution should routinely be raised and resolved within the confines of the established criminal process which provides for a preliminary inquiry (in some cases), a trial, and a full appeal on the record after that trial.”³⁹ However, this preference for trial adjudication of constitutional claims rings hollow in many cases in that the adjudicative facts relating to the elements of an offence charged may bear little relationship to the constitutional claim being advanced. The routine and mundane facts which will comprise the adjudicative facts supporting a criminal charge of communicating for the purpose of prostitution, or

³⁵ *Reference re Section 293 of the Criminal Code of Canada*, *supra*, note 14, at paras. 26-51, 59-62, 104-105; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] S.C.J. No. 66, [2000] 2 S.C.R. 1120, at paras. 8-13 (S.C.C.); *Little Sisters BCSC*, *supra*, note 13, at paras. 101-104.

³⁶ Jane Bailey, “Reopening Law’s Gate: Public Interest Standing and Access to Justice” (2011) 44 U.B.C. L. Rev. 255.

³⁷ *R. v. Rahey*, [1987] S.C.J. No. 23, [1987] 1 S.C.R. 588, at 590-91, 595-96, 601-604 (S.C.C.); *R. v. Smith*, [1989] S.C.J. No. 119, [1989] 2 S.C.R. 1120, at 1121, 1128-29 (S.C.C.) [hereinafter “*Smith*”].

³⁸ *R. v. Khan*, [2009] O.J. No. 111, 184 C.R.R. (2d) 342 (Ont. S.C.J.).

³⁹ *R. v. Johnson*, [1991] O.J. No. 481, 3 O.R. (3d) 49, at para. 7 (Ont. C.A.).

possession of marijuana,⁴⁰ did very little to illuminate the section 7 claims brought to challenge these offences.

In the criminal trial context, the constitutional challenge will invariably proceed on the basis of *viva voce* evidence; whereas, an application for declaratory relief will proceed on the basis of affidavit evidence subject to pre-hearing cross-examination before a special examiner. There is no question that the latter route creates difficulties for the hearing judge to exercise his or her “gatekeeper”⁴¹ function with respect to the admissibility of expert evidence. To make the gatekeeping role even more difficult, it is common practice for the parties to compile a written record of all affidavits and transcripts of cross-examination and leave issues of admissibility to be determined by the hearing judge in the absence of the witness.

However, with respect to expert evidence, it is less critical for the judge to assess the demeanour of the witness in discharging the gatekeeper function, and the Supreme Court of Canada has now rejected the proposition that an application hearing judge’s findings on social and legislative facts, as drawn from a written record, are not entitled to the same level of deference as findings made by trial judges on adjudicative facts and *viva voce* evidence. In *Bedford*, the Court concluded 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.”⁴² There may be strategic advantages or disadvantages to consider in choosing to raise a constitutional claim in a trial court or by way of an application; however, regardless of the route chosen, the findings of a single judge, made after reviewing an overwhelming array of legislative fact evidence, will become the established perspective and understanding of a social problem in the absence of an overriding error made by the judge.

⁴⁰ See the adjudicative facts outlined in *Caine*, *supra*, note 28, at paras. 8-11; *Clay*, *supra*, note 28, at paras. 5-8; *R. v. Skinner*, [1990] S.C.J. No. 51, [1990] 1 S.C.R. 1235, at 1240-41 (S.C.C.).

⁴¹ *R. v. Abbey*, [2009] O.J. No. 3534, 2009 ONCA 624, at paras. 55, 76-79 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.). See also *R. v. Sekhon*, [2014] S.C.J. No. 15, 2014 SCC 15, at paras. 46-47 (S.C.C.).

⁴² *Bedford SCC*, *supra*, note 4, at para. 56.

2. Proof: The Unsupported Hypotheses of Enthusiastic Counsel

Notwithstanding the recent trend of converting court applications into commissions of inquiries, it must be recognized that many section 7 claims can advance in the absence of any legislative fact evidence. Many claims will be supported solely by the argument and hypotheses of enthusiastic counsel. For example, if the section 7 claim is premised on a deprivation of liberty alone then, in the context of criminal law, there is no need to call evidence on the deprivation as all criminal offences raise the possibility of incarceration.⁴³ In addition, the elucidation and application of the principles of fundamental justice rarely requires evidence as this task largely concerns reasoned argument over the significance of a legal principle. The seminal cases establishing a minimum standard of fault under section 7 did not require any legislative fact evidence, and these cases were resolved by the judicial creation of an abstract standard and an interpretation of the impugned provisions to determine if this standard had been met.⁴⁴ Similarly, the section 7 overbreadth and vagueness challenges all proceeded as a matter of statutory interpretation and judicial construction of the purpose of the legislation — neither task requiring the presentation of legislative fact evidence.⁴⁵

Even when the violation requires a demonstration of a deprivation of security on the basis of arbitrariness or gross disproportionality it may not be necessary to call legislative fact evidence. Sometimes the proof of a constitutionally adverse effect of law can be a matter of reasoned argument and simple common sense. Scientific and empirical inquiry will usually play a critical role, but, in some circumstances, common sense should come into play if science has yet to provide a conclusive resolution. For example, in *RJR-McDonald* the Court needed to reach a factual finding as to whether advertising increased consumption of a product (*i.e.*, cigarettes). The scientific studies presented to the Court were not resolute or determinative of the issue and the Court relied upon

⁴³ If the liberty claim is based upon the rarely successful “fundamental personal decision” argument then in all likelihood legislative fact evidence would be called to demonstrate whether there is cultural, social or historical support for the characterization of the decision as fundamental.

⁴⁴ *R. v. Vaillancourt*, [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, 68 Nfld. & P.E.I.R. 281 (S.C.C.); *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.); *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687 (S.C.C.).

⁴⁵ For overbreadth, see *Heywood*, *supra*, note 27; *R. v. Demers*, [2004] S.C.J. No. 43, [2004] 2 S.C.R. 489 (S.C.C.). For vagueness, see *Prostitution Reference*, *supra*, note 21; *R. v. Morales*, [1992] S.C.J. No. 98, [1992] 3 S.C.R. 711 (S.C.C.).

the “powerful common sense observation” that companies would not spend millions on advertising if they did not believe that it would increase consumption of their products.⁴⁶ The Court recognized that the exercise of proving the effects of law cannot be seen as a pure scientific inquiry as “predictions respecting the ramifications of legal rules upon the social and economic order are not matters of precise measurement, and are often ‘the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components’”.⁴⁷ The Court’s characterization of this exercise suggests that common sense may be more significant than a scientific measurement of causality in some cases.

Reliance upon common sense is often expressed through the concept of proving a violation by the use of reasonable hypotheticals. Although the Supreme Court of Canada has warned that constitutional issues should not be argued in an “evidentiary vacuum” and that a constitutional challenge be fully animated by the relevant adjudicative and legislative facts, the Court has also permitted challenges to laws to proceed on the basis of speculation and hypothesis relating to how the law could potentially violate Charter rights. The reasonable hypothetical methodology was first used for demonstrating that a mandatory minimum sentence could constitute a cruel and unusual punishment as applied to a hypothetical accused,⁴⁸ but it has since been applied to other section 7 claims relating to full answer and defence and overbreadth (but not to vagueness challenges).⁴⁹ Demonstrating that a law is unconstitutional in terms of its effects on the basis of its potential application and operation is an acceptable mode of proof unless the hypotheticals are “far-fetched”, “remote” or “marginally imaginable”.⁵⁰

In a challenge to the legislative means to achieve a state objective, whether by invoking arbitrariness, overbreadth or gross disproportionality,

⁴⁶ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68, [1995] 3 S.C.R. 199, at paras. 84, 184 (S.C.C.) [hereinafter “*RJR-McDonald*”]; *Chaoulli*, *supra*, note 13, at paras. 136-137.

⁴⁷ *RJR-MacDonald, id.*, at para. 67.

⁴⁸ *Smith*, *supra*, note 37; *R. v. Morrissey*, [2000] S.C.J. No. 39, [2000] 2 S.C.R. 90, at paras. 50-53 (S.C.C.) [hereinafter “*Morrissey*”]; *R. v. Goltz*, [1991] S.C.J. No. 90, [1991] 3 S.C.R. 485 (S.C.C.) [hereinafter “*Goltz*”].

⁴⁹ *Heywood*, *supra*, note 27, at para. 62; *R. v. Mills*, [1999] S.C.J. No. 68, [1999] 3 S.C.R. 668, at paras. 40-42 (S.C.C.); *Ontario v. Canadian Pacific Ltd.*, [1995] S.C.J. No. 62, [1995] 2 S.C.R. 1031 (S.C.C.) [hereinafter “*Canadian Pacific Ltd.*”]; *Mussani v. College of Physicians and Surgeons of Ontario*, [2004] O.J. No. 5176, 74 O.R. (3d) 1, at para. 75 (Ont. C.A.).

⁵⁰ *Goltz*, *supra*, note 48, at para. 42; *Morrissey*, *supra*, note 48, at para. 30.

it will be necessary for the Court to undertake a proportionality analysis. Although the use of reasonable hypotheticals has been used primarily with respect to section 12 claims of cruel and unusual punishment, the Supreme Court of Canada has noted that constitutional adjudication by means of “reasonable hypotheticals” is necessary and ideally suited for the assessment of proportionality:

Where a party alleges that a law is overbroad, or that punishment is cruel and unusual, a court must engage in proportionality analysis. In *Goltz, supra*, for example, I discussed the test for determining violations of s. 12 of the Charter, and stated, at p. 498, “that a sentence which is grossly or excessively disproportionate to the wrongdoing would infringe s. 12”. Cory J. asserted a similar proportionality test in *Heywood, supra*, at p. 793: “The effect of overbreadth is that in some applications the law is arbitrary or disproportionate”.

Proportionality analysis involves an assessment of whether a law, the terms of which are not vague, applies in a proportionate manner to a particular fact situation. Inevitably, courts will be required to compare the law with the facts. In that situation, the use of reasonable hypotheticals will be of assistance, and may be unavoidable ...⁵¹

Recently, the Ontario Court of Appeal struggled with the question of how and when reasonable hypotheticals can be employed in the context of a section 12 Charter claim being brought with respect to a minimum sentence for possession of a loaded firearm. The Court outlined the proper approach to this mode of argumentation:

The reasonable hypothetical ... describes those cases that fall within the broad mainstream of fact situations contemplated by the terms of the offence in issue. Fact situations that represent true outliers, the “remote or extreme examples”, may, if and when they arise, give rise to an argument that the mandatory minimum is unconstitutional as applied to the specific accused and, therefore, of no force or effect. Those extreme examples cannot, however, be used as reasonable hypotheticals to strike down mandatory minimums in cases where the minimum as applied to the specific accused does not constitute cruel and unusual punishment. After *Goltz*, the reasonable hypothetical designed to capture every “lurking” possibility in *Smith* had been narrowed to capture those possibilities that “could commonly arise”.⁵²

⁵¹ *Canadian Pacific Ltd., supra*, note 49, at paras. 80-81.

⁵² *R. v. Nur*, [2013] O.J. No. 5120, 2013 ONCA 677, at para. 122 (Ont. C.A.), leave to appeal granted [2014] S.C.C.A. No. 17 (S.C.C.).

If a constitutional violation is to be proved by way of reasonable hypothetical the courts will insist that the hypothetical describes potential factual scenarios that could commonly arise with respect to the law being challenged. This suggests that the courts are reluctant to invalidate legislation if the only constitutionally adverse impact is restricted to unique situations unlikely to recur. The Supreme Court in *Bedford* may have suggested that invalidation flows from proof of a violation of the rights of a solitary applicant (or a hypothetical applicant in a *Big M* challenge); yet the thrust of a reasonable hypothetical approach to proving the violation is designed to show that the adverse impact of the law has the potential to apply to situations which “commonly arise”.

Even when the resolution of the constitutional issue demands the introduction of legislative fact evidence, it will not always be necessary to introduce this evidence through the vehicle of a witness, whether *viva voce* or by affidavit. The Supreme Court of Canada has stated that “[t]he usual vehicle for reception of legislative facts is judicial notice, which requires that the ‘facts’ be so notorious or uncontroversial that evidence of their existence is unnecessary.”⁵³ Reliance upon judicial notice obviates the need to call a witness to prove the uncontroversial fact; however, the Court also warned that “[t]he concept of ‘legislative fact’ does not, however, provide an excuse to put before the court controversial evidence to the prejudice of the opposing party without providing a proper opportunity for its truth to be tested.”⁵⁴

Although the concept of judicial notice can be difficult to apply, the concept can be simply stated: “a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy”.⁵⁵ It is important to note that this criteria for admission is further relaxed when the evidence being tendered is not dispositive of the issues raised at the trial or hearing. As the Supreme Court has noted, the permissible scope of judicial notice varies according to the nature of the issue under consideration, and the

⁵³ *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, [2000] S.C.J. No. 2, [2000] 1 S.C.R. 44, 250 A.R. 314, at para. 5 (S.C.C.).

⁵⁴ *Id.*

⁵⁵ *R. v. Find*, [2001] S.C.J. No. 34, [2001] 1 S.C.R. 863, at para. 48 (S.C.C.); *R. v. Spence*, [2005] S.C.J. No. 74, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 53 (S.C.C.) [hereinafter “*Spence*”].

closer a fact approaches the dispositive issue the more a court ought to insist on compliance with the stricter criteria for judicial recognition.⁵⁶

Evidence-based research studies, whether in the natural or social sciences, which focus on and explore the behavioural and societal effects of law do not fit comfortably into the concept of judicial notice.⁵⁷ Rarely would a study of any nature be considered “so notorious or generally accepted as not to be the subject of debate among reasonable persons”. It may be that in some cases decades of well-known research crystallizes into a fact beyond debate as was the case when the court in *Vriend* concluded that “I am satisfied that the discrimination homosexuals suffer is so notorious that I can take judicial notice of it without evidence”.⁵⁸ However, one would think that in most cases judicial notice would not be of much assistance in proving the unconstitutional effects of law.

When the Supreme Court notes that “the usual vehicle for reception of legislative facts is judicial notice” it is most likely referring to the tendering of government reports without the need to call the author, or committee members, as witnesses. On a consistent and routine basis, the litigants and the courts have relied upon government reports without supporting witnesses for the purpose of elucidating legislative objectives and to provide evidence of the effects of legislation. Even a cursory review of Supreme Court jurisprudence in the Charter era reveals extensive reliance on government reports to establish a wide array of legislative facts.⁵⁹ Government reports may not always be “generally

⁵⁶ *Spence, id.*, at paras. 60, 61; *Find, id.*

⁵⁷ It should be noted that the Supreme Court of Canada in *Spence* indicated that the test for judicial notice will become somewhat more “elastic” when the Court is dealing with legislative facts. The test does not change when the Court is receiving legislative fact evidence, but it is clear that due to the speculative nature of legislative fact evidence it is impossible to apply the test with the same rigour (*Spence, id.*).

⁵⁸ *Vriend v. Alberta*, [1994] A.J. No. 272, [1994] 6 W.W.R. 414, at para. 12 (Alta. Q.B.), revd [1996] A.J. No. 182 (Alta. C.A.), affd [1998] S.C.C. No. 29, [1998] 1 S.C.R. 493 (S.C.C.).

⁵⁹ Consider the following diverse examples: In *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 484, 493, 513-14 (S.C.C.), the Court relied on the *Fraser Report* and the *MacGuigan Report* to elucidate legislative purpose and the effects of viewing pornography. In *Caine, supra*, note 28, at paras. 3, 21, 44, 55-56, 58, 195-196, the Court relied on the *Le Dain Report* and reports of the Senate Special Committee on Illegal Drugs and the House of Commons Special Committee on Non-Medical Use of Drugs for discerning legislative purpose, demographics of marijuana users, and the effects of marijuana use. In *Moge v. Moge*, [1992] S.C.J. No. 107, [1992] 3 S.C.R. 813, at 854-56, 863-64 (S.C.C.), the Court relied on three Statistics Canada reports, the 1990 Department of Justice *Evaluation of the Divorce Act*, and the 1990 *Women and Poverty Revisited* report with respect to the demographics of single mothers and the economic impact of divorce. In *R. v. Gladue*, [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688, at paras. 55-59 (S.C.C.), the Court relied upon the 1967 report *Indians and the Law*, the 1987 Canadian Sentencing Commission report, a report of the House of Commons

accepted” and beyond debate; however, evidence-based studies of law are few and far between, and a focused inquiry by lawmakers and their agents into the effects of law may be the only evidence readily available to supplement common sense and reasonable hypotheticals.

If there does not exist government reports or government-commissioned studies, simple reliance upon common sense and reasonable hypotheticals may not be sufficiently powerful to provide the court with the impetus to invalidate a challenged law. In *Bedford*, the factual questions underlying the constitutional argument could have been answered with common sense and reasonable hypothetical argument. Although the policy issues surrounding many aspects of the sex trade are controversial, divisive and the subject-matter of endless debate, it must be remembered that the factual issue raised in the case was far more simple: can safety be enhanced by moving indoors, recruiting assistance and communicating with clients? It seems that this question could be answered easily based upon common sense; nonetheless, it is hard to imagine the Court invalidating the sex trade provisions without the accompanying record of empirical study, experiential opinion and government-commissioned reports, which all spoke to the increased risk of violence faced by sex workers operating in the current legal regime.

In theory a law can be invalidated on the basis of abstractions and hypotheticals; however, in practice there will usually be some underlying resistance to striking a law on the basis of potential and not actual effects. Professor Hogg identifies one source of this resistance in his assessment of the overbreadth doctrine:

Why should the Supreme Court of Canada be in such a hurry to strike down a law for overshooting its purpose in a case where the law is clearly accomplishing its purpose? After all, if the hypothetical cases are realistic, there will be future opportunities to review the law when it is applied too broadly. The reliance on hypothetical cases turns the courts into “roving commissions assigned to pass judgement on the validity of the Nation’s laws”. The American courts have not allowed this to happen. In the United States, it is well established that “a person

Standing Committee on Justice and Solicitor General, a 1997 Federal/Provincial/Territorial report on population growth in prisons, and the five-year review of the *Corrections and Conditional Release Act* in evaluating the disproportionate impact of the criminal justice system on Aboriginal persons. In *Reference re Unemployment Insurance Act (Can.)*, ss. 22 and 23, [2005] S.C.J. No. 57, [2005] 2 S.C.R. 669, at paras. 19-20, 31, 64, 72 (S.C.C.), the Court relied on the *Rowell-Sirois Report*, the *Gill Report*, the *Cousineau Report*, the *Boyer Report* and the *Forget Report* to reach conclusions about the systemic discrimination of women under the Unemployment Insurance regime.

to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the court". Surely, this reflects a more appropriately restrained role for the courts.⁶⁰

To overcome this resistance a litigant should move beyond hypothetical argument and develop the legislative fact evidence as this type of evidence often demonstrates how the adverse impact of law on third parties is not just a potential outcome but is actually taking place on a recurring basis.

3. Proof: Legislative Fact Evidence

The genesis for proving constitutional violations on the basis of social science research is the "Brandeis Brief". For Louis Brandeis, "it was essential ... that legal analysis proceed through an understanding of social facts" and not merely through legal formalism in order to properly adjudicate the merits of the case.⁶¹ Further, in his view, the introduction of social facts would allow the judiciary to break from rigid tradition of *stare decisis* by assessing new and changing situations, allowing the judiciary to apply the law in a manner that appropriately responded to the relevant issues of the day.⁶² In 1908, Brandeis successfully represented the state in defending hours-of-work legislation in *Muller v. Oregon*,⁶³ by submitting what is referred to as a "Brandeis Brief". The brief comprised two pages of legal argument, accompanied by over 100 pages of sociological data demonstrating the detrimental link between women's poor health and their long working hours.⁶⁴ The Brandeis Brief continues to be used on a frequent basis in American constitutional litigation. Michael Walsh lists a number of contemporary instances where briefs were submitted — to challenge the *Federal Death Penalty Act*, in

⁶⁰ Peter W. Hogg, *Constitutional Law of Canada*, 5th ed., vol. 2, loose-leaf (consulted March 2014) (Scarborough, ON: Thomson Carswell, 2007), at 47-54 [hereinafter "Hogg, *Constitutional Law*"].

⁶¹ Edward A. Purcell, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America* (New Haven, CT: Yale University Press, 2000), at 166-67.

⁶² Stephen W. Baskerville, *Of Laws and Limitations: An Intellectual Portrait of Louis Dembitz Brandeis* (Rutherford, NJ: Fairleigh Dickinson University Press, 1994), at 234-35.

⁶³ 208 U.S. 412 (1908).

⁶⁴ Reynolds Hedland Blankenship Jr., "Comments: Time, Place, and Manner Analysis, Brandeis Briefs, and the Partial-Birth Abortion Ban Act of 2003" (2004) 50 Loy. L. Rev. 173, at 201.

critique of the insanity defence, to analyze racial patterns in prosecutors' jury selection and, most notably, to challenge racial segregation in schools.⁶⁵ Professor Hogg notes that the Brandeis Brief

seems to rest on an expanded notion of judicial notice. The courts take notice of the state of expert knowledge in a field of social science, even though the facts do not have the indisputable character that is the traditional prerequisite for judicial notice. As a practical matter, the Brandeis brief can expose the court to a broad canvass of the state of social-science knowledge without the parties incurring the costs associated with a trial involving a lengthy parade of expert witnesses.⁶⁶

Professor Hogg also notes that American jurisprudence has not developed any clear rules regarding Brandeis Briefs, such as what are the appropriate forms of evidence, the procedures for rebuttal, or how much weight should be accorded to this evidence.⁶⁷ A similar criticism can be made of the current Canadian approach to legislative fact evidence in that it is clear that the Brandeis Brief approach to legislative fact evidence permits the tendering of government reports by way of judicial notice, but beyond that stipulation there is a lack of clarity and consistency with respect to the nature, scope and manner of admitting legislative fact evidence in Canadian constitutional litigation.

The Supreme Court of Canada may not have provided much guidance as to when and how legislative fact evidence should be introduced, but it has provided a clear definition of what legislative fact evidence entails:

It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis's words, "who did what, where, when, how and with what motive or intent" Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic

⁶⁵ Michael Walsh, "The Grammatical Lawyer", *The Practical Lawyer* 54:3 (June 2008).

⁶⁶ Hogg, *Constitutional Law*, *supra*, note 60, at 60-14 (citations omitted).

⁶⁷ *Id.*

and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements ...⁶⁸

The proposition that “such facts ... are subject to less stringent admissibility requirements” does not mean that the rules of evidence are recklessly abandoned, and it is most likely a reference to the established principle that the usual vehicle for admission of these facts would be through judicial notice without the need to call a supporting witness. The extent to which the ordinary rules for admissibility are abandoned or altered remains unclear; however, in 2007 the B.C. Supreme Court provided this helpful summary of the state of the law governing legislative fact evidence:

1. Legislative facts relate to the constitutionality of legislation or policy. They should not relate to the adjudication of the matters in issue (“adjudicative facts”) but rather to the socio/economic framework within which that adjudication takes place.
2. Legislative facts establish the purpose and background of legislation, the social and economic conditions under which it is enacted, the mischief at which it is directed and the institutional framework in which it is to operate.
3. Examples of materials admitted under the legislative facts rule include reports of parliamentary committees, Law Reform Commission reports, white papers, green papers, Royal Commission reports, government reports and independently commissioned studies relied upon by government.
4. Legislative facts are an expanded form of judicial notice but they may not have the indisputable character traditionally required for judicial notice.
5. The permissible scope of judicial notice should vary according to the nature of the issue under consideration. The closer the legislative fact is to the subject of dispute, the more it should be notorious and accurate because it can become determinative. If the legislative fact simply forms part of the context in which the dispute is to be resolved, then its reliability, accuracy and notoriety is of less concern.
6. Where the legislative facts may be disputed, they should be proved by the opinion of expert witnesses in the relevant field of

⁶⁸ *Danson v. Ontario (Attorney General)*, [1990] S.C.J. No. 92, [1990] 2 S.C.R. 1086, at para. 27 (S.C.C.).

knowledge. The expert can be cross-examined or contradicted by another expert witness as to the value and weight to be given to certain reports. The result is some assurance of reliability for factual findings of controverted legislative facts.

7. Studies done after enactment of legislation can be legislative fact used to analyze the legislation.⁶⁹

In the early Charter days, legislative fact evidence was tendered without any real consideration of its probative value and constitutional significance. If the litigants did not object to the admission of the evidence then there would not be any critical assessment of the value of this evidence. The evidence might be dispositive of some issue in question or it may simply have constituted background information of interest but of no real import. The evidence was simply admitted without critical assessment. As Lokan and Dassios note about the early days:

The high water mark of this “early liberal approach” was *R.W.D.S.U., Locals 544, 496, 635, 955 v. Saskatchewan*, where Dickson C.J.C., in a concurring judgment, cited newspaper articles to establish that a public-sector strike by dairy workers would harm the public by disrupting the milk supply. In retrospect, some early debates about important issues of public policy appear to have taken place in a relative factual vacuum, as the courts and counsel struggled to find their way in the unfamiliar territory of the Charter.⁷⁰

In retrospect, the casual and flexible approach to admitting social science data and other research materials undercuts the objective of admitting this evidence to provide the decision-maker with an informed basis upon which to review public policy. Untested, voluminous but selective data does not bode well for an informed decision. It is disconcerting that in the late 1980s many provisions relating to impaired driving, which had been found to be constitutionally deficient, were upheld as reasonable limits on the basis of a selective and unchallenged introduction of legislative fact evidence by the Crown:

Crown counsel submitted seven volumes of material in support of his submission that any restraint under s. 234.1 was a reasonable limit prescribed by law within s. 1 of the Charter. The material consisted of

⁶⁹ *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, [2007] B.C.J. No. 1342, 2007 BCSC 858, at para. 2 (B.C.S.C.).

⁷⁰ Andrew K. Lokan & Christopher M. Dassios, *Constitutional Litigation in Canada* (Toronto: Thomson Carswell, 2006), at 8-6, 8-7 [hereinafter “Lokan & Dassios”].

the legislative history of this enactment in the Code, including extracts from Hansard at the time the various amendments to the Code were introduced into Parliament by the Minister of Justice; a volume of statistics showing a causal relationship between driving while under the influence of alcohol and the severity of accidents; surveys and studies on the problem of driving after drinking; a report on the effectiveness of roadside testing in detecting the drinking driver; various research papers on the problem, including a research paper prepared specifically for the purposes of this appeal, and a volume on American and English case and statute law.

Counsel for the appellant did not object to the introduction of this material at this level.⁷¹

There is no question that “by 1989, the Supreme Court perceived the need to send a sharp signal that it required a more reliable and more extensive information base upon which to make momentous decisions of public policy”;⁷² however, this signal has not been accompanied by any guidelines or direction. There have been few cases in which legislative fact evidence is subjected to a critical analysis of admissibility and probative value;⁷³ however, the *Bedford* case actually did provide this opportunity for critical analysis by the Supreme Court of Canada as the application hearing judge relied extensively and explicitly on most of the legislative fact evidence introduced by all litigants. This opportunity was lost as the Court ruled that deference to the lower court findings would be the proper approach to this evidence and as a result the Court made little or no mention of legislative fact evidence as it applied to the law’s impact on third parties. The Court focused on the adjudicative facts introduced by the three applicants and relegated third party impact evidence to the category of interesting but marginally relevant evidence.⁷⁴

⁷¹ *R. v. Seo*, [1986] O.J. No. 178, 54 O.R. (2d) 293, at paras. 21-22 (Ont. C.A.).

⁷² *Lokan & Dassios*, *supra*, note 70, at 8-7.

⁷³ For one case in which an application was made to strike legislative fact evidence, see *Chaudhary v. Ontario (Attorney General)*, [2012] O.J. No. 1542, 2012 ONSC 1936 (Ont. S.C.J.). The evidence was admitted but it never formed part of the decision on the ultimate substantive claim (a constitutional duty under s. 7 to preserve evidence in a post-conviction setting): *Chaudhary v. Ontario (Attorney General)*, [2012] O.J. No. 4422, 2012 ONSC 5023 (Ont. S.C.J.), *affd* [2013] O.J. No. 4616, 2013 ONCA 615 (Ont. C.A.). See also *Ontario (Attorney General) v. Dieleman*, [1993] O.J. No. 1792, 14 O.R. (3d) 697 (Ont. Gen. Div.).

⁷⁴ It is possible that the Court was heavily influenced by the third party impact evidence; however, the Court never explicitly refers to any of this evidence because in paragraphs 48 to 56 of its judgment the Court simply defers to the findings of fact made by the application court judge. Without specifically addressing this evidence, it becomes impossible to conclude that this type of evidence influenced the Court in any significant way. See *Bedford SCC*, *supra*, note 4, at paras. 48-56.

Earlier in the paper it was noted that some of the recent constitutional challenges have proceeded with a vast evidentiary record rivalling the scope of evidence tendered at a commission of inquiry or legislative committee hearing. A great deal of this evidence is admitted on the basis of judicial notice. Although Professor Hogg speaks approvingly of the Brandeis Brief approach because it can “expose the court to a broad canvas of the state of social-science knowledge without the parties incurring the costs associated with a trial involving a lengthy parade of expert witnesses”, he still expresses concern over the recent growth of evidence-based challenges:

Evidence in Charter cases gives rise to many problems. One is ... that the validity or invalidity of a law will often turn on the state of the evidentiary record at trial. Another problem is cost. A parade of expert witnesses is extremely costly, and this cost is borne not just by the defending government, but also by the challenger, who, although not bearing the burden of proof, must in all prudence adduce evidence to rebut the government’s evidence of justification. Another problem is that, in the realm of public policy, cogent social-science evidence often does not exist for a perceived harm, and yet the legislators do have a “reasoned apprehension of harm”. For these reasons, in my opinion, it would be desirable for Charter review to become less dependent on evidence, even if the courts have to strain somewhat to make “obvious” or “self-evident” findings.⁷⁵

Reliance upon legislative fact evidence is a mixed blessing. On the one hand, a comprehensive record of available research should enhance informed decision-making. On the other hand a decision-maker may find the voluminous record overwhelming and insufficiently tested for probative value. In addition, echoing the concerns of Professor Hogg, Justice La Forest has noted that “it is undesirable that an Act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad social and economic facts that happens to have been presented by counsel.”⁷⁶ On balance, the value of making a decision in a proper socio-political context is too significant for establishing the decision’s legitimacy and authority to propose restricting the scope of legislative fact evidence. Nonetheless, it is incumbent upon the Court to provide better guidance with respect to the criteria for admissibility and evaluation of legislative fact evidence. When operating

⁷⁵ Hogg, *Constitutional Law*, *supra*, note 60, at 38-8 – 38-9.

⁷⁶ *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at 803 (S.C.C.).

within the current legal framework of an adversarial approach to proof, there is greater risk that the legislative fact evidence could lead to a badly informed decision despite the appearance of being fully informed.

IV. THE FUTURE OF EVIDENCE-BASED CHALLENGES

In another paper I have argued that rigorous substantive review of legislation by the judiciary is both warranted and justified in light of the dysfunctional and political nature of criminal law reform.⁷⁷ Assuming that the judiciary does need to take an activist and ambitious role in reviewing legislation, one must not idealize the judicial function. Ambition must be supported by some degree of competence, and it is hard to know whether judges have the requisite skills and abilities to assess contentious social science data and evaluate the significance of wide-ranging and untested legislative fact evidence. Establishing a clear and non-contentious set of facts to provide the foundation for public policy decision-making can be a daunting task, whether undertaken by the legislature or judiciary, and undertaking this exercise within the framework of adversarial justice further complicates the process.

To state the obvious, judicial decision-making is a fallible, human enterprise. The judiciary clearly has experience and expertise in assessing the who, what, when, where and how of adjudicative facts, but, even within this comfort zone, the saga of wrongful convictions demonstrate how courts can err in making findings of adjudicative facts. The fallibility of this process is increased when a court goes beyond its comfort zone and is required to make findings of legislative fact pertaining to the effects of law on personal behaviour and society at large.⁷⁸

Outside of the realm of adjudicative facts we have at least one infamous example of the dangers or pitfalls of making constitutional determinations based upon statistics and social science studies. In 1990, the Supreme Court of Canada determined that the right to be tried within a reasonable time under section 11(b) of the Charter required that a trial in the lower courts be completed within six to eight months of the charge being laid. This proscription was based on an extensive review of

⁷⁷ Alan N. Young, "Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law" in J. Cameron & J. Stribopoulos, eds. (2008) 40 S.C.L.R. (2d) 441, at 447-60.

⁷⁸ Michael J. Saks & Charles H. Baron, eds., *The Use, Non-Use, Misuse of Applied Social Research in the Courts* (Cambridge, MA: Abt Books Inc., 1980).

statistical data relating to disposition times in various jurisdictions. As a result of this ruling, 50,000 charges in Ontario were stayed for unreasonable delay. Subsequent to the decision it was discovered that the statistics had been misinterpreted and misapplied by the Court,⁷⁹ and two years later the Court modified its prescription in recognition of the error:

With respect to the use of statistics, care must be taken that a comparison of jurisdictions is indeed a comparative analysis. For example, in *Askov* we were given statistics with respect to Montreal in an affidavit by Professor Baar. Subsequently, it was brought to our attention that this was a misleading comparison. Evidence was led in this appeal showing that the manner in which criminal charges are dealt with in Montreal and Brampton is sufficiently dissimilar so as to make statistics drawn from the two jurisdictions of limited comparative value.⁸⁰

Innocent misinterpretation of research data will always be a possibility; however, when one enters an area of contentious moral, social and political debate, the risk of error is no longer restricted to innocent misrepresentation. The Court is now being asked to assess data often prepared and presented by activists. Professor Best aptly describes this pitfall:

Social statistics describe society, but they are also products of our social arrangements. The people who bring social statistics to our attention have reasons for doing so; they inevitably want something, just as reporters and the other media figures who repeat and publicize statistics have their own goals. Statistics are tools, used for particular purposes Statistics, then, can become weapons in political struggles Certainly, we need to understand that people debating social problems choose statistics selectively and present them to support their points of view.⁸¹

This pitfall is well recognized by the Supreme Court of Canada and the Court does approach social science data with some caution. In 1999, in the context of a claim of discrimination against same-sex couples, the Court noted:

⁷⁹ Carl Baar, “Court Delay Data as Social Science Evidence: The Supreme Court of Canada and ‘Trial Within a Reasonable Time’” (1997) 19 Justice System J. 123; Carl Baar, “Criminal Court Delay and the Charter: The Use and Misuse of Social Facts in Judicial Policy” (1993) 72 Can. Bar Rev. 305.

⁸⁰ *R. v. Morin*, [1992] S.C.J. No. 25, [1992] 1 S.C.R. 771, at para. 51 (S.C.C.).

⁸¹ Joel Best, *Damned Lies and Statistics: Untangling Numbers from the Media, Politicians, and Activists* (Berkeley, CA: University of California Press, 2012), at 7, 10, 18.

I have been greatly aided in my consideration of the existing social science evidence by the voluminous Brandeis briefs and articles submitted by the respondent. While this evidence is an important source of information for this Court, I must stress that care should be taken with social science data. When dealing with studies exploring the general characteristics of a socially disadvantaged group, a court should be cautious not to adopt conclusions that may in fact be based on, or influenced by, the very discrimination that the courts are bound to eradicate. Judges, in fact, should be diligent in examining all social science material for experimental, systemic or political bias of any kind. With this caution in mind, I will briefly consider the material before this Court.⁸²

The examination of “all social science materials for experimental, systemic and political bias of any kind” is critical but it is easier said than done. Without a background in statistical method, and without knowledge of the basic principles and practices of qualitative or quantitative research, the critical examination might be nothing more than a superficial appraisal.

Nonetheless, in the context of the sex work challenge, it did appear as if the application hearing judge was ready, willing and able to critically examine research studies. The government had tendered numerous studies with troubling conclusions relating to the demographic background of sex workers. The witnesses introducing this evidence presented the data as definitive and conclusive despite the fact that sex workers are considered a “hard to reach” population for the purposes of statistical study.⁸³ Much of the evidence was fraught with methodological shortcomings and largely comprised gross overgeneralizations and ideological conclusions masked as science.⁸⁴ Exercising the gatekeeper

⁸² *M. v. H.*, [1999] S.C.J. No. 23, [1999] 2 S.C.R. 3, at para. 296 (S.C.C.).

⁸³ Frances Shaver, “Sex Work Research: Methodological and Ethical Challenges” (2005) 20 *Journal of Interpersonal Violence* 296; Cecilia Benoit *et al.*, “Community-Academic Research on Hard-to-Reach Populations: Benefits and Challenges” (2005) 15 *Qualitative Health Research* 263; Research and Statistics Division, “Identifying Research Gaps in the Prostitution Literature” by John Lowman (2001), online: <http://www.justice.gc.ca/eng/tp-pr/csj-sjc/jsp-sjp/r02_9/index.html>.

⁸⁴ It is interesting to note the critique presented by the applicants in *Bedford* with respect to the value of the empirical evidence presented by the Crown. Some of this was adopted by the application hearing judge but most of the critique was not addressed in the various judgments. A fuller critique of the problems with the witness/activists can be found in the Superior Court factum of the Applicant, see *Bedford ONSC*, *supra*, note 13 (Factum of the Applicants, at paras. 276-330), online: <<http://bedfordsafehaveninitiative.com/superior-court-of-justice/>>. See also *Bedford v. Canada (Attorney General)*, [2012] O.J. No. 1296, 2012 ONCA 186 (Ont. C.A.) [hereinafter “*Bedford ONCA*”] (Factum of the Respondent, at paras. 72-81), online: <<http://bedfordsafehaveninitiative.com/court-of-appeal-for-ontario/>>.

function the application hearing judge critically assessed this evidence and placed little weight on it. She noted:

In reviewing the extensive record presented, I was struck by the fact that many of those proffered as experts to provide international evidence to this court had entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist the court. For example, some experts made bold assertions without properly outlined bases for their claims and were unwilling to qualify their opinions in the face of new facts provided. While it is natural for persons immersed in a field of study to begin to take positions as a result of their research over time, where these witnesses act primarily as advocates, their opinions are of lesser value to the court.

...

I found the evidence of Dr. Melissa Farley to be problematic. Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence. Furthermore, in her affidavit, she failed to qualify her opinion regarding the causal relationship between post-traumatic stress disorder and prostitution, namely, that it could be caused by events unrelated to prostitution.

Dr. Farley's choice of language is at times inflammatory and detracts from her conclusions.⁸⁵

On the one hand, the Court's critical assessment in this case provides some confidence for believing that the judiciary is ready, willing and able to work with social science data; however, it may also simply be a reflection that, due to the political divisiveness of the sex trade issue, the lack of neutrality among expert witnesses is very transparent and easily detected in this context. For example, as the *Bedford* case was slowly moving its way to the Supreme Court of Canada, a human trafficking prosecution proceeded in Ontario in which the Crown tried to qualify Professor Benjamin Perrin as an expert witness in human trafficking and the recruitment techniques of traffickers. The trial judge refused to qualify Professor Perrin as an expert stating that:

The probative value of the proposed evidence is questionable. Much of Professor's Perrin's observations are one sided and second hand: his

⁸⁵ *Bedford ONSC, supra*, note 13, at paras. 182, 353-354.

study was limited to interviews of approximately fifty individuals in government, law enforcement and NGO capacities, as well as the analysis of Access to Information filings from various government departments; moreover, his research did not involve field work, clinical studies, or, most importantly, direct interaction with either the victims of sex trafficking or sex worker advocacy groups.

Further, Professor Perrin is a career advocate, and does not provide the appearance of objectivity. While his efforts to end human trafficking and raise consciousness about this issue are doubtless laudable, his professional life is anchored in his role as advocate for the victims of sex trafficking and lobbyist for policy change in government. He has publicly stated that in his view sex work should not be decriminalized. His testimony would not be that of an objective academic but rather a dedicated lobbyist.⁸⁶

Proving a violation by reliance upon legislative fact evidence presents both the court and the litigants with a difficult choice. Allowing this evidence to be introduced informally through the vehicle of judicial notice facilitates and enhances access to justice by significantly reducing the cost and time needed to launch an effective constitutional challenge. However, the greater the reliance upon judicial notice as the vehicle for admission, the greater the risk of distortion and mistake. The critical assessments noted above with respect to witnesses in the sex worker cases followed the testing of the witnesses' evidence through cross-examination, either in court or before a special examiner. Without the testing of this evidence a court may have ended up taking judicial notice of unsubstantiated and methodologically unsound conclusions. In the quest to educate and inform the judiciary with a comprehensive evidentiary record, a choice may have to be made between prioritizing access to justice or enhancing accuracy of fact-finding.

When the Supreme Court in *Bedford* noted that Charter relief by way of invalidation will be granted upon proof of a violation of one person's rights the Court may have been implicitly expressing a concern with the recent practice of proving violations with Brandeis briefs of monumental proportions. In light of a court's limits in terms of assessing the value and significance of social science research, the tendering of hundreds of thousands of pages of documentary evidence will not enhance a court's fact-finding potential, but rather will just muddy the waters. It is far simpler, and more accurate, for a court to determine whether one

⁸⁶ *R. v. MacPherson*, [2011] O.J. No. 6548, 2011 ONSC 7717, at paras. 30-31 (Ont. S.C.J.).

person's rights have been violated based upon the adjudicative facts of this person's life and experience.

Even with the shortcomings involved in making findings of law's causality and other social facts based upon a selective record of research studies, it is hard to imagine a court invalidating legislation solely on the basis that it violates the rights of one claimant. Despite the language employed by the Court in *Bedford*, the communication, living on avails and bawdy house provisions were not invalidated solely because the record showed that the applicants, Bedford, Scott and Lebovitch had legitimate rights claims. Whether the Court implicitly relied upon common sense, reasonable hypotheticals or the voluminous legislative fact evidence, the Court could reach the conclusion that invalidation was warranted because the rights claims of the applicants did not merely arise out of their unique life experiences. When the evidence and argument in a constitutional claim extends beyond the impact on the applicant, the foundation for invalidation is strengthened as this drastic remedy is not being employed to address a law that was only "peripherally problematic".

Conceptually it makes far more sense to provide a personal remedy under section 24(1) of the Charter when an applicant can demonstrate that his or her rights have been violated and to grant the drastic remedy of invalidation when there exists legislative fact evidence or reasonable hypotheticals demonstrating that many others may be adversely impacted by the law. In suggesting that invalidation is the appropriate response to the rights claim of a uniquely situated claimant the Court is playing a high stakes game that can end up stultifying the growth of rights as "the drastic nature of such a remedy may implicitly influence how the court interprets the underlying rights".⁸⁷ One need only examine the evolution of the "abuse of process" doctrine in criminal law to see how the looming presence of the "drastic"⁸⁸ remedy of a stay of proceeding has rendered the doctrine toothless and of little practical impact.

When a rights claim is unique the obvious choice of a personal remedy would be a constitutional exemption. In the United States, an

⁸⁷ Kent Roach, *Constitutional Remedies in Canada*, 2d ed. (Toronto: Canada Law Book, 2013), at 14-37.

⁸⁸ *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at paras. 69, 77, 81, 171 (S.C.C.). I am not aware of any systematic study on this issue, but since this decision in 1995, which underscored the "drastic" nature of a stay of proceedings and the need to prove irreparable prejudice, there have been very few cases in which any court has ordered a stay to remedy a claimed abuse.

individual can launch an “as-applied” challenge in addition to a facial challenge — the as-applied challenge “targets the constitutionality of the statute as it is applied in the particular context of the case, and seeks to invalidate it only as applied to those circumstances”.⁸⁹ This nuanced approach lowers the stakes of our zero-sum invalidation game. Unfortunately, this approach appears to be foreclosed by the Supreme Court’s consistent rejection of constitutional exemptions. A constitutional exemption under section 24(1), in lieu of the remedy of invalidation under section 52, is the equivalent of the “as-applied” form of constitutional review, but the Court has consistently frowned upon this alternative remedy.⁹⁰ Most recently, the Court stated, “such exemptions are to be avoided”⁹¹ for the reasons cited in *Ferguson*: “(1) the jurisprudence; (2) the need to avoid intruding on the role of Parliament; (3) the remedial scheme of the *Charter*; and (4) the impact of granting constitutional exemptions in mandatory sentence cases on the values underlying the rule of law”.⁹² In a nutshell, the Court viewed constitutional exemptions as being a more intrusive remedy than an invalidation because the creation of an exemption undermines and undercuts Parliament’s purpose in enacting the legislation.

When a constitutional challenge is advanced in the absence of any evidence of third party and societal impact, the remedy of invalidation suffers from the proverbial problem of throwing the baby out with the bathwater. If the Court does not revisit its stance on constitutional exemptions it will have few tools in its remedial arsenal to respond in a principled and meaningful way to legislation that is “substantially constitutionally and peripherally problematic”.

The Court would still have as an option the remedy of reading down or reading in as a more nuanced remedy with respect to peripherally problematic legislation. The Court has addressed constitutionally flawed provisions dealing with child pornography,⁹³ the use of force to discipline

⁸⁹ Catherine Gage O’Grady, “The Role of Speculation in Facial Challenges” (2011) 53 *Ariz. L. Rev.* 867, at 873.

⁹⁰ *R. v. Seaboyer; R. v. Gayme*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577, at paras. 84-89 (S.C.C.); *R. v. Ferguson*, [2008] S.C.J. No. 6, [2008] 1 S.C.R. 96 (S.C.C.) [hereinafter “*Ferguson*”]; *Schachter v. Canada*, [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679, at paras. 56-57, 60 (S.C.C.); *PHS*, *supra*, note 13, at para. 149.

⁹¹ *PHS*, *id.*

⁹² *Ferguson*, *supra*, note 90, at para. 40.

⁹³ *Sharpe*, *supra*, note 3.

children⁹⁴ and court-ordered medical treatment for minors⁹⁵ by performing cosmetic surgery by way of statutory interpretation or the reading in of exemptions to the existing provisions. In fact, this remedy was available to the Supreme Court of Canada in *Bedford* as the Court of Appeal for Ontario held that the appropriate response to the constitutional overbreadth of the living on the avail offence was to read in a requirement of proving “circumstances of exploitation” in addition to the statutory element of receiving money from a sex worker. The Supreme Court did not even consider this less intrusive remedy.

Taken at face value the *Bedford* case raises the question of whether legislative fact evidence will ever be necessary in future cases if invalidation follows from proof of a personal violation. A robust evidentiary record of third party impact would undoubtedly strengthen a claim by making it more compelling; however, the question is not one of strategic value but one of evidentiary necessity. Perhaps the Court is signalling that the assessment of social facts and the corresponding development of public policy should remain a matter of legislative action, and that a court’s primary mandate is to strike down problematic legislation, whether the problem lies at the core or the periphery. The refusal to grant a more nuanced remedy may be seen as a response that needs to be adopted in order to provide the impetus for the legislature to fulfil its primary mandate of fixing the problems with the law. This constitutional dialogue theory⁹⁶ of constitutional adjudication provides the only sound rationale for a court overreaching in invalidating a law that is “substantially constitutional”.

The Court is not just refusing to do the dirty work for Parliament of fixing a constitutionally defective law. The Court may also be signalling to Parliament that the proper legislative solution for complex social problems is for lawmakers to enact laws that have the requisite flexibility to respond to uniquely situated rights claimants. The arbitrary and grossly disproportionate violation of the security rights of heroin addicts by the decision of the Minister to refuse to authorize safe injection sites

⁹⁴ *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, [2004] 1 S.C.R. 76 (S.C.C.).

⁹⁵ *C. (A.) v. Manitoba (Director of Child and Family Services)*, [2009] S.C.J. No. 30, [2009] 2 S.C.R. 181 (S.C.C.).

⁹⁶ See Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L.J. 75; Richard Haigh & Michael Sobkin, “Does the Observer have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts” (2007) 45 Osgoode Hall L.J. 67.

did not lead to an invalidation of the offending provisions of the *Controlled Drugs and Substances Act*.⁹⁷ Invalidation was unnecessary and overreaching as the Court concluded that the presence of a discretionary exempting provision within the legislation operated as a constitutional safety valve; that is, building flexibility into the law allowed the law to operate in a constitutionally proper manner even if the Minister acting under this law violated the rights of claimants. Similarly, the Supreme Court upheld a mandatory firearms prohibition upon conviction for possession of a loaded firearm partly on the basis of the “ameliorative effects of the exception provided for by section 113 of the *Criminal Code* in cases where the prohibition would result in a deprivation of livelihood or sustenance”.⁹⁸ A law that is “substantially constitutional” will be upheld if there are provisions designed to address its “peripherally problematic” applications.

V. CONCLUSION

It would be comforting to believe that science can provide a clear answer to all social problems and that public policy should be guided by the scientific method. There is no question that science can illuminate and inform, but, in the area of human behaviour and societal expectations, science usually provides many theories and few determinate answers. The Supreme Court of Canada is realistic in its approach to legislative fact evidence and it cannot be faulted for concluding that “none of the [Charter] principles measure the percentage of the population that is negatively impacted [by the law]. The analysis is qualitative, not quantitative.”⁹⁹

However, even a qualitative analysis requires social science research. Despite the rhetorical appeal of the statement, “a grossly disproportionate effect on one person is sufficient to violate the norm”, it does not appear that the Court is seriously suggesting that invalidation will follow upon tendering anecdotal and experiential evidence from one rights claimant. The qualitative analysis the Court speaks of would serve to show that the experience of the single rights claimant is not unique and is replicated in other contexts and circumstances with other rights claimants. Showing a

⁹⁷ S.C. 1996, c. 19.

⁹⁸ *R. v. Wiles*, [2005] S.C.J. No. 53, [2005] 3 S.C.R. 895, at paras. 8, 10 (S.C.C.).

⁹⁹ *Bedford SCC*, *supra*, note 4, at para. 123.

negative impact on third parties can be accomplished by resort to reasonable hypotheticals and common sense, but supplementing argument with a wide array of legislative fact evidence should be the turning point for a court in considering whether to strike out a law believed to be beyond redemption. Without this supplementary evidence a court should restrict its remedial authority to the granting of a personal remedy, and this will only happen if the courts overcome their aversion to constitutional exemptions.

The *Bedford* challenge involved a law found to be beyond repair and redemption and in this context there was no need to consider the applicability of a person remedy short of invalidation. However, the decision to invalidate, instead of reading down or reading in, will serve to test the theory that invalidation facilitates a constitutional dialogue between the judiciary and Parliament.

The dialogue theory resonates well with democratic ideals but may ring hollow in practice. If legislative inertia and indifference led to the creation of an irrational and contradictory legal regime in the first place, it may be misplaced confidence to believe that the same institution will adequately fix the problem upon judicial command. If a court is presented with a wide array of legislative facts, and it is satisfied that it can make relevant findings of social fact based on this record, it may not be prudent to simply bounce the problem back to Parliament. Some creativity and innovation in finding remedies short of invalidation should be encouraged because the dialogue theory may be just a pipe dream. In time we will discover if the Parliamentary response to the *Bedford* case will be constitutionally adequate or whether the response will just trigger the need for another protracted challenge.

